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Witkin Summary of California Law, Tenth Edition
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CHAPTER X - Constitutional Law

Witkin Summary of California Law

I. THE FEDERAL SYSTEM

A. Limited Powers of Federal Government.

1. Source of Federal Powers.

7 Witkin Sum. Cal. Law Const Law § 1

[§ 1] Source of Federal Powers.

(1) *In General.* The United States Constitution was adopted in 1787, and went into effect in 1789. It grants power to the federal government, which has only those powers that are expressly or impliedly granted to it. Thus, the Tenth Amendment to the federal Constitution declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people." The doctrine of limited powers, however, is true only as to *internal affairs*. In foreign affairs, a broader scope of federal power is recognized. (*United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304, 57 S.Ct. 216, 219, 81 L.Ed. 255, 260; see *infra*, §1337.)

Neither the preamble to the Constitution (see *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25 S.Ct. 358, 359, 49 L.Ed. 643, 648) nor the "general welfare" clause (Art. I, §8) gives substantive power to the federal government. (See 36 *Harv. L. Rev.* 548.) (On federal tax powers under Art. I, §8, see 9 *Summary* (10th), *Taxation* §105.) Nor has Congress any "emergency power"; an emergency cannot create a power previously nonexistent. (*Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 54 S.Ct. 231, 235, 78 L.Ed. 413, 422, *infra*, §1289; *Ex parte Milligan* (1866) 71 U.S. 2, 18 L.Ed. 281; 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §52; but see *infra*, §1323 et seq., for illustrations of broadened war power; and see 36 *So. Cal. L. Rev.* 373 ["Tomorrow's Weapons vs. The Constitution"].)

(2) *Texts and Law Reviews.* Commentary on the Constitution and federalism in general has been extensive. (See Rotunda & Nowak, *Treatise on Constitutional Law; Substance and Procedure* (3d ed., 1999, 5 volumes), hereinafter cited as Rotunda; Tribe, *American Constitutional Law* (3d ed., 2000, 2 volumes), hereinafter cited as Tribe; 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §51 et seq.; 101 *Harv. L. Rev.* 1303 [book review of Tribe]; 102 *Harv. L. Rev.* 842 [Federalism and Informal Interstate Cooperation]; 3 *Hastings Const. L. Q.* 899, 919, 941 [Constitution and moral order]; 16 *Hastings Const. L. Q.* 69 [The Powell-Stevens Debates on Federalism and Separation of Powers]; 20 *Hastings Const. L. Q.* 267 [Health Care and the Constitution]; 45 *Hastings L. J.* 1105 [book review of Gottlieb, *Public Values in Constitutional Law*]; 53 *Hastings L. J.* 431 [Federalism and Rehnquist Court]; 22 *Hastings Const. L. Q.* 707 [extent to which federal Constitution applies in U.S. territories]; 25 *Hastings Const. L. Q.* 483 [changing structural foundations of federalism]; 28 *Hastings Const. L. Q.* 1 [Nostalgic Federalism]; 28 *Hastings Const. L. Q.* 93 [constitutional value of dialogue and new judicial federalism]; 8 *Loyola L.A. L. Rev.* 1 [American Constitutionalism], 507 [foundations of constitutionalism]; 9 *Loyola L.A. L. Rev.* 544 [William Crosskey and the Common Law]; 36 *Loyola L.A. L. Rev.* 1651 [federal statutory interpretation in contravention of state law violates federalism]; 9 *Pacific L. J.* 711

[Contemporary Federalism]; 37 *San Diego L. Rev.* 347 [Democracy Within Federalism: An Attempt To Reestablish Middle Ground]; 68 *So. Cal. L. Rev.* 1447, 1493 [judicial enforcement of federalism]; 74 *So. Cal. L. Rev.* 523 [Federalism for the Future]; 52 *U.C.L.A. L. Rev.* 217 [sources of federalism; Court's quest for original meaning]; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §222 et seq.; 77 *Am.Jur.2d* (1997 ed.), *United States* §11et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Law Reviews*. Volumes 1 and 2 of Rotunda and Nowak were replaced in 2007 with volumes 1 and 2 of the 4th edition, and the final four volumes of the 3d edition were replaced in 2008 with volumes 3 through 6. They are cited in this Supplement as Rotunda 4th.

See 95 *Cal. L. Rev.* 885 [state Attorneys General, regulatory litigation, and new federalism]; 35 *Hastings Const. L. Q.* 169 [Untangling Tenth Amendment Standing: Why Private Parties Cannot Enforce the Federal Structure]; 35 *Pepperdine L. Rev.* 47 [federalism: science versus doctrine]; 58 *Stanf. L. Rev.* 1763 [assumptions of federalism]; 58 *Stanf. L. Rev.* 1793 [federalism decisions of Justices Rehnquist and O'Connor]; 77 *Am.Jur.2d* (2006 ed.), *United States* §10 et seq.



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I. THE FEDERAL SYSTEM

A. Limited Powers of Federal Government.

2. Reserved Powers of States.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 2

[§ 2] In General.

(1) *Earlier View of Independent Limitation.* The Tenth Amendment (*supra*, §1) has sometimes been considered an independent limitation on actual federal powers, so that legislation beyond the express and implied powers of the federal government is an unconstitutional invasion of the reserved powers of the states. Thus, it was held that even where a recognized federal power is exercised, e.g., the taxing power, if it is used for the purpose of regulating or controlling subjects beyond the scope of federal power, it is void as a means to an unconstitutional end. (*United States v. Butler* (1936) 297 U.S. 1, 56, S.Ct. 312, 320, 80 L.Ed. 477, 489; *Hopkins Fed. Savings & Loan Assn. v. Cleary* (1935) 296 U.S. 315, 56 S.Ct. 235, 240, 80 L.Ed. 251, 258 [federal statute permitting federal incorporation of state building and loan associations, in violation of state law, held invalid]; see 9 *Summary* (10th), *Taxation* §108.)

(2) *Development of Modern View.* In *United States v. Darby* (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, the theory that the Tenth Amendment is an independent limitation was abandoned. The Court declared that the amendment "states but a truism" indicating the relationship between the national and state governments, the purpose of which was to "allay fears that the new national government might seek to exercise powers not granted." (61 S.Ct. 462, 85 L.Ed. 622.) (See 52 *Harv. L. Rev.* 1342.)

In *Case v. Bowles* (1946) 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552, the Washington state commissioner of public lands sought to sell school lands to the highest bidder, pursuant to state law. The court held that the federal Emergency Price Control Act applied to prevent a sale in excess of the ceiling. The argument that, because the sale was for the purpose of carrying on the essential state governmental function of education, it was free from federal regulatory power, was summarily rejected. "Where, as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow." (66 S.Ct. 443, 90 L.Ed. 560.) (See *Fernandez v. Wiener* (1945) 326 U.S. 340, 66 S.Ct. 178, 189, 90 L.Ed. 116, 134.)

In *United States v. Oregon* (1961) 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575, an incompetent Oregon resident died in a V.A. Hospital, leaving an estate of \$ 13,000 in personal property. A federal statute provided that when a veteran patient in a veteran's hospital or other facility died leaving personal property not disposed of by will and without heirs at law, the property should vest in the U.S. for the use of the General Post Fund, to be used for recreational

purposes of other veterans. Oregon claimed it by escheat, contending that devolution of property is a local matter and that the statute contravened the Tenth Amendment. *Held*, the U.S. was entitled to the money. The express war power authorizes, under the Necessary and Proper Clause, payment of pensions and the building of hospitals and homes for veterans. "We think it plain that the same sources of power authorize Congress to require that the personal property left by its wards when they die in government facilities shall be devoted to the comfort and recreation of other ex-service people who must depend upon the Government for care. The fact that this law pertains to the devolution of property does not render it invalid. Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power." (81 S.Ct. 1281, 6 L.Ed.2d 579.)

The same result was reached in *Estate of Turner* (1959) 171 C.A.2d 591, 595, 341 P.2d 376, on the ground that the decedent veteran, on entering the hospital, executed a valid contract for the assignment to the U.S. (See generally 1 Rotunda, §4.8 et seq.; 1 Tribe, §5-10 et seq.; 89 Harv. L. Rev. 1871 [Municipal Bankruptcy, the Tenth Amendment and the New Federalism]; 13 San Diego L. Rev. 876 [The Tenth Amendment and the Resolution of Federalism Conflicts]; on requirement under Supremacy Clause that state courts apply federal law, see *infra*, §25.)

The Tenth Amendment also has been used to challenge the constitutionality of child support and custody orders. (See *Kilroy v. Superior Court* (1997) 54 C.A.4th 793, 816, 63 C.R.2d 390 [insofar as Full Faith and Credit for Child Support Orders Act required California to defer to Georgia support order, there was no violation of Tenth Amendment]; *In re Santos Y.* (2001) 92 C.A.4th 1274, 1322, 112 C.R.2d 692 [in dependency action, federal Indian Child Welfare Act impermissibly intruded on California's reserved power to care for dependent children where child's only connection with Tribe was one-quarter genetic contribution]; on Full Faith and Credit Clause generally, see *infra*, §31.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Development of Modern View*. See 1 Rotunda 4th, §4.8 et seq.



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b. Regulation of State Employees.

1. Former Rule.

7 *Witkin Sum. Cal. Law Const Law* § 3

[§ 3] Former Rule.

State sovereignty was given substantial recognition in *National League of Cities v. Usery* (1976) 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245. The Fair Labor Standards Act of 1938 regulated wages of employees in private employment (see *infra*, §1321; 3 *Summary* (10th), *Agency and Employment*, §540). A series of amendments extended its coverage to some public employees, including those of state hospitals, institutions, and schools (see *Maryland v. Wirtz* (1968) 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020). In 1974, the statute was again amended to make it applicable to virtually all employees of states and their political subdivisions, so that the minimum wage, maximum hour, and overtime provisions were essentially identical to those imposed on private employers. The 1974 legislation was challenged by individual cities and the National League of Cities. The district court, believing itself bound by "the far-reaching implications" of *Maryland v. Wirtz*, upheld the amendments. *Held*, reversed.

(a) Congressional enactments, though within the broad power granted by the Commerce Clause, may nevertheless be invalid if in conflict with constitutional limitations such as the jury trial right or the *Due Process Clause*. (96 S.Ct. 2469, 49 L.Ed.2d 251.) And the same is true where the exercise of power invades state sovereignty: "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." (96 S.Ct. 2471, 49 L.Ed.2d 253.)

(b) Determination of the wages and hours of public employees is an attribute of state sovereignty. (96 S.Ct. 2471, 49 L.Ed.2d 254.) And imposition of the federal requirements would result in substantially increased costs to state governmental agencies and in the forced relinquishment of various activities, such as training of new employees, affirmative action programs, and handling of overtime. (96 S.Ct. 2471, 49 L.Ed.2d 254.) This would be an impermissible interference with governmental functions of the states. "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress." (96 S.Ct. 2474, 49 L.Ed.2d 257.)

(c) The language of *Maryland v. Wirtz* was too broad: "While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled." (96 S.Ct. 2476, 49 L.Ed.2d 259.)

Three justices joined in a strong dissenting opinion attacking the holding as unsound in principle and totally lacking in authority. (See 1 Rotunda, §4.10; 1 Tribe, §5-11; 89 Harv. L. Rev. 1871 [implications of the decision]; 90 Harv. L. Rev. 62; 90 Harv. L. Rev. 1065; 30 Hastings L. J. 1763.)

SUPPLEMENT: [This section is current through the latest supplement]
See 1 Rotunda 4th, §4.9.



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b. Regulation of State Employees.

2. Valid Regulation.

7 Witkin Sum. Cal. Law Const Law § 4

[§ 4] Valid Regulation.

In *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016, defendant SAMTA operated a mass transit system that received large grants of federal funds. The issue raised in this case was whether it was subject to the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA), or was immune under *National League of Cities v. Usery* (1976) 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245, supra, §3. Held, it is not immune, and *National League of Cities* is overruled.

(a) Immunity under *National League of Cities* has been recognized where the challenged federal statute impaired the state's ability "to structure integral operations in areas of *traditional governmental functions*." (105 S.Ct. 1010, 83 L.Ed.2d 1025.) But the numerous federal decisions have not identified an organizing principle that places a case on one or the other side of the line. "The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best." (105 S.Ct. 1011, 83 L.Ed.2d 1026.) And in the tax immunity cases, the distinction between "governmental" and "proprietary" functions was discarded as unworkable. (105 S.Ct. 1013, 1014, 83 L.Ed.2d 1027, 1028, 1029.)

(b) "The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." (105 S.Ct. 1015, 83 L.Ed.2d 1030, 1031.) This rule is unsound in principle and unworkable in practice. (105 S.Ct. 1016, 83 L.Ed.2d 1031.)

(c) The underlying issue in *National League of Cities* was the manner in which the Constitution insulates states from the reach of Congress' power under the *Commerce Clause*. (105 S.Ct. 1016, 83 L.Ed.2d 1031.) In the present case, "we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same

minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." (105 S.Ct. 1019, 83 L.Ed.2d 1036.)

(d) "Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action--the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended." (105 S.Ct. 1020, 83 L.Ed.2d 1037.)

Four justices dissented in two opinions, arguing that *National League of Cities* was correctly decided and that its principle had been repeatedly reaffirmed. The first dissenting opinion also asserts that "[t]here have been few cases ... in which the principle of *stare decisis* and the rationale of recent decisions were ignored as abruptly as we now witness." (105 S.Ct. 1021, 83 L.Ed.2d 1038.) (See *South Carolina v. Baker* (1988) 485 U.S. 505, 108 S.Ct. 1355, 1360, 99 L.Ed.2d 592, 9 Summary (10th), *Taxation*, §15; 1 Rotunda, §4.10; 1 Tribe, §5-11; 23 Cal. Western L. Rev. 105; 99 Harv. L. Rev. 84; 13 Hastings Const. L. Q. 271; 70 So. Cal. L. Rev. 1311; 20 U.S.F. L. Rev. 675.)

SUPPLEMENT: [This section is current through the latest supplement]
See 1 Rotunda 4th, §4.10.



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3. Invalid Regulation.

7 *Witkin Sum. Cal. Law Const Law* § 5

[§ 5] Invalid Regulation.

In *Gregory v. Ashcroft* (1991) 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed. 2d 410, the Court held that the Supremacy Clause did not override a state's Tenth Amendment right to impose retirement rules on its judges, even though those rules were otherwise violative of the federal Age Discrimination in Employment Act (see *infra*, §873). "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, 'it is incumbent upon federal courts to be certain of Congress' intent before finding that federal law overrides' this balance.'" (111 S.Ct. 2401, 115 L.Ed. 2d 423.) Where, as here, it is ambiguous whether Congress intended that appointed judges be excluded from coverage by the federal Act, the court will not attribute an intent to intrude on state governmental functions. (111 S.Ct. 2406, 115 L.Ed.2d 430.) (See 1 Tribe, §5-11; 105 Harv. L. Rev. 196; 41 U.C.L.A. L. Rev. 903.)

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c. No Requirement That State Officials Administer Federal Law.

7 *Witkin Sum. Cal. Law Const Law* § 6

[§ 6] No Requirement That State Officials Administer Federal Law.

In *New York v. United States* (1992) 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120, the Court addressed the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985:

(a) "[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government." (112 S.Ct. 2414, 120 L.Ed.2d 133.) "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty,' ... reserved explicitly to the States by the Tenth Amendment." (112 S.Ct. 2434, 120 L.Ed.2d 158.)

(b) "Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them." (112 S.Ct. 2435, 120 L.Ed.2d 158.) (See 21 *Hastings Const. L. Q.* 489, 577, 593, 611 [health care reform, Tenth Amendment, and *New York v. United States*].)

Printz v. United States (1997) 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914, and *Mack v. United States* (1997) 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914, involved certain interim provisions of the Brady Handgun Violence Prevention Act, which requires the Attorney General to establish a national background check system for the purchase of handguns. Until the system becomes operative, state law enforcement officers are required to receive notice of a

proposed transfer from a firearms dealer and to perform a background check on the prospective purchaser. *Held*, these provisions are unconstitutional; Congress may not compel state officers to execute federal laws. Because the Constitution itself does not speak to this precise question, the answer must be found in historical understanding and practice, the structure of the Constitution, and the Court's jurisprudence:

(a) *Historical understanding and practice.*

(1) Early federal statutes imposing obligations on state courts have their basis in U.S. Const., Art. III, §1 (which established a Supreme Court but made the creation of lower federal courts optional, even though one court could not possibly hear all federal matters), and in U.S. Const., Art. VI, Cl. 2 (the Supremacy Clause, providing that judges in every state are bound by the laws of the United States). These statutes do not imply a power of Congress to impose obligations on the state executive. Until very recent years, federal enactments that made demands on the state executive did so either under the direct authority of the Constitution, as a nonbinding "recommendation" offering compensation, by entering into contracts with the states, or by a request to the governors. Federal statutes enacted in the last few decades are too recent to shed light on the historical understanding of the text of the *Constitution*. (117 S.Ct. 2371, 138 L.Ed.2d 927.)

(2) Suggestions in *The Federalist* that the national government would be able to employ the "ordinary magistracy" of the states to execute its laws did not suggest that it could do so without the consent of the states. (117 S.Ct. 2372, 138 L.Ed.2d 929, quoting *The Federalist*, No. 27, at 176 (A. Hamilton).) And statements in *The Federalist* that state executive officers are bound by an oath to observe "the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction," that they are "incorporated into the operations of the national government," and are "auxiliary to the enforcement of its laws," mean only that state officials must enact, enforce, and interpret state laws so as not to obstruct federal law. (117 S.Ct. 2373, 138 L.Ed.2d 929, quoting *The Federalist*, No. 27, at 177 (A. Hamilton).)

(b) *Structure of the Constitution.*

(1) The Constitution establishes a system of dual sovereignty in which the states retain a "residuary and inviolable sovereignty," implicit in the grant to Congress of only enumerated powers (U.S. Const., Art I., §8) and express in the reservation to the states of powers not delegated to the federal government (Tenth Amendment). (117 S.Ct. 2376, 138 L.Ed.2d 934.) In designing the system, the framers of the Constitution rejected a central government that would act on and through the states: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." (117 S.Ct. 2377, 138 L.Ed.2d 935, quoting *The Federalist*, No. 39, at 245 (J. Madison).)

(2) Federal control of state officers also violates the separation of powers within the federal Government. It is the President who is required to execute the laws of the land. The Brady Act interim provisions transfer this responsibility to thousands of state law enforcement officers who are left to implement it without meaningful Presidential control. (117 S.Ct. 2378, 138 L.Ed.2d 936.)

(3) The interim provisions cannot be justified under U.S. Const., Art. I, §8, as "necessary and proper for carrying into execution" the power of Congress under the Commerce Clause to regulate the sale of handguns. When a law for executing the Commerce Clause violates the principle of state sovereignty set forth in the constitutional provisions mentioned above, it is not a law proper for carrying into execution the *Commerce Clause*. (117 S.Ct. 2378, 138 L.Ed.2d 937.)

(c) *Prior United States Supreme Court jurisprudence.* U.S. Supreme Court opinions have made clear that the federal Government may not compel the states to enact or administer federal regulatory programs. (117 S.Ct. 2380, 138 L.Ed.2d 938, citing *Hodel v. Virginia Surface Mining & Reclamation Assn.* (1981) 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1; *Federal Energy Regulatory Com. v. Mississippi* (1982) 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532, *infra*, §7; *New York v. United States*, *supra*.) The present case cannot be distinguished on the basis that state or local officers

are required to provide only "limited, nonpolicymaking help in enforcing" the Brady Act. There is arguably a policymaking component in determining what constitutes "reasonable efforts" to be expended in conducting a background check, but even if there is not, making the state officers into "puppets of a ventriloquist Congress" only worsens the intrusion on state sovereignty. (117 S.Ct. 2380, 138 L.Ed.2d 939.) Nor can it be distinguished because the subject regulations are directed to individuals, rather than to the state; the Brady Act is directed to individuals only in their official capacities as state officers, and thus as agents of the state. (117 S.Ct. 2382, 138 L.Ed.2d 941.) Finally, claims that the Brady Act serves very important purposes best administered by state law enforcement officers during the interim period, and places only a minimal and temporary burden on state officers, are beside the point. A balancing analysis is inappropriate under the circumstances, because an enactment may not violate the division of powers among sovereigns as "an expedient solution to the crisis of the day." (117 S.Ct. 2383, 138 L.Ed.2d 943, quoting *New York v. United States*, *supra*.)

Two justices wrote concurring opinions and four others dissented. One concurring opinion pointed out that the states may still voluntarily carry out the Brady Act provisions, or Congress may amend them to provide for their enforcement through contracts with the states. (117 S.Ct. 2385, 138 L.Ed.2d 945.) (See 1 Tribe, §§5-11, 5-12; 111 Harv. L. Rev. 207 [Printz]; 111 Harv. L. Rev. 2180 [same]; 51 Hastings L. J. 231 [Printz and New York]; 25 Pepperdine L. Rev. 869 [Printz and New York]; 26 Pepperdine L. Rev. 631 [Printz]; 32 U.C. Davis L. Rev. 455 [same]; 30 West L.A. L. Rev. 24 [gun control; discussing Printz and New York]; on requirement under Supremacy Clause that state courts enforce federal law, see *infra*, §25.)

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d. Regulation of State Utilities.

7 *Witkin Sum. Cal. Law Const Law* § 7

[§ 7] Regulation of State Utilities.

The Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C., §2601 et seq.) requires state consideration of federal rate-making standards and imposes certain procedures on state commissions. In *Federal Energy Regulatory Com. v. Mississippi* (1982) 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532, the Court, distinguishing *National League of Cities v. Usery* (1976) 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245, supra, §3 (now overruled, see supra, §4), upheld the statute.

National League of Cities involved the problem of "the extent to which state sovereignty shields the States from generally applicable federal regulations." In PURPA, "the Federal Government attempts to use state regulatory machinery to advance federal goals." (102 S.Ct. 2137, 72 L.Ed.2d 546.) On the critical issue of procedural requirements, the court said: "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field--and we hold today that it can--there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks. The procedural requirements obviously do not compel the exercise of the State's sovereign powers, and do not purport to set standards to be followed in all areas of the state commission's endeavors." (102 S.Ct. 2143, 72 L.Ed.2d 554.)

Four justices dissented. (See 1 Tribe, §5-11; 96 *Harv. L. Rev.* 196.)

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CHAPTER X - Constitutional Law

Witkin Summary of California Law

I. THE FEDERAL SYSTEM

B. Relations Between States and Federal Government.

1. Federal Supremacy.

a. Conflicting State Law Is Invalid.

1. Constitutional Principle.

7 *Witkin Sum. Cal. Law Const Law* § 8

[§ 8] Constitutional Principle.

(1) *In General.* The supremacy of the federal Government is expressed in Article VI of the federal Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (See 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §51 et seq.; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §238 et seq.)

"The relative importance to the State of its own law is not material when there is a conflict with a valid federal law. ... [A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." (*Free v. Bland* (1962) 369 U.S. 663, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180, 183.)

In *Sterling v. Constantin* (1932) 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375, the Texas Railroad Commission imposed limits on the production of oil wells. After a federal injunction against enforcement of the restrictions was secured, the Governor declared martial law and enforced his orders with state troops. An injunction against the Governor and state military authorities was sustained. The Court declared that "[t]here is no avenue of escape from the paramount authority of the Federal Constitution," and held that the military and executive power of the state could not be used to subvert the authority of a federal court having jurisdiction over the cause. (53 S.Ct. 195, 77 L.Ed. 385.) (See *Hines v. Davidowitz* (1941) 312 U.S. 52, 61 S.Ct. 399, 404, 85 L.Ed. 581, 584; *Antoine v. Washington* (1975) 420 U.S. 194, 95 S.Ct. 944, 950, 43 L.Ed.2d 129, 137 [when ratified by Act of Congress, agreement between Executive Branch and Indians is binding on states]; *Howlett v. Rose* (1990) 496 U.S. 356, 110 S.Ct. 2430, 2438, 110 L.Ed.2d 332, 347; *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 10, 95 C.R. 329, 485 P.2d 529; *People v. Naegele Outdoor Advertising Co.* (1985) 38 C.3d 509, 522, 213 C.R. 247, 698 P.2d 150 [state regulation of outdoor advertising on Indian reservations is preempted by federal law]; *Webb v. Superior Court* (1990) 225 C.A.3d 990, 999, 275 C.R. 581; *Steele v. Collagen Corp.* (1997) 54 C.A.4th 1474, 1490, 63 C.R.2d 879 [burden of proving preemption is on defendant]; *F & L Farm Co. v. City Council of Lindsay* (1998) 65 C.A.4th 1345, 1353, 77 C.R.2d 360 [judicial construction of California constitutional debt and tax limitations to prevent payment of inverse condemnation judgments would conflict with Fifth Amendment to U.S. Constitution and would violate Supremacy Clause]; for illustrations, see *infra*, §20 et seq.)

(2) *Promotion of State Purpose Is Insufficient.* The supremacy doctrine was reexamined in *Perez v. Campbell* (1971) 402 U.S. 637, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233, 242. The Arizona Motor Vehicle Responsibility Act, based on the Uniform Act, contains the usual provisions on suspension of a license. (See 8 Cal. Proc. (4th), *Enforcement of Judgment*, §406 et seq.) Mr. and Mrs. P, uninsured motorists, were involved in an accident. The other parties recovered a judgment by confession on November 8, 1967. On November 6, 1967, Mr. and Mrs. P filed voluntary bankruptcy petitions, scheduled the judgment debt, and received a discharge on July 8, 1968. The Arizona Act stated that a discharge following rendition of judgment "shall not relieve the judgment debtor from any of the requirements of this article." Mr. and Mrs. P sought injunctive relief in the federal court, asserting a conflict with the Bankruptcy Act. *Held*, the Arizona statute was invalid.

(a) The primary purpose of the statute, as construed by the Arizona Supreme Court, is protection of the public using the highways from financial hardship that may result from use of automobiles by financially irresponsible persons. (91 S.Ct. 1708, 29 L.Ed.2d 239.)

(b) The primary purpose of the Bankruptcy Act is to give debtors a new opportunity for future effort, unhampered by preexisting debt. Congress intended this new opportunity to include freedom "from most kinds of preexisting tort judgments." (91 S.Ct. 1711, 29 L.Ed.2d 241.)

(c) *Kesler v. Department of Public Safety, Financial Responsibility Division, Utah* (1962) 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641, and *Reitz v. Mealey* (1941) 314 U.S. 33, 62 S.Ct. 24, 86 L.Ed. 21, held that such statutes did not conflict with the Bankruptcy Act. But they relied on the purpose of the state law--not to circumvent the Bankruptcy Act but to promote highway safety; and this approach is mistaken: "We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy--other than frustration of the federal objective--that would be tangentially furthered by the proposed state law." (91 S.Ct. 1712, 29 L.Ed.2d 243.) (See 5 *Loyola L.A. L. Rev.* 298.)

(3) *Texts and Law Reviews.* Commentary on federal supremacy has been extensive. (See 2 Rotunda, §12.1 et seq.; 1 Tribe, Chap. 6; 46 Cal. L. Rev. 22 [problems arising under federal and state regulation of atomic energy]; 50 Cal. L. Rev. 800 [Supreme Court and Federal System]; 87 Cal. L. Rev. 1125 [law, economics, and politics of federal preemption jurisdiction]; 103 Harv. L. Rev. 1306 [preemption and regulatory efficiency in federal energy statutes]; 19 Pacific L. J. 217 [Challenges to the Constitutionality of the California Divestment Statute]; 28 Pepperdine L. Rev. 757 [Federalism and Preemption in October Term 1999]; 33 Stanf. L. Rev. 1005 [Supremacy Clause and regulation of Indian affairs]; 39 U.C.L.A. L. Rev. 941 [Exclusion of Military Recruiters From Public School Campuses: The Case Against Federal Preemption].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Promotion of State Purpose Is Insufficient.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §437 et seq. (3) *Texts and Law Reviews.* See 2 Rotunda 4th, §12.1 et seq.; 34 Ecology L. Q. 1147 [Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations]; 119 Harv. L. Rev. 609 [federalism's political safeguards]; 120 Harv. L. Rev. 1604 [empirical study of congressional responses to Supreme Court preemption decisions]; 53 U.C.L.A. L. Rev. 1353 [Backdoor Federalization].



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2. Questions Involved.

7 *Witkin Sum. Cal. Law Const Law* § 9

[§ 9] Questions Involved.

Before a state law can apply, the following questions must be answered in the negative:

(1) Does the state policy in fact conflict with declared federal policy in whole or in part? If it does, the state policy must yield under the Supremacy Clause. (See *supra*, §8.)

(2) If it does not conflict, did Congress nevertheless intend to preempt the field with its policy? If so, the state policy must yield under the Supremacy Clause. (See *Pennsylvania v. Nelson* (1956) 350 U.S. 497, 76 S.Ct. 477, 481, 100 L.Ed. 640, 653 [federal criminal statute preempts similar preexisting state statutes]; *Burbank v. Lockheed Air Terminal* (1973) 411 U.S. 624, 93 S.Ct. 1854, 1862, 36 L.Ed.2d 547, 556 [Federal Aviation Act requires uniform and exclusive system of federal regulation, and precludes local curfew for jet aircraft takeoffs]; *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 98 S.Ct. 988, 994, 55 L.Ed.2d 179, 189; *Greater Westchester Homeowners Assn. v. Los Angeles* (1979) 26 C.3d 86, 93, 160 C.R. 733, 603 P.2d 1329; *Hartenstine v. Superior Court* (1987) 196 C.A.3d 206, 217, 241 C.R. 756 [express preemption clause]; 6 *Hastings Const. L. Q.* 191 [*Ray v. Atlantic Richfield Co.*]; 13 *U.C. Davis L. Rev.* 1 [California's Nuclear Law as a Preemption Case Study].)

(3) Apart from the Supremacy Clause, does the state policy purport to regulate an area over which the federal Constitution has delegated exclusive control to the federal government? If so, state laws are invalid even in the absence of federal legislation. (See *Southern Pac. Co. v. Jensen* (1917) 244 U.S. 205, 37 S.Ct. 524, 529, 61 L.Ed. 1086, 1099 [state compensation laws applied to injuries on navigable waters affecting foreign shipping]; *Zschernig v. Miller* (1968) 389 U.S. 429, 88 S.Ct. 664, 670, 19 L.Ed.2d 683, 692 [Oregon escheat statute affecting rights of nonresident aliens].)

These questions are difficult to answer, and federal supremacy is sometimes denied on doubtful reasoning. In *United States v. Yazell* (1966) 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404, Mrs. Y and her husband, partners in a business in Texas, suffered a disaster loss, and borrowed money from the Disaster Loan Office of the Small Business Administration. The loan was negotiated with full knowledge of Texas law, which at that time retained the archaic defense of coverture for a married woman; i.e., she could not bind her separate property until she had first obtained a court decree removing her disability to contract. In this action by the United States against Mrs. Y for the balance due,

the court held that there was no overriding federal interest that called for disregarding the state law on married women's contractual power. (86 S.Ct. 504, 15 L.Ed.2d 408.) Three dissenting justices argued that (a) a "loan from the Federal Government is a federal matter and should be governed by federal law"; (b) the Small Business Act, under which many loans were made throughout the country, should be of uniform application; and (c) if a person has the capacity to receive money from the federal government, the person has the capacity to return it. (86 S.Ct. 510, 15 L.Ed.2d 414.)

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3. Substantive Civil Law.

aa. Arbitration.

7 Witkin Sum. Cal. Law Const Law § 10

[§ 10] Arbitration.

Section 2 of the Federal Arbitration Act (see 9 U.S.C., §1 et seq.), which requires enforcement of arbitration provisions in contracts involving commerce, is a substantive rule applicable in state as well as federal courts and forecloses state attempts to undercut enforceability of arbitration agreements. Hence, *Corp.C. 31512*, as interpreted by the California Supreme Court to require judicial consideration of claims brought under the state Franchise Investment Law, thus rendering arbitration provisions unenforceable, violates the Supremacy Clause. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 104 S.Ct. 852, 858, 861, 79 L.Ed.2d 1, 11, 15; see *Perry v. Thomas* (1987) 482 U.S. 483, 107 S.Ct. 2520, 2526, 96 L.Ed.2d 426, 436, 3 Summary (10th), *Agency and Employment*, §396 [Lab.C. 229, permitting action for wages despite arbitration agreement, is preempted by 9 U.S.C., §2]; *Mastrobuono v. Shearson Lehman Hutton* (1995) 514 U.S. 52, 115 S.Ct. 1212, 1216, 131 L.Ed.2d 76, 83 [Federal Arbitration Act, which permits arbitrators to award punitive damages, preempts contrary state laws].)

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bb. Aviation.

7 *Witkin Sum. Cal. Law Const Law* § 11

[§ 11] Aviation.

The federal airline acts have been held to preempt a number of state claims relating to airline misconduct and accidents. (See *Morales v. Trans World Airlines* (1992) 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 [Federal Airline Deregulation Act preempts states from prohibiting allegedly deceptive fare advertisements through enforcement of their general consumer protection statutes]; *American Airlines v. Wolens* (1995) 513 U.S. 219, 115 S.Ct. 817, 823, 824, 130 L.Ed.2d 715, 724, 725 [Federal Airline Deregulation Act preempts frequent flyer claims against airline under state consumer fraud law, but not breach of contract claims]; *Bethman v. Ukiah* (1989) 216 C.A.3d 1395, 1408, 265 C.R. 539 [Federal Aviation Act preempts state tort action based on claim that accident was caused by inadequate navigational facilities at airport]; *Abou-Jaoude v. British Airways* (1991) 228 C.A.3d 1137, 1141, 281 C.R. 150 [Federal Aviation Act preempts C.C. 2103 on duties of common carriers]; *Burroughs v. Precision Airmotive Corp.* (2000) 78 C.A.4th 681, 690, 93 C.R.2d 124 [General Aviation Revitalization Act is federal statute of repose, barring actions arising from accidents brought more than 18 years after airplane is first sold; Act expressly preempts state law to extent state law permits civil action after applicable limitations period]; 29 U.S.F. L. Rev. 741 [federal preemption of state tort law with respect to safety in aircraft design].)

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See *Power Standards Lab v. Federal Express Corp.* (2005) 127 C.A.4th 1039, 1042, 26 C.R.3d 202 [in action to recover for damage to equipment shipped by defendant carrier, plaintiff's recovery was limited under Airline Deregulation Act to declared value of equipment, and trial court erred in awarding additional compensatory and punitive damages]; *Fitz-Gerald v. SkyWest* (2007) 155 C.A.4th 411, 419, 423, 65 C.R.3d 913 [Airline Deregulation and Railway Labor Acts preempted action for relief by flight attendants alleging violations of California minimum wage, overtime, and meal and rest break laws]; *Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 C.A.4th 1173, 1180, 70 C.R.3d 660 [FAA preempts field of airline safety, but state law causes of action, and defenses to them, may be invoked where violation of FAA standards result in personal injury or death].



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cc. Banking.

7 Witkin Sum. Cal. Law Const Law § 12

[§ 12] Banking.

(1) *In General.* Federal banking laws have been held to preempt a number of state claims relating to banking. (See *Aalgaard v. Merchants Nat. Bank* (1990) 224 C.A.3d 674, 689, 692, 274 C.R. 81 [National Bank Act preempts contractual claims of employment rights, including plaintiff's claim of discharge constituting age discrimination in violation of California statute]; *Smiley v. Citibank* (1995) 11 C.4th 138, 44 C.R.2d 441, 900 P.2d 690, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §164 [Section 30 of National Bank Act (12 U.S.C., §85), permitting national bank to charge interest at rate allowed by its home state, includes late payment fees and preempts conflicting state usury laws]; *Smiley v. Citibank* (1996) 517 U.S. 735, 116 S.Ct. 1730, 1735, 135 L.Ed.2d 25, 34 [same]; *Washington Mut. Bank v. Superior Court* (2002) 95 C.A.4th 606, 615, 115 C.R.2d 765 [action challenging practice of charging interest on home loans funded before close of escrow was preempted by Home Owner's Loan Act and its implementing regulations]; *Lopez v. World Savings & Loan Assn.* (2003) 105 C.A.4th 729, 737, 130 C.R.2d 42 [federal regulations preempt entire field of lending by federal savings associations, which includes charges for providing payoff demand statements].)

However, in *Peatros v. Bank of America* (2000) 22 C.4th 147, 172, 183, 91 C.R.2d 659, 990 P.2d 539, there was no plurality opinion on the preemption issue. Three justices wrote that the National Bank Act provision permitting discharge of bank officers "at pleasure" preempts the FEHA only *when it conflicts with the Act*, while three other justices wrote that the provision preempts the FEHA absolutely. A seventh justice wrote that the provision "completely preempts FEHA in all cases involving bank 'officers,'" but that there was no preemption here because plaintiff was not an officer.

(2) *D'Oench, Duhme Doctrine.* In *Resolution Trust Corp. v. Winslow* (1992) 9 C.A.4th 1799, 12 C.R.2d 510, the court explored the nature and application of the doctrine established by *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.* (1942) 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956.

(a) *The D'Oench case.* The Federal Deposit Insurance Corporation (FDIC) sued on a note after it took over a bank. The obligor set up the defense of a side agreement precluding liability. The Court held that public policy requires a person who, for the accommodation of a bank, executes an instrument which is in form a binding obligation, "should be

estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced." (9 C.A.4th 1805.)

(b) *Codification of doctrine.* The doctrine was partially codified in 12 U.S.C., §1823(e), providing that no agreement that tends to diminish or defeat the interest of the FDIC in any asset acquired under 12 U.S.C., §1821 or 1823 is valid unless certain conditions are met (writing, approval, and official record). (9 C.A.4th 1806.)

(c) *Extended coverage.* In 1989, statutory revisions extended the protection of 12 U.S.C., §1823(e) to other federal entities. (9 C.A.4th 1806.) The policy, however, remains the same: to retain public confidence in the banking system and to minimize loss to the depositors and the FDIC when a banking institution fails. "Secret agreements between banks and their customers cannot be recognized if this goal is to be achieved." (9 C.A.4th 1807, quoting *Federal Deposit Ins. Corp. v. Dureau* (1989) 212 C.A.3d 956, 965, 261 C.R. 19.)

(d) *Federal law governs in state action.* Although the cause of action in the present case was for misrepresentation based entirely on state law, "the involvement of the RTC imports a federal issue into the case which requires the application of federal law." (9 C.A.4th 1807.) The federal statutory scheme establishes a federal policy that the responsibility of the federal entities must not extend to agreements that are not positively reflected in the financial institution's records. "This policy is supreme over state law both because it is indispensable to the achievement of the underlying federal goal of preventing a national financial collapse and because it involves, as a party, an entity created and financed by the federal government. Thus, notwithstanding *Erie*, federal statutory and common law is supreme in this case." (9 C.A.4th 1809, distinguishing *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188, *infra*, §58.)

(e) *Affirmative claims for relief.* The doctrine applies not only to defensive use of alleged oral promises, but also to offensive use, such as fraud or breach of contract claims based on alleged oral agreements. (9 C.A.4th 1811.) (See *Walsh v. New West Fed. Savings & Loan Assn.* (1991) 234 C.A.3d 1539, 1542, 1 C.R.2d 35; *Bartram v. Federal Deposit Ins. Corp.* (1991) 235 C.A.3d 1749, 1752, 1 C.R.2d 614; *Weber v. New West Fed. Savings & Loan Assn.* (1992) 10 C.A.4th 97, 99, 104, 106, 107, 12 C.R.2d 468; 2974 *Properties v. Resolution Trust Corp.* (1994) 23 C.A.4th 871, 876, 28 C.R.2d 667 [federal law, establishing administrative process for resolving claims when federally chartered bank is placed in receivership, requires dismissal of previously filed state action against bank]; *Wurzl v. Holloway* (1996) 46 C.A.4th 1740, 1747, 54 C.R.2d 512; *Remington Inv. v. Hamedani* (1997) 55 C.A.4th 1033, 1039, 64 C.R.2d 376 [D'Oench doctrine is not blanket approval for admission of all bank records without evidence of reliability]; 62 *So. Cal. L. Rev.* 255 [D'Oench, *Duhme* and 12 U.S.C., §1823 overprotect insurer when banks fail]; 36 *Proof of Facts* 3d 289 [application of D'Oench doctrine in litigation with FDIC].)

In *RTC Mortg. Trust 1994-S2 v. Shlens* (1998) 62 C.A.4th 304, 320, 72 C.R.2d 581, the court held that the common law D'Oench doctrine survived the Supreme Court's pronouncement in *O'Melveny & Myers v. Federal Deposit Ins. Corp.* (1994) 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67, that there is no federal general common law and that a state rule of decision governed the tort liability of attorneys who provided services to a bank.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Weiss v. Washington Mut. Bank* (2007) 147 C.A.4th 72, 75, 53 C.R.3d 782 [federal regulations preempt state laws affecting prepayment penalties imposed by federal savings and loan associations].

Smiley case:

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §187.



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dd. Bankruptcy.

7 *Witkin Sum. Cal. Law Const Law* § 13

[§ 13] Bankruptcy.

In *Perez v. Campbell* (1971) 402 U.S. 637, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233, 244, supra, §8, it was held that a discharge in bankruptcy bars enforcement of a local financial responsibility law providing for suspension of a driver's license.

In *Grimes v. Hoschler* (1974) 12 C.3d 305, 115 C.R. 625, 525 P.2d 65, the court, following *Perez* and overruling *Tracy v. Contractors' State License Bd.* (1965) 63 C.2d 598, 47 C.R. 561, 407 P.2d 865, held that the provision in B. & P.C. 7113.5, making an adjudication in bankruptcy a cause for disciplinary action against a contractor, is unconstitutional.

(a) *Tracy* held the statute valid on the ground that its purpose was not to aid collection of debts but to protect the public welfare. *Perez*, however, established a test involving both purpose and effect. (12 C.3d 312.)

(b) Applying the *Perez* test, even though the statutory purpose was valid, the statutory effect was to frustrate the objectives of Congress in three respects: (1) it tends to discourage a licensed contractor from having his or her business debts discharged in bankruptcy; (2) if the contractor is adjudicated a bankrupt, the board may revoke or suspend his or her license, thus depriving the contractor of a means of livelihood; (3) the statute in effect compels the disciplined licensee to pay the discharged business debts in order to have the license reissued or reinstated. "In sum, the relevant sections of the Contractors License Law here under examination not only discourage licensed contractors from voluntarily availing themselves of the beneficial provisions of the Bankruptcy Act but sternly deny a fresh start to all licensees who are adjudicated bankrupts either voluntarily or involuntarily." (12 C.3d 312.) (See 10 *Loyola L.A. L. Rev.* 753 [Bankruptcy Act and State Statutes].) (A 1975 amendment to B. & P.C. 7113.5 deleted the unconstitutional provision.)

In *Gene R. Smith Corp. v. Terry's Tractor* (1989) 209 C.A.3d 951, 954, 257 C.R. 598, the court held that federal bankruptcy law preempts a state action for abuse of process and malicious prosecution based on the filing of an involuntary bankruptcy petition. (See *Pauletto v. Reliance Ins. Co.* (1998) 64 C.A.4th 597, 605, 75 C.R.2d 334

[applying *Gene R. Smith* to voluntary bankruptcy proceeding]; *Saks v. Parilla, Hubbard & Militzok* (1998) 67 C.A.4th 565, 572, 79 C.R.2d 120 [following *Gene R. Smith* and *Pauletto*]; *Ross v. Universal Studios Credit Union* (2002) 95 C.A.4th 537, 539, 115 C.R.2d 712 [following *Pauletto*]; *Choy v. Redland Ins. Co.* (2002) 103 C.A.4th 789, 798, 127 C.R.2d 94 [following *Gene R. Smith*, *Pauletto*, and *Saks*; third party's action against insurer for misuse of bankruptcy process by causing insured to declare bankruptcy was preempted by federal law].)

The court distinguished *Gene R. Smith*, *Pauletto*, *Saks*, and *Ross* in *Satten v. Webb* (2002) 99 C.A.4th 365, 121 C.R.2d 234, holding that the trial court erred in sustaining a demurrer to a malicious prosecution action based on federal preemption. The underlying common law fraud action was removed to bankruptcy court because the bankruptcy trustee's administration of the estate was also challenged, and that action was resolved on state law grounds. State court jurisdiction here would not interfere with the uniformity of the application of bankruptcy law or the bankruptcy court's control over the proceedings. (99 C.A.4th 377, 386.)

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ee. Employee Retirement Income Security Act.

7 Witkin Sum. Cal. Law Const Law § 14

[§ 14] Employee Retirement Income Security Act.

The Employee Retirement Income Security Act (ERISA) (see 3 *Summary* (10th), *Agency and Employment*, §406 et seq.) has been held to preempt state actions based on a wide range of claims. For example, in *Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, 107 S.Ct. 1549, 1553, 1558, 95 L.Ed.2d 39, 48, 54, the court held that ERISA preempted state common law actions based on improper processing of claims for disability insurance benefits. In *Commercial Life Ins. Co. v. Superior Court* (1988) 47 C.3d 473, 475, 484, 253 C.R. 682, 764 P.2d 1059, the court held that ERISA preempted an action under *Ins.C. 790.03(h)* for bad faith rejection of a claim arising from an employee benefit plan. (See *Faria v. Northwestern Nat. Life Ins. Co.* (1989) 216 C.A.3d 1129, 1134, 265 C.R. 309 [*Pilot Life* and *Commercial Life* are fully retroactive]; 21 *Loyola L.A. L. Rev.* 1343 [*Blind Faith Conquers Bad Faith*; criticism of *Pilot Life*]; 24 *U.C. Davis L. Rev.* 255 [*Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured*].)

Several cases have held that ERISA preempts state law claims for wrongful termination. (See *Johnson v. Trans World Airlines* (1983) 149 C.A.3d 518, 524, 196 C.R. 896 [federal proscription against discharge of employee for purpose of depriving him of retirement benefits preempts common law action for damages based on same wrongful conduct]; *Lembo v. Texaco* (1987) 194 C.A.3d 531, 537, 239 C.R. 596 [ERISA preempts employees' state action based on claim that employer fraudulently induced employees to retire to deprive them of pension benefits]; *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 [ERISA preempted employee's state law claim that he was wrongfully discharged to prevent his attainment of benefits under pension plan]; *AT&T Communications v. Superior Court* (1994) 21 C.A.4th 1673, 1681, 26 C.R.2d 802 [ERISA preempted employee's state law claim that he was wrongfully terminated for not returning from illness when medically cleared by employer's physicians, but not by his personal physician].)

A variety of other state laws are preempted by ERISA. The following are illustrative:

FMC Corp. v. Holliday (1990) 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 [Pennsylvania law precluding employee welfare benefit plans from exercising subrogation rights on a claimant's tort recovery].

Carpenters Southern Calif. Administrative Corp. v. El Capitan Dev. Co. (1991) 53 C.3d 1041, 282 C.R. 277, 811 P.2d 296 [California mechanic's lien enforcement statute as it related to employee benefit plans]. (See 19 *Pepperdine L. Rev.* 818.)

Bruenn v. Aetna Life Ins. Co. (1987) 197 C.A.3d 1000, 1003 et seq., 243 C.R. 262 [ERISA preempts action, under Ins.C. 790.03 (unfair insurance business practices), by employee against administrator of plan even though administrator also provided excess insurance coverage, where employee's claim was below amount that would have made administrator liable as insurer].

District of Columbia v. Greater Washington Bd. of Trade (1992) 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 [District of Columbia requirement of health insurance coverage for employees eligible for workers' compensation benefits];

Marshall v. Bankers Life & Cas. Co. (1992) 2 C.4th 1045, 1051, 10 C.R.2d 72, 832 P.2d 573 [citing *Pilot Life and Commercial Life*; employer's purchase of group health insurance policy established "employee benefit plan" within meaning of ERISA, despite employer's minimal involvement in administration of plan; thus, action for damages under state law for denial of benefits was preempted].

Hollingshead v. Matsen (1995) 34 C.A.4th 525, 533, 539, 40 C.R.2d 603 [multiple employer group health insurance plan was employee benefit plan within meaning of ERISA, even though plan was administered by third party; hence, state law claims against insurer for failure to pay benefits were preempted by ERISA].

Operating Engineers Pension Trust v. Insurance Co. of the West (1995) 35 C.A.4th 59, 63, 66, 42 C.R.2d 1 [action by third-party beneficiaries seeking to collect on payment and performance bonds to recover unpaid fringe benefits owed by employer was preempted by ERISA; review of California state remedies preempted by ERISA].

Employee apprenticeship programs, including the standards under which these programs operate, are employee welfare benefit plans within the scope of ERISA's general preemption clause. However, because the federal Fitzgerald Act (29 U.S.C., §50) grants states the general authority to approve or disapprove apprenticeship programs, they are saved from preemption under ERISA's general savings clause. (*Southern Calif. Chapter of Associated Builders & Contractors, Joint Apprenticeship Committee v. California Apprenticeship Council* (1992) 4 C.4th 422, 436, 450, 14 C.R.2d 491, 841 P.2d 1011 [concluding that California regulation prohibiting programs with adverse effect on prevailing conditions would impair Fitzgerald Act and thus was preempted by ERISA]; 21 *Pepperdine L. Rev.* 353.)

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ff. Environmental Legislation.

7 *Witkin Sum. Cal. Law Const Law* § 15

[§ 15] Environmental Legislation.

Federal environmental legislation has been held to preempt state claims relating to environmental protection. (See *International Paper Co. v. Ouellette* (1987) 479 U.S. 481, 107 S.Ct. 805, 813, 93 L.Ed.2d 883, 898, 900 [federal Clean Water Act preempts state common law to extent that it imposes liability on out-of-state pollution source]; *Louisiana-Pac. Corp. v. Koppers Co.* (1995) 32 C.A.4th 599, 602, 604, 38 C.R.2d 257 [Federal Insecticide, Fungicide, and Rodenticide Act preempts state common law claims based on theories of failure to warn about proper use and disposal; applying *Cipollone v. Liggett Group* (1992) 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407]; *Etcheverry v. Tri-Ag Service* (2000) 22 C.4th 316, 334, 93 C.R.2d 36, 993 P.2d 366 [same]; *Arnold v. Dow Chemical Co.* (2001) 91 C.A.4th 698, 710, 110 C.R.2d 722 [relying on *Etcheverry* on failure-to-warn claims]; 14 *Ecology L. Q.* 541 [International Paper].)

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gg. Foreign Affairs.

7 *Witkin Sum. Cal. Law Const Law* § 16

[§ 16] Foreign Affairs.

Federal supremacy is particularly clear in the field of foreign affairs including immigration, naturalization, and deportation. Hence, a state law providing for registration and supervision of aliens was held inoperative on the enactment of a federal statute occupying the field and manifesting an intention to provide a uniform national registration system. (*Hines v. Davidowitz* (1941) 312 U.S. 52, 61 S.Ct. 399, 401, 85 L.Ed. 581, 584; see *Graham v. Richardson* (1971) 403 U.S. 365, 91 S.Ct. 1848, 1855, 29 L.Ed.2d 534, 545, *infra*, §727 [state law restricting eligibility for welfare benefits on grounds of alienage conflicts with overriding national policy]; *Toll v. Moreno* (1982) 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 [following *Graham v. Richardson*; state university's policy barring domiciled nonimmigrant aliens with G-4 visas is invalid]; *In re Adolfo M.* (1990) 225 C.A.3d 1225, 1228, 1233, 275 C.R. 619 [juvenile court order transferring nonresident alien to Mexican authorities was proper under *In re Manuel P.* (1989) 215 C.A.3d 48, 263 C.R. 447, but order that he not return to U.S. without written permission from court was unconstitutional infringement on federal power over immigration]; 20 *Loyola L.A. L. Rev.* 513 [city sanctuary resolutions and the preemption doctrine]; on federal power over immigration, see *infra* §183 et seq.)

Crosby v. National Foreign Trade Council (2000) 530 U.S. 363, 120 S.Ct. 2288, 2294, 147 L.Ed.2d 352, held that a state law barring state entities from doing business with Burma (Myanmar) undermined the federal act giving the President discretion to control economic sanctions and to develop multilateral strategy involving Burma, and was preempted under the Supremacy Clause. (See 79 *Cal. L. Rev.* 1169 [State Sovereignty and Nuclear Free Zones]; 114 *Harv. L. Rev.* 349 [*Crosby*]; 26 *Hastings Const. L. Q.* 307 [state and local "sanctions" against foreign countries]; 28 *Hastings Const. L. Q.* 67 [*Crosby*]; 108 *A.L.R.5th* 189 [nonalien cases on validity of statutes allegedly infringing on exclusive federal power over foreign affairs]; on foreign affairs, see *infra*, §1337 et seq.)

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hh. Labor Relations.

7 *Witkin Sum. Cal. Law Const Law* § 17

[§ 17] Labor Relations.

Federal labor acts have been held to preempt state claims relating to labor relations (See *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould* (1986) 475 U.S. 282, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223, 229 [state statute barring repeat violators of National Labor Relations Act from doing business with state was preempted by federal Act's comprehensive regulation]; *Livadas v. Bradshaw* (1994) 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 [California state policy against enforcing state-law wage claims on behalf of discharged employees was covered by collective bargaining agreements preempted by federal law as abridging exercise of employees' rights under National Labor Relations Act]; *DeTomaso v. Pan Amer. World Airways* (1987) 43 C.3d 517, 526, 533, 235 C.R. 292, 733 P.2d 614 [airline employee's actions for defamation and emotional distress were subject to grievance procedures of collective bargaining agreement and hence preempted by federal Railway Labor Act]; *Southern Calif. Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 C.A.4th 873, 886, 63 C.R.2d 106 [as applied to construction project controlled by federal government, state's prevailing wage law is preempted by federal Davis-Bacon Act]; 19 *Pacific L. J.* 905 [*DeTomaso*].)

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ii. Telecommunications.

7 *Witkin Sum. Cal. Law Const Law* § 18

[§ 18] Telecommunications.

In *Duggal v. G.E. Capital Communications Services* (2000) 81 C.A.4th 81, 87, 91, 96 C.R.2d 383, the court held that the filed rate doctrine, under which the filed rate is the only lawful rate, barred an action against telecommunication companies by resellers of long-distance telephone services for fraud and breach of contract. To permit a state law damage award here would violate the "doctrine by in effect providing a disguised retroactive rate adjustment" and by putting the court in the "business of determining a reasonable level of service for matters subject to FCC regulation." (See *Ball v. GTE Mobilnet of Calif.* (2000) 81 C.A.4th 529, 538, 96 C.R.2d 801, *infra*, §24 [billing for "noncommunication time" is part of "rate" charged for service; thus, action in California challenging legality of billing for this time is preempted by Federal Communications Act]; *Rancho Palos Verdes v. Abrams* (2002) 101 C.A.4th 367, 378, 124 C.R.2d 80 [FCC has exclusive authority in allocating radio frequencies; thus, where FCC licensed defendant to use certain frequencies for commercial purposes, city could not deny permit for that use].)

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See *Gallivan v. AT & T Corp.* (2004) 124 C.A.4th 1377, 1384, 21 C.R.3d 898 [filed rate doctrine applies to network access charge, sanctioned but not mandated by FCC, included in telephone company's rate tariff]; 32 A.L.R. Fed 2d 125 [construction of Communications Act of 1934 and Telecommunications Act of 1996--U.S. Supreme Court cases].



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jj. Other Subjects.

7 *Witkin Sum. Cal. Law Const Law* § 19

[§ 19] Other Subjects.

The cases apply the supremacy doctrine to conflicts between competing federal and state policies in many other areas of substantive law. Examples are:

(1) *Agriculture*. See *Michigan Canners & Freezers Assn. v. Agricultural Marketing & Bargaining Bd.* (1984) 467 U.S. 461, 104 S.Ct. 2518, 2528, 81 L.Ed.2d 399, 411, 412 [state act conferring exclusive bargaining authority on agricultural cooperatives is preempted by provision of Federal Agricultural Fair Practices Act prohibiting coercion of producers in marketing of products].

(2) *Criminal Law*. In *Pennsylvania v. Nelson* (1956) 350 U.S. 497, 76 S.Ct. 477, 481, 100 L.Ed. 640, 653, a state sedition statute was held to have been superseded by the federal Smith Act and similar anti-Communist legislation. The court followed the test developed in the commerce cases (infra, §§1307, 1308). (See *Henry v. Mississippi* (1965) 379 U.S. 443, 85 S.Ct. 564, 567, 13 L.Ed.2d 408, 412 [state procedural rule cannot be invoked mechanically to defeat federal constitutional right]; *Burbank v. Lockheed Air Terminal* (1973) 411 U.S. 624, 93 S.Ct. 1854, 1855, 36 L.Ed.2d 547, 549; *Gates v. Municipal Court* (1992) 9 C.A.4th 45, 54, 11 C.R.2d 439 [sheriff's compliance with federal court's order gave him immunity from state prosecution]; 67 *Harv. L. Rev.* 1419 [*Pennsylvania v. Nelson* and Smith Act]; 70 *Harv. L. Rev.* 116 [same]; 12 *Stanf. L. Rev.* 208 [same]; 30 *So. Cal. L. Rev.* 101[same]; 33 *So. Cal. L. Rev.* 92 [same]; 4 *U.C.L.A. L. Rev.* 118 [same].)

(3) *Discovery*. See *Department of Trans. v. Superior Court* (1996) 47 C.A.4th 852, 857, 55 C.R.2d 2 [23 U.S.C., §409 preempts state law and protects from disclosure data collected to identify or alleviate roadway hazards, but scope of preemption is narrow and extends only to information collected under provisions specified in §409, not to data relating to highway safety improvement generally].

(4) *Energy Transmission*. See *Southern Calif. Edison Co. v. Public Util. Com.* (2004) 121 C.A.4th 1303, 1313, 18 C.R.3d 435 [statute requiring public utilities to pay upfront costs of upgrades to national power grid network at point of interconnection was preempted by federal law].

(5) *Federal Employers Liability Act*. See *Monarch v. Southern Pac. Trans. Co.* (1999) 70 C.A.4th 1197, 1205, 1208, 83 C.R.2d 247 [FELA occupies field for personal injuries to railroad employees incurred in course of employment, including intentional tort of fraudulent concealment].

(6) *Fishing Restrictions in Territorial Waters*. See *Douglas v. Seacoast Products* (1977) 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 [Virginia statutes limiting rights of nonresidents and aliens to catch fish in territorial waters were preempted by Federal Enrollment and Licensing Act, insofar as they subjected federally licensed vessels to restrictions different from those applicable to residents and citizens].

(7) *Food and Drug Acts*. See *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 C.4th 910, 924, 931, 12 C.R.3d 262, 88 P.3d 1 [health warnings mandated by Proposition 65 on over-the-counter products containing nicotine were preempted by Food, Drug, and Cosmetic Act; although language in Food and Drug Administration Modernization Act exempts Proposition 65 from preemptive effect of FDCA, Proposition 65 warnings directly conflict with one required by Food and Drug Administration, and FDA has authority to prohibit truthful California warning if it misleads consumers]; *Kanter v. Warner-Lambert Co.* (2002) 99 C.A.4th 780, 795, 122 C.R.2d 72 [state law claims alleging that labels on drugs contained false and misleading statements were preempted by FDAMA].

(8) *Government Procurement Contracts*. See *United States v. Allegheny County* (1944) 322 U.S. 174, 64 S.Ct. 908, 913, 88 L.Ed. 1209, 1216 [rule of passage of title under state law was inapplicable]; *Public Util. Com. of Calif. v. United States* (1958) 355 U.S. 534, 78 S.Ct. 446, 453, 2 L.Ed.2d 470, 478 [California rate regulation of carriers of military traffic was void as in conflict with federal procurement policy].

(9) *Indian Affairs*. See *Boisclair v. Superior Court* (1990) 51 C.3d 1140, 1147, 276 C.R. 62, 801 P.2d 305 [federal statute precludes states from asserting jurisdiction over disputes concerning Indian land]; *Inland Casino Corp. v. Superior Court* (1992) 8 C.A.4th 770, 776, 778, 10 C.R.2d 497 [following *Boisclair*]; 18 *Pepperdine L. Rev.* 1066 [*Boisclair*]; 184 A.L.R. Fed 107 [Indian Major Crimes Act].

(10) *Internet*. See *Kathleen R. v. Livermore* (2001) 87 C.A.4th 684, 692, 104 C.R.2d 772 [47 U.S.C., §230, providing immunity for interactive computer service providers, preempted state law claims relating to minor's use of Internet at library to download objectionable material]; *Gentry v. eBay* (2002) 99 C.A.4th 816, 828, 121 C.R.2d 703 [47 U.S.C., §230 preempted state law claims relating to failure of defendant Internet auctioneer to provide certificate of authenticity of autographed collectibles sold on its website].

(11) *Job Training and Partnership Act*. See *Private Industry Council v. Employment Dev. Dept.* (1997) 57 C.A.4th 1290, 1294, 67 C.R.2d 669 [federal Job Training and Partnership Act provision providing for recapture of unspent funds over 3 years superseded state directive requiring forfeiture of balance of funds if 80% of funds is not spent within 1 year].

(12) *Jurisdiction and Procedure*. See *Testa v. Katt* (1947) 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967, *infra*, §25 [state court must take jurisdiction of action involving claim under federal Price Control Act, despite state's objection that statute was foreign penal law]; *Miller v. Municipal Court of Los Angeles* (1943) 22 C.2d 818, 841, 142 P.2d 297 [same]; *United States v. John Hancock Mut. Life Ins. Co.* (1960) 364 U.S. 301, 81 S.Ct. 1, 4, 5 L.Ed.2d 1, 7 [local statute of limitation does not bind U.S.]; *Felder v. Casey* (1988) 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 [state notice-of-claim statute is inapplicable to actions in state court under federal Civil Rights Act (42 U.S.C., §1983)].

(13) *Medicare and Medicaid*. See *Olszewski v. Scripps Health* (2003) 30 C.4th 798, 820, 135 C.R.2d 1, 69 P.3d 927 [federal Medicaid statutes and regulations limiting provider reimbursement preempt state statute permitting medical providers to obtain lien against personal injury claims, judgments, or settlements of Medi-Cal beneficiaries for full customary charges for services]; *Congress of Calif. Seniors v. Catholic Healthcare West* (2001) 87 C.A.4th 491, 508, 104 C.R.2d 655 [federal law governing Medicare provider cost reporting and reimbursement so thoroughly occupies field that there is no room left for states to supplement it].

(14) *Natural Gas Regulation*. See *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi* (1986) 474 U.S. 409, 106 S.Ct. 709, 718, 88 L.Ed.2d 732, 746 [state regulation requiring interstate pipeline to buy gas on proportionate basis from all owners in common gas pool was preempted by federal Natural Gas Act and Natural Gas Policy Act]; *Schneidewind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 108 S.Ct. 1145, 1151, 99 L.Ed.2d 316, 325 [state statute regulating issuance of securities by natural gas companies was preempted by federal Natural Gas Act]; *Southern Calif. Gas Co. v. Occupational Safety & Health App. Bd.* (1997) 58 C.A.4th 200, 209, 67 C.R.2d 892 [Natural Gas Pipeline Safety Act completely preempts field of pipeline safety]; cf. *People v. Torch Energy Services* (2002) 102 C.A.4th 181, 186, 188, 125 C.R.2d 365 [finding preemption under *Southern Calif. Gas*, but using judicial estoppel to prevent party from asserting federal preemption].

(15) *Negligence Actions*. See *Evraets v. Intermedics Intraocular* (1994) 29 C.A.4th 779, 787, 791, 34 C.R.2d 852, 6 Summary (10th), *Torts*, §§872, 1540 [Medical Device Amendments to federal Food, Drug and Cosmetic Act preempt state strict liability and negligence claims based on same conduct but do not preempt negligence per se claims]; *Scott v. CIBA Vision Corp.* (1995) 38 C.A.4th 307, 317, 324, 44 C.R.2d 902, 6 Summary (10th), *Torts*, §§872, 1540 [Medical Device Amendments preempt strict liability, negligence and negligence per se claims]; 35 U.C. Davis L. Rev. 1 [Federal Preemption of State Tort Claims].

(16) *Patents*. See *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 84 S.Ct. 784, 789, 11 L.Ed.2d 661, 665, 13 Summary (10th), *Personal Property*, §79 [state law cannot provide indirect protection to unpatented or unpatentable invention]; 78 Harv. L. Rev. 309.

(17) *Racial Discrimination*. See *Cooper v. Aaron* (1958) 358 U.S. 1, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5, 17, *infra*, §751 [official state opposition to desegregation decision: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it"].

(18) *Railroads*. See *Scheiding v. General Motors Corp.* (2000) 22 C.4th 471, 474, 93 C.R.2d 342, 993 P.2d 996 [Locomotive Boiler Inspection Act preempts state actions against locomotive manufacturers for defective design; following *Napier v. Atlantic Coast Line R. Co.* (1926) 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432].

(19) *Safety Acts*. See *Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 [Occupational Safety and Health Act]; *Buckman Co. v. Plaintiffs' Legal Committee* (2001) 531 U.S. 341, 121 S.Ct. 1012, 1017, 148 L.Ed.2d 854, 861 [state fraud action against consultant based on misrepresentations to FDA in obtaining approval to market bone screws conflicted with FDA's responsibility to police fraud and was therefore impliedly preempted by Federal Food, Drug and Cosmetic Act; distinguishing *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443, *infra*, §21]; *Carrillo v. ACF Industries* (1999) 20 C.4th 1158, 1162, 86 C.R.2d 832, 980 P.2d 386 [Safety Appliance Act preempts tort action against railroad manufacturer based on strict products liability]; for discussion of federal and California statutes on occupational safety and health, see 3 Summary (10th), *Agency and Employment*, §363 et seq.

(20) *Securities*. See *McKey v. Charles Schwab & Co.* (1998) 67 C.A.4th 731, 737, 79 C.R.2d 213 [regulation of "order flow payments" (incentives from dealers to brokers to attract business) is impliedly preempted by federal securities laws].

(21) *Social Security*. See *Townsend v. Swank* (1971) 404 U.S. 282, 92 S.Ct. 502, 505, 30 L.Ed.2d 448, 452 [state eligibility standard excluding minor college students from support even though eligible under Social Security Act is invalid]; *Carleson v. Remillard* (1972) 406 U.S. 598, 92 S.Ct. 1932, 1934, 32 L.Ed.2d 352, 355 [state rule that parent's absence because of military duty does not qualify child for assistance is invalid].

(22) *State Contracts and Regulations*. See *Case v. Bowles* (1946) 327 U.S. 92, 66 S.Ct. 438, 443, 90 L.Ed. 552, 558, *supra*, §2 [federal price controls applied to sale of state property despite state claim of governmental immunity]; *Fry v. United States* (1975) 421 U.S. 542, 95 S.Ct. 1792, 1796, 44 L.Ed.2d 363, 369 [federal Economic Stabilization Act and

Pay Board's ruling thereunder precluded state from increasing wages and salaries of state employees]; *Fidelity Fed. Savings & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 102 S.Ct. 3014, 3030, 73 L.Ed.2d 664, 685, 4 Summary (10th), *Security Transactions in Real Property*, §90 [state doctrine precluding enforcement of due-on-sale clauses was preempted by regulations of federal Home Loan Bank Board permitting clauses; board acted within its statutory authority in issuing regulations]; *San Diego v. Van Winkle* (1945) 69 C.A.2d 237, 245, 158 P.2d 774 [federal prohibition of eviction during national emergency barred enforcement of municipal single dwelling zoning ordinance].

(23) *Survivorship*. See *Free v. Bland* (1962) 369 U.S. 663, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180, 185 [federal Treasury regulations covering U.S. Savings Bonds prevail over conflicting state law]; *Yiatchos v. Yiatchos* (1964) 376 U.S. 306, 84 S.Ct. 742, 746, 11 L.Ed.2d 724, 728 [same]; *United States v. Oregon* (1961) 366 U.S. 643, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575, 577, *supra*, §2; *Ridgway v. Ridgway* (1981) 454 U.S. 46, 102 S.Ct. 49, 55, 70 L.Ed.2d 39, 48 [federal Servicemen's Group Life Insurance Act prevails over inconsistent state law]; *Estate of Lindquist* (1944) 25 C.2d 697, 710, 154 P.2d 879 [federal statute on escheat of unexpended pension payments of deceased incompetent veteran controls distribution]; 34 *Hastings L. J.* 685 [Ridgway and other cases].

(24) *Taxation*. See *Arizona Public Service Co. v. Snead* (1979) 441 U.S. 141, 99 S.Ct. 1629, 1634, 60 L.Ed.2d 106, 113 [federal statute directly prohibiting New Mexico tax that imposed greater burden on electricity transmitted in interstate commerce than on electricity transmitted in intrastate commerce]; *Maryland v. Louisiana* (1981) 451 U.S. 725, 101 S.Ct. 2114, 2130, 68 L.Ed.2d 576, 600.

(25) *Tobacco Advertising*. See *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 121 S.Ct. 2404, 2419, 150 L.Ed.2d 532, 556, 557 [Federal Cigarette Labeling and Advertising Act preempts state regulations targeting cigarette advertising, but states may still regulate cigarette use and sales, and impose generally applicable zoning regulations].

(26) *Torts of Public Employees*. See *Williams v. Horvath* (1976) 16 C.3d 834, 842, 129 C.R. 453, 548 P.2d 1125, 3 Cal. Proc. (4th), *Actions*, §236 [California statutory requirement of filing claim in tort action against public officer cannot be applied to action brought under federal Civil Rights Act].

(27) *Voting Rights*. See *Katzenbach v. Morgan* (1966) 384 U.S. 641, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828, 833, *infra*, §241 [Federal Voting Rights Act bars enforcement of state literacy test].

(28) *Workers' Compensation*. In *Goodyear Atomic Corp. v. Miller* (1988) 486 U.S. 174, 108 S.Ct. 1704, 100 L.Ed.2d 158, the issue was whether the Supremacy Clause bars a state "from subjecting a private contractor operating a federally owned nuclear production facility to a state-law workers' compensation provision that provides an increased award for injuries resulting from an employer's violation of a state safety regulation." The court recognized, as a general rule, that "a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation." Without deciding whether the additional-award provision was "sufficiently akin to direct regulation" to be potentially barred by the Supremacy Clause, the court found that application of the provision to workers at the facility was authorized by 40 U.S.C., §290 (now 40 U.S.C., §3172), which empowers states to apply their workers' compensation laws to federal premises "in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State." (108 S.Ct. 1711, 100 L.Ed.2d 169.)

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(4) *Energy Transmission*. See *Wholesale Electricity Antitrust Cases I & II* (2007) 147 C.A.4th 1293, 1312, 55 C.R.3d 253 [distinguishing *Younger v. Jensen* (1980) 26 C.3d 397, 161 C.R. 905, 605 P.2d 813; action seeking damages for antitrust violations and unfair competition relating to defendants' alleged manipulation, distortion, and corruption of wholesale electricity market was preempted by Federal Price Act and federal energy regulatory scheme; exclusive federal authority to determine reasonableness of rates would be impinged by attempt to fix antitrust damages]; *People v. Powerex Corp.* (2007) 153 C.A.4th 93, 111, 62 C.R.3d 638 [filed rate doctrine (see text, §18) barred action by Attorney General against power company for unfair competition and commodity manipulation schemes; any monetary relief

would be in excess of tariffs eventually applied by FERC and would conflict with FERC's exclusive regulatory power over wholesale energy market].

(7) *Food and Drug Acts*. See *Blanco v. Baxter Healthcare Corp.* (2008) 158 C.A.4th 1039, 1053, 1056, 70 C.R.3d 566 [distinguishing and disagreeing with *Armstrong v. Optical Radiation Corp.* (1996) 50 C.A.4th 580, 57 C.R.2d 763; Medical Device Amendments preempted state tort action based on defective implanted heart valve because state requirements for manufacturing defect was different than Act's device-specific requirements]; *Jessen v. Mentor Corp.* (2008) 158 C.A.4th 1480, 1492, 71 C.R.3d 714 [MDA preempted state law tort claims against defendant manufacturer of prosthesis where plaintiff failed to show that defendant had failed to comply with FDA labeling requirement in effect when plaintiff had surgery]; 33 *Pepperdine L. Rev.* 1 [Symposium: Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices].(10) *Internet*. See *O'Grady v. Superior Court* (2006) 139 C.A.4th 1423, 1440, 44 C.R.3d 72 [federal Stored Communications Act preempted civil discovery subpoenas, served on e-mail service providers, seeking e-mail documents identifying persons who supplied information regarding trade secrets]; 34 *Southwestern U. L. Rev.* 247 [what constitutes creation or development of content under Communications Decency Act].(18) *Railroads*. See *Frastaci v. Vapor Corp.* (2007) 158 C.A.4th 1389, 1393, 1399, 70 C.R.3d 402 [*Scheiding v. General Motors Corp.* (2000) 22 C.4th 471, 93 C.R.2d 342, 993 P.2d 996, text, p. 94, forecloses state tort claims against locomotive manufacturers for defective product design, regardless of whether locomotive is in use or off line in roundhouse or repair shop]; *Southern Calif. Regional Rail Authority v. Superior Court* (2008) 163 C.A.4th 712, 718, 730, 77 C.R.3d 765 [regulations promulgated under Federal Railroad Safety Act preempted negligence action relating to defendant's operation of commuter train in push mode].

(19) *Safety Acts*. See *People v. Union Pac. R. Co.* (2006) 141 C.A.4th 1228, 1258, 47 C.R.3d 92 [federal Hazardous Materials Transportation Authorization Act preempts state civil penalties for fact of spill of hazardous materials itself and for alleged failure to train employees regarding spills].

(20) *Securities*. See *Merrill Lynch v. Dabit* (2006) 547 U.S. 71, 126 S.Ct. 1503, 1514, 164 L.Ed.2d 179, 193 [federal Securities Litigation Uniform Standards Act preempted state-law class action, alleging fraudulent manipulation of stock prices, brought by private individuals who held securities rather than purchased or sold them; Act does not actually preempt any state cause of action; it simply denies right to use class action to vindicate certain claims]; *Wells Fargo Bank v. Superior Court* (2008) 159 C.A.4th 381, 388, 71 C.R.3d 506 [following *Merrill Lynch*; state law class action by beneficiaries of trusts maintained by defendant bank was preempted by SLUSA where gravamen of action involved misrepresentation or omission in connection with purchase or sale of mutual funds].(25) *Tobacco Advertising*. See *In re Tobacco Cases II* (2007) 41 C.4th 1257, 1273, 63 C.R.3d 418, 163 P.3d 106 [following *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532, text, p. 95; Federal Cigarette Labeling and Advertising Act preempted claim under unfair competition law seeking to impose liability on tobacco companies for advertising that targeted minors for purpose of encouraging them to start smoking].

(26) *Torts of Public Employees*.

Williams case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §245.



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b. When State Law Will Be Upheld.

1. General Principles.

7 Witkin Sum. Cal. Law Const Law § 20

[§ 20] General Principles.

Where Congress has not preempted the entire field, a state law will be upheld if it does not conflict with, or is authorized by, the federal statute. (See 1 Rotunda, §12.1 et seq.; 1 Tribe, §6-28 et seq.; *16A Am.Jur.2d (1998 ed.)*, *Constitutional Law* §241 et seq.) Many cases have upheld state statutes against claims of federal preemption; the cases discussed below and in subsequent sections (see *infra*, §21 et seq.) illustrate the analysis.

In *DeCanas v. Bica* (1976) 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43, the United States Supreme Court upheld former Lab.C. 2805, which made it a crime to knowingly employ an illegal alien if the employment would have an adverse effect on lawful resident workers. (See 3 *Summary* (10th), *Agency and Employment*, §337.)

(a) Although regulation of immigration is exclusively a federal power (see *infra*, §183), the fact that aliens are the subject of a state statute does not render it a regulation of immigration, i.e., a determination of who should be admitted and the conditions under which a legal entrant may remain. "In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." (96 S.Ct. 936, 47 L.Ed.2d 49.)

(b) The first rule of federal preemption--that the nature of the regulated subject matter permits no other conclusion--does not apply here. The California statute is a proper exercise of police power to protect its fiscal interests and lawfully resident labor force; and it has not been demonstrated that either the wording or legislative history of the federal Immigration and Nationality Act indicates a congressional intention to preclude this state regulation of employment. (96 S.Ct. 937, 47 L.Ed.2d 49.) The second rule--that Congress has unmistakably so ordained--is likewise inapplicable. The provisions of the statute indicate a congressional intention that states may, consistently with federal law, regulate the employment of illegal aliens. (96 S.Ct. 939, 47 L.Ed.2d 52.)

(c) *Hines v. Davidowitz* (1941) 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581, *supra*, §16, and *Pennsylvania v. Nelson* (1956) 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640, *supra*, §19, are distinguishable. Both of these cases dealt with federal

statutes in the specific field that the states were attempting to regulate; in neither was there affirmative evidence that Congress sanctioned concurrent state legislation on the subject covered; and both imposed burdens on aliens lawfully within the country, in conflict with various federal laws. (96 S.Ct. 940, 47 L.Ed.2d 53.) (See 4 *Hastings Const. L. Q.* 295; 6 *Hastings Const. L. Q.* 909; 7 *Golden Gate L. Rev.* 291; 14 *San Diego L. Rev.* 282; 17 *Santa Clara L. Rev.* 198, 751.)

In *Elsworth v. Beech Aircraft Corp.* (1984) 37 C.3d 540, 208 C.R. 874, 691 P.2d 630, a wrongful death action arising out of an airplane crash, plaintiffs sought recovery on a theory of negligence per se, based on defendant's failure to comply with safety regulations of the FAA, and the trial judge gave a negligence per se instruction. Defendant, on appeal from the judgment against it, contended that determinative effect should have been given to the FAA's certification of the plane's design as complying with applicable safety regulations, and that the instruction permitted intrusion into a field preempted by federal law. The court rejected the preemption claim and affirmed the judgment on the verdict.

(a) There is no inconsistency in the federal government entirely occupying a regulated field and the state simultaneously granting damages for violation of regulations. (37 C.3d 548, 549, citing *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443, *infra*, §21.) The Federal Aviation Act expressly declares that its provisions are not intended to abridge remedies that a party may have under state law, and the doctrine of negligence per se is one of those remedies. (37 C.3d 549.)

(b) There is no irreconcilable conflict between federal and state standards. Plaintiffs do not challenge the power of the FAA to adopt safety regulations or to certify aircraft as complying, and they do not seek to revoke the certification of the airplane; and the jury could make the same determination of defective design if the airplane complied with every regulation. Thus, the negligence per se instruction affects only the jury's reason for finding a design defect. (37 C.3d 550.)

(c) State law does not pose an obstacle to the federal regulatory scheme; if anything, the converse is true: An inquiry in a state court into whether the manufacturer has in fact complied with regulations would assist the FAA in policing a manufacturer's compliance. (37 C.3d 550.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Fonseca v. Fong* (2008) 167 C.A.4th 922, 936, 941, 84 C.R.3d 567 [applying test of *De Canas v. Bica* (1976) 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43, text, p. 96; federal immigration law did not preempt state statute requiring state and local law enforcement agencies to notify federal authorities when they suspect that person arrested for one of specific drug offenses is not U.S. citizen; statute did not require arresting agencies to independently determine whether arrestee was U.S. citizen or whether arrestee was lawfully in U.S.]; 2 *Rotunda* 4th, §12.1 et seq.



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aa. United States Supreme Court.

7 *Witkin Sum. Cal. Law Const Law* § 21

[§ 21] United States Supreme Court.

A state law that does not frustrate or impede the operation of the federal law normally may apply in the same area. *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443, illustrates the approach. A state-authorized award of punitive damages, in an action to recover for contamination injuries caused by the escape of plutonium from a nuclear facility, was held not preempted by federal law. Although federal statutes preempt state regulation of the safety aspects of nuclear energy, an award of punitive damages for injuries caused by nuclear hazards neither conflicts with nor frustrates the federal scheme. (104 S.Ct. 625, 626, 78 L.Ed.2d 457, 458.) (See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com.* (1983) 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752, *infra*, §24 [state regulation of economic aspects of nuclear power is not preempted by federal regulation of safety aspects]; *English v. General Elec. Co.* (1990) 496 U.S. 72, 110 S.Ct. 2270, 2279, 2281, 110 L.Ed.2d 65, 79, 81 [employee's tort action for intentional infliction of emotional distress, arising out of nuclear facility's retaliatory discharge of her after she made safety complaints, is not preempted either by federal regulation of nuclear safety or by federal Energy Reorganization Act, which prohibits retaliation against employees who report nuclear safety violations].)

The following federal cases found no conflict:

New York Tel. Co. v. New York State Dept. of Labor (1979) 440 U.S. 519, 99 S.Ct. 1328, 1337, 59 L.Ed.2d 553, 564, 3 *Summary* (10th), *Agency and Employment*, §555 [state statute authorizing payment of unemployment compensation to strikers is not preempted by federal labor laws]. (See 93 *Harv. L. Rev.* 263.)

Rice v. Norman Williams Co. (1982) 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 [California statute prohibiting importer from importing brand of distilled spirits for which it is not a designated importer is not preempted by federal antitrust laws or Federal Alcohol Administration Act].

Hillsborough v. Automated Med. Laboratories (1985) 471 U.S. 707, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714, 723 [county ordinances regulating blood plasma centers were not preempted by FDA regulations establishing minimum standards for collection of blood plasma].

Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 105 S.Ct. 2380, 2399, 85 L.Ed.2d 728, 752 [state statute requiring specified minimum mental health-care benefits in insurance policies is not preempted by federal ERISA or NLRA].

Louisiana Public Service Com. v. Federal Communications Com. (1986) 476 U.S. 355, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 369, 383 [state regulation of depreciation rates and methods for classes of property used by telephone companies is not preempted by rulings of Federal Communications Commission; Federal Communications Act, §152(b), denies this authority to FCC].

R.J. Reynolds Tobacco Co. v. Durham (1986) 479 U.S. 130, 107 S.Ct. 499, 513, 93 L.Ed.2d 449, 469 [federal statutes promoting foreign commerce do not preempt imposition of property tax on imported goods while stored in customs-bonded warehouse awaiting domestic manufacture and sale].

California Fed. Savings & Loan Assn. v. Guerra (1987) 479 U.S. 272, 107 S.Ct. 683, 693, 695, 93 L.Ed.2d 613, 620, 621 [Govt.C. 12945(b)(2), requiring employers to provide female employees an unpaid pregnancy disability leave of up to 4 months, is not preempted by federal Pregnancy Discrimination Act of 1978]. (See 101 Harv. L. Rev. 320.)

California Coastal Com. v. Granite Rock Co. (1987) 480 U.S. 572, 107 S.Ct. 1419, 1431, 94 L.Ed.2d 577, 599 [California Coastal Commission's permit requirement for mining by holder of unpatented mining claim in national forest is not preempted by federal statutes and regulations governing land use planning].

CTS Corp. v. Dynamics Corp. of America (1987) 481 U.S. 69, 107 S.Ct. 1637, 1644, 95 L.Ed.2d 67, 88 [Indiana statute regulating acquisition of control shares in state-chartered corporations is consistent with and not preempted by federal Williams Act regulating hostile tender offers].

Rose v. Rose (1987) 481 U.S. 619, 107 S.Ct. 2029, 2039, 95 L.Ed.2d 599, 614 [federal statutes governing veteran's disability benefits do not preempt state court from considering these benefits in awarding child support and using contempt power to enforce award].

Fort Halifax Packing Co. v. Coyne (1987) 482 U.S. 1, 107 S.Ct. 2211, 2223, 96 L.Ed.2d 1, 18 [state statute requiring one-time severance payment to employees in event of plant closing is not preempted by federal ERISA or NLRA].

Northwest Cen. Pipeline Corp. v. State Corp. Com. of Kansas (1989) 489 U.S. 493, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509, 527 [state regulation governing production of natural gas is not preempted by federal Natural Gas Act].

Cotton Petroleum Corp. v. New Mexico (1989) 490 U.S. 163, 109 S.Ct. 1698, 1713, 104 L.Ed.2d 209, 233 [state taxation of oil and gas produced by non-Indian lessee on tribal reservation is not preempted by federal Indian Mineral Leasing Act of 1938].

Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University (1989) 489 U.S. 468, 109 S.Ct. 1248, 1255, 1256, 103 L.Ed.2d 488, 499, 500, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §489 [C.C.P. 1281.2, providing for stay of arbitration under specified circumstances, is not preempted by Federal Arbitration Act].

Wisconsin Public Intervenor v. Mortier (1991) 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 [Federal Insecticide, Fungicide and Rodenticide Act did not preempt local governmental regulation of pesticide use].

Cipollone v. Liggett Group (1992) 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 [Federal Cigarette Labeling and Advertising Act, before being amended by the Public Health Cigarette Smoking Act, did not preempt state law damages actions].

CSX Trans. v. Easterwood (1993) 507 U.S. 658, 113 S.Ct. 1732, 1743, 123 L.Ed.2d 387, 404 [Federal Railroad

Safety Act regulations preempt negligence action only insofar as it asserts that train was traveling at excessive speed].

Building & Const. Trades Council of Metropolitan Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island (1993) 507 U.S. 218, 113 S.Ct. 1190, 1194, 122 L.Ed.2d 565, 574 [NLRA did not preempt state, as owner of construction project, from enforcing otherwise lawful prehire collective bargaining agreement negotiated by private parties].

Hawaiian Airlines v. Norris (1994) 512 U.S. 246, 114 S.Ct. 2239, 2249, 2251, 129 L.Ed.2d 203, 218, 220 [federal Railway Labor Act does not preempt state law claims involving rights and obligations that exist independently of collective bargaining agreement; thus, unionized aircraft mechanic's state claims for wrongful discharge were not preempted].

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. (1995) 514 U.S. 645, 115 S.Ct. 1671, 1678, 1680, 131 L.Ed.2d 695, 707, 709 [state statute imposing surcharges on some but not all health care insurers had only indirect economic effect on employee benefit plan administrators and hence was not preempted by federal ERISA].

Freightliner Corp. v. Myrick (1995) 514 U.S. 280, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385, 391 [National Traffic and Motor Vehicle Safety Act, which preempts state safety standards whenever federal standard is in effect, did not preempt state common law actions alleging design defects in braking systems of tractor-trailers, because suspension of federal safety standard left no federal standard in effect].

American Airlines v. Wolens (1995) 513 U.S. 219, 115 S.Ct. 817, 823, 824, 130 L.Ed.2d 715, 724, 725 [Federal Airline Deregulation Act preempts frequent flyer claims against airline under state consumer fraud law, but not breach of contract claims].

Anderson v. Edwards (1995) 514 U.S. 143, 115 S.Ct. 1291, 131 L.Ed.2d 178 [federal "family filing unit rule," which groups all cohabiting nuclear family members into single assistance unit for purposes of AFDC benefits, did not preempt California "non-sibling filing unit rule," which groups all cohabiting needy children under care of same adult into same assistance unit]. (See 26 *Golden Gate L. Rev.* 301.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 125 S.Ct. 1788, 1800, 161 L.Ed.2d 687, 705 [language of Federal Insecticide, Fungicide, and Rodenticide Act proscribing state labeling or packaging requirements "in addition to or different from" those required by Act permits parallel requirements by states; thus, state law that is equivalent to, and consistent with, Act's misbranding provisions is not preempted]; 32 *Ecology L. Q.* 763 [*Bates*]; 119 *Harv. L. Rev.* 376 [same]; 2 *A.L.R. Fed* 2d 265 [federal preemption of state claims pertaining to herbicides].

Cases finding no conflict:

Volt Information Sciences case:

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §511.



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bb. California Supreme Court.

7 *Witkin Sum. Cal. Law Const Law* § 22

[§ 22] California Supreme Court.

In *O'Reilly v. Board of Med. Examiners* (1967) 66 C.2d 381, 387, 58 C.R. 7, 426 P.2d 167, a federal statute established an exchange-visitor program for students, teachers, and persons of special skill. *Held*, while Congress could have made this statute supersede state regulation of the medical profession, it did not; consequently petitioner, a sponsor of foreign doctors, was properly found guilty of violating former B. & P.C. 2392 (now B. & P.C. 2264), prohibiting employment of an unlicensed practitioner.

Perdue v. Crocker Nat. Bank (1985) 38 C.3d 913, 216 C.R. 345, 702 P.2d 503, rejected the claim that California law, as applied to prohibit national banks from exacting unreasonable charges for processing checks without sufficient funds (see 1 *Summary* (10th), *Contracts*, §339), is preempted by federal law: "In sum, the controlling doctrines of California law do not facially conflict with any federal statute or regulation. Neither does it appear from the pleading that the application of these doctrines to national bank contracts will impair the efficiency or viability of national banks, or frustrate the purpose of legislation regulating (or deregulating) those banks. Although conceivably information not contained in the pleadings might lead to a different conclusion, such information is not before us in reviewing a judgment upon demurrer. We cannot presume, without evidence, that prohibiting a national bank from setting unreasonable prices or enforcing an unconscionable contract will render that bank less efficient, less competitive or less able to fulfill its function in a national banking system." (38 C.3d 943.)

Other illustrative cases include the following:

People v. Conklin (1974) 12 C.3d 259, 269, 114 C.R. 241, 522 P.2d 1049 [P.C. 631, prohibiting wiretapping by persons other than law enforcement officers, unless consent is given, is not preempted by federal legislation].

Greater Westchester Homeowners Assn. v. Los Angeles (1979) 26 C.3d 86, 96, 100, 160 C.R. 733, 603 P.2d 1329 [claims for personal injuries caused by noise from aircraft using city-owned airport is not preempted by federal control of aircraft flight; "proprietor exception" governs]. (See 20 *Santa Clara L. Rev.* 533.)

Younger v. Jensen (1980) 26 C.3d 397, 404, 161 C.R. 905, 605 P.2d 813 [state Attorney General's investigation of antitrust violations affecting marketing in California of Alaska natural gas is not preempted by federal statutes].

People v. Mendocino (1984) 36 C.3d 476, 493, 204 C.R. 897, 683 P.2d 1150 [county regulation prohibiting aerial application of phenoxy herbicides is not preempted by Federal Insecticide, Fungicide and Rodenticide Act].

Wells Fargo Bank v. Superior Court (1991) 53 C.3d 1082, 1086, 1103, 282 C.R. 841, 811 P.2d 1025 [National Bank Act, granting board of directors of bank power to discharge bank officers "at pleasure," does not preempt state action for wrongful discharge unless board itself either dismissed officer or approved or ratified discharge]. (See 19 *Pepperdine L. Rev.* 822.)

Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 C.4th 1057, 1060, 1065, 31 C.R.2d 358, 875 P.2d 73 [Federal Cigarette Labeling and Advertising Act, as amended by Public Health Cigarette Smoking Act, does not preempt state action for unfair competition based on advertising campaign seeking to induce minors to smoke and illegally to purchase cigarettes].

Rosenthal v. Great Western Financial Sec. Corp. (1996) 14 C.4th 394, 409, 58 C.R.2d 875, 926 P.2d 1061, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §488A [procedural provisions of federal Arbitration Act are not binding on state courts if state procedures serve to further, rather than defeat, federal objectives].

Tidewater Marine Western v. Bradshaw (1996) 14 C.4th 557, 566, 59 C.R.2d 186, 927 P.2d 296 [federal law does not preempt state regulation of seamen's overtime pay].

Peatros v. Bank of America (2000) 22 C.4th 147, 172, 183, 91 C.R.2d 659, 990 P.2d 539, *supra*, §12 [no plurality opinion on preemption of FEHA by National Bank Act provision permitting discharge of bank officers "at pleasure"].

McCall v. PacifiCare of Calif. (2001) 25 C.4th 412, 424, 425, 106 C.R.2d 271, 21 P.3d 1189 [Medicare Act does not preempt state tort law remedies that are "collateral to, and not inextricably intertwined with, Medicare benefit claims"].

Bronco Wine Co. v. Jolly (2004) 33 C.4th 943, 989, 17 C.R.3d 180, 95 P.3d 422 [state wine labeling statute that prevents use of "Napa," or other federally recognized viticultural area in Napa County, in brand name or on label unless 75% of grapes used in wine are from Napa County is not preempted by Federal Alcohol Administration Act].

SUPPLEMENT: [This section is current through the latest supplement]

See *People v. R.J. Reynolds Tobacco Co.* (2005) 37 C.4th 707, 716, 36 C.R.3d 814, 124 P.3d 408 [Federal Cigarette Labeling and Advertising Act does not preempt state law regulating free distribution of cigarettes to minors or adults]; *Viva! Int. Voice for Animals v. Adidas Promotional Retail Operations* (2007) 41 C.4th 929, 941, 63 C.R.3d 50, 162 P.3d 569 [Endangered Species Act does not preempt state law prohibiting importation or sale of kangaroo products]; *In re Tobacco Cases II* (2007) 41 C.4th 1257, 1273, 63 C.R.3d 418, 163 P.3d 106 [overruling *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 C.4th 1057, 31 C.R.2d 358, 875 P.2d 73, text, p. 102, to extent it conflicts with *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532, text, §19].

Other illustrative cases:

Rosenthal case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §509.



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cc. California Courts of Appeal.

7 *Witkin Sum. Cal. Law Const Law* § 23

[§ 23] California Courts of Appeal.

The following Court of Appeal cases found no federal preemption:

Schroeder v. Municipal Court (1977) 73 C.A.3d 841, 845, 846, 141 C.R. 85 [Federal Communications Act authorization of antennas reaching 200 feet did not preempt municipal zoning ordinance prohibiting radio or television antennas over 40 feet in height]. (See 9 *Pacific L. J.* 1041 [criticizing *Schroeder*].)

In re Marriage of Johnston (1978) 85 C.A.3d 900, 907, 909, 912, 149 C.R. 798, 11 *Summary* (10th), *Community Property* §62 [federal ERISA does not preempt California law giving employee's spouse community property interest in pension benefits].

Crown Oil Corp. v. Superior Court (1986) 177 C.A.3d 604, 612, 223 C.R. 164 [federal antitrust law does not preempt Cartwright Act, as amended to allow action by indirect purchaser].

Pacific Airmotive Corp. v. First Interstate Bank (1986) 178 C.A.3d 1130, 1139, 1141, 224 C.R. 233 [ERISA did not preempt employer's action against trustee of employee retirement plan for damages caused by breach of fiduciary duty].

Bohemian Club v. Fair Emp. & Housing Com. (1986) 187 C.A.3d 1, 15, 18, 231 C.R. 769 [state Fair Employment and Housing Act's prohibition against discrimination by private clubs is not preempted by federal Title VII exemption of private clubs].

Amarel v. Connell (1988) 202 C.A.3d 137, 147, 150, 248 C.R. 276 [action under state statutes claiming anticompetitive practices involving rice trade with Korea did not interfere with foreign affairs and was not preempted by Commerce Clause or by federal Sherman Antitrust Act].

Smith v. Santa Barbara (1988) 203 C.A.3d 1415, 1425, 251 C.R. 1 [county building regulations were not preempted by Supremacy Clause even though private developer intended to lease building to federal agency].

In re Manuel P. (1989) 215 C.A.3d 48, 66, 71, 263 C.R. 447 [Welf.C. 738, permitting juvenile court to order nonresident alien returned to country of origin, was not improper regulation of immigration or foreign relations; under statute and implementing project, actual deportation processing is done by federal officials].

Denari v. Superior Court (1989) 215 C.A.3d 1488, 1495, 1502, 264 C.R. 261 [privilege against discovery under California constitutional right to privacy was not preempted by inclusion in state action of claim under federal Civil Rights Act (42 U.S.C., §1983); applying criteria of *Felder v. Casey* (1988) 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123, *infra*, §841].

Evans v. Southern Pac. Trans. Co. (1989) 213 C.A.3d 1378, 1387, 1388, 262 C.R. 416 [action under state Fair Employment and Housing Act, claiming employment discrimination on basis of race and physical handicap, is not preempted by arbitration provisions of Federal Railway Labor Act].

Abou-Jaoude v. British Airways (1991) 228 C.A.3d 1137, 1141, 281 C.R. 150 [Federal Aviation Act did not preempt Unruh Civil Rights Act].

Hall v. Great Western Bank (1991) 231 C.A.3d 713, 718, 721, 282 C.R. 640 [federal banking regulations did not bar wrongful discharge action brought by employee of federal bank].

Tahoe Regional Planning Agency v. King (1991) 233 C.A.3d 1365, 1386, 285 C.R. 335 [Federal Highway Beautification Act did not preempt ordinance regulating outdoor advertising signs].

Hotz v. Rich (1992) 4 C.A.4th 1048, 1052, 1056, 6 C.R.2d 219 [Federal Communications Commission declaratory ruling did not preempt judicial enforcement of private restrictive covenants in deed].

Stevenson v. San Francisco Housing Authority (1994) 24 C.A.4th 269, 279, 283, 29 C.R.2d 398 [federal housing laws does not preempt Govt.C. 818.6, granting inspection immunity to public entities (see 5 *Summary* (10th), *Torts*, §288)].

Armstrong v. Optical Radiation Corp. (1996) 50 C.A.4th 580, 594, 57 C.R.2d 763 [Medical Device Amendments of 1976 did not preempt personal injury action against manufacturer of surgical aid].

People v. Cotter & Co. (1997) 53 C.A.4th 1373, 1379, 62 C.R.2d 368 [Federal Hazardous Substances Act does not preempt California Safe Drinking Water and Toxic Enforcement Act (Proposition 65)].

Del Rio v. Jetton (1997) 55 C.A.4th 30, 35, 37, 63 C.R.2d 712 [malicious prosecution action by police officers who had been defendants in federal civil rights action was not preempted by federal statute allowing recovery of attorneys' fees by prevailing defendants in civil rights actions].

Marques v. Bank of America (1997) 59 C.A.4th 356, 363, 69 C.R.2d 154 [distinguishing *Aalgaard v. Merchants Nat. Bank* (1990) 224 C.A.3d 674, 689, 692, 274 C.R. 81; although bank officers may be dismissed "at pleasure" under National Bank Act, banks are still subject to Title VII of Civil Rights Act, and there is no conflict calling for preemption where subject of discrimination is dealt with by both Title VII and California's Fair Employment and Housing Act].

Day v. AT & T Corp. (1998) 63 C.A.4th 325, 331, 74 C.R.2d 55 [filed rate doctrine, which bars damage actions involving common carrier rates filed with FCC, does not bar complaint for injunctive relief alleging that carriers and retailers engaged in unfair business practices and false and misleading advertising in violation of B. & P.C. 17200, 17500].

San Jose v. Department of Health Services (1998) 66 C.A.4th 35, 45, 77 C.R.2d 609 [city's authority to regulate tobacco smoking was not preempted by federal law].

Burbank v. Burbank-Glendale-Pasadena Airport Authority (1999) 72 C.A.4th 366, 380, 85 C.R.2d 28 [local

regulation of airport land use not touching on control of aircraft or airspace or any aspect of aircraft navigation was not preempted by federal law].

Jones v. Union Pac. R. Co. (2000) 79 C.A.4th 1053, 1060, 1063, 1066, 94 C.R.2d 661 [trial court erred in entering summary judgment for defendant railroad based on preemption of nuisance action by Federal Interstate Commerce Commission Termination Act, Noise Control Act, and Railroad Safety Act where action involved harassing activities of defendant's employees in blowing horns and whistles, and idling train engines for hours on end in front of plaintiffs' home at all hours of day and night, which did not further rail safety or operations].

Jie v. Liang Tai Knitwear Co. (2001) 89 C.A.4th 654, 662, 107 C.R.2d 682 [California law permitting wrongful termination action based on retaliation for reporting employer's violations of Immigration Reform and Control Act is not preempted by that Act].

Pleasant Hill Bayshore Disposal v. Chip-It Recycling (2001) 91 C.A.4th 678, 685, 110 C.R.2d 708 [FAA Authorization Act does not preempt state and local regulations concerning garbage collection].

Arnold v. Dow Chemical Co. (2001) 91 C.A.4th 698, 715, 721, 110 C.R.2d 722 [Federal Insecticide, Fungicide, and Rodenticide Act did not preempt actions against pesticide manufacturers and distributors for strict liability and breach of implied warranties of fitness and merchantability].

Lovejoy v. AT & T Corp. (2001) 92 C.A.4th 85, 101, 111 C.R.2d 711 [filed rate doctrine of Federal Communications Act did not prohibit state law remedy against telephone carrier for its wrongful conduct in "slamming" plaintiff's 800 service (transferring service to itself without plaintiff's authorization), concealing "slam" from plaintiff, and then terminating 800 service without plaintiff's knowledge when defendant terminated plaintiff's long-distance service].

Black v. Financial Freedom Senior Funding Corp. (2001) 92 C.A.4th 917, 929, 112 C.R.2d 445 [federal Parity Act, Truth in Lending Act, and Depository Institutions Deregulation and Monetary Control Act did not preempt claims regarding manner of marketing reverse mortgages].

Vinnick v. Delta Airlines (2001) 93 C.A.4th 859, 872, 113 C.R.2d 471 [negligence claim against airline relating to storage of baggage in overhead bin was not preempted by federal law].

LaPlante v. Wellcraft Marine Corp. (2001) 94 C.A.4th 282, 294, 114 C.R.2d 196 [Federal Boat Safety Act did not preempt claims for negligence, strict liability, and breach of warranty arising from personal injuries suffered in boating accident, and claims based on manufacturer's failure to provide and maintain necessary safety devices].

Sun Valley Packing v. Consep (2001) 94 C.A.4th 315, 322, 114 C.R.2d 237 [Federal Insecticide, Fungicide, and Rodenticide Act did not preempt state law claims for breach of warranty and negligence against manufacturer of pesticide based on manufacturer's voluntary guarantee that product was fit for particular purpose].

Consumer Justice Center v. Olympian Labs (2002) 99 C.A.4th 1056, 1058, 121 C.R.2d 749 [federal law did not preempt false advertising action against dietary supplements manufacturer].

Personal Watercraft Coalition v. Marin County Bd. of Supervisors (2002) 100 C.A.4th 129, 153, 154, 122 C.R.2d 425 [Federal Boat Safety Act and Federal Clean Air Act did not preempt county ordinance banning use of personal watercraft within its territorial waters].

Gibson v. World Savings & Loan Assn. (2002) 103 C.A.4th 1291, 1299, 128 C.R.2d 19 [federal regulations concerning operation of savings associations did not preempt claim for restitution under Unfair Competition Law for overcharging borrowers for replacement insurance].

Hussey-Head v. World Savings & Loan Assn. (2003) 111 C.A.4th 773, 782, 4 C.R.3d 171 [following *Gibson*, *supra*; lender that voluntarily provided credit agencies with credit information about borrowers was subject to California law requiring fair and accurate reporting; law only comes into play after loan is made, and it does not affect manner in which lender services or maintains loan].

Zolezzi v. PacifiCare of Calif. (2003) 105 C.A.4th 573, 585, 129 C.R.2d 526 [following *McCall v. PacifiCare of Calif.* (2001) 25 C.4th 412, 106 C.R.2d 271, 21 P.3d 539; in circumstances of this case, Medicare Act did not preempt arbitration disclosure provisions of *Health & Saf.C. 1363.1*, which do not affect coverage determinations].

Aquino v. Asiana Airlines (2003) 105 C.A.4th 1272, 1284, 130 C.R.2d 223 [Airline Deregulation Act does not preempt state law personal injury and discrimination actions that only have peripheral effect on deregulation].

Whiteley v. Philip Morris (2004) 117 C.A.4th 635, 666, 11 C.R.3d 807, 5 Summary (10th), *Torts*, §812 [fraud claims against tobacco companies based on false statements and affirmative misrepresentations were not preempted by Federal Cigarette Labeling and Advertising Act, which specifically preempts state laws relating to advertising or promotion].

SUPPLEMENT: [This section is current through the latest supplement]

The following Court of Appeal cases found no federal preemption:

Farmers Bros. Coffee v. Work. Comp. App. Bd. (2005) 133 C.A.4th 533, 539, 35 C.R.3d 23 [Immigration Reform Control Act does not preempt state law providing that immigration status is irrelevant to issue of liability under state labor and employment laws, which include Workers' Compensation Act].

Smith v. Wells Fargo Bank (2005) 135 C.A.4th 1463, 1482, 38 C.R.3d 653 [preemption regulations of federal Office of Comptroller of the Currency (OCC) did not preempt plaintiff's state unfair competition action against bank alleging violations of OCC's disclosure regulations].

Southern Calif. Edison Co. v. Public Util. Com. (2006) 140 C.A.4th 1085, 1100, 45 C.R.3d 485 [National Labor Relations Act did not preempt PUC order requiring payment of prevailing wages on energy utility construction projects].

People v. Union Pac. R. Co. (2006) 141 C.A.4th 1228, 1253, 1257, 1260, 47 C.R.3d 92 [federal Hazardous Materials Transportation Authorization Act does not preempt state laws requiring verbal notification of spills of hazardous substances or remedial claims arising from spills; although civil penalties for spills are generally preempted, civil penalty for failure to give verbal notification is not].

McKell v. Washington Mut. (2006) 142 C.A.4th 1457, 1486, 49 C.R.3d 227, 13 Summary (10th), *Equity*, Supp., §117 [neither federal Real Estate Settlement Procedures Act nor Home Owners' Loan Act preempted action against lender using state Unfair Competition Law to enforce federal law].

Hood v. Santa Barbara Bank & Trust (2006) 143 C.A.4th 526, 541, 49 C.R.3d 369 [federal visitorial powers, deposit-taking, and lending regulations of Office of Comptroller of the Currency did not preempt class action under state consumer protection laws challenging bank's practice of seizing loan applicants' tax refunds, without valid contract, proper notice, or knowing consent, for collection purposes to repay tax refund anticipation loans made by other lenders].

Reyes v. Val Elk, Ltd. (2007) 148 C.A.4th 604, 616, 56 C.R.3d 68, 3 Summary (10th), *Agency and Employment*, Supp., §391 [Immigration Reform and Control Act did not preempt state prevailing wage law].

Ramanathan v. Bank of America (2007) 155 C.A.4th 1017, 1028, 66 C.R.3d 471 [state employment discrimination claims were not preempted by section of National Bank Act providing that officers serve at pleasure of bank; defendant

failed to show that plaintiff, who had title of vice-president, was vested with any of duties or responsibilities normally associated with position].



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b. When State Law Will Be Upheld.

3. Federal Authorization.

7 Witkin Sum. Cal. Law Const Law § 24

[§ 24] Federal Authorization.

When Congress expressly recognizes the propriety of state regulation, application of state law turns solely on the extent to which the state policy conflicts with federal policy. (See *Askew v. American Waterways Operators* (1973) 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 [federal statute establishing strict federal liability for oil spillage but expressly authorizing local state regulation that does not conflict with federal policy]; *California Fed. Savings & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 107 S.Ct. 683, 690, 93 L.Ed.2d 613, 627 [narrow scope of preemption available under Pregnancy Discrimination Act reflects importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity]; 2 Rotunda, §12.6; 1 Tribe, §6-35.) No impermissible conflict was found in the following areas:

(1) *Nuclear Power Plants*. The Atomic Energy Act provides that it shall not affect the state or local power to regulate activities for purposes other than protection against radiation hazards. (42 U.S.C., §2021(k).) Accordingly, in *Northern Calif. Assn. to Preserve Bodega Head & Harbor v. Public Util. Com.* (1964) 61 C.2d 126, 133, 37 C.R. 432, 390 P.2d 200, the court held that the California Public Utilities Commission could inquire into the safety of the location of an atomic reactor near an earthquake fault zone.

In *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com.* (1983) 461 U.S. 190, 103 S.Ct. 1713, 1718, 75 L.Ed.2d 752, 773, 777, the U.S. Supreme Court held that the California statute (see 12 *Summary* (10th), *Real Property*, §910), conditioning construction of nuclear power plants on findings that adequate storage facilities and means of waste disposal are available, is an economic rather than a safety regulation and hence is not preempted by the federal act. (See 97 *Harv. L. Rev.* 238.)

(2) *Real Estate Settlement Procedures Act (RESPA)*. Language in RESPA and Regulation X (regulating settlement procedures involving federal loans) declaring that no provision of state law is to be deemed "inconsistent" for purposes of preemption if the state law gives greater protection to the consumer means that Congress "intended that consumers should receive maximum protection not only in the form of federal legislation but also in the form of state laws" as long as the state laws do not interfere with the operation of federal law and it is possible to comply with both. (*Washington Mut. Bank v. Superior Court* (1999) 75 C.A.4th 773, 785, 787, 89 C.R.2d 560 [permitting borrowers to sue lender for

unlawful disclosures or omissions regarding its real estate settlement procedures will not interfere with federal law].)

(3) *Securities Exchange Act*. Except as modified by the Securities Uniform Standards Act of 1998, the Securities Exchange Act of 1934 (15 U.S.C., §78bb(a)) supplements but does not displace state regulations and remedies. (*Diamond Multimedia Systems v. Superior Court* (1999) 19 C.4th 1036, 1057, 80 C.R.2d 828, 968 P.2d 539, 9 Summary (10th), *Corporations*, §443; *Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 C.A.4th 345, 352, 95 C.R.2d 258 [trial court erred in finding preemption in action under California's unfair competition law claiming that brokerage firm violated duty to its customers by "trading ahead" for its own benefit rather than executing customers' orders in timely manner].)

(4) *State Licensed Pilot*. "In this case of apparent first impression, we hold that state authorities can suspend the state pilot license of a ship's pilot, even though the grounds for his suspension occurred when he was acting under the authority of his federal pilot license--at the time he crashed a loaded oil tanker into a terminal. Action by state authorities against the pilot's state license does not offend principles of federal-state comity, where the state does not purport to suspend or otherwise impair the pilot's federal license." (*Hochstetler v. Board of Pilot Commrs.* (1992) 6 C.A.4th 1659, 1661, 8 C.R.2d 403.)

(5) *Telecommunications*. Although the Federal Communications Act (47 U.S.C., §332) preempts state regulation of cellular telephone rates, it specifically allows states to regulate "the other terms and conditions" of cellular services, including "customer billing information" and "other consumer protection matters." (*Ball v. GTE Mobilnet of Calif.* (2000) 81 C.A.4th 529, 543, 96 C.R.2d 801; see *Spielholz v. Superior Court* (2001) 86 C.A.4th 1366, 1373, 104 C.R.2d 197 [Federal Communications Act does not preempt state action for monetary relief against wireless phone company based on claim for false advertising].)

SUPPLEMENT: [This section is current through the latest supplement]

See 2 Rotunda 4th, §12.6.(3a) (*New*) *National Securities Markets Improvement Act*. The savings provision of the National Securities Markets Improvement Act permits a state to retain jurisdiction to investigate and bring enforcement actions for "fraud and deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions." (*Capital Research & Management Co. v. Brown* (2007) 147 C.A.4th 58, 66, 53 C.R.3d 770 [Act did not preempt state action against investment advisor and wholesale distributor for making inaccurate or inadequate representations to purchasers].)(5) *Telecommunications*. See *Pacific Bell Wireless, LLC v. Public Util. Com.* (2006) 140 C.A.4th 718, 734, 44 C.R.3d 733 [Federal Communications Act did not preempt PUC order imposing penalties on wireless company for charging early termination fee with no grace period and making misrepresentations regarding service].

(6) (*New*) *Food, Drug, and Cosmetic Act*. The Act allows states to adopt statutes that are identical to federal law. These state laws may be enforced by private parties. (*Farm Raised Salmon Cases* (2008) 42 C.4th 1077, 1090, 1095, 72 C.R.3d 112, 175 P.3d 1170 [Act did not preempt private state action for deceptive marketing of food products based on failure to disclose that farmed salmon contained color additives].)



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1. Federal Supremacy.

c. State Court Must Apply Federal Law.

7 Witkin Sum. Cal. Law Const Law § 25

[§ 25] State Court Must Apply Federal Law.

The Full Faith and Credit Clause (*infra*, §31) does not compel a state court to apply a federal statute, but the Supremacy Clause has that effect. (*Miller v. Municipal Court of Los Angeles* (1943) 22 C.2d 818, 841, 851, 142 P.2d 297 [by assuming jurisdiction of consumer action pursuant to federal Emergency Price Control Act, state court is not entertaining action created by totally unrelated sovereign, but is merely yielding to superior exercise of lawful right granted Congress by U.S. Constitution].) (On lack of federal power to require state *officials* to administer federal programs, see *supra*, §6.)

A far-reaching effect was given to this clause, compelling a state court to enforce a federal statute irrespective of objections of local policy, in *Testa v. Katt* (1947) 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967. K sold an automobile to T at a price above that imposed by the Emergency Price Control Act. T filed suit in a Rhode Island court, seeking treble damages under a provision of the Act that gave concurrent jurisdiction to federal and state courts. The Rhode Island court allowed recovery only of the actual amount of the overcharge. *Held*, even if the law was penal in the international sense, so that the lower court would be free to refuse to enforce a similar statute of a "foreign" jurisdiction or sister state, this was not a proper basis for refusal to enforce the federal statute. "It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws." (67 S.Ct. 812, 91 L.Ed. 970.)

The most common examples of cases in which California courts are compelled to enforce federal law are suits under the Federal Employers Liability Act (45 U.S.C., §51) and the Jones Act (46 U.S.C. Appx., §688). (See 2 *Summary* (10th), *Workers' Compensation*, §§118 et seq., 131 et seq.)

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2. Interference With Governmental Functions.

7 *Witkin Sum. Cal. Law Const Law* § 26

[§ 26] Interference With Governmental Functions.

A state government cannot interfere with the federal Government and its agencies, instrumentalities, or operations, and the federal Government is under a similar limitation. This principle finds its chief application in taxation cases. (See *United States v. Allegheny County, PA.* (1944) 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209; 89 Harv. L. Rev. 700.) But it has some application in other fields.

In *First Nat. Bank of San Jose v. California* (1923) 262 U.S. 366, 43 S.Ct. 602, 67 L.Ed. 1030, a California statute providing for escheat of inactive bank deposits was held invalid because of harsh provisions deemed a deterrent to depositors dealing with national banks. (Cf. *Anderson Nat. Bank v. Lueckett* (1944) 321 U.S. 233, 64 S.Ct. 599, 607, 88 L.Ed. 692, 705, where a more reasonable state statute was upheld.)

Although a federal postal driver cannot be required to obtain a state driver's license as a prerequisite to using the highways (see *Johnson v. Maryland* (1920) 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126), the worker may be convicted of a violation of local traffic laws. (*People v. Don Carlos* (1941) 47 C.A.2d Supp. 863, 867, 117 P.2d 748; see 72 Harv. L. Rev. 161; 15 So. Cal. L. Rev. 247.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Federal Jurisdiction.

7 *Witkin Sum. Cal. Law Const Law* § 27

[§ 27] Federal Jurisdiction.

The federal Government may acquire territory within a state by purchase with consent of the state (U.S. Const., Art. I, §8), or by cession by the state. (See 77 *Am.Jur.2d* (1997 ed.), *United States* §35 et seq.) (On retrocession, see *infra*, §29.)

The earlier cases held that the state lost jurisdiction over these areas. (See *Standard Oil Co. v. California* (1934) 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775 [state cannot tax transaction taking place on military reservation]; *Pacific Coast Dairy v. Department of Agriculture of Calif.* (1943) 318 U.S. 285, 63 S.Ct. 628, 630, 87 L.Ed. 761, 766 [California Milk Control Act cannot be applied to sales]; 8 *So. Cal. L. Rev.* 61; cf. *Collins v. Yosemite Park & Curry Co.* (1938) 304 U.S. 518, 58 S.Ct. 1009, 1016, 82 L.Ed. 1502, 1512 [state cannot regulate sale of liquor licenses, but can levy excise tax].)

A state may, however, reserve jurisdiction over purely local matters that do not interfere with the exercise of federal governmental functions. (See *infra*, §28.)

Federal jurisdiction was held exclusive in *Humble Pipe Line Co. v. Waggonner* (1964) 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed.2d 782, where the U.S., by donations from the state, acquired the fee title to Louisiana land for use as a military base. The Government then made an oil and gas lease to petitioner. Louisiana sought to tax the drilling equipment and pipe lines. *Held*, the tax was invalid; the federal legislative power is exclusive, whether the land is acquired by purchase for consideration or by cession. *S.R.A. v. Minnesota* (1946) 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851, *infra*, §29, is distinguishable. There the land was sold, while here, the Government continued to hold it subject to the lease for exploitation of oil. And the lease requirement that the company pay all lawful taxes was merely a standard precaution, which could not alone manifest a purpose of the Government to abandon exclusive jurisdiction over a military enclave.

In *Paul v. United States* (1963) 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292, California sought to apply its minimum wholesale price regulations to milk sold at three military installations in this state. As to sales to the U.S., the federal statutory procurement policy, requiring competitive bidding, clearly controlled. (83 S.Ct. 431, 432, 9 L.Ed.2d 298.) As to milk bought with nonappropriated funds for use in military clubs and for resale at post exchanges, the question was whether Congress had exclusive jurisdiction over these enclaves, and this called for consideration of the conditions

existing at the time of their purchases from California: (a) If the California price-control laws were not in effect at that time, the state could not enforce them, for only the state law existing at the time of federal acquisition remained enforceable. (b) If, however, the basic milk control law was in effect at that time, the state regulations--though differing in some respects--still applied. The record being uncertain on this issue, the case was remanded for its determination. (83 S.Ct. 440, 9 L.Ed.2d 307.)

SUPPLEMENT: [This section is current through the latest supplement]
See 77 *Am.Jur.2d* (2006 ed.), *United States* §33 et seq.



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b. Reserved State Jurisdiction.

7 Witkin Sum. Cal. Law Const Law § 28

[§ 28] Reserved State Jurisdiction.

A state, in consenting to federal purchase, or in ceding territory, may reserve jurisdiction for local purposes that involve no interference with governmental functions. (*James v. Dravo Contracting Co. (1937) 302 U.S. 134, 58 S.Ct. 208, 213, 82 L.Ed. 155, 162* [retention of power to tax local activities]; *Wilson v. Cook (1946) 327 U.S. 474, 66 S.Ct. 663, 670, 90 L.Ed. 793, 802*; see *Coso Energy Developers v. Inyo (2004) 122 C.A.4th 1512, 1523, 19 C.R.3d 669* [county properly taxed plaintiff's geothermal energy operations located on land within naval weapons center, which land was ceded to U.S. by Mexico pursuant to treaty in 1848; 1891 statute ceding exclusive jurisdiction to U.S. over land ceded by California did not apply to land ceded to U.S. by Mexico]; *77 Am.Jur.2d (1997 ed.), United States §37.*)

In California, *Govt.C. 126* cedes concurrent criminal jurisdiction to the United States, within land held by the U.S. for specified purposes, with the following conditions: (1) The U.S. must request the cession in writing. (*Govt.C. 126(c).*) (2) The state Lands Commission must find that the cession is in the interest of the state and must specify the purposes of the cession in its order. (*Govt.C. 126(d).*) (3) The state reserves jurisdiction over water and its use (*Govt.C. 126(g)*) and over all mineral deposits, including oil and gas (*Govt.C. 126(h).*)

There is also a tendency, both by congressional legislation and judicial decision, to recognize the continued effect of much state civil and criminal authority not expressly abrogated, in order that these areas not be left without a developed legal system. (See *James Stewart & Co. v. Sadrakula (1940) 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596* [New York Labor Law safety rule was effective in tort action for death based on its violation, in absence of contrary federal legislation]; *People v. Brown (1945) 69 C.A.2d 602, 605, 159 P.2d 686* [California had jurisdiction over crime committed in governmental military reservation]; *Arapajolu v. McMenamin (1952) 113 C.A.2d 824, 249 P.2d 318* [residence in California military reservation was California residence for voting purposes]; *In re Terry Y. (1980) 101 C.A.3d 178, 181, 161 C.R. 452* [juvenile court had jurisdiction to declare child dependent where child and parents were residents of federal military installation]; *People v. Crusilla (1999) 77 C.A.4th 141, 150, 91 C.R.2d 415* [presumption of state jurisdiction applies to drunk driving offense committed at federal border crossing facility]; *49 Cal. L. Rev. 550* [rights of residents of enclave to state residency benefits].) (On federal Assimilative Crimes Act, *18 U.S.C., §13*, allowing state criminal laws to operate, see *United States v. Sharpnack (1958) 355 U.S. 286, 78 S.Ct. 291, 2 L.Ed.2d 282; 70 Harv. L. Rev. 685.*)

A person working in a federal enclave may sue under (1) federal law, (2) any California law not in conflict with federal law that existed when the area became a federal enclave, and (3) subsequently enacted state law to the extent authorized by Congress. (*Taylor v. Lockheed Martin Corp. (2000) 78 C.A.4th 472, 482, 484, 92 C.R.2d 873, 6 Cal. Proc. (4th), Proceedings Without Trial*, Supp., §186 [employee could pursue "whistle-blower" claim against private contractor under *Lab.C. 6310* because federal OSHA did not claim exclusive jurisdiction over worker safety issues on military base].)

SUPPLEMENT: [This section is current through the latest supplement]
See 77 *Am.Jur.2d* (2006 ed.), *United States* §35.

Taylor v. Lockheed Martin case:

Cross-Reference: 6 *Cal. Proc. (5th), Proceedings Without Trial*, §208.



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c. Retrocession.

7 *Witkin Sum. Cal. Law Const Law* § 29

[§ 29] Retrocession.

Notwithstanding unrestricted cession of land by a state to the federal Government, federal sovereignty and jurisdiction may be relinquished to the state (1) by "express retrocession" to the state, or (2) perhaps by sale and transfer of the land by the federal Government to private persons.

In *S.R.A. v. Minnesota* (1946) 327 U.S. 558, 66 S.Ct. 749, 753, 90 L.Ed. 851, 857, the majority opinion, in a strong dictum on the second point, declared that "it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property." (See 20 *So. Cal. L. Rev.* 212.) A lease of mineral rights, however, does not constitute a retrocession. (*Humble Pipe Line Co. v. Waggonner* (1964) 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed.2d 782, *supra*, §27.)

The California statute expressly provides that the cession "continues only so long" as the land belongs to and is held by the U.S. for the purpose specified. (*Govt.C. 126(e)*.)

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4. Full Faith and Credit to Judgments.

7 Witkin Sum. Cal. Law Const Law § 30

[§ 30] Full Faith and Credit to Judgments.

(1) *State Judgment in Federal Court*. The Full Faith and Credit Clause of the U.S. Constitution requires recognition of judgments of state courts "in each state." (See *infra*, §31.) The provisions of the Federal Judicial Code, enacted pursuant to that clause, also impose the requirement on "every court within the United States." (28 U.S.C., §1738.) Hence, federal courts must accord full faith and credit to judgments of state courts. (See *Davis v. Davis* (1938) 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26; *Huron Holding Corp. v. Lincoln Mine Operating Co.* (1941) 312 U.S. 183, 61 S.Ct. 513, 517, 85 L.Ed. 725, 732.) (On state judgment binding in federal court action, see 7 Cal. Proc. (4th), Judgment, §297.)

(2) *Federal Judgment in State Court*. The Full Faith and Credit Clause does not expressly cover judgments of federal courts, but they are entitled to equal res judicata effect under the constitutional judicial power of the United States, the Necessary and Proper Clause, and the Supremacy Clause. (See *Embry v. Palmer* (1883) 107 U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346, 348; *Hancock Nat. Bank v. Farnum* (1900) 176 U.S. 640, 20 S.Ct. 506, 44 L.Ed. 619; *Stoll v. Gottlieb* (1938) 305 U.S. 165, 59 S.Ct. 134, 137, 83 L.Ed. 104, 108; *In re Bailleaux* (1956) 47 C.2d 258, 260, 302 P.2d 801; *Martin v. Martin* (1970) 2 C.3d 752, 761, 87 C.R. 526, 470 P.2d 662; 7 Cal. Proc. (4th), Judgment, §298.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *State Judgment in Federal Court*. See *San Remo Hotel, L.P. v. San Francisco* (2005) 545 U.S. 323, 125 S.Ct. 2491, 2501, 2503, 162 L.Ed.2d 315, 333, 335 [there is no exception to federal full faith and credit statute that provides federal forum for litigants seeking to advance federal takings claims under Fifth Amendment that are not ripe until entry of final state judgment denying adequate compensation; here, landowner was entitled to insulate one federal issue from preclusive effect of state mandamus action but lost that right when landowner chose to advance broader issues, which included that issue, in state action].

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §354.

(2) *Federal Judgment in State Court*.

Martin case:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §355.



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1. Full Faith and Credit Clause.

a. In General.

7 Witkin Sum. Cal. Law Const Law § 31

[§ 31] In General.

U.S. Const. Art. IV, §1, provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." This is supplemented by a provision in the Federal Judicial Code that states: "Such Acts, records and judicial proceedings or copies thereof ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." (28 U.S.C., §1738; see 2 Rotunda, §12.7; 16B Am.Jur.2d (1998 ed.), Constitutional Law §973 et seq.)

As to *statutes*, the purpose of the Clause is not to give the state law extraterritorial force, but to protect rights and enforce obligations created in one state when asserted or challenged in another, except where strong considerations of local policy are opposed. (See 28 Cal. L. Rev. 507; 3 U.C.L.A. L. Rev. 1; 12 Stanf. L. Rev. 653 [misconstruction of state law]; infra, §§33, 34.)

As to *judgments*, the Clause takes them out of the class of foreign judgments subject to reexamination, and establishes "throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered." (*Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430, 64 S.Ct. 208, 214, 88 L.Ed. 149, 155; see infra, §35 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See 2 Rotunda 4th, §12.7; 120 Harv. L. Rev. 1468 [Congress, Article IV, and Interstate Relations].



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b. Choice of Law Questions.

7 Witkin Sum. Cal. Law Const Law § 32

[§ 32] Choice of Law Questions.

In *Allstate Ins. Co. v. Hague* (1981) 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521, H, plaintiff's husband, was killed in a collision with a car operated by an uninsured motorist. H had an insurance policy covering three automobiles owned by him, with uninsured motorist coverage limited to \$ 15,000 for each automobile. Under Minnesota law, this coverage could be "stacked" to provide a total of \$ 45,000; under Wisconsin law, it could not be stacked. Plaintiff sued the insurer in Minnesota and sought to apply the favorable law of that state. Defendant contended that Wisconsin law should apply because the insurance policy was delivered there, the accident occurred there, and all persons involved were residents of that state at the time of the accident. The Minnesota Supreme Court approved the application of Minnesota law on the basis of the state's contacts: decedent was employed there, defendant insurer did business there, and plaintiff became a resident prior to instituting the litigation. *Held*, affirmed. Four justices joined in an opinion making the following points:

(a) In deciding constitutional choice of law questions under either the Due Process Clause or the Full Faith and Credit Clause, the Court has traditionally examined the contacts of the state with the parties and the occurrence or transaction giving rise to the litigation. (101 S.Ct. 637, 66 L.Ed.2d 527.)

(b) Cases such as *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106, hold that if a state has only insignificant contacts, application of its law is unconstitutional. (101 S.Ct. 638, 66 L.Ed.2d 528.) Cases such as *Alaska Packers' Assn. v. Industrial Acc. Com. of Calif.* (1934) 1 C.2d 250, 34 P.2d 716, affirmed *Alaska Packers' Assn. v. Industrial Acc. Com. of Calif.* (1935) 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044, 2 Summary (10th), *Workers' Compensation*, §111, and *Clay v. Sun Ins. Office, Ltd.* (1964) 377 U.S. 179, 84 S.Ct. 1197, 1199, 12 L.Ed.2d 229, 232, *infra*, §34, sustain the choice of law where the contacts are significant. (101 S.Ct. 639, 640, 66 L.Ed.2d 529, 530.)

(c) The principal contacts with Minnesota (decedent working there and insurer doing business there) were significant; and although plaintiff's change of residence was not sufficient in itself, her subsequent appointment in Minnesota as personal representative of her late husband's estate was relevant. (101 S.Ct. 640, 66 L.Ed.2d 531.) "In sum, Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair." (101 S.Ct. 644, 66 L.Ed.2d 535.)

Three justices dissented, arguing that the contacts were trivial and insufficient. (101 S.Ct. 650, 66 L.Ed.2d 543.) (See 18 *Hastings Const. L. Q.* 325 [Full Faith and Credit, Choice of Laws, and Extraterritorial Regulation of Corporate Transactions]; 52 *So. Cal. L. Rev.* 61 [State Autonomy in Choice of Law: A Suggested Approach].)

Phillips Petroleum Co. v. Shutts (1985) 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628, was a class action to recover interest on delayed royalty payments on gas leases. Although 99% of the leases and 97% of the class members had no apparent connection to Kansas other than the action, the Kansas Supreme Court approved application of Kansas law to every claim. *Held*, reversed.

(a) The Due Process Clause and the Full Faith and Credit Clause require the state, before applying its substantive law, to have significant contact or contacts to ensure that choice of its law is neither arbitrary nor fundamentally unfair. (105 S.Ct. 2978, 86 L.Ed.2d 646, quoting *Allstate Ins. Co.*, *supra*.)

(b) Kansas properly asserted personal jurisdiction over the plaintiffs (see 4 *Cal. Proc.* (4th), *Pleading*, §260), but assumption of jurisdiction does not supply the necessary contacts to resolve the distinct issue of choice of law. Because Kansas lacks interest in claims unrelated to that state, and because there are material substantive conflicts with the laws of other jurisdictions, "application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." (105 S.Ct. 2979, 86 L.Ed.2d 648.) (See 60 *So. Cal. L. Rev.* 1299.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §293.



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c. State Statutes.

1. Right of Action.

7 *Witkin Sum. Cal. Law Const Law* § 33

[§ 33] Right of Action.

(1) *In General*. The court of the forum must enforce a right of action arising under the statutes of another state unless some strong policy objection is present. However, this type of objection is not likely to be sustained, for a mere difference in laws does not justify rejection of rights founded on the law of another state. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §§361, 362.)

In *Hughes v. Fetter* (1951) 341 U.S. 609, 71 S.Ct. 980, 95 L.Ed. 1212, Wisconsin sought to prevent wrongful death suits based on the statutes of another state. Because it allowed domestic suits for wrongful death, it had no true policy against this type of action, and could not deny access to its courts for foreign causes of action. (See *First Nat. Bank of Chicago v. United Air Lines* (1952) 342 U.S. 396, 72 S.Ct. 421, 96 L.Ed. 441 [following *Hughes*]; *Luikart v. McDonald* (1936) 11 C.A.2d 433, 53 P.2d 1012 [foreign receiver may sue on claim based on statutory stockholder's liability].)

(2) *Penal and Tax Statutes*. The Full Faith and Credit Clause may yield, however, where the statutory obligation is considered *penal*. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §360.) And there is still no decisive departure from the old rule that foreign governmental claims, such as those for taxes, are not entitled to obligatory enforcement. (See Rev.C. 30, 31 [California will enforce other state's tax claim if it extends like comity to this state]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §360.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §§370, 371.

(2) *Penal and Tax Statutes*.

Penal obligations:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §369.

Tax claims:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §369.



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2. Substantive Defense.

7 Witkin Sum. Cal. Law Const Law § 34

[§ 34] Substantive Defense.

Bradford Elec. Light Co. v. Clapper (1932) 286 U.S. 145, 52 S.Ct. 571, 576, 76 L.Ed. 1026, 1035, held that a Vermont statute, making its workers' compensation remedy exclusive, was a good defense to a suit in New Hampshire for a death occurring there, where the deceased had been employed in Vermont. The court pointed out that one state does not have to enforce every right conferred by another state's statute; it may refuse enforcement (a) where the statute is beyond the legislative jurisdiction of the enacting state; (b) where enforcement would be obnoxious to the public policy of the forum; (c) where the liability is penal in character; or (d) where the forum has no court with jurisdiction or no procedure appropriate to the determination. In these cases, denial of a remedy--leaving the right unimpaired for enforcement elsewhere--may be proper; but a state may not refuse to give effect to a substantive defense and thereby subject the defendant to an irremediable liability. (On when forum must be provided, see *supra*, §33.)

Although the result reached in *Clapper* is no longer likely in compensation cases (see 2 *Summary* (10th), *Workers' Compensation*, §115 et seq.), the general principle that the forum state must give effect to a substantive defense established by the law of another state is still sound. (See *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 [Texas court was required to give effect to statutory defense of fraud under insurance policy made in New York]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §975 et seq.; cf. *People v. Shear* (1999) 71 C.A.4th 278, 283, 83 C.R.2d 707, citing the text [Full Faith and Credit Clause did not preclude California from convicting defendant of possession of firearm by felon based on felony conviction in Arizona, even though his right to possess firearm in Arizona had been restored].)

The Clause was successfully invoked to compel enforcement of the governing rules of a fraternal benefit society in *Order of United Commercial Travelers of America v. Wolfe* (1947) 331 U.S. 586, 67 S.Ct. 1355, 91 L.Ed. 1687. The society, incorporated in Ohio, had a provision in its constitution, valid under Ohio law, allowing only 6 months to sue on a rejected claim for benefits resulting from death of an insured. Plaintiff sued on such a claim in South Dakota, after the period had passed. He relied on the South Dakota 6-year statute of limitations and another South Dakota statute declaring void all contractual provisions cutting down the statute of limitations. *Held*, the South Dakota judgment for plaintiff should be reversed. The society existed by virtue of the public acts of Ohio, and "the rights and obligations incident to membership therein are as much entitled to full faith and credit as the statutes upon which they depend." (67

S.Ct. 1366, 91 L.Ed. 1701.)

United Commercial Travelers was distinguished and limited in *Clay v. Sun Ins. Office, Ltd.* (1964) 377 U.S. 179, 84 S.Ct. 1197, 1199, 12 L.Ed.2d 229, 232, 3 Cal. Proc. (4th), Actions, §111, as "a highly specialized decision dealing with unique facts"--a fraternal society with "indivisible unity." (See 76 Harv. L. Rev. 1484 [forum state's power to refuse to apply other state's statutory limit on wrongful death judgment]; 10 U.C.L.A. L. Rev. 670 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

Clay case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §61.



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1. General Principle.

7 *Witkin Sum. Cal. Law Const Law* § 35

[§ 35] General Principle.

In *Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149, the court emphasized the distinction between enforcement of statutes and judgments. While a state, for sound reasons of policy, may refuse to substitute the conflicting statute of another state, ordinarily it must, regardless of policy objections, recognize the judgment of another state court as *res judicata*. This is so even though the action or proceeding that resulted in the judgment could not have been brought under the law or policy of the forum, or a statute on which the judgment was based could have been refused recognition on policy grounds. (See *Fauntleroy v. Lum* (1908) 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 [gambling debt]; *Kenney v. Supreme Lodge of the World, Loyal Order of Moose* (1920) 252 U.S. 411, 40 S.Ct. 371, 64 L.Ed. 638 [damages for wrongful death opposed to local policy]; *Milwaukee v. M.E. White Co.* (1935) 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 [tax judgment]; *Titus v. Wallick* (1939) 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653; *Harrah v. Craig* (1952) 113 C.A.2d 67, 247 P.2d 855 [gambling]; *New York Higher Education Assistance Corp. v. Siegel* (1979) 91 C.A.3d 684, 688, 154 C.R. 200, quoting the text; *Tyus v. Tyus* (1984) 160 C.A.3d 789, 792, 793, 206 C.R. 817, citing the text [divorce judgment]; *Medical Legal Consulting Services v. Covarrubias* (1991) 234 C.A.3d 80, 89, 285 C.R. 559 [discussing general rule]; cf. *Thomas v. Washington Gas Light Co.* (1980) 448 U.S. 261, 100 S.Ct. 2647, 2663, 65 L.Ed.2d 757, 776, 2 *Summary* (10th), *Workers' Compensation*, §117 [specific holding of *Magnolia* is inconsistent with *Industrial Com. of Wisconsin v. McCartin* (1947) 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140; *McCartin* held controlling]; *Rest.2d, Conflict of Laws* §93 et seq.; 54 *Cal. L. Rev.* 282; 23 *Cal. Western L. Rev.* 219 [entitlement of tribal judgments to full faith and credit]; 64 *Harv. L. Rev.* 485; 36 *U.C. Davis L. Rev.* 993 [full faith and credit of state court antisuit injunctions]; 2 *A.L.R.3d* 1384 [judgment subject to appeal].) (On enforcement of workers' compensation award as foreign judgment, see 2 *Summary* (10th), *Workers' Compensation*, §117; on enforcement of foreign divorce and support decrees, see 11 *Summary* (10th), *Husband and Wife*, §§344, 345; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §395 et seq.; on enforcement of sister state judgments, see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §414; on *res judicata* generally, see 7 *Cal. Proc.* (4th), *Judgment*, §280 et seq.)

A strong application of the rule was made in *Morris v. Jones* (1947) 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488. An Illinois unincorporated insurance association was sued in a tort action in Missouri. While the action was pending, Illinois appointed a statutory liquidator who ordered all suits stayed. The plaintiff in the Missouri suit, with knowledge

of the stay order, nevertheless obtained a default judgment against the association, and this was held entitled to full faith and credit. The argument of convenience in administration of assets in Illinois was answered by the statement that full faith and credit is "a more inexorable command," and that "its applicability does not turn on a balance of convenience as between litigants." The opinion made it clear, however, that the judgment did not interfere with the title of the liquidator or with the determination of priorities among claimants. "The single point of our decision is that the *nature and amount* of petitioner's claim has been conclusively determined by the Missouri judgment and may not be relitigated in the Illinois proceedings, it not appearing that the Missouri court lacked jurisdiction over either the parties or the subject matter." (67 S.Ct. 457, 91 L.Ed. 497.) (See 35 Cal. L. Rev. 575.)

SUPPLEMENT: [This section is current through the latest supplement]

Enforcement of foreign support and divorce decrees:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §407 et seq.

Enforcement of sister state judgments:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §445.

Res judicata:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §334 et seq.



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2. Public Policy Exception.

7 *Witkin Sum. Cal. Law Const Law* § 36

[§ 36] Public Policy Exception.

In *Smith v. Superior Court* (1996) 41 C.A.4th 1014, 49 C.R.2d 20, two plaintiffs injured in separate accidents involving defendant General Motors' vehicles sought to depose an expert witness formerly employed by defendant. As part of the settlement of an earlier wrongful termination suit against defendant, a Michigan court issued a preliminary injunction prohibiting the expert from discussing or disclosing any of defendant's "trade secrets confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation." (41 C.A.4th 1019.) Held, the Michigan injunction is not enforceable in California.

(a) A cause of action is a form of property. The Michigan injunction adversely affects plaintiffs' causes of action against defendant by effectively destroying their ability to prove a substantial portion of their case. These causes of action are "situated" in California, having been filed here. Neither plaintiffs nor their causes of action were subject to the Michigan court's jurisdiction. (41 C.A.4th 1023.)

(b) Except in the case of a money judgment in a civil suit, there are limitations on the extent to which a state may be required by the Full Faith and Credit Clause to enforce the judgment of another state in contravention of its own statutes or policy. (41 C.A.4th 1023, citing *Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149, supra, §35.) This public policy exception is " 'implied from the nature of our dual system of government, and recognizes that consistently with the full faith and credit clause there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another.' " (41 C.A.4th 1024; quoting *Milwaukee v. M.E. White Co.* (1935) 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220.) Although use of this exception is rare, it is necessary here. Not only were plaintiffs "not parties to the Michigan proceedings, having no notice thereof or opportunity to contest issuance of the injunction, but this equitable decree blatantly and irreconcilably conflicts with our fundamental policy against suppression of evidence." (41 C.A.4th 1025.)

(c) Defendant essentially purchased the expert's agreement not to testify at any judicial proceeding. (41 C.A.4th 1025.) The injunction not only prevented the expert from speaking on his own behalf, but prevents anyone else from finding out what he knows, effectively blocking a litigant's search for the truth and redress. Thus, besides violating California's fundamental policy against suppression of evidence, recognition of the injunction would undermine the

fundamental integrity of this state's judicial system. "We can imagine no stronger instance compelling application of the public policy exception to the full faith and credit clause." (41 C.A.4th 1026.) (See *Medical Legal Consulting Services v. Covarrubias* (1991) 234 C.A.3d 80, 89, 285 C.R. 559 [discussing limited public policy exception].)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Necessity of Jurisdiction.

7 Witkin Sum. Cal. Law Const Law § 37

[§ 37] Necessity of Jurisdiction.

A judgment is entitled to full faith and credit only if rendered by a state court having jurisdiction of the parties and the subject matter. Where lack of jurisdiction is shown, the judgment will be denied enforcement. (See *Riley v. New York Trust Co.* (1942) 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885; *Williams v. North Carolina* (1945) 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577; *Griffin v. Griffin* (1946) 327 U.S. 220, 66 S.Ct. 556, 560, 90 L.Ed. 635, 640; *May v. Anderson* (1953) 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221; *Rest.2d, Conflict of Laws* §104; 10 *Summary* (10th), *Parent and Child*, §375; 11 *Summary* (10th), *Husband and Wife*, §129 et seq.; 2 *Cal. Proc.* (4th), *Jurisdiction*, §§10, 11, 108 et seq.)

This principle, however, is subject to the qualification that the determination of jurisdiction in the first action may be res judicata and not subject to challenge. (See *Bank of America v. Jennett* (1999) 77 C.A.4th 104, 114, 91 C.R.2d 359 [sister state judgment may be challenged only if issue of jurisdiction was not litigated in sister state]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §335 et seq.)

Thus, in *Durfee v. Duke* (1963) 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186, G sued D in Nebraska to quiet title to a tract of bottom land adjacent to the Missouri River. The main channel of the river is the boundary between Nebraska and Missouri, and whether the land was in Nebraska and subject to the Nebraska court's jurisdiction depended on determination of the fact of a shift in the river's course by accretion. D appeared in the Nebraska action and contested the court's jurisdiction; the court found for G and quieted title; D appealed and the Supreme Court of Nebraska affirmed, expressly holding that the land was in Nebraska. D did not seek review in the United States Supreme Court, but filed a suit against G in Missouri to quiet title to the same land, alleging that it was in Missouri. The suit was removed to a federal district court on diversity grounds, and that court held the Nebraska judgment binding. *Held*, affirmed. A judgment is entitled to full faith and credit, even as to jurisdictional questions, when these questions have been litigated and decided in the first court. (84 S.Ct. 245, 11 L.Ed.2d 191.) The broad declaration that courts of one state "are completely without jurisdiction directly to affect title to land in other States" is subject to this rule. (84 S.Ct. 247, 11 L.Ed.2d 193.)

The Court pointed out that the judgment was binding only between the parties to this litigation and their privies in

Missouri; it did not bind either of the two states as to the location of their boundary or their sovereignty over the land; and either state might at any time protect its interest by initiating judicial proceedings in the *U.S. Supreme Court*. (84 S.Ct. 247, 11 L.Ed.2d 193.) (See *Underwriters Nat. Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guaranty Assn.* (1982) 455 U.S. 691, 102 S.Ct. 1357, 1366, 71 L.Ed.2d 558, 571 [Indiana decree determining jurisdiction was binding on North Carolina; following *Durfee*]; 52 Cal. L. Rev. 623 [*Durfee*].)

SUPPLEMENT: [This section is current through the latest supplement]

Jurisdiction of parties and subject matter:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §§11, 12, 106 et seq.

Res judicata:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §344 et seq.



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4. No Greater Effect Than in State of Rendition.

7 Witkin Sum. Cal. Law Const Law § 38

[§ 38] No Greater Effect Than in State of Rendition.

The Full Faith and Credit Clause requires only that the judgment be given as much effect in the state of the forum as in the state of its rendition. (See *People v. Halvey* (1947) 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 [Florida child custody decree, subject to modification by New York court]; *Gilmer v. Spitalny* (1948) 84 C.A.2d 39, 44, 189 P.2d 744 [Arizona judgment against husband and wife on community debt was not enforceable in California against wife's separate property]; *Farley v. Farley* (1964) 227 C.A.2d 1, 6, 38 C.R. 357, 2 Cal. Proc. (4th), *Jurisdiction*, §329 [recognition denied where judgment disclosed on its face that it was rendered in excess of jurisdiction under law of state of rendition]; *Scheuerman v. Hauk* (2004) 116 C.A.4th 1140, 1142, 11 C.R.3d 125 [support order found to be invalid in issuing state cannot be enforced in California]; 8 Cal. Proc. (4th), *Enforcement of Judgment*, §§415, 416.)

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Mary G.* (2007) 151 C.A.4th 184, 202, 59 C.R.3d 703, citing the text [although Michigan has no "presumed father" statutory category, which is necessary status in California to qualify for reunification services without showing best interests of child, Michigan paternity affidavit was entitled to full faith and credit because effect of acknowledgement of paternity in both Michigan and California was the same].

Farley case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §338.

Reasons for denying enforcement:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §§446, 447.



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5. Judgment Barred by Limitations.

7 *Witkin Sum. Cal. Law Const Law* § 39

[§ 39] Judgment Barred by Limitations.

Where a judgment rendered by State A is still enforceable under State A's *longer* statute of limitations, it may nevertheless be denied enforcement in State B if State B's shorter statute of limitations has run. Where a judgment rendered by State A is barred by State A's *shorter* statute of limitations, State B is nevertheless free to enforce it under its longer statute. In this latter case, if State B gives a new judgment on the basis of the original one, that new judgment is entitled to obligatory full faith and credit in State A, which cannot look behind the new judgment. (See *Union Nat. Bank of Wichita, Kansas v. Lamb* (1949) 337 U.S. 38, 69 S.Ct. 911, 915, 93 L.Ed. 1190, 1197 [dissenting opinion]; *Rest.2d, Conflict of Laws* §118.)

In *Lamb*, petitioner's outlawed Colorado judgment was revived by valid proceedings in Colorado in 1945. In petitioner's suit in Missouri on the revived judgment, recovery was denied on the ground that Missouri's 10-year statute of limitations was a bar. *Held*, judgment reversed. (a) If the revival proceedings in Colorado had merely *extended* the statutory period in which to enforce the old judgment in Colorado, Missouri would be entitled to apply its own 10-year statute of limitations and refuse enforcement. (b) But if, as appeared here, the revival proceedings created a *new judgment* in Colorado, the Missouri courts were bound to enforce it. Thus, the ultimate result in this kind of case depends entirely on the nature of the revival proceeding. (69 S.Ct. 913, 93 L.Ed. 1194.) (See 3 *Cal. Proc.* (4th), *Actions*, §110.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §60.



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1. Full Faith and Credit Clause.

d. State Judgments.

6. Penal and Tax Judgments.

7 *Witkin Sum. Cal. Law Const Law* § 40

[§ 40] Penal and Tax Judgments.

(1) *Penal Judgments.* The rule that the clause does not require enforcement of a judgment that is penal in character still persists. (See *Nelson v. George* (1970) 399 U.S. 224, 90 S.Ct. 1963, 1966, 26 L.Ed.2d 578, 582, 2 Cal. Proc. (4th), Jurisdiction, §364; *People v. Laino* (2004) 32 C.4th 878, 888, 11 C.R.3d 723, 87 P.3d 27 [Full Faith and Credit Clause did not bar California from determining, under its own laws, whether Arizona guilty plea constitutes "conviction" for purposes of California three strikes law].) But what constitutes a penalty is subject to the controlling determination of the U.S. Supreme Court. (See *Huntington v. Attrill* (1892) 146 U.S. 657, 13 S.Ct. 224, 227, 36 L.Ed. 1123, 1127; *Rest.2d, Conflict of Laws* §120.)

(2) *Tax Judgments.* It is now settled that tax judgments are not penal. (*Milwaukee v. M.E. White Co.* (1935) 296 U.S. 268, 56 S.Ct. 229, 231, 80 L.Ed. 220, 224; see 69 Harv. L. Rev. 378; 10 So. Cal. L. Rev. 197; *Rest.2d, Conflict of Laws* §120.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Penal Judgments.*

Nelson case:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §373.



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C. Relations Between States.

2. Actions Against States.

a. In General.

7 Witkin Sum. Cal. Law Const Law § 41

[§ 41] In General.

(1) *Eleventh Amendment Immunities*. U.S. Const., Art. III, §2, gives the federal courts jurisdiction over actions between a state or its citizens and foreign states, citizens, and subjects. But the Eleventh Amendment deprives them of jurisdiction over actions *against a state* by a citizen of another state, or a foreign citizen or subject. (See *Missouri v. Fiske* (1933) 290 U.S. 18, 54 S.Ct. 18, 24, 78 L.Ed. 145, 149; *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy* (1993) 506 U.S. 139, 113 S.Ct. 684, 686, 687, 121 L.Ed.2d 605, 610, 612 [district court order denying state or state agency's claim of Eleventh Amendment immunity is immediately appealable]; *California v. Deep Sea Research* (1998) 523 U.S. 491, 118 S.Ct. 1464, 1473, 140 L.Ed.2d 626, 640 [Eleventh Amendment does not bar federal court jurisdiction over *in rem* admiralty action where res, shipwreck, is not within California's possession].)

The Amendment does not specifically cover all the limitations. By reason of its sovereignty, a state is immune from an action in a federal court by a *foreign country*, by a *federal corporation*, or by its own *citizens*. (*Monaco v. Mississippi* (1934) 292 U.S. 313, 54 S.Ct. 745, 749, 78 L.Ed. 1282, 1285; *Ford Motor Co. v. Department of Treasury of Indiana* (1945) 323 U.S. 459, 65 S.Ct. 347, 350, 89 L.Ed. 389, 394; *Employees of Dept. of Public Health & Welfare, Missouri v. Department of Public Health & Welfare, Missouri* (1973) 411 U.S. 279, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251, 254; *Edelman v. Jordan* (1974) 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, *infra*, §53; *Federal Maritime Com. v. South Carolina State Ports Authority* (2002) 535 U.S. 743, 122 S.Ct. 1864, 1874, 1878, 152 L.Ed.2d 962, 978, 982 [state sovereign immunity bars Federal Maritime Commission from adjudicating complaint filed by private party against nonconsenting state; Commission may still investigate violations of Shipping Act and institute administrative proceeding against state-run port]; *Pyne v. Meese* (1985) 172 C.A.3d 392, 402, 403, 218 C.R. 87 [Eleventh Amendment bar to actions by state's citizens applies to state as well as federal actions]; see 116 *Harv. L. Rev.* 210 [*Federal Maritime*]; 4 *Cal. Proc.* (4th), *Pleading*, §92 et seq.)

Likewise, the Eleventh Amendment bars an action by an Indian tribe against a state. (*Blatchford v. Native Village of Noatak & Circle Village* (1991) 501 U.S. 775, 111 S.Ct. 2578, 2582, 115 L.Ed.2d 686, 695 [following *Monaco v. Mississippi*]; *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252, *infra*, §46; *Idaho v. Coeur d'Alene Tribe of Idaho* (1997) 521 U.S. 261, 117 S.Ct. 2028, 2036, 138 L.Ed.2d 438, 451 [state forum was available to tribe]; see 111 *Harv. L. Rev.* 269 [*Coeur d'Alene*]; 86 *Cal. L. Rev.* 879 [same]; 21 *Hastings Const. L. Q.* 71, 92 [Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act; concluding that

"States cannot invoke the Eleventh Amendment as a defense because Congress both intended to abrogate state immunity in IGRA and had the power to do so"; 27 *U.S.F. L. Rev.* 907 [How American Indian Tribes Can Sue States Under the Indian Gaming Regulation Act Without Violating the Eleventh Amendment].)

(2) *Who May Bring Action.* Only the following parties may bring actions against states without their consent:

(a) *The United States.* (See *United States v. Texas* (1892) 143 U.S. 621, 12 S.Ct. 488, 493, 36 L.Ed. 285, 291.)

(b) *Another state.* (See *Texas v. Florida* (1939) 306 U.S. 398, 59 S.Ct. 563, 568, 83 L.Ed. 817, 825 [interpleader to determine domicile of decedent for tax purposes, where danger of depletion of funds]; *Massachusetts v. Missouri* (1939) 308 U.S. 1, 60 S.Ct. 39, 84 L.Ed. 3 [before United States court will take jurisdiction it must appear that there is justiciable controversy, i.e., that complaining state has suffered a wrong or is asserting a right susceptible of judicial enforcement]; 20 *Hastings L. J.* 1 [procedural rules].)

(c) *Citizen authorized by federal statute.* (See *infra*, §43.)

(3) *Waiver of Immunity.* A state that voluntarily removes a case from state to federal court waives its Eleventh Amendment immunity. (*Lapides v. Board of Regents of University System of Georgia* (2002) 535 U.S. 613, 122 S.Ct. 1640, 1643, 152 L.Ed.2d 806, 812 [fact that federal court might remand plaintiff's state-law tort claims against state to state court does not change rule]; see 29 *Hastings Const. L. Q.* 439 [Congressional Authority To Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)]; 41 *San Diego L. Rev.* 1057 [*Lapides*].)

(4) *Texts and Law Reviews.* Commentary on the Eleventh Amendment has been extensive. (See 1 Rotunda, §2.12; 1 Tribe, §3-25 et seq.; 91 *Cal. L. Rev.* 827 [defective abrogation of sovereign immunity and its remedial impact]; 92 *Cal. L. Rev.* 1375 [case against treating state sovereign immunity as Article III doctrine]; 89 *Harv. L. Rev.* 682; 102 *Harv. L. Rev.* 1342 [discussing different theories of Eleventh Amendment], 1372 [critical evaluation of diversity theory]; 115 *Harv. L. Rev.* 1561 [Sovereign Immunity as a Doctrine of Personal Jurisdiction]; 40 *Hastings L. J.* 1123 [analyzing Eleventh Amendment decisions]; 29 *Hastings Const. L. Q.* 721 [The Metes and Bounds of State Sovereign Immunity]; 42 *Santa Clara L. Rev.* 607 [Can Congress Require That States Waive Their Immunity to Private Lawsuits in Exchange for Receiving Federal Patent Rights?]; 64 *So. Cal. L. Rev.* 51 [critical evaluation of Eleventh Amendment decisions]; 73 *So. Cal. L. Rev.* 741 [empirical assessment of Supreme Court federalism jurisprudence]; 35 *Stanf. L. Rev.* 1033; 53 *Stanf. L. Rev.* 1115 [Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity], 1225 [The Eleventh Amendment as Curb on Bureaucratic Power]; 36 *U.C. Davis L. Rev.* 407 [pretext review of means-end relationships]; 50 *U.C.L.A. L. Rev.* 1031 [Reimagining the Eleventh Amendment]; 180 *A.L.R. Fed.* 579 [Immunity of States in Private Actions for Damages under Family and Medical Leave Act]; 187 *A.L.R. Fed.* 175 [Supreme Court cases on immunity of state from civil suits under Eleventh Amendment].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Eleventh Amendment Immunities.*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §106 et seq.(4) *Texts and Law Reviews.* See 1 Rotunda 4th, §2.12; 93 *Cal. L. Rev.* 589 [fairness, waiver, and hypothetical Eleventh Amendment jurisdiction]; 119 *Harv. L. Rev.* 1855 [State Collective Action].



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b. Action Authorized by Federal Statute.

1. Former Rule.

7 Witkin Sum. Cal. Law Const Law § 42

[§ 42] Former Rule.

Parden v. Terminal Ry. of Alabama State Docks Dept. (1964) 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, held that a railroad employee could sue a state-owned railroad by virtue of 45 U.S.C., §51. A resident citizen may sue his or her own state when Congress, acting within its constitutional powers, provides a federal remedy; such an action is not barred by the Eleventh Amendment, and the Supremacy Clause overrides the state's immunity. (84 S.Ct. 1211, 12 L.Ed.2d 239.) (See 69 Cal. L. Rev. 189 [citizen's right to bring action in state court for federal constitutional violations].)

Parden was partially overruled in *Welch v. Texas Dept. of Highways & Public Trans.* (1987) 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389, *infra*, §45, and fully overruled in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.* (1999) 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605, *infra*, §47.

In *Pennsylvania v. Union Gas Co.* (1989) 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1, the majority concluded that the authority of Congress to abrogate a state's Eleventh Amendment immunity is not limited to the Fourteenth Amendment (see *infra*, §43). The case involved federal statutes providing for cleanup of hazardous waste sites. The Court first held that Congress had clearly expressed its intent to authorize actions for monetary damages against a state. (109 S.Ct. 2280, 2295, 105 L.Ed.2d 15, 33.) The lead opinion, joined by four justices, then considered the issue of congressional authority:

(a) The Supreme Court's prior decisions lead unmistakably to the conclusion that the commerce power includes the authority to override the states' Eleventh Amendment immunity. The Commerce Clause, like the Fourteenth Amendment, expands congressional power while contracting state power, and the rationale of *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614, *infra*, §43, thus applies to both provisions. (109 S.Ct. 2281, 2282, 105 L.Ed.2d 15, 16, 17.) Nothing indicates that the Eleventh Amendment was intended to limit congressional authority; it refers only to judicial power. (109 S.Ct. 2283, 105 L.Ed.2d 18.)

(b) The special nature of the commerce power also supports the conclusion that Congress may override the states' immunity when exercising that power. (1) In approving the Commerce Clause, the states relinquished their immunity and consented to actions against them where Congress found it necessary in exercising its authority. (109 S.Ct. 2284,

105 L.Ed.2d 19.) (2) Where the Commerce Clause precludes state regulation, "a conclusion that Congress may not create a cause of action for money damages against the States would mean that no one could do so. And in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause." (109 S.Ct. 2285, 105 L.Ed.2d 20.)

(c) This case illustrates these points. Environmental problems often require federal solutions that must include money damages. States are among the owners and operators of hazardous waste sites, and failure to make them pay for cleanup costs would seriously affect the congressional desire to encourage voluntary cleanups. (109 S.Ct. 2284, 2285, 105 L.Ed.2d 20, 21.)

One justice disagreed with the Court's statutory interpretation. (109 S.Ct. 2295, 105 L.Ed.2d 33.) Another justice agreed that Congress intended to subject the states to monetary liability but disagreed that it had the power to do so. (109 S.Ct. 2295, 2296, 105 L.Ed.2d 33, 34.) Three justices dissented on both the statutory and constitutional issues. (109 S.Ct. 2289, 2296, 105 L.Ed.2d 26, 34.)

Pennsylvania v. Union Gas Co. was overruled in *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 1128, 134 L.Ed.2d 252, 273, *infra*, §46.

SUPPLEMENT: [This section is current through the latest supplement]



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b. Action Authorized by Federal Statute.

2. Fourteenth Amendment.

7 *Witkin Sum. Cal. Law Const Law* § 43

[§ 43] Fourteenth Amendment.

In *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614, the court upheld the 1972 amendments to Title VII of the Civil Rights Act of 1964 (infra, §855), authorizing federal courts to award money damages to a private individual in an action against a state government found to have subjected the individual to prohibited employment discrimination. The amendments were enacted under the authority of §5 of the Fourteenth Amendment, giving Congress the power to enforce the substantive provisions of the Amendment "by appropriate legislation" (see infra, §§694, 814). Following *Parden v. Terminal Ry. of Alabama State Docks Dept.* (1964) 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, supra, §42, and distinguishing *Edelman v. Jordan* (1974) 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, infra, §53, the court said: "When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." (96 S.Ct. 2671, 49 L.Ed.2d 621.) (See 47 U.C.L.A. L. Rev. 653 [framework for determining whether Congress has abrogated state immunity when it provides cause of action for damages pursuant to §5 of Fourteenth Amendment].)

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3. Family and Medical Leave Act.

7 *Witkin Sum. Cal. Law Const Law* § 44

[§ 44] Family and Medical Leave Act.

Nevada Dept. of Human Resources v. Hibbs (2003) 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953, held that state employees may recover money damages from the state for violating the family care provision of the Family and Medical Leave Act (FMLA), 29 U.S.C., §2612(a).

(a) Congress may abrogate state sovereign immunity in federal court if it makes this intention clear in the statutory language and acts pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment. Here, congressional intent is clear. 29 U.S.C., §2617(a)(2) permits employees to seek damages against any employer, including a public agency (which includes the state), in any federal or state court of competent jurisdiction. Thus, the case turns on "whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity" for purposes of the family leave provision. (123 S.Ct. 1977, 155 L.Ed.2d 962.)

(b) Section 5 of the Fourteenth Amendment grants Congress the power to enact "appropriate legislation" to enforce equal protection of the laws. This power includes the authority to enact "legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." (123 S.Ct. 1977, 155 L.Ed.2d 963.) The aim of the FMLA is to protect an employee's right to be free from gender-based discrimination. Unlike the age and disability discrimination involved in *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522, *infra*, §49, and *Board of Trustees of University of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866, *infra*, §50, a gender-based classification is subject to heightened scrutiny. (123 S.Ct. 1981, 155 L.Ed.2d 967.)

(c) The classification serves an important governmental interest. Congress had evidence of a long, extensive, and persistent history of sex discrimination in the administration of leave benefits which justified passage of the FMLA. (123 S.Ct. 1978, 155 L.Ed.2d 964.) Although many states have enacted some form of family-care leave laws, many are inadequate. For example, in seven states the laws only apply to women; in 12 states there is no provision for caring for a sick child or family member; and in many states there is no statutorily guaranteed right to take the leave. (123 S.Ct. 1980, 155 L.Ed.2d 966.)

(d) The discriminatory means employed is substantially related to the achievement of the objective. "By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes." (123 S.Ct. 1982, 155 L.Ed.2d 969.) The FMLA is narrowly tailored to address the targeted unconstitutional behavior. It requires only unpaid leave of limited duration and excludes elected state officials, their staffs, and appointed policymakers. (123 S.Ct. 1983, 155 L.Ed.2d 970.)

Four justices concurred in two opinions (123 S.Ct. 1984, 155 L.Ed.2d 971), and three justices dissented in two opinions (123 S.Ct. 1985, 1986, 155 L.Ed.2d 972, 973). (See 117 Harv. L. Rev. 236 [Hibbs]; 197 A.L.R. Fed 229 [award of attorneys' fees and other costs under fee-shifting provision of Act]; on California's Family Rights Act, see *infra*, §942 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See 93 Cal. L. Rev. 541 [Hibbs]; 58 Stanf. L. Rev. 1871 [same].



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4. (New) Americans With Disabilities.

7 *Witkin Sum. Cal. Law Const Law* § 44A

[§ 44A] (New) Americans With Disabilities.

In *Tennessee v. Lane* (2004) 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820, a criminal defendant and a court reporter, both paraplegics who used wheelchairs for mobility, sought money damages and injunctive relief for being denied access to, and the services of, the state court system because of their disabilities. The criminal defendant, required to appear on the second floor of a courthouse without an elevator, alleged that he was compelled to crawl up two flights of stairs to attend his first hearing and was arrested for failure to appear when he refused to do so again at his second hearing. The court reporter alleged that she had lost both work and an opportunity to participate in the judicial process because she was unable to gain access to a number of county courthouses. The Court answered the question left open in *Board of Trustees of University of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866, text, §50: whether the Eleventh Amendment permits suits for money damages under Title II of the Americans With Disabilities Act (ADA). Title II prohibits discrimination by public entities in the provision of public services and activities to qualified persons with disabilities. It incorporates by reference the provision of the Rehabilitation Act authorizing private citizens to bring actions for money damages. *Held*, Title II, as it applies to cases implicating the fundamental right of access to the courts, is a valid exercise of Congress' authority, under §5 of the Fourteenth Amendment, to enforce Fourteenth Amendment guarantees.

(a) There are significant differences between Titles I and II of the ADA. The purpose of Title I is to enforce the command of the Fourteenth Amendment that "all persons similarly situated should be treated alike." As observed in *Garrett*, "classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose." (124 S.Ct. 1988, 158 L.Ed.2d 836.) "Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. ... These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment" and the Confrontation Clause of the Sixth Amendment. Further, the public's right of access to criminal proceedings is secured by the *First Amendment*. (124 S.Ct. 1988, 158 L.Ed.2d 836, 837.)

(b) "While §5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent." (124 S.Ct. 1988, 158 L.Ed.2d 837.) Here, the gravity of

the harm was sufficient to support the prophylactic legislation it enacted. (124 S.Ct. 1992, 158 L.Ed.2d 841.) Title II was written "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." (124 S.Ct. 1989, 158 L.Ed.2d 837.) "A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities." (124 S.Ct. 1990, 158 L.Ed.2d 839.) The evidence before Congress was sufficient for it to conclude in the text of the ADA itself (see 42 U.S.C., §12101(a)(3)) that discrimination against the disabled persists in "access to public services." (124 S.Ct. 1992, 158 L.Ed.2d 841.)

(c) Title II is an appropriate response to the history and pattern of unequal treatment of persons with disabilities regarding the accessibility of judicial services. "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that" the problem warranted additional prophylactic measures. Title II "requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service." (124 S.Ct. 1993, 158 L.Ed.2d 842.) Its duty to accommodate persons with disabilities in the administration of justice is consistent with due process and its objective of preventing unconstitutional behavior. (124 S.Ct. 1994, 158 L.Ed.2d 843.)

Four justices dissented in three opinions. (124 S.Ct. 1997, 2007, 2013, 158 L.Ed.2d 846, 857, 864.) (See 118 Harv. L. Rev. 258 [*Tennessee v. Lane*]; 32 Pepperdine L. Rev. 39 [same].)

See *United States v. Georgia* (2006) 546 U.S. 151, 126 S.Ct. 877, 882, 163 L.Ed.2d 650, 659, Supp., infra, §882 [Title II of ADA abrogates state immunity to extent conduct actually violates Fourteenth Amendment].

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c. Action Not Authorized by Federal Statute.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 45

[§ 45] In General.

In *Welch v. Texas Dept. of Highways & Public Trans.* (1987) 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389, the Court held that the Jones Act (see 2 *Summary* (10th), *Workers' Compensation*, §131 et seq.) did not authorize a federal court action against a state by its employee. The lead opinion, joined by four justices, reasons as follows:

(a) "We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to §5 of the Fourteenth Amendment. ... Petitioner's argument fails in any event because Congress has not expressed *in unmistakable statutory language* its intention to allow States to be sued in federal court under the Jones Act." (107 S.Ct. 2947, 97 L.Ed.2d 397, 398.)

(b) *Parden v. Terminal Ry. of Alabama State Docks Dept.* (1964) 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, supra, §42, found congressional intent from the general language of the statute. (107 S.Ct. 2947, 97 L.Ed.2d 398.) "Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden's* discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law." (107 S.Ct. 2948, 97 L.Ed.2d 399.) In *Employees of Dept. of Public Health & Welfare, Missouri v. Department of Public Health & Welfare, Missouri* (1973) 411 U.S. 279, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251, 254, and later cases, "the Court consistently has required *an unequivocal expression* that Congress intended to override Eleventh Amendment immunity." To the extent that it is inconsistent with this requirement, *Parden* is overruled. (107 S.Ct. 2948, 97 L.Ed.2d 399.)

(c) *Hans v. Louisiana* (1890) 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842, holding that the Eleventh Amendment bars a citizen from suing his or her own state in federal court, has been followed in many cases and will not be overruled without special justification which is not present here. (107 S.Ct. 2952, 97 L.Ed.2d 400.)

Four justices dissented, arguing that the Eleventh Amendment does not apply to suits by a state's own citizens and that *Hans* should be overruled. (107 S.Ct. 2958, 97 L.Ed.2d 416.)

Other federal acts have been held not to abrogate state sovereign immunity. (See *Dellmuth v. Muth* (1989) 491 U.S. 223, 109 S.Ct. 2397, 2402, 105 L.Ed.2d 181, 190 [language of Education of the Handicapped Act (now Individuals with

Disabilities Education Act; see *infra*, §881) does not show unmistakably clear intent to abrogate states' Eleventh Amendment immunity]; *Hoffman v. Connecticut Dept. of Income Maintenance* (1989) 492 U.S. 96, 109 S.Ct. 2818, 2824, 106 L.Ed.2d 76, 86 [Bankruptcy Code does not abrogate states' immunity from suit for monetary damages]; *infra*, §46 et seq.)

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c. Action Not Authorized by Federal Statute.

2. Indian Gaming.

7 Witkin Sum. Cal. Law Const Law § 46

[§ 46] Indian Gaming.

Pennsylvania v. Union Gas Co. (1989) 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1, supra, §42, was overruled in *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252. Plaintiff Indian tribe sued the state of Florida and its Governor in federal court under the Indian Gaming Regulatory Act, passed by Congress under the Indian Commerce Clause, to force defendants to negotiate for the inclusion of certain gaming activities in a tribal-state compact. *Held*, the Eleventh Amendment prohibits Congress from making Florida subject to suit in federal court under the Act, and the exception provided by *Ex parte Young* (1908) 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, *infra*, §54, is inapplicable.

(a) *No abrogation of immunity.*

(1) To determine whether Congress has abrogated a state's sovereign immunity, the Court must ask whether Congress has unequivocally expressed its intent to abrogate the immunity, and whether it acted pursuant to a valid exercise of power. (116 S.Ct. 1123, 134 L.Ed.2d 266, citing *Green v. Mansour* (1985) 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371, *infra*, §55.) Numerous references to the "State" in the Act make it clear that Congress intended to abrogate the states' sovereign immunity from suit. (116 S.Ct. 1124, 134 L.Ed.2d 267.)

(2) Determining whether Congress acted pursuant to a valid exercise of power depends on whether the Act was passed pursuant to a constitutional provision granting Congress the power to abrogate. Authority to abrogate has been found under only two constitutional provisions. In *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614, supra, §43, the Court recognized that "the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. ... We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that 'The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.' ... We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that §5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." (116 S.Ct. 1125, 134 L.Ed.2d 268.) In *Pennsylvania v. Union Gas Co.*, a plurality of the Court found that the Interstate Commerce Clause granted Congress the power to

abrogate state sovereign immunity. (116 S.Ct. 1125, 134 L.Ed.2d 268.) That opinion "allows no principled distinction" in favor of the states between the *Indian Commerce Clause* and the *Interstate Commerce Clause*. (116 S.Ct. 1127, 134 L.Ed.2d 271.)

(3) "The Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court. ... *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision." (116 S.Ct. 1127, 134 L.Ed.2d 271.) "Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III. ... The plurality's citation of prior decisions for support was based on what we believe to be a misreading of precedent." (116 S.Ct. 1128, 134 L.Ed.2d 272.) The plurality's reliance on *Fitzpatrick v. Bitzer* is also misplaced. *Fitzpatrick* was based on "a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment." (116 S.Ct. 1128, 134 L.Ed.2d 272.)

(4) *Union Gas* has proven to be a solitary departure from established law. None of the policies underlying stare decisis require continuing adherence to its holding. "[B]oth the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III. We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled." (116 S.Ct. 1128, 134 L.Ed.2d 273.)

(5) In overruling *Union Gas*, "we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." (116 S.Ct. 1131, 134 L.Ed.2d 276.)

(b) *Exception for prospective injunctive relief inapplicable.* Where Congress has prescribed a detailed remedial scheme for enforcement against a state of a statutorily created right, a court should hesitate before casting it aside and permitting an action against a state officer based on *Ex parte Young*, *supra*. Here, Congress intended §2710(d)(3) of the Act, requiring a state to negotiate in good faith toward the formation of a compact, "to be enforced against the State in an action brought under §2710(d)(7); the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also significantly to limit, the duty imposed by §2710(d)(3)." (116 S.Ct. 1132, 134 L.Ed.2d 278.) If §2710(d)(3) could be enforced in a suit under *Ex parte Young*, §2710(d)(7) would have been superfluous. Although Congress does not have the authority to make the state amenable to suit in federal court under §2710(d)(7), "the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under §2710(d)(3)." (116 S.Ct. 1133, 134 L.Ed.2d 279.)

Four justices dissented in two separate opinions. One justice stated that the majority opinion is an "affront to a coequal branch of our Government," and that it prevents Congress from providing a federal forum for a broad range of actions against states, including those sounding in copyright and patent law, bankruptcy, and environmental law. (116 S.Ct. 1133, 1134, 134 L.Ed.2d 279, 280.) Three justices agreed that the statute should have been construed to harmonize with *Ex parte Young*, which would have saved an act of Congress and rendered a discussion on constitutional grounds wholly unnecessary. Lacking the application of *Ex parte Young*, they would have followed *Union Gas* in recognizing congressional power under Article I to abrogate sovereign immunity. (116 S.Ct. 1145, 1184, 134 L.Ed.2d 294, 344.) (See 110 Harv. L. Rev. 102 [*Seminole Tribe*]; 112 Harv. L. Rev. 1759 [constructive waiver after *Seminole Tribe*]; 113 Harv. L. Rev. 213 [*Seminole Tribe*]; 33 Loyola L.A. L. Rev. 1275 [Symposium on New Directions in Federalism];

discussing *Seminole Tribe* and following cases]; 53 *Stanf. L. Rev.* 1259 [*Fitzpatrick v. Bitzer* and *Seminole Tribe*]; 46 *U.C.L.A. L. Rev.* 161 [federal appellate court review of state court judgments after *Seminole Tribe*.])

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3. Patent and Trademark.

7 Witkin Sum. Cal. Law Const Law § 47

[§ 47] Patent and Trademark.

In *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank* (1999) 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575, plaintiff bank sued Florida for patent infringement. The district court held that the patent laws failed to contain the requisite statement of intent to abrogate state sovereign immunity from infringement suits. The Court of Appeals held that Congress, in the Patent Remedy Act, had validly abrogated the state's sovereign immunity from infringement suits under §5 of the Fourteenth Amendment. *Held*, reversed and remanded.

(a) *Authority to abrogate state sovereign immunity.* *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252, *supra*, §46, reaffirmed the Court's holding in *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614, *supra*, §43, that "Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment." (119 S.Ct. 2205, 144 L.Ed.2d 586.) But the legislation must be appropriate under §5 as that term was construed in *Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624, *infra*, §516, where the Court held that "for Congress to invoke §5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." (119 S.Ct. 2206, 2207, 144 L.Ed.2d 587, 588.)

(b) *Necessity for congressional action.* "The underlying conduct at issue here is state infringement of patents and the use of sovereign immunity to deny patent owners compensation for the invasion of their patent rights. ... It is this conduct then--unremedied patent infringement by the States--that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act." (119 S.Ct. 2207, 144 L.Ed.2d 588.) However, "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." (119 S.Ct. 2207, 144 L.Ed.2d 588.) Because of the lack of evidence of widespread and persistent deprivation of patent owners' property without due process of law by claims of sovereign immunity, the provisions of the Patent Remedy Act are out of proportion to the remedial or preventive object they are designed to prevent. (119 S.Ct. 2210, 144 L.Ed.2d 592.)

(c) *Insufficiency of Article I authority.* "The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place the States on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole*

Tribe." (119 S.Ct. 2211, 144 L.Ed.2d 593.)

Four justices dissented, stating that *Boerne* "amply supports congressional authority to enact the Patent Remedy Act, whether one assumes that States seldom infringe patents, ... or that patent infringements potentially permeate an 'unlimited range of state conduct.'" (119 S.Ct. 2211, 144 L.Ed.2d 594.) (See 113 Harv. L. Rev. 223 [*Florida Prepaid*]; 29 *Hastings Const. L. Q.* 645 [*Boerne*]; 73 *So. Cal. L. Rev.* 1161 [same]; 53 *Stanf. L. Rev.* 1127 ["Appropriate" Means-Ends Constraints on Section 5 Powers; discussing *Boerne*]; 34 *U.C. Davis L. Rev.* 271 [*Florida Prepaid*].)

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.* (1999) 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605, a companion case to *Florida Prepaid*, plaintiff bank claimed that Florida was subject to suit in federal court under the Trademark Remedy Clarification Act (TRCA) for false and misleading advertising. *Held*, sovereign immunity was neither validly abrogated by the TRCA nor voluntarily waived by the state's activities in interstate commerce.

(a) *Need for protectable property right.* To abrogate sovereign immunity under §5 of the Fourteenth Amendment, there must be a protectable property right. Neither "(1) a right to be free from a business competitor's false advertising about its own product," nor "(2) a more generalized right to be secure in one's business interests" qualifies (119 S.Ct. 2224, 144 L.Ed.2d 614):

(1) "As to the first: The hallmark of a protected property interest is the right to exclude." (119 S.Ct. 2224, 144 L.Ed.2d 614.) Although the Act's provisions dealing with infringement of trademarks deal with "property" that an owner can exclude others from using, the false advertising provisions "bear no relationship to any right to exclude; and Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion." (119 S.Ct. 2224, 144 L.Ed.2d 615.)

(2) As to the second: Although assets of a business unquestionably are property, "business in the sense of *the activity of doing business* or *the activity of making a profit* is not property in the ordinary sense--and it is only *that*, and not any business asset, which is impinged upon by a competitor's false advertising." (119 S.Ct. 2225, 144 L.Ed.2d 616.)

(b) *No constructive waiver of immunity.* A state may waive its sovereign immunity by invoking federal jurisdiction or by making a *clear declaration* that it intends to submit to federal jurisdiction. (119 S.Ct. 2226, 144 L.Ed.2d 616.) While limited in subsequent cases, *Parden v. Terminal Ry. of Alabama State Docks Dept.* (1964) 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, *supra*, §42, found an implied or constructive waiver of immunity by engaging in interstate commerce. Whatever remains of that decision is overruled. (119 S.Ct. 2226, 2228, 144 L.Ed.2d 617, 619.)

Four justices dissented, asserting that Congress should have the power to regulate commercial activities of a state that is acting like a private person. (119 S.Ct. 2235, 144 L.Ed.2d 628.) (See 89 *Cal. L. Rev.* 507 [Holding the Sovereign's Universities Accountable for Patent Infringement After *Florida Prepaid* and *College Savings Bank*]; 51 *Hastings L. J.* 1003 [*Florida Prepaid* and *College Savings Bank*]; 37 *San Diego L. Rev.* 637 [same]; 53 *Stanf. L. Rev.* 1331 [Overcoming Immunity: The Case of Federal Regulation of Intellectual Property]; 35 *U.S.F. L. Rev.* 407 [*Florida Prepaid* and *College Savings Bank*].)

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4. Fair Labor Standards.

7 Witkin Sum. Cal. Law Const Law § 48

[§ 48] Fair Labor Standards.

In *Employees of Dept. of Public Health & Welfare, Missouri v. Department of Public Health & Welfare, Missouri* (1973) 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251, the Court concluded that Congress, in extending coverage under the Fair Labor Standards Act (FLSA) to state employees, did not intend to authorize an action by a citizen against his or her state. *Parden v. Terminal Ry. of Alabama State Docks Dept.* (1964) 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, supra, §42, was distinguished on the ground that the conclusion there was ultimately premised on a theory of consent by the state. (93 S.Ct. 1617, 36 L.Ed.2d 254, 255, and footnote 1.)

In *Alden v. Maine* (1999) 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636, a case of first impression, plaintiff probation officers claimed that Maine had violated the overtime provisions of the FLSA, and sought compensation and liquidated damages in federal court. While the action was pending, the Court decided *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252, supra, §46, and the district court dismissed plaintiffs' action. Plaintiffs then filed the same action in state court, where it was dismissed based on the state's sovereign immunity. *Held*, affirmed. The powers delegated to Congress under Article I "do not include the power to subject nonconsenting States to private suits for damages in state courts." Here, "Maine has not consented to suits for overtime pay and liquidated damages under the FLSA." (119 S.Ct. 2246, 144 L.Ed.2d 652.)

(a) *Constitutional history.* The silence of the founders of the Constitution on congressional power to strip states of immunity from suit in their own courts "is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip States of the immunity." (119 S.Ct. 2260, 144 L.Ed.2d 670.) The Eleventh Amendment "was directed toward the only provisions of the constitutional text believed to call the States' immunity from private suit into question. Although Article III expressly contemplated jurisdiction over suits between States and individuals, nothing in the Article or in any other part of the Constitution suggested States could not assert immunity from private suit in their own courts or that Congress had the power to abrogate sovereign immunity there." (119 S.Ct. 2260, 144 L.Ed.2d 671.)

(b) *Statutory history.* "The provisions of the FLSA at issue here, which were enacted in the aftermath of *Parden*, are among the first statutory enactments purporting in express terms to subject nonconsenting States to private suits.

Although similar statutes have multiplied in the last generation, 'they are of such recent vintage that they are no more probative than the [FLSA] of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice.' " (119 S.Ct. 2261, 144 L.Ed.2d 672, quoting *Printz v. United States* (1997) 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914, supra, §6.)

(c) *States' right to reciprocal privilege.* "It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege." (119 S.Ct. 2264, 144 L.Ed.2d 675.)

(d) *No immunity where state consents to suit.* Sovereign immunity "does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity." (119 S.Ct. 2266, 144 L.Ed.2d 679.) One "of these limits is that sovereign immunity bars suits only in the absence of consent. Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. ... Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits." (119 S.Ct. 2267, 144 L.Ed.2d 679.) Here, however, the state has not consented to suit. (119 S.Ct. 2268, 144 L.Ed.2d 680.)

Four justices joined in a lengthy dissent: "The Court's federalism ignores the accepted authority of Congress to bind States under the FLSA and to provide enforcement of federal rights in state court. The Court's history simply disparages the capacity of the Constitution to order relationships in a Republic that has changed since the founding." (119 S.Ct. 2270, 144 L.Ed.2d 683.) (See 113 Harv. L. Rev. 200 [Alden]; 89 Cal. L. Rev. 183 [same]; 33 U.C. Davis L. Rev. 325 [same].)

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Correction: Page 135, second line of section, "*Missourie*" should be "*Missouri*".



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5. Age Discrimination.

7 Witkin Sum. Cal. Law Const Law § 49

[§ 49] Age Discrimination.

In *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 120 S.Ct. 631, 643, 645, 145 L.Ed.2d 522, 539, 542, the Court extended the reasoning of *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252, supra, §46, and following cases, to the Age Discrimination in Employment Act. *Held*, 5-4, neither the Commerce Clause nor the Fourteenth Amendment authorized Congress to abrogate the state's immunity from suit under the Act.

(a) *Commerce Clause*. Congress' powers under Article I "do not include the power to subject States to suit at the hands of private individuals." (120 S.Ct. 644, 145 L.Ed.2d 539.)

(b) *Fourteenth Amendment*. Age "is not a suspect classification under the Equal Protection Clause." (120 S.Ct. 646, 145 L.Ed.2d 542.) Thus, "states may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." (120 S.Ct. 646, 145 L.Ed.2d 542.) The Act is " 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' " (120 S.Ct. 647, 145 L.Ed.2d 544, quoting *Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624, infra, §516.) Under 29 U.S.C., §623(a)(1), all discrimination " 'against any individual ... because of such individual's age' " is made unlawful. (120 S.Ct. 647, 145 L.Ed.2d 544.) Thus, the Act "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." (120 S.Ct. 647, 145 L.Ed.2d 544.) Further, in extending the Act to the States in 1974, Congress failed to identify any pattern of discrimination by the states rising to the level of constitutional violation necessitating broad prophylactic legislation. (120 S.Ct. 649, 145 L.Ed.2d 546.) (See 89 Cal. L. Rev. 1165 [State Sovereign Immunity and Stare Decisis: Solving the Prisoners' Dilemma Within the Court]; 114 Harv. L. Rev. 179 [Kimel], 2146 [The Irrational Application of Rational Basis: *Kimel*, *Garrett*, and Congressional Power To Abrogate State Sovereign Immunity]; 33 Loyola L.A. L. Rev. 1275 [Symposium on New Directions in Federalism; discussing *Seminole Tribe* and following cases]; 34 U.C. Davis L. Rev. 673 [Congress' Section 5 Power and Remedial Rights]; 48 U.C.L.A. L. Rev 1203 [State Sovereign Immunity: Searching for Stability].)

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6. Americans With Disabilities.

7 *Witkin Sum. Cal. Law Const Law* § 50

[§ 50] Americans With Disabilities.

In *Board of Trustees of University of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866, plaintiff employees sued two state entities for failing to comply with the Americans With Disabilities Act (ADA) (see *infra*, §882) by refusing to make the required "special accommodations" necessary to prevent discrimination against the disabled. *Held*, 5-4, under the Eleventh Amendment, states are immune from private damages actions under the ADA.

(a) Although by its terms the Eleventh Amendment grants immunity to a state only when that state is sued by a citizen of "another state," it has been held that the Amendment's immunity extends to a suit by a citizen against his or her own state. (121 S.Ct. 962, 148 L.Ed.2d 876, citing *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252, *supra*, §46.)

(b) Congress may abrogate the states' Eleventh Amendment immunity when (1) it unequivocally intends to do so, and (2) it acts pursuant to a valid grant of constitutional authority. Because the ADA specifically abrogates Eleventh Amendment immunity, the question is whether Congress acted within its constitutional authority by subjecting the states to federal suits for damages under the ADA. Under *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank* (1999) 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575, *supra*, §47, Congress may not base abrogation on its power under the Commerce Clause. However, under *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614, *supra*, §43, it may base abrogation on Section 5 of the Fourteenth Amendment, which grants Congress the power to enforce that Amendment's substantive guarantees by enacting "appropriate legislation." Thus, the ADA can apply to the states only to the extent that it is appropriate Section 5 legislation. (121 S.Ct. 962, 148 L.Ed.2d 877.)

(c) The initial step in applying these principles is to identify the scope of the constitutional right at issue, i.e., the limitations that the substantive provisions of the Fourteenth Amendment place on state treatment of the disabled. *Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313, *infra*, §789, which dealt with an Equal Protection Clause challenge to an ordinance requiring a special use permit to operate a home for the mentally retarded, held that "mental retardation" did not qualify as a "quasi-suspect" classification, but instead that the ordinance incurred only the minimum "rational basis" review applicable to general social and economic legislation. (121 S.Ct.

963, 148 L.Ed.2d 878.) Thus, under *Cleburne*, states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions are rational. They could quite hardheadedly--and perhaps hard-heartedly--hold to job qualification requirements that make no allowance for the disabled. "If special accommodations for the disabled are to be required, they must come from positive law and not through the Equal Protection Clause." (121 S.Ct. 964, 148 L.Ed.2d 879.)

(d) Next, it is necessary to determine whether Congress identified a history and pattern of unconstitutional employment discrimination by the *states* against the disabled, because Congress' Section 5 authority is appropriately exercised only in response to state transgressions. (121 S.Ct. 964, 148 L.Ed.2d 880.) This inquiry does not extend, as plaintiffs contend, to units of local governments, because Eleventh Amendment immunity does not extend beyond the state level. Although the record assembled by Congress in enacting the ADA contains many examples supporting its general finding that society has tended to discriminate against the disabled, the majority of the incidents do not deal with the activities of states. Also, the relatively few examples of state discrimination against the disabled fall far short of the pattern of unconstitutional discrimination on which Section 5 legislation must be based, especially because 43 million Americans are disabled and the states employ more than 4.5 million people. (121 S.Ct. 965, 148 L.Ed.2d 880, 881.) Moreover, had Congress believed that the assembled material on discrimination reflected a pattern of state discrimination, it would have so found (it did not), and language in the legislative history of the ADA refutes the contention that general, societal discrimination against the disabled includes discrimination by the states. (121 S.Ct. 966, 148 L.Ed.2d 882.)

The dissenting opinion characterized the congressional record as showing "massive society-wide discrimination," concluded that this discrimination was sufficient to implicate the states, and reasoned that the ADA was an "appropriate" way of dealing with this problem. (121 S.Ct. 966, 148 L.Ed.2d 885, 886.) (See 114 Harv. L. Rev. 2146 [The Irrational Application of Rational Basis: *Kimel*, *Garrett*, and Congressional Power To Abrogate State Sovereign Immunity]; 115 Harv. L. Rev. 306 [*Garrett*]; 29 Hastings Const. L. Q. 645 [same]; 54 Stanf. L. Rev. 87 [same].)

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For a decision holding that action for money damages is available to persons with disabilities under Title II of the ADA for a state's denial of access to its courts, see *Tennessee v. Lane* (2004) 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820, Supp., supra, §44A.



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7 Witkin Sum. Cal. Law Const Law § 51

[§ 51] Action in State Court.

Hall v. University of Nevada (1972) 8 C.3d 522, 524, 105 C.R. 355, 503 P.2d 1363, held that the immunity from being sued by citizens of another state does not exist where the cause of action is based on the defendant state's activities in another state. (See 4 Cal. Proc. (4th), Pleading, §93; 63 Cal. L. Rev. 1144; 6 Loyola L.A. L. Rev. 585; 81 A.L.R.3d 1239.) In the subsequent trial, the Court of Appeal affirmed a tort judgment for damages in favor of a California plaintiff in the action against the state of Nevada. (*Hall v. University of Nevada* (1977) 74 C.A.3d 280, 141 C.R. 439.) In *Nevada v. Hall* (1979) 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, the United States Supreme Court affirmed the judgment of the Court of Appeal, holding that a state has no constitutional immunity from suit in a state court.

(a) *Nature of sovereign immunity.* A truly independent sovereign is immune from being sued in its own courts. But immunity from being sued in another sovereign's courts must depend on an agreement or a voluntary decision to respect the dignity of the first sovereign as a matter of comity. The California court has said that it does not, as a matter of comity, extend this immunity. (99 S.Ct. 1186, 1187, 59 L.Ed.2d 423.)

(b) *Eleventh Amendment and Article III.* Nothing in these sections provides a basis for imposing limits on the exercise of one state's power to authorize its courts to assert jurisdiction over another state. (99 S.Ct. 1188, 59 L.Ed.2d 425.)

(c) *Full faith and credit.* Under the Full Faith and Credit Clause, a state may in some situations be required to apply the statutory law of another state; but it is not required to apply that law in violation of its own legitimate public policy. (99 S.Ct. 1189, 59 L.Ed.2d 426.) A similar conclusion is appropriate in this case. California's interest in providing full protection to those who are injured on its highways through negligence is substantial. To effectuate this interest, California has provided for jurisdiction over residents and nonresidents alike, and has waived its own immunity from liability. "As the California courts have found, to require California either to surrender jurisdiction or to limit respondents' recovery to the \$ 25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery. The Full Faith and Credit Clause does not require this result." (99 S.Ct. 1190, 59 L.Ed.2d 427.)

(d) *No implied constitutional limitations.* Nevada's argument that the Constitution implicitly requires respect for the

sovereignty of another state is unsound. Several constitutional limitations (imports, extradition, etc.) show that the states are not wholly independent sovereigns, but do not imply that a state's immunity from suit rests on anything but comity. It may be a wise policy for states to accord each other immunity; but if a federal court were to hold, by inference from the structure of the Constitution, that California is not free to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the states and the power of the people. (99 S.Ct. 1191, 59 L.Ed.2d 429.) (See *Children's Hosp. & Med. Center v. Bonta* (2002) 97 C.A.4th 740, 757, 758, 118 C.R.2d 629 [Eleventh Amendment did not bar state action based on disparity of Medi-Cal reimbursements for in-state and out-of-state hospitals where issues were based on violations of Equal Protection and Commerce Clauses, and did not derive from any private right of action under Medicaid Act; distinguishing *Alden v. Maine* (1999) 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636, supra, §48]; *Franchise Tax Bd. of Calif. v. Hyatt* (2003) 538 U.S. 488, 123 S.Ct. 1683, 1689, 155 L.Ed.2d 702, 712 [following *Nevada v. Hall*; in tort action in Nevada against California tax board, Nevada was not required to apply California statute immunizing its tax collection agency where that application would violate Nevada's own legitimate public policy]; 93 Harv. L. Rev. 189 [*Nevada v. Hall*].)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §107.



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1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 52

[§ 52] In General.

(1) *Action Based on Personal Liability.* A plaintiff may sue a state officer, such as a tax collector, to recover a personal judgment against the officer based on his or her wrongful individual action in violation of law, e.g., improper collection of money under color of state law. (See 4 *Cal. Proc. (4th), Pleading*, §92.) And actions "against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." (*Griffin v. County School Bd. of Prince Edward County* (1964) 377 U.S. 218, 84 S.Ct. 1226, 1232, 12 L.Ed.2d 256, 264, *infra*, §96; see *Scheuer v. Rhodes* (1974) 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, 5 *Summary* (10th), *Torts*, §177.)

The Eleventh Amendment is also not a bar to an action based on the theory that the officer acted beyond the scope of his or her statutory authority, or, if the officer acted within his or her authority, that that authority is unconstitutional. (*Florida Dept. of State v. Treasure Salvors* (1982) 458 U.S. 670, 102 S.Ct. 3304, 3317, 73 L.Ed.2d 1057, 1072; see 96 *Harv. L. Rev.* 246.)

(2) *Distinction: Action To Enforce State Liability.* An action nominally against individuals may affect them in their capacities as state officers, and may in substance be a forbidden action against the state to enforce state liability. (See *Worcester County Trust Co. v. Riley* (1937) 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268; *infra*, §639; *Great Northern Life Ins. Co. v. Read* (1944) 322 U.S. 47, 64 S.Ct. 873, 876, 88 L.Ed. 1121, 1126; *Ford Motor Co. v. Department of Treasury, Indiana* (1945) 323 U.S. 459, 65 S.Ct. 347, 350, 89 L.Ed. 389, 394, *infra*, §36.) (For the comparable theory that an action against a *federal* officer may be deemed a forbidden action against the United States, see 4 *Cal. Proc. (4th), Pleading*, §87 *et seq.*)

(3) *Action Against State Agency or Instrumentality.* An action against a state agency that is in reality an action against the state is barred by the Eleventh Amendment. (See *Arkansas v. Texas* (1953) 346 U.S. 368, 74 S.Ct. 109, 98 L.Ed. 80; *Regents of Univ. of Calif. v. Doe* (1997) 519 U.S. 425, 117 S.Ct. 900, 904, 137 L.Ed.2d 55, 60; *infra*, §§53, 55.) However, an action against a political subdivision that is not considered to be an *arm of the state* is not barred. (*Lynch v. San Francisco Housing Authority* (1997) 55 C.A.4th 527, 541, 65 C.R.2d 620 [local housing authority is not state agency immune from being sued under Eleventh Amendment]; see *Hess v. Port Authority Trans-Hudson Corp.* (1994) 513 U.S. 30, 115 S.Ct. 394, 402, 130 L.Ed.2d 245, 258 [financially independent bistate railway does not possess

Eleventh Amendment immunity that states enjoy; suing railway in federal court under Federal Employer's Liability Act does not affect states' dignity and solvency, the two concerns that underpin Eleventh Amendment].)

A state agency's Eleventh Amendment immunity may be waived by a state statute consenting to being sued. (See *Petty v. Tennessee-Missouri Bridge Com.* (1959) 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 [immunity waived by interstate compact]; *Port Authority Trans-Hudson Corp. v. Feeney* (1990) 495 U.S. 299, 110 S.Ct. 1868, 1874, 109 L.Ed.2d 264, 274 [immunity waived by state statutes consenting to action against bistate agency and expressly indicating that consent extends to action in federal court].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action Based on Personal Liability.*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §106.

(2) *Distinction: Action To Enforce State Liability.*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §101 et seq.

(3) *Action Against State Agency or Instrumentality.* See *Northern Ins. Co. of New York v. Chatham County, Georgia* (2006) 547 U.S. 189, 126 S.Ct. 1689, 1694, 164 L.Ed.2d 367, 374 [action in admiralty for damages to boat caused by operation of drawbridge; county was not acting as arm of state in operating bridge, and thus was not immune].



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2. Action To Recover Money.

7 *Witkin Sum. Cal. Law Const Law* § 53

[§ 53] Action To Recover Money.

An action that seeks the recovery of money from the state is barred by the Eleventh Amendment. This rule applies without regard to the nominal defendant or the type of action involved. (See 1 Rotunda, §2.12.)

In *Ford Motor Co. v. Department of Treasury of Indiana* (1945) 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389, plaintiff, a foreign corporation, sued the Indiana Department of Treasury in a federal district court, to recover taxes paid. *Held*: (a) the claim was for a refund from the state itself, and barred by the Eleventh Amendment; (b) the state had by statute consented to refund actions only in the *state court*; and (c) the fact that the state Attorney General appeared and defended on the merits in the district court and Court of Appeals was not a waiver of the objection; the Amendment "declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue ... even though urged for the first time in this Court." (65 S.Ct. 352, 89 L.Ed. 396.) (See *Kennecott Copper Corp. v. State Tax Com.* (1946) 327 U.S. 573, 66 S.Ct. 745, 90 L.Ed. 862 [statutory consent was insufficient to permit suit in federal court]; 59 *Harv. L. Rev.* 802; on consent generally, see 4 *Cal. Proc.* (4th), *Pleading*, §92 et seq.)

In *Edelman v. Jordan* (1974) 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, Jordan brought an action individually and on behalf of a class of persons receiving Aid to Aged, Blind, and Disabled, against directors of the Illinois Department of Public Aid. The theory of the action was that the Illinois officials were following state regulations that did not comply with federal time limits for processing applications. The federal district court issued a permanent injunction requiring compliance with the federal time limits and ordering retroactive payment of benefits wrongfully withheld from July, 1968, the date of the federal regulations, to the date of the injunction. *Held*, reversed as to the retroactive payments.

(a) Although the Eleventh Amendment does not by its terms bar an action by the state's own citizen, the immunity has consistently been upheld. (94 S.Ct. 1355, 39 L.Ed.2d 672.)

(b) An action may be barred even though the state itself is not named, if it seeks a judgment that must be paid from public funds in the state treasury. (94 S.Ct. 1356, 39 L.Ed.2d 672, citing *Ford Motor Co.*)

(c) An exception is recognized for an action seeking an injunction against unconstitutional acts, which operates prospectively to compel compliance with federal regulations. (94 S.Ct. 1356, 39 L.Ed.2d 673; see *infra*, §54.) But the label of equitable relief in the nature of restitution cannot support a judgment for money, which would be the effect of retroactive application of the injunction in the instant case. (94 S.Ct. 1357, 39 L.Ed.2d 674.)

(d) There was no congressional authorization for suit against a class of defendants that included state instrumentalities, and the state did not waive its immunity by participating in the program. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' " (94 S.Ct. 1361, 39 L.Ed.2d 678.) (See 88 Harv. L. Rev. 243; 63 Cal. L. Rev. 1167; on effect of *Edelman* on award of attorneys' fees in public benefit class actions against the state or state officers, see 88 Harv. L. Rev. 1875; 9 U.S.F. L. Rev. 465; and see *Quern v. Jordan* (1979) 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 [sequel to *Edelman*]; 67 Cal. L. Rev. 407.)

The fact that the federal government has agreed to indemnify a state agency against the costs of litigation, including adverse judgments, does not divest the state agency of Eleventh Amendment immunity. (*Regents of Univ. of Calif. v. Doe* (1997) 519 U.S. 425, 117 S.Ct. 900, 902, 137 L.Ed.2d 55, 59.)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, §2.12.

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §106 et seq.



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3. Action To Compel Future Act or Expenditure.

7 *Witkin Sum. Cal. Law Const Law* § 54

[§ 54] Action To Compel Future Act or Expenditure.

Ex parte Young (1908) 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, held that a state official could be enjoined in a federal action from enforcing an unconstitutional state law. Later cases have extended the *Young* exception to permit a federal court to order prospective relief, even where the relief requires the future expenditure of state funds, where a state statute is unconstitutional or otherwise conflicts with federal law. (See *Edelman v. Jordan* (1974) 415 U.S. 651, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662, 673, supra, §53; *Pennhurst State School & Hosp. v. Halderman* (1984) 465 U.S. 89, 104 S.Ct. 900, 909, 79 L.Ed.2d 67, 79, infra, §56; 1 Rotunda, §2.12; 1 Tribe, §3-27.)

Papasan v. Allain (1986) 478 U.S. 265, 106 S.Ct. 2932, 2939, 92 L.Ed.2d 209, 226, was an action against state officials challenging Mississippi's distribution of public school land funds on various grounds, including a claimed denial of equal protection. The Court noted that the line between permitted and prohibited actions under the Eleventh Amendment is indistinct. "In discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought, ... and will be guided by the policies underlying the decision in *Ex parte Young*." (106 S.Ct. 2941, 92 L.Ed.2d 227.) The Court then held that the Amendment does not bar a remedy necessary to correct a current violation of the Equal Protection Clause, even if the remedy might require expenditure of state funds. (106 S.Ct. 2943, 92 L.Ed.2d 229, 230.)

Frew v. Hawkins (2004) 540 U.S. 431, 124 S.Ct. 899, 157 L.Ed.2d 855, held that a consent decree was enforceable against state officials who had accepted it. The federal decree was entered to implement a federal statute, and the fact that the decree required the officials to implement many detailed procedures not specifically required by the federal statute did not make its enforcement violative of the *Eleventh Amendment*. (124 S.Ct. 904, 157 L.Ed.2d 864.)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, §2.12; 60 *Stanf. L. Rev.* 989 [*Ex Parte Young*].



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4. Action For Injunctive or Declaratory Relief.

7 *Witkin Sum. Cal. Law Const Law* § 55

[§ 55] Action For Injunctive or Declaratory Relief.

The bar of the Eleventh Amendment is not limited to actions seeking money damages. Hence where an action seeking an injunction against a state official was in reality an action against the state itself, it was barred by the Amendment. (See *Cory v. White* (1982) 457 U.S. 85, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694, 699 [Federal Interpleader Act does not give federal district court jurisdiction to resolve inconsistent death tax claims by officials of two states]; *Idaho v. Coeur d'Alene Tribe of Idaho* (1997) 521 U.S. 261, 117 S.Ct. 2028, 2040, 2043, 138 L.Ed.2d 438, 455, 459 [where Indian tribe's action seeking injunctive and declaratory relief against state was functional equivalent of quiet title action implicating special sovereignty interests, exception of *Ex parte Young* (1908) 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, supra, §54, was not available]; *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252, supra, §46; 86 Cal. L. Rev. 879 [*Coeur d'Alene*]; 111 Harv. L. Rev. 269 [same]; 53 Stanf. L. Rev. 1311 [The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983].)

The rule also applies to other types of actions seeking prospective relief. In *Green v. Mansour* (1985) 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371, plaintiffs claimed that defendant state official's calculation of benefits under the AFDC program violated federal law. Before final determination of the merits, Congress amended the statute, rendering any demand for injunctive relief moot. Plaintiffs still sought declaratory and "notice relief" that defendant's prior conduct violated federal law. *Held*, the Eleventh Amendment was a bar. Unless some exception applies, the Amendment precludes both prospective and retroactive relief. *Quern v. Jordan* (1979) 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358, permitted "notice relief" ancillary to prospective relief enjoining violation of federal regulations. In the present case, there is no continuing violation of federal law, and hence no appropriate relief to which the requested declaratory relief can be ancillary. (106 S.Ct. 426, 427, 88 L.Ed.2d 377, 379.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Action To Compel Compliance With State Law.

7 *Witkin Sum. Cal. Law Const Law* § 56

[§ 56] Action To Compel Compliance With State Law.

In *Pennhurst State School & Hosp. v. Halderman* (1984) 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67, plaintiffs sued defendant state and county officials, alleging that conditions at a state institution for the mentally retarded violated federal constitutional and statutory rights, as well as state law. The district court awarded injunctive relief on the basis of both federal and state law, and the Court of Appeals affirmed. *Held*, reversed.

(a) The doctrine of *Ex parte Young* (1908) 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, *supra*, §54, is based on the need to harmonize the principles of the Eleventh Amendment with the supremacy of federal law. (104 S.Ct. 911, 79 L.Ed.2d 81.) "This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." (104 S.Ct. 911, 79 L.Ed.2d 82.)

(b) The claim that once jurisdiction is established on the basis of a federal question, the doctrine of pendent jurisdiction (see 2 *Cal. Proc.* (4th), *Jurisdiction*, §73) permits consideration of state law claims without further consideration of the Eleventh Amendment is mistaken. Pendent jurisdiction is a judge-made doctrine inferred from the general language of Article III and cannot displace the explicit limitation on federal jurisdiction contained in the *Eleventh Amendment*. (104 S.Ct. 917, 79 L.Ed.2d 91.) That amendment bars a claim that state officials violated state law, and the bar "applies as well to state-law claims brought into federal court under pendent jurisdiction." (104 S.Ct. 919, 79 L.Ed.2d 92.) (See 98 *Harv. L. Rev.* 61; 75 *Cal. L. Rev.* 129; 12 *Hastings Const. L. Q.* 643.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §72.



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1. In General.

a. Nature of Diversity Jurisdiction.

7 Witkin Sum. Cal. Law Const Law § 57

[§ 57] Nature of Diversity Jurisdiction.

The federal Constitution (Art. III, §2), and the federal Judicial Code (28 U.S.C., §1332), give the federal courts jurisdiction of actions between citizens of different states (including the territories and District of Columbia), who thus have a right to choose the federal courts at their option. (See *Meredith v. Winter Haven* (1943) 320 U.S. 228, 64 S.Ct. 7, 11, 88 L.Ed. 9, 13; *Indianapolis v. Chase Nat. Bank* (1941) 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47; *National Mut. Ins. Co., Dist. of Columbia v. Tidewater Transfer Co.* (1949) 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 [upholding 1940 amendment with respect to actions between citizens of the District of Columbia and citizens of the various states]; 41 *Harv. L. Rev.* 483 [historical basis].) The *jurisdictional minimum* is \$ 75,000. (28 U.S.C., §1332(a); see 2 *Cal. Proc.* (4th), *Jurisdiction*, §67; 1 *Tribe*, §3-23; 46 *Cal. L. Rev.* 831; 186 *A.L.R. Fed* 321 [aggregation of claims of one plaintiff against two or more defendants to determine amount in controversy]; 187 *A.L.R. Fed* 139 [aggregation of claims of one plaintiff against one defendant to determine amount in controversy].)

A corporation is deemed a citizen for this purpose of any state of incorporation and the state of its principal place of business. (28 U.S.C., §1332(c); on diversity jurisdiction generally, see 2 *Cal. Proc.* (4th), *Jurisdiction*, §67 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Jurisdictional minimum:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §66.

Diversity jurisdiction:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §66 et seq.



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1. In General.

b. Erie Doctrine.

7 *Witkin Sum. Cal. Law Const Law* § 58

[§ 58] Erie Doctrine.

(1) *Former Doctrine of Swift v. Tyson*. A federal statute known as the Rules of Decision Act (28 U.S.C., §1652) provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as *rules of decision* in civil actions in the courts of the United States, in cases where they apply." In *Swift v. Tyson* (1842) 41 U.S. 1, 10 L.Ed. 865, the court limited this rule of conformity to state statutes and permanent usages, or cases where a rule of property is involved, and held that in matters of general law, the federal courts need not follow the decisions of the local state courts but may apply their own views. (See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* (1928) 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681.)

(2) *Erie R. Co. v. Tompkins*. In *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, the court reexamined the problem and concluded that the doctrine of *Swift v. Tyson* was unsound in theory, discriminatory and unfair in practice, and an unconstitutional invasion of rights reserved to the states. "Except in matters governed by the federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. *There is no federal general common law*. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." (58 S.Ct. 822, 82 L.Ed. 1194.)

The *Erie* decision "was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court it should be denied in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts." (*Ragan v. Merchants Transfer & Warehouse Co.* (1949) 337 U.S. 530, 69 S.Ct. 1233, 1234, 93 L.Ed. 1520, 1523.)

Later decisions reaffirmed the broad scope of the *Erie* rule. *Guaranty Trust Co. of New York v. York* (1945) 326 U.S. 99, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079, 2086, held that the rule applies to equity suits as well as actions at law. "[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the

outcome of a litigation, as it would be if tried in a State court." (See *O'Melveny & Myers v. Federal Deposit Ins. Corp.* (1994) 512 U.S. 79, 114 S.Ct. 2048, 2052, 2053, 129 L.Ed.2d 67, 73, 74 [in suit by FDIC, as receiver of federally insured bank, asserting California causes of action against attorneys who provided services to bank, California rule of decision governs issue whether corporate officers' knowledge is imputed to FDIC]; *Semtek Int. v. Lockheed Martin Corp.* (2001) 531 U.S. 497, 121 S.Ct. 1021, 1028, 149 L.Ed.2d 32, 43 [claim-preclusive effect of federal judgment dismissing diversity action is determined by law of state where federal court sits]; 115 Harv. L. Rev. 467 [*Semtek*].) (On whether *Erie* doctrine applies to questions of maritime law, see *Wilburn Boat Co. v. Fireman's Fund Ins. Co.* (1955) 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337; 64 Harv. L. Rev. 246; 69 Harv. L. Rev. 169; 97 Harv. L. Rev. 1513; 13 Stanf. L. Rev. 622; on extent of its application to actions involving bonds of federal agencies, see *Bank of America v. Parnell* (1956) 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93; *Miree v. DeKalb County, Georgia* (1977) 433 U.S. 25, 97 S.Ct. 2490, 2495, 53 L.Ed.2d 557, 565 [following *Parnell*; federal interest was too speculative to justify application of federal law to transaction essentially of local concern]; 71 Harv. L. Rev. 131 [*Parnell*]; 45 Cal. L. Rev. 212 [same]; on converse problem of state law based on federal law in federal courts, see 83 Harv. L. Rev. 289.)

(3) *Texts and Law Reviews*. The *Erie* doctrine has been the subject of extensive comment and criticism. (See 1 Tribe §3-23; 52 Harv. L. Rev. 1002; 56 Harv. L. Rev. 298; 59 Harv. L. Rev. 966; 75 Harv. L. Rev. 1400 [state law in federal antitrust treble damage actions]; 77 Harv. L. Rev. 1084 [competence of federal courts to formulate rules of decisions]; 87 Harv. L. Rev. 693; 87 Harv. L. Rev. 741; 87 Harv. L. Rev. 753; 87 Harv. L. Rev. 1682; 91 Harv. L. Rev. 356; 97 Harv. L. Rev. 1513 [defense of *Swift v. Tyson*]; 99 Harv. L. Rev. 883; 29 Cal. L. Rev. 228, 380; 34 Hastings L. J. 201 [review of Freyer's "Harmony and Dissonance: The *Swift* and *Erie* Cases in American Federalism"]; 29 San Diego L. Rev. 743 [Federal Common Law and the Need for Uniformity in the Regulation of Federal Savings and Loan Associations and Federal Credit Unions]; 23 So. Cal. L. Rev. 204; 16 Stanf. L. Rev. 27; 19 U.C. Davis L. Rev. 201 [suggesting use of "national consensus law" as alternative in complex multistate litigation].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Texts and Law Reviews*. See 95 Cal. L. Rev. 1289 [*Erie's* Constitutional Source]; 96 Cal. L. Rev. 595 [Repressing *Erie's* Myth].



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1. In General.

c. Determination of State Law.

7 Witkin Sum. Cal. Law Const Law § 59

[§ 59] Determination of State Law.

(1) *In General.* In applying the *Erie* rule (*supra*, §58), difficulty may be encountered in determining what is the state law, in the absence of a clear, controlling decision by the state's highest court. One aspect of the problem involves an analysis of appellate court decisions to discover whether the point has been the subject of a ruling or persuasive dictum. The other aspect concerns the type of state court, other than the highest court, whose decisions are invoked. (See 59 *Harv. L. Rev.* 1299.)

It has been held that the federal court must follow the decisions of *intermediate state appellate courts*, unless there is convincing evidence that the law is otherwise. (See *Six Cos. of Calif. v. Joint Highway Dist. No. 13 of Calif.* (1940) 311 U.S. 180, 61 S.Ct. 186, 85 L.Ed. 114 [decision of California Court of Appeal followed]; 59 *Harv. L. Rev.* 1299; 22 *So. Cal. L. Rev.* 186.) The rule stops short, however, of requiring rigid adherence to the decisions of *trial courts*. In *King v. Order of United Commercial Travelers of America* (1948) 333 U.S. 153, 68 S.Ct. 488, 92 L.Ed. 608, a ruling of a South Carolina Court of Common Pleas was held not binding because (a) there was no showing that the decisions of that court were accepted as precedents in the state, and (b) the decisions of the court were not reported and ascertainment of the holding by searching the records would be impracticable. The opinion adds a qualification, however: "Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. ... [O]ther situations in other states may well call for a different result." (68 S.Ct. 493, 92 L.Ed. 613.) (See 22 *So. Cal. L. Rev.* 186.)

The federal courts cannot refuse jurisdiction on the ground of uncertainty of the state law, but must determine and apply it. (*Meredith v. Winter Haven* (1943) 320 U.S. 228, 64 S.Ct. 7, 11, 88 L.Ed. 9, 13; see 40 *Cal. L. Rev.* 305.) Moreover, where the state precedent is old and of doubtful strength, there has been some suggestion that the federal court may either seek to declare the probable present state view or determine the law of the case independently. (See 45 *Cal. L. Rev.* 87; 46 *Cal. L. Rev.* 294.)

C.R.C., Rule 29.8 provides a procedure by which the United States Supreme Court, a Court of Appeal, or a court of another jurisdiction may request a decision on a question of California law from the California Supreme Court. (See 9 *Cal. Procedure* (4th), *Appeal*, Supp., §11A.)

(2) *Independent Review of District Court's Determination.* In *Salve Regina College v. Russell* (1991) 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190, the Court explained its rejection of the rule of deference as follows: "District judges preside alone over fast-paced trials: of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. ... Courts of appeals, on the other hand, are structurally suited to the collaborative judicial process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. Perhaps most important, courts of appeals employ multi-judge panels ... that permit reflective dialogue and collective judgment." (111 S.Ct. 1221, 113 L.Ed.2d 198.) (See 105 Harv. L. Rev. 309.)

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2. Procedure.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 60

[§ 60] In General.

Erie R. Co. v. Tompkins (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118, *supra*, §58, makes only the state *substantive law* the rule of decision in federal courts; *procedure* remained subject to federal law. But the line between substance and procedure cannot be drawn with precision, and some "procedural" matters, particularly under the Federal Rules of Procedure, have so pronounced an effect on rights and liabilities that they may be regarded, in part at least, as "substantive" in nature. (See *Bernhardt v. Polygraphic Co. of America* (1956) 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 [state law governs enforceability of arbitration agreement]; *Byrd v. Blue Ridge Rural Elec. Cooperative* (1958) 356 U.S. 525, 78 S.Ct. 893, 901, 2 L.Ed.2d 953, 962 [federal right to jury determination of employment relationship prevails over state rule committing determination to judge]; *Hanna v. Plumer* (1965) 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 [federal rules govern method of personal service]; 70 *Harv. L. Rev.* 138 [*Bernhardt*]; 72 *Harv. L. Rev.* 147 [*Byrd*]; 78 *Harv. L. Rev.* 673 [*Hanna* case in Court of Appeals]; 54 *Cal. L. Rev.* 1382 [*Hanna*]; 13 *U.C.L.A. L. Rev.* 413 [same].)

The problem of substance versus procedure has been the subject of extensive comment. (See 60 *Harv. L. Rev.* 822; 62 *Harv. L. Rev.* 1030; 66 *Harv. L. Rev.* 1516; 67 *Harv. L. Rev.* 150; 69 *Harv. L. Rev.* 66; 72 *Harv. L. Rev.* 147; 74 *Harv. L. Rev.* 1046 [discovery]; 76 *Harv. L. Rev.* 287 [*Erie* doctrine and federal evidence reform]; 36 *Cal. L. Rev.* 127; 40 *Cal. L. Rev.* 433; 44 *Cal. L. Rev.* 949; 49 *Cal. L. Rev.* 382 [evidentiary privilege]; 52 *Cal. L. Rev.* 640 [same]; 9 *Stanf. L. Rev.* 606; 4 *U.C.L.A. L. Rev.* 619; 6 *U.C.L.A. L. Rev.* 322; 95 *A.L.R.2d* 320 [evidence: privileged communications].)

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b. Capacity To Sue.

7 *Witkin Sum. Cal. Law Const Law* § 61

[§ 61] Capacity To Sue.

In *Woods v. Interstate Realty Co.* (1949) 337 U.S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524, a foreign corporation brought suit in the federal district court in Mississippi, without having qualified under Mississippi law by designating an agent for service of process. The state statute provided that any foreign corporation failing to comply with this provision "shall not be permitted to bring or maintain any action or suit in any of the courts of this State." *Held*, plaintiff could not maintain the action in the federal court. Under the rule of *Guaranty Trust Co. of New York v. York* (1945) 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, *supra*, §58, a right that "local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case," and where, in these cases, one is barred from recovery in the state court, one "should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts." (69 S.Ct. 1237, 93 L.Ed. 1527.)

In *Cohen v. Beneficial Industrial Loan Corp.* (1949) 337 U.S. 541, 69 S.Ct. 1221, 1230, 93 L.Ed. 1528, 1541, a New Jersey statute provided that a corporation shareholder bringing a derivative action might be required to give security for costs and attorneys' fees. Federal Rule 23 did not impose this requirement. *Held*, the condition was binding in an action in the federal district court in New Jersey. It was not solely a regulation of procedure. It created a *substantive liability* on the part of the shareholder to pay costs if he or she did not prevail, and provided a procedure (requirement of an indemnity bond in advance) for enforcing the liability. (See 63 *Harv. L. Rev.* 126; 82 *Harv. L. Rev.* 708 [construction of Federal Rule 17(b) (capacity of corporation to sue) in cases where forum state would deny right to sue]; 40 *Cal. L. Rev.* 433.)

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c. Statute of Limitations.

7 Witkin Sum. Cal. Law Const Law § 62

[§ 62] Statute of Limitations.

In *Ragan v. Merchants Transfer & Warehouse Co. (1949)* 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520, plaintiff filed a tort claim for personal injuries in the federal district court in Kansas. The state statute established a 2-year limitation period and provided that actions were deemed commenced on the date of service of summons, contrary to Federal Rule 3, under which the earlier filing of the complaint was the crucial date. Plaintiff's complaint was filed within 2 years, but defendant was served after the period had run. *Held*, though apparently maintainable under the federal rule, the action was barred. "[W]e look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. ... It accrues and comes to an end when local law so declares. ... Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed." (69 S.Ct. 1235, 93 L.Ed. 1523.) (See *Walker v. Armco Steel Corp. (1980)* 446 U.S. 740, 100 S.Ct. 1978, 1984, 64 L.Ed.2d 659, 669 [following *Ragan*]; 63 Harv. L. Rev. 126; 75 Harv. L. Rev. 627; 10 Cal. Western L. Rev. 131; 6 U.C.L.A. L. Rev. 332; 90 A.L.R.2d 265 [effect of federal court's adoption of state period of limitation in action to enforce federally created right].)

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3. Conflict of Laws.

7 *Witkin Sum. Cal. Law Const Law* § 63

[§ 63] Conflict of Laws.

Generally speaking, the federal courts under the Rules of Decision Act (*supra*, §58) follow the local state's substantive conflict of laws rules. (See *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477; *Griffin v. McCoach* (1941) 313 U.S. 498, 61 S.Ct. 1023, 85 L.Ed. 1481; *Ferens v. John Deere Co.* (1990) 494 U.S. 516, 110 S.Ct. 1274, 1277, 1284, 108 L.Ed.2d 443, 450, 458 [when action is transferred under 28 U.S.C., §1404(a) (see 2 *Cal. Proc.* (4th), *Jurisdiction*, §371), transferee court must follow conflict of laws rules prevailing in transferor court, regardless of whether plaintiff or defendant initiated transfer]; 59 *Harv. L. Rev.* 966; 65 *Harv. L. Rev.* 688; 68 *Harv. L. Rev.* 1212; 29 *Cal. L. Rev.* 228; 15 *So. Cal. L. Rev.* 95; 3 *Stanf. L. Rev.* 397; 14 *U.C.L.A. L. Rev.* 1191 [Toward a Federal Common Law of Choice of Law]; 21 *A.L.R.2d* 247; 54 *A.L.R.2d* 1053 [enforceability of attorney fee provision, valid in state of execution but invalid under law of forum].)

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Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §382.



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4. Federal Statute or Policy.

a. Case Involving Federal Statute.

7 Witkin Sum. Cal. Law Const Law § 64

[§ 64] Case Involving Federal Statute.

The underlying theory of the Rules of Decision Act (*supra*, §58) and *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188, *supra*, §58, has no application to a suit based on a federal statute. Here the emphasis is not on uniformity of decision in all the courts sitting within a state, but rather on uniformity of decision in all courts throughout the U.S. that deal with the *same federal right*. (See 59 Harv. L. Rev. 966.)

In *Holmberg v. Armbrrecht* (1946) 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743, creditors of a Joint Stock Land Bank brought an action in equity in the federal court in New York to enforce the shareholders' liability imposed by the Federal Farm Loan Act. The defendants contended that the action was barred by the New York statute of limitations. *Held*, the action was maintainable, being subject to the equitable rules of laches rather than the state statute of limitations. In distinguishing *Guaranty Trust Co. of New York v. York* (1945) 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, *supra*, §58, the Court said: "We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." (66 S.Ct. 584, 90 L.Ed. 747.) (See *Francis v. Southern Pac. Co.* (1948) 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798 [federal rule allowing interstate railroads to stipulate against liability for ordinary negligence in free passes was matter of interpretation of Hepburn Act regulating issuance of free passes]; *Dice v. Akron, Canton & Youngstown R. Co.* (1952) 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 [validity of release under Federal Employers Liability Act, where fraud is claimed, is determined by federal law]; 82 Harv. L. Rev. 1512 [federal common law]; 83 Harv. L. Rev. 289 [hybrid state law in federal courts]; 90 A.L.R.2d 265 [effect of federal court's adoption of state period of limitation in action to enforce federally created right].)

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4. Federal Statute or Policy.

b. Case Involving Federal Policy.

7 *Witkin Sum. Cal. Law Const Law* § 65

[§ 65] Case Involving Federal Policy.

A suggestion of a substantial field for federal common law comes from *United States v. Standard Oil Co. of Calif.* (1947) 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067. The Court held that the liability, if any, of a third party tortfeasor to the United States government for injury to a soldier is not within the rule of *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188, *supra*, §58, and hence is not governed by the law of the state where the tort occurred. The reasons are that (a) the government-soldier relation is distinctively and exclusively a creation of federal law, and (b) the liability is one that affects the federal treasury and is chiefly one of federal fiscal policy. Hence, the type of case is one that calls for uniform national treatment, rather than diversified local rulings.

In making this preliminary decision on choice of law, the court noted that there was no federal legislative basis for a determination of liability, and that therefore it was required to reach its decision by applying its view of the *common law*. *Erie*, said the court, repudiated the notion that the federal courts could make independent determinations of common law in areas essentially of local interest and state control, but did not wholly exclude common law from the federal courts. "In this sense therefore there remains what may be termed, for want of a better label, an area of 'federal common law' or perhaps more accurately 'law of independent federal judicial decision,' outside the constitutional realm, untouched by the *Erie* decision." (67 S.Ct. 1608, 91 L.Ed. 2072.) (See *Sibbach v. Wilson & Co.* (1941) 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 [federal discovery rule requiring personal injury plaintiff to submit to physical examination]; *United States v. Little Lake Misere Land Co.* (1973) 412 U.S. 580, 93 S.Ct. 2389, 2397, 37 L.Ed.2d 187, 197; 66 Harv. L. Rev. 1519 [Sibbach]; 74 Harv. L. Rev. 1046 [discovery]; 75 Harv. L. Rev. 1656 [interpretation of government defense contract]; 82 Harv. L. Rev. 1512 [federal common law]; 83 Harv. L. Rev. 289 [hybrid state law in federal courts]; on maritime law, see *supra*, §58.)

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E. Interstate Compacts and Reciprocal Agreements.

7 *Witkin Sum. Cal. Law Const Law* § 66

[§ 66] Interstate Compacts and Reciprocal Agreements.

The Compact Clause of the federal Constitution (Art. I, §10, cl. 3) recognizes the authority of states, with the approval of Congress, to enter into compacts with each other to solve problems that call for joint action. The validity and construction of these agreements are federal questions on which the Supreme Court has the final determination. (See *West Virginia v. Sims* (1951) 341 U.S. 22, 71 S.Ct. 557, 560, 95 L.Ed. 713, 722 [eight-state compact to handle sewage]; *Petty v. Tennessee-Missouri Bridge Com.* (1959) 359 U.S. 275, 79 S.Ct. 785, 788, 3 L.Ed.2d 804, 808 [compact between Tennessee and Missouri to create bistate corporation to build bridge across Mississippi River]; *California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 C.A.4th 841, 851, 852, 19 C.R.2d 357; *Kansas v. Colorado* (1995) 514 U.S. 673, 115 S.Ct. 1733, 131 L.Ed.2d 759 [resolving disputes arising under Arkansas River Compact]; *Kingston Constructors v. Washington Metropolitan Area Transit Authority* (1997) 14 C.4th 939, 951, 59 C.R.2d 866, 928 P.2d 581 [California trial court lacked subject matter jurisdiction of action against transit authority created by compact between District of Columbia and states of Maryland and Virginia, which granted original jurisdiction to U.S. district courts, concurrent with courts of Maryland and Virginia]; 2 Rotunda, §12.5.)

In *De Veau v. Braisted* (1960) 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109, New York and New Jersey, after long legislative investigation, made a compact establishing a bistate Waterfront Commission to keep criminals away from the waterfront. Following congressional approval, the New York Waterfront Commission Act was passed, providing that no person could solicit dues for a union if any officer or agent of that union had been previously convicted of a felony and not pardoned, or otherwise relieved of the disability. Appellant, a union officer with a prior conviction of grand larceny, was suspended by the union after the district attorney threatened to prohibit the local from collecting dues. He sued for a declaratory judgment and injunction. *Held*, the statute was valid. It was not a bill of attainder (*infra*, §205) or ex post facto law (1 *Cal. Crim. Law* (3d), *Introduction to Crimes*, §10 et seq.), and did not deny due process.

The chief attack on the statute, which three dissenting justices supported, was that federal statutes had preempted the field of labor representation. But the majority declared that (a) the state law was part of a program to vindicate a compelling state interest in combating local crime in a particular industry, and (b) Congress, well aware of the purposes, had approved the compact and its implementing legislation. (80 S.Ct. 1150, 4 L.Ed.2d 1113.) (See *infra*, §§1308, 1309.)

California has entered into a number of these compacts. The following are illustrative:

(1) Pest Control Compact. (See *Food & Ag.C. 8801* et seq.)

(2) Tahoe Regional Planning Compact. (*Govt.C.* 66801; see *People v. El Dorado* (1971) 5 C.3d 480, 96 C.R. 553, 487 P.2d 1193 [upholding Compact].)

(3) Tahoe Conservancy Agency Compact. (See *Govt.C.* 66900 et seq.)

(4) California-Nevada Interstate Compact. (See *Water C.* 5975 et seq. [water apportionment and conservation].)

(5) Interstate Compact to Conserve Oil and Gas. (See *Pub.Res.C.* 3275 et seq.)

(6) Interstate Civil Defense and Disaster Compact. (See *Govt.C.* 177 et seq.)

(7) Interstate Corrections Compact. (See *P.C.* 11189 et seq.)

(8) Interstate Agreement on Qualification of Educational Personnel. (See *Educ.C.* 12500 et seq.)

(9) Multistate Tax Compact. (*Rev.C.* 38006, 9 *Summary* (10th), *Taxation*, §333; see *United States Steel Corp. v. Multistate Tax Com.* (1978) 434 U.S. 452, 98 S.Ct. 799, 54 L.Ed.2d 682 [rejecting contention that act is unconstitutional because it has not received congressional approval].)

Notwithstanding the anticasino provisions of Cal. Const., Art. IV, §19(e), the Governor, with the approval of the Legislature, is authorized to negotiate and conclude compacts with federally recognized Indian tribes for casino-style gambling on Indian lands in California, in accordance with federal law. (Cal. Const., Art. IV, §19(f).)

Although no constitutional enabling provision exists, the states may enter into reciprocal agreements of a cooperative nature, such as that contained in the Uniform Act To Secure the Attendance of Witnesses From Without the State in Criminal Cases (11 U.L.A. (Master Ed.), p. 1; see 2 *Cal. Evidence* (4th), *Witnesses*, §9 et seq.). "The Constitution ... does not preclude resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual State is inadequate. By reciprocal, voluntary legislation the States have invented methods to accomplish fruitful and unprohibited ends." (*New York v. O'Neill* (1959) 359 U.S. 1, 79 S.Ct. 564, 571, 3 L.Ed.2d 585, 592; see 32 *So. Cal. L. Rev.* 405; 11 *Stanf. L. Rev.* 173 [state court decision that was reversed].)

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See 2 Rotunda 4th, §12.5.(10) (*New*) *Emergency Management Assistance Compact*. (See *Govt.C.* 179 et seq., enacted in 2005.)



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A. Constitution of California.
1. History.

7 Witkin Sum. Cal. Law Const Law § 67

[§ 67] History.

California was first under Spanish rule, then under Mexican; and from May 30, 1848, when the treaty of Guadalupe-Hidalgo was signed, the Constitution of the United States extended over California.

The California Constitution was adopted by a convention on October 10, 1849, ratified by the people on November 13, 1849, and went into effect by proclamation on December 20, 1849. It was amended in 1857 and 1871. A new Constitution was adopted by a convention on March 3, 1879, ratified on May 7, 1879, and went into effect for election of officers on July 4, 1879, and completely on January 1, 1880. (See 3 *Hastings Const. L. Q.* 697 [review of California Constitutions]; 15 *Hastings Const. L. Q.* 391 [reflections on state constitutions]; 29 *So. Cal. L. Rev.* 389.) (For the later revisions in 1966, 1968, and 1972, see *infra*, §71.)

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A. Constitution of California. 2. Restrictive and Enabling Provisions.

7 *Witkin Sum. Cal. Law Const Law* § 68

[§ 68] Restrictive and Enabling Provisions.

(1) *Restrictions on State Powers.* The California Constitution, like other state constitutions, is generally a restriction on the powers of the state. Unless restricted by the federal or state Constitution, the Legislature has any power that it chooses to exercise. (*Sheehan v. Scott* (1905) 145 C. 684, 686, 79 P. 350; *Fitts v. Superior Court* (1936) 6 C.2d 230, 234, 57 P.2d 510 ["we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited"]; *Collins v. Riley* (1944) 24 C.2d 912, 916, 152 P.2d 169; *Delaney v. Lowery* (1944) 25 C.2d 561, 568, 154 P.2d 674; *Dean v. Kuchel* (1951) 37 C.2d 97, 100, 230 P.2d 811; *San Francisco v. Work. Comp. App. Bd.* (1978) 22 C.3d 103, 112, 148 C.R. 626, 583 P.2d 151, 2 *Summary* (10th), *Workers' Compensation*, §§3, 241; *Laborers' Int. Union of North America, Local 89, AFL-CIO v. El Dorado Landscape Co.* (1989) 208 C.A.3d 993, 1000, 256 C.R. 632, citing the text; see 33 *Cal. L. Rev.* 147.)

Accordingly, all intendments favor legislation; i.e., constitutional limitations should be construed strictly, and constitutional amendments removing restrictions should be construed liberally. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 C.3d 685, 691, 97 C.R. 1, 488 P.2d 161.)

(2) *Enabling Provisions.* The state Constitution also contains special enabling provisions that give the Legislature power to pass laws on certain subjects. Two important provisions are those for the Public Utilities Act (Art. XII, §5), and for the Workers' Compensation Act (Art. XIV, §4; 2 *Summary* (10th), *Workers' Compensation*, §2).

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7 Witkin Sum. Cal. Law Const Law § 69

[§ 69] Self-Executing Provisions.

(1) *Construction of Provision.* Early state constitutions were drafted on the theory that they should outline the broad principles of government, provide for officers and departments, and place certain restrictions on the various departments for the protection of individual rights, leaving lawmaking to the Legislature. The later tendency was to include a great deal of law.

As a result of this change in content, it has been declared that a constitutional provision will now be presumed to be self-executing, and will be given effect, without legislation, unless it clearly appears that this was not intended. (*Winchester v. Howard* (1902) 136 C. 432, 439, 64 P. 692, 69 P. 77; see *Rose v. California* (1942) 19 C.2d 713, 719, 123 P.2d 505 [former Art. I, §14, now Art. I, §19, compensation for damages in eminent domain]; *Flood v. Riggs* (1978) 80 C.A.3d 138, 154, 145 C.R. 573, citing the text [Art. II, §4, directing Legislature to prohibit improper election practices and provide for disqualification of electors]; on interpretation in general, see *infra*, §112 et seq.; 14 *Hastings Const. L. Q.* 789 ["Safe Schools" provision of Cal. Const., Art. I, §28(c)].)

However, in *People v. Vega-Hernandez* (1986) 179 C.A.3d 1084, 225 C.R. 209, the court held that a "directive to the Legislature to implement a constitutional provision is an expression of intent that the provision not be self-executing." (179 C.A.3d 1092.) The court distinguished *Flood v. Riggs*, where the amendment was not intended to alter existing statutes. Here, the opposite was true. The intention of Cal. Const., Art. I, §28(b), was to establish a new and unqualified right to restitution for crime victims. (179 C.A.3d 1094.) "The general rule we distill from the case law is this: a nonprohibitory constitutional provision which does not merely permit but directs the Legislature to implement a newly conferred right is not self-executing unless, as is extremely unlikely, the legislative directive is purposeless because the provision is so complete with respect to the nature of the right and the means of its enforcement as to deprive the Legislature of any discretion in either respect." (179 C.A.3d 1099.)

(2) *Legislative Power.* Although the Legislature may not impair or unreasonably burden a self-executing constitutional right, it may impose reasonable conditions on its exercise. (See *Bergevin v. Curtz* (1899) 127 C. 86, 88, 59 P. 312 [requirement that elector register before being allowed to vote]; *Chesney v. Byram* (1940) 15 C.2d 460, 463, 101 P.2d 1106 [requirement that veteran file affidavit with assessor to claim tax exemption]; *Vinnicombe v. California* (1959) 172 C.A.2d 54, 57, 341 P.2d 705 [former requirement that bond be furnished, as applied to plaintiff seeking damages in eminent domain].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Construction of Provision.* The Safe Schools provision of Cal. Const., Art. II, §28, was relettered as Cal. Const., Art. II, §28(f), in 2008.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW B. Amendment of Constitutions. 1. Federal Constitution.

7 Witkin Sum. Cal. Law Const Law § 70

[§ 70] Federal Constitution.

(1) *In General.* Amendments to the federal Constitution are proposed by: (a) a two-thirds vote of each house of Congress; or (b) a convention called by Congress on the application of the legislatures of two-thirds of the states. They are ratified by: (a) legislatures of three-fourths of the states; or (b) conventions in three-fourths of the states. (U.S. Const., Art. V.) All amendments except the Twenty-First have been ratified by the legislatures, and not by conventions. (See *United States v. Sprague* (1931) 282 U.S. 716, 51 S.Ct. 220, 75 L.Ed. 640; *American Federation of Labor-Congress of Industrial Organizations v. Eu* (1984) 36 C.3d 687, 691, 206 C.R. 89, 686 P.2d 609; *Bramberg v. Jones* (1999) 20 C.4th 1045, 1060, 1063, 86 C.R.2d 319, 978 P.2d 1240 [following *American Federation*; voters may not thwart or mandate operation of federal constitutional amendment process; holding Proposition 225, on congressional term limits, unconstitutional]; 109 *Harv. L. Rev.* 1747 [reconciling oath to uphold constitution with power to amend it]; 114 *Harv. L. Rev.* 1457 [The Irrelevance of Constitutional Amendments]; 24 *Hastings Const. L. Q.* 545 [ratification and expiration of pending amendment]; 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §12 et seq.)

The convention method has been the subject of extensive comment. (See 85 *Harv. L. Rev.* 1612 [proposed legislation]; 95 *Harv. L. Rev.* 2010 [review of Edel, Constitutional Convention: Threat or Challenge]; 60 *A.B.A.J.* 285 [Amending the Constitution Through a Convention]; 11 *Hastings Const. L. Q.* 1 [criticism of proposed convention to adopt balanced budget amendment]; 10 *Pacific L. J.* 627 [Request of Congress To Call Convention To Propose Balanced Budget Amendment]; 10 *Pacific L. J.* 641 [Convention Method: Its Meaning, Usefulness, and Wisdom]; 17 *Southwestern U. L. Rev.* 207 [It's Time for a New U.S. Constitution].)

(2) *Validity of Ratification.* The validity of a state's ratification is a political question for Congress to decide, and the United States Supreme Court will not determine it. (*Coleman v. Miller* (1939) 307 U.S. 433, 59 S.Ct. 972, 980, 83 L.Ed. 1385, 1394 [effect of previous rejection on subsequent ratification]; see 97 *Harv. L. Rev.* 386 [argument for judicial review of amendment process]; 97 *Harv. L. Rev.* 433 [defense of restrained judicial role]; 97 *Harv. L. Rev.* 446 [rejoinder to defense of restrained judicial role]; 28 *Hastings L. J.* 979 [Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?]; 13 *So. Cal. L. Rev.* 122; on political question doctrine, see *infra*, §87.)

(3) *Limitations on Amending Power.* The Constitution contains two express provisions that limit the amending power: (a) "[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate." (U.S. Const., Art. V,

§1.) (b) "[N]o new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states, without the consent of the Legislatures of the states concerned as well as of Congress." (U.S. Const., Art. IV, §3.)

West's Key Number Digest, Constitutional Law k.10

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW

B. Amendment of Constitutions.

2. California Constitution.

a. In General.

7 Witkin Sum. Cal. Law Const Law § 71

[§ 71] In General.

(1) *Amendments.* Amendments to the California Constitution are proposed by: (a) a two-thirds roll call vote of each house; or (b) an initiative petition signed by qualified voters equal to 8% of all votes cast for governor at the last election. (Cal. Const., Art. XVIII, §1 [legislative proposal]; Cal. Const., Art. II, §8 [initiative]; see Cal. Const., Art. II, §12 [no amendment may be submitted that names an individual to office].) They are ratified by a majority of the votes at the election. (Cal. Const., Art. XVIII, §4.) (See *California Assn. of Retail Tobacconists v. California* (2003) 109 C.A.4th 792, 833, 135 C.R.2d 224 [constitutional changes made as part of initiative Act creating commission to administer antismoking and early childhood development programs funded by increase in tobacco tax constituted constitutional amendment and not revision; Act provides for exclusive management and control by state and does not substantially alter basic government framework]; 74 Harv. L. Rev. 609 [state court review of validity of adoption of state constitutional amendment]; 75 Cal. L. Rev. 1473; 81 Harv. L. Rev. 697 [criticizing Kentucky decision that method of revision prescribed by constitution need not be followed if proposed constitution is submitted to voters]; 1 Stanf. L. Rev. 279 [excessive use of amending power in California]; on amendment of state constitutions generally, see 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §19 et seq.)

(2) *Revision.* A convention to revise the Constitution may be called by (a) roll call vote of two-thirds of the Legislature, and (b) approval of a majority of the voting members. (Cal. Const., Art. XVIII, §2; see 29 So. Cal. L. Rev. 391.)

The Constitutions of 1849 and 1879 (supra, §67) provided that the Legislature could propose "amendments," and it was generally felt that overall constitutional revision required a convention. In the election of November, 1962, Proposition 7, authorizing the Legislature to submit proposed constitutional revisions in the same manner as it submits proposed amendments, was approved; the proposition eliminated the necessity of a constitutional convention. To implement that authority, the California Constitution Revision Commission was created. (See 38 So. Cal. L. Rev. 246.)

The Commission's completed study and recommendations are contained in three reports to the Legislature, made between 1966 and 1971. The recommendations were incorporated in a series of propositions dealing with separate articles, submitted to the voters in 1966 and subsequent elections. Some were defeated, but by 1976, most of the provisions of the Constitution had been renumbered, revised, or both. (See 1 Western State L. Rev. 48.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Amendments.* In *Californians For An Open Primary v. McPherson* (2006) 38 C.4th 735, 43 C.R.3d 315, 134 P.3d 299, the court addressed an issue of first impression: the proper interpretation of the provision of Cal. Const., Art. XVIII, §1, requiring the Legislature to prepare and submit each proposed amendment to the California Constitution so that "it can be voted on separately." Proposition 60 proposed two constitutional changes. The first proposed change was designed to supersede a competing initiative measure regarding open primaries (Proposition 62); the second proposed change concerned the sale of surplus state property to help pay state bond obligations. Proposition 60 was challenged by supporters of Proposition 62 on the ground that it violated the separate-vote provision. The Court of Appeal agreed that the proposition violated this provision, but instead of striking the measure, the court ordered it bifurcated into two propositions, 60 and 60A. On appeal, the California Supreme Court, because of the impending election and ballot preparation deadlines, directed that the two amendments be placed on the ballot as separate provisions. Proposition 62 was defeated and Propositions 60 and 60A were adopted. Plaintiffs then challenged both Propositions 60 and 60A, claiming that the Court of Appeal erred in bifurcating the resolution and in directing that it be placed on the ballot as separate propositions, and seeking invalidation of the two provisions despite their adoption by the voters. *Held*, the proposed submission of two distinct changes in a single constitutional amendment violated the separate-vote provision, and the Court of Appeal erred in ordering the bifurcation. However, it is unnecessary and inappropriate to invalidate the adoption of either provision.

(a) The separate-vote provision applies to amendments, but not revisions, of the *California Constitution*. (38 C.4th 760.) Although it has existed in the California Constitution since 1879, no California decision has defined its scope. (38 C.4th 742.) However, the derivation and history of the provision show that it was meant to be a limitation on legislative power. (38 C.4th 747, 762.) This history includes decisions of sister states that have unanimously interpreted their own similar provisions as imposing limitations on the power of their legislatures to submit constitutional changes to the voters by "barring submissions that otherwise might cause voter confusion or constitute 'logrolling'--that is, the practice of combining two or more unrelated provisions in one measure, thereby forcing a single take-it-or-leave-it vote on matters that properly should be voted on separately." (38 C.4th 749.) Further, the separate-vote provision has survived other revisions and amendments to *Article XVIII*. (38 C.4th 760.)

(b) The separate-vote provision applies to disparate constitutional changes proposed in a single measure. The test for the proposed changes should be the same as that employed under the related single-subject provision (see text, §131 et seq.). Under this test, the word "amendment" as used in Cal. Const., Art. XVIII, §1, refers to a substantive change that is "*reasonably germane* to a common theme, purpose, or subject." (38 C.4th 763.) "The separate-vote provision does not impose a stricter standard requiring a showing of 'close' or 'functional' relatedness." (38 C.4th 777.) Hence, if, as is the case here, the Legislature proposes a resolution that presents in a single measure substantive changes to the California Constitution "that are not reasonably germane to a common theme, purpose, or subject," the presentation of that "measure to the voters as an amendment will violate the separate-vote provision." (38 C.4th 763.)

(c) The Court of Appeal erred in bifurcating the two measures. (38 C.4th 781.) Propositions 60 and 60A, as adopted by the voters after bifurcation, were never separately adopted by a two-thirds vote of the Legislature, and nobody in the Legislature ever proposed that they be submitted to the voters as separate measures. (38 C.4th 780.) Allowing bifurcation of a measure that violates the separate-vote provision would permit the logrolling-type manipulation in the Legislature that the provision was partially designed to prevent. For example, a faction within the Legislature, knowing that it did not have the two-thirds vote necessary to pass an amendment, could join its change in a single measure with a disparate change supported by another faction. Both factions would vote for the measure "knowing that a court likely would find a separate-vote violation but thereafter could order the provisions bifurcated and presented separately to the electorate as discrete amendments." (38 C.4th 781.) The result would be that legislators constituting less than two-thirds of each house could place measures before the electorate in violation of the *Constitution*. (38 C.4th 782.)

(d) However, in the absence of evidence of manipulation and under the unusual circumstances presented here, it is inappropriate to invalidate the two measures that were separately submitted to, and approved by, the electorate. (38 C.4th 782.)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW

B. Amendment of Constitutions.

2. California Constitution.

b. No Revision by Initiative.

7 *Witkin Sum. Cal. Law Const Law* § 72

[§ 72] No Revision by Initiative.

A significant distinction between amendment and revision was made in *McFadden v. Jordan* (1948) 32 C.2d 330, 196 P.2d 787. An initiative measure was proposed to add to the Constitution 208 sections of over 21,000 words (as compared with the existing 347 sections of about 55,000 words). It covered a wide variety of distinct subjects, and had a modifying effect on practically every part of the existing instrument. *Held*, mandamus should issue to compel omission of the measure from the ballot. Describing it as substantially a revision rather than an amendment, the court held that only a constitutional convention could propose such far-reaching changes. "The initiative power ... applies only to the proposing and the adopting or rejecting of 'laws and amendments to the Constitution' and does not purport to extend to a constitutional revision." (32 C.2d 333.) (See *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 C.3d 208, 229, 149 C.R. 239, 583 P.2d 1281 [Article XIII A (Jarvis-Gann initiative) is valid amendment, not invalid revision; distinguishing *McFadden*]; 14 U.C. Davis L. Rev. 461 [Judicial Review of Initiative Constitutional Amendments]; on legislative urgency measure establishing sufficiency of signatures to permit measure to go on ballot, see *Brosnahan v. Eu* (1982) 31 C.3d 1, 181 C.R. 100, 641 P.2d 200; on power of Legislature to propose revisions, see *supra*, § 71; on initiative generally, see *infra*, § 153 et seq.)

Raven v. Deukmejian (1990) 52 C.3d 336, 276 C.R. 326, 801 P.2d 1077, involved a constitutional challenge by mandamus to the validity of Proposition 115 (the Crime Victims Justice Reform Act) adopted at the June 5, 1990, primary election. Plaintiff taxpayers and voters attacked the measure as violative of the single-subject rule (*infra*, § 131) and the rule requiring constitutional "revisions" to be accomplished by more formal procedures than are contemplated for mere constitutional "amendments." Defendants were certain public officials and courts charged with the responsibility of implementing, enforcing, or applying the measure. *Held*, the measure did not violate the single-subject rule but did violate the constitutional revisions rule.

(a) "[O]ur revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision." (52 C.3d 350.)

(b) Petitioners attacked the provision that amends Cal. Const., Art. I, § 24, relating to the independent nature of certain rights guaranteed by the California Constitution. Proposition 115 adds an important proviso to that section:

"In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States." (52 C.3d 350.)

(c) The quantitative effects of Proposition 115 are not more extensive than those presented in prior cases upholding initiative measures, e.g., *Amador Valley* and *Brosnahan v. Brown* (1982) 32 C.3d 236, 186 C.R. 30, 651 P.2d 274, 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §104; but its qualitative effect is devastating; in essence it "would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court." (52 C.3d 352.) "In effect, new article I, section 24, would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect. As an historical matter, Article I and its Declaration of Rights was viewed as the only available protection for our citizens charged with crimes, because the federal Constitution and its Bill of Rights was initially deemed to apply only to the conduct of the federal government." (52 C.3d 352.)

(d) The idea of deferring to the U.S. Supreme Court in interpreting identical or similar constitutional language found in the state and federal Constitutions is not new. The authorities acknowledge and support a general principle or policy of deference to U.S. Supreme Court decisions in the absence of good cause for departure or deviation. (52 C.3d 353.) But to mandate the state courts' blind obedience to these decisions, as a constitutional imperative, is an entirely different matter. "Proposition 115 imposes such an imperative for the first time in California's history. It substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections. It directly contradicts the well-established jurisprudential principle that '[t]he judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort.' " (52 C.3d 354.)

(e) *In re Lance W.* (1985) 37 C.3d 873, 210 C.R. 631, 694 P.2d 744, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §13, and *People v. Frierson* (1979) 25 C.3d 142, 158 C.R. 281, 599 P.2d 587, 3 Cal. Crim. Law (3d), *Criminal Trial*, §210, rejected revision challenges to initiative measures that included similar restrictions on judicial power. "But neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution." (52 C.3d 355.) (See *Legislature v. Eu* (1991) 54 C.3d 492, 513, 286 C.R. 283, 816 P.2d 1309, *infra*, §269 [distinguishing *Raven v. Deukmejian*; term limits initiative]; 18 *Pepperdine L. Rev.* 1084; 28 *San Diego L. Rev.* 729; 25 *U.C. Davis L. Rev.* 1.)

West's Key Number Digest, Constitutional Law k.4 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW C. Power To Declare Laws Unconstitutional.

1. In General.

a. Origin and Nature of Power.

7 Witkin Sum. Cal. Law Const Law § 73

[§ 73] Origin and Nature of Power.

(1) *In General.* The power of the judiciary to review the constitutionality of legislation is not derived from any specific provision in the federal Constitution, but was declared a necessary consequence of our system of government in the famous case of *Marbury v. Madison* (1803) 5 U.S. 137, 2 L.Ed. 60. President Adams appointed Marbury to the office of Justice of the Peace in the District of Columbia, but Adams' term ended before the commission was delivered. After President Jefferson took office, his Secretary of State, Madison, refused to deliver the commission. Marbury applied for a writ of mandamus from the Supreme Court to compel him to do so. An act of Congress authorized the Supreme Court to issue the writ in such a case, but the original jurisdiction of the court, as stated in the Constitution, included no such power. *Held*, the Supreme Court could not issue the writ, because of the express constitutional limitation on the jurisdiction of the court. Chief Justice Marshall reasoned that the Constitution was a grant of power to Congress, and that if it acted beyond its powers, its acts were void, and the judiciary was bound to uphold the Constitution by disregarding these acts. (See 1 Rotunda §§1.2, 1.3; 1 Tribe, §3-2.)

A state constitutional requirement for concurrence of more than a majority of supreme court justices to declare the unconstitutionality of a state statute is valid. (*Ohio v. Akron Metropolitan Park Dist. For Summit County* (1930) 281 U.S. 74, 50 S.Ct. 228, 230, 74 L.Ed. 710, 716; see 18 Cal. L. Rev. 439.)

(2) *Texts and Law Reviews.* Since the decision in *Marbury v. Madison*, the courts have exercised the power in numerous instances, and in spite of criticism and agitation for its curtailment, it is firmly entrenched as a basic principle of American government. (See 1 Rotunda, §1.4 et seq.; 1 Tribe, §3-1 et seq.; 89 Harv. L. Rev. 1 [Constitutional Common Law]; 95 Harv. L. Rev. 17 [limitations on power of Congress to regulate jurisdiction of federal courts on constitutional issues]; 98 Harv. L. Rev. 4 [judicial review of economic disputes]; 98 Harv. L. Rev. 592 [criticism of economic model of judicial review]; 98 Harv. L. Rev. 1331 [idealism as basis of judicial review]; 101 Harv. L. Rev. 908 [A Workable Government? The Constitution After 200 Years]; 103 Harv. L. Rev. 1344 [Constitutional Stare Decisis]; 105 Harv. L. Rev. 151 [Antidiscrimination and Constitutional Accountability]; 107 Harv. L. Rev. 32 [Supreme Court 1992 Term; Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism]; 108 Harv. L. Rev. 26 [Supreme Court 1993 Term; Foreword: Law as Equilibrium]; 60 Cal. L. Rev. 1140 [Antidemocratic Character of Judicial Review]; 67 Cal. L. Rev. 1049 [Judicial Review and Democratic Theory]; 77 Cal. L. Rev. 234 [The Bicentennial of the Jurisprudence of Original Intent: The Recent Past]; 78 Cal. L. Rev. 1441 [Indeterminacy and

Incommensurability in Constitutional Law]; 81 *Cal. L. Rev.* 817 [Advocacy and Scholarship; constitutional decisions by the Supreme Court]; 91 *Cal. L. Rev.* 1 [bicentennial essay on *Marbury* and wages of doctrinal tension]; 9 *Hastings Const. L. Q.* 257 [The Constitution, the Supreme Court, and Creativity]; 14 *Hastings Const. L. Q.* 487 [defense of judicial activism]; 24 *Hastings Const. L. Q.* 359 [Judicial Supremacy and Nonjudicial Interpretation of the Constitution]; 19 *Hastings L. J.* 1 [defense of judicial activism]; 34 *Hastings L. J.* 1011 [Justice Rehnquist and Constitutional Interpretation]; 42 *Hastings L. J.* 1527 [Constitutional Turf Wars: Competing for the Consent of the Governed]; 8 *San Diego L. Rev.* 246 [Rx for a Nagging Constitutional Headache]; 23 *Santa Clara L. Rev.* 769 [judicial review as necessary to curb democratic despotism]; 22 *San Diego L. Rev.* 437 [judicial restraint]; 50 *So. Cal. L. Rev.* 1099 [Judicial Review in Democratic Theory]; 50 *So. Cal. L. Rev.* 1139 [Justiciability and Theories of Judicial Review: A Remote Relationship]; 62 *So. Cal. L. Rev.* 493 [What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition]; 63 *So. Cal. L. Rev.* 107 [Do We Have an Unwritten Constitution?]; 63 *So. Cal. L. Rev.* 1237 [The Political Dimension of Constitutional Adjudication]; 20 *Stanf. L. Rev.* 169 [Neutrality, Legitimacy, and the Supreme Court]; 27 *Stanf. L. Rev.* 703 [Do We Have an Unwritten Constitution?]; 44 *Stanf. L. Rev.* 219 [historical background and current significance of *Marbury v. Madison*.]

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 1 Rotunda 4th, §§1.2, 1.3.

(2) *Texts and Law Reviews*. See 1 Rotunda 4th, §1.4 et seq.; 58 *Stanf. L. Rev.* 455 [Judicial Review Before *Marbury*].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW

C. Power To Declare Laws Unconstitutional.

1. In General.

b. Administrative Agency Cannot Exercise Power.

7 Witkin Sum. Cal. Law Const Law § 74

[§ 74] Administrative Agency Cannot Exercise Power.

(1) *Former Rule.* In *Southern Pac. Trans. Co. v. Public Util. Com.* (1976) 18 C.3d 308, 134 C.R. 189, 556 P.2d 289, the Public Utilities Commission, in a proceeding involving the allocation of costs of installing and maintaining a safety device on a publicly used road, concluded that *Pub.Util.C. 1202.3* was unconstitutionally vague, and rendered a decision contrary to its terms. The Supreme Court, on review, annulled the decision, holding the statute valid. But on the basic issue of the authority of the Commission to hold a statute unconstitutional, the court (5-2) upheld the authority in an elaborate footnote (18 C.3d 311, footnote 2), reasoning that an "administrative agency's obligation to adhere to the Constitution is not limited to mere promulgation of rules, but extends to the agency's application of legislation to the facts presented." Further, the Constitution and statutes grant the Commission "wide administrative, legislative and judicial powers" (see *infra*, §1084), and restrict review to the Supreme Court to determine whether the Commission has regularly pursued its authority, "including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State" (see *infra*, §1108 et seq.).

Hand v. Board of Examiners in Veterinary Medicine (1977) 66 C.A.3d 605, 619, 136 C.R. 187, reconciled *Southern Pac. Trans. Co.* with a conflicting holding in *California v. Superior Court (Veta Co.)* (1974) 12 C.3d 237, 251, 115 C.R. 497, 524 P.2d 1281, 3 Cal. Proc. (4th), Actions, §321, by limiting the power to *administrative agencies of constitutional origin*. (See 90 Harv. L. Rev. 1682; 66 Cal. L. Rev. 180.)

(2) *Constitutional Prohibition of Power.* The majority ruling in *Southern Pac. Trans. Co.* was nullified in 1978 by the adoption of Cal. Const., Art. III, §3.5. The section provides that an "administrative agency, including an administrative agency created by the Constitution or an initiative statute," has *no power* to do the following:

(a) "To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination" that the statute is unconstitutional. (Cal. Const., Art. III, §3.5(a).)

(b) "To declare a statute unconstitutional." (Cal. Const., Art. III, §3.5(b).)

(c) "To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement" of the statute, unless an appellate court has made a determination that

enforcement of the statute is prohibited by federal law or regulations. (Cal. Const., Art. III, §3.5(c).)

(3) *Interpretation of Constitutional Prohibition.* Cal. Const., Art. III, §3.5(c) was construed in *Reese v. Kizer* (1988) 46 C.3d 996, 251 C.R. 299, 760 P.2d 495, holding that the Legislature may direct an administrative agency to implement a statute to the extent that it does not conflict with federal law. Welf.C. 14005.16, a provision of the Medi-Cal Act, provides for the determination of eligibility for benefits of married persons; and the Legislature, recognizing the possibility that the use of community property principles might be in conflict with federal law, directed (in an uncodified section) that the state Department of Health Services (DHS) should seek federal waivers necessary to implement the provisions, and that provisions for which waivers could not be obtained would not be implemented. (46 C.3d 999.) Plaintiffs brought a class action demanding implementation of Welf.C. 14005.16 notwithstanding DHS's determination that the statute was in conflict with federal law and regulations. The Court of Appeal ruled in their favor, construing the section as giving DHS the power to determine independently that Welf.C. 14005.16 was in conflict with federal law; to refuse to enforce it was an unconstitutional grant of power under Article III, §3.5(c). (46 C.3d 1001.) *Held*, judgment of Court of Appeal reversed.

(a) "This question, one of first impression, has profound implications for the state's participation in a number of joint federal-state programs. To assure the continued availability of federal funds for these programs the state must operate plans which conform to the governing federal statutes and regulations. As these myriad guidelines are subject to constant change, the state plans must remain flexible in their application or risk running afoul of federal rules. To accomplish this purpose, the state statutes governing the operation of these plans contain numerous provisions which call upon the administering state agency to determine the impact of federal law and federal regulations and to avoid doing anything which would create a conflict therewith." (46 C.3d 998.)

(b) The uncodified section merely directs the agency to effectuate the statute to the maximum extent allowed under federal law as determined by the relevant federal authorities. Cal. Const., Art. III, §3.5(c), was designed to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature. "Its language, however, cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. By limiting the implementation of a statute as directed by the Legislature, an agency neither 'declares it unenforceable' nor 'refuses to enforce it.' Indeed, far from thwarting the Legislature's mandate, such action precisely fulfills it." (46 C.3d 1002.) (See *Burlington Northern & Santa Fe Ry. Co. v. Public Util. Com.* (2003) 112 C.A.4th 881, 886, 5 C.R.3d 503 [Cal. Const., Art. III, §3.5(c) does not prohibit PUC from refusing to enforce statute that is inconsistent with another statute].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Former Rule.*

California v. Superior Court case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §344.



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CHAPTER X - Constitutional Law

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C. Power To Declare Laws Unconstitutional.

1. In General.

c. Presumption of Validity.

7 Witkin Sum. Cal. Law Const Law § 75

[§ 75] Presumption of Validity.

A legislative act is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity. (*Alabama State Federation of Labor, Local Union No. 103, United Brotherhood of Carpenters & Joiners of America v. McAdory* (1945) 325 U.S. 450, 65 S.Ct. 1384, 1394, 89 L.Ed. 1725, 1737; *People v. Globe Grain & Milling Co.* (1930) 211 C. 121, 127, 294 P. 3; *Lockyer v. San Francisco* (2004) 33 C.4th 1055, 1086, 17 C.R.3d 225, 95 P.3d 459, quoting the text; *Horeczko v. State Bd. of Registration* (1991) 232 C.A.3d 1352, 1358, 284 C.R. 149; see 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §166 et seq.) Thus, the speculative possibility of discriminatory or other invalid administration of a statute is not a ground for holding it void. (*People v. Globe Grain & Milling Co.*, supra; *Estate of Monks* (1941) 48 C.A.2d 603, 614, 120 P.2d 167; see infra, §703.)

In *Queenside Hills Realty Co. v. Saxl* (1946) 328 U.S. 80, 66 S.Ct. 850, 90 L.Ed. 1096, a statute required that lodging houses of nonfireproof construction existing prior to its enactment install automatic sprinkler systems. Appellant objected that since the law in terms applied only to existing houses, a new house could be erected without being subject to the regulation. *Held*, this was not a proper basis of attack. No showing was made that a new building had been constructed and the Legislature was competent to handle that situation when it arose by making the law applicable or by imposing different regulations.

American Motorists Ins. Co. v. Starnes (1976) 425 U.S. 637, 96 S.Ct. 1800, 48 L.Ed.2d 263, involved a Texas statute permitting suit (a) against a domestic corporation outside the county of its domicile only on proof by the plaintiff at a preliminary venue hearing by a preponderance of the evidence that he or she has a cause of action; but (b) against a foreign corporation outside of that county without this proof. Appellant, a foreign corporation sued outside the county of its residence, contended that the statute was unconstitutionally discriminatory in affording to domestic corporations an opportunity to preview its adversary's case and in requiring that adversary to prove his or her cause of action by a preponderance of the evidence. *Held*, the statute was not subject to constitutional challenge. Despite its seeming discriminatory operation, in practice, as counsel for both parties agreed, the proceedings are brief and prima facie proof is regarded as sufficient to meet the plaintiff's burden. Thus, the domestic corporate defendant does not have any appreciable advantage over the foreign corporate defendant. "Just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, ... so may a statute discriminatory on its face be nondiscriminatory in its operation." (96 S.Ct. 1804, 48 L.Ed.2d 271.)

However, where the statute limits the exercise of a fundamental right, particularly freedom of speech, the presumption is given less effect. (See 37 *Cal. L. Rev.* 122, 125; 21 *So. Cal. L. Rev.* 61, 63; *infra*, §406.) And in any case, "[c]onstitutional concepts are not static"; a law, deemed valid when originally enacted, may, in the light of modern thinking, be declared unconstitutional. (*People v. Belous* (1969) 71 *C.2d* 954, 967, 80 *C.R.* 354, 458 *P.2d* 194 [holding California abortion statute invalid].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

II. NATURE AND SCOPE OF CONSTITUTIONAL LAW

C. Power To Declare Laws Unconstitutional.

2. Standing: Interest of Party Attacking Constitutionality.

a. In General.

1. Nature of Standing Requirement.

7 Witkin Sum. Cal. Law Const Law § 76

[§ 76] Nature of Standing Requirement.

(1) *In General.* Ordinarily, the courts will not consider the constitutionality of a statute at the request of a person whose rights are not affected by it. The party attacking it must therefore show some injury, actual or threatened. (*Doremus v. Board of Education of Borough of Hawthorne* (1952) 342 U.S. 429, 72 S.Ct. 394, 397, 96 L.Ed. 475, 479; *Communist Party of the United States of America v. Subversive Activities Control Bd.* (1961) 367 U.S. 1, 81 S.Ct. 1357, 1396, 6 L.Ed.2d 625, 674; *McGowan v. Maryland* (1961) 366 U.S. 420, 81 S.Ct. 1101, 1107, 6 L.Ed.2d 393, 401; *Cramp v. Board of Public Instruction of Orange County, Florida* (1961) 368 U.S. 278, 82 S.Ct. 275, 278, 7 L.Ed.2d 285, 289.)

In *Allen v. Wright* (1984) 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556, *infra*, §77, the court, after pointing out that the standing doctrine "incorporates concepts concededly not susceptible of precise definition," said: "Determining standing in a particular case may be facilitated by clarifying principles or even clean rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" (104 S.Ct. 3325, 82 L.Ed.2d 569, 570.) (See *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364, *infra*, §139.)

(2) *Texts and Law Reviews.* Many texts and law reviews discuss standing issues. (See 1 Rotunda, §2.13; 1 Tribe, §3-14 *et seq.*; 72 Cal. L. Rev. 68 [rethinking standing]; 73 Cal. L. Rev. 52 [collective constitutional rights; standing to challenge government action]; 29 Cal. Western L. Rev. 1 [The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights]; 74 Harv. L. Rev. 1265 [public actions]; 86 Harv. L. Rev. 645 [functional analysis]; 112 Harv. L. Rev. 1313 [Expressive Harms and Standing]; 113 Harv. L. Rev. 1321 [As-Applied and Facial Challenges and Third-Party Standing]; 14 Hastings Const. L. Q. 595 [justiciability, standing, and ripeness as decision-avoidance techniques]; 16 Hastings Const. L. Q. 453 [voter standing as means to challenge nonprofit corporation's tax-exempt status]; 23 Santa Clara L. Rev. 811 [standing for state and federal legislators]; 14 Stanf. L. Rev. 433 [standing to sue: criticism of misuse of requirement]; 40 Stanf. L. Rev. 1371 [standing and the problem of

self-governance]; 42 *U.C.L.A. L. Rev.* 47 [paradox of antitrust and Lanham Act standing]; 35 *Proof of Facts* 3d 493 [proof of standing in environmental citizen suits]; 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §139 et seq.)

West's Key Number Digest, Constitutional Law k.41, 42

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Andal v. Stockton* (2006) 137 *C.A.4th* 86, 94, 40 *C.R.3d* 34, quoting the text.

(2) *Texts and Law Reviews*. See 1 *Rotunda* 4th, §2.13; 35 *Hastings Const. L. Q.* 169 [Untangling Tenth Amendment Standing: Why Private Parties Cannot Enforce the Federal Structure].



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7 Witkin Sum. Cal. Law Const Law § 77

[§ 77] Standing Not Shown.

In *Alabama Power Co. v. Ickes* (1938) 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374, a federal statute authorized contracts for financial assistance to municipalities for public power systems, and petitioner, a private power distributor in the particular area, sued to enjoin the making of the contracts. *Held*, it could not raise the constitutional issue of validity of the grants, because its only loss would be from lawful competition, and this would not be a legal injury. (58 S.Ct. 303, 82 L.Ed. 378.) (See 51 Harv. L. Rev. 897.)

In *Franklin v. Peterson* (1948) 87 C.A.2d 727, 197 P.2d 788, a Los Angeles city ordinance imposed license fees on persons engaged in various occupations and professions. Appellant, an attorney with a law office *within* the city, was held unable to raise the objection that the provisions of the ordinance were so broad as to include occupations carried on wholly *outside* the city by persons not residents of the city. (87 C.A.2d 730.)

In *Linda R.S. v. Richard D.* (1973) 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536, the mother of an illegitimate child brought a class action in the federal district court to "enjoin" a local district attorney in Texas from forbidding or declining prosecution of the father of her illegitimate child. The Texas law, as judicially construed, provided for criminal prosecution only of married parents, and plaintiff mother challenged this as an unconstitutional discrimination. *Held*, dismissal for want of standing affirmed: "[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant does have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws." (93 S.Ct. 1149, 35 L.Ed.2d 541.) (See *Simon v. Eastern Kentucky Welfare Rights Organization* (1976) 426 U.S. 26, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450, 464 [following *Linda R.S.*]; 90 Harv. L. Rev. 205 [Simon].)

In *Allen v. Wright* (1984) 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556, plaintiffs, parents of black public school children, brought a nationwide class action against the IRS, alleging that it had not adopted sufficient standards and procedures to deny tax-exempt status to racially discriminatory private schools. *Held*, they lacked standing.

(a) An asserted right to have the government act in accordance with the law is not sufficient, standing alone, to

confer jurisdiction. (104 S.Ct. 3326, 82 L.Ed.2d 571.) Standing may be based on "the stigmatizing injury often caused by racial discrimination," but *only* to those persons who are personally denied equal treatment. (104 S.Ct. 3326, 3327, 82 L.Ed.2d 572, citing *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, *infra*, §698; *O'shea v. Littleton* (1974) 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674, and *Rizzo v. Goode* (1976) 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561, *infra*, §843.) "In each of those cases, the plaintiffs alleged official racial discrimination comparable to that alleged by respondents here. Yet standing was denied in each case because the plaintiffs were not personally subject to the challenged discrimination." (104 S.Ct. 3327, 82 L.Ed.2d 572.) If the abstract stigmatic injury were cognizable, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school." (104 S.Ct. 3327, 82 L.Ed.2d 572, 573.)

(b) Plaintiffs further allege an identified injury--their children's diminished ability to receive an education in a racially integrated school. But this alleged injury cannot support standing because it is not fairly traceable to the government's conduct. The causal link--as in *Simon*--is too weak, for plaintiffs have not alleged that there were enough racially discriminatory private schools receiving tax exemptions in their communities to make an appreciable difference in public school integration. (104 S.Ct. 3328, 82 L.Ed.2d 574.)

Two justices dissented. (See 98 *Harv. L. Rev.* 236.)

In *Bender v. Williamsport Area School Dist.* (1986) 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501, high school students were denied permission to use school facilities for meetings of a religious club. They sued the school district, school board and its members, and other school officials, claiming violation of freedom of speech. The district court entered judgment for plaintiffs. The school district did not appeal, but an individual board member did. *Held*, the board member lacked standing. (a) No relief was sought against him in his *individual* capacity. (106 S.Ct. 1332, 89 L.Ed.2d 512.) (b) As a board member sued in his *official* capacity, he had no personal stake in the outcome of the litigation. (106 S.Ct. 1332, 89 L.Ed.2d 512.) (c) His status as parent of a student did not confer standing, because he was not sued in that capacity. (106 S.Ct. 1334, 89 L.Ed.2d 514.)

Many other cases exhibit a lack of standing. The following are illustrative:

Diamond v. Charles (1986) 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48, 63 [pediatrician who intervened to defend validity of state abortion statute had no standing to appeal where state did not].

United States v. Hays (1995) 515 U.S. 737, 115 S.Ct. 2431, 2433, 2436, 132 L.Ed.2d 635, 639, 643 [state residents who lived in one congressional district lacked standing to raise racial gerrymandering claim with respect to different congressional district].

Raines v. Byrd (1997) 521 U.S. 811, 117 S.Ct. 2312, 2322, 138 L.Ed.2d 849, 864 [individual members of Congress lacked standing to challenge constitutionality of Line Item Veto Act where they had insufficient "personal stake" in dispute and failed to allege sufficiently concrete injury]. (See 54 *Stanf. L. Rev.* 205 [Raines].)

Cornelius v. Los Angeles County Metropolitan Trans. Authority (1996) 49 C.A.4th 1761, 1768, 1770, 57 C.R.2d 618 [engineer lacked standing to challenge affirmative action program for award of contracts, where he was not licensed contractor and thus was legally unable to submit bids and lacked ownership interest in firms that could submit bids; applying *Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville, Florida* (1993) 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586, *infra*, §78, and *Adarand Constructors v. Pena* (1995) 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158, *infra*, §78].

People v. Superior Court (Manuel G.) (2002) 104 C.A.4th 915, 933, 128 C.R.2d 794 [minor lacked standing to assert equal protection challenge to statute prohibiting sealing of juvenile records of conviction for certain offenses; he was not treated differently than adult who commits same offense and cannot have conviction expunged under another provision].

SUPPLEMENT: [This section is current through the latest supplement]



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7 Witkin Sum. Cal. Law Const Law § 78

[§ 78] Standing Shown.

In *Board of Education of Central School Dist. No. 1 v. Allen* (1968) 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060, state school officials were held to have standing to challenge the constitutionality of a statutory duty imposed on them by state law. Having "taken an oath to support the United States Constitution," and believing the law "to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step ... that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation." (88 S.Ct. 1925, 20 L.Ed.2d 1064, footnote 5.) (See 82 Harv. L. Rev. 173, 174.)

In *Heckler v. Mathews* (1984) 465 U.S. 728, 104 S.Ct. 1387, 79 L.Ed.2d 646, a nondependent husband was held to have standing to challenge a provision of the Social Security Act granting greater benefits to nondependent women than to similarly situated men, despite a provision of the Act that prevented him from receiving greater benefits even if he prevailed. The Court explained:

"[T]he right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group ... , can cause serious *non-economic injuries* to those persons who are personally denied equal treatment solely because of their membership in a disfavored group. Accordingly ... the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by *withdrawal of benefits* from the favored class as well as by *extension of benefits* to the excluded class." (104 S.Ct. 1395, 79 L.Ed.2d 657.)

In *Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville, Florida* (1993) 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586, plaintiff association of contractors challenged a city ordinance that gave preferential treatment to certain minority-owned businesses in the award of city contracts. The issue was whether, to make its challenge, plaintiff was required to show that one of its members would have received a contract absent the ordinance. *Held*, this showing was not required. (113 S.Ct. 2299, 124 L.Ed.2d 592.) The Court distinguished *Lujan v. National Wildlife Federation* (1990) 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695, *infra*, §139, and *Warth v. Seldin*

(1975) 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, *infra*, §82, and followed *Regents of Univ. of Calif. v. Bakke* (1978) 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, *infra*, §969. (113 S.Ct. 2301 et seq., 124 L.Ed.2d 595 et seq.) The Court, after reviewing the relevant decisions, explained the basis for its conclusion as follows:

"Singly and collectively, these cases stand for the following proposition: When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' is the denial of equal treatment, resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. ... To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." (113 S.Ct. 2303, 124 L.Ed.2d 597.)

Two justices dissented. (See 107 Harv. L. Rev. 303.)

In *Adarand Constructors v. Pena* (1995) 515 U.S. 200, 115 S.Ct. 2097, 2104, 2105, 132 L.Ed.2d 158, 170, 172, an action seeking declaratory and injunctive relief against *future* use of subcontractor compensation clauses favoring disadvantaged businesses, the Court held that allegations that the use of these clauses denied plaintiff, a nondisadvantaged subcontractor, equal protection, and that plaintiff was very likely to bid on these contracts in the near future, were sufficient to establish that the injury was particularized and imminent.

In *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 C.A.4th 1011, 50 C.R.2d 892, the court, disapproving its decision in *Associated Boat Industries of Northern Calif. v. Marshall* (1951) 104 C.A.2d 21, 230 P.2d 379, and declining to follow *Lujan*, held that an organization may be an "interested" party, for purposes of challenging an administrative regulation under Govt.C. 11350 (see 9 Cal. Proc. (4th), Admin. Proc., §118), if it or its members may be impacted by the regulation. (43 C.A.4th 1016, 1017, 1020.) (See *Coral Const. v. San Francisco* (2004) 116 C.A.4th 6, 19, 10 C.R.3d 65 [although contractor failed to identify city contract on which it would be bidding, contractor had standing to challenge ordinance giving preferential treatment to women-and minority-owned businesses in bids for city contracts; contractor had suffered actual injury from application of ordinance in past and is ready, willing, and able to bid on future contracts but, under ordinance, will be forced to compete on unequal basis].)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §141 et seq.



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b. First Amendment Challenge.

7 Witkin Sum. Cal. Law Const Law § 79

[§ 79] First Amendment Challenge.

(1) *In General.* In the area of First Amendment freedoms, there is great danger in allowing a penal statute of broad scope to remain unchallenged until a party is able to show its injurious application to him or her. Accordingly, the cases relax the requirement. Thus, in *Freedman v. Maryland* (1965) 380 U.S. 51, 85 S.Ct. 734, 737, 13 L.Ed.2d 649, 653, infra, §371, appellant was allowed to challenge Maryland's moving picture censorship law for failure to provide adequate procedural safeguards, even though he could have had a license for his own picture if he had asked for it. (See *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, 415, infra, §383; *Fort v. Civil Service Com. of Alameda* (1964) 61 C.2d 331, 339, 38 C.R. 625, 392 P.2d 385, infra, §255 [exception is appropriate wherever overly broad or vague provision, "if allowed to stand, would amount to a coercive restraint on free speech"]; on uncertainty and overbreadth challenge to statute on First Amendment grounds, see infra, §408 et seq.)

But unless a substantial First Amendment right is involved, a litigant whose conduct is precisely proscribed by a statute has no standing to argue that the law is vague or overly broad as applied to others. (See *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830, 838 [state employees clearly covered by valid prohibitions against partisan political activity had no standing to attack overbreadth of statute that might affect rights of others]; *Vallejo v. Adult Books* (1985) 167 C.A.3d 1169, 1175, 213 C.R. 143; *In re Andre P.* (1991) 226 C.A.3d 1164, 1170, 277 C.R. 363 [following *Broadrick*; statute clearly pertained to defendant's conduct]; *Bailey v. National City* (1991) 226 C.A.3d 1319, 1331, 277 C.R. 427 [rule regulating right of "intimate," but not "expressive," association is not subject to First Amendment overbreadth challenge by defendant whose conduct is proscribed by rule].)

(2) *Strict View: No Standing.* In *Laird v. Tatum* (1972) 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154, a stricter view of standing in the First Amendment area was declared. Plaintiffs were civilians whose lawful political actions in protesting governmental policies were subjected to surveillance by Army intelligence personnel. The Army alleged the need for data on potential disruptions, so that its duties under 10 U.S.C., §311 (to suppress domestic insurrection when ordered to do so by the President) could be performed without resort to "blind force." Plaintiffs sought declaratory and injunctive relief on behalf of themselves and all others similarly situated. They did not allege any misuse of the information collected, asserting only that the Army's actions "chilled" their exercise of First Amendment rights. *Held* (5-4), the complaint was properly dismissed. The Army's actions were neither "regulatory, proscriptive, [n]or compulsory in nature," and "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective

harm or a threat of specific future harm." (92 S.Ct. 2325, 2326, 33 L.Ed.2d 162, 163.)

The dissent agreed with the Court of Appeals that the Army's activities imposed a "present inhibiting effect." (92 S.Ct. 2331, 2337, 33 L.Ed.2d 170, 177.) (See 86 Harv. L. Rev. 135 [*Laird v. Tatum*; suggesting that majority introduced innovation in requiring immediate threat, explainable in part by class nature of action]; 3 *Hastings Const. L. Q.* 254 [*Laird v. Tatum*]; 30 U.C.L.A. L. Rev. 976 [The Justiciability and Constitutionality of Political Intelligence Gathering].)

(3) *Liberal View: Standing Shown*. In *Secretary of State of Maryland v. Joseph H. Munson Co.* (1984) 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786, respondent, a professional fundraiser, challenged a statute that prohibited any charitable organization from paying expenses of more than 25% of the amount it raised. *Held*, standing was shown. Respondent has suffered both threatened and actual injury and hence satisfies the "case or controversy" requirement of Article III; and, because the case involves a First Amendment challenge to an allegedly overbroad statute, respondent may assert the third-party rights of the charities regardless of their own ability to do so. (104 S.Ct. 2847, 81 L.Ed.2d 794, 796.)

The basic theory was stated in *People v. Fogelson* (1978) 21 C.3d 158, 145 C.R. 542, 577 P.2d 677: "[R]eview is permitted in these circumstances because case-by-case adjudication may not fully vindicate the constitutional rights at stake. The actual application of an overbroad ordinance is not its only vice; it may also have a substantial deterrent impact or 'chilling effect' on the exercise of constitutional rights. Faced with a regulation that threatens to impose sanctions upon free speech or the free exercise of religion, significant numbers of persons may elect not to exercise those rather than undergo the rigors of litigation and the risk of eventual punishment. While it is crucial that persons not be punished for having exercised their rights of free speech and religion, it is equally important that they not be deterred from such conduct." (21 C.3d 163.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Matrixx Initiatives v. Doe* (2006) 138 C.A.4th 872, 879, 42 C.R.3d 79 [litigants who were not parties in underlying defamation action had no standing to challenge discovery of identities of Doe defendants in that action; there was no close relationship between litigants and persons for whom they were seeking First Amendment protection, and litigants failed to demonstrate that there was some hindrance to ability of Doe defendants to protect their own interests].



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7 Witkin Sum. Cal. Law Const Law § 80

[§ 80] State or Local Taxpayer.

A taxpayer may challenge the constitutionality of a tax or the expenditure of tax money by the state or its subdivisions. (See *Crampton v. Zabriskie* (1879) 101 U.S. 601, 25 L.Ed. 1070 [issuance of county bonds in violation of state statute]; *Ames v. Hermosa Beach* (1971) 16 C.A.3d 146, 150, 93 C.R. 786 [enforcement of overbroad penal statute]; 74 Harv. L. Rev. 1265; 82 Harv. L. Rev. 224; 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §155.)

C.C.P. 526a has been used to claim or deny standing in a variety of situations. (See *Fiske v. Gillespie* (1988) 200 C.A.3d 1243, 1245, 1246, 246 C.R. 552 [C.C.P. 526a does not authorize general challenge with no reference to specific application of statute; actual expenditure or threat of expenditure of public funds is required]; *Ventura v. State Bar* (1995) 35 C.A.4th 1055, 1059, 1060, 41 C.R.2d 794 [district attorney had standing to challenge State Bar's calculation of Hudson fees deduction from bar dues (see infra, §385), because payment of those fees by district attorney would constitute financial contribution to political and ideological activities and hence would subject him to taxpayer's action under C.C.P. 526a for waste of public funds]; *Cornelius v. Los Angeles County Metropolitan Trans. Authority* (1996) 49 C.A.4th 1761, 1768, 1770, 57 C.R.2d 618 [plaintiff who did not reside or pay property taxes in county, but alleged that he paid state income taxes and county sales and gasoline taxes, lacked standing under C.C.P. 526a to challenge affirmative action program].)

In *White v. Davis* (1975) 13 C.3d 757, 764, 120 C.R. 94, 533 P.2d 222, infra, §575, a city taxpayer brought an action under C.C.P. 526a against defendant Chief of Police to enjoin expenditure of public funds for an intelligence gathering program. Held, the taxpayer had standing to sue. *Laird v. Tatum* (1972) 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154, supra, §79, and other federal cases holding that no justiciable issue was presented for a federal court action under the Civil Rights Act, are distinguishable. Under C.C.P. 526a, no showing of special damage to the particular taxpayer is necessary; the primary purpose of the statute is to enable a large body of the citizenry to challenge governmental action that would otherwise go unchallenged because of the standing requirement. (13 C.3d 764.) The use of C.C.P. 526a to challenge the legality of ongoing police practices is established by *Wirin v. Horrall* (1948) 85 C.A.2d 497, 193 P.2d 470, and *Wirin v. Parker* (1957) 48 C.2d 890, 313 P.2d 844, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §354. (13 C.3d 763.) (See *Blair v. Pitchess* (1971) 5 C.3d 258, 96 C.R. 42, 486 P.2d 1242, 4 Cal. Proc. (4th), *Pleading*, §145 [liberal construction of statute]; on taxpayers' actions generally, see 4 Cal. Proc. (4th), *Pleading*, §144 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Blair case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §163.

Taxpayers' actions:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §162 et seq.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
II. NATURE AND SCOPE OF CONSTITUTIONAL LAW
C. Power To Declare Laws Unconstitutional.
2. Standing: Interest of Party Attacking Constitutionality.
d. Federal Taxpayer.

7 Witkin Sum. Cal. Law Const Law § 81

[§ 81] Federal Taxpayer.

(1) *Attack on Levy of Tax.* A federal taxpayer may object to the levy of a tax against him or her before it is paid. (*United States v. Butler* (1936) 297 U.S. 1, 56 S.Ct. 312, 315, 80 L.Ed. 477, 484; see 9 *Summary* (10th), *Taxation*, §108; 1 Rotunda, §2.13.)

(2) *Action To Enjoin Expenditure: Sufficient Showing.* It was originally thought that a taxpayer's interest was too remote to permit him or her to enjoin a federal appropriation. Hence, in *Massachusetts v. Mellon* (1923) 262 U.S. 447, 43 S.Ct. 597, 601, 67 L.Ed. 1078, 1085, relief was denied to a federal taxpayer who attacked the Maternity Act (a statute appropriating funds for promoting infant hygiene) as unconstitutional. (See 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §155.)

The *Mellon* case was distinguished and limited in *Flast v. Cohen* (1968) 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947. Appellants sought to enjoin defendant Secretary of Health, Education and Welfare from expending federal funds under the Elementary and Secondary Education Act of 1965. The ground urged was that some of the money was being used to further instruction in religious schools in violation of the First Amendment (*infra*, §529). *Held*, appellants had standing to sue.

(a) *Basic concepts.* "Justiciability," a word of uncertain meaning, embraces the ideas of nonjusticiable question (e.g., political question or moot case) and standing; and it has become a blend of constitutional requirements and policy considerations. (88 S.Ct. 1951, 20 L.Ed.2d 960.) "Standing" is an aspect of justiciability--an amorphous concept that sometimes serves as a shorthand expression for all elements of justiciability. (88 S.Ct. 1952, 20 L.Ed.2d 961.) But standing raises the question whether the person whose standing is challenged is a proper party to request adjudication of a particular issue, not whether the issue itself is justiciable. (88 S.Ct. 1952, 20 L.Ed.2d 961.)

(b) *Test of standing of federal taxpayer.* A federal taxpayer must establish two links: *First*, a logical link between his or her status and the type of legislative enactment attacked; i.e., the taxpayer may only attack the exercise of congressional power under the Taxing and Spending Clause of U.S. Const., Art. I, §8. *Second*, a link between the taxpayer's status and the precise nature of the constitutional infringement; i.e., the taxpayer must show that the enactment is a violation of the taxing and spending power, not merely that it is beyond congressional powers. (88 S.Ct.

1954, 20 L.Ed.2d 963.)

(c) *Mellon distinguished*. The taxpayer in *Mellon* satisfied only the first link: He attacked a federal spending program, but merely contended that the Maternity Act invaded state powers reserved by the *Tenth Amendment*. (88 S.Ct. 1955, 20 L.Ed.2d 964.)

(d) *Standing established*. The taxpayer in the instant case satisfied both requirements: The Establishment and Free Exercise Clauses (infra, §507 et seq.) were drafted because of fear that the taxing and spending power would be used to favor one religion or support religion, and the Establishment Clause operates as a specific constitutional limitation on the exercise of the taxing and spending power. (88 S.Ct. 1954, 20 L.Ed.2d 963.)

(e) *Conclusion*. "[A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review." (88 S.Ct. 1955, 20 L.Ed.2d 967.) (See 82 Harv. L. Rev. 224, 296; 86 Harv. L. Rev. 660; 16 U.C.L.A. L. Rev. 444.)

(3) *Action To Enjoin Expenditure: Insufficient Showing*. In *United States v. Richardson* (1974) 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678, plaintiff, a federal taxpayer, sued to compel defendant Secretary of the Treasury to give an accounting of expenditures by the Central Intelligence Agency and to enjoin further publication of statements that did not reflect those expenditures. *Held*, the taxpayer lacked standing. He was seeking "to employ a federal court as a forum in which to air his generalized grievances about the conduct of the government." (94 S.Ct. 2946, 41 L.Ed.2d 687.) "It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." (94 S.Ct. 2947, 41 L.Ed.2d 689.)

Schlesinger v. Reservists Committee To Stop The War (1974) 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706, took the same position regarding a class suit against the Secretary of Defense and others challenging the military policy allowing members of Congress to retain their status in the Armed Forces Reserves.

Both opinions emphasize the continued vitality of *Ex parte Levitt* (1937) 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493, holding that standing may not be based on an interest held in common by all members of the public. (94 S.Ct. 2932, 2937, 41 L.Ed.2d 716, 720.) (See *Simon v. Eastern Kentucky Welfare Rights Organization* (1976) 426 U.S. 26, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450, 461; *Valley Forge Christian College v. Americans United for Separation of Church & State* (1982) 454 U.S. 464, 102 S.Ct. 752, 758, 70 L.Ed.2d 700, 712; 88 Harv. L. Rev. 236 [Richardson and Schlesinger]; 90 Harv. L. Rev. 205 [Simon]; 96 Harv. L. Rev. 12, 196 [Valley Forge]; 27 Hastings L. J. 213 [Richardson and Schlesinger].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Attack on Levy of Tax*. See 1 Rotunda 4th, §2.13.(3) *Action To Enjoin Expenditure: Insufficient Showing*. In *Hein v. Freedom From Religion Foundation* (2007) 551 U.S. 587, 127 S.Ct. 2553, 2564, 168 L.Ed.2d 424, 439, the Court refused to extend the exception for taxpayer standing established in *Flast v. Cohen* (1968) 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947, text, p. 177, to expenditures by the Executive Branch that do not involve an Act of Congress. Plaintiff members of an organization that opposed government endorsement of religion claimed that expenditures for conferences held in connection with the Executive Branch's faith-based initiatives program violated the Establishment Clause by promoting religious community groups over secular ones. *Held*, in the plurality opinion and judgment of the court, plaintiffs lacked standing. Two justices would have overruled *Flast* (127 S.Ct. 2573, 168 L.Ed. 2d 450), and four justices would have applied *Flast* to provide standing here (127 S.Ct. 2584, 168 L.Ed. 2d 462). (See 121 Harv. L. Rev.

325 [*Hein*].)



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7 Witkin Sum. Cal. Law Const Law § 82

[§ 82] General Rule and Warth Test.

(1) *Theory of Rule.* In consonance with the general doctrine that injury must be shown (*supra*, §76), it is often declared that, where a statute is alleged to be discriminatory, only a member of the class discriminated against can attack it. (*Tileston v. Ullman* (1943) 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603; *In re Nowak* (1921) 184 C. 701, 709, 195 P. 402; *Fox-Woodsum Lumber Co. v. Bank of America* (1936) 7 C.2d 14, 22, 59 P.2d 1019.) However, this rule is not inflexible, and several important exceptions have been recognized. (See *infra*, §84 et seq.; 1 Tribe, §3-15 et seq.; 86 Harv. L. Rev. 645 [functional analysis of standing]; 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §147 et seq.)

(2) *Warth Case.* In *Warth v. Seldin* (1975) 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, plaintiffs, residents of Rochester, sued an adjacent town, claiming that its zoning ordinance excluded persons of low and moderate income from living there. *Held*, they lacked standing because they asserted only a remote possibility of harm to their personal interests. (95 S.Ct. 2209, 45 L.Ed.2d 360.) "[A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention." (95 S.Ct. 2210, 45 L.Ed.2d 360.) (See *Simon v. Eastern Kentucky Welfare Rights Organization* (1976) 426 U.S. 26, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450, 464 [following *Warth*]; *Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) 429 U.S. 252, 97 S.Ct. 555, 562, 50 L.Ed.2d 450, 464 [Warth test met]; *Hunt v. Washington State Apple Advertising Com.* (1977) 432 U.S. 333, 97 S.Ct. 2434, 2440, 53 L.Ed.2d 383, 394 [same]; *Allen v. Wright* (1984) 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556, *supra*, §77; on rejection of Warth test in California, see *infra*, §83.)

In *Gladstone, Realtors v. Village of Bellwood* (1979) 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66, *infra*, §89, an action alleging discrimination in housing under Title VIII of the Civil Rights Act of 1968 (see *infra*, §851), the Court restated the doctrine as follows:

(a) The inquiry into standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." (99 S.Ct. 1607, 60 L.Ed.2d 76, quoting *Warth*.)

(b) Even when a case falls within constitutional boundaries, a plaintiff may still lack standing under "the prudential

principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." (99 S.Ct. 1608, 60 L.Ed.2d 77.) The plaintiff must normally assert an injury peculiar to himself or herself or to a distinct group of which the plaintiff is a part, rather than an injury shared in substantially equal measure by all or a large class; and the plaintiff must also assert his or her own legal interests rather than those of third parties. (99 S.Ct. 1608, 60 L.Ed.2d 77, citing *Warth*.)

(3) *Texts and Law Reviews*. The *Warth* rule has been the subject of numerous texts and law reviews. (See 1 Rotunda §2.13; 1 Tribe §3-18; 88 *Harv. L. Rev.* 423 [analysis and criticism]; 89 *Harv. L. Rev.* 189; 90 *Harv. L. Rev.* 205 [*Simon* case]; 90 *Harv. L. Rev.* 1632 [standing of member of Congress to challenge validity of executive action or policy]; 91 *Harv. L. Rev.* 1373 [Insular Majorities Unabated]; 3 *Hastings Const. L. Q.* 485; 23 *Pacific L. J.* 223 [later cases]; 18 *Santa Clara L. Rev.* 183 [federal standing since *Warth*]; 9 *Southwestern U. L. Rev.* 1247 [aftermath of *Warth*]; 29 *Stanf. L. Rev.* 323.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Law Reviews*. See 1 Rotunda 4th, §2.13.



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e. Member of Injured Class.

2. California Test.

7 *Witkin Sum. Cal. Law Const Law* § 83

[§ 83] California Test.

In *Stocks v. Irvine* (1981) 114 C.A.3d 520, 170 C.R. 724, six plaintiffs alleged that by exclusionary zoning practices (see *infra*, §1030 et seq.), defendant city of Irvine had made it impossible for them to find affordable housing in the city, thereby denying them equal protection of the law. The trial judge, relying on *Warth v. Seldin* (1975) 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, *supra*, §82, granted summary judgment for defendants on the ground that plaintiffs had no standing to sue. The appellate court first observed that the relevant facts in *Warth* were identical to those in this case (114 C.A.3d 526, 527), and that the sole issue was standing to sue. Hence, for purposes of the appeal, "we will assume that Irvine's zoning practices purposefully excluded low and middle income persons, violating constitutional and statutory rights of the persons excluded and of those persons harmed by the adverse effect on the regional housing market." (114 C.A.3d 526.) *Held*, summary judgment reversed.

(a) *Warth standing requirements are not binding on California courts.* Although *Warth* was cited in two California cases, neither adopted its standing test. (114 C.A.3d 528, 530.)

(b) *Sufficiency of complaint.* Plaintiffs alleged facts showing that they are aggrieved and have a real and personal interest in the outcome of the litigation. "[T]o challenge exclusionary zoning practices in California does not depend on plaintiffs showing a 'substantial probability' that their injuries would not exist but for those practices. It is sufficient that they show a causal relationship by alleging that the city's zoning practices have excluded them from desired residency in that city or that those practices have raised their housing costs outside that city by adversely affecting the regional housing market. Such allegations show membership in the class discriminated against and the 'real' and 'personal' interest that entitles plaintiffs to bring the action. To require more would deny access to the courts to plaintiffs with legitimate justiciable causes." (114 C.A.3d 532.)

(c) *Effect on judicial review.* "Applying the *Warth* standard in California would have the effect of putting the most restrictive zoning ordinances beyond judicial review. The more restrictive a city's zoning becomes, the less likely it will be that a builder will propose a housing project that would satisfy the needs of the excluded group. Such an act by a builder becomes an increasingly futile gesture. Without a proposed project, however, plaintiffs could not meet *Warth's* 'substantial probability' test." (114 C.A.3d 533.)

(d) *Conclusion.* "We do not share the concern expressed in *Warth* that plaintiffs' dependence on third party builders to obtain housing may render a trial court's decision advisory. We *are* concerned that making plaintiffs' standing to challenge exclusionary zoning practices dependent on the discretionary acts of the housing construction industry (i.e., the proposal of projects) will unjustly deny the plaintiffs access to judicial redress." (114 C.A.3d 537.)

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3. Class Member Unable To Challenge Law.

7 Witkin Sum. Cal. Law Const Law § 84

[§ 84] Class Member Unable To Challenge Law.

When there is no way in which a member of the class discriminated against can raise the objection, anyone affected by the statute can raise it. In *Quong Ham Wah Co. v. Industrial Acc. Com. of Calif.* (1920) 184 C. 26, 192 P. 1021, the validity of the Workers' Compensation Act was attacked by an employer on the ground that it gave the Commission jurisdiction, where the contract of employment was made within the state, over injuries incurred outside the state, only when the workers were residents of California, and not when they were nonresidents. Because the Commission could not consider the claim of a nonresident employee, the Supreme Court could never hear his or her objection to the constitutionality of the Act. *Held*, the employer could raise the question. (184 C. 33.)

N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488, 1497, *infra*, §379, is another illustration. Petitioner, an organization, was allowed to challenge an order for disclosure of its membership lists. Obviously, the individual members affected could not raise the issue without disclosing their membership and nullifying their claimed right of privacy.

In *Eisenstadt v. Baird* (1972) 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349, a Massachusetts statute authorized distribution of contraceptives only by physicians and pharmacists, and only to married persons. B, not a physician or pharmacist, delivered a lecture, after which he gave a contraceptive to a woman described as "an unmarried adult." He was convicted of violating the statute, and his standing to attack its discriminatory nature (see *infra*, §560) was challenged by the state on the grounds that he was married and not prohibited from obtaining contraceptives himself, and, unlike the appellants in *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, *infra*, §85, he had no professional relationship to the distributee. *Held*, he had standing. The unmarried user of the contraceptive was not subject to prosecution, and had no forum to assert his or her own rights. (92 S.Ct. 1034, 31 L.Ed.2d 356.) (See *Craig v. Boren* (1976) 429 U.S. 190, 97 S.Ct. 451, 457, 50 L.Ed.2d 397, 406 [following *Eisenstadt*; licensed vendor of beer was entitled to challenge statute discriminating against males under 21 years of age]; 86 Harv. L. Rev. 116 [*Eisenstadt*]; 88 Harv. L. Rev. 426 [same].)

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4. Complainant Injured by Law.

7 *Witkin Sum. Cal. Law Const Law* § 85

[§ 85] Complainant Injured by Law.

Where the complainant is injured by legislation, he or she may raise the question of the constitutionality of the statute, even though the complainant is not a member of the class discriminated against. Thus, in *Buchanan v. Warley* (1917) 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, an ordinance prohibited "colored" persons from living in a particular area. Plaintiff, a Caucasian, contracted to sell to a Black, and, in a suit for specific performance, defendant relied on the ordinance as a defense. Plaintiff claimed that it was an unconstitutional discrimination against "colored" persons. *Held*, the claim could be heard, because the law injured the plaintiff by narrowing the market for his land. (See *Clinton v. New York* (1998) 524 U.S. 417, 118 S.Ct. 2091, 2099, 141 L.Ed.2d 393, 409 [health care providers had standing to challenge constitutionality of Line Item Veto Act where they were injured by President's cancellation of statutory protection against federal government's right to recoup taxes that state had levied against Medicaid providers]; *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 6, footnote 1, 95 C.R. 329, 485 P.2d 529, *infra*, §765 [employer could raise constitutional rights of women excluded from employment in bar because statute subjected employer to criminal liability and license revocation for hiring them]; *Gowens v. Bakersfield* (1960) 179 C.A.2d 282, 285, 3 C.R. 746, 9 Summary (10th), Taxation, §50; 78 Harv. L. Rev. 667 [standing of white defendant to challenge exclusion of Blacks from jury lists]; 78 Harv. L. Rev. 1667 [standing of Blacks already admitted to white school to challenge segregated school system]; 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §145 et seq.)

In *Barrows v. Jackson* (1953) 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, defendant, a Caucasian who sold land and permitted non-Caucasians to occupy it, was sued for damages by other parties to a racial restrictive covenant, and challenged the constitutionality of this attempted indirect enforcement of the covenant (*infra*, §746). The situation was unique in that the attack was not on a statute but against *state court action* (*infra*, §700), and it would have been difficult if not impossible for the members of the class discriminated against to raise the issue. Hence, the Court thought that the reasons underlying its rule of practice were outweighed by the need to protect the fundamental rights involved. "The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant, so universally condemned by the courts." (73 S.Ct. 1036, 97 L.Ed. 1597.) (See

67 *Harv. L. Rev.* 105; 1 *U.C.L.A. L. Rev.* 98.)

In *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 1679, 14 L.Ed.2d 510, 512, *infra*, §560, appellants, officials of the Planned Parenthood League, were held to have standing to raise the constitutional rights of married persons to advise on contraception, where they had a professional relationship with these persons. The court relied on *Truax v. Raich* (1915) 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, *infra*, §721, where an employee asserted the rights of an employer; *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, *infra*, §519, where school owners asserted the rights of pupils; and *Barrows v. Jackson, supra*. (See 79 *Harv. L. Rev.* 162; 88 *Harv. L. Rev.* 423.)

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5. Challenge by State, Subdivision, or Court.

7 *Witkin Sum. Cal. Law Const Law* § 86

[§ 86] Challenge by State, Subdivision, or Court.

(1) *State*. The state, in enforcing a regulatory statute, may challenge an invalid exemption from its terms. If the exemption is unconstitutional it has no effect (see *infra*, §105), and those who are not exempted have no basis for a challenge on equal protection grounds. Hence, unless the state can make a challenge, the exempted class escapes operation of the statute and those not exempted would be denied equal protection. (*People v. Building Maintenance Contractors' Assn.* (1953) 41 C.2d 719, 726, 264 P.2d 31; see 77 Harv. L. Rev. 1157 [standing of U.S. to sue to enjoin city segregative practice]; on standing of state to challenge federal statute, see *infra*, §87.)

(2) *State Agencies*. As a general rule, state agencies may not raise constitutional challenges to actions by other state agencies. This rule applies where the right is a First Amendment right designed to protect individuals from government encroachment. (*Native Amer. Heritage Com. v. Board of Trustees* (1996) 51 C.A.4th 675, 683, 59 C.R.2d 402 [university lacked standing to challenge actions of California Native American Heritage Commission].)

(3) *Special Districts*. Fire protection and water districts, as political subdivisions of the state, lack standing to challenge the constitutionality of statutes allocating property tax revenues. (*San Miguel Consol. Fire Protection Dist. v. Davis* (1994) 25 C.A.4th 134, 143, 145, 30 C.R.2d 343.)

(4) *County or City*. A city or county has a limited right to challenge state legislation: (a) A subordinate political entity, as a "creature" of the state, cannot challenge state action as violative of the entity's rights under the Due Process, Equal Protection, or Contract Clauses. (b) But it has standing to raise the claim of federal supremacy or commerce power. "State action cannot be so insulated from scrutiny that encroachments on the federal government's constitutional powers go unredressed." (*Star-Kist Foods v. Los Angeles* (1986) 42 C.3d 1, 8, 9, 227 C.R. 391, 719 P.2d 987; see *Selinger v. City Council* (1989) 216 C.A.3d 259, 271, 264 C.R. 499 [city had standing to challenge constitutionality of Permit Streamlining Act, *Govt.C.* 65920 et seq., where citizens' rights were bound up with city's duties under law and short time period for making challenges created obstacles to citizens' ability to protect own rights].)

(5) *Court*. A court has jurisdiction to determine its own jurisdiction; hence, it may inquire into the constitutionality of a statute conferring jurisdiction on it. (*Mendoza v. Small Claims Court of Los Angeles Judicial Dist.* (1958) 49 C.2d

668, 670, 321 P.2d 9.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *County or City*. See *Santa Monica v. Stewart* (2005) 126 C.A.4th 43, 60, 24 C.R.3d 72 [distinguishing *Selinger v. City Council* (1989) 216 C.A.3d 259, 264 C.R. 499, text, p. 184; city lacked standing to challenge constitutionality of voter-approved initiative; city had minimal responsibilities under initiative, and there was no allegation of actual or threatened action that would injure city or violate its rights]; *Sanchez v. Modesto* (2006) 145 C.A.4th 660, 676, 51 C.R.3d 821 [following *Selinger*; city had standing on behalf of citizens to assert equal protection challenge to race-related changes in voting system; citizens' equal protection interest was inextricably bound up with city's interest in continuing present system and there were genuine obstacles to citizens asserting own rights]; *San Diego v. San Diego NORML* (2008) 165 C.A.4th 798, 818, 81 C.R.3d 461 [although counties lacked standing to obtain advisory opinion declaring entirety of Medical Marijuana Program Act invalid under preemption principles, they had standing to challenge those portions of Act that created obligation on them to adopt and operate identification card system, which obligation would be obviated if Act were preempted by federal law].



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3. Political Questions.

a. General Rule.

7 Witkin Sum. Cal. Law Const Law § 87

[§ 87] General Rule.

It has long been held that the courts have no power to make decisions on political matters; relief is limited to cases in which the rights of persons or property are involved. (*Luther v. Borden* (1849) 48 U.S. 1, 7 How. 1, 12 L.Ed. 581, 598; *Taylor v. Beckham* (1900) 178 U.S. 548, 20 S.Ct. 890, 44 L.Ed. 1187; *Pacific States Tel. & Tel. Co. v. Oregon* (1912) 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377; *Coleman v. Miller* (1939) 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385; *Colegrove v. Green* (1946) 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, *infra*, §88; *Nixon v. United States* (1993) 506 U.S. 224, 113 S.Ct. 732, 735, 740, 122 L.Ed.2d 1, 8,14; see 1 Rotunda, §2.16; 1 Tribe, §3-13; 62 Cal. L. Rev. 1344; 78 Cal. L. Rev. 1341 [The Justiciability of Legislative Rules]; 87 Cal. L. Rev. 1265 [prudential approach to political questions]; 53 Harv. L. Rev. 134; 71 Harv. L. Rev. 1057; 90 Harv. L. Rev. 1643; 100 Harv. L. Rev. 1125; 107 Harv. L. Rev. 293 [Nixon]; 9 Hastings Const. L. Q. 231; 14 Hastings Const. L. Q. 595 [justiciability as myth that hides decisions on merits]; 22 U.C.L.A. L. Rev. 633; 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §123.)

In *Massachusetts v. Mellon* (1923) 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078, Massachusetts sought to enjoin federal officers from administering the federal Maternity Act on the ground that the Act was beyond the powers of Congress and a usurpation of the reserved powers of the state. *Held*, the question was merely one of political power, there being no injury to property rights of the state itself. (43 S.Ct. 600, 67 L.Ed. 1084.) (See *Hopkins Fed. Savings & Loan Assn. v. Cleary* (1935) 296 U.S. 315, 56 S.Ct. 235, 242, 80 L.Ed. 251, 260 [federal statute attempted to permit conversion of state corporations to federal corporations in violation of local law; state, to protect its citizens from these unauthorized acts of the corporations, could bring the action]; see 56 Harv. L. Rev. 800.)

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." (*Japan Whaling Assn. v. American Cetacean Soc.* (1986) 478 U.S. 221, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166, 178, *infra*, §88.)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, §2.16; 119 Harv. L. Rev. 1274 [Judicially Manageable Standards and Constitutional Meaning]; 9 A.L.R.6th 177 [Construction and Application of Political Question Doctrine by State Courts].



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Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW

C. Power To Declare Laws Unconstitutional.

3. Political Questions.

b. Illustrations.

7 Witkin Sum. Cal. Law Const Law § 88

[§ 88] Illustrations.

(1) *Election Matters*. In *Colegrove v. Green* (1946) 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, an Illinois statute set up congressional election districts differing widely in population. Plaintiffs, contending that the result was to deny them, as voters, the equal protection of the laws, sought to restrain officials from conducting an election. The Court denied relief without a majority opinion (three justices holding the question political and hence nonjusticiable, one holding it a proper case for discretionary refusal of equitable relief, and three dissenting). (See *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 81 S.Ct. 125, 130, 5 L.Ed.2d 110, 116, *infra*, §238 [distinguishing *Colegrove* and holding question justiciable]; 71 Harv. L. Rev. 1057 [Legislative Apportionment and the Federal Courts].)

A new and more liberal approach to election matters was inaugurated in *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, holding that the issue of discriminatory apportionment of election districts was justiciable. (See *infra*, §294.)

(2) *Republican Form of Government*. The political question restriction was invoked to refuse judicial determination of questions arising under Article IV, §4 of the federal Constitution: "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence." (*Pacific States Tel. & Tel. Co. v. Oregon* (1912) 223 U.S. 118, 32 S.Ct. 224, 228, 56 L.Ed. 377, 382, 386; see 1 Rotunda, §2.16; 94 Harv. L. Rev. 681; 62 So. Cal. L. Rev. 369 [Guarantee Clause as basis for federal prosecution of state and local officials]; 16B Am.Jur.2d (1998 ed.), *Constitutional Law* §634 et seq.)

(3) *International Relations*. The courts may construe treaties and executive agreements. Hence, the decision of the Secretary of Commerce, not to certify Japan for harvesting whales in excess of the quotas established by the International Convention for the Regulation of Whaling, could be challenged in federal court. (*Japan Whaling Assn. v. American Cetacean Soc.* (1986) 478 U.S. 221, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166, 178; see 1 Rotunda, §2.16; 17 U.C.L.A. L. Rev. 1135 [foreign relations]; 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §124.)

(4) *Constitutional Amendments*. The Supreme Court has refused to decide the validity of a state's ratification of an amendment. (*Coleman v. Miller* (1939) 307 U.S. 433, 59 S.Ct. 972, 980, 83 L.Ed. 1385, 1394.) However, the courts

have decided other issues relating to the amendment process. (See *Hawke v. Smith* (1920) 253 U.S. 221, 40 S.Ct. 495, 501, 64 L.Ed. 871, 877 [state requirement that legislative ratification be submitted to referendum was unconstitutional].)

In *American Federation of Labor-Congress of Industrial Organizations v. Eu* (1984) 36 C.3d 687, 206 C.R. 89, 686 P.2d 609, petitioners challenged a proposed initiative that would require the state Legislature to apply to Congress to convene a constitutional convention, arguing that under Article V only the Legislature could make this application. The court rejected the claim that the constitutional issues were nonjusticiable. Assuming that *Coleman v. Miller* remains controlling on the issues it decided, it did not overrule *Hawke v. Smith*, which permitted removal of a proposal from a state election ballot on the ground of nonconformity with Article V. Determination of whether the present initiative should be removed from the ballot depends on the meaning of the word "Legislatures" in Article V, and that word is subject to judicial construction. (36 C.3d 698, 699.) (See 1 Rotunda, §2.16; 23 *Santa Clara L. Rev.* 745 [case for judicial restraint in resolving Article V issues].)

(5) *State Budget Act*. In *Schabarum v. California Legislature* (1998) 60 C.A.4th 1205, 70 C.R.2d 745, plaintiff contended that an aspect of the State Budget Act violated a constitutional limitation on legislative spending. *Held*, the constitutional question is justiciable. Because the enactment of a budget bill is a legislative function, the usual rules of judicial review that accord appropriate deference to the legislative and executive exercise of political prerogatives must be applied. But deference does not mean complete forbearance. The potential for unwarranted judicial intrusion may be addressed by limiting discovery and trial to the appropriate scope of the justiciable issue. (60 C.A.4th 1217.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Republican Form of Government*. See 1 Rotunda 4th, §2.16.

(3) *International Relations*. See 1 Rotunda 4th, §2.16.

(4) *Constitutional Amendments*. See 1 Rotunda 4th, §2.16.



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CHAPTER X - Constitutional Law

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7 Witkin Sum. Cal. Law Const Law § 89

[§ 89] Constitutional Limitation.

Under U.S. Const., Article III, §2, jurisdiction of the federal courts extends only to cases and controversies. Unless a proceeding comes within this classification, the federal courts will not take cognizance of it and will not declare constitutional rights. (See *Muskrat v. United States* (1911) 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246; *Rescue Army v. Municipal Court of Los Angeles* (1947) 331 U.S. 549, 67 S.Ct. 1409, 1419, 91 L.Ed. 1666, 1679; *Doremus v. Board of Education of Borough of Hawthorne* (1952) 342 U.S. 429, 72 S.Ct. 394, 397, 96 L.Ed. 475, 479; *Poe v. Ullman* (1961) 367 U.S. 497, 81 S.Ct. 1752, 1756, 6 L.Ed.2d 989, 995; *Bender v. Williamsport Area School Dist.* (1986) 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501, *supra*, §77; *Diamond v. Charles* (1986) 476 U.S. 54, 106 S.Ct. 1697, 1704, 90 L.Ed.2d 48, 56; 1 Rotunda, §2.13; 1 Tribe, §3-7 et seq.; 74 Cal. L. Rev. 1915; 93 Harv. L. Rev. 297, 1698, 1727; 42 Stanf. L. Rev. 227 [discussing lack of coherent definition of "case" and suggesting model definition].)

In *Gladstone, Realtors v. Village of Bellwood* (1979) 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66, the court explained the requirements of Article III as follows:

(a) The constitutional limits eliminate claims in which the plaintiff has failed to make out a case or controversy between himself or herself and the defendant. To satisfy Article III, the plaintiff must show that he or she personally has suffered some actual or threatened injury as a result of the defendant's conduct. (99 S.Ct. 1608, 60 L.Ed.2d 76.)

(b) Congress may by legislation expand standing to the full extent permitted by Article III, thus permitting litigation by one who would otherwise be barred by the prudential standing rules; but in no event may Congress abrogate the Article III minima. A plaintiff must always have personally suffered a distinct and palpable injury that is likely to be redressed if the requested relief is granted. (99 S.Ct. 1608, 60 L.Ed.2d 77.) (See *Los Angeles v. Lyons* (1983) 461 U.S. 95, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675, 684 [threat of injury must be "real and immediate," not "conjectural" or "hypothetical"]; 97 Harv. L. Rev. 215 [Lyons].)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, §2.13; 95 Cal. L. Rev. 849 [Article III standing in class action context].



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7 Witkin Sum. Cal. Law Const Law § 90

[§ 90] Jurisdiction Rejected.

(1) *Where Party Declines To Violate Law.* In *United Public Workers of America (C.I.O.) v. Mitchell* (1947) 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754, federal employees who desired to engage in political activity in violation of the Hatch Act, but who had not actually done so, brought an action to restrain its enforcement. *Held*, there was no justiciable controversy. It is well known that the federal courts "do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." (67 S.Ct. 564, 91 L.Ed 766.) (See 66 Harv. L. Rev. 121; cf. *Cramp v. Board of Public Instruction of Orange County, Florida* (1961) 368 U.S. 278, 82 S.Ct. 275, 279, 7 L.Ed.2d 285, 290, *infra*, §409 [loyalty oath]; on relaxation of related abstention doctrine when First Amendment rights are asserted, see *infra*, §96.)

(2) *Where State Declines To Enforce Law.* In *Poe v. Ullman* (1961) 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989, a Connecticut statute prohibited using contraceptive devices and giving medical advice in their use. Three declaratory relief actions were brought against the state's attorney. Two were by married persons alleging their need for medical advice on contraceptives, and their inability to obtain the contraceptives or information concerning them, and one was by their doctor, alleging deprivation of liberty and property without due process in preventing him from giving the advice. The state court sustained demurrers. *Held*, dismissed for lack of a justiciable question (5-4 decision).

The "undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis." (81 S.Ct. 1755, 6 L.Ed.2d 995.) Further, the "fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality." (81 S.Ct. 1758, 6 L.Ed.2d 999.) (See 50 Cal. L. Rev. 137; 75 Harv. L. Rev. 58.)

(3) *Moot Case.* Under Article III, the federal courts have no jurisdiction to review a case that, as a result of subsequent acts or events, has become moot. (See *DeFunis v. Odegaard* (1974) 416 U.S. 312, 94 S.Ct. 1704, 1706, 1707, 40 L.Ed.2d 164, 169, 170, 9 Cal. Proc. (4th), *Appeal*, §643 [white petitioner's challenge of law school's admissions policies as racially discriminatory rendered moot by petitioner's subsequent admission and impending

graduation from school]; *Preiser v. Newkirk* (1975) 422 U.S. 395, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272, 278 [prisoner's constitutional challenge of transfer from medium to maximum security prison was rendered moot by subsequent transfers to medium and then minimum security prisons]; *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170, 193, 194 [when plaintiff, who as state employee challenged state constitutional amendment declaring English as official language, took job in private sector where speech was not governed by amendment, she lacked still vital claim for prospective relief]; 1 Rotunda, §2.13; 1 Tribe, §3-11.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Moot Case*. See 1 Rotunda 4th, §2.13.

DeFunis case:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §750.



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7 *Witkin Sum. Cal. Law Const Law* § 91

[§ 91] Jurisdiction Accepted.

On a strict application of the case or controversy limitation, the Supreme Court originally held that federal courts could not render a declaratory judgment. (*Liberty Warehouse Co. v. Grannis* (1927) 273 U.S. 70, 47 S.Ct. 282, 71 L.Ed. 541.) However, in *Nashville, Chattanooga, & St. Louis Ry. v. Wallace* (1933) 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, appellant railway attacked the constitutionality of a Tennessee statute by a proceeding for declaratory relief. The state court upheld the law and appeal was taken to the Supreme Court. *Held*, this was a case or controversy of which the court would take jurisdiction; the state statute required an actual controversy as a prerequisite to relief, and it was not necessary that this be in the traditional form of procedure. (53 S.Ct. 346, 77 L.Ed. 734.) (On the subsequently enacted Federal Declaratory Judgment Act, 28 U.S.C., §§2201, 2202, see *Aetna Life Ins. Co. of Hartford Connecticut v. Haworth* (1937) 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617; *Super Tire Engineering Co. v. McCorkle* (1974) 416 U.S. 115, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1, 8 [Federal Act satisfied]; 26 Thomas Jefferson L. Rev. 239.)

In *Public Util. Com. of Calif. v. United States* (1958) 355 U.S. 534, 78 S.Ct. 446, 450, 2 L.Ed.2d 470, 475, the California Public Utilities Code was amended to regulate rates of carriers dealing with the federal Government. A constitutional attack was upheld where it appeared that, by its official orders, the Commission had plainly indicated an intent to enforce the statute.

In *Times Film Corp. v. Chicago* (1961) 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403, *infra*, §371, involving censorship of a movie, the district court and Court of Appeals thought no justiciable controversy was presented without evidence of the film itself. The Supreme Court held, however, that because petitioner had submitted the film and was denied a permit, a broad justiciable issue was presented on whether the constitutional free speech provision guarantees complete freedom to exhibit any kind of motion picture once. (81 S.Ct. 393, 5 L.Ed.2d 405.) (See 75 Harv. L. Rev. 51.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Federal Election Com. v. Wisconsin Right to Life* (2007) 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329, *Supp.*, *infra*, §256, plaintiff, a nonprofit advocacy corporation, challenged a provision of the Bipartisan Campaign Reform Act of 2002 prohibiting the use of corporate or union treasury funds to pay for "electioneering communications" broadcast within a specified time before an election. Although the election had passed and plaintiff did not assert that it had a continuing interest in running the same ads that it had pulled before the election, it planned to run similar ads in the

future. The Court held that this case fit within the exception to mootness for disputes capable of repetition, yet evading review. The exception applies where (1) the duration of the challenged action is too short to fully litigate the issue prior to cessation or expiration, and (2) there is a reasonable expectation that the same controversy involving the same complaining party will recur. (127 S.Ct. 2662, 168 L.Ed.2d 341.)

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §363 et seq.



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C. Power To Declare Laws Unconstitutional.

5. Abstention: Where Decision on Constitutionality Is Unnecessary.

a. Abstention Doctrine.

7 *Witkin Sum. Cal. Law Const Law* § 92

[§ 92] Abstention Doctrine.

The U.S. Supreme Court, in reviewing a state court decision, will not pass on the federal question of constitutionality where the judgment can be upheld on an alternative, nonfederal ground, e.g., on an interpretation of the state law. (*Minnesota v. National Tea Co.* (1940) 309 U.S. 551, 60 S.Ct. 676, 678, 84 L.Ed. 920, 923; *Herb v. Pitcairn* (1945) 324 U.S. 117, 65 S.Ct. 459, 463, 89 L.Ed. 789, 794; cf. *Alabama State Federation of Labor, Local Union No. 103, United Brotherhood of Carpenters & Joiners of America v. McAdory* (1945) 325 U.S. 450, 65 S.Ct. 1384, 1393, 89 L.Ed. 1725, 1739 [federal courts should ordinarily not attempt to determine constitutionality of state statute in reviewing declaratory judgment unless state court has first had opportunity to construe statute]; see 1 Rotunda, §2.15; 1 Tribe, §§3-29, 3-30; 43 *Cal. L. Rev.* 234; 47 *Cal. L. Rev.* 943; 80 *Harv. L. Rev.* 604; 84 *Harv. L. Rev.* 769 [scholarly tradition and Supreme Court]; 4 *Pepperdine L. Rev.* 1 [application of abstention doctrine to inverse condemnation actions in federal court]; 29 *San Diego L. Rev.* 361 [Ninth Circuit case dealing with federal declaratory judgment actions and parallel state proceedings as "A Fifth Branch of Abstention"]; 45 *So. Cal. L. Rev.* 847 [First Amendment]; 62 *So. Cal. L. Rev.* 1237 [abstention in cases based on diversity of citizenship]; 46 *Stanf. L. Rev.* 1049 [critical discussion of abstention doctrine]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §354 et seq.; 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §122.)

The same policy of "judicial self restraint" is followed in avoidance of unnecessary determination of constitutional issues arising under federal law. (See *Peters v. Hobby* (1955) 349 U.S. 331, 75 S.Ct. 790, 794, 99 L.Ed. 1129, 1137; *United States v. International Union United Automobile, Aircraft & Agricultural Implement Workers of America (UAW-CIO)* (1957) 352 U.S. 567, 77 S.Ct. 529, 540, 1 L.Ed.2d 563, 577; *United States v. Raines* (1960) 362 U.S. 17, 80 S.Ct. 519, 522, 4 L.Ed.2d 524, 529, *infra*, §846.)

"There are, of course, two primary types of federal abstention. The first, usually referred to as *Pullman* abstention, involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate or at least to alter materially, the constitutional question presented . . . The second type is *Younger* abstention, in which the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an on-going state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context." (*Ohio Bureau of Emp. Services v. Hodory* (1977) 431 U.S. 471, 97 S.Ct. 1898, 1902, 52 L.Ed.2d 513, 520; see *infra*, §§93, 94; on third type of abstention, referred to as *Burford* doctrine, see *infra*, §95.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Los Altos El Granada Investors v. Capitola* (2006) 139 C.A.4th 629, 655, 43 C.R.3d 434 [trial court did not err in striking plaintiff's reservation, made under authority of *England v. Louisiana State Bd. of Med. Examiners* (1964) 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440, to return to federal court; although plaintiff originally chose federal court as its forum, by time it filed state court claims, there was no federal forum with jurisdiction over matter for plaintiff to go back to]; 1 Rotunda 4th, §2.15; 93 Cal. L. Rev. 399 [avoidance canon in early Warren court].



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5. Abstention: Where Decision on Constitutionality Is Unnecessary.

b. Pullman Abstention.

7 *Witkin Sum. Cal. Law Const Law* § 93

[§ 93] Pullman Abstention.

If state remedies have not been exhausted, or a state court decision might be based on a nonfederal ground, or a state statute might be interpreted so as to eliminate and thus avoid determination of the constitutional issue, the case may be dismissed, continued, or remanded on the ground that the issue is "not ripe for decision." (See *Railroad Com. of Texas v. Pullman Co.* (1941) 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 [case retained until state court decision on statutory question]; 1 Tribe, §§3-10, 3-29; 90 Harv. L. Rev. 1250 et seq.; 38 Hastings L. J. 665, 690; 20 U.C. Davis L. Rev. 1; 18 U.C.L.A. L. Rev. 888; 183 A.L.R. Fed 379 [propriety of federal court's abstention under *Pullman* regarding federal constitutional due process or equal protection claim]; 192 A.L.R. Fed 429 [propriety of federal court's abstention under *Pullman* regarding First Amendment claim].) This principle has been applied in the following cases:

Herb v. Pitcairn (1945) 324 U.S. 117, 65 S.Ct. 459, 463, 89 L.Ed.2d 789, 794 [case continued to allow counsel to apply to state court for certificate or other showing on necessity of decision of federal question].

American Federation of Labor v. Watson (1946) 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 [retention of case until state court decides statutory question].

Parker v. Los Angeles (1949) 338 U.S. 327, 70 S.Ct. 161, 163, 94 L.Ed. 144, 147 [Court should not "entertain constitutional questions in advance of the strictest necessity"].

Clay v. Sun Ins. Office Ltd. (1960) 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170 [Court of Appeals decision vacated and case remanded for certification of question to Florida Supreme Court, pursuant to its statute permitting this procedure].

Reetz v. Bozanich (1970) 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 [federal three-judge court's ruling on federal constitutional issues was improper where issues of Alaska constitutional law were uncertain].

Fornaris v. Ridge Tool Co. (1970) 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 [Court of Appeals ruling that recent Puerto Rican statute was unconstitutional was reversed where resolution of local law might avoid federal issues].

Sanks v. Georgia (1971) 401 U.S. 144, 91 S.Ct. 593, 27 L.Ed.2d 741 [appeal dismissed where uncertain if

resolution of pending issues would affect subsequent proceedings on remand in light of amendment of challenged state statute after oral argument].

Harris County Commrs. Court v. Moore (1975) 420 U.S. 77, 95 S.Ct. 870, 875, 43 L.Ed.2d 32, 39 [district court's ruling on constitutionality of Texas statute was improper where statute might be interpreted to avoid constitutional issue].

Bellotti v. Baird (1976) 428 U.S. 132, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844, 857 [district court should have abstained from deciding constitutionality of parental consent provision of state abortion law, where statute might be interpreted so as to avoid constitutional issue and where state law provided for prompt resolution of issue of interpretation].

SUPPLEMENT: [This section is current through the latest supplement]



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5. Abstention: Where Decision on Constitutionality Is Unnecessary.

c. Younger Abstention.

7 Witkin Sum. Cal. Law Const Law § 94

[§ 94] Younger Abstention.

In *Younger v. Harris* (1971) 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, the Court, holding that a three-judge district court had improperly restrained a state criminal prosecution, gave this explanation: "The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. ... This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions. ... This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism.'" (91 S.Ct. 750, 27 L.Ed.2d 675.)

Younger has been followed in a number of decisions. (See *Juidice v. Vail* (1977) 430 U.S. 327, 97 S.Ct. 1211, 1216, 1218, 51 L.Ed.2d 376, 382 [federal district court erred in enjoining state contempt proceedings]; *Moore v. Sims* (1979) 442 U.S. 415, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994, 1001 [three-judge district court erred in taking jurisdiction of civil action challenging constitutionality of state child abuse statute]; *Middlesex County Ethics Committee v. Garden State Bar Assn.* (1982) 457 U.S. 423, 102 S.Ct. 2515, 2523, 73 L.Ed.2d 116, 127 [federal court erred in entertaining challenge to State Bar disciplinary proceeding]; *Deakins v. Monaghan* (1988) 484 U.S. 193, 108 S.Ct. 523, 529, 98 L.Ed.2d 529, 540 [even if *Younger* abstention doctrine applies to federal action seeking only monetary relief, federal district court had no discretion to stay claims for monetary relief that could not be redressed in state proceeding]; 1 Rotunda, §2.15; 1 Tribe, §3-30; 67 Cal. L. Rev. 1318 [limiting *Younger*]; 69 Cal. L. Rev. 377 [abstention in land use litigation]; 90 Harv. L. Rev. 1274 et seq. [*Younger*]; 33 Hastings L. J. 103 [*Younger*: federalism in context]; 38 Hastings L. J. 665, 684; 10 Southwestern U. L. Rev. 969 [*Juidice v. Vail*]; on abstention under *Younger* as exception rather than rule, see *infra*, §95.)

In *Ohio Civil Rights Com. v. Dayton Christian Schools* (1986) 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512, Linda H. was a teacher at Dayton, a church school. She became pregnant and was informed that her contract would not be renewed. Although the contract contained a requirement of internal dispute resolution before the Board of Directors, she filed a discrimination complaint with the state Civil Rights Commission. Dayton, asserting its constitutional rights under the First Amendment Religion Clauses, sought an injunction in the federal district court. The Commission

stipulated to the court's jurisdiction. *Held*, the court should have abstained from adjudicating the cause.

(a) A state may voluntarily submit to federal jurisdiction even though it might have a tenable claim for abstention, as in *Brown v. Hotel & Restaurant Employees & Bartenders Int. Union Local 54* (1984) 468 U.S. 491, 104 S.Ct. 3179, 82 L.Ed.2d 373; *Ohio Bureau of Emp. Services v. Hodory* (1977) 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513, *supra*, §92; and *Sosna v. Iowa* (1975) 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532, 11 Summary (10th), *Husband and Wife*, §73. But in each of these cases, the state expressly urged an adjudication on the merits, and there was no similar consent here. (106 S.Ct. 2722, 91 L.Ed.2d 521.)

(b) *Younger's* concern for comity and federalism is equally applicable to civil proceedings in which important state interests are involved. (106 S.Ct. 2723, 91 L.Ed.2d 521, citing *Huffman v. Pursue, Ltd.* (1975) 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482, *Trainor v. Hernandez* (1977) 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486, *Juidice v. Vail*, *supra*, and *Moore v. Sims*, *supra*.) Here, the elimination of prohibited sex discrimination is a sufficiently important state interest to bring this case within the principle of these decisions. And there is no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims before the state administrative body, with the decision of that body subject to judicial review. (106 S.Ct. 2723, 2724, 91 L.Ed.2d 522, 523.)

In *Pennzoil Co. v. Texaco* (1987) 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1, Pennzoil obtained a jury verdict of \$ 10.53 billion in the state court. Texaco, unable to post a supersedeas bond in the required amount, filed an action in the federal district court, alleging that the state proceedings violated federal constitutional and statutory rights. The district court issued a preliminary injunction barring enforcement of the judgment, and the Court of Appeals affirmed. *Held*, reversed.

(a) One reason for *Younger* abstention is to avoid unwarranted determination of federal constitutional questions. Texaco never presented its federal claims to the state courts; had it done so, the case might have been resolved on state grounds without reaching the federal constitutional questions. (107 S.Ct. 1526, 95 L.Ed.2d 16.)

(b) The argument that there is no vital state interest justifying abstention "reflects a misreading of our precedents." The state's interest in administering its judicial system extends to enforcement of orders and judgments of its courts. "Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained." (107 S.Ct. 1527, 95 L.Ed.2d 17.)

(c) Texaco has not met its burden of proving that state procedural law barred presentation of its claims. Where, as here, "a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." (107 S.Ct. 1528, 95 L.Ed.2d 18.)

SUPPLEMENT: [This section is current through the latest supplement]
See 1 Rotunda 4th, §2.15.



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5. Abstention: Where Decision on Constitutionality Is Unnecessary.

d. Burford Abstention.

7 *Witkin Sum. Cal. Law Const Law* § 95

[§ 95] Burford Abstention.

New Orleans Public Service v. Council of New Orleans (1989) 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298, discusses a third type of abstention. The Federal Energy Regulatory Commission (FERC) allocated the costs of a nuclear reactor among various companies, including New Orleans Public Service, Inc. (NOPSI). However, the New Orleans City Council, the local ratemaking body, found that NOPSI had been negligent in failing to diversify and refused its request for complete reimbursement by means of a rate increase. NOPSI challenged the order in state court, and, claiming that the Council's order was preempted by federal law, also sought relief in federal district court. That court and the Court of Appeals concluded that abstention was proper under *Burford v. Sun Oil Co.* (1943) 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424, as well as *Younger v. Harris* (1971) 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, *supra*, §94. *Held*, neither *Burford* nor *Younger* justified abstention.

(a) *Burford*. The Court described the "*Burford* doctrine" as follows: "Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" (109 S.Ct. 2514, 105 L.Ed.2d 312.) However, the fact that a complex state regulatory system is involved does not automatically require abstention. Where, as here, the question is whether the rate order is facially preempted by federal law, it may be decided without the undue intrusion into local problems that *Burford* guards against. (109 S.Ct. 2514, 2515, 105 L.Ed.2d 313.) Hence, abstention under *Burford* was improper. (109 S.Ct. 2515, 105 L.Ed.2d 314.)

(b) *Younger*. Abstention under *Younger* is the exception rather than the rule. (1) "[I]t has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." (109 S.Ct. 2518, 105 L.Ed.2d 317.) (2) The City Council's order setting rates was a legislative rather than a judicial act, and *Younger* has never been extended to proceedings that are not "judicial in nature." (109 S.Ct. 2519, 105 L.Ed.2d 318.) (3) The Louisiana court's review of the City Council's order is judicial, not legislative, in nature. Thus, while abstention on ripeness grounds would be proper if the legislative process were ongoing, that is not the case here. (109 S.Ct. 2520, 105 L.Ed.2d 319.) "As a challenge to completed legislative action, NOPSI's suit represents neither the interference with

ongoing judicial proceedings against which *Younger* was directed, nor the interference with an ongoing legislative process against which our ripeness holding in *Prentis* was directed." (109 S.Ct. 2520, 105 L.Ed.2d 320; referring to *Prentis v. Atlantic Coast Line Co.* (1908) 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.) (See 1 Tribe §3-29; 87 Cal. L. Rev. 613 [review of state administrative action by federal courts]; 192 A.L.R. Fed 429 [propriety of federal court's abstention under *Burford* regarding state tort claim].)

SUPPLEMENT: [This section is current through the latest supplement]

See 200 A.L.R. Fed 391 [propriety of federal abstention under *Burford* as to state law claim for breach of contract]; 25 A.L.R. Fed 2d 207 [propriety of federal abstention under *Burford* as to claim that state or local statute or regulation violates federal Constitution or conflicts with federal statute or regulation--issues other than land use, zoning, social welfare, or family law]; 30 A.L.R. Fed 2d 285 [propriety of federal abstention under *Burford* as to claim that state or local statute or regulation violates federal Constitution or conflicts with federal statute or regulation--land use and zoning issues]; 32 A.L.R. Fed 2d 327 [propriety of federal abstention under *Burford* as to claim that state or local statute or regulation violates federal Constitution or conflicts with federal statute or regulation--social welfare and family law issues].



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e. Exceptions.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 96

[§ 96] In General.

"The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." It is applied where there are special circumstances that call for it, and the determination whether they exist is made on a case by case basis. (*Baggett v. Bullitt* (1964) 377 U.S. 360, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377, 387, *infra*, §409.)

Griffin v. County School Bd. of Prince Edward County (1964) 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256, *infra*, §752, involved the question of school integration: "[W]e hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education*, ... had been denied Prince Edward County Negro children." (84 S.Ct. 1232, 12 L.Ed.2d 264.)

Baggett v. Bullitt, *supra*, challenged a Washington loyalty oath for teachers. The state contended that the statute, though on the books for 3 decades, had never been construed by Washington courts, and that they might so interpret it as to eliminate the necessity of deciding the vagueness issue. The Court thought it doubtful whether state interpretation would alter the constitutional issue. In most of the abstention cases, the unsettled issue of state law concerned applicability of the statute to a person or defined course of conduct, and its resolution would terminate the action. In the instant case, the statutory oath was subject to an indefinite number of interpretations, and the challenge was that persons could not understand the required promise or the range of activities in which they might engage. Only a series of costly and lengthy piecemeal suits could bring the oath within constitutional bounds. (84 S.Ct. 1326, 12 L.Ed.2d 389.)

In *N.A.A.C.P. v. Alabama* (1964) 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325, *infra*, §379, the Alabama Attorney General made a number of attempts to oust the N.A.A.C.P. from the state, each time being prevented by the U.S. Supreme Court without a decision reaching the merits of the issue. Then the trial court issued a restraining order, which the Alabama Supreme Court affirmed, on inadequacy of the form of the brief under its rules (several assignments of error allegedly argued together). The U.S. Supreme Court found this ground untenable: "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule

with which there has been compliance in both substance and form in every real sense." (84 S.Ct. 1308, 12 L.Ed.2d 332.) Alabama's last ditch request--that if the procedural ground were found insufficient the case should be remanded to its courts for a decision on the merits--was rejected because of the history of the case (four times before the U.S. Supreme Court without a determination of the issue). (84 S.Ct. 1311, 12 L.Ed.2d 335.) (See *Hostetter v. Idlewild Bon Voyage Liquor Corp.* (1964) 377 U.S. 324, 84 S.Ct. 1293, 1296, 12 L.Ed.2d 350, 354 [long procedural delays, neither party requested abstention].)

In *Harman v. Forssenius* (1965) 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50, challenging Virginia's discriminatory voting law, the abstention doctrine was held inapplicable for two reasons. *First*, the statute, though never interpreted by the state courts, was unambiguous and left no reasonable room for construction. (85 S.Ct. 1182, 14 L.Ed.2d 55.) *Second*, the consequences of abstaining would be serious. The right to vote was being challenged by a broad class of citizens shortly before an election. (85 S.Ct. 1183, 14 L.Ed.2d 56.) (See 79 Harv. L. Rev. 139.)

The following cases also illustrate the willingness of the Supreme Court to reject the limitation where important constitutional issues are presented:

Dombrowski v. Pfister (1965) 380 U.S. 479, 85 S.Ct. 1116, 1124, 14 L.Ed.2d 22, 30 [flat declaration that abstention doctrine is inapplicable where statute regulating speech is attacked on its face; dissent asserts that decision abolishes doctrine in all suits challenging state criminal statutes for vagueness]. (See 79 Harv. L. Rev. 170; 80 Harv. L. Rev. 611; 3 San Diego L. Rev. 76; 13 U.C.L.A. L. Rev. 153.)

Zwickler v. Koota (1967) 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 [plaintiff's claim for declaratory relief against New York criminal statute regulating distribution of election handbills, challenging it as unconstitutional on its face for overbreadth]. (See 83 Harv. L. Rev. 844 [overbreadth].)

Wisconsin v. Constantineau (1971) 400 U.S. 433, 91 S.Ct. 507, 510, 27 L.Ed.2d 515, 517, *infra*, §659 [doctrine was inapplicable where state statute was not ambiguous and there were no unresolved state law questions, even though counsel deliberately avoided raising constitutional issue in state court in order to get three-judge federal court decision with direct appeal to Supreme Court; see strong dissent].

SUPPLEMENT: [This section is current through the latest supplement]



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e. Exceptions.

2. Absence of Pending Proceeding in State Court.

7 Witkin Sum. Cal. Law Const Law § 97

[§ 97] Absence of Pending Proceeding in State Court.

In *Ankenbrandt v. Richards* (1992) 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468, petitioner Carol, a citizen of Missouri, brought a suit on behalf of her daughters against her former husband Jon and his female companion Debra, citizens of Louisiana, seeking damages for alleged sexual and physical abuse of the children. The suit was filed in the federal district court of Louisiana. The district court granted respondents' motion to dismiss on two grounds: (1) the case fell within the "domestic relations" exception to diversity jurisdiction, and (2) the abstention doctrine of *Younger v. Harris* (1971) 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, supra, §94, applied. The Court of Appeals affirmed. *Held*, the Supreme Court reversed.

(a) The domestic relations exception stemmed from the announcement in *Barber v. Barber* (1858) 62 U.S. 582, 16 L.Ed. 226, that federal courts have no jurisdiction over actions for divorce or alimony. The statements in *Barber*, although technically dicta, formed the basis for a jurisdictional limitation that the lower federal courts have recognized ever since. "Because we are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction." (112 S.Ct. 2210, 119 L.Ed.2d 476, 477.)

(b) The language in *Barber* and in subsequent decisions makes it clear that *Barber* was not relying on constitutional limits in justifying the exception. (112 S.Ct. 2210, 2211, 119 L.Ed.2d 477.) And the *Barber* Court did not intend to strip federal courts of authority to hear cases arising from domestic relations of persons unless they sought granting or modification of a divorce or alimony decree. (112 S.Ct. 2214, 119 L.Ed.2d 481.) Subsequently this Court expanded the exception to include decrees in child custody cases. (112 S.Ct. 2214, 119 L.Ed.2d 482.) "Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody cases." (112 S.Ct. 2215, 119 L.Ed.2d 482.) This conclusion is supported by sound policy considerations. State courts are more eminently suited to work of this type than are federal courts. (112 S.Ct. 2215, 119 L.Ed.2d 482.)

(c) The present lawsuit does not seek a divorce, alimony, or child custody decree; the complaint seeks damages for torts allegedly committed against petitioner's children. Hence, federal subject matter jurisdiction is proper in this case.

(112 S.Ct. 2215, 119 L.Ed.2d 483.)

(d) The final question is whether, even though jurisdiction might be proper, sufficient grounds exist to warrant *Younger* abstention, as the district court and the Court of Appeals concluded. Although *Younger* abstention has been applied in civil cases, this Court has never applied it when no state proceeding was pending nor any assertion of important state interest made. "Absent any pending proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous." (112 S.Ct. 2216, 119 L.Ed.2d 483.)

(e) In certain circumstances the abstention principles developed in *Burford v. Sun Oil Co.* (1943) 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424, supra, §95, might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This "might well be the case if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." (112 S.Ct. 2216, 119 L.Ed.2d 484.)

A concurring opinion of one justice disagreed with the majority's recognition of a domestic relations "exception." (112 S.Ct. 2217, 119 L.Ed.2d 485.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Methods of Raising Constitutionality.

a. Injunction.

1. In General.

7 Witkin Sum. Cal. Law Const Law § 98

[§ 98] In General.

The enforcement, or threatened enforcement, of an unconstitutional statute affecting property rights may be enjoined where the remedy at law is inadequate. (*Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; *Abbott v. Los Angeles* (1960) 53 C.2d 674, 678, footnote 2, 3 C.R. 158, 349 P.2d 974; see *Brown v. Chote* (1973) 411 U.S. 452, 93 S.Ct. 1732, 36 L.Ed.2d 420 [injunction against enforcement of statute allegedly abridging political rights of candidates and voters]; 6 Cal. Proc. (4th), *Provisional Remedies*, §332; 82 Harv. L. Rev. 1133 [remedies for denial of equal protection]; on injunction against prosecution, see 4 Cal. Crim. Proc. (3d), *Jurisdiction and Venue*, §10 et seq.)

The provisions of C.C.P. 526 and C.C. 3423, to the effect that "[a]n injunction cannot be granted ... to prevent the execution of a public statute by officers of the law for the public benefit," have been held inapplicable to unconstitutional statutes or ordinances. (*Bueneman v. Santa Barbara* (1937) 8 C.2d 405, 407, 65 P.2d 884; *McKay Jewelers v. Bowron* (1942) 19 C.2d 595, 599, 122 P.2d 543; *Wade v. San Francisco* (1947) 82 C.A.2d 337, 341, 186 P.2d 181; *People v. Amdur* (1954) 123 C.A.2d Supp. 951, 968, 267 P.2d 445 [unconstitutional application of valid statute].)

It has also been recognized that in a rare case an injunction might be granted against the enactment of unconstitutional legislation. (See *Harnett v. Sacramento* (1925) 195 C. 676, 682, 235 P. 445; *Johnston v. Board of Supervisors of Marin County* (1947) 31 C.2d 66, 71, 187 P.2d 686 [denied where there was no showing of irreparable injury]; *Santa Clara v. Superior Court* (1949) 33 C.2d 552, 557, 203 P.2d 1 [same]; 6 Cal. Proc. (4th), *Provisional Remedies*, §333; on use of extraordinary writ to challenge proposed legislation, see *infra*, §102.)

When the constitutionality of a federal statute "affecting the public interest" is questioned in any federal court, and the government is not already a party, it may intervene and present its argument in support of the law. (28 U.S.C., §2403(a).) (See *International Ladies' Garment Workers' Union v. Donnelly Garment Co.* (1938) 304 U.S. 243, 58 S.Ct. 875, 879, 82 L.Ed. 1316, 1322; 51 Harv. L. Rev. 148; 35 Cal. L. Rev. 260.)

SUPPLEMENT: [This section is current through the latest supplement]

Enjoining enforcement of unconstitutional statute:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §331.

Enjoining enactment of unconstitutional legislation:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §332.



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a. Injunction.

2. Limitations on Federal Injunction of State Law.

7 *Witkin Sum. Cal. Law Const Law* § 99

[§ 99] Limitations on Federal Injunction of State Law.

(1) *Judicially Declared Limitation.* The United States Supreme Court has imposed a limitation on the power of federal courts over state statutes. No federal injunction should issue against a state statute "unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." (*Massachusetts State Grange v. Benton* (1926) 272 U.S. 525, 47 S.Ct. 189, 190, 71 L.Ed. 387, 391.) It has further been declared that no federal injunction will issue against a state criminal statute even though it is unconstitutional, except under unusual circumstances and on a clear showing of great and immediate danger of irreparable loss. (*Watson v. Buck* (1941) 313 U.S. 387, 61 S.Ct. 962, 966, 85 L.Ed. 1416, 1423; *American Federation of Labor v. Watson* (1946) 327 U.S. 582, 66 S.Ct. 761, 766, 90 L.Ed. 873, 880 [sufficient irreparable injury shown].)

(2) *Federal Judicial Code.* Additional limitations on injunctions are imposed by the federal Judicial Code when the constitutionality of a state law is questioned in a federal court.

(a) A federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (28 U.S.C., §2283; see 83 *Harv. L. Rev.* 1870; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §208 et seq.)

(b) A three-judge district court must "be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." (28 U.S.C., §2284(a); on composition of court, see 28 U.S.C., §2284(b).)

(c) Federal courts cannot enjoin a state order affecting the rates to be charged by public utilities where the order does not interfere with interstate commerce, has been made after reasonable notice and hearing, and a plain, speedy, and efficient remedy may be had in the courts of the state. (28 U.S.C., §1342.)

(d) When the constitutionality of a state statute "affecting the public interest" is questioned in any federal court, and the state is not already a party, the state may intervene on the question of constitutionality. (28 U.S.C., §2403(b).)

(e) The district courts must not enjoin, suspend, or restrain the assessment, levy, or "collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." (28 U.S.C., §1341; see 35 Cal. L. Rev. 263; 151 A.L.R. Fed. 387 [what constitutes "tax" under Tax Injunction Act].)

In *California v. Grace Brethren Church* (1982) 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93, plaintiffs, California churches and religious schools, brought an action in the federal district court raising First Amendment objections to the application of the California unemployment insurance tax statutes to the employees of the schools, and seeking an injunction against collection of the taxes. *Held*, the district court had no jurisdiction. Although the Tax Injunction Act expressly refers to an injunction, it necessarily prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional, for the declaratory judgment procedure may in every practical sense operate to suspend collection of the taxes and thereby defeat the statutory objective. (102 S.Ct. 2508, 2509, 73 L.Ed.2d 107, 108.)

The exception where the state remedy is not "plain, speedy, and efficient" was fully considered in *Rosewell v. LaSalle Nat. Bank* (1981) 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464, 9 Summary (10th), *Taxation*, §285. Under *Rosewell*, the California refund procedure is sufficient. (102 S.Ct. 2509, 2513, 73 L.Ed.2d 108, 112.) (See *Franchise Tax Bd. of Calif. v. Alcan Aluminium Ltd.* (1990) 493 U.S. 331, 110 S.Ct. 661, 666, 667, 107 L.Ed.2d 696, 705, 707, 9 Summary (10th), *Taxation*, §99 [action by foreign corporation challenging application of California's unitary business formula to California subsidiary was barred by 28 U.S.C., §1341; California refund procedure provided plain, speedy, and efficient remedy for parent's claims, because parent had total control of subsidiary and could direct all aspects of its pursuit of relief in state court].)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Federal Judicial Code*.

(e) *Assessment, levy, or collection of taxes:* See 10 A.L.R. Fed 2d 575 [what constitutes "plain, speedy, and efficient" state remedy under Tax Injunction Act].



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b. Declaratory Relief and Quiet Title.

7 *Witkin Sum. Cal. Law Const Law* § 100

[§ 100] Declaratory Relief and Quiet Title.

(1) *Declaratory Relief*. The validity of a statute or ordinance may be challenged in a proceeding for declaratory relief under *C.C.P.* 1060. (*LaFranchi v. Santa Rosa* (1937) 8 C.2d 331, 65 P.2d 1301 [zoning ordinance]; *Abbott v. Los Angeles* (1960) 53 C.2d 674, 678, footnote 2, 3 C.R. 158, 349 P.2d 974 [listing cases]; *Floresta v. City Council of San Leandro* (1961) 190 C.A.2d 599, 611, 12 C.R. 182 [dictum]; *California Restaurant Assn. v. Henning* (1985) 173 C.A.3d 1069, 1073, 1074, 219 C.R. 630 [action for declaratory and injunctive relief is proper method of challenging statute's constitutionality].) (See 5 *Cal. Proc.* (4th), *Pleading*, §815; on declaratory judgment to test constitutionality in federal courts, see *Steffel v. Thompson* (1974) 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505, 4 *Cal. Crim. Law* (3d), *Jurisdiction and Venue*, §12; 35 *Cal. L. Rev.* 252; 83 *Harv. L. Rev.* 1876.)

(2) *Quiet Title*. A declaration of invalidity of a *zoning ordinance* may also be obtained in an action to quiet title against the municipality. The theory is that the invalid ordinance, like an unenforceable building restriction in a deed, constitutes a cloud on the title and interferes with the right to sell or use the property. (*Bank of America v. Atherton* (1943) 60 C.A.2d 268, 140 P.2d 678; see 5 *Cal. Proc.* (4th), *Pleading*, §613; on constitutionality of zoning regulations, see *infra*, §1005 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Declaratory Relief*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §859.

(2) *Quiet Title*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §654.



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6. Methods of Raising Constitutionality.

c. Extraordinary Writs and Appeal.

1. In General.

7 Witkin Sum. Cal. Law Const Law § 101

[§ 101] In General.

(1) *Habeas Corpus*. In a criminal case, where the defendant is imprisoned pursuant to a charge or conviction under an unconstitutional statute, the defendant may attack the statute by an application for habeas corpus. (See *Ex parte Siebold* (1879) 100 U.S. 371, 25 L.Ed. 717; *In re Deane* (1937) 8 C.2d 599, 67 P.2d 333; *In re Bell* (1942) 19 C.2d 488, 492, 122 P.2d 22; *In re Dixon* (1953) 41 C.2d 756, 762, 264 P.2d 513; 2 Cal. Proc. (4th), *Jurisdiction*, §89; 6 Cal. Crim. Law (3d), *Criminal Writs*, §37 et seq.)

A person "constructively in custody," e.g., at liberty on bail or on personal recognizance, may invoke this remedy. (See *Hensley v. Municipal Court* (1973) 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294; *In re Petersen* (1958) 51 C.2d 177, 181, 331 P.2d 24; 6 Cal. Crim. Law (3d), *Criminal Writs*, §14.)

(2) *Prohibition*. A defendant who is not in actual or constructive custody cannot obtain a writ of habeas corpus. But the defendant can achieve the same result, i.e., can test the constitutionality of a criminal statute before trial, by a writ of prohibition. (See *Rescue Army v. Municipal Court of Los Angeles* (1946) 28 C.2d 460, 462, 171 P.2d 8; *Moore v. Municipal Court of Salinas Judicial Dist., Monterey County* (1959) 170 C.A.2d 548, 551, 339 P.2d 196; 2 Cal. Proc. (4th), *Jurisdiction*, §89; 6 Cal. Crim. Law (3d), *Criminal Writs*, §84.) Similarly, in the rare situation in which a civil proceeding is based entirely on an unconstitutional statute, prohibition will lie to restrain the proceeding. (See *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 C.2d 481, 483, 171 P.2d 21; 2 Cal. Proc. (4th), *Jurisdiction*, §90.)

(3) *Mandamus*. A public ministerial officer, such as the president or secretary of a municipal or quasi-municipal corporation, may refuse, in good faith, to sign bonds he or she believes to be invalid. The public corporation may then raise the question of constitutionality by a proceeding in mandamus to compel the officer to sign. (*Golden Gate Bridge & Highway Dist. v. Felt* (1931) 214 C. 308, 317, 5 P.2d 585; see *Connerly v. State Personnel Bd.* (2001) 92 C.A.4th 16, 30, 112 C.R.2d 5, *infra*, §967 [mandamus may be used to test constitutional validity of statute]; 3 Cal. Proc. (4th), *Actions*, §77; 8 Cal. Proc. (4th), *Extraordinary Writs*, §84 et seq.) And where an administrative agency or local official allegedly denies a constitutional right, mandamus has sometimes been used to review the administrative action. (See *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 171 P.2d 885 [writ issued to compel school board to give permission to use auditorium for public meeting]; *Floresta v. City Council of San Leandro* (1961) 190 C.A.2d 599,

612, 12 C.R. 182; cf. *Reynolds v. Barrett* (1938) 12 C.2d 244, 83 P.2d 29 [writ sought to compel issuance of building permit; constitutional issue considered and relief denied].) (On use of mandamus to preserve constitutional rights of criminal defendants, see 6 Cal. Crim. Law (3d), *Criminal Writs*, §93 et seq.)

(4) *Certiorari and Appeal*. Certiorari will not lie where an appeal is possible. (See 8 Cal. Proc. (4th), *Extraordinary Writs*, §40.) Hence, because a defendant in a criminal or civil proceeding brought under a statute may challenge its constitutionality in the trial court and appeal from an adverse decision, the defendant cannot seek certiorari to annul the judgment. (See *Portnoy v. Superior Court* (1942) 20 C.2d 375, 125 P.2d 487, 8 Cal. Proc. (4th), *Extraordinary Writs*, §43; *Hatch v. Superior Court* (2000) 80 C.A.4th 170, 192, footnote 16, 94 C.R.2d 453, citing the text [where defendant raised constitutionality issue on P.C. 995 motion and received adverse ruling, issue was properly before appellate court]; 6 Cal. Crim. Law (3d), *Criminal Writs*, §82.)

However, if a defendant is convicted of a misdemeanor or infraction and the conviction is affirmed by the appellate division of the superior court (see 6 Cal. Crim. Law (3d), *Criminal Appeal*, §182 et seq.), there is no further appeal in California, but only a discretionary transfer to the Court of Appeal. (See 6 Cal. Crim. Law (3d), *Criminal Appeal*, §190; 9 Cal. Proc. (4th), *Appeal*, §45.)

Where a judicial decree, such as an injunction, is based on an allegedly unconstitutional statute, the United States Supreme Court has held that the proper remedy is a motion to dissolve it, and that if this motion was not made, the claim of unconstitutionality cannot be raised in a contempt proceeding for deliberate violation of the order. (See *Walker v. Birmingham* (1967) 388 U.S. 307, 87 S.Ct. 1824, 1832, 18 L.Ed.2d 1210, 1219, 2 Cal. Proc. (4th), *Jurisdiction*, §333; 22 *Pepperdine L. Rev.* 405 [discussing applicability of "collateral bar" rule, under which party who disobeys judicial order cannot later challenge its validity, to First Amendment cases involving media organizations].) The California rule is contra: A void order can be disobeyed and its invalidity asserted in the contempt hearing and on review of a contempt adjudication by certiorari. (See 2 Cal. Proc. (4th), *Jurisdiction*, §334.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Habeas Corpus*.

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §88.

(2) *Prohibition*.

Testing constitutionality of criminal statute:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §88.

Civil proceeding based on unconstitutional statute:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §89.

(3) *Mandamus*.

Cross-References: 3 Cal. Proc. (5th), *Actions*, §27; 8 Cal. Proc. (5th), *Extraordinary Writs*, §85 et seq.(4) *Certiorari and Appeal*.

Possibility of appeal:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §42.

Portnoy case:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §45.

Discretionary transfer:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §1020.

Walker case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §342.

California rule:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §343.



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6. Methods of Raising Constitutionality.

c. Extraordinary Writs and Appeal.

2. Challenge to Proposed Legislation.

aa. In General: No Relief.

7 *Witkin Sum. Cal. Law Const Law* § 102

[§ 102] In General: No Relief.

Successful challenges of proposed legislation are extremely rare. Injunctive relief is usually denied (see *supra*, §98), and mandamus will not issue for the same reason. "Regardless of how clearly a statute's unconstitutionality appeared, it would be an intolerable interference with the coordinate branches of government to invoke the judicial power to prevent the Legislature from recording its vote on a statute or from submitting it to the Governor for his signature, or to prevent the Governor from signing it, or to prevent the Secretary of State from filing it as required by law. ... It would likewise be an intolerable interference with the people's reserved legislative power to prevent the official recordation of their vote." (*Kevelin v. Jordan* (1964) 62 C.2d 82, 83, 41 C.R. 169, 396 P.2d 585 [petition for mandamus directing Secretary of State not to file statement of vote on ballot proposition; writ denied].) Thus, in a preelection challenge, a ballot measure will be removed only on a "compelling showing" of invalidity. (*Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 C.A.4th 141, 150, 153, 16 C.R.2d 408, *infra*, §155; *Memorial Hosp. Assn. v. Randol* (1995) 38 C.A.4th 1300, 1306, 1307, 45 C.R.2d 547 ["compelling showing" standard applies only to preelection challenge; in postelection challenge, issue is only whether ballot measure is valid].) (See 71 *Cal. L. Rev.* 1216 [preelection judicial review]; 15 *Pacific L. J.* 1127 [same]; 25 *Santa Clara L. Rev.* 529 [same]; on amendment and repeal of initiative or referendum, see *infra*, §158.)

Mandamus may be granted, however, for the opposite purpose: to compel a county clerk to count signatures for an initiative measure without passing on constitutional objections. (See *Gayle v. Hamm* (1972) 25 C.A.3d 250, 101 C.R. 628; *infra*, §155.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Challenge to Proposed Legislation.

bb. Invalid Initiative.

7 Witkin Sum. Cal. Law Const Law § 103

[§ 103] Invalid Initiative.

In *Legislature v. Deukmejian* (1983) 34 C.3d 658, 194 C.R. 781, 669 P.2d 17, the 1983 Legislature, pursuant to Cal. Const., Art. XXI, enacted a statute reapportioning election districts. Although the constitutional section provides for apportionment once every 10 years, real parties in interest proposed an initiative measure that would repeal the legislative reapportionment and realign the Assembly, Senate, and congressional districts. The Governor proclaimed a special election to submit the measure to the voters, and petitioners--the Legislature and other officials--sought mandamus to prevent the Governor and others from carrying out the election. *Held*, writ granted.

(a) *Propriety of preelection review.* It is usually more appropriate to review challenges to a measure after an election than to prevent its submission to the voters; but this general rule favoring postelection review contemplates that no serious consequences will result if consideration of the measure is delayed until after the election. Here, the high cost of a special election, the lack of time for orderly implementation of changes, and the fact that the Legislature has already completed its constitutional duty to establish district boundaries for this decennial period, make it imperative to decide the issue in this proceeding. (34 C.3d 665, 666, 667.)

(b) *Constitutional limitation applies to initiative.* A long line of decisions holds that the constitutional limitation to a single decennial redistricting precludes a further change of district boundaries by the Legislature. The same rule should apply to an initiative, which is equally subject to state and federal constitutional limitations. (34 C.3d 673, 674.) Hence, the proposed initiative may not be submitted to the voters. (34 C.3d 663, 680.)

One justice dissented, arguing that nothing in the Constitution suggests that the 10-year redistricting rule applies to the initiative, and that the holding is an unwarranted impairment of the people's right "to approve or disapprove a blatantly gerrymandered reapportionment plan." (34 C.3d 690.)

In *American Federation of Labor-Congress of Industrial Organizations v. Eu* (1984) 36 C.3d 687, 206 C.R. 89, 686 P.2d 609, proponents of an amendment to the federal Constitution calling for a balanced federal budget obtained sufficient signatures for an initiative measure compelling the California Legislature to apply to Congress to convene a

constitutional convention to propose the amendment, with sanctions against the Legislature if it failed to comply. *Held*, mandamus granted to prevent defendant Secretary of State from placing the measure on the ballot.

(a) *Proposed initiative is invalid.* The measure does not adopt a California statute; it is only a step in a process to amend the federal Constitution. (See *supra*, §70.) Hence, it is not an exercise of legislative power reserved to the people under the *California Constitution*. (36 C.3d 694.)

(b) *Preelection review is proper under Legislature v. Deukmejian.* "The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (36 C.3d 697.)

(c) *Proposed initiative in part violates U.S. Const., Art. V.* The reference to "Legislatures" in Article V (see *supra*, §70) does not include the people exercising the initiative power; hence, they cannot apply directly to Congress for a constitutional convention. (36 C.3d 697, citing *Barlotti v. Lyons* (1920) 182 C. 575, 189 P. 282, and out-of-state cases.) The proposed initiative seeks to bypass the Legislature by mandating it to adopt a resolution calling for a constitutional convention. This is a violation of Article V. "Under article V, the legislators must be free to vote their own considered judgment, being responsible to their constituents through the electoral process." (36 C.3d 706.)

(d) *Violation of California Constitution.* The initiative also violates Article II of the California Constitution. The reserved powers of initiative and referendum are limited to the adoption or rejection of "statutes"; they do not include a resolution merely expressing the wishes of the enacting body. (36 C.3d 708 et seq., 715.)

One justice filed a lengthy dissent. (36 C.3d 717 et seq.) (See *California Trial Lawyers Assn. v. Eu* (1988) 200 C.A.3d 351, 357, 245 C.R. 916 [preelection review is proper where initiative palpably violates single subject rule and circumstances do not militate against review]; *San Francisco v. Patterson* (1988) 202 C.A.3d 95, 100, 248 C.R. 290 [preelection review is proper where claim is that proposed initiative is beyond power of the electorate to adopt].)

In *Citizens for Responsible Behavior v. Superior Court* (1991) 1 C.A.4th 1013, 2 C.R.2d 648, the Riverside Citizens for Responsible Behavior, a nonprofit corporation, produced an initiative measure to repeal existing ordinances protecting homosexual rights, and to require voter approval for any future ordinances concerning sexual orientation, homosexuality, or AIDS. The city of Riverside refused to place the initiative on the ballot, and Citizens sought mandamus from the superior court, which denied the petition. Citizens then filed a petition seeking the same relief from the Court of Appeal. *Held*, writ denied.

(a) Although there is a mandatory duty to place a properly qualified measure on the ballot, a court may determine that the measure is invalid and direct the appropriate official not to place it on the ballot. (1 C.A.4th 1021, 1022, 1023, citing *Legislature v. Deukmajian and American Federation of Labor-Congress of Industrial Organizations, supra*.) "The costs of an election--and of preparing the ballot materials necessary for each measure--are far from insignificant. ... Proponents and opponents of a measure may both expend large sums of money during the election campaign. Frequently, the heated rhetoric of an election campaign may open permanent rifts in a community. That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure which is for any reason legally invalid." (1 C.A.4th 1023.)

(b) In the present case, the proposed ordinance is substantively invalid in that it denies equal protection to homosexuals who, as citizens, are entitled to equal protection. (1 C.A.4th 1025.) The Notice of Intent to Circulate shows that it is designed to encourage discrimination and promote bias against a selected class of citizens. (1 C.A.4th 1030, 1031.) The ordinance is also beyond the power of the electorate to enact in both prohibiting the enactment of any future ordinance that "promotes, encourages, endorses, legitimizes, or justifies homosexuality," and in prohibiting the funding of any individual, organization, or activity that takes a similar position. (1 C.A.4th 1031.)

SUPPLEMENT: [This section is current through the latest supplement]



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7 *Witkin Sum. Cal. Law Const Law* § 104

[§ 104] Waiver of Constitutional Right.

There is no sanctity in a claim of constitutional right that "prevents its being waived as any other claim of right may be." (*Wall v. Parrot Silver & Copper Co.* (1917) 244 U.S. 407, 37 S.Ct. 609, 611, 61 L.Ed. 1229, 1231; see 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §162 et seq.) The following are the chief methods of waiver:

(1) *Acceptance of benefits* under the statute claimed to be unconstitutional. (See *Wall v. Parrot Silver & Copper Co.*, *supra*; *Hershey v. Reclamation Dist. No. 108* (1927) 200 C. 550, 564, 254 P. 542; *Sacramento County v. Sacramento* (1946) 75 C.A.2d 436, 447, 171 P.2d 477 [waiver by defendant city]; *People v. Hymes* (1958) 161 C.A.2d 668, 673, 327 P.2d 219 [defendant, having voluntarily invoked sexual psychopathy proceeding on his own request, could not be heard to question constitutionality of the law]; 65 A.L.R.2d 660 [right to attack statute or ordinance relating to occupational or professional license as affected by applying for, or securing, license].)

(2) *Failure to exhaust administrative or statutory remedies*. (See *Yakus v. United States* (1944) 321 U.S. 414, 64 S.Ct. 660, 677, 88 L.Ed. 834, 859 ["a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"]; *Walker v. Birmingham* (1967) 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210; *Metcalfe v. Los Angeles* (1944) 24 C.2d 267, 269, 148 P.2d 645; 3 *Cal. Proc.* (4th), *Actions*, §296 et seq.; on exhaustion of state remedy before seeking relief in federal courts, see *Edelman v. California* (1953) 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387; 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §§180, 181; 2 *Cal. Proc.* (4th), *Jurisdiction*, §356.)

(3) *Prior adjudication*. (See *Chicot County Drainage Dist. v. Baxter State Bank* (1940) 308 U.S. 371, 60 S.Ct. 317, 320, 84 L.Ed. 329, 335 [where party failed to raise question in prior proceeding, judgment was res judicata on that issue]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §340.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Integrated Healthcare Holdings v. Fitzgibbons* (2006) 140 C.A.4th 515, 531, 44 C.R.3d 517 [only clear and compelling relinquishment of First Amendment rights will be effective].

(2) *Failure to exhaust administrative or statutory remedies*.

Cross-References: 3 *Cal. Proc.* (5th), *Actions*, §313 et seq.; 2 *Cal. Proc.* (5th), *Jurisdiction*, §365.

(3) *Prior adjudication.*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §349.



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7 Witkin Sum. Cal. Law Const Law § 105

[§ 105] Effect of Determination of Unconstitutionality.

In *Norton v. Shelby County* (1886) 118 U.S. 425, 6 S.Ct. 1121, 1125, 30 L.Ed. 178, 186, the Court declared that an unconstitutional statute "is not a law; it confers no rights, it imposes no duties; it affords no protection and creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." And *Newberry v. United States* (1921) 256 U.S. 232, 41 S.Ct. 469, 473, 65 L.Ed. 913, 920, later held that if a statute is unconstitutional at the time of its enactment, a subsequent grant of power to the Legislature by constitutional amendment cannot validate it *ex proprio vigore*. (See 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §203 et seq.)

Under this general principle, it has been held that persons acting in reliance on an unconstitutional statute, such as public enforcement officers, may become liable in damages to persons injured by their acts. (See *Hopkins v. Clemson Agricultural College of South Carolina* (1911) 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890; *Golden Gate Bridge & Highway Dist. v. Felt* (1931) 214 C. 308, 317, 5 P.2d 585, 3 Cal. Proc. (4th), *Actions*, §77.) However, in California public officers or employees are relieved from civil liability when acting in good faith under statutes subsequently declared unconstitutional. (Govt.C. 820.6; see 5 *Summary* (10th), *Torts*, §348.) And the United States Supreme Court has held that state police officers relying in good faith on an unconstitutional statute are not liable under the Civil Rights Act. (See *Pierson v. Ray* (1967) 386 U.S. 547, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288, 295; 5 *Summary* (10th), *Torts*, §§166, 348.)

Moreover, the unqualified statement in *Norton* has been criticized in later decisions pointing out that binding rights and obligations may be based on a statute that is subsequently declared unconstitutional, and that not every declaration of unconstitutionality is retroactive in its effect. (See *Chicot County Drainage Dist. v. Baxter State Bank* (1940) 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329; 30 Cal. L. Rev. 108 [effect of unconstitutionality of repealing act]; 73 Harv. L. Rev. 416; 2 Cal. Proc. (4th), *Jurisdiction*, §340.)

SUPPLEMENT: [This section is current through the latest supplement]

Golden Gate Bridge & Highway Dist. case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §27.

Chicot County Drainage Dist. case:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §349.



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C. Power To Declare Laws Unconstitutional.

9. Partial Unconstitutionality and Severability.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 106

[§ 106] In General.

The effect on the remainder of a statute when certain parts of it are held to be unconstitutional depends on whether the Legislature intended it to be severable. If so, the objectionable portions are void, but the rest of the statute remains valid. (*Regan v. Time* (1984) 468 U.S. 641, 104 S.Ct. 3262, 3269, 3272, 82 L.Ed.2d 487, 496, 501, *infra*, §365 [severability found]; *Brockett v. Spokane Arcades* (1985) 472 U.S. 491, 105 S.Ct. 2794, 2801, 2803, 86 L.Ed.2d 394, 404, 407 [same]; *Hale v. McGettigan* (1896) 114 C. 112, 119, 45 P. 1049; *Estate of Phillips* (1928) 203 C. 106, 112, 263 P. 1017; *People v. McCaughan* (1957) 49 C.2d 409, 416, 317 P.2d 974 [severability found]; *Board of Osteopathic Examiners v. Board of Med. Examiners* (1975) 53 C.A.3d 78, 85, 125 C.R. 619 [same]; *Lewis v. Hayward* (1986) 177 C.A.3d 103, 115, 222 C.R. 781 [same]; *People's Advocate v. Superior Court* (1986) 181 C.A.3d 316, 329, 333, 226 C.R. 640, *infra*, §162 [same]; see 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §207 et seq.)

Where, however, to sustain the remaining valid portion would accomplish a result different from that intended by the Legislature or the People, the whole will be declared invalid. (*Robert v. Police Court of San Francisco* (1905) 148 C. 131, 82 P. 838; *People v. Stevenson* (1962) 58 C.2d 794, 798, 26 C.R. 297, 376 P.2d 297, 5 Cal. Crim. Law (3d), *Criminal Trial*, §528 [inseverable where wholesale rewriting would be necessary to make statute constitutional]; *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 173, 174, 130 C.R. 465, 550 P.2d 1001, 12 Summary (10th), *Real Property*, §577 [municipal rent control initiative; inseverable where adding matter necessary to make initiative constitutional might defeat intent of voters adopting measure]; see *Pederson v. Superior Court* (2003) 105 C.A.4th 931, 942, 130 C.R.2d 289 [constitutional infirmity of statute that deprived misdemeanor defendants of equal protection could only be remedied by declaring statute invalid in its entirety because portion that would remain after severing objectionable parts would be incomplete and reformation was not possible].)

In the celebrated case of *Pollock v. Farmers' Loan & Trust Co.* (1895) 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108, the first federal income tax law (passed before the Sixteenth Amendment) taxed all income in excess of \$ 4,000, regardless of its source. The tax on income from real and personal property was held to be a direct tax, and invalid under the Constitution because not apportioned according to population. But to eliminate the tax on this income would place the entire burden on income derived from other sources. The Court concluded that this was not the legislative intention and therefore held the entire act void.

Where the general provisions of a statute are constitutional but it contains an unconstitutional exception, the tendency is to sustain the statute and invalidate only the exception, particularly where there is a severability clause. (See *Bacon Service Corp. v. Huss* (1926) 199 C. 21, 32, 248 P. 235; *Speegle v. Board of Fire Underwriters of the Pac.* (1946) 29 C.2d 34, 46, 172 P.2d 867; *People v. Building Maintenance Contractors' Assn.* (1953) 41 C.2d 719, 726, 264 P.2d 31.)

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9. Partial Unconstitutionality and Severability.

b. Severability Clause.

7 *Witkin Sum. Cal. Law Const Law* § 107

[§ 107] Severability Clause.

(1) *Simple Clause.* A typical severability clause is a stereotyped statement to the effect that if any provision is held unconstitutional the validity of the remainder shall be unaffected. This kind of statement, though not conclusive, is persuasive evidence of legislative intention. (*Bacon Service Corp. v. Huss* (1926) 199 C. 21, 34, 248 P. 235; *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 555, 171 P.2d 885; *People's Fed. Savings & Loan Assn. v. State Franchise Tax Bd.* (1952) 110 C.A.2d 696, 701, 243 P.2d 902.)

(2) *Broad Provision.* A broader clause, now in common use, contains language similar to the following: "If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable." This kind of clause provides for what might be called "application severability"; the court is required to determine, not the validity of particular parts of the statute, but the validity of its application to particular persons under particular circumstances. (See U.C.C. 1108 [model severability section recommended by commissioners on Uniform State Laws].)

That a severability clause does not always accomplish its purpose appears from *In re Blaney* (1947) 30 C.2d 643, 184 P.2d 892. The Hot Cargo Act of 1941 was held invalid in part as an unconstitutional interference with freedom of speech, and the court made no determination of the validity of its prohibitions against some types of secondary boycotts, holding that the partial invalidity nullified the entire statute. After stating the general presumption of constitutionality and the policy of sustaining valid parts, the court said: "This is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. ... On the other hand, where there is no possibility of mechanical severance, as where the language is so broad as to cover subjects within and without the legislative power, and the defeat cannot be cured by excising any word or group of words, the problem is quite different." (30 C.2d 655.)

Here, the statute applied generally to "any combination or agreement" causing third parties to refuse to deal with the employer involved in the dispute; its provisions were not segregated so as to distinguish between peaceful publicizing of the facts of a labor dispute and economic pressure against third parties. This was held to be a fatal defect. "The only way in which such segregation could be made would be by judicial interpretation, first holding that the act as

it stands is wholly unconstitutional, but then determining that, by inserting qualifications and exceptions in the statutory language, a judicially reformed statute might be given some effect. ... [T]he Legislature has in effect sought to delegate to the courts the task of rewriting the statute. ... It is an inescapable result that, in the meantime, those individuals who guess correctly will be released by the courts, and those who guess incorrectly will be punished; but that no one, employer, employee, union or any one will know what the law is until, after violation of the statute, and judgment thereon, a higher court is given an opportunity to pass on the question of its validity as applied to the particular 'person or circumstance.' " (30 C.2d 655.) (See *Hamer v. Ross* (1963) 59 C.2d 776, 789, 31 C.R. 335, 382 P.2d 375, citing the text; *Mulkey v. Reitman* (1966) 64 C.2d 529, 544, 50 C.R. 881, 413 P.2d 825 [following *Blaney*]; *Fort v. Civil Service Com. of Alameda County* (1964) 61 C.2d 331, 340, 38 C.R. 625, 392 P.2d 385, *infra*, §255 [where statute contains both valid and invalid restrictions on freedom of speech, and language does not permit severance, entire provision is void]; *Santa Barbara School Dist. v. Superior Court* (1975) 13 C.3d 315, 331, 118 C.R. 637, 530 P.2d 605 [effective clause]; *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 C.A.3d 177, 199, 98 C.R. 609, citing the text [some parts of statute were severable, others not]; 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §212 et seq.)

In *Calfarm Ins. Co. v. Deukmejian* (1989) 48 C.3d 805, 258 C.R. 161, 771 P.2d 1247, the court held that the insurance restriction provision of Proposition 103 was invalid (see *infra*, §1083), but that the invalid provision was severable (48 C.3d 822):

(a) "First, the subdivision is mechanically and grammatically severable. It constitutes a distinct and separate provision of Proposition 103 which can be removed as a whole without affecting the wording of any other provision." (48 C.3d 822.)

(b) "Second, the subdivision is functionally severable. Because it provides an exception to the more general rate-setting standard of section 1861.05, its removal merely eliminates the exception, permitting the general standard to operate from the effective date of the initiative." (48 C.3d 822.)

(c) "Third, the remainder of the initiative, after deleting the insolvency standard, would likely have been adopted by the people had they foreseen the invalidity of the insolvency standard. The voters who enacted Proposition 103 would presumably prefer rate setting and regulation under the balance of the initiative to the method of setting insurance rates which existed before the initiative was enacted. There is no persuasive reason to suppose the insolvency standard was so critical to the enactment of Proposition 103 that the measure would not have been enacted in its absence." (48 C.3d 822.)

(d) The consumer advocacy provision of Proposition 103 is also invalid but severable. (48 C.3d 835, 836.) (See *infra*, §163; *People's Advocate v. Superior Court* (1986) 181 C.A.3d 316, 329, 333, 226 C.R. 640, *infra*, §162 [severability found where valid sections were discrete and capable of independent application, and would have been adopted even if invalidity of other sections had been foreseen]; *Maribel M. v. Superior Court* (1998) 61 C.A.4th 1469, 1477, 72 C.R.2d 536 [applying *Calfarm Ins. Co.* criteria to invalid amendment to rule requiring any decision on merits to be rendered by written opinion after issuance of order to show cause or alternative writ, which conflicted with Welf.C. 366.26]; *People v. Salazar-Merino* (2001) 89 C.A.4th 590, 600, 107 C.R.2d 313 [P.C. 114, making it a felony to conceal one's true citizenship or alien resident status through use of false documents, is severable from unconstitutional portions of Proposition 187 (see *infra*, §731) because it reflects substantial portion of electorate's purpose in passing initiative].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Simple Clause.* See *McMahan v. San Francisco* (2005) 127 C.A.4th 1368, 1374, 26 C.R.3d 509 [following *Calfarm Ins. Co. v. Deukmejian* (1989) 48 C.3d 805, 258 C.R. 161, 771 P.2d 1247, text, p. 212; invalid funding provision of "Care Not Cash" initiative was severable where it was grammatically separable, voters would have adopted initiative even if they had known that funding provision was invalid, and remaining provision could be implemented fully even if city could not be required to allocate fixed portion of its budget each year to services for indigents].

(2) *Broad Provision.* U.C.C. 1108 was renumbered U.C.C. 1105 in 2006.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW

- C. Power To Declare Laws Unconstitutional.
- 9. Partial Unconstitutionality and Severability.
- c. Construction To Avoid Unconstitutionality.

7 *Witkin Sum. Cal. Law Const Law § 108*

[§ 108] Construction To Avoid Unconstitutionality.

The general rule that a statute will be interpreted if possible as constitutional is well settled. (See *infra*, §115 et seq.) A more subtle question is whether the court can construe a law contrary to the *legislative intent* at the time of enactment, to salvage what can be saved of the *legislative purpose*.

In *Metromedia v. San Diego* (1982) 32 C.3d 180, 185 C.R. 260, 649 P.2d 902, the Court held a municipal billboard regulation unconstitutional on the ground that its prohibition on *noncommercial* billboards violated the First Amendment. (See *infra*, §1067.) The case was then remanded to the California court to determine whether constitutionality could be saved by construction, i.e., by limiting its scope to prohibit only commercial signs. *Held*, this construction would not be proper. It would be inconsistent with the language and original intent of the ordinance; it would leave the city with one less effective in achieving the city's goals; and it would invite constitutional difficulties in distinguishing between commercial and noncommercial signs. (32 C.3d 191.)

Two justices dissented, asserting that (a) "courts are fully authorized to undertake precisely this kind of constitutionally compelled editing and interpreting in order to uphold a legislative scheme insofar as it is constitutionally permissible"; and (b) the choice between alternative schemes is a policy matter for the city. (32 C.3d 192, 195.) (See *Kopp v. Fair Political Practices Com.* (1995) 11 C.4th 607, 660, 47 C.R.2d 108, 905 P.2d 1248 [reformation of initiative provisions was not possible].)

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10. State Constitutional Protection (Independent Grounds).
a. Nature of Doctrine.

7 *Witkin Sum. Cal. Law Const Law* § 109

[§ 109] Nature of Doctrine.

The California Constitution is a document of independent force, and the state Supreme Court is the ultimate interpreter of the meaning of that document. Hence, while state courts must enforce the minimum federal constitutional standards as interpreted by the U.S. Supreme Court, they remain free to interpret state constitutional provisions, including those similar to or the same as federal constitutional provisions, in a manner that will grant *additional protection*. Authoritative construction of the California Constitution is left to the Supreme Court, "informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions." (*Reynolds v. Superior Court* (1974) 12 C.3d 834, 842, 117 C.R. 437, 528 P.2d 45; see 16 Am.Jur.2d (1998 ed.), *Constitutional Law* §80 et seq.)

A definitive exposition of the doctrine was given in *People v. Brisendine* (1975) 13 C.3d 528, 119 C.R. 315, 531 P.2d 1099, holding a warrantless search by deputy sheriffs invalid under California precedents, despite its probable validity under U.S. Supreme Court decisions.

(a) The right of a state to impose higher constitutional standards cannot be seriously questioned. In the search and seizure area, California courts have often followed federal decisions as a matter of choice and not compulsion; and in both search and seizure and double jeopardy decisions our court has on occasion imposed a higher standard. (13 C.3d 548, 549, and footnote 17.)

(b) "The foregoing cases illustrate the incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism but also the historic bases of state charters. It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise; the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." (13 C.3d 549.)

(c) "The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials. Thus in determining that California citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures than that required by the

United States Constitution, we are embarking on no revolutionary course. Rather we are simply reaffirming a basic principle of federalism--that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens." (13 C.3d 550.)

(d) This conclusion was confirmed by the adoption in 1974 of Cal. Const., Art. I, §24, declaring that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." The ballot pamphlet to voters advised them that this provision was a reaffirmation of existing law. (13 C.3d 551.)

The doctrine has been applied in many other California cases. (See *People v. Olivas* (1976) 17 C.3d 236, 245, 246, 131 C.R. 55, 551 P.2d 375, *infra*, §779; *Serrano v. Priest* (1976) 18 C.3d 728, 764, 135 C.R. 345, 557 P.2d 929, *infra*, §805; *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899, 910, 153 C.R. 854, 592 P.2d 341, *infra*, §316; *Rankins v. Commission on Professional Competence of Ducor Union School Dist.* (1979) 24 C.3d 167, 154 C.R. 907, 593 P.2d 852, *infra*, §551; *People v. Chavez* (1980) 26 C.3d 334, 351, 161 C.R. 762, 605 P.2d 401; *Santa Barbara v. Adamson* (1980) 27 C.3d 123, 164 C.R. 539, 610 P.2d 436, *infra*, §1032; *Committee To Defend Reproductive Rights v. Myers* (1981) 29 C.3d 252, 172 C.R. 866, 625 P.2d 779, *infra*, §578; *People v. Bustamante* (1981) 30 C.3d 88, 97, 177 C.R. 576, 634 P.2d 927; *People v. Houston* (1986) 42 C.3d 595, 609, 610, 230 C.R. 141, 724 P.2d 1166; *People v. Mayoff* (1986) 42 C.3d 1302, 1312, 233 C.R. 2, 729 P.2d 166.)

The independent grounds doctrine was limited by the adoption of Proposition 8, The Victims' Bill of Rights, which added Cal. Const., Art. I, §28. Under this Proposition, *relevant* evidence is admissible in criminal proceedings unless required to be excluded on federal constitutional grounds. (See *Cal. Evidence* (4th), *Introduction*, §7 et seq.)

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10. State Constitutional Protection (Independent Grounds).
b. Commentary.

7 *Witkin Sum. Cal. Law Const Law* § 110

[§ 110] Commentary.

Commentary on state constitutional protections has been extensive. The following sources are illustrative. (See 1 Rotunda, §1.6; 1 Tribe, §3-24; 61 *Cal. L. Rev.* 273 [state Constitution as a more than adequate nonfederal ground]; 90 *Harv. L. Rev.* 489 [state constitutions and the protection of individual rights]; 95 *Harv. L. Rev.* 1324 [Developments in the Law: Interpretation of State Constitutional Rights]; 106 *Harv. L. Rev.* 1147 [Interpretation and Authority in State Constitutionalism]; 6 *Hastings Const. L. Q.* 975 [All Sail and No Anchor]; 9 *Hastings Const. L. Q.* 1 [Reliance on State Constitutions--Away From a Reactionary Approach]; 12 *Hastings Const. L. Q.* 395 [Justice Mosk and his use of state constitutional grounds]; 13 *Hastings Const. L. Q.* 599 [survey of judicial reliance on state Constitutions and individual rights litigation]; 15 *Hastings Const. L. Q.* 429 [role of federalism in state constitutional analysis]; 17 *Hastings Const. L. Q.* 1 [California Constitutional Symposium, covering a wide variety of subjects]; 18 *Hastings Const. L. Q.* 371 [The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine]; 18 *Hastings Const. L. Q.* 723 [Divided We Stand: State Constitutions in a More Perfect Union]; 21 *Hastings Const. L. Q.* 95 [The Doctrine of Independent State Grounds and the Voter Initiative in California; discussion of Propositions 8 and 115]; 26 *Hastings L. J.* 481 [Rediscovering the California Declaration of Rights]; 21 *Santa Clara L. Rev.* 199 [Independent Interpretation: California's Declaration of Rights or Declaration of Independence?]; 45 *So. Cal. L. Rev.* 750 [invalidation of death penalty on state constitutional grounds]; 9 *Southwestern U. L. Rev.* 1157 [Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals]; 29 *Stanf. L. Rev.* 297 [The New Federalism: Toward a Principled Interpretation of the State Constitution].)

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See 1 Rotunda 4th, §1.6; 31 *Hastings Const. L. Q.* 141 [early years of state constitutional rights].



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c. Specification of State Grounds.

7 *Witkin Sum. Cal. Law Const Law* § 111

[§ 111] Specification of State Grounds.

In *Michigan v. Long* (1983) 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214, the Court suggested a method of avoiding the practice of remanding a case for clarification of the constitutional basis of an opinion: "[W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." (See *Long Beach v. Bozek* (1983) 33 C.3d 727, 190 C.R. 918, 661 P.2d 1072 [opinion after remand from U.S. Supreme Court to consider whether judgment was based on federal or state constitutional grounds or both; "We ... certify that our judgment is based on both the First Amendment to the United States Constitution and article I, section 3, of the California Constitution"]; 97 *Harv. L. Rev.* 224 [*Michigan v. Long*]; 100 *Harv. L. Rev.* 1485 [same]; 11 *Hastings Const. L. Q.* 523 [same].)

The "plain statement rule" of *Michigan v. Long* applies in a case on federal habeas review as well as in a case on direct review. (*Harris v. Reed* (1989) 489 U.S. 255, 109 S.Ct. 1038, 1042, 103 L.Ed.2d 308, 316; *Coleman v. Thompson* (1991) 501 U.S. 722, 111 S.Ct. 2546, 2557, 115 L.Ed.2d 640, 659; see 105 *Harv. L. Rev.* 329 [*Coleman v. Thompson*].)

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D. Interpretation of Constitutions and Statutes.

1. In General.

a. Federal and State Courts.

7 *Witkin Sum. Cal. Law Const Law* § 112

[§ 112] Federal and State Courts.

(1) *Federal Constitution and Laws*. On questions involving the interpretation of the federal Constitution and laws, or the constitutionality of any law, federal or state, under the federal Constitution, the U.S. Supreme Court has final authority, and its decisions will bind the courts of California. (*United States v. Reynolds* (1914) 235 U.S. 133, 35 S.Ct. 86, 90, 59 L.Ed. 162, 168; *Brook v. Oakland* (1911) 160 C. 423, 427, 117 P. 433; see *Arkansas v. Sullivan* (2001) 532 U.S. 769, 121 S.Ct. 1876, 1878, 149 L.Ed.2d 994, 999 [state may not interpret federal Constitution more restrictively than interpretation given it by U.S. Supreme Court]; *Robbins v. Foothill Nissan* (1994) 22 C.A.4th 1769, 1774, 28 C.R.2d 190 [construing Financial Institutions Reform, Recovery, and Enforcement Act (12 U.S.C., §1811 et seq.) for purposes of determining state or federal jurisdiction]; 66 *Harv. L. Rev.* 1498 [review by U.S. Supreme Court of state interpretation of federal laws incorporated by reference in state statutes]; 43 *Santa Clara L. Rev.* 495 [third-party beneficiary approach to constitutional interpretation]; 47 *U.C.L.A. L. Rev.* 491 [Judicial Supremacy and the Law of the Constitution]; 9 *Cal. Proc.* (4th), *Appeal*, §941.)

It is sometimes stated that the decisions of other federal courts are also binding on state courts, but the prevailing view appears to be that these decisions are only entitled to great weight. (See 9 *Cal. Proc.* (4th), *Appeal*, §942.)

(2) *California Constitution and Laws*. In the interpretation of the California Constitution and statutes, and the determination of constitutionality under the California Constitution, the California courts have final authority, and the federal courts will accept the determination of the California Supreme Court. (*Fallbrook Irr. Dist. v. Bradley* (1896) 164 U.S. 112, 17 S.Ct. 56, 61, 41 L.Ed. 369, 387; *Quong Ham Wah Co. v. Industrial Acc. Com. of Calif.* (1921) 255 U.S. 445, 41 S.Ct. 373, 65 L.Ed. 723; see *Kopp v. Fair Political Practices Com.* (1995) 11 C.4th 607, 47 C.R.2d 108, 905 P.2d 1248 [statute declared unconstitutional by federal court is not treated as if it was never passed, and is subject to judicial reformation]; *Oakland Raiders v. Berkeley* (1976) 65 C.A.3d 623, 629, 137 C.R. 648, citing the text [interpretation and constitutionality of statutes and ordinances is within authority of courts, and parties' stipulation as to interpretation of ordinance is ineffective]; 9 *Cal. Proc.* (4th), *Appeal*, §943; 1 *Rotunda*, §1.6; on determination of state law in applying *Erie* doctrine, see *supra*, §59.)

West's Key Number Digest, Constitutional Law k.11 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Federal Constitution and Laws.*

U.S. Supreme Court:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §505.

Other federal courts:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §506.(2) *California Constitution and Laws.* See 1 Rotunda 4th, §1.6.

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §507.



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1. In General.

b. Strict or Liberal Construction of Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 113

[§ 113] Strict or Liberal Construction of Constitution.

The question whether the Constitution should be interpreted strictly in accord with the "original intention" of the framers, or liberally to promote the broad social values sought by the framers, is an old one. (See *16 Am.Jur.2d* (1998 ed.), *Constitutional Law* §66 et seq.; for extensive commentary on question, see *infra*, §114.)

"The provisions of this Constitution are mandatory and prohibitory, unless by *express words* they are declared to be otherwise." (Cal. Const. Art. I, §26.) The effect of this section is said to be that the courts cannot consider the policy of a constitutional provision when its language is plain and positive. (*Shay v. Roth* (1923) 64 C.A. 314, 316, 221 P. 967; see *People v. San Buenaventura* (1931) 213 C. 637, 3 P.2d 3; *People v. Santa Clara* (1951) 37 C.2d 335, 341, 231 P.2d 826; *State Bd. of Education v. Levit* (1959) 52 C.2d 441, 460, 343 P.2d 8; *Delaney v. Superior Court* (1990) 50 C.3d 785, 798, 799, 800, 268 C.R. 753, 789 P.2d 934 [clear and unambiguous language controls; words should be given their ordinary meaning, and courts may not add language to provision that is plain and definite].)

However, a "liberal, practical common-sense construction" that will "meet changed conditions and the growing needs of the people," has been advocated for all constitutional provisions. (*Alameda v. Sweeney* (1957) 151 C.A.2d 505, 513, 312 P.2d 419; see *ITT World Communications v. San Francisco* (1985) 37 C.3d 859, 865, 210 C.R. 226, 693 P.2d 811 [natural and ordinary meaning of words, in favor of validity, against implied repeal of another constitutional provision]; *Redevelopment Agency of Sacramento v. Malaki* (1963) 216 C.A.2d 480, 487, 31 C.R. 92 [criticizing "plain meaning" rule]; *Franchise Tax Bd. v. Superior Court* (1989) 212 C.A.3d 1343, 1347, 261 C.R. 236 [constitutional provision must be construed with reference to its underlying purpose; provision prohibiting judicial action enjoining collection of taxes was not violated by statute that postpones collection of taxes during litigation].)

West's Key Number Digest, Constitutional Law k.14 et seq.

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7 *Witkin Sum. Cal. Law Const Law* § 114

[§ 114] Commentary.

Commentary on the question whether constitutions should be interpreted strictly or liberally has been extensive. The following sources are illustrative. (See 5 Rotunda, §23.19 et seq.; 1 Tribe, §3-4; 96 *Harv. L. Rev.* 781 [Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles]; 98 *Harv. L. Rev.* 885 [original understanding of original intent]; 98 *Harv. L. Rev.* 1331 [idealism as interpretive aid]; 100 *Harv. L. Rev.* 1189 [Constructive Coherence]; 103 *Harv. L. Rev.* 1344 [Constitutional Stare Decisis]; 106 *Harv. L. Rev.* 1197 [book review of Burt, *The Constitution in Conflict*]; 106 *Harv. L. Rev.* 1218 [book note on Bobbitt, *Constitutional Interpretation*]; 107 *Harv. L. Rev.* 1140 [commentary on constitutional doctrine]; 108 *Harv. L. Rev.* 1221 [Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation]; 117 *Harv. L. Rev.* 2708 [Satisfying the "Appearance of Justice": The Uses of Apparent Impropriety in Constitutional Adjudication]; 73 *Cal. L. Rev.* 1482 [questioning whether originalist interpretation can be justified]; 77 *Cal. L. Rev.* 235 [The Bicentennial of the Jurisprudence of Original Intent: The Recent Past]; 36 *Hastings L. J.* 155 [criticism of use of cost-benefit analysis in reaching decisions]; 45 *Hastings L. J.* 707 [symposium on methods of constitutional decision making]; 25 *Loyola L.A. L. Rev.* 1135 [Symposium: One Hundred Twenty-Five Years of the Reconstruction Amendments]; 27 *San Diego L. Rev.* 309 [Majorities May Limit the People's Liberties Only When Authorized To Do So by the Constitution]; 29 *San Diego L. Rev.* 385 [Rights of the individual and the legacy of Oliver W. Holmes]; 63 *So. Cal. L. Rev.* 107 [Do We Have an Unwritten Constitution?]; 67 *So. Cal. L. Rev.* 585 [The Sleeping Giant: Textualism as Power Struggle]; 40 *Stanf. L. Rev.* 181 [Deconstructing the Constitution]; 44 *Stanf. L. Rev.* 1019 ["Interpreting" the Constitution: Posner on Bork]; 47 *Stanf. L. Rev.* 395 [new readings of Constitution as maintaining fidelity with past understandings]; 19 *U.C. Davis L. Rev.* 2, 15, 22 [three views on constitutional construction]; 29 *U.C.L.A. L. Rev.* 797 [An Essay on Constitutional Language].)

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See 6 Rotunda 4th, §23.19 et seq.; 2A Sutherland, *Statutes and Statutory Construction* 7th, Chap. 45 et seq.; 2B Sutherland, *Statutes and Statutory Construction* 7th, Chap. 49 et seq.; 94 *Cal. L. Rev.* 1745 [The First Congress Canon and the Supreme Court's Use of History]; 118 *Harvard L. Rev.* 1787 [Legitimacy and the Constitution]; 118 *Harvard L. Rev.* 1854 [Reply: Legitimacy and Obedience]; 31 *Hastings Const. L. Q.* 269 [Constitution as federal treaty]; 44 *San Diego L. Rev.* 957 [interpretive lessons from positive theories of communication and legislation]; 44 *San Diego L. Rev.* 1001 [Intentionalism's Revival]; 52 *U.C.L.A. L. Rev.* 639 [constitutional comparativism].



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2. Rules for Interpretation of Statutes.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 115

[§ 115] In General.

(1) *General Rules of Interpretation.* In *DeYoung v. San Diego* (1983) 147 C.A.3d 11, 17, 194 C.R. 722, the court pointed out that the fundamental rules of statutory construction apply in interpreting provisions of a municipal charter (147 C.A.3d 17), and cited cases applying the following important rules:

(a) Ascertain the intent of the Legislature so as to effectuate the purpose of the law. (See *Burden v. Snowden* (1992) 2 C.4th 556, 562, 7 C.R.2d 531, 828 P.2d 672 [effectuate legislative intent]; *Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 C.A.3d 1038, 1042, 283 C.R. 873 [effectuate apparent purpose, harmonize statutory sections relating to same subject, impute meaning that comports to legislative objective]; *California Correctional Peace Officers Assn. v. Department of Corrections* (1999) 72 C.A.4th 1331, 1340, 85 C.R.2d 797 [if earlier and later enactments present unavoidable conflict, most recent expression of legislative will prevails].)

(b) Give a provision a reasonable and common sense interpretation consistent with the apparent purpose, which will result in wise policy rather than mischief or absurdity. (See *Wotton v. Bush* (1953) 41 C.2d 460, 467, 261 P.2d 256 [consideration of objective sought to be achieved and evil to be prevented]; *Granberry v. Islay Inv.* (1984) 161 C.A.3d 382, 388, 207 C.R. 652 [avoid absurd result]; on disregarding words to avoid absurdity, see *infra*, §120.)

(c) Give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole. (See *Moyer v. Work. Comp. App. Bd.* (1973) 10 C.3d 222, 232, 110 C.R. 144, 514 P.2d 1224 [word susceptible of different meanings construed in conformity with general purpose of statute]; *California Assn. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 18, 270 C.R. 796, 793 P.2d 2; 18 *Pepperdine L. Rev.* 77 [California Assn. of Psychology].)

(d) Take into account matters such as context, object in view, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction. (See *Delaney v. Superior Court* (1990) 50 C.3d 785, 796, 797, footnote 5, 268 C.R. 753, 789 P.2d 934 [state constitutional provision applies equally to nearly identical statutory provision]; *infra*, §123 et seq.; on implied amendment or repeal of conflicting statutes, see *infra*, §117.)

(e) Give great weight to consistent administrative construction. (See *infra*, §127.)

Where a statute specifically adopts the provisions of another statute, the provisions are incorporated in the form in which they existed at the time of adoption, and not as subsequently modified. The repeal of the original statute does not affect the adopting statute in the absence of clear expression to the contrary. (*Palermo v. Stockton Theatres* (1948) 32 C.2d 53, 58, 195 P.2d 1; see *In re Jovan B.* (1993) 6 C.4th 801, 816, 25 C.R.2d 428, 863 P.2d 673 [distinguishing *Palermo*; where it is unclear from words of incorporation whether adopting statute contemplates only time-specific incorporation, determining factor is legislative intent]; *Sneed v. Saenz* (2004) 120 C.A.4th 1220, 1238, 16 C.R.3d 563 [in interpreting welfare statute that did not specifically adopt calculation methodology of since-repealed statute in time-specific way, department was not bound to use that methodology].)

Many other cases discuss statutory construction. (See *Monzon v. Schaefer Ambulance Service* (1990) 224 C.A.3d 16, 30, 273 C.R. 615, quoting the text; *Texas Commerce Bank v. Garamendi* (1992) 11 C.A.4th 460, 471, 14 C.R.2d 854 [analysis and discussion of *noscitur a sociis*]; *People v. Squier* (1993) 15 C.A.4th 235, 241, 18 C.R.2d 536 [rule of strict interpretation of penal statutes does not apply in California]; *Board of Education v. Sacramento County Bd. of Education* (2001) 85 C.A.4th 1321, 1331, 102 C.R.2d 872 [whether time provisions in statute are mandatory or merely directory partially depends on purpose of statute]; *Union Bank of Calif. v. Superior Court* (2004) 115 C.A.4th 484, 489, 9 C.R.3d 137 [under Govt.C. 9607, repeal of statute that repealed former statute did not revive former statute or undo rights conferred by it]; *infra*, §116 et seq.; on liberal construction of statutes enacted in aid of self-executing constitutional provisions, see *Chester v. Hall* (1921) 55 C.A. 611, 617, 204 P. 237; *Chesney v. Byram* (1940) 15 C.2d 460, 101 P.2d 1106.) (See Uniform Statutory Construction Act, 14 U.L.A. (Master Ed.), §1 et seq.)

(2) *Law Reviews and Texts.* The following sources are illustrative of the commentary on the interpretation of statutes. (See 31 *Cal. L. Rev.* 203 [doctrine of latent ambiguities]; 83 *Harv. L. Rev.* 1887 [legislative purpose as factor]; 95 *Harv. L. Rev.* 892 [Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court]; 103 *Harv. L. Rev.* 405 [Interpreting Statutes in the Regulatory State]; 107 *Harv. L. Rev.* 1437 [warning against excessive reliance on dictionaries in statutory interpretation]; 108 *Harv. L. Rev.* 593 [Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation]; 40 *Hastings L. J.* 805 [Realism and Reasonableness in Statutory Interpretation]; 17 *So. Cal. L. Rev.* 335 [consideration of facts in determining constitutionality]; 65 *So. Cal. L. Rev.* 2505 [Understanding Postmodern Thought and Its Implications for Statutory Interpretation]; 5 *Southwestern L. Rev.* 349 [general rules of statutory construction]; 35 *Stanf. L. Rev.* 213 [Calabresian approach to statutory interpretation]; 43 *Stanf. L. Rev.* 321 [Statutory Interpretation as Practical Reasoning]; 37 *U.C.L.A. L. Rev.* 621 [new textualism]; 73 *Am.Jur.2d* (2001 ed.), *Statutes* §60 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Law Reviews and Texts.* See 2A Sutherland, *Statutes and Statutory Construction* 7th, §45:4 et seq.; 38 *Loyola L.A. L. Rev.* 1899 [Symposium: Theories of Statutory Interpretation (and Their Limits)].



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2. Rules for Interpretation of Statutes.

b. Initiative and Referendum Powers.

7 *Witkin Sum. Cal. Law Const Law* § 116

[§ 116] Initiative and Referendum Powers.

Several cases emphasize the policy of liberal construction of the constitutional and statutory provisions for the initiative and referendum in favor of the powers thus reserved to the people. (See *McFadden v. Jordan* (1948) 32 C.2d 330, 332, 196 P.2d 787, supra, §72 [initiative power was exceeded]; *Blotter v. Farrell* (1954) 42 C.2d 804, 809, 270 P.2d 481 [initiative power upheld]; *Dye v. Council of Compton* (1947) 80 C.A.2d 486, 490, 182 P.2d 623 [referendum power upheld]; *Larson v. Duca* (1989) 213 C.A.3d 324, 329, 261 C.R. 559 [court interpreting initiative measure must follow rule that electorate is deemed to know law prior to enactment of measure].)

In *Hunt v. Riverside* (1948) 31 C.2d 619, 191 P.2d 426, the court called attention to the opposing principle that, if applying the referendum power to a particular piece of legislation would have the inevitable effect of greatly impairing the efficacy of some other essential governmental power, it may be assumed that the people intended no such result. It was accordingly held that the referendum provisions of a city charter should not be construed to extend to an ordinance imposing a sales tax, because disruption in city fiscal administration would result from the uncertainty and delay of referendum proceedings. (31 C.2d 628.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW D. Interpretation of Constitutions and Statutes. 2. Rules for Interpretation of Statutes. c. Conflicting Statutes.

7 *Witkin Sum. Cal. Law Const Law* § 117

[§ 117] Conflicting Statutes.

(1) *Conflicting Statutes at Same Session.* Unless there is an express provision to the contrary, it must be conclusively presumed that the statute that is enacted last or has the highest chapter number prevails over a conflicting statute that was adopted earlier or has a lower chapter number. (*Govt.C. 9605*; see *In re Thierry S.* (1977) 19 C.3d 727, 745, footnote 17, 139 C.R. 708, 566 P.2d 610 [highest chapter number rule manifests Legislature's intent and must be followed].)

(2) *Implied Repeal of Conflicting Statutes.* To overcome the strong presumption against the implied repeal of conflicting statutes, the two statutes "must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together." (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 C.3d 408, 419, 261 C.R. 384, 777 P.2d 157; see *Stop Youth Addiction v. Lucky Stores* (1998) 17 C.4th 553, 569, 71 C.R.2d 731, 950 P.2d 1086 [retailer failed to demonstrate that P.C. 308, prohibiting sales of cigarettes to minors, is irreconcilable with broad standing provision of Unfair Competition Law]; *Medical Bd. of Calif. v. Superior Court* (2001) 88 C.A.4th 1001, 1005, 1013, 106 C.R.2d 381 [B. & P.C. 141, permitting state licensing boards to impose discipline based on disciplinary action taken by another state, can be reconciled with more specific B. & P.C. 2305, mandating disciplinary action against medical licensees based on out-of-state discipline that "would have been grounds for discipline in California," by treating B. & P.C. 2305 as an exception to, but not replacement of, B. & P.C. 141]; *Burlington Northern & Santa Fe Ry. Co. v. Public Util. Com.* (2003) 112 C.A.4th 881, 891, 5 C.R.3d 503 [statute requiring railroads to employ brakemen to work in obsolete position for 2 years before becoming conductors was repealed by implication by later enacted anti-featherbedding initiative, regardless of whether initiative expressly named statute or whether statute was inconsistent with initiative at time initiative was passed]; 92 *Cal. L. Rev.* 487 [Rethorizing the Presumption Against Implied Repeals].)

(3) *Implied Amendment of Conflicting Statutes.* The implied amendment of an existing statute is not favored. It "is to be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes." (*McLaughlin v. State Bd. of Education* (1999) 75 C.A.4th 196, 219, 222, 89 C.R.2d 295.) *Educ.C. 33050* provides that, except for specifically enumerated statutes, Education Code provisions may be waived. In *McLaughlin*, the court impliedly amended the statute to add *Educ.C. 300-340* (Proposition

227, the "English Language in Public Schools" initiative) to the list of excepted statutes, i.e., statutes that may *not* be waived. Initiatives are held to a different standard than statutes enacted by the *Legislature* (75 C.A.4th 214), and the failure to specifically add the core provisions of the initiative to the list of exceptions to *Educ.C. 33050* was due to "drafters' oversight" (75 C.A.4th 223). "[I]n light of the abolitionist tone of the proposition, including the ballot pamphlet materials, we believe the only reasonable conclusion is that the initiative's failure to conform section 33050 to the Chapter was simply the product of neglect." (75 C.A.4th 223.)

SUPPLEMENT: [This section is current through the latest supplement]

(1a) (*New*) *Conflicting Amendments*. Where a legislative body amends an ordinance that is also subject to amendment by a conflicting and irreconcilable initiative measure, the version of the ordinance passed later in time controls. (*Garber v. Levit* (2006) 141 C.A.4th Supp. 1, 7, 46 C.R.3d 348.) (2) *Implied Repeal of Conflicting Statutes*. See *Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 C.A.4th 109, 118, 80 C.R.3d 326, 4 Summary (10th), *Secured Transactions in Personal Property*, Supp., §164 [more specific provision of State Lottery Act prohibiting assignment of final three annual lottery payments could be harmonized as exception to more general U.C.C. provision codifying principle of free assignability of accounts].



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2. Rules for Interpretation of Statutes.

d. Construction in Favor of Constitutionality.

7 *Witkin Sum. Cal. Law Const Law* § 118

[§ 118] Construction in Favor of Constitutionality.

(1) *In General.* A statute susceptible of two interpretations will if possible be construed as constitutional. (See *Shealor v. Lodi* (1944) 23 C.2d 647, 653, 145 P.2d 574; *Palermo v. Stockton Theatres* (1948) 32 C.2d 53, 60, 195 P.2d 1; *Kopp v. Fair Political Practices Com.* (1995) 11 C.4th 607, 47 C.R.2d 108, 905 P.2d 1248 [reformation of Proposition 73 to ensure its constitutionality would impermissibly intrude on policymaking functions reserved to Legislature and the People]; *In re Marriage of Shupe* (1983) 139 C.A.3d 1026, 1035, 189 C.R. 288; *Summit Care-California v. Department of Health Services* (1986) 186 C.A.3d 1584, 1588, 231 C.R. 476; *Clare v. State Bd. of Accountancy* (1992) 10 C.A.4th 294, 303, 12 C.R.2d 481; 5 Rotunda, §23.10; 24 *Pepperdine L. Rev.* 286 [Kopp]; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §172 et seq.)

And, to uphold their validity, statutes may be construed together with constitutional provisions. (*People v. Globe Grain & Milling Co.* (1930) 211 C. 121, 127, 294 P. 3; *California Housing Finance Agency v. Elliott* (1976) 17 C.3d 575, 593, 131 C.R. 361, 551 P.2d 1193 [construing statute to incorporate self-executing constitutional provision].)

A related rule is that a statute will normally be construed as prospective in effect, not only to avoid due process objections, but also to prevent hardship or unfairness from constitutionally valid retroactive application. (See *infra*, §633.)

(2) *Avoiding Decision on Constitutionality.* A court should not decide the question whether a statute is constitutional if alternative grounds are available to dispose of the issues in the case. (See *California State Electronics Assn. v. Zeos Int. Ltd.* (1996) 41 C.A.4th 1270, 1274, 49 C.R.2d 127 [sales by out-of-state computer manufacturer were not subject to warranty requirements of C.C. 1793.2(a)(1)(A) (see 4 *Summary* (10th), *Sales*, §317); hence, constitutionality of statute need not be decided]; 116 *Harv. L. Rev.* 1798 [discussing whether Supreme Court should presume Congress acts constitutionally; role of avoidance and reliance on early legislative practice in constitutional interpretation]; on similar rule in federal courts, see *supra*, §92 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 6 Rotunda 4th, §23.10.



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7 *Witkin Sum. Cal. Law Const Law* § 119

[§ 119] Facial Challenge.

A facial challenge to a legislative act is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The fact that an act "might operate unconstitutionally under one set of circumstances is insufficient to render it wholly invalid," except in the limited context of an overbreadth challenge under the First Amendment. (*United States v. Salerno* (1987) 481 U.S. 739, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 [Bail Reform Act is not facially unconstitutional]; see *In re Marriage of Siller* (1986) 187 C.A.3d 36, 48, 50, 231 C.R. 757 [distinguishing between facial challenge and challenge to statute as applied].)

Even in the context of a First Amendment challenge, "[o]nly a statute that is substantially overbroad may be invalidated on its face." (*Houston v. Hill* (1987) 482 U.S. 451, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398, 410; see *Williams v. Garcetti* (1993) 5 C.4th 561, 578, 20 C.R.2d 341, 853 P.2d 507 ["Although the right of intimate family association is constitutionally protected, a statute that seeks to regulate parental behavior is not overbroad per se"]; *People v. Rodriguez* (1998) 66 C.A.4th 157, 166, 77 C.R.2d 676 [discussing facial unconstitutionality and First Amendment exceptions]; 30 U.C. Davis L. Rev. 1 [Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns]; *infra*, §408 et seq.)

In *Welton v. Los Angeles* (1976) 18 C.3d 497, 134 C.R. 668, 556 P.2d 1119, *infra*, §335, the court offered the following suggestions on construction of a statute or ordinance challenged for overbreadth: "Two principles of statutory construction govern whether a statute or ordinance suffering overbreadth may be construed so as to avoid conflict with the Constitution. First, the enactment may be validated if its terms are reasonably susceptible to an interpretation consistent with the Constitution . . . Second, the court should construe the enactment so as to limit its effect and operation to matters that may be constitutionally regulated or prohibited." (18 C.3d 505.) However, "[b]oth principles are limited by the further rule that judicial construction must not create uncertainty inhibiting exercise of a constitutional right." (18 C.3d 506.)

SUPPLEMENT: [This section is current through the latest supplement]



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f. Disregarding Words To Avoid Absurdity.

7 *Witkin Sum. Cal. Law Const Law* § 120

[§ 120] Disregarding Words To Avoid Absurdity.

Unzueta v. Ocean View School Dist. (1992) 6 C.A.4th 1689, 8 C.R.2d 614, explores the meaning and effect of the rule that the literal meaning of the words of a statute may be disregarded to avoid "absurd results." (6 C.A.4th 1698.)

(a) Like beauty, absurdity "is in the eye of the beholder." (6 C.A.4th 1698.) As Lord Bramwell put it: "I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another. ... I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter those words according to one's notion of an absurdity." (6 C.A.4th 1698.)

(b) "Each time the judiciary utilizes the 'absurd result' rule, a little piece is stripped from the written rule of law and confidence in legislative enactments is lessened. ... If the dissent had one additional vote, this court would sit as a 'super-Legislature' with more than veto power over legislation. The court would have the power to add and subtract from the plain language of a statute. Lord Bramwell would not be pleased with the dissent's definition of absurdity." (6 C.A.4th 1699.)

(c) "[E]xcept in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature." (6 C.A.4th 1700.)

The dissent found the majority holding unacceptable: "Absurdity--I know it when I see it. I agree with my colleagues that absurdity is in the mind of the beholder. Perhaps I am too prone to see it, but its specter haunts me in this case." (6 C.A.4th 1702.) "A mechanical, literal interpretation of the statute in the lifeless atmosphere of a vacuum creates a result contrary to public policy, contrary to legislative intent, contrary to common sense, and contrary to our shared notions of justice." (6 C.A.4th 1705.) (See *California School Employees Assn. v. Governing Bd. of the Marin Community College District* (1994) 8 C.4th 333, 339, 342, 33 C.R.2d 109, 878 P.2d 1321 [Educ.C. 88203 and 79020, providing that days appointed by President as days of "thanksgiving" are holidays for community college employees, construed to require that proclamation contemplated national holiday, since literal interpretation would result in absurd

result that entitlement to holiday depends on President's fortuitous choice of words].)

SUPPLEMENT: [This section is current through the latest supplement]
See 2A Sutherland, Statutes and Statutory Construction 7th, §47:37.



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g. Plain Meaning and Other Particular Rules.

7 *Witkin Sum. Cal. Law Const Law* § 121

[§ 121] Plain Meaning and Other Particular Rules.

In examining and interpreting the words of a statute, courts are guided by the following rules:

(1) *Plain meaning*. Courts will adopt a literal interpretation unless it is repugnant to the obvious purpose of the statute. (*Lungren v. Deukmejian* (1988) 45 C.3d 727, 735, 248 C.R. 115, 755 P.2d 299; *Duty v. Abex Corp.* (1989) 214 C.A.3d 742, 749, 263 C.R. 13; see *Petaluma v. Sonoma* (1993) 12 C.A.4th 1239, 1244, 1247, 15 C.R.2d 617; *J.A. Jones Const. Co. v. Superior Court* (1994) 27 C.A.4th 1568, 1575, 33 C.R.2d 206 [where text of statute is clear, court should not inquire into legislative intent]; 29 Cal. Western L. Rev. 373 [a legal phoenix; after its alleged demise it is rising again]; 68 So. Cal. L. Rev. 259 [The Ambiguity of Plain Meaning; *Smith v. United States* and the New Textualism]; 30 U.C. Davis L. Rev. 569 [resurrection of plain meaning in California courts].)

(2) *Ejusdem generis*. Items of the same kind will be treated together. (See *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 1159, 278 C.R. 614, 805 P.2d 873; *Moore v. California State Bd. of Accountancy* (1992) 2 C.4th 999, 1012, 9 C.R.2d 358, 831 P.2d 798, *infra*, §334 [doctrine of *ejusdem generis* is inapplicable where it would frustrate intent underlying statute]; *Yolo v. Los Rios Community College Dist.* (1992) 5 C.A.4th 1242, 1254, 7 C.R.2d 647; *Texas Commerce Bank v. Garamendi* (1992) 11 C.A.4th 460, 471, 14 C.R.2d 854 [analysis and discussion of doctrine]; *Eller Media Co. v. Community Redevelopment Agency* (2003) 108 C.A.4th 25, 38, 133 C.R.2d 324 [doctrine is one of statutory construction that cannot be used to defeat legislative intent].)

(3) *Expressio unius est exclusio alterius*. The expression of one thing is the exclusion of another. (See *United Farm Workers v. Agricultural Lab. Rel. Bd.* (1995) 41 C.A.4th 303, 316, 48 C.R.2d 696 [grant of power to Table Grape Commission to investigate and prosecute civilly certain violations of Food & Agriculture Code impliedly excluded commission from filing charges with Agriculture Labor Relations Board for violation of other statute]; *In re Christopher T.* (1998) 60 C.A.4th 1282, 1290, 71 C.R.2d 116 [discussing and defining rule]; *Dean v. Superior Court* (1998) 62 C.A.4th 638, 641, 73 C.R.2d 70 [although Elec.C. 13307 does not specifically prohibit comments in one candidate's statement for nonpartisan elective office on another candidate's qualifications, character, or activities, maxim *expressio unius est exclusio alterius* applies to prevent those comments].)

(4) *Last antecedent rule*. Qualifying words or phrases should be applied to those immediately preceding them

unless separated by a comma. (See *Garcetti v. Superior Court* (2000) 85 C.A.4th 1113, 1120, 102 C.R.2d 703.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Plain Meaning*. See 2A Sutherland, Statutes and Statutory Construction 7th, §§46:1, 46:2.(2) *Ejusdem Generis*. See 2A Sutherland, Statutes and Statutory Construction 7th, §47:17 et seq.

(3) *Expressio unius est exclusio alterius*. See *O'Grady v. Superior Court* (2006) 139 C.A.4th 1423, 1443, 44 C.R.3d 72 [Stored Communications Act, 18 U.S.C., §2701 et seq., clearly prohibits disclosure of stored e-mail except as authorized by enumerated exceptions; statute cannot be interpreted to make implicit exception for civil discovery subpoenas]; 2A Sutherland, Statutes and Statutory Construction 7th, §47:23 et seq.

(5) *(New) Noscitur a Sociis*. "[A] word is given more precise content by the neighboring words with which it is associated." (*United States v. Williams* (2008) 553 U.S. ___, 128 S.Ct. 1830, 1839, 170 L.Ed.2d 650, 663), Supp., infra, §441 [in statute prohibiting pandering and solicitation of child pornography, word "promotes" in list that includes "solicits," "distributes," and "advertises," most rationally means act of recommending child pornography to person for his or her acquisition]; see 2A Sutherland, Statutes and Statutory Construction 7th, §47:16.



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h. Application of Rules.

7 *Witkin Sum. Cal. Law Const Law* § 122

[§ 122] Application of Rules.

In *Halbert's Lumber v. Lucky Stores* (1992) 6 C.A.4th 1233, 8 C.R.2d 298, the court undertook a comprehensive analysis of the problem of statutory interpretation, commencing with a reference to an illuminating article by Llewellyn:

(a) "More than 40 years ago, Karl Llewellyn authored a now classic law review article in which he took great delight in listing, side by side, contradictory maxims of statutory interpretation. Llewellyn's thesis was that judges pick and choose among the rules to arrive at a result consonant with their own judicial temperament and philosophy." (6 C.A.4th 1237.)

(b) "At its logical extreme, Llewellyn's thesis would mean there is no law when it comes to the interpretation of law itself. It all depends on the 'felt need' emanating from the particular 'situation' and 'controversy' before the court. But the rules of statutory interpretation are not quite so plastic as Llewellyn's article might lead us to believe. There is order in the most fundamental rules of statutory interpretation if we want to find it. The key is applying those rules in proper sequence." (6 C.A.4th 1238.)

(c) "First, a court should examine the actual language of the statute. ... Judges, lawyers and laypeople all have far readier access to the actual laws enacted by the Legislature than the various and sometimes fragmentary documents shedding light on legislative intent. More significantly, it is the language of the statute itself that has successfully braved the legislative gauntlet. It is that language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history.'" (6 C.A.4th 1238.)

(d) "If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. ... There is nothing to 'interpret' or 'construe.'" (6 C.A.4th 1239.) But if the meaning of the words is not clear, "courts must take the second step and refer to the legislative history." (6 C.A.4th 1239.)

(e) "The final step--and one which we believe should only be taken when the first two steps have failed to reveal clear meaning--is to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable ... , in accord with common sense and justice, and avoid an absurd result." (6 C.A.4th 1239.) (See *People v. Duque* (2003) 105 C.A.4th 259, 267, 129 C.R.2d 298 [statute that provides for forfeiture of office as penalty for PUC commissioner involuntarily holding stock in regulated company but provides no penalty for voluntary possession is not absurd when read with reference to entire scheme of law of which it is part]; 116 Harv. L. Rev. 2387 [absurdity doctrine].)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Aids to Interpretation.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 123

[§ 123] In General.

Sources of legislative and constitutional intent are numerous. (See *People v. Avanesian* (1999) 76 C.A.4th 635, 641, 90 C.R.2d 367 [editors' descriptive headings to statutes are private editorial creations that may not be relied on for statutory interpretation]; 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §77 et seq.; 73 *Am.Jur.2d* (2001 ed.), *Statutes* §66 et seq.)

Among the permissible aids to construction are the following:

(1) Proceedings of the California constitutional convention. (See *Older v. Superior Court* (1910) 157 C. 770, 776, 109 P. 478; *Story v. Richardson* (1921) 186 C. 162, 165, 198 P. 1057; *Wallace v. Superior Court* (1956) 141 C.A.2d 771, 777, 298 P.2d 69.)

(2) Printed arguments to voters on a statute or constitutional amendment submitted by initiative or referendum. (See *Lundberg v. Alameda* (1956) 46 C.2d 644, 652, 298 P.2d 1 [held inconclusive]; *White v. Davis* (1975) 13 C.3d 757, 775, footnote 11, 120 C.R. 94, 533 P.2d 222, *infra*, §575 [quoted and relied on]; *Lungren v. Deukmejian* (1988) 45 C.3d 727, 738, 248 C.R. 115, 755 P.2d 299; *Delaney v. Superior Court* (1990) 50 C.3d 785, 802, 803, 268 C.R. 753, 789 P.2d 934 [ballot argument was relevant but inconclusive and provided insufficient basis to ignore unambiguous language of measure itself]; *Robert L. v. Superior Court* (2003) 30 C.4th 894, 906, 135 C.R.2d 30, 69 P.2d 951 [to determine voter intent, reviewing court may look at ballot's legislative analysis, which includes arguments in ballot pamphlet advanced by both proponents and opponents of measure]; *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 C.A.3d 212, 230, 253 C.R. 497; *Larson v. Duca* (1989) 213 C.A.3d 324, 329, 261 C.R. 559 [ballot summary and argument showed intent to broaden exception from tax reassessment]; *Woo v. Superior Court* (2000) 83 C.A.4th 967, 978, 100 C.R.2d 156 [voters approving revised charter did not intend to change term limits law to disqualify persons who had already served two terms before term limits were adopted, even though revised charter on its face disqualified persons who had ever served two terms; ballot pamphlet and recent history of term limits law led voters to believe law would be unchanged, and fundamental right to hold public office was at issue; distinguishing *Delaney*].)

(3) Declaratory initiative on meaning of earlier initiative. (See *California Bldg. Industry Assn. v. Governing Bd.*, *supra*, 206 C.A.3d 232 [later initiative providing that neither it nor earlier measure could be construed to authorize new

tax].)

(4) California Law Revision Commission Reports. (See *Brian W. v. Superior Court* (1978) 20 C.3d 618, 622, 143 C.R. 717, 574 P.2d 788; *Miro v. Superior Court* (1970) 5 C.A.3d 87, 99, 84 C.R. 874; *Osgood v. Shasta* (1975) 50 C.A.3d 586, 589, 123 C.R. 442; *Continental Ins. Co. v. Crockett* (1985) 177 C.A.3d Supp. 12, 27, 223 C.R. 772; *Sierra Nevada Memorial-Miners Hosp. v. Superior Court* (1990) 217 C.A.3d 464, 469, 266 C.R. 50 [report entitled to substantial weight where proposed statute is adopted without change].)

(5) Legislative counsel's digest. (See *California Assn. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 16, 270 C.R. 796, 793 P.2d 2 [legislative counsel's written opinion requested by legislator]; *People v. Broussard* (1993) 5 C.4th 1067, 1074, 22 C.R. 278, 856 P.2d 1134; *California Teachers' Assn. v. Governing Bd.* (1983) 141 C.A.3d 606, 613, 614, 616, 190 C.R. 453 [helpful, but must be disregarded where law is clear and no need for construction]; *Planned Protective Services v. Gorton* (1988) 200 C.A.3d 1, 14, 245 C.R. 790.)

(6) Attorney General's Opinion. (See *infra*, §127.)

(7) Prior judicial construction of an earlier constitutional provision. (See *People v. Mims* (1955) 136 C.A.2d 828, 831, 289 P.2d 539 ["where a provision of the earlier Constitution has been construed by the Supreme Court it must be presumed that the framers of the present Constitution in readopting it intended it to have the same effect"].)

(8) Prior judicial construction of a statute. (See *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist.* (1978) 21 C.3d 650, 659, 147 C.R. 359, 580 P.2d 1155 [Legislature, in amending statute, intended to alter law].)

(9) Legislative history. (See *infra*, §§124, 125.)

(10) Statement of legislative findings or intent. (See *infra*, §126.)

(11) Contemporaneous administrative construction. (See *infra*, §127.)

SUPPLEMENT: [This section is current through the latest supplement]

See 2A Sutherland, Statutes and Statutory Construction 7th, Chap. 47 et seq.; 120 Harv. L. Rev. 597 [deference to presidential signing statements in statutory interpretation].



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7 *Witkin Sum. Cal. Law Const Law* § 124

[§ 124] In General.

Legislative history of the adoption of a statute or proposed constitutional amendment is an important factor in interpretation. As the court said in *Lewis v. Ryan* (1976) 64 C.A.3d 330, 134 C.R. 355:

"In determining that issue, we apply the recognized approach of seeking the intent of the Legislature in enacting the statutory scheme so that the intent may be carried out by judicial construction . . . More precisely, we search for the manner in which the Legislature would have treated the problem in the case at bench had the Legislature foreseen it. In that search, we are cognizant of at least three judicial approaches applied singly or in some combination. One approach utilizes maxims of statutory construction which, by a process of selection, can support any result a court thinks appropriate . . . Another resolves the unforeseen problem in the way the court would have done had it been the Legislature and blessed with foresight equal to hindsight . . . The third approach seeks clues of legislative intent from legislative history and within the statutory scheme of which the legislation to be interpreted is a part . . . As seductive and uninhibited as the first and second approaches may be, we deem the third controlling upon us where clues to the legislative intent exist." (64 C.A.3d 333.)

However, legislative history is not relevant in interpreting a statute adopted by initiative; instead, the court must look to the voters' intent. (*Robert L. v. Superior Court* (2003) 30 C.4th 894, 904, 135 C.R.2d 30, 69 P.2d 951.) And the history of legislative intent provides no guidance to the voters' intent in later adopting a nearly identical constitutional provision, where none of the indicia of the Legislature's intent were before the voters. (*Delaney v. Superior Court* (1990) 50 C.3d 785, 801, 268 C.R. 753, 789 P.2d 934.)

In *J.A. Jones Const. Co. v. Superior Court* (1994) 27 C.A.4th 1568, 33 C.R.2d 206, the court noted formidable criticisms of the use of legislative history. This history represents the views of only a few of the persons, including lobbyists and committee staff people, involved in the legislative process, and the history is contaminated by documents that are aimed more at influencing the judiciary than explaining the bill to the rest of the Legislature. (27 C.A.4th 1577.) These criticisms do not warrant a blanket rule against use of legislative history. However, "the wisest course is to rely on legislative history only when that history itself is unambiguous." (27 C.A.4th 1578.)

The use of legislative history in interpreting statutes and constitutional amendments has been the subject of numerous law reviews. (See 25 *Cal. L. Rev.* 326 [congressional debates]; 105 *Harv. L. Rev.* 1005 [Why Learned Hand Would Never Consult Legislative History Today]; 12 *Pacific L. J.* 621 [history of "due process of law" as demonstrating irrelevance of legislative history]; 9 *So. Cal. L. Rev.* 421 [congressional debates]; 65 *So. Cal. L. Rev.* 845 [uses of legislative history in interpreting statutes]; 23 *Southwestern U. L. Rev.* 47 [legislative history in statutory interpretation cases in 1992 U.S. Supreme Court term]; 54 *Stanf. L. Rev.* 87 [Legislative Record Review]; 4 *U.C.L.A. L. Rev.* 280; 29 *U.S.F. L. Rev.* 1 [relevance of English practice].)

SUPPLEMENT: [This section is current through the latest supplement]

See 2A Sutherland, Statutes and Statutory Construction 7th, §48:2 et seq.; 39 *U.S.F. L. Rev.* 1045 [California Supreme Court's search for specific legislative intent that does not exist].



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D. Interpretation of Constitutions and Statutes.

3. Aids to Interpretation.

b. Legislative History.

2. Sources of Legislative History.

7 *Witkin Sum. Cal. Law Const Law* § 125

[§ 125] Sources of Legislative History.

Legislative history includes the following:

(1) *Legislative committee reports.* (See *Commodore Home Systems v. Superior Court* (1982) 32 C.3d 211, 219, 185 C.R. 270, 649 P.2d 912; *Lyons v. Wickhorst* (1986) 42 C.3d 911, 919, 231 C.R. 738, 727 P.2d 1019 [staff report to legislative committee]; *Seibert v. Sears, Roebuck & Co.* (1975) 45 C.A.3d 1, 19, 120 C.R. 233; *In re Marriage of Brigden* (1978) 80 C.A.3d 380, 390, 145 C.R. 716; *Curtis v. Los Angeles* (1985) 172 C.A.3d 1243, 1250, 218 C.R. 772; *Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 C.A.3d 1038, 1044, 283 C.R. 873; *Haworth v. Lira* (1991) 232 C.A.3d 1362, 1368, 284 C.R. 62; *In re Rocco M.* (1991) 1 C.A.4th 814, 821, 2 C.R.2d 429; *Metropolitan Water Dist. of Southern Calif. v. Imperial Irr. Dist.* (2000) 80 C.A.4th 1403, 1425, 96 C.R.2d 314 [court will consider only those materials indicative of Legislature's intent as a whole].)

(2) *Legislative analyst's reports.* (See *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 300, 250 C.R. 116, 758 P.2d 58; *Metropolitan Water Dist. of Southern Calif. v. Imperial Irr. Dist.*, *supra*, 80 C.A.4th 1425.)

(3) *Statements and memorandums of legislators.* (See *In re Marriage of Bouquet* (1976) 16 C.3d 583, 588, 128 C.R. 427, 546 P.2d 1371 [statement of sponsoring legislator; irrelevant to extent that it reflects personal views; relevant to extent that it evidences understanding of Legislature]; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1015, 140 C.R. 168, citing the text [same]; *Commodore Home Systems v. Superior Court*, *supra*, 32 C.3d 219.)

(4) *Unpassed bills and other statutes.* (See *Dyna-Med v. Fair Emp. & Housing Com.* (1987) 43 C.3d 1379, 1393, 241 C.R. 67, 743 P.2d 1323 [comparison of parallel development of other statutes]; *Robinson v. Fair Emp. & Housing Com.* (1992) 2 C.4th 226, 236, 5 C.R.2d 782, 825 P.2d 767 [looking at history of similar statutes in other states]; *Seibert v. Sears, Roebuck & Co.*, *supra*, 45 C.A.3d 19 [unpassed bills]; *Kern v. Imperial* (1990) 226 C.A.3d 391, 400, 276 C.R. 524 [bill sponsored by State Board of Equalization]; cf. *Miles v. Work. Comp. App. Bd.* (1977) 67 C.A.3d 243, 248, footnote 4, 136 C.R. 508 [rejection of proposed measure has little value as evidence of legislative intent].)

(5) *Omissions from bills.* (See *Beverly v. Anderson* (1999) 76 C.A.4th 480, 485, 90 C.R.2d 545 [fact that Legislature

omitted provision from final version of statute is strong evidence that it did not intend provision to be judicially grafted onto statute].)

(6) *Model bill and its commentary.* (See *CD Inv. Co. v. California Ins. Guarantee Assn.* (2000) 84 C.A.4th 1410, 1424, 101 C.R.2d 806.)

(7) *Public comments.* (See *American Tobacco Co. v. Superior Court* (1989) 208 C.A.3d 480, 487, 488, 255 C.R. 280, 6 Summary (10th), *Torts*, §1535 [support from groups with contradictory interests, letter from president of one group, legislative staff memorandum, and contemporaneous news accounts, all indicated that statute was compromise measure]; *Metropolitan Water Dist. of Southern Calif. v. Imperial Irr. Dist.*, *supra*, 80 C.A.4th 1425 [testimony or argument to Legislature or committees].)

SUPPLEMENT: [This section is current through the latest supplement]
See 2A Sutherland, Statutes and Statutory Construction 7th, §48:6 et seq.



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c. Statement of Legislative Findings or Intent.

7 *Witkin Sum. Cal. Law Const Law* § 126

[§ 126] Statement of Legislative Findings or Intent.

(1) *In General.* The views of the Legislature, as evidenced by passage of a law in accordance with a particular interpretation, are persuasive as to legislative intent. (See *San Francisco v. Industrial Acc. Com.* (1920) 183 C. 273, 279, 191 P. 26; *Lundberg v. Alameda* (1956) 46 C.2d 644, 652, 298 P.2d 1; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist.* (1978) 21 C.3d 650, 658, 147 C.R. 359, 580 P.2d 1155 [express statement of legislative intent in enacting statute]; *California Assn. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 15, 270 C.R. 796, 793 P.2d 2; *Professional Engineers in Calif. Government v. Department of Trans.* (1997) 15 C.4th 543, 569, 63 C.R.2d 467, 936 P.2d 473, 3 *Summary* (10th), *Agency and Employment*, §19 [deference afforded to legislative findings does not foreclose court's independent judgment of facts bearing on issue of constitutional law; citing *Turner Broadcasting System v. Federal Communications Com.* (1994) 512 U.S. 622, 114 S.Ct. 2445, 2471, 129 L.Ed.2d 497, 532, *infra*, §375]; *Sutter's Place v. Kennedy* (1999) 71 C.A.4th 674, 691, 84 C.R.2d 84 [Legislature's declaration of urgency for particular legislation should be given deference]; and see *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304, 57 S.Ct. 216, 224, 81 L.Ed. 255, 266 [long-continued legislative practice]; 110 *Harv. L. Rev.* 1359 [extrajudicial constitutional interpretation].)

Although the Legislature's interpretation of a constitutional term in an enacted ballot measure is relevant to assessment of the electorate's intention, this canon of construction must be used with caution when interpreting an initiative measure. The Legislature is not always enamored with initiative measures enacted by the voters, and it ought not to be able to frustrate the intent of the electorate by enacting statutes that frustrate the popular will. Consequently, although courts will examine statutes enacted in light of the subject constitutional provision, they will continue to give greater significance to the will of the electorate itself. (*Hoogasian Flowers v. State Bd. of Equalization* (1994) 23 C.A.4th 1264, 1277, 1278, 28 C.R.2d 686, 9 *Summary* (10th), *Taxation*, §139; see *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 C.A.3d 212, 231, 253 C.R. 497 [Legislature's interpretation of meaning of initiative measure indicated by statutes adopted to implement it].)

(2) *Declaratory Statute.* "[A]lthough construction of a statute is a judicial function, where a statute is unclear, a subsequent expression of the Legislature bearing upon the intent of the prior statute may be properly considered in determining the effect and meaning of the prior statute." (*Tyler v. California* (1982) 134 C.A.3d 973, 977, 185 C.R. 49; see *California Emp. Stabilization Com. v. Payne* (1947) 31 C.2d 210, 213, 187 P.2d 702; *Redevelopment Agency of San*

Francisco v. Pacific Vegetable Oil Corp. (1966) 241 C.A.2d 606, 612, 50 C.R. 676; *American Tobacco Co. v. Superior Court* (1989) 208 C.A.3d 480, 489, 255 C.R. 280, 6 Summary (10th), Torts, §1535 [declaratory portion of statute harmonized with remainder]; for example of declaration of intent, see historical note to Rev.C. 2192.1 [statute is declaratory of existing law and was designed to avoid interpretation in federal decision]; on use of declaratory *initiative*, see *California Bldg. Industry Assn. v. Governing Bd.*, *supra*, 206 C.A.3d 224.)

(3) *Distinction: Statement of Individual Legislator.* A statement of personal belief of an individual legislator as to legislative intent cannot be considered. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 C.3d 692, 701, 170 C.R. 817, 621 P.2d 856 [see concurring opinion strongly disagreeing with this view and citing long list of opinions in which these statements were used]; *Walters v. Weed* (1988) 45 C.3d 1, 10, 246 C.R. 5, 752 P.2d 443; *San Francisco v. Superior Court* (1982) 130 C.A.3d 481, 485, 181 C.R. 775; *Los Angeles v. Superior Court (Friedman)* (1985) 170 C.A.3d 744, 752, 216 C.R. 311; *Metropolitan Water Dist. of Southern Calif. v. Imperial Irr. Dist.* (2000) 80 C.A.4th 1403, 1426, 96 C.R.2d 314 [material showing motive or understanding of individual legislator, including bill's author, is generally not considered because it fails to show Legislature's collective intent]; 15 U.S.F. L. Rev. 241.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Contemporaneous Administrative Construction.

7 *Witkin Sum. Cal. Law Const Law* § 127

[§ 127] Contemporaneous Administrative Construction.

Contemporaneous administrative construction of a constitutional provision or statute by the executive department is constantly invoked in determining legislative intent. (See *Pocket Veto Case* (1929) 279 U.S. 655, 49 S.Ct. 463, 469, 73 L.Ed. 894, 902; *Di Giorgio Fruit Corp. v. Department of Employment* (1961) 56 C.2d 54, 61, 13 C.R. 663, 362 P.2d 487; *Redevelopment Agency of San Bernardino v. San Bernardino* (1978) 21 C.3d 255, 259, 264, 267, 145 C.R. 886, 578 P.2d 133 [Attorney General's opinion quoted at length and followed]; *Freedom Newspapers v. Orange County Employees Retirement System* (1993) 6 C.4th 821, 828, 830, 25 C.R.2d 148, 863 P.2d 218; *Mantzoros v. State Bd. of Equalization* (1948) 87 C.A.2d 140, 143, 196 P.2d 657 [California Attorney General's opinion, followed by administrative board, accepted by court as proper construction of uncertain term in statute]; *Cristmat v. Los Angeles* (1971) 15 C.A.3d 590, 595, 93 C.R. 325 [Attorney General's opinion]; *Lucas v. Board of Trustees* (1971) 18 C.A.3d 988, 991, 96 C.R. 431 [same]; *Worthington v. Unemp. Ins. App. Bd.* (1976) 64 C.A.3d 384, 388, 389, 134 C.R. 507 [Attorney General's opinion, and construction by officials in accordance with opinion]; *Killian v. San Francisco* (1978) 77 C.A.3d 1, 12, 143 C.R. 430, citing the text; *Department of Health Services v. Superior Court* (1991) 232 C.A.3d 776, 782, 283 C.R. 546; *State Bd. of Education v. Honig* (1993) 13 C.A.4th 720, 735, 16 C.R.2d 727; *Orange County Employees Assn. v. Orange* (1993) 14 C.A.4th 575, 578, 17 C.R.2d 695; on deference to administrative construction of law, see 9 *Cal. Proc.* (4th), *Administrative Proceedings*, §111.)

However, this contemporaneous construction will not be followed where it is clearly erroneous. (See *Mudd v. McColgan* (1947) 30 C.2d 463, 470, 183 P.2d 10 [unless clearly erroneous, administrative application of language of act is significant factor to be considered]; *Louis Stores v. Department of Alcoholic Beverage Control* (1962) 57 C.2d 749, 759, 22 C.R. 14, 371 P.2d 758 [cannot be followed where contrary to language of statute, even though statute subsequently reenacted without change]; *People v. United Nat. Life Ins. Co.* (1967) 66 C.2d 577, 597, 58 C.R. 599, 427 P.2d 199 [not persuasive when based on misapprehension as to constitutional limits of state regulation]; *Sanchez v. Unemp. Ins. App. Bd.* (1977) 20 C.3d 55, 66, 141 C.R. 146, 569 P.2d 740 [Attorney General's opinion analyzed and found not persuasive]; *Blatz Brewing Co. v. Collins* (1948) 88 C.A.2d 438, 450, 454, 199 P.2d 34 [erroneous administrative ruling on statutory power of board was rejected]; *Rizzo v. Board of Trustees* (1994) 27 C.A.4th 853, 861, 32 C.R.2d 892 [long-standing, consistent administrative construction, particularly where interested parties have acquiesced in interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous]; *Jacobs*,

Malcolm & Burt v. Voss (1995) 33 C.A.4th 1399, 1404, 1405, footnote 3, 39 C.R.2d 774 [same].)

SUPPLEMENT: [This section is current through the latest supplement]
See 2B Sutherland, Statutes and Statutory Construction 7th, Chap. 49.

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §131 et seq.



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e. Distinction: No Extrinsic Evidence Where Statute Is Clear.

7 *Witkin Sum. Cal. Law Const Law* § 128

[§ 128] Distinction: No Extrinsic Evidence Where Statute Is Clear.

Where statutory language is clear and unambiguous, extrinsic indicia of intent should not be considered. (*Delaney v. Superior Court* (1990) 50 C.3d 785, 800, 801, 268 C.R. 753, 789 P.2d 934; *Sacramento v. Public Employees' Retirement System* (1994) 22 C.A.4th 786, 793, 27 C.R.2d 545; *Ceridian Corp. v. Franchise Tax Bd.* (2000) 85 C.A.4th 875, 889, 102 C.R.2d 611.)

An unusual aspect of this rule was presented in *Planned Parenthood Affiliates v. Swoap* (1985) 173 C.A.3d 1187, 219 C.R. 664. The 1985-1986 California State Budget originally contained §33.35, which restricted the use of family planning funds for organizations providing abortion-related services. The Legislature by a two-thirds majority voted to delete the provision, but by clerical error, the deletion was not made. The Governor, although requested by the Speaker of the Assembly to correct the bill, signed it, stating that he was opposed to use of public funds for these services. Petitioners, a coalition of family planning organizations and state officers, sought mandamus to compel respondent Secretary of Health and Welfare to refrain from enforcing the section. *Held*, the petition could not be granted on this showing.

The court pointed out that the issue was not one of *interpretation* to carry out legislative intent. The words of the section were clear, and extrinsic evidence could not be used to nullify the provision as enacted. (173 C.A.3d 1193, citing *Sherman v. Story* (1866) 30 C. 253, *Yolo v. Colgan* (1901) 132 C. 265, 64 P. 403, and *People v. Santa Clara* (1951) 37 C.2d 335, 338, 231 P.2d 826.) The appropriate remedy for mistakes in budget bills is a "cleanup bill" to correct the errors. (173 C.A.3d 1195.) (For the holding on violation of single subject rule, see *infra*, §132.)

SUPPLEMENT: [This section is current through the latest supplement]
See 2A Sutherland, Statutes and Statutory Construction 7th, §48:1.



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Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW E. Title and Subject of Statute. 1. Descriptive Title.

7 *Witkin Sum. Cal. Law Const Law* § 129

[§ 129] Descriptive Title.

"A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void." (Cal. Const., Art. IV, §9.) The requirement applies to statutes, and not to municipal ordinances. (*Ex parte Haskell* (1896) 112 C. 412, 421, 44 P. 725 [former Art. IV, §24].)

The most important decision on this requirement, applying former Article IV, §24, was *Lewis v. Dunne* (1901) 134 C. 291, 66 P. 478, holding invalid the revised 1901 Code of Civil Procedure. The objectionable title was: "An act to revise the Code of Civil Procedure of the State of California by amending certain sections, repealing others and adding certain new sections." (For other examples of titles held defective, see *Wallace v. Zinman* (1927) 200 C. 585, 590, 254 P. 946; *Clark v. Jordan* (1936) 7 C.2d 248, 60 P.2d 457 [short title in initiative measure was misleading]; *Balzano v. Traeger* (1928) 93 C.A. 640, 646, 270 P. 249; *Jackson v. Santa Monica* (1936) 13 C.A.2d 376, 386, 57 P.2d 226.)

In most cases, however, the attack has failed. The courts have pointed out that the title need not be an abstract or index of the provisions of the statute, so long as it is reasonably indicative of the matter contained in it. (See *Heron v. Riley* (1930) 209 C. 507, 510, 289 P. 160; *People v. Superior Court* (1937) 10 C.2d 288, 296, 73 P.2d 1221; *Metropolitan Water Dist. of Southern Calif. v. Marquardt* (1963) 59 C.2d 159, 172, 28 C.R. 724, 379 P.2d 28; *Los Angeles v. Hurlbut* (1941) 44 C.A.2d 88, 100, 111 P.2d 963; *Ikuta v. Ikuta* (1950) 97 C.A.2d 787, 791, 218 P.2d 854.)

Cal. Const., Art. II, §10(d), requires the Attorney General to "prepare a title and summary" before circulation of an initiative or referendum measure. (See *Elec.C. 9001 et seq.*, 9086.) The test of sufficiency of the title and summary is the same as that for a statute. (See *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 C.3d 208, 243, 149 C.R. 239, 583 P.2d 1281; *Tinsley v. Superior Court* (1983) 150 C.A.3d 90, 108, 197 C.R. 643.) However, opponents lack standing under *Elec.C. 9106* to challenge the accuracy of the title and summary of a proposed initiative measure before the initiative has qualified for the ballot. (*Songstad v. Superior Court* (2001) 93 C.A.4th 1202, 1208, 113 C.R.2d 729.) (On enforcement of duty to prepare title and summary, see *infra*, §131.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Reenactment Requirement.

7 *Witkin Sum. Cal. Law Const Law* § 130

[§ 130] Reenactment Requirement.

"A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended." (Cal. Const., Art. IV, §9; see *Scott A. v. Superior Court* (1972) 27 C.A.3d 292, 295, 103 C.R. 683.)

This provision prevents legislative changes by directing insertions or omissions, and requires that the *entire context* as amended be republished. However, where a statute is divided into *sections*, it is unnecessary to republish the entire act; republication of the particular sections affected is sufficient. (*People v. Western Fruit Growers* (1943) 22 C.2d 494, 501, 140 P.2d 13 [decided under former Art. IV, §24]; see *White v. California* (2001) 88 C.A.4th 298, 315, 105 C.R.2d 714 [Legislature did not violate Art. IV, §9 "when it added new code sections restating each of the statutes that would be changed by the enactment"].)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Title and Subject of Statute.

3. Single Subject Rule.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 131

[§ 131] In General.

A statute may only embrace *one subject*. (Cal. Const., Art. IV, §9; see *Evans v. Superior Court* (1932) 215 C. 58, 8 P.2d 467 [decided under former Art. IV, §24; upholding 1931 Probate Code, despite inclusion of law of guardianship].)

In 1948, former Article IV, §1c (now Cal. Const., Art. II, §8(d)) was adopted to make the restriction applicable to statutes or constitutional amendments proposed by *initiative*. Because the purpose of this section is the same as that governing legislative acts, it is similarly construed. (See *Perry v. Jordan* (1949) 34 C.2d 87, 92, 207 P.2d 47; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 C.3d 208, 229 et seq., 149 C.R. 239, 583 P.2d 1281 [Article XIII A (Jarvis-Gann initiative) does not violate single-subject requirement]; *Fair Political Practices Com. v. Superior Court* (1979) 25 C.3d 33, 39 et seq., 157 C.R. 855, 599 P.2d 46 ["reasonably germane test" applies; rejecting contention that more restrictive test should be applied to initiative measures]; *Brosnahan v. Brown* (1982) 32 C.3d 236, 247, 186 C.R. 30, 651 P.2d 274, 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §104 [Proposition 8 (The Victims' Bill of Rights) upheld against single-subject challenge]; *Tinsley v. Superior Court* (1983) 150 C.A.3d 90, 105, 106, 197 C.R. 643 [Proposition 1 (Anti-Busing Amendment) upheld against single-subject challenge]; 14 *Pacific L. J.* 1095 [demise of single-subject rule]; 24 *U.C. Davis L. Rev.* 879 [Putting the "Single" Back in the Single-Subject Rule: A proposal for Initiative Reform in California]; 30 *U.C.L.A. L. Rev.* 936 [initiatives and single-subject rule].) (On invalidity of initiative where constitutional "amendment" was so extensive as to constitute a proposed revision, see *supra*, §72.)

In *Schmitz v. Younger* (1978) 21 C.3d 90, 93, 145 C.R. 517, 577 P.2d 652, the Attorney General refused to prepare a title and summary of a proposed statewide ballot measure on the ground that it covered more than one subject. *Held*, mandamus granted to compel him to act as requested. Citing *Farley v. Healey* (1967) 67 C.2d 325, 62 C.R. 26, 431 P.2d 650, *infra*, §155, the court declared that the duty involved is ministerial, and must be performed when the proposed measure is in proper form and complies with procedural requirements. The Attorney General may challenge the validity of the measure by timely and appropriate legal action, but may not delay or impede the initiative process while that challenge is being considered. (21 C.3d 93.) Two justices joined in a strong dissent, arguing that the Attorney General should not be compelled to perform an illegal act (giving a title to a proposed measure that violates the Constitution). (21 C.3d 96.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hernandez v. Los Angeles* (2008) 167 C.A.4th 12, 21, 84 C.R.3d 10 [single subject rule did not apply to ballot measure sponsored by city council].



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E. Title and Subject of Statute.

3. Single Subject Rule.

b. Rule Violated.

7 *Witkin Sum. Cal. Law Const Law* § 132

[§ 132] Rule Violated.

In *Planned Parenthood Affiliates v. Swoap* (1985) 173 C.A.3d 1187, 219 C.R. 664, supra, §128, the 1985-1986 California State Budget contained a provision (§33.35) restricting the use of family planning funds for organizations furnishing abortion-related services. *Held*, the provision violated the single subject rule. Annual budget acts are subject to the rule; hence, the bill may deal only with the one subject of appropriations to support the annual budget, and may not be used to grant authority to a state agency that the agency does not possess or to amend existing statutory law. (173 C.A.3d 1199, citing *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 C.3d 384, 394, 211 C.R. 758, 696 P.2d 150.) The section granted this authority, thus amending the family planning act, and was therefore unconstitutional. (173 C.A.3d 1201.) (See 38 *Hastings L. J.* 563 [case for subject veto].)

In *Harbor v. Deukmejian* (1987) 43 C.3d 1078, 240 C.R. 569, 742 P.2d 1290, *infra*, §173, the court held that Senate Bill 1379, dealing with many distinct and unrelated fiscal matters, violated the constitutional prohibition.

(a) The *single subject* and the *title* requirements are distinct and serve separate purposes. Hence, a statute may be held unconstitutional solely on the ground of violation of the single subject requirement. (43 C.3d 1096.) Senate Bill 1379 amends, repeals, or adds approximately 150 sections contained in more than 20 codes and legislative acts, and petitioners sought to sustain it under *Evans v. Superior Court* (1932) 215 C. 58, 8 P.2d 467, holding that the act adopting a Probate Code contained only one subject. (43 C.3d 1097.) But later cases have pointed out that measures containing unduly diverse or extensive provisions bearing no reasonable relation to each other cannot be joined. (43 C.3d 1099.) "[T]hese cases hold that a measure complies with the rule if its provisions are either functionally related to one another or are reasonably germane to one another or the objects of the enactment." (43 C.3d 1100.)

(b) Senate Bill 1379 complies with none of these standards. "Fiscal affairs" and "statutory adjustments" to the budget are too broad in scope if they encompass any substantive measure which has no effect on the budget. "If petitioners' position were accepted, a substantial portion of the many thousand statutes adopted during each legislative session could be included in a single measure even though their provisions had no relationship to one another or to any single object except that they would have some effect on the state's expenditures as reflected in the budget bill." (43 C.3d 1101.)

(c) This ruling, however, is to be applied prospectively. The practice of enacting budget implementation bills began in 1978, and between that time and 1984, several of these bills were passed, some of which suffer from the same defect as Senate Bill 1379. Thus, a substantial number of provisions in prior bills would be subject to challenges. (43 C.3d 1102.)

(d) The same prospective effect is to be given to the veto. The Governor would clearly have had the power to veto §45.5 if it had been passed as a separate bill, and his inability to do so was frustrated by the Legislature's inclusion of the section in a multisubject bill. "In these circumstances, an evenhanded respect for the executive and legislative branches of government leads us to invoke an exception to the general rule of retroactivity ... so as to achieve a result that most closely conforms to the outcome that would have occurred if both the Legislature and the Governor had complied with the law. Accordingly, the Governor's veto of section 45.5 will not be invalidated and only that section of Bill 1379 will be rendered inoperative." (43 C.3d 1102.)

California Trial Lawyers Assn. v. Eu (1988) 200 C.A.3d 351, 245 C.R. 916, involved a challenge to the Insurance Cost Control Initiative of 1988. The measure included provisions establishing no fault automobile insurance, reducing premiums, limiting attorneys' contingency fees, and requiring arbitration. Section 8, entitled "Regulation of campaign contributions," would have allowed those involved in the insurance industry to make campaign contributions and exempted elected officials receiving these contributions from conflict of interest rules. *Held*, the initiative violated the single subject rule.

(a) The connection between the stated object of the initiative--reducing insurance costs--and section 8 "is not readily apparent." (200 C.A.3d 359.) Whether guaranteeing the insurance industry the right to participate in the political process is logically related to reducing insurance costs may be questioned; but even if it is, there is no reasonable connection between exempting public officials from conflict of interest rules and controlling insurance costs. (200 C.A.3d 359.)

(b) A primary purpose of Cal. Const., Art. II, §8(d) (*supra*, §131) is to minimize confusion and deception both as to voters and signers of initiative petitions. (200 C.A.3d 360.) "In our view, section 8 of the initiative is a paradigm of the potentially deceptive combinations of unrelated provisions at which the constitutional limitation on the scope of initiatives is aimed. It is located, as previously described, near the middle of a 120 page document, and consists of two brief paragraphs which bear no connection to what precedes or follows." (200 C.A.3d 360.) This new section would be placed between sections in the Insurance Code dealing with fraudulent claims and administrative proceedings. "We believe it extremely unlikely that the average voter or signer of a sponsoring petition, or even one more conscientious and sophisticated, would take the time to study the initiative in such detail as to discover this obscure campaign funding provision." (200 C.A.3d 361.)

(c) "In the present case, not only is there a lack of any reasonably discernible nexus between the stated object of the initiative and the campaign spending and conflict of interest provisions of section 8, but the title and various descriptions of the initiative's contents give no clue that any such provisions are buried within. These flaws are fatal." (200 C.A.3d 361.)

(d) Cal. Const., Art. II, §8(d), in contrast to Cal. Const., Art. IV, §9 (*supra*, §129), dealing with legislative enactments, has no provision for severance. Hence, violation of the single subject rule cannot be cured by judicial surgery. (200 C.A.3d 362.)

Chemical Specialties Mfrs. Assn. v. Deukmejian (1991) 227 C.A.3d 663, 278 C.R. 128, held that Proposition 105, an initiative measure entitled "Public's Right To Know Act," violated the single subject rule. The court, discussing *Harbor v. Deukmejian* and *California Trial Lawyers Assn. v. Eu*, *supra*, observed that "the measure seeks to reduce toxic pollution, protect seniors from fraud and deceit in the issuance of insurance policies, raise the health and safety standard in nursing homes, preserve the integrity of the election process, and fight apartheid; well-intentioned objectives but not reasonably related to one another for purposes of the single-subject rule." (227 C.A.3d 671.)

"The unconstitutionality of Proposition 105 is also supported by a brief review of the history of the measure. Initially, the five parts to the initiative were introduced separately and rejected in our State Legislature. After the individual bills were defeated they were gathered together as one ballot initiative. While this 'logrolling' alone does not convince us of the invalidity of the initiative, it is but additional support that the initiative does not satisfy the purposes behind the single-subject requirement." (227 C.A.3d 672.)

Violations of the single subject rule have been found in additional cases. (See *Homan v. Gomez* (1995) 37 C.A.4th 597, 600, 601, 43 C.R.2d 647 [following *Planned Parenthood Affiliates v. Swoap*; provision of budget act prohibiting certain prisoners from receiving family visits, thereby effecting substantive change in Department of Corrections regulations allowing these visits, violated single subject rule]; *Senate of the State of Calif. v. Jones* (1999) 21 C.4th 1142, 1160, 90 C.R.2d 810, 988 P.2d 1089 [following *Chemical Specialties* and *California Trial Lawyers Assn.*; initiative seeking, among other things, to transfer power to reapportion legislative districts to state Supreme Court and to revise provisions relating to compensation of state legislators and other state officials, violated single subject rule]; 33 *McGeorge L. Rev.* 779 [future of comprehensive criminal justice initiatives after *Senate v. Jones*].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW

E. Title and Subject of Statute.

3. Single Subject Rule.

c. Rule Not Violated.

7 *Witkin Sum. Cal. Law Const Law* § 133

[§ 133] Rule Not Violated.

In *Insurance Industry Initiative Campaign Committee v. Eu* (1988) 203 C.A.3d 961, 250 C.R. 320, the court held that the Insurance Reform and Consumer Protection Act of 1988 did not violate the single subject rule. (a) A section permitting banks to participate in the insurance industry is related to the goal of consumer protection and to the stated purpose of increasing competition. (203 C.A.3d 965.) (b) A section guaranteeing clients the right to negotiate legal fees, although not limited to cases involving insurance coverage, is relevant to the stated purpose of guaranteeing consumers fair compensation for legitimate insurance claims. (203 C.A.3d 966, 967.)

Raven v. Deukmejian (1990) 52 C.3d 336, 276 C.R. 326, 801 P.2d 1077, supra, §72, involved a constitutional challenge by mandamus to the validity of Proposition 115, the Crime Victims Justice Reform Act. Plaintiff taxpayers and voters attacked the measure as violative of the single subject rule and the rule requiring constitutional "revisions" to be accomplished by more formal procedures than are contemplated for mere constitutional "amendments" (supra, §72). *Held*, the measure did not violate the single subject rule, but did violate the constitutional revisions rule.

(a) *Brosnahan v. Brown* (1982) 32 C.3d 236, 186 C.R. 30, 651 P.2d 274, 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §104, dealing with Proposition 8 (a criminal justice reform initiative), is controlling: "As with Proposition 8, the various elements of Proposition 115 unite to form a comprehensive criminal justice reform package." (52 C.3d 347.) Its single subject is promotion of the rights of actual and potential crime victims; a subsidiary unifying theme is that nearly all the changes appear directed toward abrogating particular holdings of this court that the framers deemed unduly expansive of criminal defendants' rights. (52 C.3d 347.)

(b) "Thus, although the provisions of Proposition 115 seem somewhat disparate, as in *Brosnahan* they reflect a consistent theme or purpose to nullify particular decisions of our court affecting various aspects of the criminal justice system. We do not suggest, of course, that a measure addressing wholly diverse and unrelated subjects could be saved from a single-subject challenge by the mere fact of perceived public displeasure with court decisions or statutes treating those matters." (52 C.3d 348.)

One justice, concurring on the revision issue, dissented on the single subject issue, stressing "the monumental complexity and diversity of the 31 sections it contains." (52 C.3d 357.) (For listing of provisions, see majority opinion,

52 C.3d 342.) (See 18 *Pepperdine L. Rev.* 1084; 28 *San Diego L. Rev.* 729; 25 *U.C. Davis L. Rev.* 1.)

Kennedy Wholesale v. State Bd. of Equalization (1991) 53 C.3d 245, 279 C.R. 325, 806 P.2d 1360, rejected a challenge to Proposition 99, the Tobacco Tax and Health Protection Act of 1988 (Rev.C. 30121 et seq.; see 9 *Summary* (10th), *Taxation*, §387).

(a) "The primary stated objective of Proposition 99 ... is to reduce the economic costs of tobacco use in California. ... The measure represents a coherent effort to achieve this objective by (a) raising the tax on tobacco products and (b) directing the increased revenues to areas in which smoking has increased the state's costs." (53 C.3d 253.)

(b) Plaintiff argued that the measure violates the single subject rule because it does not guarantee that every expenditure from the fund will be related to tobacco use. "[I]t is possible to imagine expenditures that would fall within Proposition 99's spending categories without addressing tobacco-related problems. However, the measure's spending provisions direct new revenues more precisely to tobacco-related problems than if the electorate had simply omitted any such provisions. We do not believe the voters' failure to require even greater precision invalidates the measure, since it is well established that an initiative may have 'collateral effects' without violating the single-subject rule." (53 C.3d 254.)

(c) Plaintiff also argued that the measure is an example of "logrolling," or exploiting the initiative process by combining in a single measure several provisions that might not have commanded majority support if considered separately. The argument was based on the spending provisions, which plaintiff asserted were designed to bring together disparate interest groups such as antismoking forces, environmentalists, medical groups, and those concerned about medical care for the poor. (53 C.3d 255.) But there is no constitutional basis for a separate claim of logrolling. "The single-subject rule is the method by which the state Constitution guards against that hazard. Moreover, we have consistently held that the single-subject rule does not require a showing that each one of a measure's several provisions was capable of gaining voter approval independently of the remaining provisions." (53 C.3d 255.) (See 19 *Pepperdine L. Rev.* 259 [*Kennedy Wholesale*].)

Many other cases have found no violation of the single subject rule:

Calfarm Ins. Co. v. Deukmejian (1989) 48 C.3d 805, 842, 258 C.R. 161, 771 P.2d 1247 [Proposition 103, insurance rate reduction initiative (see *infra*, §1083)].

Legislature v. Eu (1991) 54 C.3d 492, 513, 286 C.R. 283, 816 P.2d 1309, *infra*, §269 [term limits initiative].

Watson v. Fair Political Practices Com. (1990) 217 C.A.3d 1059, 1077, 1078, 266 C.R. 408 [initiative limiting campaign funding and contributions; provision prohibiting mass mailings at public expense did not violate single subject rule].

League of Women Voters v. Eu (1992) 7 C.A.4th 649, 666, 9 C.R.2d 416 [reviewing controlling cases].

San Mateo County Coastal Landowners' Assn. v. San Mateo (1995) 38 C.A.4th 523, 553, 45 C.R.2d 117 [under *Raven*, local coastal plan did not violate single subject rule].

Yoshioka v. Superior Court (1997) 58 C.A.4th 972, 993, 68 C.R.2d 553 [Proposition 213, prohibiting uninsured motorists, drunk drivers, and fleeing felons from recovering noneconomic damages in actions arising out of motor vehicle accidents].

Manduley v. Superior Court (2002) 27 C.4th 537, 573, 117 C.R.2d 168, 41 P.3d 3, 10 *Summary* (10th), *Parent and Child*, §737 [Proposition 21, providing for prosecution of certain minors in adult criminal court without fitness hearing; all of its parts are reasonably related to its purpose of reducing juvenile and gang-related crime].

California Assn. of Retail Tobacconists v. California (2003) 109 C.A.4th 792, 811, 135 C.R.2d 224 [Proposition 10, increasing tobacco excise tax to help reduce tobacco use among teens and to fund early child development and antismoking programs; components of initiative had reasonable relationship and were reasonably germane to each other].

Shea Homes Ltd. Partnership v. Alameda (2003) 110 C.A.4th 1246, 1256, 2 C.R.3d 739 [local measures that constricted county's urban growth boundary, changed land use designations to restrict new housing, and altered county's solid waste management and planning practices; limiting landfills and requiring solid waste policies to conform with those of other county agencies were germane to measure's purpose of enhancing and protecting open space and agricultural lands].

San Joaquin Helicopters v. Department of Forestry & Fire Protection (2003) 110 C.A.4th 1549, 1556, 1559, 3 C.R.3d 246 [single subject of statute cannot be one of excessive generality; exemption of Department of General Services from processes, procedures, and policies of Administrative Procedure Act was reasonably germane to general subject of statute on operation and administration of Department with respect to state property].

SUPPLEMENT: [This section is current through the latest supplement]

No violation of single subject rule found: See *Marathon Entertainment v. Blasi* (2008) 42 C.4th 974, 989, 70 C.R.3d 727, 174 P.3d 741 [Talent Agencies Act regulates persons and entities providing talent agency services, which includes personal managers when they engage in that conduct]; *California Family Bioethics Council, LLC v. California Institute for Regenerative Medicine* (2007) 147 C.A.4th 1319, 1340, 55 C.R.3d 272 [Proposition 71, providing for stem cell research and funding].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law II. NATURE AND SCOPE OF CONSTITUTIONAL LAW F. Uncertainty: Void for Vagueness. 1. Criminal Statutes.

7 *Witkin Sum. Cal. Law Const Law* § 134

[§ 134] Criminal Statutes.

(1) *Statutes*. A criminal statute that is so indefinite in its statement of the standard of guilt that it does not give adequate notice of the conduct prohibited violates due process under the "void for vagueness" doctrine. (See *Connally v. General Const. Co.* (1926) 269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328; *United States v. Lanier* (1997) 520 U.S. 259, 117 S.Ct. 1219, 1228, 137 L.Ed.2d 432, 446 [fair warning is satisfied where unlawfulness under Constitution is apparent in light of preexisting law]; 82 *Cal. L. Rev.* 487 [symposium on void for vagueness doctrine]; 30 *A.L.R.5th* 683 [validity, construction, and application of hazing statutes]; on First Amendment challenge based on uncertainty and overbreadth, see *infra*, §408 et seq.) (For elaborate discussion of valid and invalid statutes, and methods of ascertaining meaning and thereby establishing necessary certainty, see 1 *Cal. Crim. Law* (3d), *Introduction to Crimes*, §40 et seq.)

The "void for vagueness" doctrine was used to challenge statutes in the following cases:

Colautti v. Franklin (1979) 439 U.S. 379, 99 S.Ct. 675, 683, 685, 58 L.Ed.2d 596, 606, 608 [penal provisions of abortion law are void].

Burg v. Municipal Court (1983) 35 C.3d 257, 269, 198 C.R. 145, 673 P.2d 732, 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §55 [*Veh.C.* 23152(b), prohibiting driving with blood alcohol level of 0.10% (now 0.08%), gives fair notice].

People v. Superior Court (Caswell) (1988) 46 C.3d 381, 390, 392, 250 C.R. 515, 758 P.2d 1046, 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §49 [*P.C.* 647(d), prohibiting loitering about public toilet for purpose of lewd or lascivious or any unlawful act, provides adequate notice].

People v. Martin (1989) 211 C.A.3d 699, 705, 706, 259 C.R. 770 ["hazardous waste," as defined in Hazardous Waste Control Act (*Health & Saf.C.* 25100 et seq.), gives adequate notice to those who produce or handle such waste].

People v. Appel (1996) 51 C.A.4th 495, 504, 59 C.R. 2d 216, citing the text [term "waters of the United States," as used in Federal Water Pollution Control Act (now Clean Water Act) and incorporated into *Water C.* 13387, is not unconstitutionally vague].

Trinkle v. Stroh (1997) 60 C.A.4th 771, 779, 70 C.R.2d 661 [seizure of illegal gaming machines; plaintiff cannot

complain of vagueness of penal statute if his conduct falls clearly within its bounds].

(2) *Ordinances*. The same rule applies to local ordinances. (See 72 *A.L.R.5th* 1 [loitering statutes and ordinances].) The "void for vagueness" doctrine was used to challenge ordinances in the following cases:

Chicago v. Morales (1999) 527 U.S. 41, 119 S.Ct. 1849, 1861, 1863, 144 L.Ed.2d 67, 83, 85 [anti-gang ordinance prohibiting loitering (remaining "in any one place with no apparent purpose") afforded too much discretion to police and too little notice to citizens]. (See 28 *Pepperdine L. Rev.* 221.)

Tobe v. Santa Ana (1995) 9 C.4th 1069, 1106, 1107, 40 C.R.2d 402, 892 P.2d 1145, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §62 [ordinance prohibiting camping and storage of personal property in public areas is not unconstitutionally vague when purpose clause is considered and terms are read in context; there is no possibility law enforcement agent would think picnic in public park is "camping" or leaving towel on beach or umbrella in library is "storage"].

Aaron v. Municipal Court (1977) 73 C.A.3d 596, 607, 140 C.R. 849 [prohibition of charitable solicitations without license; invalid].

People v. Stephenson (1978) 83 C.A.3d Supp. 8, 15, 148 C.R. 575 [requirement of permit to operate "social club"; invalid].

People v. Trantham (1984) 161 C.A.3d Supp. 1, 6, 8, 208 C.R. 535 [ordinance against person entering, remaining, staying, or loitering in public park between 10:30 p.m. and 5 a.m.; valid].

In re Timothy R. (1988) 202 C.A.3d 593, 601, 248 C.R. 721 [ordinance prohibiting presence on posted business or commercial premises except with written permission or "under claim or color of legal right" was; unconstitutionally vague].

People v. Scott (1993) 20 C.A.4th Supp. 5, 10, 26 C.R.2d 179 [ordinance prohibiting camping in city parks; adequate notice of what activities constituted "camping," even though ordinance did not specifically define that term].

Personal Watercraft Coalition v. Marin County Bd. of Supervisors (2002) 100 C.A.4th 129, 141, 122 C.R.2d 425 [absence of express language limiting reach of county ordinance banning use of personal watercraft only to unincorporated areas did not make ordinance vague; intention to limit ordinance to areas within county's jurisdiction is implicit in all county legislation].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutes*. See *United States v. Williams* (2008) 553 U.S. ___, 128 S.Ct. 1830, 1846, 170 L.Ed.2d 650, 671, Supp., infra, §441 [federal statute prohibiting pandering and solicitation of child pornography was not impermissibly vague].



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7 Witkin Sum. Cal. Law Const Law § 135

[§ 135] Civil Statutes.

(1) *In General*. Occasionally, a similar objection of uncertainty results in invalidation of a civil statute that is too indefinite to enforce. (See *A.B. Small Co. v. American Sugar Refining Co.* (1925) 267 U.S. 233, 45 S.Ct. 295, 297, 69 L.Ed. 589, 593; *Cramp v. Board of Public Instruction of Orange County, Florida* (1961) 368 U.S. 278, 82 S.Ct. 275, 280, 7 L.Ed.2d 285, 292, *infra*, §409 [loyalty oath]; *Seaboard Acceptance Corp. v. Shay* (1931) 214 C. 361, 5 P.2d 882; *Perez v. Sharp* (1948) 32 C.2d 711, 728, 198 P.2d 17; *Bess v. Park* (1956) 144 C.A.2d 798, 805, 301 P.2d 978; *Citizens for Jobs & the Economy v. Orange* (2002) 94 C.A.4th 1311, 1334, 115 C.R.2d 90 [initiative that required voter ratification of any county act to approve military airport conversion project was too vague to be workable].)

Another objection may be that a statute delegating legislative power is too indefinite to be valid. (See *41 Cal. L. Rev.* 530; *infra*, §166.)

(2) *Valid Statutes*. Most of the decisions find the statutes sufficiently certain. (See *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 371; *Katz v. Department of Motor Vehicles* (1973) 32 C.A.3d 679, 684, 108 C.R. 424 [Veh.C. 5105, authorizing Department of Motor Vehicles to refuse to issue personalized license plate bearing "connotations offensive to good taste and decency"]; *Goldberg v. Barger* (1974) 37 C.A.3d 987, 991, 112 C.R. 827 [Ins.C. 1668(d), authorizing denial of insurance agent's license where "applicant is not of good business reputation"]; *Hall v. Bureau of Emp. Agencies* (1976) 64 C.A.3d 482, 491, 138 C.R. 725 [grounds for suspension of employment agency license: "unprofessional conduct," unethical "business standards," "unfair or misleading practices," etc.]; *Bamboo Bros. v. Carpenter* (1982) 133 C.A.3d 116, 126, 183 C.R. 748; *Rutherford v. California* (1987) 188 C.A.3d 1267, 1276, 1278, 1279, 233 C.R. 781; *Kahn v. Department of Motor Vehicles* (1993) 16 C.A.4th 159, 164, 166, 20 C.R.2d 6 [discussing and following *Katz v. Department of Motor Vehicles*]; 34 *Hastings L. J.* 1273 [*Hoffman Estates*].)

A civil statute or ordinance may also be *construed* to overcome the charge of unconstitutional vagueness. (See *Associated Home Builders v. Livermore* (1976) 18 C.3d 582, 598, 135 C.R. 41, 557 P.2d 473, *infra*, §1031 [zoning ordinance].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. When an ordinance "regulates business behavior, constitutional requirements are more relaxed than they

are for statutes that are penal in nature." (*Amaral v. Cintas Corp. No. 2 (2008) 163 C.A.4th 1157, 1181, 1183, 78 C.R.3d 572, Supp., infra, §1004* [living wage ordinance applied to defendant company under service contract with city even though its employees worked outside boundaries of city; defendant's failure to ask anyone about proper application of ordinance undermined claim that ordinance was hopelessly ambiguous].) *Correction:* Page 247, sixth line of subdivision (1), "*Seaboard Accepptance Corp.*" should be "*Seaboard Acceptance Corp.*"



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7 *Witkin Sum. Cal. Law Const Law* § 136

[§ 136] Rules.

In *Cranston v. Richmond* (1985) 40 C.3d 755, 221 C.R. 779, 710 P.2d 845, plaintiff, a police officer of defendant city, led fellow officers on a high speed chase late at night, over wet and slippery streets, in a mechanically defective car. He was discharged under a city personnel rule for "conduct unbecoming an employee of the City Service." *Held*, the rule was not unconstitutionally vague.

(a) The rule must be judged in light of the specific facts of plaintiff's conduct (40 C.3d 768), and the required specificity may be provided by common knowledge and understanding of members of the particular vocation or profession to which it applies (40 C.3d 766).

(b) In *Morrison v. State Bd. of Education* (1969) 1 C.3d 214, 82 C.R. 175, 461 P.2d 375, 3 Summary (10th), *Agency and Employment*, §301, the court noted that the proscription against "immoral" and "unprofessional" conduct appears in many statutes relating to a wide variety of occupations and professions. (40 C.3d 768.) Thus, the rule questioned here should be construed as if it read "conduct unbecoming a city police officer." (40 C.3d 769.) "Police officers, like teachers and veterinarians, will normally be able to determine what kind of conduct indicates unfitness." (40 C.3d 769.)

In *Franklin v. Leland Stanford Junior University* (1985) 172 C.A.3d 322, 218 C.R. 228, *infra*, §486, defendant university's general standards on professional conduct, clarified by a detailed policy on campus disruption, were held sufficiently certain to meet the constitutional challenge. (172 C.A.3d 347, 348.)

However, in *People v. Carlson* (1996) 45 C.A.4th Supp. 1, 4, 6, 53 C.R.2d 568, a regulation specifying caging requirements for "juvenile" and "large adult" native reptiles, but not defining "juvenile" or "large adult," was held to be unconstitutionally vague.

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law

III. SEPARATION OF POWERS

A. In General.

1. Nature of Doctrine.

7 *Witkin Sum. Cal. Law Const Law* § 137

[§ 137] Nature of Doctrine.

Both the state and the federal governments follow the principle of separation of powers into three departments. Generally speaking, one department cannot exercise or interfere with the functions of either of the others. (See *Hornung v. Superior Court* (2000) 81 C.A.4th 1095, 1099, 97 C.R.2d 382 [commissioners of Board of Prison Terms perform quasi-judicial function when they decide to grant or deny parole; therefore, court may not inquire into mental processes or motivation underlying their decisions]; 1 Rotunda, §3.12; 1 Tribe, §2-1 et seq.; 109 Harv. L. R. 2020 [executive review of court's extradition determination as violation of separation of powers]; 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §246 et seq.)

The California Constitution expressly states the doctrine: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const. Art. III, §3; see *Parker v. Riley* (1941) 18 C.2d 83, 89, 113 P.2d 873; *Bixby v. Pierno* (1971) 4 C.3d 130, 141, 93 C.R. 234, 481 P.2d 242.) The federal Constitution does not, but the principle has been declared to be implicit in it. (See *Springer v. Government of Philippine Islands* (1928) 277 U.S. 189, 48 S.Ct. 480, 482, 72 L.Ed. 845, 849; *O'Donoghue v. United States* (1933) 289 U.S. 516, 53 S.Ct. 740, 743, 77 L.Ed. 1356, 1360; *Immigration & Naturalization Service v. Chadha* (1983) 462 U.S. 919, 103 S.Ct. 2764, 2786, 77 L.Ed.2d 317, *infra*, §170; 114 Harv. L. Rev. 1551 [Powers of Congress and the Courts Regarding the Availability and Scope of Review]; 20 *Hastings Const. L. Q.* 1 [Special Issue on the subject]; 52 *Hastings L. J.* 47 [separation of powers and judicial review]; 53 *Hastings L. J.* 519 [erosion of doctrine under "congruence and proportionality" test]; 18 *Pepperdine L. Rev.* 1 [Symposium on doctrine]; 20 *Pepperdine L. Rev.* 533 [separation of powers doctrine in the Supreme Court; review of background and recent cases]; 60 *So. Cal. L. Rev.* 1083 [Burger Court's approach]; 30 *Stanf. L. Rev.* 66 [Separation of Powers and the Scope of Federal Equitable Remedies]; 51 *U.C.L.A. L. Rev.* 1079 [California's separation of powers].)

In *Deukmejian v. Superior Court* (1983) 143 C.A.3d 632, 191 C.R. 905, an action was filed in Marin County against Governor Deukmejian and several corrections officials to alleviate overcrowding and other allegedly unconstitutional conditions in San Quentin State Prison, located in the county. The plaintiffs served a notice to appear on the Governor and the trial judge denied his motion to quash the notice. *Held*, mandamus issued to nullify the order. Under *State Bd. of Pharmacy v. Superior Court* (1978) 78 C.A.3d 641, 144 C.R. 320, 2 *Cal. Evidence* (4th), *Discovery*, §30, a public officer should not be required to give evidence in his or her official capacity in the absence of compelling reasons. No compelling reasons were shown: The Governor's testimony was sought not because of his unique

knowledge of conditions at the prison, but because his policies were alleged to have contributed to those conditions and his plans would be helpful. "It is assumed that the court may call the Governor 'on the carpet,' or at least compel him to work in a committee-like atmosphere with the court in order to solve prison problems. We disapprove such a blurring of the lines separating judicial and executive authority." (143 C.A.3d 635.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Zumbrun Law Firm v. California Legislature* (2008) 165 C.A.4th 1603, 1614, 82 C.R.3d 525 [Legislature has power to engage in activities that are incidental or ancillary to lawmaking functions, including power to protect itself and its members from violence; hence, Legislature properly delegated incidental power to Joint Rules Committee to contract for construction of facilities to provide security on State Capitol grounds]; 1 Rotunda 4th, §3.12; 119 Harv. L. Rev. 2312 [Separation of Parties, Not Powers].



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CHAPTER X - Constitutional Law

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III. SEPARATION OF POWERS

A. In General.

2. Exceptions and Distinctions.

7 Witkin Sum. Cal. Law Const Law § 138

[§ 138] Exceptions and Distinctions.

(1) *Local Governments*. The doctrine does not apply to local governments such as municipalities and counties; the Legislature may establish these governments without regard to separation of powers. (*People v. Provines* (1868) 34 C. 520, 534; *Wulzen v. Board of Supervisors* (1894) 101 C. 15, 25, 35 P. 353.)

(2) *Administrative Agencies*. The doctrine does not apply to administrative agencies that are vested with defined quasi-legislative and quasi-judicial powers. (*Imperial Irr. Dist. v. State Water Resources Control Bd.* (1990) 225 C.A.3d 548, 565, 275 C.R. 250; see; 16A Am. Jur.2d (1998 ed.), *Constitutional Law* §§257, 263; infra, §§145, 146.)

(3) *Federal Constitution*. The federal Constitution has no application to delegations of power by state legislatures; hence any delegation consistent with the *state Constitution* will be valid. (*Sandstrom v. California Horse Racing Bd.* (1948) 31 C.2d 401, 412, 189 P.2d 17; see 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §254.)

(4) *Federal Government Authorization*. The federal government, in the absence of state legislation to the contrary, may authorize state courts to enforce federal laws. (See *Miller v. Municipal Court of Los Angeles* (1943) 22 C.2d 818, 850, 142 P.2d 297 [former federal Price Control Act]; *Harris v. Superior Court* (1921) 51 C.A. 15, 29, 196 P. 895 [former Prohibition Law].) But the federal government cannot by statute incorporate *future* state legislation, and thereby delegate federal legislative power to the state. (See *Knickerbocker Ice Co. v. Stewart* (1920) 253 U.S. 149, 40 S.Ct. 438, 441, 64 L.Ed. 834, 840; 13 Cal. L. Rev. 314.) It would seem to be equally clear that a state Legislature cannot adopt prospective federal legislation. (See *In re Burke* (1923) 190 C. 326, 327, 212 P. 193; 17 Cal. L. Rev. 555.)

(5) *Authorization by California Constitution*. In rare instances, the California Constitution has expressly authorized a delegation that might otherwise be subject to challenge. (See *In re Phyle* (1947) 30 C.2d 838, 850, 186 P.2d 134 [former delegation of quasi-judicial power to prison warden to make final determination of sanity of convicted prisoner].)

(6) *Necessary Minor Delegations*. Minor delegations or mingling of powers are sometimes necessary and unobjectionable. Thus, *Parker v. Riley* (1941) 18 C.2d 83, 113 P.2d 873, held that the creation of a commission on interstate cooperation (former Govt.C. 8000 et seq., repealed in 1981), to correlate information and make recommendations, composed of members of the Legislature, the Governor, and the Governor's appointees, did not

violate the separation of powers provision. It was argued that certain of the commission's duties were executive, and could not be performed by legislators, but, since some duties were legislative, the same objection could be made to their performance by the executive. The court declared that the doctrine "has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch ... it can never be used thereafter by another"; and that incidental, subsidiary duties may properly be performed by different governmental agencies or branches. (18 C.2d 90.) (See *California Assn. of Retail Tobacconists v. California* (2003) 109 C.A.4th 792, 832, 135 C.R.2d 224 [commingling by initiative of executive and legislative powers in 9-member commission (4 legislative and 3 gubernatorial appointees plus Secretaries of Health and Human Services and of Education) did not violate separation of powers doctrine; statutes contained adequate executive controls to ensure that appointments did not impair executive's authority over commission].)

The same approach prevails on the federal level. "[T]he separate powers were not intended to operate with absolute independence." (*United States v. Nixon* (1974) 418 U.S. 683, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039, 1063.) In approaching separation of powers questions, "the more pragmatic, flexible approach" of Madison and Story is used. (*Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 97 S.Ct. 2777, 2789, 53 L.Ed.2d 867, 890.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Necessary Minor Delegations. Marine Forests Soc. v. California Coastal Com.* (2005) 36 C.4th 1, 30 C.R.3d 30, 113 P.3d 1062, involved a constitutional challenge to provisions of the California Coastal Act (Pub.Res.C. 30300 et seq.) governing the appointment and tenure of members of the California Coastal Commission. The pertinent provisions specified, at the time the action was commenced, that one-third of the voting members must be appointed by the Governor, one-third by the Senate Rules Committee, and one-third by the Speaker of the Assembly. Each member served for 2 years and was eligible for another 2-year term, but each member served at the pleasure of the authority that appointed the member and was removable at any time. Plaintiffs claimed that this structure made the Commission a "legislative body," for purposes of the California separation of powers clause, which could not engage in executive or judicial functions. The trial court granted summary adjudication in favor of plaintiffs and enjoined the Commission from granting or denying permits or issuing and hearing cease and desist orders. The Court of Appeal affirmed, declaring that the provisions authorizing the Senate Rules Committee and the Speaker of the Assembly to remove a majority of the members at will created an improper subservience of the members to the legislative branch.

While appeal of the decision was pending, and in response to the Court of Appeal decision, the Legislature enacted and the Governor signed a bill amending the challenged provisions of the Coastal Act. The statute continues to provide for the Governor, the Senate Rules Committee, and the Speaker of the Assembly each to appoint one-third of the voting members, but the prescribed terms for those members appointed by the Senate Committee and the Speaker are now 4 years, and they are not removable at the pleasure of their appointing authority. Because of this statutory modification, the validity of the judgment granting injunctive relief necessarily rests on an assessment of the validity of the statute in its current version. *Held*, reversed. The current provisions of the Act governing membership selection and tenure do not violate the separation of powers clause of the California Constitution.

(a) *Functions of Coastal Commission.* The Commission performs an "executive" function in carrying out programs and policies established by the Legislature, and is considered to be part of the executive branch. However, it also performs a "quasi-legislative" function when engaging in rulemaking through the adoption of regulations, and a "quasi-judicial" function when passing on applications for permits, reviewing the validity of local coastal programs, and issuing cease and desist orders. (36 C.4th 25.)

(b) *Federal vs. California separation of powers doctrines.* "The separation of powers issue presented in this case concerns the authority to appoint a public official who performs an executive function." Under the federal separation of powers doctrine, Congress may not appoint a federal executive officer. This doctrine does not apply to the states. (36 C.4th 30.) There is nothing in the California Constitution granting the Governor exclusive authority to appoint executive officers, or prohibiting their appointment by the Legislature. Further, under the California Constitution, the Legislature has the authority to determine both whether to create new executive offices, agencies, or commissions, and to decide

who is to appoint the executive officers and commissioners, including the authority to provide for their appointment by the Legislature itself. (36 C.4th 31, 40.)

(c) *Limitations on legislative power to appoint executive officials.* There are limitations on legislative enactments authorizing the appointment of executive officers. (36 C.4th 43.) The proper standard to be applied in evaluating this legislation is whether it operates "to defeat or materially impair the executive branch's exercise of its constitutional functions." In applying this standard, "it is appropriate to consider whether the statutes either (1) improperly intrude upon a core zone of executive authority, impermissibly impeding the Governor (or another constitutionally prescribed executive officer), in the exercise of his or her executive authority or functions, or (2) retain undue legislative control over a legislative appointee's executive actions, compromising the ability of the legislative appointees to the Coastal Commission (or of the Coastal Commission as a whole) to perform their executive functions independently, without legislative coercion or interference." (36 C.4th 45.)

(d) *No improper intrusion on executive authority.* The Coastal Act, as amended, does not improperly intrude on a core zone of executive authority. Commission members are not intimate advisors of the Governor or other executive officer. They are members of an independent administrative agency charged with a broad variety of executive, quasi-legislative, and quasi-judicial functions. Land use planning within the coastal zone is not an area traditionally overseen by the executive branch. (36 C.4th 46.) And, "the balance of power between the Governor and the Commission does not depend upon the identity of the persons or entities who are statutorily authorized to appoint the individual members of the Commission." (36 C.4th 48.)

(e) *No improper control by Legislature.* The Coastal Act, as amended, does not compromise the ability of commission members to perform their duties independently and without improper control by the Legislature. The fact that the Legislature appoints the persons who it determines are best qualified to exercise the particular executive functions of the office does not mean that it has the authority to exercise those executive functions. (36 C.4th 48.) And the fact that the Legislature may reappoint a commission member does not constitute an impermissible measure of control over the incumbent member. (36 C.4th 49.) Further, the Act contains numerous provisions governing the conduct of commission business, including detailed substantive standards that members must apply through decisions that are subject to judicial review. (36 C.4th 50.)

(f) *No proscription against Legislature appointing majority of commission members.* The California separation of powers clause does not prohibit the Legislature from appointing a majority of the commission members. (36 C.4th 50.) And here, the two-thirds of commission members selected by the Legislature are not chosen by the Legislature as a whole. By dividing the appointment authority among the Governor, the Senate Rules Committee, and the Speaker of the Assembly, the voters, in enacting the Act, sought to disperse the appointment authority "to avoid a situation in which one official who might not be sympathetic to the purpose and objectives of the Coastal Act could attempt to subvert those aims by appointing a majority of Commission members who are hostile to those goals. In this regard, this aspect of the statutory scheme serves an objective that is analogous to one of the principal purposes of the separation of powers clause, the avoidance of an aggregation of power in a single entity or officer." (36 C.4th 51.)



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CHAPTER X - Constitutional Law

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III. SEPARATION OF POWERS

A. In General.

3. Standing and Case-or-Controversy Requirement.

7 *Witkin Sum. Cal. Law Const Law* § 139

[§ 139] Standing and Case-or-Controversy Requirement.

(1) *In General. Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351, deals with the Endangered Species Act of 1973 (ESA), which seeks to protect species of animals against threats to their continuing existence caused by man. The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species and their critical habitat. Initially a regulation stated that the obligations of consultation extend to actions taken in foreign nations; a revised regulation requires consultation only for actions taken in the United States. Respondents, organizations dedicated to wildlife conservation, filed this action against the Secretary seeking declaratory relief and an injunction. The district court granted the Secretary's motion to dismiss for lack of standing; the Court of Appeals reversed. On remand the district court denied the Secretary's motion for summary judgment on the ground that the Court of Appeals had already determined the standing question. *Held*, reversed; respondents lacked standing.

(a) The federal Constitution divides the powers conferred on the federal government into legislative, executive, and judicial powers, and it limits the jurisdiction of federal courts to "cases" and "controversies." These terms are not defined; "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." (112 S.Ct. 2136, 119 L.Ed.2d 363.) One of the landmarks setting apart the "cases" and "controversies" that are appropriately resolved through the judicial process is the doctrine of standing. "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." (112 S.Ct. 2136, 119 L.Ed.2d 364.)

(b) The irreducible constitutional minimum of standing contains three element. First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest that is concrete and particularized, and actual or imminent. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. (112 S.Ct. 2136, 119 L.Ed.2d 364.)

(c) The party invoking federal jurisdiction bears the burden of establishing these elements. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice; but in response to a summary judgment motion, the plaintiff must set forth specific facts; and at the final stage those facts, if controverted, must be supported by the evidence adduced at trial. (112 S.Ct. 2137, 119 L.Ed.2d 364.)

(d) When, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation or lack of regulation of someone else, standing is more difficult to establish. "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction--and perhaps on the response of others as well. The existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.' " (112 S.Ct. 2137, 119 L.Ed.2d 365.)

Two concurring opinions were filed (112 S.Ct. 2146, 119 L.Ed.2d 376; 112 S.Ct. 2147, 119 L.Ed.2d 378), and two justices joined in a strong dissenting opinion (112 S.Ct. 2151, 119 L.Ed.2d 383.). (See 106 Harv. L. Rev. 308 [Lujan]; 28 U.S.F. L. Rev. 859 [same]; 67 So. Cal. L. Rev. 689 [arguing that separation of powers principles should not limit standing to sue government]; 35 Proof of Facts 3d 493 [proof of standing in environmental citizen suits].) (On standing to challenge constitutionality of statute, see supra, §76 et seq.)

(2) *California Law*. The California Constitution contains no "case or controversy" requirement. Thus, a suit by a citizen in the undifferentiated public interest is justiciable in California. (See *National Paint & Coatings Assn. v. California* (1997) 58 C.A.4th 753, 761, 68 C.R.2d 360 [empowerment of private citizens to enforce Safe Drinking Water and Toxic Enforcement Act does not undermine or impair enforcement by executive branch].)

SUPPLEMENT: [This section is current through the latest supplement]



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III. SEPARATION OF POWERS

B. Judicial Power.

1. Judicial Power Is in Courts.

a. The Judiciary.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 140

[§ 140] In General.

(1) *Judicial Powers*. The judicial function is to declare the law and determine the rights of parties to controversies before the court. (*Marin Water & Power Co. v. Railroad Com. of Calif.* (1916) 171 C. 706, 711, 154 P. 864; see 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §259 et seq.)

The entire judicial power of the state is vested in the constitutional courts (Cal. Const., Art. VI, §1; see 2 *Cal. Proc.* (4th), *Courts*, §167 et seq.), and the Legislature may not give true judicial powers to any other state board or tribunal. (*Department of Public Works of Calif., Div of Water Rights v. Superior Court* (1925) 197 C. 215, 221, 239 P. 1076; on quasi-judicial powers of administrative agencies, see *infra*, §146.) Of course, the Constitution may make exceptions, as in the enabling provisions of the Workers' Compensation Act (2 *Summary* (10th), *Workers' Compensation*, §2) and the Public Utilities Act (*infra*, §1085).

(2) *Nonjudicial Powers*. Courts cannot be compelled to exercise nonjudicial powers. (See *Los Angeles v. South Gate* (1930) 108 C.A. 398, 401, 291 P. 654.) They cannot, e.g., be forced to decide a question on which there is no dispute. (On necessity of justiciable controversy, see 3 *Cal. Proc.* (4th), *Actions*, §§73, 74.) This objection did not, however, invalidate the statute providing for quieting title when public records are lost (*Title & Document Restoration Co. v. Kerrigan* (1906) 150 C. 289, 318, 88 P. 356), or the declaratory relief statute (*Blakeslee v. Wilson* (1923) 190 C. 479, 482, 213 P. 495). (See 11 *Cal. L. Rev.* 289; 69 *Harv. L. Rev.* 1305 [constitutionality of statutes providing for advisory opinions].)

In *Mistretta v. United States* (1989) 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714, the Sentencing Reform Act of 1984 created a federal Sentencing Commission comprised of seven members, three of whom were federal judges, as an independent agency in the judicial branch. The members were appointed by the President for specific terms and were removable for good cause. The Commission was empowered to adopt sentencing guidelines for federal offenses. *Held*, the Act does not violate the principle of separation of powers.

(a) Separation of powers cases involving the judicial branch guard against two dangers: (1) that the judiciary be assigned or allowed tasks more appropriately accomplished by other branches; (2) that a law impermissibly threaten the

institutional integrity of the judicial branch. (109 S.Ct. 660, 102 L.Ed.2d 737, 738.)

(b) There are activities that, although nonadjudicatory in nature, are so related to the mission of the judiciary that it is appropriate to assign them to the judicial branch; e.g., delegation to the judiciary of rulemaking power. (109 S.Ct. 661, 662, 663, 102 L.Ed.2d 739, 740, 741.)

(c) The sentencing function has long been a shared responsibility among the branches of government, and placing the Commission in the judicial branch properly recognizes the judiciary's traditional role in sentencing. (109 S.Ct. 664, 102 L.Ed.2d 742.) The political nature of the Commission's work does not alter this conclusion. (1) The Commission is an independent agency, not a court; and (2) judges already make sentencing decisions, so placing the Commission in the judicial branch does not increase its power. (109 S.Ct. 665, 666, 102 L.Ed.2d 744, 745.) "Given their limited reach, the special role of the Judicial Branch in the field of sentencing, and the fact that the Guidelines are promulgated by an independent agency and not a court, it follows that as a matter of 'practical consequences' the location of the Sentencing Commission within the Judicial Branch simply leaves with the Judiciary what long has belonged to it." (109 S.Ct. 667, 102 L.Ed.2d 746.)

(d) Requiring the judges on the Commission to share their power with nonjudges does not undermine the integrity of the judicial branch. (1) The Constitution does not prohibit federal judges from undertaking extrajudicial duties, and they frequently have done so. (109 S.Ct. 668, 669, 102 L.Ed.2d 747, 748.) (2) On the Commission, the judges exercise an administrative rather than a judicial power regarding a subject on which they are uniquely qualified. (109 S.Ct. 671, 102 L.Ed.2d 751.) (3) The particular judges serve voluntarily, so there is no threat to judicial independence or integrity. (109 S.Ct. 672, 102 L.Ed.2d 752.)

(e) The claim that judicial participation threatens the judiciary's impartiality is more troubling. However, the Commission's sole function is the essentially neutral one of developing rules to guide judges in performing their judicial role of passing sentence, and their participation threatens neither the fact nor the appearance of impartiality. (109 S.Ct. 673, 102 L.Ed.2d 753.)

(f) The President's appointment and removal power over Commission members does not affect the tenure or compensation of the judges in their judicial role and poses no threat to the independence of the judiciary. (109 S.Ct. 674, 675, 102 L.Ed.2d 754, 755.) (See *Kasler v. Lockyer* (2000) 23 C.4th 472, 493, 97 C.R.2d 334, 3 P.3d 581, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §163 [applying *Mistretta* to challenge to "add-on" provision of Assault Weapons Control Act]; 103 Harv. L. Rev. 279 [*Mistretta*].)

West's Key Number Digest, Constitutional Law k.67 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Judicial Powers*. See 118 Harv. L. Rev. 645 [Article I Tribunals, Article III Courts, and the Judicial Power of the United States].

Cross-Reference: 2 Cal. Proc. (5th), *Courts*, §161 et seq. (2) *Nonjudicial Powers*.

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §21 et seq.



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III. SEPARATION OF POWERS

B. Judicial Power.

1. Judicial Power Is in Courts.

a. The Judiciary.

2. Compelling Payment of Judgment Against Executive.

7 Witkin Sum. Cal. Law Const Law § 141

[§ 141] Compelling Payment of Judgment Against Executive.

In *Mandel v. Myers* (1981) 29 C.3d 531, 174 C.R. 841, 629 P.2d 935, plaintiff successfully prosecuted an action against the Governor and other executive officers to prevent closing of state offices for a 3-hour period on Good Friday, and an award of \$ 25,000 in attorneys' fees was entered against the defendants and affirmed on appeal (*Mandel v. Hodges* (1976) 54 C.A.3d 596, 127 C.R. 244, 7 Cal. Proc. (4th), Judgment, §221). The State Board of Control approved plaintiff's claim and included it in an omnibus claim bill introduced in the Legislature. The Legislative Analyst, ignoring the binding effect of the final judgment, opposed the claim on the ground that the fee was improperly awarded, and the Legislature deleted the item. Plaintiff then sought relief in the trial court, and that court entered an order directing the State Controller to pay the award out of funds in the current Budget Act for operating expenses of the principal defendant agency (Department of Health Services). Defendants appealed, contending that the order violated the separation of powers doctrine. *Held*, affirmed.

(a) *Court may compel payment.* Although a court cannot compel the Legislature to appropriate funds, it may order the State Controller or other similar official to make payment out of appropriated funds. (29 C.3d 539, 540, citing cases dealing with unconstitutional restrictions on payments to particular persons or classes of persons.) The latter decisions show that, if, in the absence of an "invalid restriction, appropriated funds are reasonably available for the expenditures in question, the separation of powers doctrine poses no barrier to a judicial order" directing payment of the funds. (29 C.3d 542.)

(b) *Appropriated funds were available.* The Budget Act appropriation for "services" and for "all other proper expenses" supported the trial judge's conclusion that appropriated funds were available; and payment of court-awarded attorneys' fees out of an agency's current operating expense budget has been a routine administrative practice. (29 C.3d 543, 544.)

(c) *No valid exclusion of award.* By deleting the item, the Legislature disregarded the finality of a court judgment, and asserted a power to readjudicate the merits of the judgment. This is a legislative usurpation of judicial power. "The recognition of such legislative authority would completely deprive court judgments of the respect and deference which the Constitution contemplates each branch of government will accord to final actions within the jurisdiction of a

coequal branch, and would repose in the Legislature a combination of powers that the constitutional draftsmen specifically intended to forestall." (29 C.3d 549.)

(d) *Methods of restricting costs of awards.* The Legislature may enact a wide variety of legitimate controls, such as fixed or maximum hourly rates or limits on amounts awarded, limitation of cases in which fees may be awarded, or appropriation of a designated sum for payment of fees with provision for allocation of the money among eligible claimants if the sum proves insufficient. (29 C.3d 551.)

(e) *Conclusion.* The opinion concludes with an emphatic restatement of the basis of the decision: "In sum, individual citizens who litigate claims against the government in our state courts are constitutionally entitled to expect that when the government loses, the Legislature will respect the final outcome of such litigation. The Legislature is not a supercourt that can pick and choose on a case-by-case basis which final judgments it will pay and which it will reject. If that kind of arbitrary conduct by the Legislature were to be the law, our system of justice would be subordinated to the popular vote of legislators, and our constitutional bedrock principle of separation of powers would become a shattered mass of scattered fragments." (29 C.3d 552.)

Two justices dissented in separate opinions. (29 C.3d 552, 559.)

Mandel v. Myers was analyzed and distinguished in *Estate of Cirone* (1987) 189 C.A.3d 1280, 234 C.R. 749. Petitioners, executors of the estate of Cirone, objected to an inheritance tax on the ground that the initiative measure repealing the tax had become operative on the day of the decedent's death. The probate court sustained the objection, the state appealed, and petitioners prevailed. On remand, they obtained an award of \$ 18,000 for attorneys' fees pursuant to C.C.P. 1021.5 (see 7 Cal. Proc. (4th), *Judgment*, §225), based on an hourly charge of \$ 150 and a multiplication factor of 1.5. The State Controller contended that the award exceeded the limitations of the Budget Act, but the court ordered the Controller to pay it. *Held*, reversed.

(a) "[T]he Legislature cannot be forced to appropriate more money when it decides to appropriate less money than necessary to satisfy a judgment in full. Furthermore, the Legislature can attach to its appropriations whatever terms and conditions it chooses so long as they are constitutionally permissible." (189 C.A.3d 1290.)

(b) The restriction here, that expenditures not exceed a maximum hourly rate of \$ 90, does not invade the province of the judiciary. The attorney fee award was not modified; it came into existence after the establishment of the hourly rate restrictions that the Legislature had the power to impose. (189 C.A.3d 1291, 1292.) (See *Kuykendall v. State Bd. of Equalization* (1994) 22 C.A.4th 1194, 1206, 27 C.R.2d 783, 9 Summary (10th), *Taxation*, §321 [distinguishing *Mandel v. Myers*].)

SUPPLEMENT: [This section is current through the latest supplement]

The State Board of Control has been renamed the California Victim Compensation and Government Claims Board.

Mandel case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §254. *Attorneys' fees:*

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §259.



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B. Judicial Power.

1. Judicial Power Is in Courts.

b. Executive or Administrative Officers.

7 *Witkin Sum. Cal. Law Const Law* § 142

[§ 142] Executive or Administrative Officers.

Executive or administrative officers cannot exercise or interfere with judicial powers. (See *Boags v. Municipal Court* (1987) 197 C.A.3d 65, 67, 242 C.R. 681; 109 Harv. L. Rev. 2020 [executive review of court's extradition determination as violation of separation of powers].) Hence, the pardoning power of the Chief Executive is limited to cases of criminal contempt, and does not extend to persons convicted of civil contempt. (See *Ex parte Grossman* (1925) 267 U.S. 87, 45 S.Ct. 332, 333, 69 L.Ed. 527, 531.) And, in the absence of a judicial determination that a statute is unconstitutional, a local executive official charged with the ministerial duty of enforcing the statute lacks the authority to disregard its mandate based on the official's belief that it is unconstitutional. (*Lockyer v. San Francisco* (2004) 33 C.4th 1055, 1068, 1079, 1082, 17 C.R.3d 225, 95 P.3d 459 [local officials exceeded authority by altering state marriage license application form, issuing licenses to same-sex couples, and registering marriage certificates for those couples in violation of statutory restriction limiting marriage to man and woman].) (On delegation of quasi-judicial power to administrative agencies, see *infra*, §§145, 146.)

Likewise, the Legislature may not condition judicial action on the approval of an executive officer. (*People v. Tenorio* (1970) 3 C.3d 89, 94, 89 C.R. 249, 473 P.2d 993 [statutory prohibition against striking prior narcotics conviction except on motion of district attorney held invalid]; see *People v. Superior Court (Romero)* (1996) 13 C.4th 497, 509, 513, 53 C.R.2d 789, 917 P.2d 628, 3 Cal. Crim. Law (3d), Punishment, §369 [discussing *People v. Tenorio*, and construing three strikes law to avoid separation of powers issues that would arise if trial court were precluded from dismissing prior felony allegations without consent of prosecutor].) Hence, a statute that allowed narcotic addicts otherwise ineligible for treatment under the rehabilitation program to become eligible with the concurrence of the district attorney was held a violation of the requirement that judicial power be vested in the judiciary. (*People v. Navarro* (1972) 7 C.3d 248, 258, 259, 102 C.R. 137, 497 P.2d 481.)

However, P.C. 739, providing that the district attorney may charge in an information any offense shown by the testimony taken before the committing magistrate, does not confer judicial powers on the district attorney; the information merely accuses the defendant and does not adjudicate his or her rights. (*People v. Bird* (1931) 212 C. 632, 639, 300 P. 23; see 18 Cal. L. Rev. 324; 19 Cal. L. Rev. 330, 645; 4 Cal. Crim. Law (3d), Pretrial Proceedings, §169 et seq.) Likewise, Welf.C. 707(d), giving prosecutors the discretion to file charges against certain minors directly in criminal court without prior adjudication of unfitness for disposition in juvenile court, is within the charging authority

of the executive branch and does not violate the separation of powers doctrine. (*Manduley v. Superior Court* (2002) 27 C.4th 537, 554, 117 C.R.2d 168, 41 P.3d 3, 10 Summary (10th), *Parent and Child*, §737.)

The fact that an administrative officer exercises judgment and discretion in the performance of his or her duties does not make these actions or powers judicial in nature. (*People v. Sun Pac. Farming Co.* (2000) 77 C.A.4th 619, 636, 92 C.R.2d 115 [agency's ability to file lawsuit is not quasi-judicial power because, in filing suit, it does not adjudicate rights of parties]; see *20th Century Ins. Co. v. Quackenbush* (1998) 64 C.A.4th 135, 141, 75 C.R.2d 113 [Insurance Commissioner did not invade power of judiciary by issuing and disseminating opinion letter regarding statute of limitations for filing claims for earthquake damage; Commissioner's statutory authority to provide information to public does not exclude subjects of pending litigation].)

West's Key Number Digest, Constitutional Law k.71 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

III. SEPARATION OF POWERS

B. Judicial Power.

1. Judicial Power Is in Courts.

c. The Legislature.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 143

[§ 143] In General.

(1) *Nature of Limitation.* The Legislature cannot exercise or place limitations on judicial powers. However, the Legislature may adopt reasonable regulations affecting a court's inherent powers, so long as the legislation does not defeat or impair the court's exercise or fulfillment of its constitutional power. (*Superior Court v. Mendocino* (1996) 13 C.4th 45, 57, 60, 66, 51 C.R.2d 837, 913 P.2d 1046 [Govt.C. 68108, authorizing county to close courts on unpaid furlough days, was not wrongful usurpation of judicial power because Legislature has historically designated legal holidays and other days on which courts are closed, and exercise of this power does not threaten integrity or independence of judicial process]; see *Fleming v. Superior Court* (1925) 196 C. 344, 349, 238 P. 88 [act prohibiting use of evidence obtained by speed traps is not infringement on judicial functions]; *Johnson v. Superior Court* (1958) 50 C.2d 693, 329 P.2d 5 [statute allowing peremptory challenge of judge for prejudice is valid]; *People v. Superior Court (Mudge)* (1997) 54 C.A.4th 407, 412, 62 C.R.2d 721, citing the text [C.C.P. 170.65, allowing joint stipulation of parties for disqualification of retired judge to try criminal case, is unconstitutional as impairment of Chief Justice's power to appoint retired judges]; *Los Angeles County Employees Assn., SEIU, Local 660 v. Superior Court* (2000) 81 C.A.4th 164, 176, 96 C.R.2d 418 [statutes providing civil service status to municipal court clerks did not violate separation of powers doctrine because employment status of clerks does not impair judiciary's functions; following *Mendocino*]; *Case v. Lazben Financial Co.* (2002) 99 C.A.4th 172, 185, 121 C.R.2d 405 [C.C.P. 1008, providing for reconsideration of orders on application of parties, permits trial court to reconsider its own interim orders sua sponte; otherwise, statute would defeat core function of judiciary to resolve specific controversies in violation of separation of powers doctrine]; 24 *Pepperdine L. Rev.* 1090 [*Mendocino*]; on lack of congressional power to adopt Religious Restoration Act, see *infra*, §516.)

(2) *Contempt.* The courts have inherent power to punish for contempt and cannot be deprived of it. (*Michaelson v. United States* (1924) 266 U.S. 42, 45 S.Ct. 18, 20, 69 L.Ed. 162, 167; *Lamberson v. Superior Court* (1907) 151 C. 458, 461, 91 P. 100; *In re McKinney* (1968) 70 C.2d 8, 10, 73 C.R. 580, 447 P.2d 972; see 7 *Cal. Proc.* (4th), Trial, §182.) And the former California statute imposing a penalty for refusal to grant a writ of habeas corpus was held unconstitutional, as an infringement of the immunity of judges exercising judicial functions. (See *Oppenheimer v. Ashburn* (1959) 173 C.A.2d 624, 633, 343 P.2d 931.) On the other hand, the Legislature may regulate the procedure to

be followed in punishing for contempt. (*Briggs v. Superior Court* (1931) 211 C. 619, 627, 297 P. 3; see 7 *Cal. Proc.* (4th), *Trial*, §185.)

(3) *Practice of Law*. Although admission to the practice of law is a judicial function, it is subject to reasonable restrictions that the Legislature may place on it. (*Brydonjack v. State Bar* (1929) 208 C. 439, 443, 281 P. 1018; see *O'Brien v. Jones* (2000) 23 C.4th 40, 44, 57, 96 C.R.2d 205, 999 P.2d 95 [statute providing for appointment of three of five judges of State Bar Court by executive and legislative branches does not defeat or materially impair Supreme Court's authority over practice of law, and thus does not violate separation of powers doctrine, because safeguards and procedures ensure that nominees are qualified]; *In re Paguirigan* (2001) 25 C.4th 1, 7, 104 C.R.2d 402, 17 P.3d 758 [in enacting summary disbarment statute, Legislature did not significantly impair court's inherent power over attorney discipline]; 27 *Golden Gate U. L. Rev.* 601 [constitutionality of legislation to restructure State Bar; 1 *Cal. Proc.* (4th), *Attorneys*, §357].)

(4) *Jurisdiction*. The extent of the Legislature's power to regulate the jurisdiction of the courts is unclear. Some regulation clearly is permissible, but the Legislature may not exercise its power so as to interfere with the independence of the judiciary. (See 1 *Rotunda*, §§2.10, 2.11; 97 *Harv. L. Rev.* 778 [validity of statutes precluding judicial review of administrative disbursement of benefits]; 105 *Harv. L. Rev.* 1153 [congressional power under Article III to restrict jurisdiction of federal courts; 36 *Stanf. L. Rev.* 895 [guide to debate on congressional power to curtail federal court jurisdiction]; 2 *Cal. Proc.* (4th), *Courts*, §170 et seq.].)

West's Key Number Digest, Constitutional Law k.70 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Limitation*. See 79 *So. Cal. L. Rev.* 753 [Legislative Arrogance and Constitutional Accountability].(2) *Contempt*.

Inherent power:

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §168.

Regulation of procedure:

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §172.

(3) *Practice of Law*.

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §341.

(4) *Jurisdiction*. See 1 *Rotunda* 4th, §§2.10, 2.11.

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §167 et seq.



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III. SEPARATION OF POWERS

B. Judicial Power.

1. Judicial Power Is in Courts.

c. The Legislature.

2. Statutes Abrogating or Interpreting Prior Law.

7 Witkin Sum. Cal. Law Const Law § 144

[§ 144] Statutes Abrogating or Interpreting Prior Law.

The Legislature sometimes passes acts stating what is the meaning or proper interpretation of a prior law. These declaratory statutes may be invalid if they operate retrospectively on existing causes of action to the impairment of vested rights; and they have been considered by some courts an exercise of judicial power in violation of the doctrine of separation of powers. But, where prospective, they are generally upheld. (See *In re Coburn* (1913) 165 C. 202, 210, 131 P. 352; *Hunt v. Superior Court* (1999) 21 C.4th 984, 1008, 90 C.R.2d 236, 987 P.2d 705 [statutory declaration interpreting prior statute contrary to case law was proper exercise of legislative power to enact law for future and it governed propriety of injunctive relief, which operates prospectively; following *Mandel v. Myers* (1981) 29 C.3d 531, 174 C.R. 841, 629 P.2d 935, supra, §141, and *Western Sec. Bank v. Superior Court* (1997) 15 C.4th 232, 62 C.R.2d 243, 933 P.2d 507, infra, §624]; *Anderson v. Superior Court* (1998) 68 C.A.4th 1240, 1250, 80 C.R.2d 891 [statute that prospectively abrogated effect of judicial decision relating to funding of federal program did not violate separation of powers provision].)

In *Mendly v. Los Angeles* (1994) 23 C.A.4th 1193, 28 C.R.2d 822, plaintiffs sought to enforce a stipulated judgment they had entered into with a county providing for setting general assistance levels at a higher level for 5 years. After entry of the judgment, the Legislature enacted a statute setting a formula for determining a sufficient level of aid, and an uncodified provision, indicating that it was the Legislature's intent to abrogate agreements such as plaintiffs' stipulated judgment. The trial judge denied plaintiffs' motion to enforce the judgment, and the Court of Appeal affirmed. After rejecting plaintiffs' argument that the legislation violated the Contract Clause, the court also rejected their separation of powers claim: "Appellants fail to establish that the instant stipulated judgment constituted a 'final judgment' for purposes of the separation of powers doctrine. ... [T]he instant judgment did not vest in appellants any rights that were not subject to alteration by the Legislature." The judicial authority embodied in the stipulated judgment was the authority to enforce a particular statute, and a court must be free to modify the terms of a consent decree when a change in law brings those terms into conflict with statutory objectives. (23 C.A.4th 1212; on Contract Clause issue, see infra, §1292.)

In *Plaut v. Spendthrift Farm* (1995) 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328, P sued S in 1987 for violation of §10b-5 of the federal Securities Exchange Act of 1934, based on acts committed in 1983 and 1984. In 1991, the

district court dismissed the action with prejudice, following the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* (1991) 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321, holding that the limitations period for these actions was 1 year from discovery or 3 years from commission of the violation. After the judgment became final, Congress enacted §27A(b) of the 1934 Act, providing for reinstatement of actions commenced before *Lampf* but dismissed after it as time-barred, if the actions would have been timely under pre-*Lampf* state law. P's motion for reinstatement was denied on the ground that §27A(b) was unconstitutional, and the Court of Appeals affirmed. *Held*, to the extent that it requires federal courts to reopen final judgments entered before its enactment, §27A(b) of the 1934 Act violates the separation of powers doctrine.

(a) Article III, in establishing a "judicial department" with the province and duty to say what the law is in particular cases and controversies, "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." One of the judicial powers is to render dispositive judgments. "By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle." (115 S.Ct. 1453, 131 L.Ed.2d 342.)

(b) Section 27A(b) effects a clear violation of the separation of powers principle. "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'" (115 S.Ct. 1456, 131 L.Ed.2d 346.)

(c) It is true that, when a new law makes clear that it is retroactive, an appellate court must apply it in reviewing judgments still on appeal, and must alter the outcome accordingly. This is because Article III creates not a batch of unconnected courts, but a judicial department, with inferior courts and one Supreme Court, and within the Article III hierarchy the decision of an inferior court is not the final word of the department as a whole. (115 S.Ct. 1457, 131 L.Ed.2d 347.) "Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was." (115 S.Ct. 1457, 131 L.Ed.2d 348.)

(d) "We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so." (115 S.Ct. 1463, 131 L.Ed.2d 356.)

One justice concurred in the judgment. (115 S.Ct. 1463, 131 L.Ed.2d 356.) Two justices dissented. (115 S.Ct. 1466, 131 L.Ed.2d 360.) (See *People v. Lynch* (1999) 69 C.A.4th 313, 318, 81 C.R.2d 552 [Legislature cannot "readjudicate controversies that have been litigated in the courts and resolved by final judgment"]; 109 Harv. L. Rev. 229 [Plaut].)

In *People v. Bunn* (2002) 27 C.4th 1, 115 C.R.2d 192, 37 P.3d 380, and its companion case, *People v. King* (2002) 27 C.4th 29, 115 C.R.2d 214, 37 P.3d 398, the court examined successive versions of P.C. 803(g), which increases the time for prosecuting sex crimes against minors. The statute permits refiling charges previously dismissed by the courts as time-barred. The question was whether, and to what extent, Cal. Const., Art. III, §3, the California separation of powers clause, precludes application of the refiling provision. The court explained that "refiling legislation cannot be applied retroactively to reopen court cases that had already been dismissed, if the dismissals had become final judgments under the law of finality which then pertained, before the refiling provision became effective. In this sense, and for separation of powers purposes, such prior judgments are sacrosanct. On the other hand, as *Plaut* itself explained, any dismissal that was already subject to a particular refiling at the time the dismissal was entered or finally upheld cannot, to that extent, be deemed a final judgment immune from legislative interference. Hence, the refiling provision, as it existed at the time the dismissal was entered or finally upheld, may constitutionally permit reopening of the case." (27 C.4th 5.)

SUPPLEMENT: [This section is current through the latest supplement]

People v. Bunn: P.C. 803 was repealed and reenacted in 2005. P.C. 803(f) now provides for increasing the time for prosecuting sex crimes against minors.

See *Perez v. Roe 1* (2006) 146 C.A.4th 171, 187, 52 C.R.3d 762 [following *Plaut v. Spendthrift Farm* (1995) 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328, text, p. 261, and *People v. Bunn*; Legislature violated separation of powers doctrine by trying to revive sexual abuse actions that had already been finally resolved adversely to plaintiffs].



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III. SEPARATION OF POWERS

B. Judicial Power.

2. Delegation of Judicial Power.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 145

[§ 145] In General.

The growth of administrative law has resulted in modification of the strict doctrine that judicial powers cannot be delegated to a nonjudicial board or officer. An administrative board or officer may be invested with "quasi-judicial" power to determine facts and exercise discretion. (See *New York v. Van De Carr* (1905) 199 U.S. 552, 26 S.Ct. 144, 50 L.Ed. 305; *Gaylord v. Pasadena* (1917) 175 C. 433, 436, 166 P. 348; *East Bay Mun. Util. Dist. v. Department of Public Works* (1934) 1 C.2d 476, 479, 35 P.2d 1027; *Rainey v. Michel* (1936) 6 C.2d 259, 277, 57 P.2d 932 [powers to take over insolvent banks and determine necessity and amount of assessment on stockholders]; *Roussey v. Burlingame* (1950) 100 C.A.2d 321, 324, 223 P.2d 517; *infra*, §161.)

Thus, boards of medical and dental examiners may be empowered to hold hearings and revoke licenses for causes defined by law (*Suckow v. Alderson* (1920) 182 C. 247, 249, 187 P. 965; *Purviance v. Compton* (1928) 94 C.A. 277, 279, 271 P. 120; *Jameson v. Board of Dental Examiners* (1931) 118 C.A. 105, 108, 5 P.2d 47), and the Real Estate Commissioner has been validly invested with similar powers (*Brecheen v. Riley* (1921) 187 C. 121, 125, 200 P. 1042).

Quasi-judicial administrative decisions are reviewable only by mandamus. (See *Bixby v. Pierno* (1971) 4 C.3d 130, 137, 93 C.R. 234, 481 P.2d 242; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §257.)

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SUPPLEMENT: [This section is current through the latest supplement]

Quasi-judicial administrative decisions:

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §258.



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B. Judicial Power.

2. Delegation of Judicial Power.

b. Valid Administrative Adjudication.

7 *Witkin Sum. Cal. Law Const Law* § 146

[§ 146] Valid Administrative Adjudication.

McHugh v. Santa Monica Rent Control Bd. (1989) 49 C.3d 348, 261 C.R. 318, 777 P.2d 91, explores in depth the nature and extent of administrative adjudication and the constitutional restraints on exercise of the process. The Santa Monica Charter Rent Control article, in addition to the usual regulatory provisions, authorizes a court action for damages by a tenant against the landlord for receipt of excess rent, to recover treble damages, costs, and attorneys' fees. The article also authorizes an alternative administrative remedy by a proceeding in which the Rent Control Board can determine violations, and the tenant can deduct the excess rent and treble damages from future rent payments. Tenants filed an administrative complaint against their landlord, and the board awarded them restitution of excess rent and treble damages, and authorized withholding of rent for the amounts. Plaintiff landlord sought administrative mandamus, and the trial judge, concluding that the administrative adjudication process violated the Judicial Powers Clause of the California Constitution (Cal. Const., Art. VI, §1), issued a peremptory writ, ordering the board to vacate its decision, and permanently enjoining the board from proceeding on any complaints for excess rents under the article. *Held*, reversed.

(a) *Jersey Maid case not controlling.* *Jersey Maid Milk Products Co. v. Brock* (1939) 13 C.2d 620, 91 P.2d 577, held unconstitutional a provision allowing the Director of Agriculture to establish minimum prices for milk and resolve complaints by milk producers against milk distributors. (49 C.3d 357.) However, the *Jersey Maid* opinion is unclear in its holding and lacking in reasoning or in consideration of precedents from other jurisdictions or policy implications; and the intervening five decades of case law shows that it is out of step with every sister-state court that has considered administrative awards of "restitutive" damages. (49 C.3d 358.)

(b) *Power to make "restitutive" money awards: California cases.* While they furnish no direct authority, the professional licensing cases, rejecting "judicial power" challenges to administrative action so long as a judicial review was available, are persuasive. These decisions recognized what Professor Davis termed the "principle of check." As he put it: "We have had little or no concern for avoiding a mixture of three or more kinds of power in the same agency; we have had much more concern for *avoiding or minimizing unchecked power*. The very identifying badge of the modern administrative agency has been the combination of judicial power (adjudication) with legislative power (rulemaking)." (49 C.3d 361.) Thus, "although we acknowledge the constitutional importance of ensuring judicial review of administrative determinations, our prior cases do not stand for the proposition that an administrative agency may

exercise all manner of 'judicial-like' power on the simple condition that judicial review of the administrative decision remains available. On the other hand, our prior licensing cases have accepted without constitutional debate the authority of licensing agencies to impose a restitutive award as a probationary term on a licensee, and these cases do not foreclose the possibility that, under appropriate circumstances, an agency without licensing power should likewise be allowed to make such restitutive awards." (49 C.3d 364.)

(c) *Power to make "restitutive" money awards: sister state cases.* The Judicial Powers Clause of the California Constitution has counterparts in most other state constitutions, but modern courts have not rigidly construed these provisions. Instead, the courts have recognized the necessity of administrative adjudication of certain disputes, subject to two limiting principles:

(1) *Procedural*: the principle of check, satisfied by availability of judicial review. (49 C.3d 365.) The decisions also reserve to the courts the "true" judicial power, upholding the agency's authority only if the administrative scheme respects the principle of check by providing for judicial review. (49 C.3d 373.)

(2) *Substantive*: the judicial powers are proper if they are needed to produce an efficient and effective administrative enforcement of the public interest. (49 C.3d 366.) The view embraced by sister states avoids "meaningless, wooden distinctions" between quasi-judicial and judicial powers, and the decisions "forthrightly recognize that administrative agencies do indeed exercise 'judicial-like' powers." But they also stress a crucial and workable limiting principle: "The agency may exercise *only those powers that are reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes.*" (49 C.3d 372.) At least nine states have upheld the remedial power. (49 C.3d 367.)

(d) *Conclusion.* Administrative adjudication and awarding of restitution does not offend the Judicial Powers Clause when these substantive and procedural limitations are respected. Thus, the "reasonable necessity/legitimate regulatory purpose" requirements will be applied "to guard against unjustified delegation of authority to decide disputes that otherwise belong in the courts. Specifically, we will inquire whether the challenged remedial power is authorized by legislation, and reasonably necessary to accomplish the administrative agency's regulatory purposes. Furthermore, we will closely scrutinize the agency's asserted regulatory purposes in order to ascertain whether the challenged remedial power is merely incidental to a proper, primary regulatory purpose, or whether it is in reality an attempt to transfer determination of traditional common law claims from the courts to a specialized agency whose primary purpose is the processing of such claims. Thus, for example, we would not approve the Board's adjudication of a landlord's common law counterclaims (extraneous to the Board's regulatory functions) against a tenant. Such adjudication would (i) not reasonably effectuate the Board's regulatory purposes--ensuring enforcement of rent levels--and (ii) it would shift the Board's primary purpose from one of ensuring the enforcement of rent levels, to adjudicating a broad range of landlord-tenant disputes traditionally resolved in the courts. Finally, we will continue to apply the 'principle of check' in order to reserve to the courts the 'true' judicial powers." (49 C.3d 374.) And in cases of this kind, in which a private party has a direct pecuniary interest, the independent judgment test may be the appropriate standard. (49 C.3d 375, footnote 36.)

(e) *Application of limiting principles to this case.*

(1) *Permissible determination on excess rents.* The board's determination that plaintiff charged excess rents, though judicial in nature, was incidental to the legitimate primary purpose of regulating rents. (49 C.3d 375.)

(2) *No withholding of rent.* However, the board's order violated the principle of check: (a) The order becomes final when made, and the tenant may then withhold rent; i.e., in a practical sense, it is a self-enforcing final order effective before the landlord has an opportunity to petition for judicial review and obtain a stay. (b) In addition, the order is made an affirmative defense to an unlawful detainer action based on the tenant's nonpayment of rent. (49 C.3d 376.)

(3) *No power to award treble damages.* The Charter authorized an award of treble damages (since deleted by

amendment), and the board, under the substantive limitation test, cannot constitutionally impose these damages. Administrative agencies regularly exercise a range of powers to induce compliance with regulations (e.g., fines or penalties, costs, and attorneys' fees), and there is no reason to believe that these options are insufficient here. "Most significantly, however, we believe that the power to award treble damages in the present contest poses a risk of producing arbitrary, disproportionate results that magnify, beyond acceptable risks, the possibility of arbitrariness inherent in any scheme of administrative adjudication." (49 C.3d 379.)

(4) *No constitutional right to jury trial.* The sister state decisions are in agreement on the proposition that, when a challenged administrative power meets the substantive limitation set forth above, the state constitution's jury trial provision does not preclude administrative adjudication. (49 C.3d 380.) The federal courts hold that the Seventh Amendment guaranty does not attach to the administrative adjudication of "public rights." (49 C.3d 381.) "[W]e conclude that when, as here, a rent control board's adjudication of excess rent meets the substantive-limitations requirement imposed by our judicial powers clause, the Constitution's jury trial provision does not operate to preclude administrative adjudication." (49 C.3d 386.)

Two justices concurred (49 C.3d 386), and one justice dissented in part (49 C.3d 388). (See *Bradshaw v. Park* (1994) 29 C.A.4th 1267, 1275, 34 C.R.2d 872 [power of Director of Industrial Relations, under *Lab.C. 3722(a)*, to adjudicate monetary penalties on employers who fail to secure workers' compensation insurance meets reasonably necessary/legitimate regulatory purpose prong of *McHugh*]; *Miller v. Superior Court* (1996) 50 C.A.4th 1665, 1674, 58 C.R.2d 584 [*Veh.C. 3050*, enumerating list of duties of New Motor Vehicle Board, does not confer plenary power on board to adjudicate every matter between new car dealer and manufacturer]; *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 C.A.4th 585, 597, 60 C.R.2d 583 [assertion of jurisdiction by New Motor Vehicle Board violated Judicial Powers Clause because board had no statutory authority to preside over claims against manufacturer, including common law contract and tort claims seeking compensatory, treble, and punitive damages]; *Santa Teresa Citizen Action Group v. State Energy Resources Conservation & Dev. Com.* (2003) 105 C.A.4th 1441, 1450, 130 C.R.2d 392 [California Supreme Court's summary denial of review of Energy Commission decision did not represent unconstitutional delegation of judicial power to executive agency; plaintiffs' constitutional claims were judicially reviewed on merits, thus satisfying separation of powers doctrine].)

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C. Legislative Power.

1. Legislative Power Is in Legislature.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 147

[§ 147] In General.

(1) The power to make laws is vested in the legislative department. Legislative power cannot be delegated to courts or administrative officers; it must be exercised by the Legislature itself. (*Schaezlein v. Cabaniss* (1902) 135 C. 466, 67 P. 755; *In re McLain* (1923) 190 C. 376, 379, 212 P. 620 [statute empowering commission to fix speed limit on highway or bridge at less than legally established rate was invalid]; see *San Diego County Water Authority v. Metropolitan Water Dist. of Southern Calif.* (2004) 117 C.A.4th 13, 29, 11 C.R.3d 446 [courts cannot nullify law on basis of obsolescence in absence of constitutional objection]; 1 Tribe, §5-1 et seq.)

(2) The courts cannot interfere with the legislative process. (See *Johnston v. Board of Supervisors* (1947) 31 C.2d 66, 70, 187 P.2d 686; *Santa Clara v. Superior Court* (1949) 33 C.2d 552, 559, 203 P.2d 1.) A practical exception has been recognized, however, in court-ordered reapportionment of legislative districts. (See *infra*, §294.)

In *Gilligan v. Morgan* (1973) 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407, plaintiffs, students of Kent State University, brought a class action in the federal district court to enjoin the Governor and leaders of the National Guard from ordering troops to duty in civil disorders and from violating students' constitutional rights. *Held*, no justiciable controversy was presented. U.S. Const., Art. I, §8, vests in Congress the power to organize and govern the Militia (now the National Guard); Congress has enacted appropriate legislation, and has also authorized the President as Commander-in-Chief of the Armed Forces to prescribe regulations for training and discipline. Thus, the relief sought would invade areas of responsibility in both the legislative and executive branches of government, responsible to the electorate. (93 S.Ct. 2446, 37 L.Ed.2d 413.)

(3) Legislative power cannot be given to private persons. (See 67 *Harv. L. Rev.* 1398.) However, in *Brock v. Superior Court* (1937) 9 C.2d 291, 71 P.2d 209, the court upheld an act that contemplated the assent of persons engaged in an industry to related marketing agreements. The court pointed to the analogy of local option statutes, and found no constitutional objection. (9 C.2d 299.) (See *Highland Farms Dairy v. Agnew* (1937) 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 [delegation of power to milk commission to set minimum and maximum prices was not unlawful].) The Legislature may make the effective date of an act contingent on a future event, even though that event is the adoption of a constitutional amendment without which the Legislature would lack power to pass the statute. (*Busch v. Turner* (1945) 26 C.2d 817, 821, 161 P.2d 456.)

(4) Although the legislative power to punish for contempt is usually exercised by legislative committees (see *infra*, §164), the Legislature itself also has the power. (*Groppi v. Leslie* (1972) 404 U.S. 496, 92 S.Ct. 582, 585, 30 L.Ed.2d 632, 636, *infra*, §638.)

West's Key Number Digest, Constitutional Law k.50 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Legislative power must be exercised by Legislature:* See *O'Connell v. Superior Court* (2006) 141 C.A.4th 1452, 1476, 47 C.R.3d 147 [trial court had no power to impose own remedy for educational inequality by issuing statewide preliminary injunction enjoining enforcement of statute requiring students to pass state-mandated high school exit exam as requirement for receiving diploma]; 43 *San Diego L. Rev.* 61 [Congressional Administration].



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III. SEPARATION OF POWERS

C. Legislative Power.

1. Legislative Power Is in Legislature.

b. Court Cannot Compel Legislative Action.

7 *Witkin Sum. Cal. Law Const Law* § 148

[§ 148] Court Cannot Compel Legislative Action.

(1) *In General.* In *City Council v. Superior Court* (1960) 179 C.A.2d 389, 3 C.R. 796, petitioner city, in 1956, entered into a 10-year garbage removal contract with P's predecessor, which provided for adjustment of rates only by ordinance of the city council and amendment of the contract. P applied for rate increases, which the council refused. P then sought mandamus in the superior court to compel the city council to grant the higher rate, and the lower court issued an alternative writ. On petition for prohibition by the city council, *held*, writ granted.

(a) The contract called for quasi-legislative action to adjust rates; the mere ascertainment of facts as a basis did not render the process judicial. (179 C.A.2d 393.) While quasi-legislative action may sometimes be undone for fraud or arbitrariness, the court cannot compel affirmative legislative action. "The commanding of specific legislative action is beyond the power of the courts for it would violate the principle of division of powers of the three governmental departments." (179 C.A.2d 395.) This principle applies equally to legislative action by the state and municipalities. "The enactment of an ordinance or performance of any other legislative or quasi legislative function is but the exercise, through delegation, of a part of the legislative power of the state. It cannot be controlled by the courts." (179 C.A.2d 396.)

(b) The court noted that the lower court was attempting to compel amendment of a contract. The contract provision was a limitation on the council's power, and required a showing that an increase was essential to continued operation and reasonable return; it was not a grant to a contractor of an affirmative right to an increase on making the showing. A court may not compel a city to agree to amend a binding contract with a contractor, any more than the contractor can be subjected to a change by the city. (179 C.A.2d 401.) (See *Contra Costa v. California* (1986) 177 C.A.3d 62, 77, 222 C.R. 750 [requirement of exhaustion of remedies is based in part on separation of powers doctrine, and judicial action before legislative process is completed is in excess of jurisdiction].)

(2) *Appropriation of Funds.* The separation of powers doctrine prevents a court from directly ordering the Legislature to enact a specific appropriation. (See *Sacramento v. California State Legislature* (1986) 187 C.A.3d 393, 396, 231 C.R. 686.) However, "that doctrine does not preclude the judiciary from ordering that funds which have been appropriated should be paid without regard to an invalid legislative restriction." (*Committee To Defend Reproductive Rights v. Cory* (1982) 132 C.A.3d 852, 856, 183 C.R. 475, citing *Mandel v. Myers* (1981) 29 C.3d 531, 174 C.R. 841,

629 P.2d 935, *supra*, §141.)

In *Sacramento v. California State Legislature*, *supra*, the action was brought by plaintiff city to obtain reimbursement, pursuant to Cal. Const., Art. XIII B, §6, of costs expended in compliance with a state mandated unemployment insurance program. Plaintiff argued that the fundamental rule against ordering enactment of an appropriation should be subject to an exception where the Legislature's duty is ministerial. *Held*, no such exception can be created:

"The City suggests that the need for departing from precedent is great because otherwise the will of the electorate embodied in article XIII B, section 6, will be frustrated. The difficulty with the City's argument is that it applies in every instance in which a claim of this nature is tendered. Such a claim always rests on some mandatory constitutional provision; how else could we be called upon to check the Legislature? But this has never sufficed to breach the rule. If the electorate is willing it may directly enact an appropriation. In the absence of such an explicit expression of the People's will we will not indulge the presumption that we can discern it more faithfully and accurately than the political branches." (187 C.A.3d 397.)

(3) *Sanctions Against Individual Legislators*. *Spallone v. United States* (1990) 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644, involved the "most recent episode of a lengthy lawsuit in which the city of Yonkers was held liable for intentionally enhancing racial segregation in housing in Yonkers. The issue here is whether it was a proper exercise of judicial power for the District Court to hold petitioners, four Yonkers city council members, in contempt for refusing to vote in favor of legislation implementing a consent decree earlier approved by the city." (110 S.Ct. 628, 107 L.Ed.2d 650.)

The Court held that sanctions were properly imposed on the city; but it was an abuse of discretion to impose sanctions on the council members, who were not parties to the underlying action. (110 S.Ct. 633, 634, 107 L.Ed.2d 657, 658.) "The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests. ... Such fines thus encourage legislators, in effect, to declare that they favor an ordinance not in order to avoid bankrupting the city for which they legislate, but in order to avoid bankrupting themselves." (110 S.Ct. 634, 107 L.Ed.2d 658.) (See *Steiner v. Superior Court* (1996) 50 C.A.4th 1771, 1790, 58 C.R.2d 668 [Govt.C. 3060, providing for accusation against county officer for wilful or corrupt misconduct in office, violates separation of powers doctrine insofar as it is used to accuse county supervisors for acts or omissions committed as part of their legislative functions and that violate no penal statute]; 104 Harv. L. Rev. 296 [federal court's power to compel state legislative action; discussing *Spallone*].)

(4) *Exception: Material Impairment of Required Functions*. In *Scott v. Common Council* (1996) 44 C.A.4th 684, 52 C.R.2d 161, the trial court ordered defendant city council to reinstate and fund city attorney investigator positions, which had been eliminated in the annual budget, on the ground that the budget cuts prevented the city attorney from performing the duties prescribed in the city charter. *Held*, affirmed.

(a) The general rule that courts may not interfere with the legislative process must yield to the exception that interference is authorized when a legislative enactment violates some provision of the constitution, statute, or municipal charter. (44 C.A.4th 693, 694, citing *Hicks v. Board of Supervisors* (1977) 69 C.A.3d 228, 138 C.R. 101, 4 Cal. Crim. Law (3d), *Introduction to Criminal Procedure*, §18.)

(b) "In the present economic climate, state, county and local governments are facing an unprecedented restriction of funds and they are constantly required to allocate scarce funds among competing government needs. The budget process is obviously an allocation process, and it is obviously a legislative process. However, in making allocation decisions, the legislative body cannot act in excess of its authority by first eliminating mandatory government functions, such as the investigative function of the city attorney in this case." (44 C.A.4th 697.)

(c) Here, there is substantial evidence to support the trial court's determination that the actions taken by the council

eliminated the city attorney's ability to carry out the duties prescribed by the city charter. (44 C.A.4th 698.) (See *Board of Supervisors v. Superior Court* (1995) 33 C.A.4th 1724, 1740, 39 C.R.2d 906 [county board of supervisors could not be held in contempt of consent decree placing cap on detention center population because contempt order would invade board's discretion in allocating public funds, and there was no substantial evidence that board wilfully failed to appropriate resources to allow sheriff to comply]; *California Teachers Assn. v. Ingwerson* (1996) 46 C.A.4th 860, 867, 876, 53 C.R.2d 917 [court erred in requiring county to develop budget that did not reduce or freeze teachers' salaries, where school district faced severe economic problems, and officials did not act in unreasonable and arbitrary manner].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Appropriation of Funds.* See *San Diego v. California* (2008) 164 C.A.4th 580, 594, 79 C.R.3d 489 [trial court erred in issuing writ ordering Legislature to appropriate funds in future state budgets to satisfy reimbursement obligations to counties and to pay those funds to counties].



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III. SEPARATION OF POWERS

C. Legislative Power.

1. Legislative Power Is in Legislature.

c. Court Cannot Inquire Into Legislative Motivation.

7 *Witkin Sum. Cal. Law Const Law* § 149

[§ 149] Court Cannot Inquire Into Legislative Motivation.

In *Los Angeles v. Superior Court (Burroughs)* (1975) 13 C.3d 721, 119 C.R. 631, 532 P.2d 495, Los Angeles County adopted an ordinance establishing salaries and wages for a majority of county employees. B filed a taxpayer's suit seeking a declaration of invalidity and an injunction restraining implementation, alleging that the Board of Supervisors enacted the ordinance under the duress and coercion of a threatened illegal strike. Then, pending the hearing on the preliminary injunction, B sought, on deposition, to question members of the board about discussions that took place during the executive sessions preceding negotiations with the employees' representatives. The deponents refused to answer, the trial judge ordered them to answer, and they sought prohibition. *Held*, writ granted.

(a) *Evidence Code privilege is not significant.* The parties in the lower court were concerned with *Ev.C. 1040*, the official information privilege, and *Govt.C. 54957.6*, authorizing executive sessions during labor negotiations. B argued that the conditional privilege was subject to the discretionary exception made by the trial judge in this case. This issue as to the proper application of *Ev.C. 1040* need not be resolved. (13 C.3d 725, 726.)

(b) *Principle prohibiting judicial inquiry into subjective motives or mental processes of legislators is fundamental.* This principle, long established, is supported by many decisions. "The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." (13 C.3d 726.) The principle applies to local legislators as well as to members of state *Legislatures or Congress*. (13 C.3d 726.) And it is, on one level, a corollary of the related principle that the validity of a legislative act does not depend on the subjective motivation of its draftsmen but on the objective effect of the legislative terms. (13 C.3d 727.)

(c) *Distinction where agreement alone is involved.* *Grasko v. Los Angeles City Bd. of Education* (1973) 31 C.A.3d 290, 297, 107 C.R. 334, invalidated an employment agreement on the ground that it resulted from an illegal teachers' strike. "[W]e entertain grave doubts" whether the holding is correct; and *East Bay Mun. Employees Union v. Alameda* (1970) 3 C.A.3d 578, 584, 83 C.R. 503, reached a contrary conclusion. (13 C.3d 728.)

(d) *Proof where ulterior motive is relevant.* Even where an ulterior purpose is relevant to the validity of the ordinance, the taxpayer must establish it by objective proof, not by inquiry into motivation. (13 C.3d 729.) Thus, in

Stahm v. Klein (1960) 179 C.A.2d 512, 4 C.R. 137, a civil service employee was allowed to challenge the validity of a municipal ordinance abolishing his position on the ground that it had been adopted in bad faith. This is one of the rare circumstances in which ulterior purpose is relevant to validity; i.e., legislative subterfuge cannot be used to strip an employee of his or her position. But the *Stahm* court made it clear that legislators could not be questioned and evidence or oral conversations could not be introduced. (13 C.3d 729, 730.)

(e) *Conclusion*. "It is simply unthinkable ... that members of legislative majorities should from time to time be subject to cross-examination in various courts over the country regarding their state of mind when they voted. That is no more representative government than it would be judicial process for judges to be subject to cross-examination by legislative committees about their state of mind in deciding cases. It seems almost anticlimactic to add that legislatures whose members were subject to call for testimony in this fashion would be hard put to find the time to legislate." (13 C.3d 731, quoting Professor Bickel.) (See *San Francisco v. Cooper* (1975) 13 C.3d 898, 913, 120 C.R. 707, 534 P.2d 403; *Santa Cruz v. Superior Court* (1995) 40 C.A.4th 1146, 1152, 1155, 48 C.R.2d 216 [although city planning director and commissioners were not legislators, inquiry into whether they had secret agreement with city council to refuse to consider certain zoning issues violated rule against inquiring into legislative motivation]; 15 *San Diego L. Rev.* 925 et seq. [symposium on legislative motivation]; 27 *Stanf. L. Rev.* 585 [conscientious legislator's duty to consider his or her motivation in assessing constitutionality of proposed legislation].)

In *Board of Supervisors v. Superior Court* (1995) 32 C.A.4th 1616, 38 C.R.2d 876, an action challenging a board of supervisors' decision to consolidate court-related services in the county sheriff rather than the marshal's office, plaintiff judge's association sought discovery of extrinsic evidence on whether the supervisors, as required by statute, took into advisement the judges' recommendation. *Held*, this discovery would constitute an improper inquiry into the legislators' motives or mental processes. (32 C.A.4th 1623, 1626.)

SUPPLEMENT: [This section is current through the latest supplement]

See *King City v. Community Bank of Cen. Calif.* (2005) 131 C.A.4th 913, 944, 32 C.R.3d 384 [rule that court may not inquire into subjective mental processes of legislators is restricted to cases where validity of statute or ordinance is being challenged, and does not prevent consultation of extrinsic evidence to construe enactment; hence, trial court erred in using rule to deny discovery relating to city council's approval of loan to redevelopment agency]; *Nadler v. Schwarzenegger* (2006) 137 C.A.4th 1327, 1336, 41 C.R.3d 92, Supp., infra, §301 [regardless of whether Assembly partially waived legislative privilege regarding consultant's declaration explaining considerations involved in redistricting, trial court did not err in denying motion to compel his deposition; court may not inquire into subjective motivations of legislative members]; *Sutter's Place v. Superior Court* (2008) 161 C.A.4th 1370, 1380, 75 C.R.3d 9 [Proposition 59, adopting Cal. Const., Art. I, §3(b), and establishing constitutional right of access concerning conduct of public business, did not eliminate mental processes rule].



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1. Legislative Power Is in Legislature.

d. Speech or Debate Clause.

1. Nature of Immunity.

7 *Witkin Sum. Cal. Law Const Law* § 150

[§ 150] Nature of Immunity.

(1) *In General.* U.S. Const., Art. I, §6, states that senators and representatives "shall not be questioned in any other place" for "any Speech or Debate in either House." (See 1 Rotunda, §8.6 et seq.; 28 *U.C.L.A. L. Rev.* 217 [discussing whether clause provides immunity for congressional hiring practices].) There is no comparable evidentiary privilege for *state legislators* in federal criminal prosecutions. (*United States v. Gillock* (1980) 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454.)

The constitutional provision received its first definitive construction in *United States v. Johnson* (1966) 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681. Johnson, a former Congressman, was found guilty of violating the federal conflict of interest statute and of conspiring to defraud the United States (18 U.S.C., §371). An important element in the case was proof of the allegation that he had agreed, for pay, to make a speech on the House floor favorable to independent savings and loan associations, which his client, a Maryland association, could circulate to allay apprehensions of potential depositors. *Held*, the Clause was a defense. The privilege was intended to preserve the independence of the legislative branch by preventing intimidation by the executive and accountability before a possibly hostile judiciary; and a criminal prosecution dependent on inquiries into the preparation and motives of a congressman's speech necessarily contravenes the constitutional provision. (86 S.Ct. 757, 15 L.Ed.2d 688.) The Court did not decide the validity of a prosecution founded on a narrowly drawn statute enacted in the exercise of congressional power to regulate the conduct of its members. (86 S.Ct. 758, 15 L.Ed.2d 690.)

(2) *Private Civil Actions.* In *Eastland v. United States Servicemen's Fund* (1975) 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324, Congress authorized the Senate Subcommittee on Internal Security to study the operation of the Internal Security Act of 1950. The committee began an inquiry into activities of respondent organization, and issued a subpoena duces tecum for its bank records. The organization and two members sued the chairman, members, and counsel of the subcommittee to enjoin implementation of the subpoena duces tecum as violative of First Amendment rights. *Held*, no injunction could be granted; the actions attacked were within the "legitimate legislative sphere" and therefore protected by the Speech and Debate Clause.

"The applicability of the Clause to private civil actions is supported by the absoluteness of the terms 'shall not be

questioned,' and the sweep of the terms 'in any other Place.' In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' ... Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled." (95 S.Ct. 1821, 44 L.Ed.2d 336.) (See 95 S.Ct. 1825, 44 L.Ed.2d 341, where the court notes that the legislative inquiry was frustrated for nearly 5 years by this improper action.) (See 89 Harv. L. Rev. 131; 4 Hastings Const. L. Q. 35; 24 U.C.L.A. L. Rev. 546; 25 U.C.L.A. L. Rev. 796.)

(3) *Waiver*. In *United States v. Helstoski* (1979) 442 U.S. 477, 99 S.Ct. 2432, 61 L.Ed.2d 12, defendant, a former Congressman, voluntarily appeared before federal grand juries investigating political corruption, and repeatedly asserted that he would not request immunity and would not claim the privilege against self-incrimination. *Held*, the Speech and Debate Clause provides a separate and distinct protection calling for a clear and unambiguous expression of waiver, not shown here. (99 S.Ct. 2441, 61 L.Ed.2d 26.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 1 Rotunda 4th, §8.6 et seq.; 24 A.L.R.6th 255 [Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions].



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1. Legislative Power Is in Legislature.
 - d. Speech or Debate Clause.
2. No Immunity for Nonlegislative Activities.

7 Witkin Sum. Cal. Law Const Law § 151

[§ 151] No Immunity for Nonlegislative Activities.

(1) *In General.* In *Powell v. McCormack* (1969) 395 U.S. 486, 89 S.Ct. 1944, 1956, 23 L.Ed.2d 491, 506, *infra*, §152, the Court held that nonlegislative activities of employees of a congressman are subject to judicial review; i.e., the purposes of the Speech or Debate Clause are fully achieved if legislators are relieved of the burden of defending themselves. (See *Gravel v. United States* (1972) 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583, 2 Cal. Evidence (4th), Witnesses, §304 [same, grand jury investigation]; *United States v. Brewster* (1972) 408 U.S. 501, 92 S.Ct. 2531, 2537, 33 L.Ed.2d 507, 517 [Clause does not bar prosecution where government "does not rely on legislative acts or the motivation for legislative acts"]; *Doe v. McMillan* (1973) 412 U.S. 306, 93 S.Ct. 2018, 2030, 36 L.Ed.2d 912, 927 [House committee and its employees are immune from private suit for preparing and voting to publish congressional report; but public distribution by Public Printer and Superintendent of Documents is protected by immunity only if legitimate legislative purpose is served]; 1 Rotunda, §§8.7, 8.8; 86 Harv. L. Rev. 189 [Gravel]; 86 Harv. L. Rev. 1113 [Gravel and Brewster]; 87 Harv. L. Rev. 221 [McMillan].)

(2) *Public News Release.* In *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411, plaintiff, a research scientist, received substantial federal grants for studies seeking an objective measure of aggression. His work was concentrated on the behavior patterns of certain animals when exposed to aggravating stressful stimuli. NASA and the Navy were interested in the potential of this research for resolving problems of humans confined in close quarters for extended periods. Defendant, a U.S. Senator, initiated the "Golden Fleece of the Month Award," to publicize what he perceived to be the most egregious examples of wasteful governmental spending. He made an award to NASA and other government agencies funding plaintiff's research, and gave a speech printed in the Congressional Record describing plaintiff's work as "nonsense," and asserting that, in view of "the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer." Defendant then gave wide publicity to the award and speech in press releases and a newsletter, and his legislative assistant discussed the subject with the agencies that had sponsored the research. Plaintiff sued the Senator and his assistant for defamation, interference with contractual relationships, and invasion of privacy. *Held*, summary judgment for defendants reversed.

(a) The Speech and Debate Clause has been given a practical interpretation, going beyond the chamber to protect

committee hearings and reports (*Doe v. McMillan*, *Gravel v. United States*, *supra*), but the objective of protecting only legislative activities remains. (99 S.Ct. 2683, 61 L.Ed.2d 426.) Thus, a member may be held liable for republishing defamatory statements originally made in either *House*. (99 S.Ct. 2684, 2685, 61 L.Ed.2d 426, 427, citing *Gravel* and *Doe*.)

(b) Valuable and desirable as it may be to transmit information to the public, the press releases and newsletters were not part of the deliberative process. Unlike committee reports, which are the collective expressions of opinions within the legislative process, the releases were primarily means of informing those outside the legislative forum, and represented the views of a single member. (99 S.Ct. 2686, 2687, 61 L.Ed.2d 429, 430.) (See 93 *Harv. L. Rev.* 161; 7 *Hastings Const. L. Q.* 325.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 1 Rotunda 4th, §§8.7, 8.8.



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III. SEPARATION OF POWERS

C. Legislative Power.

1. Legislative Power Is in Legislature.

e. Qualifications of Members of Legislature.

7 *Witkin Sum. Cal. Law Const Law* § 152

[§ 152] Qualifications of Members of Legislature.

(1) *In General.* Generally speaking, the Legislature has exclusive constitutional jurisdiction to determine qualifications of its members. (See Cal. Const., Art. IV, §5 ["Each house shall judge the qualifications and elections of its members"]; U.S. Const., Art. I, §5 [similar]; *In re McGee* (1951) 36 C.2d 592, 594, 597, 226 P.2d 1 [Legislature's jurisdiction extends to primary elections and cannot be delegated to courts]; *California War Veterans for Justice v. Hayden* (1986) 176 C.A.3d 982, 986, 987, 222 C.R. 512; 2 Rotunda, §9.1 et seq.; on validity of term limit laws, see *infra*, §§268, 269.)

Minimum qualifications for members of the House of Representatives and the Senate are 25 years of age for the House and 30 years of age for the Senate, 7 years for the House as a U.S. citizen and 9 years for the Senate, and an inhabitant of the state from which the member is elected. (U.S. Const., Art. I, §§2, 3.)

(2) *Limitations on Power To Determine Qualifications.* The power to determine qualifications of its members is not unlimited:

(a) Conditions violative of First Amendment protections are invalid. (See *Bond v. Floyd* (1966) 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235, *infra*, §484.)

(b) Qualifications beyond those specified in the Constitution may not be imposed. Thus, in *Powell v. McCormack* (1969) 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491, petitioner Adam Clayton Powell, Jr., was elected to Congress from New York. A House Committee, after several hearings, found that he had the qualifications of U.S. Const., Art. I, §2, on age, citizenship, and residency, but that he had been guilty of misconduct. This included asserting an unwarranted immunity from process of the New York Courts, wrongful diversion of House funds for others and himself, and false reports on expenditures of foreign currency to the Committee on House Administration. The Committee voted for censure, fine, and deprivation of seniority. The House, 307 to 116, voted to exclude him and declare his seat vacant. Powell and voters of his district brought an action in the federal district court for a declaratory judgment. *Held*, he was entitled to the relief. U.S. Const., Art. I, §5, grants authority to expel a member by a two-thirds vote. But Powell was not seated or expelled; he was excluded; and this denial of membership was beyond the powers of the House. (89 S.Ct. 1979, 23 L.Ed.2d 508.) (See 81 Harv. L. Rev. 673 [discussion of problem prior to decision]; 17 U.C.L.A. L. Rev. 1

[symposium on *Powell*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 2 Rotunda 4th, §9.1 et seq.



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C. Legislative Power.

2. Initiative and Referendum.

a. In General.

1. Constitutional Authorization.

7 Witkin Sum. Cal. Law Const Law § 153

[§ 153] Constitutional Authorization.

The initiative and referendum are obvious exceptions to the general rule that legislative powers are vested solely in the Legislature. Cal. Const., Art. II, §8, provides for submission, on petitions signed by a specified percentage of voters, of statewide initiative measures proposing statutes or constitutional amendments. Cal. Const., Art. II, §9, provides similarly for submission of statewide referendum measures to approve or reject statutes or parts of statutes. If approved by a majority of the voters, an initiative or referendum measure "takes effect the day after the election unless the measure provides otherwise." (Cal. Const., Art. II, §10(a) [initiative statute or referendum]; Art. XVIII, §4 [constitutional amendment].) (See *Lawing v. Faull* (1964) 227 C.A.2d 23, 26, 38 C.R. 417 [former constitutional provision, now Cal. Const., Art. II, §8(b), limiting percentage of voters required, was not applicable to chartered city]; 54 Cal. L. Rev. 1717; 5 Cal. Western L. Rev. 148; 70 Harv. L. Rev. 1077 [proposals for nullification of election for fraud on electorate]; 17 Hastings L. J. 805; 42 Am.Jur.2d (2000 ed), *Initiative and Referendum* §1 et seq.; on preelection challenge to ballot measure, see supra, §§102, 103; on zoning by initiative, see infra, §155; on zoning subject to referendum, see infra, §156.)

Cal. Const., Art. IV, §10(a) restricts the Governor's veto power to bills passed by the Legislature. Cal. Const., Art. II, §13 et seq. govern recall petitions. (See 92 Cal. L. Rev. 927 [constitutional lessons learned from California recall experience]; 114 A.L.R.5th 1 [Sufficiency of Particular Charges as Affecting Enforceability of Recall Petition]; 116 A.L.R.5th 1 [Sufficiency of Technical and Procedural Aspects of Recall Petitions].)

SUPPLEMENT: [This section is current through the latest supplement]
See 93 Cal. L. Rev. 1191 [Reforming Direct Democracy: Lessons From Oregon].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

III. SEPARATION OF POWERS

C. Legislative Power.

2. Initiative and Referendum.

a. In General.

2. Statutory Procedure.

7 *Witkin Sum. Cal. Law Const Law* § 154

[§ 154] Statutory Procedure.

(1) *In General.* *Elec.C.* 9000 et seq. regulate the preparation, circulation, and submission to the voters of initiative and referendum measures, both on statewide and local levels. (See *Midway Orchards v. Butte* (1990) 220 C.A.3d 765, 778, 779, 269 C.R. 796 [statutory procedures for referenda on ordinances applied to referenda on resolutions]; *People v. Scott* (2002) 98 C.A.4th 514, 519, 119 C.R.2d 797 [fact that text of proposed initiative measure attached to circulated petitions differed from text in state ballot pamphlet was not fatal to validity of initiative; variations in text were not substantial, mostly correcting clerical and grammatical errors or conforming prior version to statutory amendments]; *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 C.A.4th 123, 131, 133 C.R.2d 249 [city clerk had no authority to reject initiative petition for noncompliance with *Elec.C.* 9201, 9207, based on extrinsic evidence; city clerk had ministerial duty to accept petition that, on its face, complied with Elections Code]; 112 *Harv. L. Rev.* 434 [A Populist Critique of Direct Democracy]; 21 *Pacific L. J.* 119 [historical review and argument against limiting use of local initiatives and referenda]; 45 *U.C.L.A. L. Rev.* 1717 ["Protecting the People from Themselves," or How Direct Can Democracy Be?]; 45 *U.C.L.A. L. Rev.* 1735 [Practicing Theory: The Forgotten Law of Initiative Lawmaking]; on effect of Political Reform Act of 1974, see *infra*, §271 et seq.; on penal provisions relating to initiative and referendum (*Elec.C.* 18600 et seq.), see 2 *Cal. Crim. Law* (3d), *Crimes Against Governmental Authority* §§143, 144.)

(2) *Verification of Signatures.* The clerk must verify the validity of signatures on a petition. (See *Wheelright v. Marin* (1970) 2 C.3d 448, 454, 85 C.R. 809, 467 P.2d 537 [referendum: duties of clerk in examining signatures]; *Gayle v. Hamm* (1972) 25 C.A.3d 250, 255, 101 C.R. 628 [initiative: same]; *Malick v. Athenour* (1995) 37 C.A.4th 1120, 1126, 1127, 44 C.R.2d 281 [purpose of *Elec.C.* 105 and 9020, requiring signers of referendum to include printed name, is to assist in verification that signer is registered voter; clerk's automatic disqualification of persons who did not print each letter of name separately was arbitrary where other procedures were available to verify validity of signatures]; *Mapstead v. Anchondo* (1998) 63 C.A.4th 246, 258, 73 C.R.2d 602 [validity of signatures on petition].)

(3) *Inclusion of Text of Resolution.* In *Creighton v. Reviczky* (1985) 171 C.A.3d 1225, 217 C.R. 834, a city clerk refused to accept a municipal referendum petition for filing because of noncompliance with former *Elec.C.* 4052 (now *Elec.C.* 9238), which requires that each section of the petition contain the text of the ordinance or the portion of it that is the subject of the referendum. Plaintiff sought mandamus, which was denied. *Held*, affirmed. The purpose of the statute

is to reduce confusion as to the contents of petitions, and the noncomplying petition failed to provide electors with the information needed to exercise their rights intelligently. (171 C.A.3d 1232, 1233.) (See *Billig v. Voges* (1990) 223 C.A.3d 962, 966, 273 C.R. 91 [petition that did not include full text of ordinance at issue was properly rejected; following *Creighton*]; *Nelson v. Carlson* (1993) 17 C.A.4th 732, 740, 21 C.R.2d 485 [no exception for bulky ordinances or resolutions]; *Mervyn's v. Reyes* (1998) 69 C.A.4th 93, 104, 81 C.R.2d 148 [following *Creighton* and *Billig*].)

(4) *Accurate Title Is Required.* The petition must include a descriptive title that will not mislead the voters. (See *Hayward Area Planning Assn. v. Superior Court* (1990) 218 C.A.3d 53, 58, 59, 266 C.R. 745 [failure to include title required by former Elec.C. 4052 (now Elec.C. 9238) did not invalidate petition, where heading of petition contained same information that would have been provided by title; doctrine of substantial compliance applied]; *Lungren v. Superior Court* (1996) 48 C.A.4th 435, 437, 441, 55 C.R.2d 690 [Attorney General complied with Elec.C. 9051 and 9052 by devising title to Proposition 209 that essentially recited its operative words verbatim; he was not required to include language stating that purpose was to prohibit affirmative action programs]; *Hebard v. Bybee* (1998) 65 C.A.4th 1331, 1342, 1343, 77 C.R.2d 352 [inaccurate title of ordinance in referendum petition was not cured by inclusion of complete text of ordinance and map elsewhere in petition; evidence of actual voter confusion was not necessary to determination that misstated title failed to satisfy reasonable objectives of statute]; *Zaremborg v. Superior Court* (2004) 115 C.A.4th 111, 118, 8 C.R.3d 723 [title and summary of referendum petition, though technically imprecise, was not fatally defective; summary stated major objectives of measure].)

(5) *Miscellaneous Statutes.* The failure to follow statutory procedure has been the basis for challenging a variety of ballot measures. (See *Horwath v. East Palo Alto* (1989) 212 C.A.3d 766, 775, 779, 261 C.R. 108 [city attorney's failure to prepare impartial analysis of initiative measure, as required by former Elec.C. 5011 (now Elec.C. 9280), did not invalidate ordinance, because deficient analysis did not affect outcome of election]; *Ibarra v. Carson* (1989) 214 C.A.3d 90, 95, 99, 262 C.R. 485 [under former Elec.C. 4003, 4005 (now Elec.C. 9205, 9207), proponents of municipal initiative measure must *publish* and *post* petition before circulating it for signatures; substantial compliance with posting requirement does not excuse premature circulation]; *San Francisco Forty-Niners v. Nishioka* (1999) 75 C.A.4th 637, 645, 646, 89 C.R.2d 388 [petition containing deliberate falsehoods concerning "purport" of initiative was unlawful under Elec.C. 18600, and writ of mandamus was properly issued to stop its circulation]; *Holmes v. Jones* (2000) 83 C.A.4th 882, 890, 100 C.R.2d 138 [Legislature did not intend that fiscal estimate or opinion required by Elec.C. 9005 be used in calculating 100-word limit of Elec.C. 9002]; *People v. Orange* (2003) 106 C.A.4th 914, 934, 131 C.R.2d 274 [following *Horwath*; successful challenge after election to county counsel's impartial analysis in ballot materials requires showing that analysis profoundly misled electorate, not just that it did not educate electorate on all legal nuances of measure]; *Native American Sacred Site & Environmental Protection Assn. (NASSEPA) v. San Juan Capistrano* (2004) 120 C.A.4th 961, 966, 16 C.R.3d 146 [under Elec.C. 9214, city's duty to either adopt voter-sponsored initiative or place it on ballot is ministerial and mandatory; city's failure to adopt initiative within statutory time period does not annul its duty in absence of compelling showing that case has been made for interfering with initiative power].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Costa v. Superior Court* (2006) 37 C.4th 986, 1007, 1022, 1028, 39 C.R.3d 470, 128 P.3d 675 [where version of initiative measure submitted to Attorney General for preparation of title and summary differed from version circulated to public for signatures, preelection judicial review was appropriate, but disparities between two versions were not sufficient to justify withholding measure from ballot; discrepancies were inadvertent and did not mislead public or undermine applicable statutes]. (2) *Verification of Signatures.* See *Friends of Bay Meadows v. San Mateo* (2007) 157 C.A.4th 1175, 1189, 68 C.R.3d 916 [election officials properly invalidated signatures where second person wrote signer's name and address without signing as having witnessed signature, as required by Elec.C. 100.5; circulator is not qualified to witness signature and circulator's verification of each section of petition did not satisfy statute].

(3) *Inclusion of Text of Resolution.* See *We Care--Santa Paula v. Herrera* (2006) 139 C.A.4th 387, 390, 42 C.R.3d 577 [petition to amend general plan by requiring that increase in density for large projects be approved by voters did not

need to include copy of land use portion of general plan; inclusion of full text of measure was sufficient because it did not change existing provisions of general plan]; *Defend Bayview Hunters Point Committee v. San Francisco* (2008) 167 C.A.4th 846, 858, 84 C.R.3d 486 [referendum petition on ordinance adopting redevelopment plan that failed to include copy of incorporated plan did not satisfy text requirement of Elec.C. 9238; omission of plan frustrated purpose of statutory requirement, which is to make sure prospective signers have adequate information on substance of proposed ordinance to make informed decision about whether to sign petition].(5) *Miscellaneous Statutes*. See *MHC Financing Ltd. Partnership Two v. Santee* (2005) 125 C.A.4th 1372, 1381, 23 C.R.3d 622 [city council that mistakenly adopted ordinance proposed by invalid initiative petition properly cured defects in enactment by adopting unaltered second version of petition initiative, as required by Elec.C. 9215, making it retroactive to date of first ordinance]; *Preserve Shorecliff Homeowners v. San Clemente* (2008) 158 C.A.4th 1427, 1430, 1448, 71 C.R.3d 332 [although circulators violated requirement in Elec.C. 9209 and 9238(c), that circulators be voters or be qualified to register as voters in city where they circulate petitions, trial court did not err in failing to invalidate petitions and in allowing referendum to go forward; that requirement is unconstitutional]; *Widders v. Furchtenicht* (2008) 167 C.A.4th 769, 776, 84 C.R.3d 428 [15-day time period in Elec.C. 9203 for city attorney to prepare ballot title and summary for initiative measure is not intended as statute of limitations on city attorney's right to seek judicial relief from duty to comply with statute].

On specific requirements for recall elections, see Elec.C. 11000 et seq.; *Capo for Better Representation v. Kelley* (2008) 158 C.A.4th 1455, 1464, 71 C.R.3d 354.



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CHAPTER X - Constitutional Law

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III. SEPARATION OF POWERS

C. Legislative Power.

2. Initiative and Referendum.

a. In General.

3. Initiative.

7 *Witkin Sum. Cal. Law Const Law* § 155

[§ 155] Initiative.

(1) *In General.* The constitutional provision for initiative and referendum is based on "the theory that all power of government ultimately resides in the people," and the Constitution thus recognizes a power reserved by the people, not a right granted to them; hence, the power is liberally construed in favor of its use. (*Associated Home Builders v. Livermore* (1976) 18 C.3d 582, 591, 135 C.R. 41, 557 P.2d 473, *infra*, §1031; *Referendum Committee v. Hermosa Beach* (1986) 184 C.A.3d 152, 161, 229 C.R. 51; see *State Comp. Ins. Fund v. State Bd. of Equalization* (1993) 14 C.A.4th 1295, 1301, 18 C.R.2d 526 [liberal construction]; 11 *Hastings Const. L. Q.* 43 [criticism of use of initiative to amend constitution]; 23 *Hastings Const. L. Q.* 1057 [modern state initiatives; voter confirmation and absence of deliberation and opportunity to compromise]; 29 *Hastings Const. L. Q.* 185 [Direct Democracy and Civic Maturation]; 40 *Hastings L. J.* 1031 [interpreting purposes of initiatives]; 31 *Loyola L.A. L. Rev.* 261 [distinguishing constitutional amendment from revision in California's initiative process]; 31 *Loyola L.A. L. Rev.* 1161 [symposium on California's initiative process]; 41 *Santa Clara L. Rev.* 937 [symposium on initiative process]; 71 *So. Cal. L. Rev.* 871 [interpretation of initiatives in California]; 54 *Stanf. L. Rev.* 569 [congressional reform of state initiative lawmaking to guarantee republican form of government]; 27 *U.C.L.A. L. Rev.* 433 [criticism of abuses of initiative].)

(2) *Scope of Power.* Like statutes, initiatives are subject to state and federal constitutional limitations. Hence, the subject of the initiative must be within the power of the electorate to enact. (*Legislature v. Deukmejian* (1983) 34 C.3d 658, 674, 194 C.R. 781, 669 P.2d 17, *supra*, §103; *American Federation of Labor-Congress of Industrial Organizations v. Eu* (1984) 36 C.3d 687, 706, 708, 206 C.R. 89, 686 P.2d 609, *supra*, §103; see *Bagley v. Manhattan Beach* (1976) 18 C.3d 22, 26, 132 C.R. 668, 553 P.2d 1140, *infra*, §166 [initiative power cannot be exercised to adopt ordinance that would be beyond power of legislative body of city to enact]; *DeVita v. Napa* (1995) 9 C.4th 763, 772, 38 C.R.2d 699, 889 P.2d 1019, *infra*, §1017 [county general plan can be amended by initiative]; *Citizens for Jobs and the Economy v. Orange* (2002) 94 C.A.4th 1311, 1327, 115 C.R.2d 90 [distinguishing *DeVita*; initiative that required voter ratification of any county act to approve civilian airport project improperly restricted "power of future legislative bodies to carry out their duties, as prescribed to them by their own inherent police power"]; *Pettye v. San Francisco* (2004) 118 C.A.4th 233, 244, 12 C.R.3d 798 [trial court erred in holding that statute delegated exclusive authority to set general assistance standards to board of supervisors; local initiative power is not incompatible with state's interest in ensuring adequate

general assistance benefits, as long as standards of aid and care meet statutory levels and further state objectives]; 74 Cal. L. Rev. 491 [using initiative power to control legislative procedure]; 51 So. Cal. L. Rev. 847 [constitutionality of budgeting by statewide statutory initiative].)

In *Farley v. Healey* (1967) 67 C.2d 325, 62 C.R. 26, 431 P.2d 650, petitioners obtained sufficient signatures of San Francisco voters to place an initiative measure on the ballot urging an immediate ceasefire and American withdrawal from Vietnam. On advice of the city attorney, defendant registrar of voters refused to qualify the measure. *Held*, mandamus granted. The power of initiative is broadly given by the charter, and the people may use it for this declaration of policy. (67 C.2d 328.) An elaborate dissent argues that the local initiative, regardless of charter language, is confined to municipal affairs, that this issue is exclusively one of federal power, and that the use of the election machinery at great public expense for the vote was improper and could lead to great abuses in similar situations. (See *Gayle v. Hamm* (1972) 25 C.A.3d 250, 255, 101 C.R. 628 [mandamus to compel certification of proposed ordinance barring airports within boundaries of incorporated city unless submitted to and approved by voters]; *Bayless v. Limber* (1972) 26 C.A.3d 463, 469, 102 C.R. 647 [mandamus to compel processing of initiative ordinance to prohibit oil well drilling within residential zones]; *Duran v. Cassidy* (1972) 28 C.A.3d 574, 580, 104 C.R. 793 [mandamus to compel acceptance of initiative petition prohibiting city ownership or operation of golf course]; 5 Cal. Western L. Rev. 148 [*Farley*].)

An initiative measure will not be declared invalid on the ground that it would impair a city's tax base and hence its power to raise tax revenues. Many initiative measures, e.g., zoning, might affect the property tax base; and "such speculative consequences do not constitute a prohibited interference by the initiative power with the function of a legislative body." (*Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 144, 130 C.R. 465, 550 P.2d 1001.)

(3) *Local Board Cannot Refuse To Place Qualified Initiative on Ballot*. In *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 C.A.4th 141, 16 C.R.2d 408, plaintiffs, proponents of an initiative measure seeking to amend the general plan of the county, collected sufficient signatures to qualify for the general election ballot. However, the Board of Supervisors, finding various defects in the measure, voted to exclude it from the ballot. Plaintiffs then petitioned for mandamus to require the board to perform its ministerial duty, and the board in its answer contended that the measure was illegal. The trial court entered judgment for plaintiffs. *Held*, affirmed.

(a) The courts have repeatedly stated that local governments have the purely ministerial duty to place duly certified initiatives on the ballot, and cannot unilaterally refuse to do so. (13 C.A.4th 148, 149.) When faced with a measure believed to be invalid, the local governmental body may petition for mandamus to obtain a court order removing the measure from the ballot. (13 C.A.4th 149.)

(b) If the court decides against the local government and orders that the measure be placed on the ballot, in theory the local government could then file its writ petition for an adjudication that the measure is invalid. However, in the interests of equity and judicial economy, courts have allowed local governments to assert invalidity as a "defense" in the original writ proceeding. "But in doing so, neither courts nor litigants should lose sight of the fact that the burden of establishing this 'defense' falls squarely on the entity or person asserting the initiative's invalidity." (13 C.A.4th 150.)

(c) In exercising its discretion in preelection review of a qualified initiative, the trial court will remove the initiative only on a compelling showing, and will if possible resolve doubts in favor of the initiative power. (13 C.A.4th 150.) "In sum, the Board had a duty to place this initiative on the ballot unless it had obtained a court order barring the matter from the ballot. In a preelection challenge of a duly certified ballot initiative, the trial court determines whether the challenger has made a compelling showing that the initiative--and, indeed, of the whole practice of using initiatives to amend general plans--should await postelection review of an approved initiative." (13 C.A.4th 153.)

(4) *Timing: At Which Election Should Initiative Be Put on Ballot*. In *Jeffrey v. Superior Court* (2002) 102 C.A.4th 1, 125 C.R.2d 175, the court held that an initiative to change a city charter to provide for district elections and term limits for council members, which, if adopted, would take effect at the November 2004 election, was properly ordered for placement on the March 2004 ballot, even though it could have been placed on the November 2002 ballot. *Elec.C.*

1415 and 9255 both set minimum time limits and provide options for submitting proposals to the voters to amend or repeal city charters. However, neither statute sets a maximum time limit. (102 C.A.4th 4.) Elec.C. 36502 requires elections regarding term limits to be submitted to the voters at a "regularly scheduled election." (102 C.A.4th 7.) The March 2004 election is regularly scheduled and is not inconsistent with the initiative's effective date. (102 C.A.4th 9, 10.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 36 *Golden Gate L. Rev.* 185 [Separation of Powers and the California Initiative]; 78 *So. Cal. L. Rev.* 949, 985 [use of initiatives by political action committees and others to achieve nonpolicy-related goals]; 80 *So. Cal. L. Rev.* 299 [dual path initiative framework].

(2) *Scope of Power.* See *Independent Energy Producers Assn. v. McPherson* (2006) 38 C.4th 1020, 1030, 44 C.R.3d 644, 136 P.3d 178 [action claiming that initiative measure cannot lawfully be enacted through initiative process does not become moot if measure is approved by voters; hence, although preelection challenge is not presumptively improper, deferring judicial resolution until after election will usually be wiser course]; *Totten v. Board of Supervisors of Ventura* (2006) 139 C.A.4th 826, 839, 43 C.R.3d 244 [electorate in general law county lacked power to enact ordinance by initiative that prescribed minimum future annual budgets for county public safety agencies; board of supervisors had exclusive authority over county budget, and county budgets for public safety agencies are matter of statewide concern]; *Widders v. Furchtenicht* (2008) 167 C.A.4th 769, 784, 84 C.R.3d 428 [city attorney had no duty to prepare ballot titles and summaries under Elec.C. 9203 where proposed initiatives were facially unconstitutional because they did not propose actual legislation or purport to enact statutes].



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C. Legislative Power.

2. Initiative and Referendum.

a. In General.

4. Referendum.

7 *Witkin Sum. Cal. Law Const Law* § 156

[§ 156] Referendum.

The power of referendum is also liberally construed. (See *Associated Home Builders v. Livermore* (1976) 18 C.3d 582, 591, 135 C.R. 41, 557 P.2d 473, *infra*, §1031; *Dye v. Council of Compton* (1947) 80 C.A.2d 486, 490, 182 P.2d 623 ["power of referendum is one of the legislative powers specifically reserved by the people in their grant of general legislative power to the legislative bodies representing them"]; *Ortiz v. Board of Supervisors* (1980) 107 C.A.3d 866, 871, 166 C.R. 100 [right of electorate of county is coextensive with right of people of state]; *Midway Orchards v. Butte* (1990) 220 C.A.3d 765, 778, 779, 269 C.R. 796 [because constitutional right to referendum is self-executing, Legislature cannot abridge right by failing to adopt procedures for its exercise; where no statutory procedure was provided for referenda against *resolutions*, court would apply statutes governing referenda against *ordinances*]; *Browne v. Russell* (1994) 27 C.A.4th 1116, 1120, 1123, 33 C.R.2d 29 [ordinance requiring that circulators of referendary petitions be city residents and registered voters is not violation of right to free speech]; *Lindelli v. San Anselmo* (2003) 111 C.A.4th 1099, 1111, 4 C.R.3d 453 [town council cannot evade provisions of *Elec.C.* 9241, which prevents ordinance that is subject of referendum petition from taking effect until approved by voters, by enacting essentially identical legislation on same subject matter to take effect in interim]; 37 *Hastings L. J.* 591 [referendum power and public safety legislation].)

In *Eastlake v. Forest City Enterprises* (1976) 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132, the Court rejected the claim that a zoning referendum constituted an improper delegation of legislative power. "A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." (96 S.Ct. 2364, 49 L.Ed.2d 137.) Hence, a referendum "is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." (96 S.Ct. 2362, 49 L.Ed.2d 137.) (See *James v. Valtierra* (1971) 402 U.S. 137, 91 S.Ct. 1331, 1333, 28 L.Ed.2d 678, 682 [Cal. Const., Art. XXXIV, subjecting public housing projects to referendum is valid]; *Empire Waste Management v. Windsor* (1998) 67 C.A.4th 714, 719, 79 C.R.2d 262 [local referendum power is not superseded by *Pub.Res.C.* 40059, vesting authority to grant solid waste collection contracts in local "governing body"]; 59 *Cal. L. Rev.* 1384 [James]; 5 *Loyola L.A. L. Rev.* 368 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

A rule enunciated for general law cities in *Elec.C. 9241* prevents cities from repealing ordinances subject to referendum petitions and then essentially readopting them, for a period of 1 year after the date of repeal. The California Constitution imposes this rule on charter cities, notwithstanding the absence of an express provision addressing the matter. The rule is an implied element of the constitutional provisions reserving the referendum power. (*Rubalcava v. Martinez* (2007) 158 C.A.4th 563, 570, 572, 70 C.R.3d 225 [trial court erred in granting petition for mandamus and injunctive relief against city council of charter city where second ordinance was not essentially similar].)



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III. SEPARATION OF POWERS

C. Legislative Power.

2. Initiative and Referendum.

a. In General.

5. Alternative and Complementary Measures.

7 *Witkin Sum. Cal. Law Const Law* § 157

[§ 157] Alternative and Complementary Measures.

(1) *Alternative Measures*. Cal. Const., Art. II, §11, permitting electors of local governments to exercise initiative and referendum powers, does not prevent presentation of alternative proposals on the same ballot. Under Cal. Const., Art. II, §10(b) and *Elec.C.* 9221, where two conflicting initiatives are approved, the one receiving the most votes prevails. (See *Concerned Citizens v. Carlsbad* (1988) 204 C.A.3d 937, 941, 942, 251 C.R. 583 [decided under former provision]; *Howard Jarvis Taxpayers Assn. v. Roseville* (2003) 106 C.A.4th 1178, 1188, 132 C.R.2d 1 [for rule of conflicting initiatives to apply, both initiatives must pass; thus, rule did not apply where initiative receiving most votes failed to receive two-thirds majority needed to pass, while conflicting initiative received necessary majority vote].)

(2) *Simultaneous Passage of Complementary Measures*. In the 1990 primary election, Proposition 114 was adopted, amending P.C. 190.2, the special circumstance provision of the 1978 death penalty initiative, by expanding the class of persons who qualified under the "peace officer" special circumstance; other changes to P.C. 190.2 were nonsubstantive. Proposition 115, adopted in the same election (see *supra*, §133) but with fewer affirmative votes, made comprehensive reforms to the criminal justice system. Among its changes was a substantial revision of P.C. 190.2 that included expansion of the felony-murder special circumstance. In *Yoshisato v. Superior Court* (1992) 2 C.4th 978, 9 C.R.2d 102, 831 P.2d 327, a criminal defendant argued that, under Cal. Const., Art. II, §10(b), the version of P.C. 190.2 adopted by Proposition 115 was not operative. *Held*, the changes made by Proposition 115 are operative.

(a) When two initiatives are presented to voters as "complementary or supplementary," rather than competing, measures, "the provisions of the measure receiving the lower number of affirmative votes are operative so long as they do not conflict with the provisions of the measure receiving the higher number of affirmative votes, and so long as those nonconflicting provisions are severable from any that do conflict." (2 C.4th 988.)

(b) Here, the propositions were presented as complementary rather than competing measures. (2 C.4th 989.) Hence, the provisions of Proposition 115 must be given effect to the extent they do not conflict with any substantive changes made by Proposition 114. (2 C.4th 991, 992.) (See *People v. Barrow* (1991) 233 C.A.3d 721, 723, 284 C.R. 679 [Proposition 8 is comprehensive scheme governing rights of crime victims, while Proposition 4 only relates to bail, and initiatives otherwise do not conflict; hence, fact that Proposition 4 received higher vote than Proposition 8 at same

election rendered bail provisions, but not other provisions of Proposition 8, ineffective]; *Sacramento County Deputy Sheriffs' Assn. v. Sacramento* (2000) 85 C.A.4th 960, 967, 102 C.R.2d 523 [following *Yoshisato*].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Legislative Power.

2. Initiative and Referendum.

a. In General.

6. Amendment and Repeal.

7 *Witkin Sum. Cal. Law Const Law § 158*

[§ 158] Amendment and Repeal.

(1) *In General.* "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (Cal. Const., Art. II, §10(c).)

A legislative amendment adopted without compliance with the amendment procedures of an initiative act is void. (*Franchise Tax Bd. v. Cory* (1978) 80 C.A.3d 772, 776, 145 C.R. 819.)

(2) *Scope of Legislative Power.* *Amwest Surety Ins. Co. v. Wilson* (1995) 11 C.4th 1243, 48 C.R.2d 12, 906 P.2d 1112, considers the scope of legislative authority where an initiative measure grants the Legislature the power to amend the measure "to further its purposes." *Amwest* involved Proposition 103, which imposed a rate rollback on all insurers and required prior approval of subsequent rate increases (see *infra*, §1083), and which provided that "[t]he provisions of this act shall not be amended by the Legislature except to further its purposes." In *Calfarm Ins. Co. v. Deukmejian* (1989) 48 C.3d 805, 258 C.R. 161, 771 P.2d 1247, *infra*, §1083, the Supreme Court held that portions of the Act were unconstitutional but severable and upheld the remainder of the initiative. The Legislature subsequently added *Ins.C. 1861.135*, exempting surety insurers from the rate rollback and rate approval provisions. *Held*, the statute is invalid because it does not further the purposes of Proposition 103. (11 C.4th 1247.)

(a) Under Cal. Const., Art. II, §10(c), the Legislature may not amend an initiative measure unless the electors approve or the measure itself permits amendment without approval. The power of the voters is absolute and includes the power to permit legislative amendment subject to conditions attached by the voters. (11 C.4th 1251.)

(b) Initiative measures commonly include a provision authorizing the Legislature to amend the initiative without voter approval only if the amendment furthers the purpose of the initiative; however, only one case, *In re Nose* (1924) 195 C. 91, 231 P. 561, has interpreted this language, and the discussion of the issue is so brief that it is difficult to draw a firm conclusion. (11 C.4th 1251, 1252.)

(c) The limitation imposed by Cal. Const., Art. II, §10(c) "must be strictly construed, but it also must be given the

effect the voters intended it to have." (11 C.4th 1255, 1256.) Adoption of a deferential standard of review might cause the drafters of future initiatives to withhold legislative authority completely, a result that would diminish both the initiative and legislative processes. "Accordingly, starting with the presumption that the Legislature acted within its authority, we shall uphold the validity of section 1861.135 if, by any reasonable construction, it can be said that the statute furthers the purposes of Proposition 103." (11 C.4th 1256.)

(d) In determining the purposes of an initiative measure, the court may look to many sources, including the historical context and the ballot arguments, and is not limited to the express statement of purpose included in the initiative itself. (11 C.4th 1256.) Two major purposes of Proposition 103 were to reduce the rates for all insurance and to replace the former competitive system for regulating insurance with a system in which the Insurance Commissioner approves rates prior to their use. (11 C.4th 1259.)

(e) Plaintiff contends that *Ins.C. 1861.135* furthers the purposes of Proposition 103 by clarifying whether surety insurance was meant to be included within the ambit of the initiative. (11 C.4th 1259.) But it was clear prior to the passage of Proposition 103 that the provisions regulating insurance rates applied to surety insurance. Proposition 103 fundamentally altered the method of regulating insurance rates but did not alter the types of insurance that were regulated. The provisions of Proposition 103 clearly applied to surety insurance, and the Legislature's action constituted an alteration rather than a clarification. (11 C.4th 1260, 1261.)

(f) Various other rationales have been advanced to show that *Ins.C. 1861.135* furthers the purposes of Proposition 103. However, the voters intended Proposition 103 to apply broadly to various types of insurance, and excluding surety insurance from the rate regulatory provisions would not further the purposes of Proposition 103's broad reform. (11 C.4th 1261, 1265.)

(g) "The question before us is not whether exempting surety insurance from some of the provisions of Proposition 103 furthers the public good, but rather whether doing so furthers the purposes of Proposition 103. We hold that it does not. Because Proposition 103 expressly permits its provisions to be amended without voter approval, but only when to do so would further the purposes of the initiative, section 1861.135 is invalid." (11 C.4th 1265.) (See *Flavell v. Albany* (1993) 19 C.A.4th 1846, 1850, 25 C.R.2d 21 [ordinance that amended city's residential off-street parking requirements did not violate former Elec.C. 4013 (now Elec.C. 9217) by amending a prior initiative without voter approval, where ordinance complied with voters' mandate and harmonized initiative with other parts of city's zoning laws]; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 C.A.4th 32, 40, 43, 41 C.R.2d 393 [ordinance was invalid under Elec.C. 9217 as improper amendment, rather than clarification, of mobilehome rent control initiative]; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 C.A.4th 1473, 1490, 76 C.R.2d 342 [statute permitting insurers, for rollback purposes, to deduct premium taxes, commissions, and brokerage expenses paid during rollback period was invalid because it amended initiative without furthering purposes of initiative; following *Amwest*]; 24 *Pepperdine L. Rev.* 1134 [*Amwest*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *MHC Financing Ltd. Partnership Two v. Santee* (2005) 125 C.A.4th 1372, 1388, 23 C.R.3d 622 [city council mistakenly enacted first version of initiative-proposed ordinance, then it enacted second version to accurately reflect will of voters who signed initiative petition; doing so did not violate Elec.C. 9217, which prohibits amendment of voter-sponsored initiative ordinance].

(2) *Scope of Legislative Power.* See *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 C.A.4th 1354, 1366, 1371, 34 C.R.3d 354 [following *Amwest Surety Ins. Co. v. Wilson* (1995) 11 C.4th 1243, 48 C.R.2d 12, 906 P.2d 1112, text, p. 286; statute using absence of prior automobile insurance "in and of itself" as criterion in setting insurance rates is facially invalid; statute undermines one of major purposes of Proposition 103, to ensure that insurance is fair, available, and affordable for all Californians, and impermissibly infringes on Insurance Commissioner's power to adopt optional rating factors by regulation]; *San Diego v. San Diego NORML* (2008) 165 C.A.4th 798, 830, 81 C.R.3d 461 [Medical Marijuana Program Act (MMPA), enacted by Legislature to provide

protections for medical marijuana users through use of identification card system, was not invalid amendment of Compassionate Use Act (CUA), which was adopted by initiative; MMPA did not add statutes or standards to CUA, and it had no impact on protections provided by CUA because use of identity card under MMPA was voluntary].



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b. Exceptions to Initiative and Referendum Powers.

1. Urgency, Elections, and Tax Matters.

7 *Witkin Sum. Cal. Law Const Law* § 159

[§ 159] Urgency, Elections, and Tax Matters.

(1) *In General.* Cal. Const., Art. II, §9(a), subjects the right of referendum to the following exceptions:

(a) Urgency measures.

(b) Statutes calling elections.

(c) Tax levies or appropriations for usual current expenses of the state.

Although the constitutional provision refers to statewide referenda on statutes, it has been construed to apply also to county referenda. (See *Geiger v. Board of Supervisors* (1957) 48 C.2d 832, 836, 313 P.2d 545; *Community Health Assn. v. Board of Supervisors* (1983) 146 C.A.3d 990, 993, 194 C.R. 557; *Fenton v. Delano* (1984) 162 C.A.3d 400, 405, 208 C.R. 486 [city ordinance imposing "fee" on users of gas, electricity, telephone, and cable television]; *Westminster v. Orange* (1988) 204 C.A.3d 623, 628, 631, 251 C.R. 511 [*Govt.C.* 53727(b), requiring voter approval of city tax measures, is unconstitutional]; 100 A.L.R.2d 314 [constitutional and statutory provisions excepting laws from referendum].)

(2) *Initiative Power To Repeal Taxes.* The prohibition against referenda on tax levies does not prohibit the use of a statewide initiative to repeal tax laws. (*Carlson v. Cory* (1983) 139 C.A.3d 724, 731, 189 C.R. 185.) On the other hand, the provision has been held applicable to a county initiative. (*Community Health Assn. v. Board of Supervisors*, *supra*, 146 C.A.3d 993 [county ordinance, adopted by initiative measure, was invalid as violative of Cal. Const., Art. II, §9(a)].)

In *Rossi v. Brown* (1995) 9 C.4th 688, 38 C.R.2d 363, 889 P.2d 557, the court, disapproving dicta in earlier decisions of the Court of Appeal, held that the constitutional prohibition against referenda on tax levies does not prohibit use of the initiative power to repeal taxes *prospectively*. *Rossi* involved an initiative measure that repealed a charter city's utility tax; both the trial court and the Court of Appeal held the measure invalid, reasoning that use of the initiative power in that manner was the functional equivalent of a prohibited referendum. *Held*, reversed.

(a) Cal. Const., Art. II, §9(a), expressly excludes tax measures from referendum, but there is no similar reservation on use of the initiative power. (9 C.4th 694, 697.) As the history of the initiative provision makes clear, the limitation on the referendum power does not extend to the use of the initiative to repeal taxes prospectively. (9 C.4th 699.)

(b) A referendum affects governmental operation differently than an initiative. When a referendum petition is qualified, the ordinance is suspended and does not become effective unless approved at the election. Therefore, if a tax measure were subject to referendum, the county's ability to adopt a balanced budget and raise funds for current operating expenses would be disrupted. (9 C.4th 702, 703.) An initiative prospectively repealing a tax measure, however, has no immediate impact on current budgetary operations and thus no potential for disrupting local government services. (9 C.4th 703, 704.)

(c) Dicta in *Myers v. City Council of Pismo Beach* (1966) 241 C.A.2d 237, 50 C.R. 402, and subsequent cases, to the effect that an initiative ordinance cannot be used as a backhanded referendum against a tax ordinance, are not sound. (9 C.4th 706, 707, 709.) Other cases, such as *Carlson v. Cory*, *supra*, have barred use of the local initiative power in a manner that interferes with the responsibility of the local legislative body for fiscal management. "None of those cases is comparable to this one, however, since none involved an initiative repeal of a tax ordinance that is prospective only, i.e., would not affect the current budget of the city or county." (9 C.4th 709.)

(d) "We agree with appellant, therefore, that the Court of Appeal erred in relying on cases in which an attempt was made to use the initiative to repeal tax ordinances of general law cities and those in which the proposed measure would affect the authority of the legislative body over fiscal management under a budget already adopted by that body. An initiative which repeals taxes prospectively, i.e., one in which the repeal does not become effective until a subsequent fiscal year, is not the 'functional equivalent' of a referendum. Our obligation to jealously guard the people's reserved right of initiative precludes the restriction on its exercise suggested by the *Myers* court and adopted here by the Court of Appeal." (9 C.4th 710, 711.) (See 23 *Pepperdine L. Rev.* 1419 [Rossi].)

Cal. Const., Art. XIII C, §3, adopted effective November 6, 1996, as part of Proposition 218 (see 9 *Summary* (10th), *Taxation*, §§141, 142), reinforces *Rossi*. The section provides that the initiative power may be used to affect (including reducing or repealing) local taxes, assessments, fees, and charges of all local governments. Neither the Legislature nor a local government charter may impose a signature requirement higher than that applicable to statewide statutory initiatives. However, *Govt.C. 5854*, added in 1997, stipulates that Cal. Const., Art. XIII C, §3 is not to be construed to mean that any owner of a municipal security, purchased before or after November 6, 1996, "assumes the risk of, or in any way consents to, any action by initiative measure that constitutes an impairment of contractual rights" protected by U.S. Const., Art. I, §10.

In *Santa Clara County Local Trans. Authority v. Guardino* (1995) 11 C.4th 220, 45 C.R.2d 207, 902 P.2d 225, 9 *Summary* (10th), *Taxation*, §134, the court held that *Govt.C. 53722* (9 *Summary* (10th), *Taxation*, §§131, 133 et seq.), which requires that special taxes imposed by local governments and districts be approved by two-thirds of the electorate, is constitutional. The voter approval requirement is not a referendum, but rather is a condition precedent to enactment of a *proposed* statute; hence, the statute does not violate the constitutional prohibition against subjecting tax statutes to a referendum or the constitutional declaration that a referendum needs only a simple majority to pass. (11 C.4th 239, 240.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Initiative Power To Repeal Taxes*. Cal. Const., Art. XIII C, §3: See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 C.4th 205, 218, 46 C.R.3d 73, 138 P.3d 220 [under Cal. Const., Art. XIII C, §32, local voters may not impose voter approval requirement on future increases in water delivery charges by water agency].



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2. Matters of Statewide Concern.

7 *Witkin Sum. Cal. Law Const Law* § 160

[§ 160] Matters of Statewide Concern.

Local initiative and referendum powers may be exercised only with respect to municipal affairs. Matters of statewide concern, delegated to local governments by the Legislature, are not subject to the initiative or referendum at the local level. (See *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 C.4th 765, 776, 780, 35 C.R.2d 814, 884 P.2d 645 [under Govt.C. 25123(e), ordinance adopting memorandum of understanding between county and employees' association, adding certain employees to retirement plan, is not subject to referendum because it relates to statutory scheme regulating collective bargaining between public employers and employees, an area of statewide concern]; *Alexander v. Mitchell* (1953) 119 C.A.2d 816, 820, 260 P.2d 261 [proposed ordinance to require referendum or initiative on any city parking lot project was invalid attempt to abrogate city's power of eminent domain]; *Mervynne v. Acker* (1961) 189 C.A.2d 558, 562, 11 C.R. 340 [proposed measure to repeal parking meter ordinances; interference with traffic control, occupied by state law granting power over parking meters to city council]; *Walker v. Salinas* (1976) 56 C.A.3d 711, 717, 718, 128 C.R. 832 [ordinance adopted under Community Redevelopment Law involves state policy and is not subject to referendum]; *Friends of Mt. Diablo v. Contra Costa* (1977) 72 C.A.3d 1006, 1010, 139 C.R. 469 [referendum power does not extend to supervisors' resolution where subject is "of such statewide concern as to convert the local legislative body into an administrative agent of the state"]; *San Francisco v. Patterson* (1988) 202 C.A.3d 95, 100, 248 C.R. 290 [proposed initiative ordinance to restrict power of school district to lease or sell property was invalid because education is matter of statewide concern, school district is state agency, and Education Code explicitly regulates sale of property by district]; *Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 C.A.4th 465, 479, 6 C.R.3d 367 [statute conferring authority on matters of airport expansion or relocation specifically and exclusively on city council made subject matter one of statewide concern, precluding initiative measure on subject]; *Malibu v. California Coastal Com.* (2004) 121 C.A.4th 989, 998, 18 C.R.3d 40 [local coastal program drawn up by Coastal Commission under statutory mandate when plaintiff city failed to act was not subject to referendum].)

In *Norlund v. Thorpe* (1973) 34 C.A.3d 672, 110 C.R. 246, the Napa City Council adopted a resolution approving annexation of 99 acres of uninhabited territory. A referendum petition was submitted, and the council refused to file it on the ground that annexation of territory by a city is a matter of "statewide concern." *Held*, mandamus granted to compel consideration of the petition. The authority to annex is granted by legislation, and the general subject is covered

by statute; but a single annexation by a particular city is not a matter of statewide concern. (34 C.A.3d 674.) However, in *Ferrini v. San Luis Obispo* (1983) 150 C.A.3d 239, 247, 248, 197 C.R. 694, the court held that the Legislature, by subsequently repealing the provisions relied on in *Norlund*, indicated its intent to overrule *Norlund* as precedent and to occupy the field of annexation of unincorporated areas.

In *Committee of Seven Thousand v. Superior Court* (1988) 45 C.3d 491, 247 C.R. 362, 754 P.2d 708, a municipal initiative was proposed that would prohibit a city council in Orange County from imposing a new fee or tax to finance highway construction without first submitting the new fee or tax to a vote of the electorate. Initiative opponents filed a petition for mandamus in the superior court to bar the proposed initiative from the ballot, and the writ issued. Initiative proponents then filed a petition for mandamus in the Court of Appeal, seeking reinstatement of the initiative to the ballot, and this petition was denied. *Held*, judgment affirmed. *Govt.C. 66484.3*, which permits city councils in Orange County to impose development fees to fund construction of major thoroughfares, conflicts with the proposed initiative. The "Legislature intended that the authority thus delegated be exercised by the local legislative bodies specifically and exclusively, thereby precluding use of the initiative and referendum in this limited area." (45 C.3d 512.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Administrative Action.

7 Witkin Sum. Cal. Law Const Law § 161

[§ 161] Administrative Action.

(1) *In General.* The initiative and referendum are devised for legislative acts; executive or administrative action is generally free from the exercise of those powers. (See *Housing Authority of Eureka v. Superior Court* (1950) 35 C.2d 550, 557, 219 P.2d 457; *Simpson v. Hite* (1950) 36 C.2d 125, 129, 222 P.2d 225 [referendum; selection of site for court buildings]; *San Diego v. Dunkl* (2001) 86 C.A.4th 384, 402, 103 C.R.2d 269 [proposed initiative, which sought to administratively negate legislative purpose of earlier city ordinance adopted by voters to enable funding and construction of downtown ballpark and redevelopment project, was beyond power of voters to adopt]; *Citizens for Jobs and the Economy v. Orange* (2002) 94 C.A.4th 1311, 1333, 115 C.R.2d 90 [following *Dunkl*; where first initiative declared legislative policy regarding conversion of military air base to civilian use, which conversion had been delegated to county by state and federal governments, second initiative that added voter approval and hearing requirements to implementing decisions of Board of Supervisors impermissibly negated legislative purpose of first initiative and restricted Board's administrative discretion].) But local councils and boards normally perform both legislative and executive functions, and the distinction is difficult to state and apply. (See 42 Am.Jur.2d (2000 ed.), *Initiative and Referendum* §§8, 11, 12.)

In *Hughes v. Lincoln* (1965) 232 C.A.2d 741, 43 C.R. 306, the court, upholding an initiative, threw some light on "the vague, legislative-administrative dichotomy" (232 C.A.2d 744). Defendant city adopted a resolution directing fluoridation of its water supply, subject to approval of the State Board of Public Health pursuant to a former statute. Sufficient signatures were obtained for an initiative ordinance to prohibit the fluoridation, but the city council refused to call an election. *Held*, order granting mandamus to compel the election affirmed.

(a) *Tests.* (1) Acts declaring a public purpose and making provision for its accomplishment are legislative; acts to carry out legislative policies and purposes already declared by the legislative body are administrative. (232 C.A.2d 745.) (2) If the matter is of statewide concern, a local board acting as the state's agent to implement state policy acts administratively; if the matter is of local concern, the action is legislative even though the state law authorizes or limits it. (232 C.A.2d 745.)

(b) *Application of tests.* The operation of water systems is a valid exercise of local police power. The statutory

regulation of local water treatment is designed solely to assure purity and potability, and the statutes do not take any position on the new controversial goal of medication of public water supplies for a therapeutic purpose. Hence, the local legislative body may decide either to adhere to traditional goals or to fluoridate, and its decision is essentially legislative. "Thus, in deciding whether or not to fluoridate, a city council acts as the legislative exponent of local policy, not as the administrative instrumentality of state policy. The scheme of state legislation does not affect the intrinsically legislative character of a decision for or against fluoridation of municipal water supplies." (232 C.A.2d 748.)

(2) *Rezoning of Property*. In *Lincoln Property Co. No. 41 v. Law* (1975) 45 C.A.3d 230, 119 C.R. 292, a city annexed property and zoned it; thereafter a developer proposed a plan for a tract and the city council approved it by resolution. Plaintiffs filed a referendum petition attacking the resolution. *Held*, the original zoning change was a legislative act that could have been subjected to a referendum, but the subsequent resolution approving a development plan was administrative only, and not subject to referendum. (45 C.A.3d 234.)

In *Southwest Diversified v. Brisbane* (1991) 229 C.A.3d 1548, 1557, 280 C.R. 869, the court, citing *Arnel Dev. Co. v. Costa Mesa* (1980) 28 C.3d 511, 169 C.R. 904, 620 P.2d 565, *infra*, §1028, explained that zoning is generally regarded as a legislative act. However, in this case, "at the time the parcel was originally zoned, the legislative body treated the boundaries as provisional and subject to future adjustment according to prescribed standards and procedures. Moreover, the considerations that prompted the *Arnel* court to adopt a categorical rule are not present in the instant case. The court was concerned that a rule treating minor zoning actions as administrative would call for vague distinctions and deprive municipal governments of a 'test which distinguishes legislative from adjudicative acts with clarity and reasonable certainty.' ... Here, we perceive no difficulty in confining our holding to the unique circumstances of the case. By construing the revision of a zoning boundary pursuant to a previously adopted procedure as administrative action, we cast no doubt on the classification of zoning actions generally as legislative in nature." (229 C.A.3d 1558.) (See 29 *San Diego L. Rev.* 561.)

(3) *Other Examples*. In *Merriman v. Board of Supervisors* (1983) 138 C.A.3d 889, 188 C.R. 343, defendant board enacted an ordinance that made violations of the county building code punishable as infractions. Plaintiffs were proponents of a referendum petition seeking repeal of the ordinance or its submission to the voters. The board took no action, and petitioners sought mandamus, which the lower court denied on the theory that the challenged ordinance was administrative. *Held*, judgment denying writ reversed. The board acted under its police power in a legislative capacity; i.e., it created ways and means of accomplishing the policy underlying the *State Housing Law*. (138 C.A.3d 893.)

Many other cases deal with the legislative/administrative problem. (See *Pacific Rock & Gravel Co. v. Upland* (1967) 67 C.2d 666, 669, 63 C.R. 572, 433 P.2d 476 [referendum of city's adoption of ordinance granting railroad spur track franchise upheld]; *O'Loane v. O'Rourke* (1965) 231 C.A.2d 774, 783, 42 C.R. 283 [referendum of city's adoption of resolution for general zoning plan upheld]; *Duran v. Cassidy* (1972) 28 C.A.3d 574, 581, 104 C.R. 793 [initiative to prohibit golf course in existing public park adjacent to airport upheld]; *Fishman v. Palo Alto* (1978) 86 C.A.3d 506, 509, 150 C.R. 326 [resolution modifying plans regarding parking lot was administrative act; following *Lincoln Property*]; *Board of Education v. Superior Court* (1979) 93 C.A.3d 578, 582, 155 C.R. 839 [no referendum on closing high school]; *W.W. Dean & Associates v. South San Francisco* (1987) 190 C.A.3d 1368, 1376, 1377, 236 C.R. 11 [no referendum on amendment of development plan in accordance with Endangered Species Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Other Examples*. See *Worthington v. City Council of Rohnert Park* (2005) 130 C.A.4th 1132, 1143, 31 C.R.3d 59 [resolution under which city agreed with Indian tribe not to oppose casino project on county land was not legislation and was not subject to referendum].



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4. Legislature's Constitutional Power Over Internal Affairs.

7 Witkin Sum. Cal. Law Const Law § 162

[§ 162] Legislature's Constitutional Power Over Internal Affairs.

The constitutionality of the Legislative Reform Act of 1983, an initiative measure adopted in 1984, was considered in *People's Advocate v. Superior Court* (1986) 181 C.A.3d 316, 226 C.R. 640. The Act (1) regulated the selection by the Legislature of its officers, the appointments and powers of legislative committees, and the adoption by the Legislature of rules for its proceedings; and (2) limited the amount of money the Legislature could appropriate for its operations. *Held*, these provisions were unconstitutional.

(a) "The powers challenged by the Act are deeply rooted in constitutional soil. Since the inception of our state the power of a legislative body to govern its own internal workings has been viewed as essential to its functioning except as it may have been expressly constrained by the California Constitution." (181 C.A.3d 322.) This power is an integral part of the parliamentary common law implicit in the structure of our Constitution, and is explicitly recognized in Cal. Const., Article IV, §§7 and 11. (181 C.A.3d 322, 323.) First added almost 150 years ago, these provisions "are part of a constitutional structure of government by which the people have made statutes--*even initiative statutes--subordinate to the Constitution.*" (181 C.A.3d 322.)

(b) Cal. Const., Art. IV, §§7(a) and 11, grant the Legislature power to adopt rules or resolutions for the selection of its officers and committees and the conduct of its proceedings. (181 C.A.3d 324.) The argument that statutes, including those adopted by initiative, may supersede these rules and resolutions, "presupposes that these *subject matters* are among those which may be regulated by statute. Therein lies the fallacy." (181 C.A.3d 325.) The power to adopt laws, as expressed in statutes, is shared by the Legislature, the Governor, and the electorate. The power to adopt rules governing the internal proceedings of the Legislature is "the *exclusive prerogative* of '[e]ach house' of the Legislature or the combined houses." The initiative power "does not extend to these matters." (181 C.A.3d 325.)

(c) The Legislature's practice of adopting statutes regulating its internal proceedings is of no significance. The substantive power exercised, not the form or label chosen, governs; and the adoption of a statute relating to internal proceedings is still an exercise of the rulemaking power under Cal. Const., Art. IV, §§7 and 11. (181 C.A.3d 326, 327.)

(d) The limitation on the amount of money that the Legislature may appropriate for its operations is invalid for

other reasons. (1) It attempts "to govern the *content* of future legislation." (181 C.A.3d 328.) (2) It violates Cal. Const., Art. IV, §12, under which the Governor submits a budget bill and the Legislature, by adoption of the budget bill or by special measures, appropriates money for the support of state government. (181 C.A.3d 328, 329.) (See *Watson v. Fair Political Practices Com.* (1990) 217 C.A.3d 1059, 1069, 1070, 266 C.R. 408 [initiative measure prohibiting legislators from sending mass mailings at public expense did not infringe on Legislature's power over its internal affairs]; on severability of invalid provisions from provisions that are not challenged, see *supra*, §106.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Measure Identifying Person or Corporation.

7 Witkin Sum. Cal. Law Const Law § 163

[§ 163] Measure Identifying Person or Corporation.

"No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." (Cal. Const., Art. II, §12.)

In *Calfarm Ins. Co. v. Deukmejian* (1989) 48 C.3d 805, 258 C.R. 161, 771 P.2d 1247, *infra*, §1083, the court held that *Ins.C. 1861.10(c)*, part of Proposition 103, violated this Article. The challenged provision reads as follows:

"(1) The commissioner shall require every insurer to enclose notices in every policy or renewal premium bill informing policyholders of the opportunity to join an independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum. This organization shall be established by an interim board of public members designated by the commissioner and operated by individuals who are democratically elected from its membership. The corporation shall proportionately reimburse insurers for any additional costs incurred by insertion of the enclosure, except no postage shall be charged for any enclosure weighing less than 1/3 of an ounce. (2) The commissioner shall by regulation determine the contents of the enclosures and other procedures necessary for implementation of this provision. The legislature shall make no appropriation for this subdivision."

(a) "The consumer-advocacy provision 'identifies' a particular corporation--that one which is to be formed by an interim board of public members appointed by the Insurance Commissioner. ... [T]hat corporation is identified to perform a 'function,' to 'advocate the interests of insurance consumers in any forum.' ... We see no escape from the clear and explicit language of the state Constitution." (48 C.3d 832.)

(b) The contention that the proposed consumer-advocacy corporation would be a "nonprofit public benefit corporation," and not a "private" corporation within the meaning of Article II, §12 is unsound. "We reject the contention that the inclusion of nonprofit corporations is inconsistent with the purpose of the constitutional prohibition. It may be less likely that promoters seeking self-aggrandizement would employ a nonprofit corporation as a vehicle, but we still perceive a danger that supporters of a particular nonprofit organization might seek to obtain through the initiative some special privilege not afforded other organizations. One might even perceive this danger in the present case. There are

several consumer advocacy corporations, and others could be formed. But Proposition 103 gives a kind of state imprimatur to one particular corporation--the one formed" under *Ins.C. 1861.10(c)*--and gives that organization alone the benefit of a low-cost or free statewide mailing to solicit memberships." (48 C.3d 834.)

(c) The contention that the constitutional provision is inapplicable because it was intended only to prevent a private person or corporation from being granted a constitutional right to a public office or function is likewise unsound. "We find no such limiting language in the constitutional provision itself. Moreover, the function to be performed by the consumer-advocacy corporation is in a sense a public function, that of representing consumers in ratemaking proceedings before the Insurance Commissioner, thereby assuring that the commissioner's decisions are based upon a truly adversary process in which the interests of both insurers and consumer are presented." (48 C.3d 835.)

Application of Cal. Const., Art. II, §12, is not limited to statewide initiatives. (See *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 C.A.4th 565, 580, 63 C.R.2d 148, *infra*, §1028; *Citizens for Responsible Government v. Albany* (1997) 56 C.A.4th 1199, 1229, 66 C.R. 2d 102 [distinguishing *Pala*; required election to approve development agreements for waterfront area was not initiative measure and was not subject to prohibition of Cal. Const., Art. II, §12].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Tain v. State Bd. of Chiropractic Examiners* (2005) 130 C.A.4th 609, 633, 30 C.R.3d 330 [initiative naming Council on Chiropractic Education (CCE) as one of many organizations considered to be "accrediting agency" did not violate Cal. Const., Art. II, §12; it did not confer special privilege or advantage on CCE, or require CCE to perform any duties].



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CHAPTER X - Constitutional Law

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III. SEPARATION OF POWERS

C. Legislative Power.

3. Legislative Investigations.

a. Congressional Investigating Committees.

7 *Witkin Sum. Cal. Law Const Law* § 164

[§ 164] Congressional Investigating Committees.

A limited but important entry by the Legislature into the field of judicial or executive power is the legislative committee, which may hold hearings, summon witnesses, punish for contempt, etc., in the course of an investigation in aid of legislation. Congressional committees have received extensive consideration by the courts in cases dealing with the scope of inquiry, procedure, contempt, and constitutional guarantees protecting witnesses. (See *McGrain v. Daugherty* (1927) 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580; *United States v. Rumely* (1953) 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770 [House Committee on Lobbying Activities]; *Quinn v. United States* (1955) 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964 [House Committee on Un-American Activities]; *Wilkinson v. United States* (1961) 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d 633; *Braden v. United States* (1961) 365 U.S. 431, 81 S.Ct. 584, 5 L.Ed.2d 653; *Hutcheson v. United States* (1962) 369 U.S. 599, 82 S.Ct. 1005, 8 L.Ed.2d 137; *Gojack v. United States* (1966) 384 U.S. 702, 86 S.Ct. 1689, 16 L.Ed.2d 870; 1 Rotunda, §8.1 et seq.; 51 *Cal. L. Rev.* 267, 296, 311; 70 *Harv. L. Rev.* 671 [comprehensive note]; 76 *Harv. L. Rev.* 100; 40 *So. Cal. L. Rev.* 189 [historical study]; on self-incrimination privilege, see 2 *Cal. Evidence* (4th), *Witnesses*, §502.)

Barenblatt v. United States (1959) 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115, summarizes the basic principles: "The power of inquiry has been employed by Congress throughout our history, over the whole range of national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." (79 S.Ct. 1085, 3 L.Ed.2d 1120.)

But the power is not unlimited. "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one or the other branch of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case the relevant limitations of the Bill of Rights." (79 S.Ct. 1085, 3 L.Ed.2d 1120.)

The limitations were more pointedly declared in *Watkins v. United States* (1957) 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273. "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. ... Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." (77 S.Ct. 1179, 1 L.Ed.2d 1284.)

SUPPLEMENT: [This section is current through the latest supplement]
See 1 Rotunda 4th, §8.1 et seq.



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3. Legislative Investigations.

b. State and Municipal Investigating Committees.

7 *Witkin Sum. Cal. Law Const Law* § 165

[§ 165] State and Municipal Investigating Committees.

(1) *State Committees.* Committees of the California Legislature exercise powers similar to those of federal legislative committees (*supra*, §164). (See *In re Battelle* (1929) 207 C. 227, 240, 277 P. 725; 18 Cal. L. Rev. 289; 39 Cal. L. Rev. 502; on legislative interim committees, see *Special Assembly Interim Committee on Public Morals of Calif. Legislature v. Southard* (1939) 13 C.2d 497, 503, 90 P.2d 304; 28 Cal. L. Rev. 229; on constitutional guarantees protecting witnesses, see *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311.)

(2) *Municipal Committees.* In *Connecticut Indem. Co. v. Superior Court* (2000) 23 C.4th 807, 98 C.R.2d 221, 3 P.3d 868, plaintiff insurers challenged subpoenas issued by a city council as part of its investigation into contamination of the city's water wells and potential methods to finance abatement. Plaintiffs claimed that the subpoenas were issued solely in the city's interests in future litigation, and that the city's asserted legislative interests were a sham. *Held*, the subpoenas were valid. "[W]hen a city's issuance of a subpoena is, in itself, a proper exercise of legislative power, the potential that the city also may use information gained by that subpoena in future litigation does not render the subpoena invalid." (23 C.4th 816.) Courts should not second-guess a city's legislative motive, and here, there was no legitimate basis on which to conclude that the city's action failed "to advance the legitimate legislative functions of appropriation and lawmaking." (23 C.4th 816.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Municipal Committees.* See *Vacaville v. Pitamber* (2004) 124 C.A.4th 739, 748, 21 C.R.3d 396 [city properly issued subpoena to uncooperative taxpayer regarding compliance with city's taxing ordinance].



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a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 166

[§ 166] In General.

The rule against delegation of legislative power, like the companion rule that judicial power cannot be delegated (*supra*, §145), has yielded to the growing necessity for delegation to boards and officers of a large measure of discretionary power that is ordinarily considered legislative in character. (See *infra*, §167 et seq.) Nevertheless, delegation of an uncontrolled discretion is invalid; i.e., where the statute fails to set forth sufficiently definite standards, it is void. This was the result reached in the celebrated decision that invalidated the "codes of fair competition" established by the National Industrial Recovery Act of 1933. (*A.L.A. Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837, 848, 79 L.Ed. 1570, 1586; see *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446.) (See 23 *Cal. L. Rev.* 435; 24 *Cal. L. Rev.* 184; 75 *Harv. L. Rev.* 863, 1055, 1263; 108 *Harv. L. Rev.* 751 [review of Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation]; 16 *Hastings Const. L. Q.* 165 [A Fifth Branch of Government: The Private Regulators and Their Constitutionality]; 8 *So. Cal. L. Rev.* 226, 255; 14 *Stanf. L. Rev.* 372; 6 *U.C.L.A. L. Rev.* 312; 16 *Am.Jur.2d* (1998 ed.), *Constitutional Law* §332 et seq.)

California cases declare and apply the same test. (See *People's Fed. Savings & Loan Assn. v. State Franchise Tax Bd.* (1952) 110 *C.A.2d* 696, 700, 243 *P.2d* 902 [absolute discretion of Savings & Loan Commissioner to determine amount deductible from taxes attributable to withdrawable shares]; *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 *C.2d* 436, 448, 254 *P.2d* 29 [price-fixing discretion of members of industry being regulated]; *Allen v. California Bd. of Barber Examiners* (1972) 25 *C.A.3d* 1014, 1017, 102 *C.R.* 368 [same]; *Bayside Timber Co. v. Board of Supervisors of San Mateo* (1971) 20 *C.A.3d* 1, 10, 97 *C.R.* 431 [discretion of timber owners and operators to formulate forest practice rules for protection of public interest in lands and wildlife].)

The rule also precludes delegation of legislative powers of a city. (*Kugler v. Yocum* (1968) 69 *C.2d* 371, 375, 71 *C.R.* 687, 445 *P.2d* 303, *infra*, §169, citing the text; see 58 *Cal. L. Rev.* 293.) In *Bagley v. Manhattan Beach* (1976) 18 *C.3d* 22, 132 *C.R.* 668, 553 *P.2d* 1140, petitioners sought to place an initiative measure on the ballot in a city election, which provided for binding arbitration in disputes between the city and the firemen's employee organization. *Held*, the proposed measure was invalid; the clear legislative intent, evidenced by *Govt.C.* 36506 and legislative rejection of numerous attempts to enact compulsory arbitration statutes in the area of public employee salaries, is that the city council must fix that compensation and cannot delegate the power to an arbitrator. (18 *C.3d* 26.) (See *San Francisco*

Fire Fighters v. San Francisco (1977) 68 C.A.3d 896, 903, 137 C.R. 607 [following *Bagley* reasoning: city's charter did not authorize arbitration of fire department's rules and regulations]; *Alameda County Land Use Assn. v. Hayward* (1995) 38 C.A.4th 1716, 1724, 45 C.R.2d 752 [memorandum of understanding between county and two cities, under which they agreed that future general plan amendments regarding large parcel of land would be effective only if adopted by all three jurisdictions, was improper delegation of legislative powers].)

However, an important distinction is made in legislative authorization of decisionmaking authority by *industrial or professional associations*. There is no invalid delegation of legislative power unless the statute empowers the private industry to initiate or enact rules having legal force. (*King v. Meese* (1987) 43 C.3d 1217, 1234, 240 C.R. 829, 743 P.2d 859; see *International Assn. of Plumbing & Mechanical Officials v. California Bldg. Standards Com.* (1997) 55 C.A.4th 245, 255, 64 C.R.2d 129 [statute would not be construed to give private entity power to dictate applicable building code as this would be unlawful delegation of state's lawmaking authority].) In *King*, individual plaintiffs sought to restrain enforcement of the Financial Responsibility Act (see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §409), which makes it an infraction for a motorist stopped for a moving violation to fail to provide proof of financial responsibility. Plaintiffs contended that the Legislature unconstitutionally delegated its authority to the private insurance industry by requiring drivers to carry insurance, by allowing insurers to decide who will or will not be able to obtain private insurance and at what rates, and by failing to provide adequate guidelines to insurers in making their decisions.

The court said: "A statute that merely permits a private seller to decide to whom to sell, and at what price, is not unconstitutional." (43 C.3d 1234.) The opinion approved *Wilkinson v. Madera Community Hosp.* (1983) 144 C.A.3d 436, 192 C.R. 593, *infra*, §169, and disapproved *Rosner v. Peninsula Hosp. Dist.* (1964) 224 C.A.2d 115, 36 C.R. 332.

West's Key Number Digest, Constitutional Law k.59 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Coastside Fishing Club v. California Resources Agency* (2008) 158 C.A.4th 1183, 1203, 71 C.R.3d 87, quoting the text; 119 Harv. L. Rev. 1035 [legislative allocation of delegated power; choice between agencies and courts]; 35 *Hastings Const. L. Q.* 921 [development of nondelegation doctrine through New Deal, 1813-1944]; 81 So. Cal. L. Rev. 405 [judicially administered statutes and nondelegation doctrine].

Financial Responsibility Act:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §439.



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b. Express Standards.

7 *Witkin Sum. Cal. Law Const Law* § 167

[§ 167] Express Standards.

Where the Legislature lays down a sufficiently clear test or standard, the discretion to carry out the legislative purposes by rules and regulations may be given to a board or officer.

The theory was clearly expounded in the early case of *J.W. Hampton, Jr. & Co. v. United States* (1928) 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624. The "flexible tariff" act authorized the President to investigate the differences in cost of production of foreign and domestic articles in competition, and to increase or lower duties, within a range of 50% of the rates specified in the act, so as to equalize the conditions of foreign and domestic producers. It was further provided that he should be assisted by the Tariff Commission, that new rates should not be proclaimed until after a public hearing, and that changes should be terminated when differences no longer existed. *Held*, the delegation was proper; Congress had described its policy and plan, and authorized the executive branch to work out the difficult and complicated details so as to carry out the plan in conformity with the prescribed standard.

Yakus v. United States (1944) 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834, upheld the Emergency Price Control Act of 1942. The Court declared that the Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action," and that it is irrelevant that Congress itself might have prescribed maximum prices, for it "is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." (64 S.Ct. 667, 668, 88 L.Ed. 848, 849.)

Another strong statement of the policy supporting general delegations was made in *American Power & Light Co. v. Securities & Exchange Com.* (1946) 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103. The Public Utility Holding Company Act of 1935 was directed at the evil of pyramided corporate structures. The statute provided that the Securities & Exchange Commission should act so as to ensure that the corporate structure or continued existence of any company in a holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders." *Held*, there was no unconstitutional delegation. (a) Even considered alone, the quoted language has some meaning to those familiar with corporate realities. (b) More definite meaning, however, is given by the background of the Act, including the evils disclosed by the congressional investigations, and by the general policy declarations and regulations set forth elsewhere in the statute. (c) Nor is it a ground of constitutional objection that the Commission does not formulate detailed rules of thumb but proceeds to apply the legislative standards "by the

more flexible case-by-case method." It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations." (67 S.Ct. 142, 91 L.Ed. 116.)

Mistretta v. United States (1989) 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714, supra, §140, upheld the Sentencing Reform Act of 1984. The Act created a federal Sentencing Commission that adopted Sentencing Guidelines specifying a range of determinate sentences for all federal offenses.

(a) Except for two statutes invalidated in 1935, the Court has always upheld laws challenged on delegation grounds. (109 S.Ct. 655, 102 L.Ed.2d 731.) Here, Congress specified the goals and purposes of sentencing, prescribed the guidelines system as the specific tool to be used, directed the Commission to consider seven factors related to the offense and 11 related to the offender in formulating the guidelines, and provided even more detailed guidance for certain categories of offenses and offenders. (109 S.Ct. 655, 656, 657, 102 L.Ed.2d 732, 733.) "In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment--from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives--and stipulated the most important offense and offender characteristics to place defendants within these categories." (109 S.Ct. 657, 102 L.Ed.2d 734.)

(b) Although the statute grants the Commission significant discretion and requires it to exercise its judgment in classifying crimes and criminals, that delegation is permissible. "Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." (109 S.Ct. 658, 102 L.Ed.2d 735.)

One justice dissented, arguing that, although Congress provided sufficient standards to guide the Commission, the statute was nevertheless an invalid delegation because the Commission's rulemaking function was purely legislative. (109 S.Ct. 675, 102 L.Ed.2d 756.) (See 103 Harv. L. Rev. 279.)

Other decisions, both federal and state, almost invariably uphold the delegation. (See *United States v. Grimaud* (1911) 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563; *Lichter v. United States* (1948) 334 U.S. 742, 68 S.Ct. 1294, 1311, 92 L.Ed. 1694, 1720 [delegation of power under Renegotiation Act to determine "excess profits" to be repaid to the government]; *Touby v. United States* (1991) 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219 [federal Act authorizing Attorney General to add or remove controlled substances from statutory schedules did not violate nondelegation doctrine]; *Bank of Italy v. Johnson* (1926) 200 C. 1, 14, 251 P. 784; *Wotton v. Bush* (1953) 41 C.2d 460, 468, 261 P.2d 256; *Duskin v. State Bd. of Dry Cleaners* (1962) 58 C.2d 155, 160, 23 C.R. 404, 373 P.2d 468 [standard "need be sufficiently definite only to provide directives of conduct for the administrative body in exercising its delegated administrative or regulatory powers"].)

A far greater delegation to the President is permitted in *foreign affairs*; e.g., delegation of power to the President to declare an embargo. (*United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304, 57 S.Ct. 216, 225, 81 L.Ed. 255, 267; see *infra*, §1337.)

West's Key Number Digest, Constitutional Law k.59 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Hess Collection Winery v. Agricultural Lab. Rel. Bd.* (2006) 140 C.A.4th 1584, 1605, 45 C.R.3d 609 [upholding delegation of power to mediator to ensure more effective collective bargaining process between agricultural workers and growers]; *Coastside Fishing Club v. California Resources Agency* (2008) 158 C.A.4th 1183, 1205, 1208, 71 C.R.3d 87, quoting the text [upholding delegation of power to executive agency to enter into memorandum of understanding with private foundation to raise funds to implement statutory mandates of Marine Life Protection Act].



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c. Implied Standards.

7 *Witkin Sum. Cal. Law Const Law* § 168

[§ 168] Implied Standards.

Even where the legislative measure contains no express standards, the courts will sometimes imply them; e.g., an ordinance conferring apparently uncontrolled discretion on an officer or board to grant or deny a permit or license will be construed as authorizing only a legal discretion. (See *Roussey v. Burlingame* (1950) 100 C.A.2d 321, 324, 223 P.2d 517 [ordinance giving city council power to rule on application for change of boundary lines of lot]; *Davis v. Superior Court* (1959) 175 C.A.2d 8, 19, 345 P.2d 513 [P.C. 4570, authorizing prison warden to restrict communications to and from prisoner, calls for reasonable discretion in administration of prison].)

This is particularly true where a potentially dangerous or highly regulated business is involved, as pointed out by *In re Petersen* (1958) 51 C.2d 177, 331 P.2d 24, *infra*, §715. The San Francisco Chief of Police was authorized by ordinance to grant exclusive taxi stands on the public streets, and gave all stands at major hotels and stores to Yellow Cab Co. In upholding the ordinance, the court invoked the presumption that the agency will duly perform its public duty. "In the present case it is clear that the purpose of controlling taxicab stands by issuance of permits is to make satisfactory and orderly taxicab service readily available to the public without unnecessary obstruction of traffic. This purpose supplies standards which the chief of police must observe in granting or denying the permits. It is difficult to see how, as a practical matter, any additional standards could be set forth which would promote the objective of the ordinance, and nothing would be accomplished by requiring that the standards which are implied must be made express." (51 C.2d 185.) (See critical dissent, 51 C.2d 186; 47 Cal. L. Rev. 590; 6 U.C.L.A. L. Rev. 448.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Adequate Safeguards Doctrine.

7 *Witkin Sum. Cal. Law Const Law* § 169

[§ 169] Adequate Safeguards Doctrine.

"The need is usually not for standards but for safeguards . . . [T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards." (*Kugler v. Yocum* (1968) 69 C.2d 371, 381, 71 C.R. 687, 445 P.2d 303.) Thus, standards are merely one method of assuring against unlawful delegation of power. (69 C.2d 381, footnote 8.)

In *Kugler*, a proposed initiative measure for an ordinance of the city of Alhambra provided that salaries of firemen should be fixed in accordance with those of Los Angeles county firemen. The city council refused to submit it to the electorate on the ground that it would limit future exercise of power by the council without charter amendment. (See dissent, 69 C.2d 384, supporting this view.) The trial judge granted mandamus to compel adoption of the ordinance or an election. *Held*, affirmed.

(a) *Safeguards obviate need for standards.* The purpose of the nondelegation doctrine is to assure that truly fundamental issues will be resolved by the Legislature and that the grant of authority is accompanied by safeguards adequate to prevent its abuse. (69 C.2d 376.) "This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." (69 C.2d 376.)

(b) *Application of the doctrine: Fundamental issue resolved.* The ordinance resolves the "fundamental issue"--the policy that Alhambra wages for firemen must be on a parity with Los Angeles. The policy may be based on the belief that the city could not recruit them at lesser rates than in the adjoining county, or the fact that Los Angeles possesses superior ability to canvass comparable wages. Implementation of that policy, by filling in the facts and executing it, is not an exercise of legislative power. (69 C.2d 377.) Analogies may be found in the formulae, recognized as lawful, that tie adjustments in compensation for employees to future events such as the cost of living or average earnings or prevailing wages of a comparable occupation. The fact that a third party, whether private or governmental, performs some role in implementation of an established legislative scheme, is not an objection. (69 C.2d 379.)

(c) *Application of the doctrine: Safeguards provided.* The safeguards are economic. Los Angeles is no more

anxious to pay exorbitant compensation than Alhambra, and competitive economic forces and bargaining power will tend to settle wages at a realistic level. (69 C.2d 382.)

(d) *Conclusion*. "Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative character of the process of reaching legislative decision." (69 C.2d 384.)

In *Wilkinson v. Madera Community Hosp.* (1983) 144 C.A.3d 436, 192 C.R. 593, defendant community hospital refused to reappoint plaintiff doctor to the medical staff because he failed to maintain malpractice insurance with a "recognized insurance company" as required by defendant's rules. Plaintiff challenged the constitutionality of *Health & Saf.C. 1319*, authorizing a health facility to require professional liability insurance as a condition to being on the medical staff. *Held*, the statute is valid. Once the Legislature has established the law, it may delegate the authority to administer or apply it to governmental or private entities, provided that the delegation is accompanied by safeguards against arbitrary action. (144 C.A.3d 442, citing *Kugler*.) *Health & Saf.C. 1319* may be read as containing the implied safeguard that hospitals may only impose reasonable insurance requirements, i.e., those that would guarantee that the hospital would be protected in the event the doctor was guilty of malpractice. (144 C.A.3d 444.)

Most delegations include adequate safeguards. (See *State Bd. of Education v. Honig* (1993) 13 C.A.4th 720, 751, 16 C.R.2d 727; *Wilson v. State Bd. of Education* (1999) 75 C.A.4th 1125, 1147, 89 C.R.2d 745 [following *Honig*; Charter Schools Act, *Educ.C. 47600* et seq., does not offend nondelegation doctrine because it includes fixed standards and limits to safeguard chartering authority's decisionmaking process]; *People v. Sun Pac. Farming Co.* (2000) 77 C.A.4th 619, 634, 92 C.R.2d 115 [Pest Control Law provides adequate standards to guide citrus pest control districts in control and eradication of citrus pests]; *Alexander v. State Personnel Bd.* (2000) 80 C.A.4th 526, 538, 95 C.R.2d 324 [State Personnel Board's statutory authorization to conduct demonstration projects that required waiver of various provisions of Civil Service Act did not constitute improper delegation of power where adequate safeguards provided check on Board's power and projects were of limited duration].)

SUPPLEMENT: [This section is current through the latest supplement]

Adequate safeguards: See *Samples v. Brown* (2007) 146 C.A.4th 787, 804, 809, 53 C.R.3d 216 [statutes requiring impoundment of vehicle driven by unlicensed driver or involved in speed contest provided sufficient guidance for implementation of legislative policy, including length of impoundment and early release].



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C. Legislative Power.

5. Legislative Veto.

7 Witkin Sum. Cal. Law Const Law § 170

[§ 170] Legislative Veto.

The legislative veto is a statutory provision permitting one or both Houses of Congress or its committees to annul by resolution an action or rule of the executive branch or an administrative agency. In *Immigration & Naturalization Service v. Chadha* (1983) 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317, the Court held that the legislative veto provision in the Immigration and Nationality Act, invoked by one House of Congress to nullify an Attorney General's order suspending the deportation of a deportable alien, was unconstitutional.

"Since it is clear that the action by the House ... was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed by Art. I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." (104 S.Ct. 2787, 77 L.Ed.2d 348, 349.) (For comment on the effect of this decision on congressional statutes containing legislative veto provisions, see 2 Rotunda, §10.8; 1 Tribe, §4-4; 21 Cal. Western L. Rev. 174; 97 Harv. L. Rev. 185; 24 Santa Clara L. Rev. 697.)

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise (1991) 501 U.S. 252, 111 S.Ct. 2298, 115 L.Ed.2d 236, involved a Congressional Act authorizing transfer of operating control of two Washington, D.C., airports from the Federal Government to the Metropolitan Washington Airports Authority (MWAA). The transfer was conditioned on creation by MWAA of a "Board of Review" composed of nine members of Congress vested with veto powers over decisions of MWAA's Board of Directors. *Held*, the condition violated the constitutional principle of separation of powers.

(a) "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, §7." (111 S.Ct. 2312, 115 L.Ed.2d 259.)

(b) The statutory scheme "provides a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role. Given the scope of the federal power to dispense benefits to the States in a variety of forms and subject to a host of statutory conditions, Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy." (*111 S.Ct. 2312, 115 L.Ed.2d 259.*) (See *105 Harv. L. Rev. 206.*)

SUPPLEMENT: [This section is current through the latest supplement]
See 2 Rotunda 4th, §10.8.



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D. Executive Power.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 171

[§ 171] In General.

Although an occasional decision deals with delegation of executive power (see *Parker v. Riley* (1941) 18 C.2d 83, 113 P.2d 873, supra, §138), the chief problems relate to the scope of the power. (See 1 Rotunda, §§6.1 et seq., 7.1 et seq.; 1 Tribe, §4-1 et seq.; 74 *Harv. L. Rev.* 684 [judicial review of administrative processes in which the President participates]; 1 *Hastings Const. L. Q.* 21 [The Executive Power in State and Federal Constitutions]; 21 *Hastings Const. L. Q.* 865 [presidential defiance of "unconstitutional" laws]; 29 *Hastings Const. L. Q.* 589 [challenging executive orders]; 34 *McGeorge L. Rev.* 65 [White House nondisclosure regarding Enron, and shaping of national energy policy]; on presidential pardoning power, see *Schick v. Reed* (1974) 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430, 3 *Cal. Crim. Law* (3d), *Punishment*, §663; 89 *Harv. L. Rev.* 59; 2 *Pepperdine L. Rev.* 353 [pardon of Richard Nixon]; on executive privilege, see *United States v. Nixon* (1974) 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, 2 *Cal. Evidence* (4th), *Witnesses*, §303.)

The scope of executive power often depends on the particular subject involved:

(1) *Foreign Affairs*. The President is primarily responsible for the conduct of foreign affairs, and presidential power is generally considered at its greatest in that area. (See 1 Rotunda, §6.1; 68 *Cal. L. Rev.* 1186; 9 *Hastings Const. L. Q.* 719; 17 *Hastings Const. L. Q.* 609 [executive power to implement antiterrorism programs]; 183 *A.L.R. Fed* 57 [International Emergency Economic Powers Act]; on federal power in foreign affairs, see *infra*, §1337 et seq.; on President's power to make treaties, see *infra*, §1338 et seq.)

In *Dames & Moore v. Regan* (1981) 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918, the Court upheld the power of the President by executive orders to nullify attachments and liens on Iranian assets in the U.S. to give effect to an Executive Agreement between the U.S. and Iran. Crucial to the Court's decision "is the conclusion that Congress has implicitly approved the practice of claims settlement by executive agreement." (101 S.Ct. 2987, 69 L.Ed.2d 940.) The Court made it clear that it did not recognize a plenary power of the President to settle claims, but declared that (a) the settlement here had been determined to be necessary to resolution of a major foreign policy dispute, and (b) Congress acquiesced in the President's action. (101 S.Ct. 2991, 69 L.Ed.2d 945.) (See 95 *Harv. L. Rev.* 191 [criticizing *Dames & Moore*]; 15 *Loyola L.A. L. Rev.* 249; 29 *U.C.L.A. L. Rev.* 977.)

(2) *Emergency or Inherent Power*. The question whether the President has inherent or emergency powers has been

much debated. (See 1 Rotunda, §6.1; 96 *Harv. L. Rev.* 1102 [International Emergency Economic Powers Act]; 7 *Hastings Const. L. Q.* 1 [the "stewardship" theory of extraconstitutional executive power in domestic affairs]; 52 *So. Cal. L. Rev.* 1453 [The National Emergency Dilemma: Balancing the Executive's Crisis Powers With the Need for Accountability]; 56 *So. Cal. L. Rev.* 863 [Controlling Inherent President Power: Providing a Framework for Judicial Review].)

Youngstown Sheet & Tube Co. v. Sawyer (1952) 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, held that the President had no constitutional power to seize private property (steel mills) to prevent a labor dispute from stopping production. The order, the Court said, directed that a presidential policy be executed in a manner prescribed by the President; and the power to adopt these policies was in Congress alone. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." (72 S.Ct. 867, 96 L.Ed. 1167.) (See 29 *Hastings Const. L. Q.* 373 [Youngstown Revisited].)

(3) *Impoundment of Funds*. The questions whether, or to what extent, the President may impound and refuse to spend funds appropriated by Congress, and whether Congress may restrict the President's power in this area, have likewise received a great deal of attention but no definitive answers. (See 1 Rotunda, §7.4; 86 *Harv. L. Rev.* 1505; 22 *Stanf. L. Rev.* 1240.)

(4) *State Budgetary Restrictions*. In *Carmel Valley Fire Protection Dist. v. California* (2001) 25 C.4th 287, 105 C.R.2d 636, 20 P.3d 533, plaintiff fire districts sought reimbursement for the cost of providing protective gear for firefighters as mandated by state safety laws. Plaintiffs claimed that Govt.C. 17581 and budget language suspending both the equipment mandate and reimbursement for its performance violated California's separation of powers clause (Cal. Const., Art. III, §3) by invading the power of the executive branch to carry out its duties under Cal/OSHA. *Held*, there is no separation of powers violation.

Govt.C. 17581 and the budget items in question were properly enacted. (25 C.4th 306, distinguishing *Immigration & Naturalization Service v. Chadha* (1983) 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317, *supra*, §170.) Their "enactment expressed a legislative determination to suspend a regulation and thereby curtail the authority of the executive in pursuit of the legitimate goal of allocating scarce resources." (25 C.4th 308.) The statute and budget acts "had only a narrow impact upon the Department of Industrial Relations' regulatory scheme and ability to enforce health and safety regulations." (25 C.4th 308.) Although the districts purchased the protective gear at their own expense, they have the right under Govt.C. 17581(b) to impose local fees to recoup their costs. (25 C.4th 308.)

West's Key Number Digest, Constitutional Law k.76 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, §§6.1 et seq., 7.1 et seq.(1) *Foreign Affairs*. See 1 Rotunda 4th, §6.1.

(2) *Emergency or Inherent Power*. See 1 Rotunda 4th, §6.1; 54 *U.C.L.A. L. Rev.* 1703 [Youngstown].

Under the Emergency Services Act, the Governor has the power to declare a state of emergency in cases of extreme peril to life, property, or state resources. The Act grants the Governor broad powers to deal with emergencies, including suspending regulatory statutes, commandeering private property or personnel, and making expenditures from available funds. (See Govt.C. 8550 et seq.; *California Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 C.A.4th 802, 808, 812, 820, 77 C.R.3d 844 [Governor did not exceed powers under Emergency Services Act in declaring emergency based on prison overcrowding and in directing department of corrections to contract with private prisons to house inmates out of state].)(3) *Impoundment of Funds*. See 1 Rotunda 4th, §7.4.

(4) *State Budgetary Restrictions*. Govt.C. 17581(b) was relettered as Govt.C. 17581(c) in 2007.



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III. SEPARATION OF POWERS

D. Executive Power.

2. Appointment Power.

7 Witkin Sum. Cal. Law Const Law § 172

[§ 172] Appointment Power.

(1) *In General.* The federal Constitution gives the power of appointment to the President, subject to the consent of the Senate. (U.S. Const., Art. II, §2, cl. 2; see 2 Rotunda, §9.4; 28 *Loyola L.A. L. Rev.* 1139 [discussing Lani Guinier confirmation fight and suggesting reform of executive confirmation process]; 36 *U.C. Davis L. Rev.* 583 [symposium on appointment of federal judges]; on recess appointments, see 2 Rotunda, §§9.8, 9.9; 10 *Stanf. L. Rev.* 124.) The Appointments Clause further provides that "Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." (U.S. Const., Art. II, §2, cl. 2.)

In *Freytag v. Commissioner of Internal Revenue* (1991) 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764, Congress established the United States Tax Court, and authorized its chief judge to appoint special trial judges. *Held*, this grant of authority did not violate the Appointments Clause.

"The Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands. Moreover, since the early 1800s, Congress regularly granted non-Article III territorial courts the authority to appoint their own clerks of court, who, as of at least 1839, were 'inferior officers' within the meaning of the Appointments Clause. ... Including Article I courts, such as the Tax Court, that exercise judicial power and perform exclusively judicial functions among the 'Courts of Law' does not significantly expand the universe of actors eligible to receive the appointment power." (111 S.Ct. 2645, 115 L.Ed.2d 788.) (See *Ryder v. United States* (1995) 515 U.S. 177, 115 S.Ct. 2031, 2034, 2036, 132 L.Ed.2d 136, 141, 144 [appointment of civilian judges on Coast Guard Court of Military Review was in violation of Appointments Clause]; *Edmond v. United States* (1997) 520 U.S. 651, 117 S. Ct. 1573, 1582, 137 L.Ed.2d 917, 932 [appointment of judges of Coast Guard Court of Criminal Appeals by Secretary of Transportation is in conformity with Appointments Clause because those judges are "inferior officers" within meaning of clause]; 26 *Hastings Const. L. Q.* 935 [appointment of Assistant Attorney General for Civil Rights]; on judicially appointed special prosecutor, see *infra*, §175.)

(2) *Power of Removal.* It has been held that the President has the exclusive power to remove purely executive officers so appointed. (*Myers v. United States* (1926) 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 [postmaster].) But officers exercising quasi-legislative and quasi-judicial functions with fixed terms of office, such as members of the Federal

Trade Commission, cannot be removed by the President except for causes provided by statute. (*Humphrey's Executor v. United States* (1935) 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611; see *Wiener v. United States* (1958) 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 [no power to remove member of War Claims Commission]; 49 Harv. L. Rev. 330 [*Humphrey's Executor*]; 72 Harv. L. Rev. 164 [*Wiener*]; 9 So. Cal. L. Rev. 71 [*Humphrey's Executor*]; 2 Rotunda, §9.10.)

(3) *State Constitution*. The power of the Governor to fill a vacancy in a constitutional office is subject to confirmation by both houses of the Legislature. (Cal. Const., Art. V, §5(b); see *Lungren v. Deukmejian* (1988) 45 C.3d 727, 735, 248 C.R. 115, 755 P.2d 299.)

The powers of California's Lieutenant Governor were defined in *Brown v. Curb* (1979) 26 C.3d 110, 160 C.R. 760, 603 P.2d 1357. The court held that (a) the Lieutenant Governor has authority to exercise all gubernatorial powers of appointment while the Governor is physically absent from the state; but (b) the Governor has authority to withdraw the appointment until its confirmation becomes effective. (26 C.3d 113, 120, 122.) (See 68 Cal. L. Rev. 796; 7 *Hastings Const. L. Q.* 831.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 2 Rotunda 4th, §§9.4, 9.8, 9.9.(2) *Power of Removal*. See 2 Rotunda 4th, §9.10.



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3. Veto.

7 Witkin Sum. Cal. Law Const Law § 173

[§ 173] Veto.

The power to veto bills is an exception to the rule against exercise of legislative power by the executive. (See *Edwards v. United States* (1932) 286 U.S. 482, 52 S.Ct. 627, 76 L.Ed. 1239; *Wright v. United States* (1938) 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439.) The power extends to a reapportionment bill. (*Legislature v. Reinecke* (1972) 6 C.3d 595, 601, 99 C.R. 481, 492 P.2d 385.)

The federal Line Item Veto Act was held unconstitutional as a violation of the Presentment Clause. (*Clinton v. New York* (1998) 524 U.S. 417, 118 S.Ct. 2091, 2108, 141 L.Ed.2d 393, 420; see 88 Cal. L. Rev. 181 [Line Item Veto Act]; 20 Thomas Jefferson L. Rev. 323 [same].) And it has been held in California that the Governor cannot approve a law subject to modifications; a bill must be accepted or rejected as a whole. (*Lukens v. Nye* (1909) 156 C. 498, 501, 105 P. 593; cf. *De Asis v. Department of Motor Vehicles* (2003) 112 C.A.4th 593, 601, 5 C.R.3d 231 [bill that was sent to Governor, but was retrieved by Chief Clerk, returned to Legislature, withdrawn from enrollment, and placed in Legislature's inactive file, did not become law because its retrieval deprived Governor of full 30-day period to deliberate on bill].) However, by special constitutional provision the Governor has the power to eliminate or reduce items of an appropriation. (See *Reardon v. Riley* (1938) 10 C.2d 531, 535, 76 P.2d 101; 12 So. Cal. L. Rev. 321.)

This subject was fully explored in *Harbor v. Deukmejian* (1987) 43 C.3d 1078, 240 C.R. 569, 742 P.2d 1290. On June 15, 1984, the Legislature enacted a budget containing an item of over \$ 1.5 billion for aid to families with dependent children (AFDC). Ten days later, it passed Senate Bill 1379, dealing with many fiscal matters, including \$45.5, amending Welf.C. 11056 to allow AFDC benefits to be paid from the time the application is made rather than the date it is processed. In approving the budget, the Governor reduced the AFDC allotment by \$ 9,776,000, and in approving Senate Bill 1379, he purported to veto \$45.5 to conform to his action in reducing the AFDC allotment in the budget. Petitioner challenged this action, contending that the veto power did not extend to disapproving parts of bills that were not appropriation measures. *Held*, the Governor's veto was invalid.

(a) The Governor may veto a *bill* by returning it to the "house of origin," and it will then become law only if each house passes it by a two-thirds vote. (Cal. Const., Art. IV, §10(a).)

(b) The Governor's veto power over *appropriations* is more extensive: The Governor may reduce or eliminate one or more items. (Cal. Const., Art. IV, §10(b), now Art. IV, §10(e).) This distinction is generally recognized in state

Constitutions. (43 C.3d 1084, 1086.)

(c) The veto of §45.5 cannot be justified on the ground that the section is an "item of appropriation." It does not set aside money for the payment of any claim, and does not add any additional amount to funds already provided for; "[l]ike thousands of other statutes, it directs that a department of government act in a particular manner with regard to certain matters." (43 C.3d 1089.) Although it will require the expenditure of funds, it only expresses the Legislature's intention that the AFDC appropriation, whatever its amount, be used to provide benefits from the date of application. (43 C.3d 1090.)

(d) The veto cannot be justified on the theory that the section, standing alone, is a "bill" for the purpose of determining the scope of the veto power. This interpretation would place an intolerable burden on the relations between the executive and legislative branches of government. "[W]e reject, therefore, respondents' claim that the Governor should be empowered to make a determination as to how many subjects are contained in a bill presented to him for signature, and to veto parts of a bill which he determines constitute a separate subject therein." (43 C.3d 1093.)

(e) The veto could be justified on the ground that Senate Bill 1379 violates the constitutional single-subject rule. (See *supra*, §131.) However, to avoid serious consequences of this ruling, it should not be retroactively applied to §45.5. (43 C.3d 1101, 1102.)

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4. Invalid Delegation of Executive Power.

7 *Witkin Sum. Cal. Law Const Law* § 174

[§ 174] Invalid Delegation of Executive Power.

In *Bowsher v. Synar* (1986) 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583, the Court examined the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman-Hollings Act"), which provided for across-the-board cuts in federal spending to reach a targeted deficit level. These "automatic" reductions were to be accomplished through the "reporting provisions" of the Act, requiring the Directors of the Office of Management and Budget and the Congressional Budget Office to submit deficit estimates and reduction calculations to the Comptroller General, whose specification of spending reductions was to be ordered by the President. This action was brought by Congressmen and others, challenging these statutory provisions as an unconstitutional grant of executive powers to the Comptroller General. *Held*, the legislation was unconstitutional; the Comptroller General, while appointed by the President, can be removed by a joint resolution of Congress or by impeachment, and Congress cannot retain the power of removal over an officer performing executive functions.

(a) "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." (106 S.Ct. 3187, 92 L.Ed.2d 594.) Hence, Congress cannot reserve the power of removal of these officers, except by impeachment. (106 S.Ct. 3188, 92 L.Ed.2d 596.)

(b) *Immigration & Naturalization Service v. Chadha* (1983) 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317, *supra*, §170, holding a one house "legislative veto" invalid, supports this conclusion. "To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress." (106 S.Ct. 3189, 92 L.Ed.2d 596, 597.)

(c) The executive nature of the Comptroller General's functions is clear from the provision of the Act that gives him or her the ultimate authority to determine the budget cuts to be made. (106 S.Ct. 3192, 92 L.Ed.2d 600.)

Two justices dissented. (See 100 Harv. L. Rev. 220; 13 Hastings Const. L. Q. 185; 14 Hastings Const. L. Q. 205.)

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D. Executive Power.

5. Judicially Appointed Special Prosecutor.

7 *Witkin Sum. Cal. Law Const Law* § 175

[§ 175] Judicially Appointed Special Prosecutor.

In *Morrison v. Olson* (1988) 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569, the Court upheld the constitutionality of the independent counsel provisions of the Ethics in the Government Act of 1978 (28 U.S.C., §§49, 591 et seq.). The Act allows for the appointment of an "independent counsel" to investigate and, if appropriate, to prosecute certain high ranking governmental officials for violations of federal criminal laws, as follows:

(a) The Attorney General, after a preliminary investigation, may report to a court ("Special Division") that there are reasonable grounds for further investigation or prosecution, and the court must appoint an independent counsel and define his or her prosecutorial jurisdiction. (See 28 U.S.C., §§591(c), 592(c).)

(b) The authority and functions of the independent counsel, and his or her tenure and the procedures for termination of the office, are fully covered. (See 28 U.S.C., §594.)

(c) Provision is also made for congressional oversight of the independent counsel's activities. (See 28 U.S.C., §595.)

The constitutionality of the Act was challenged on several grounds, and the opinion, after a careful review of the statutory provisions and case law, rejected all attacks. "In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsels in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch." (108 S.Ct. 2622, 101 L.Ed.2d 609.) (See 102 Harv. L. Rev. 105; 16 Hastings Const. L. Q. 393, 603.)

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6. No Stay of Private Action.

7 *Witkin Sum. Cal. Law Const Law* § 176

[§ 176] No Stay of Private Action.

In *Clinton v. Jones* (1997) 520 U.S. 681, 117 S.Ct. 1636, 1650, 137 L.Ed.2d 945, 968, 5 *Summary* (10th), *Torts*, §179, the Court held that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until the President leaves office. "If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidity of his official actions." (117 S.Ct. 1650, 137 L.Ed.2d 967.) (See 108 *Harv. L. Rev.* 701 [extent of president's immunity from suit]; 28 *Southwestern U. L. Rev.* 71 [argument favoring legislation permitting sitting President to defer litigation]; 25 *Western State L. Rev.* 211 [hypothetical claim against President for acts before taking office]; on immunity of President and aides generally, see 5 *Summary* (10th), *Torts*, §179.)

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Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY

A. In General.

1. Restrictions on Federal and State Power.

a. Federal Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 177

[§ 177] Federal Constitution.

The federal government is restricted by the first eight Amendments to the Constitution, known as the Bill of Rights. The provisions of these Amendments apply only to the federal government, and do not restrict the states. (*Barron v. Baltimore* (1833) 32 U.S. 243, 8 L.Ed. 672, 675; *Feldman v. United States* (1944) 322 U.S. 487, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408, 1413; *Adamson v. California* (1947) 332 U.S. 46, 67 S.Ct. 1672, 1675, 91 L.Ed. 1903, 1908; *Wolf v. Colorado* (1949) 338 U.S. 25, 69 S.Ct. 1359, 1360, 93 L.Ed. 1782, 1784; see 2 Rotunda, Chap. 14; 25 So. Cal. L. Rev. 22; 41 So. Cal. L. Rev. 491 [review of Emerson, Political and Civil Rights in the United States]; 19 U.C.L.A. L. Rev. 343 [review of documentary history of Bill of Rights]; 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §407 et seq.)

Most of the fundamental rights are also protected against state action by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the federal Constitution. (See *infra*, §§218 et seq., 694 et seq.)

The theory that the constitutional protections are not fully operative while an American citizen is outside the continental limits of the U.S., set forth as dictum by *In re Ross* (1891) 140 U.S. 453, 11 S.Ct. 897, 900, 35 L.Ed. 581, 586, was repudiated in *Reid v. Covert* (1957) 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148, *infra*, §1332, in the following language: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." (77 S.Ct. 1225, 1 L.Ed.2d 1157.) And *all* of the safeguards exist: "[W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt not's' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." (77 S.Ct. 1226, 1 L.Ed.2d 1159.)

SUPPLEMENT: [This section is current through the latest supplement]

See 2 Rotunda 4th, Chap. 14.



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IV. FUNDAMENTAL RIGHTS GENERALLY

A. In General.

1. Restrictions on Federal and State Power.
 - b. California Constitution.

7 Witkin Sum. Cal. Law Const Law § 178

[§ 178] California Constitution.

Cal. Const., Art. I, contains a number of guarantees under the general heading of "Declaration of Rights." All of them are covered in detail under appropriate topical headings in the text.

The introductory section (Cal. Const., Art. I, §1) states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

The remaining sections cover the following subjects:

Speech and press (§2).

Assembly and petition (§3).

Religion (§4).

The military (§5).

Involuntary servitude (§6).

Due process, equal protection, and privileges and immunities (§7).

Employment discrimination (§8).

Bills of attainder, ex post facto laws, obligation of contracts (§9).

Detention of witnesses and imprisonment for debt (§10).

Suspension of habeas corpus (§11).

Bail and release on own recognizance (§12).

Search and seizure (§13).

Prosecution of felony and arraignment (§14).

Safeguards in criminal prosecutions (§15).

Trial by jury (§16).

Cruel or unusual punishment or excessive fines (§17).

Treason (§18).

Eminent domain (§19).

Property rights of noncitizens (§20).

Separate property of spouses (§21).

No property qualification on right to vote (§22).

Grand juries (§23).

Construction of constitutional rights (§24).

Fishing rights (§25).

Construction of constitutional provisions (§26).

Death penalty (§27).

Under the independent grounds doctrine, the California Constitution may give broader protection of rights than the federal Constitution. (See *supra*, §109; 25 *Hastings Const. L. Q.* 1 [Rediscovering the State Constitutional Right to Happiness and Safety].)

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A. In General.

1. Restrictions on Federal and State Power.

c. Classification of Rights.

7 Witkin Sum. Cal. Law Const Law § 179

[§ 179] Classification of Rights.

The principal fundamental rights are treated in this Chapter under the following topics:

- (1) Citizenship (infra, §182 et seq.).
- (2) Unreasonable search and seizure (infra, §199).
- (3) Slavery and involuntary servitude (infra, §200 et seq.).
- (4) Protection to persons accused of crime (infra, §204 et seq.).
- (5) Jury trial (infra, §208 et seq.).
- (6) Fundamental rights under Due Process Clause (infra, §218 et seq.).
- (7) Suffrage (infra, §227 et seq.).
- (8) Freedom of speech, press, and assembly (infra, §311 et seq.).
- (9) Freedom of religion (infra, §505 et seq.).
- (10) Peripheral rights under Ninth Amendment (infra, §558 et seq.).

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Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY A. In General. 2. Right To Petition Government.

7 *Witkin Sum. Cal. Law Const Law* § 180

[§ 180] Right To Petition Government.

The right to petition the Government for redress of grievances (U.S. Const., First Amend.; Cal. Const., Art. I, §3(a)) has occasionally been invoked in civil cases.

In *Matossian v. Fahmie* (1980) 101 C.A.3d 128, 161 C.R. 532, the court held that holders of alcoholic beverage licenses "have a right, in combination, to protest the granting, or transfer, of a similar license for the sole purpose of preventing or limiting competition." (101 C.A.3d 132.) The opinion points out that the right of petition to governmental agencies, like freedom of speech, press, or religion, has a paramount and preferred place in our democratic system (101 C.A.3d 135), and that it is not confined to religious or political matters (101 C.A.3d 136). Hence, "where, as here, a statute expressly invites or allows interested persons to protest, or give their views or opinions concerning, proposed or requested governmental administrative action, such persons singly or in combination have a *lawful right* to do so;" and "the law will not permit judicial or other inquiry into the person's purpose or motivation." (101 C.A.3d 137.) (See 4 Rotunda, §20.53; 36 *Stanf. L. Rev.* 1243; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §531 et seq.)

In *Long Beach v. Bozek* (1982) 31 C.3d 527, 535, 183 C.R. 86, 645 P.2d 137, 5 *Summary* (10th), *Torts*, §487, the California Supreme Court held that the right to petition a governmental entity gave rise to the defense of absolute privilege in a later action for malicious prosecution by the governmental entity. (See *Long Beach v. Bozek* (1983) 33 C.3d 727, 190 C.R. 918, 661 P.2d 1072 [memorandum opinion after reversal by U.S. Supreme Court, stating that California decision was based on both federal and state Constitutions; hence California Constitution furnished independent ground].) The court said:

"The right of petition is of parallel importance to the right of free speech and the other overlapping, cognate rights contained in the First Amendment and in equivalent provisions of the California Constitution. Although it has seldom been independently analyzed, it does contain an inherent meaning and scope distinct from the right of free speech. It is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government. A tort action against a municipality is but one of the available means of seeking redress. If cities are permitted to bring malicious prosecution actions against those who have unsuccessfully sued them, the institution of legitimate as well as baseless legal claims will be discouraged." (31 C.3d 535.) (See *Smith v. Silvey* (1983) 149 C.A.3d 400, 406, 197 C.R. 15 [following *Bozek*; mobilehome park tenant dissatisfied with plaintiff's operation of park, made complaints to governmental agencies and brought legal action to

force reinspection of park improvements]; 106 *Harv. L. Rev.* 1111 [A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions]; 21 *Hastings Const. L. Q.* 15 [examination of case law].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Mejia v. Los Angeles* (2007) 156 C.A.4th 151, 163, 67 C.R.3d 228 [trial court did not err in awarding attorneys' fees under C.C.P. 1021.5, which permits award of fees to successful party in certain actions enforcing important rights affecting public interest; important government interest served by statute is unrelated to suppression of valid petitioning activity, and incidental restriction on opposing party's right to petition as result of financial burden is justified and narrowly tailored to achieve that interest]; 5 *Rotunda* 4th, §20.53.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY A. In General. 3. Right To Bear Arms.

7 *Witkin Sum. Cal. Law Const Law* § 181

[§ 181] Right To Bear Arms.

The Second Amendment to the federal Constitution provides: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The California Constitution has no such provision, and in *Presser v. Illinois* (1886) 116 U.S. 252, 266, 6 S.Ct. 580, 29 L.Ed. 615, which preceded acceptance of the incorporation theory (infra, §218 et seq.), the Second Amendment was held *not* to apply to the states. (See *In re Rameriz* (1924) 193 C. 633, 651, 226 P. 914 [Second Amendment "applies only to the exercise of power by the federal government"]; 86 A.L.R.4th 931 [validity of state gun control legislation under state constitutional provisions securing right to bear arms].)

The major issue concerning the Second Amendment is whether it protects only the *state governments* from acts by the federal Government that would interfere with state militia and police forces, or whether there is an *individual* right to bear arms that restricts government from prohibiting private possession of at least some types of firearms. The U.S. Supreme Court has not decided the issue, but there is support in its opinions for the states' rights approach. (See *United States v. Miller* (1939) 307 U.S. 174, 59 S.Ct. 816, 819, 83 L.Ed. 1206, 1209 [federal government may by taxation regulate sawed-off shotguns]; *Lewis v. United States* (1980) 445 U.S. 55, 65, footnote 8, 100 S.Ct. 915, 63 L.Ed.2d 198, [federal government may prohibit possession of firearms by felons]; 2 Rotunda §14.2, footnote 4; 2 *Hastings Const. L. Q.* 961 [supporting states' rights theory]; 10 *Hastings Const. L. Q.* 285 [supporting individual rights theory]; 50 *Hastings L. J.* 177 [The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence]; 13 *So. Cal. L. Rev.* 129; 55 *Stanf. L. Rev.* 1193, 1313, 1371 ["more guns, less crime" hypothesis]; 18 *Thomas Jefferson L. Rev.* 61 [discussing whether private militias are protected under First and Second Amendments]; 31 *U.C. Davis L. Rev.* 309 [hidden history of Second Amendment]; 36 *U.C. Davis L. Rev.* 455 [individual right theory of Second Amendment].)

SUPPLEMENT: [This section is current through the latest supplement]

In *District of Columbia v. Heller* (2008) 554 U.S. ___, 128 S.Ct. 2783, 171 L.Ed.2d 637, the Court considered whether a District of Columbia ban on the possession of firearms in the home violated the Second Amendment to the United States Constitution. Defendant district made handgun possession a crime by requiring the registration of firearms generally, but then prohibiting the registration of handguns. The law also required residents to keep lawfully owned firearms, such as registered long guns, unloaded and disassembled or bound by a trigger lock or similar device, unless the

guns were located in a place of business or were being used for lawful recreational activities. Plaintiff, a special police officer authorized to carry a handgun while on duty, applied for a registration certificate for a handgun that he wished to keep at home, but a certificate was denied. Plaintiff challenged the constitutionality of the law on Second Amendment grounds, seeking to enjoin defendant from enforcing the bar on the registration of handguns and the trigger lock requirement insofar as it prohibited the use of functional firearms within the home. The trial court dismissed plaintiff's complaint, but the Court of Appeals reversed and directed the trial court to enter summary judgment for plaintiff. *Held*, judgment of the Court of Appeals affirmed.

(a) *Second Amendment language.*

(1) *Introduction.* The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Defendant argues that the Second Amendment protects only the right to possess and carry firearms in connection with militia service, while plaintiff contends that it protects an individual right to possess firearms not connected with militia service, and to use those arms for traditionally lawful purposes, such as self-defense within the home. (128 S.Ct. 2788, 2789, 171 L.Ed.2d 648.) The prefatory clause, rather than limiting the operative clause grammatically, announces a purpose, and logic dictates that there must be a link between the stated purpose and the operative clause's command. Thus, the prefatory clause may resolve an ambiguity in the operative clause, but, apart from that clarifying function, the prefatory clause does not limit or expand the scope of the operative clause. (128 S.Ct. 2789, 171 L.Ed.2d 648, 649.)

(2) *Operative clause: right of the people.* The original Constitution and the Bill of Rights use the phrase "right of the people" or similar language three times other than in the Second Amendment. All three of these usages unambiguously refer to individual rights, not collective rights or rights that may be exercised only through participation in some corporate body. Three provisions of the Constitution refer to "the people" in a context other than rights. These provisions arguably refer to "the people" acting collectively, but they deal with the reservation of powers. (128 S.Ct. 2790, 171 L.Ed.2d 650.) In the six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not to an unspecified subset. This contrasts markedly with the term "militia" in the prefatory clause, because the "militia" in colonial America consisted of a subset of "the people," i.e., those who were male, able bodied, and of appropriate age. Thus, reading the Second Amendment as protecting only the right to "keep and bear arms" in an organized militia fits poorly with the description in the operative clause of the holder of that right as "the people." (128 S.Ct. 2790, 2791, 171 L.Ed.2d 650, 651.)

(3) *Operative clause: keep and bear arms.*

(a) The term "arms" was applied, in colonial times as now, to weapons not specifically designed for military use and not employed in a military capacity. And the term is not limited to those arms that were in existence in the 18th century. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms. (128 S.Ct. 2791, 171 L.Ed.2d 651.)

(b) "Keep arms" was, in colonial times, a common way of referring to possession, and to "bear arms" simply meant "to carry." (128 S.Ct. 2792, 2793, 171 L.Ed.2d 651, 652.) Although the phrase "to bear arms" "implies that the carrying of the weapon is for the purpose of 'offensive or defensive action,' it in no way connotes participation in a structured military organization." (128 S.Ct. 2793, 171 L.Ed.2d 653.) The phrase also had an idiomatic meaning that was significantly different: to serve as a soldier, do military service, fight, or wage war. However, "bear arms" unequivocally had that idiomatic meaning only when followed by the preposition "against," followed by the target of the hostilities. Without that preposition, "bear arms" meant, as it continues to mean today, carrying a weapon on the person for the purpose of being ready for offensive or defensive action in case of a conflict with another person. (128 S.Ct. 2793, 2794, 171 L.Ed.2d 653, 654.)

(c) The first dissent places great weight on the inclusion of the following conscientious-objector clause in the

original draft of the Second Amendment: "no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." The dissent contends that this clause establishes that the drafters of the Second Amendment intended "bear Arms" to refer only to military service. This position is without merit. The clause was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Rather, the most natural interpretation of the clause is that those opposed to carrying weapons for potential violent confrontation would not be compelled to render military service. (128 S.Ct. 2796, 171 L.Ed.2d 656.)

(4) *Meaning of operative clause.* This textual analysis shows that the Second Amendment guarantees the individual right to possess and carry weapons in case of confrontation, a *preexisting* right created in England in response to attempts by the Crown to disarm its enemies. (128 S.Ct. 2797, 2798, 171 L.Ed.2d 657, 658.) Thus, when King George III attempted to disarm the rebellious colonists, it was only natural that they invoked the right of Englishmen to bear arms, a right that had nothing to do with military service. However, the right to keep and bear arms is not unlimited, just as the right of free speech does not allow citizens to speak for any purpose. (128 S.Ct. 2799, 171 L.Ed.2d 659.)

(5) *Prefatory clause: well-regulated militia.* In colonial times, the militia was comprised of all males physically capable of acting in concert for the common defense (see *United States v. Miller* (1939) 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed.2d 1206, text, p. 319). (128 S.Ct. 2799, 171 L.Ed.2d 659.) Defendant argues that, under the Militia Clauses of the Constitution (U.S. Const., Art. I, §8) militias were regulated military forces. This argument is incorrect, because it focuses on the wrong thing, i.e., the organized militia. Unlike armies and navies, which Congress is given the power to create, Article I assumes that the militia already is in existence. For example, U.S. Const., Art. I, §8, gives Congress the power to organize "the" militia, connoting a body already in existence, not to organize "a" militia, which is what one would expect if the militia were to be a federal creation. The "adjective 'well-regulated' implies nothing more than the imposition of proper discipline and training." (128 S.Ct. 2800, 171 L.Ed.2d 660.)

(6) *Prefatory clause: being necessary for the security of a free state.* In the 18th century, "a free state" was a term of art meaning "a free country" or "a free polity." (128 S.Ct. 2800, 171 L.Ed.2d 660.) Accordingly, when "state" is used in the Constitution to designate a particular state, rather than all the states, it is usually accompanied by a modifier, such as "each," "one," or "that." The militia was thought to be necessary to the security of a free state to repel invasions or insurrections, to render large standing armies unnecessary, and to resist tyranny. (128 S.Ct. 2800, 171 L.Ed.2d 661.)

(7) *Relationship between prefatory clause and operative clause.* The prefatory clause fits perfectly with the operative clause, given the history that the founding generation knew, i.e., that tyrants could eliminate a militia of all able-bodied men not by banning the militia, but by taking away their arms, thereby enabling a select militia or standing army to suppress political opponents. This is what had occurred in England and prompted codification, in the English Bill of Rights, of the right to bear arms. This was the reason that the right to keep and bear arms, unlike some other English rights, was codified in the United States Constitution. When viewed in light of this history, it is entirely sensible to conclude that the purpose of the Second Amendment's prefatory clause was to prevent elimination of the citizen militia. (128 S.Ct. 2801, 171 L.Ed.2d 661, 662.) Defendant claims that the organized militia, not the citizen militia, was the sole institutional beneficiary of the Second Amendment right to keep and bear arms. However, this interpretation does not assure the existence of a citizen militia as a safeguard against tyranny, because, under U.S. Const., Art. I, §8, "Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force." In other words, if defendant is correct, the Second Amendment protects the people's right to use a gun in an organization from which Congress has plenary authority to exclude them, and thus guarantees a select militia of the sort that the English kings found useful in spreading tyranny. This is not the people's militia that was the concern of the founders. (128 S.Ct. 2802, 171 L.Ed.2d 662.)

(b) *Supreme Court decisions arguably foreclosing interpreting Second Amendment as conferring individual right.* *United States v. Cruikshank* (1875) 92 U.S. 542, 23 L.Ed 588, held that the Second Amendment applies only to the federal Government, and that the states are free to restrict or protect the right to bear arms for lawful purposes under their police powers. There was no claim in *Cruikshank* that persons had been deprived of their right to carry arms in a militia. Indeed, the discussion in *Cruikshank* makes little sense if the Second Amendment grants only the right to bear

arms in a state militia. (128 S.Ct. 2813, 171 L.Ed.2d 674.) *Presser v. Illinois* (1886) 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615, text, p. 318, held that the Second Amendment does not prevent the prohibition of private paramilitary organizations, but says nothing about its meaning or scope. *United States v. Miller*, *supra*, upheld, against a Second Amendment challenge, federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce. The basis of the opinion was that the *type* of weapon at issue was not eligible for Second Amendment protection. (128 S.Ct. 2813, 2814, 171 L.Ed.2d 675.) "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." Thus, nothing in the Supreme Court's precedents precludes the holding that the Second Amendment protects an individual right to possess firearms not connected with service in a militia. (128 S.Ct. 2815, 2816, 171 L.Ed.2d 677.)

(c) *Right applied to defendant's law.*

(1) The inherent right of self-defense is central to the Second Amendment right. Yet defendant's handgun ban amounts to a prohibition of the class of arms that is overwhelmingly chosen by American society for that lawful purpose. Moreover, the prohibition extends to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that have been applied to constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protecting one's home and family fails constitutional muster. (128 S.Ct. 2817, 171 L.Ed.2d 679.) In response to defendant's contention that it is permissible to ban the possession of handguns so long as the possession of other firearms, like long guns, is allowed, it is enough to note that the American people, for many reasons, have long considered the handgun to be the quintessential self-defense weapon: A handgun "is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police." Defendant's requirement that handguns in the home be rendered inoperable at all times, thus making it impossible for citizens to use them for the core lawful purpose of self-defense, is also unconstitutional. (128 S.Ct. 2818, 171 L.Ed.2d 680.)

(2) The second dissent argues that, even assuming that the Second Amendment is a personal guarantee of the right to bear arms, defendant's law is valid, because it imposes a burden on gun owners that is proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. However, the founding-era statutes cited to support this claim were fire and safety regulations not nearly as burdensome as one preventing citizens from using handguns in self-defense. (128 S.Ct. 2819, 171 L.Ed.2d 681.) Moreover, all of the earlier laws punished the violation with a small fine and forfeiture of the weapon, while defendant's law, by contrast, threatens citizens with a year in prison for a first offense. (128 S.Ct. 2820, 2821, 171 L.Ed.2d 682.)

(3) The second dissent proposes a judge-empowering interest-balancing inquiry that asks whether defendant's statute burdens a protected interest to an extent that is out of proportion to the statute's salutary effects. This is an improper approach. There is no other enumerated constitutional right whose core protection has been subjected to a freestanding interest-balancing approach. The very enumeration of a right takes out of the hands of government the power to decide on a case-by-case basis whether the right is really worth insisting upon. "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." (128 S.Ct. 2821, 171 L.Ed.2d 683.) Assuming that plaintiff is not disqualified from the exercise of Second Amendment rights, defendant must permit him to register his handgun and must issue him a license to carry it in the home. (128 S.Ct. 2822, 171 L.Ed.2d 683, 684.)

(d) *Limitations.* "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." (128 S.Ct. 2816, 171 L.Ed.2d 678.) The weapons protected by the Second Amendment are those in common use at the time of its passage. It may be objected that if weapons that are most useful in military service, i.e., M-16 rifles and the

like, may be banned, then the Second Amendment right is completely detached from the prefatory clause. "But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." (128 S.Ct. 2817, 171 L.Ed.2d 679.)

(e) *Conclusion.* "We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. ... But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." (128 S.Ct. 2822, 171 L.Ed.2d 684.)

Four justices joined together in two dissenting opinions. One opinion concluded that the Second Amendment was adopted to protect the right of the people of each of the several states to maintain a well-regulated militia, and that there is no indication that the framers intended to enshrine the common law right of self-defense in the *Constitution*. (128 S.Ct. 2822, 171 L.Ed.2d 684.) The other opinion argued that, because the Second Amendment permits government to regulate the interests that it serves, the majority's view could not be correct unless it could show that defendant's regulation was unreasonable or inappropriate in Second Amendment terms, a showing that the majority failed to make. (128 S.Ct. 2847, 171 L.Ed.2d 710, 711.)

See 2 Rotunda 4th, §14.2; 33 *Lincoln L. Rev.* 43 [intersection of First and Second Amendments]; 39 *McGeorge L. Rev.* 1043 [implications of individual right to bear arms on constitutionality of gun-free zones].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY B. Citizenship. 1. Citizenship by Birth.

7 *Witkin Sum. Cal. Law Const Law* § 182

[§ 182] Citizenship by Birth.

(1) *Persons Born in U.S.* The Fourteenth Amendment recognizes two types of citizenship, national and state, in the following provision: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." (See 66 *Harv. L. Rev.* 704; 3*C Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §2680 et seq.) Thus, state citizenship is derived from national citizenship, although some distinctions are made in the statement of their respective rights and privileges. (*Slaughter-House Cases* (1872) 83 U.S. 36, 21 *L.Ed.* 394; see *infra*, §608 et seq.)

A person born in the U.S. may be a citizen, though his or her parents were aliens formerly ineligible to citizenship. (*United States v. Wong Kim Ark* (1898) 169 U.S. 649, 18 S.Ct. 456, 42 *L.Ed.* 890; see 107 *Harv. L. Rev.* 1026 [criticizing proposed constitutional amendment denying citizenship to American-born children of undocumented aliens]; 22 *Pepperdine L. Rev.* 669 [discussing whether Fourteenth Amendment should be altered or repealed to deny automatic citizenship to American-born children of illegal aliens].)

(2) *Persons Born Outside U.S.* A legitimate child born abroad of a parent who is a citizen and has resided in the U.S. gets national citizenship. (See 8 U.S.C., §1401; 66 *Harv. L. Rev.* 704; on difference in status between person born here and person born and residing abroad, see *Rogers v. Bellei* (1971) 401 U.S. 815, 91 S.Ct. 1060, 28 *L.Ed.2d* 499, *infra*, §196.) However, illegitimate children born outside the U.S. are treated differently, depending on whether the citizen parent is the mother or the father. (See *Miller v. Albright* (1998) 523 U.S. 420, 118 S.Ct. 1428, 1440, 140 *L.Ed.2d* 575, 593 [upholding, without plurality opinion, distinction in treatment for citizenship purposes between illegitimate children born outside U.S. of U.S. citizen mothers and those of U.S. citizen fathers]; 112 *Harv. L. Rev.* 202 [Miller]; 51 *Hastings L. J.* 557 [same]; 175 *A.L.R. Fed* 67 [validity and construction of 8 U.S.C., §1401(c)-(g), providing citizenship in certain circumstances to child born outside U.S., or found within U.S. and of unknown parentage].)

The lack of a plurality opinion in *Miller v. Albright* left open the question whether the statutory distinction between illegitimate children born outside the U.S. to U.S. citizen mothers and those of U.S. citizen fathers violates the equal protection guarantee of the Fifth Amendment. In *Tuan Anh Nguyen v. Immigration & Naturalization Service* (2001) 533 U.S. 53, 121 S.Ct. 2053, 150 *L.Ed.2d* 115, the Court held, in a 5-4 opinion, that the statute is constitutional. "Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of

rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective." (121 S.Ct. 2060, 150 L.Ed.2d 127.) A father seeking to establish paternity has three options under 8 U.S.C., §1409: legitimation, paternity oath, and court order of paternity. The statute "is designed to ensure acceptable documentation of paternity." (121 S.Ct. 2060, 150 L.Ed.2d 127.) (See 115 Harv. L. Rev. 376 [*Tuan Anh Nguyen*]; 178 A.L.R. Fed 25 [sex discrimination under Equal Protection and Due Process Clauses].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Persons Born in U.S.* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2213 et seq.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY

B. Citizenship.

2. Citizenship by Naturalization.

a. Immigration.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 183

[§ 183] In General.

(1) *Federal Law*. Congress has the power to admit or deny admission to aliens, and to impose restrictions on admission. (See *United States v. Shaughnessy* (1950) 338 U.S. 537, 70 S.Ct. 309, 312, 94 L.Ed. 317, 324; *Kleindienst v. Mandel* (1972) 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 [Attorney General may bar temporary admission of foreign Marxist scholar despite desire of U.S. residents to hear and communicate with him]; *Fiallo v. Bell* (1977) 430 U.S. 787, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50, 56; 3A *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §402 et seq.)

The law on immigration was revised by the McCarran-Walter or Immigration and Nationality Act of 1952 (8 U.S.C., §1101 et seq.), which establishes quotas for most immigrants, and specifies various grounds for exclusion (physical or mental defects, criminal activity, subversive activity, likelihood of becoming a public charge, etc.). Although the Act has been frequently amended, it continues to be the basic immigration law of the country. (See 96 *Harv. L. Rev.* 1334 [admission and exclusion of immigrants under Act]; 96 *Harv. L. Rev.* 1352 [amendment by Refugee Act of 1980]; 3A *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §5 et seq.)

The Immigration Reform and Control Act of 1986 includes: (a) an amnesty program under which certain illegal aliens who have been in the country illegally since January 1, 1982, may qualify for legalization of their status and permanent residence (8 U.S.C., §1255a); (b) a similar program for certain agricultural workers who worked in the United States for at least 90 days during the year ending May 1, 1986 (8 U.S.C., §1160); (c) prohibitions against and sanctions for employment of illegal aliens (8 U.S.C., §1324a; see *infra*, §188); and (d) prohibitions against unfair immigration-related employment practices (8 U.S.C., §1324b). (See *McNary v. Haitian Refugee Center* (1991) 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 [amnesty program]; *Reno v. Catholic Social Services* (1993) 509 U.S. 43, 113 S.Ct. 2485, 125 L.Ed.2d 38; 26 Cal. Western L. Rev. 149; 24 *San Diego L. Rev.* 277; 41 *Stanf. L. Rev.* 187 [suggesting coordinated U.S.-Mexico approach as alternative to unilateral approach of 1986 Act]; on 1986 immigration acts, see 3A *Am.Jur.2d* (1998 ed.), *Aliens and Citizens*, §11 et seq.; on subsequent acts, see 3A *Am.Jur.2d* (1998 ed.), *Aliens and Citizens*, §14 et seq.)

(2) *Cooperation With Federal Agents*. Govt.C. 53069.75 was enacted in 1993 as an urgency measure to comply with state law requirements mandated by 42 U.S.C., §3753, relating to eligibility for federal grants under the Omnibus

Control and Safe Streets Act. Under the statute, no local law may prohibit a peace or custodial officer from identifying and reporting to the U.S. Immigration and Naturalization Service any person, pursuant to federal law or regulation, to whom both of the following apply:

(a) The person was arrested and booked, based on the arresting officer's probable cause to believe that the person arrested had committed a felony. (*Govt.C. 53069.75(a).*)

(b) "After the arrest and booking in subdivision (a), the officer reasonably suspects that the person arrested has violated the civil provisions of the federal immigration laws." (*Govt.C. 53069.75(b).*)

(3) *Texts and Law Reviews.* Commentary on immigration laws has been extensive. (See 3 Rotunda, §18.11; 81 *Cal. L. Rev.* 863 [Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society]; 82 *Cal. L. Rev.* 1595 [domicile under Immigration and Nationality Act]; 92 *Cal. L. Rev.* 373 [Citizenship, Standing, and Immigration Law]; 22 *Hastings Const. L. Q.* 491 [deportation of alien parents of citizen child as unconstitutional de facto deportation of child]; 96 *Harv. L. Rev.* 1286, 1311 [constitutional limitations on power to exclude aliens]; 100 *Harv. L. Rev.* 853 [*Chinese Exclusion Case* and its progeny], 930 [ideological exclusion of political dissidents]; 108 *Harv. L. Rev.* 1643 [illegal immigration and limits of judicial federalism]; 22 *Hastings Const. L. Q.* 915 [symposium on constitutional problems in state and federal immigration law]; 27 *Loyola L.A. L. Rev.* 1265 [federal immigration law and case for open entry]; 26 *Pacific L. J.* 989 [Proposition 187]; 24 *Southwestern U. L. Rev.* 319 [discussing paradox of unenforceable immigration law]; 29 *Southwestern U. L. Rev.* 301 [inadmissibility and unlawful reentry after deportation]; 45 *Stanf. L. Rev.* 114 [Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990]; 8 *U.C. Davis L. Rev.* 217 [ideological restrictions on immigration]; 46 *U.C.L.A. L. Rev.* 1 [race discrimination and immigration law]; 177 *A.L.R.Fed* 459 [illegal reentry of alien who has been denied admission, deported, or removed]; 187 *A.L.R. Fed* 325 [mandatory predeportation detention provision of Immigration and Nationality Act]; 193 *A.L.R. Fed* 673 [Abandonment of Lawful Permanent-Resident Status]; 196 *A.L.R. Fed* 337 [hardship standard for cancellation of removal of alien]; see annual symposia on immigration and nationality published in *San Diego L. Rev.*, commencing 13 *San Diego L. Rev.* 1.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Federal Law.*

Power of Congress: See 3A *Am.Jur.2d* (2005 ed.), *Aliens and Citizens* §293 et seq.

Immigration and Nationality Act: See 3A *Am.Jur.2d* (2005 ed.), *Aliens and Citizens* §1 et seq.

Immigration Reform and Control Act: See 3A *Am.Jur.2d* (2005 ed.), *Aliens and Citizens* §25.

Subsequent acts: See 3A *Am.Jur.2d* (2005 ed.), *Aliens and Citizens* §26 et seq. (3) *Texts and Law Reviews.* See 3 Rotunda 4th, §18.11; 38 *U.C. Davis L. Rev.* 599 [Symposium: Immigration and Civil Rights After September 11: The Impact on California]; 10 *A.L.R. Fed* 2d 435 [validity, construction, and application of Legal Immigration Family Equity Act]; 15 *A.L.R. Fed* 2d 149 [construction and application of antismuggling of aliens statute]; 21 *A.L.R. Fed* 417 [validity, construction, and application of waiver of inadmissibility under INA]; 26 *A.L.R. Fed* 2d 645 [who is religious worker eligible for "special immigrant" status].



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a. Immigration.

2. Scope of Power.

7 *Witkin Sum. Cal. Law Const Law § 184*

[§ 184] Scope of Power.

The Immigration Act (*supra*, §183) formerly excluded aliens afflicted with psychopathic personality, sexual deviation, or mental defect. (Former 8 U.S.C., §1182(a)(4); see 8 U.S.C., §1182(a)(1) [inadmissibility for physical or mental disorder that poses danger to alien or to society].) In *Boutilier v. Immigration & Naturalization Service* (1967) 387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed.2d 661, petitioner, a Canadian, was a homosexual for some years before his entry. When he applied for citizenship, an arrest for sodomy came to light, and he revealed his history of homosexual behavior. After a hearing, he was ordered deported, and his petition for review was dismissed by the Court of Appeals. *Held*, affirmed.

The principal attack was on the vagueness of the language; i.e., the phrase is medically ambiguous and does not adequately warn an alien of the sexual condition that could lead to his or her deportation. But Congress used the term for the express purpose of excluding "persons having homosexual and perverted characteristics"; thus, the test is not what psychiatrists may think but what Congress intended. And petitioner was not being deported for conduct engaged in after entry, but rather for characteristics he possessed at the time of entry which made him inadmissible. The constitutional requirement of fair warning has no application to this situation; Congress has plenary power to make rules of exclusion of aliens with certain characteristics. (87 S.Ct. 1567, 18 L.Ed.2d 666.) (See 96 Harv. L. Rev. 1344 [use of statutory interpretation to circumvent specific holding of *Boutilier*]; 4 San Diego L. Rev. 148; 13 U.C.L.A. L. Rev. 246 [exclusion for "sexual deviation"]; 3 U.S.F. L. Rev. 374.)

In *Fiallo v. Bell* (1977) 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50, the Court, quoting an earlier decision, declared that "over no conceivable subject is the legislative power of Congress more complete" than it is over the admission of aliens. "Our recent decisions have not departed from this long-established rule." (97 S.Ct. 1478, 52 L.Ed.2d 56.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Marriage Fraud Act.

7 Witkin Sum. Cal. Law Const Law § 185

[§ 185] Marriage Fraud Act.

The Marriage Fraud Act withholds for a period of 2 years permanent resident status for an alien who has married a U.S. citizen. (*8 U.S.C., §1186a.*) The Act authorizes termination of the conditional permanent resident status if the Attorney General determines, within 2 years from the time the status was obtained, that the "qualifying marriage" (1) "was entered into for the purpose of procuring an alien's entry as an immigrant" or (2) "has been judicially annulled or terminated, other than through the death of a spouse." (*8 U.S.C., §1186a(b)*); see *8 U.S.C., §1186a(c)*, (d) [requirements of timely petition and interview for removal of condition]; *8 U.S.C., §1227(a)(1)(D)* [termination of status, under *8 U.S.C., §1186a*, as ground for deportation]; *8 U.S.C., §1154(c)(2)* [restriction on approving immigrant status petition where Attorney General determines that "the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws"]; *8 U.S.C., §1325(c)* [criminal penalty for "[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws"]; 25 Cal. Western L. Rev. 1 [1986 amendments to Act]; 99 *Harv. L. Rev.* 1238 [constitutionality of INS sham marriage investigation policy]; 15 *Pepperdine L. Rev.* 181 [detailed discussion of Act]; 8 *U.C. Davis L. Rev.* 309 [Defense of Sham Marriage Deportations].)

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 - 4. Detention of Juvenile Aliens.

7 *Witkin Sum. Cal. Law Const Law* § 186

[§ 186] Detention of Juvenile Aliens.

In *Reno v. Flores* (1993) 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1, the issue was stated as follows: "Over the past decade, the Immigration and Naturalization Service (INS) has arrested increasing numbers of alien juveniles who are not accompanied by their parents or other related adults. Respondents, a class of alien juveniles so arrested and held in INS custody pending their deportation hearings, contend that the Constitution and immigration laws require them to be released into the custody of 'responsible adults.'" (113 S.Ct. 1443, 123 L.Ed.2d 12.)

In rejecting the contention, the Court said: "We are unaware ... that any court--aside from the courts below--has ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody. ... Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in 'preserving and promoting the welfare of the child,' ... and is not punitive since it is not excessive in relation to that valid purpose." (113 S.Ct. 1447, 123 L.Ed.2d 17.) (See 107 Harv. L. Rev. 175; 27 *Hastings Const. L. Q.* 597 [contradictions of protecting undocumented children under Special Immigrant Juvenile statute].)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Political Asylum for Refugees.

7 *Witkin Sum. Cal. Law Const Law* § 187

[§ 187] Political Asylum for Refugees.

Congress' power over admission of aliens includes the power to determine whether, and under what circumstances, to admit political refugees; and the federal Refugee Act of 1980 created a permanent mechanism to handle both the normal flow of refugees and emergencies involving large numbers of them. (See 96 *Harv. L. Rev.* 1352; 24 *San Diego L. Rev.* 449; 60 *So. Cal. L. Rev.* 1441; 3A *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §1206 et seq.; 3B *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §1892 et seq.) The Act provides as follows:

(1) The annual admission of a specified number of refugees, and admission of greater numbers when justified by humanitarian concerns. (8 *U.S.C.*, §1157.)

(2) The Attorney General is required to establish a procedure under which refugees already in this country may apply for discretionary grants of asylum. (8 *U.S.C.*, §1158.)

(3) A "refugee" is a person who "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," is unable or unwilling to return to or to avail himself or herself of the protection of his or her own country. (8 *U.S.C.*, §1101(a)(42)(A).)

(4) Discretionary relief from deportation if the alien shows persecution or "a *well-founded fear* of persecution" on account of one of the specified grounds. (8 *U.S.C.*, §1101(a)(42), 1158(a); see 8 *U.S.C.*, §1225(b)(1)(B) [requiring alien to have "credible fear of persecution"].) The test focuses on the alien's *subjective mental state* and the "more likely than not" standard does not apply. (*Immigration & Naturalization Service v. Cardoza-Fonseca* (1987) 480 *U.S.* 421, 107 *S.Ct.* 1207, 1212, 94 *L.Ed.2d* 434, 447, 458; see 101 *Harv. L. Rev.* 340; 22 *U.S.F. L. Rev.* 385.) (See *Immigration & Naturalization Service v. Elias-Zacarias* (1992) 502 *U.S.* 478, 112 *S.Ct.* 812, 117 *L.Ed.2d* 38.)

In *Immigration & Naturalization Service v. Aguirre-Aguirre* (1999) 526 *U.S.* 415, 119 *S.Ct.* 1439, 143 *L.Ed.2d* 590, an illegal immigrant sought withholding of deportation based on his fear of persecution for earlier political activities. The Board of Immigration Appeals (BIA) did not decide whether the immigrant had established the requisite risk of persecution, because it determined that he was ineligible for withholding because he had committed a "serious

nonpolitical crime" within the meaning of former 8 U.S.C., §1253(h)(2)(C) (see 8 U.S.C., §1158(b)(2)(A)), before his entry into this country. The Court of Appeals remanded, concluding that the BIA had applied an incorrect interpretation of the serious nonpolitical crime provision. *Held*, reversed and remanded.

The BIA properly applied the phrase "serious nonpolitical crime" by "weighing 'the political nature' of an act against its 'common-law' or 'criminal' character." (119 S.Ct. 1445, 143 L.Ed.2d 600.) However, the Court of Appeals held that the BIA must supplement this weighing test by examining additional factors such as (a) the political necessity and success of the immigrant's methods, (b) whether his acts were grossly out of proportion to their objective or were atrocious, and (c) the persecution he might suffer on return to his native country. (119 S.Ct. 1442, 143 L.Ed.2d 597.) This was error. The BIA's determination should have been given deference. (119 S.Ct. 1445, 1446, 143 L.Ed.2d 601.)

In *Sale v. Haitian Centers Council* (1993) 509 U.S. 155, 113 S.Ct. 2549, 125 L.Ed.2d 128, the issue was the validity of the Coast Guard's interception of vessels engaged in the illegal transportation of undocumented aliens to this country, and returning of those passengers to Haiti without first determining whether they might qualify as refugees. The Court held that neither former 8 U.S.C., §1253(h)(1) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applied to action taken by the Coast Guard on the high seas. (113 S.Ct. 2552, 125 L.Ed.2d 137.) (See 107 *Harv. L. Rev.* 352 [*Sale*]; 21 *Hastings Const. L. Q.* 1071 [Fifth Amendment due process rights of interdicted Haitian refugees]; 33 *Hastings L. J.* 1501 [Haitian requests for political asylum]; 32 *San Diego L. Rev.* 673 [American policy toward Haitian refugees during 1980s and 1990s]; 23 *Southwestern U. L. Rev.* 151 [*Sale*]; 45 *Stanf. L. Rev.* 687 [Haitian immigration policy].)

Commentary on refugees is extensive. (See 14 *Hastings Const. L. Q.* 25 [sanctuary movement]; 23 *Loyola L.A. L. Rev.* 1023 [The Nature-Law Claim to Sanctuary for Central American Refugees]; 32 *San Diego L. Rev.* 745 [eligibility for asylum of victims of China's coercive population control policies]; 60 *So. Cal. L. Rev.* 1429 [sanctuary movement]; 24 *Southwestern U. L. Rev.* 473 [suggestions for reform of procedures under Refugee Act]; 30 *Southwestern U. L. Rev.* 171 [asylum policy towards victims of domestic violence]; 24 *Thomas Jefferson L. Rev.* 239 [same]; 42 *U.C.L.A. L. Rev.* 182 [definition of "persecution on account of political opinion" under Refugee Act]; 42 *U.C.L.A.* 1115 [eligibility of homosexuals for political asylum]; 45 *U.C.L.A. L. Rev.* 733 [Interpreting the Refugee Definition]; 179 *A.L.R.Fed* 357 [necessity and sufficiency of evidence corroborating alien's testimony to establish basis for asylum]; 177 *A.L.R.Fed* 203 [sufficiency of evidence to establish well-founded fear of persecution entitling alien to refugee status; persecution in African and Oceanian nations]; 180 *A.L.R.Fed* 369 [same; persecution in North and South American nations]; 182 *A.L.R. Fed* 147 [same; persecution in European and Asian nations]; 189 *A.L.R. Fed* 231 [When Has Alien Firmly Resettled in Another Country So As To Mitigate Against or Preclude Grant of Asylum in the United States].)

SUPPLEMENT: [This section is current through the latest supplement]

See 3A *Am.Jur.2d* (2005 ed.), *Aliens and Citizens* §998 et seq.; 3B *Am.Jur.2d* (2005 ed.), *Aliens and Citizens* §1593 et seq.; 199 *A.L.R. Fed* 307 [sufficiency of evidence to establish past persecution in African and Oceanic nations]; 1 *A.L.R. Fed* 2d 89 [sufficiency of evidence to establish past persecution in Asian nations]; 4 *A.L.R. Fed* 2d 117 [sufficiency of evidence of past persecution in North and South American nations]; 6 *A.L.R. Fed* 2d 67 [sufficiency of evidence of past persecution in European nations]; 29 *A.L.R. Fed* 2d 267 [construction of federal statutes and regulations providing that alien is disqualified from refugee status and ineligible for asylum or withholding of removal if alien participated in persecution of individual because of individual's race, religion, nationality, membership in particular social group, or political opinion].



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a. Immigration.

6. Employment of Unauthorized Aliens.

7 *Witkin Sum. Cal. Law Const Law* § 188

[§ 188] Employment of Unauthorized Aliens.

The Immigration Reform and Control Act of 1986 (*supra*, §183) includes provisions that, for the first time, make employers subject to civil and criminal sanctions if they knowingly violate the law with respect to employment of unauthorized aliens. (8 U.S.C., §1324a; see *Hoffman Plastic Compounds v. N.L.R.B.* (2002) 535 U.S. 137, 122 S.Ct. 1275, 1284, 152 L.Ed.2d 271, 284 [allowing NLRB to award back pay to illegal alien who was fired for union organizing would be inconsistent with federal immigration policy expressed in IRCA]; 100 *Harv. L. Rev.* 1979 [constitutionality of workplace raids in light of Act]; 116 *Harv. L. Rev.* 392 [*Hoffman Plastic*]; 24 *San Diego L. Rev.* 277 [Immigration Reform and Control Act]; 41 *Stanf. L. Rev.* 187 [suggesting coordinated U.S.-Mexico approach as alternative to unilateral approach of 1986 Act]; 51 *U.C.L.A. L. Rev.* 1 [*Hoffman Plastic* and new Bracero Program]; 3*B Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §2387 et seq.)

(1) The Act makes it unlawful for an employer knowingly to hire or to retain an unauthorized alien (8 U.S.C., §1324a(a)), and requires employers to comply with an employment verification system under which the employer must verify that a new employee is not an unauthorized alien by examining a specified document or documents submitted by the employee (8 U.S.C., §1324a(b)). Good faith compliance with the verification system requirements is an affirmative defense to a charge that the employer has violated the employment prohibitions. (8 U.S.C., §1324a(a)(3).)

(2) The Attorney General must establish procedures for complaints and investigations of violations. Civil penalties may include both cease and desist orders and monetary sanctions against employers. (8 U.S.C., §1324a(e).) Criminal penalties (imprisonment, fine, or both) and injunctions may be sought if an employer "engages in a pattern or practice of violations." (8 U.S.C., §1324a(f).)

(3) An "unauthorized alien" is defined as one who is neither "lawfully admitted for permanent residence" nor "authorized to be so employed by this Act or by the Attorney General." (8 U.S.C., §1324a(h)(3).)

SUPPLEMENT: [This section is current through the latest supplement]

See *Reyes v. Val Elk, Ltd.* (2007) 148 C.A.4th 604, 613, 616, 56 C.R.3d 68, 3 Summary (10th), *Agency and Employment*, Supp., §391 [Immigration Reform and Control Act did not preempt action by undocumented aliens for

violation of state prevailing wage law, which protects all residents of California and fosters goal of IRCA to control illegal immigration by removing incentive to employers to hire undocumented workers]; *3B Am.Jur.2d (2005 ed.)*, *Aliens and Citizens* §1937 et seq.



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b. Naturalization.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 189

[§ 189] In General.

Naturalization is the process by which an alien may become a citizen; i.e., "the conferring of nationality of a state upon a person after birth, by any means whatsoever." (8 U.S.C., §1101(a)(23).) The federal Constitution provides that Congress has the power to establish a uniform rule of naturalization. (U.S. Const., Art. I, §8, cl. 4; see 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2770 et seq.)

"The sole power to naturalize persons as citizens of the United States is conferred upon the Attorney General." (8 U.S.C., §1421(a).) However, the oath of allegiance may be administered by a district court or a state court having unlimited law and equity jurisdiction. (See 8 U.S.C., §1421(b).) (On naturalization procedure, see 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2963 et seq.; on derivative citizenship of children without formal naturalization, and petition by parent to naturalize child, see 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2877 et seq.)

Naturalized citizens cannot hold the office of President (U.S. Const., Art. II, §1, cl. 4) and are subject to denaturalization proceedings (see *infra*, §193). Apart from these exceptions, the rights of citizenship of the native born and the naturalized person "are of the same dignity and are coextensive." (*Schneider v. Rusk* (1964) 377 U.S. 163, 84 S.Ct. 1187, 1189, 12 L.Ed.2d 218, 220, *infra*, §196; see *Afroyim v. Rusk* (1967) 387 U.S. 253, 87 S.Ct. 1660, 1665, 18 L.Ed.2d 757, 763, *infra*, §197.)

SUPPLEMENT: [This section is current through the latest supplement]

Naturalization procedure: See 3C Am.Jur.2d (2005 ed.), Aliens and Citizens §2418 et seq.

Derivative citizenship of children: See 3C Am.Jur.2d (2005 ed.), Aliens and Citizens §2360 et seq.



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2. Citizenship by Naturalization.

b. Naturalization.

2. Eligibility.

aa. In General.

7 Witkin Sum. Cal. Law Const Law § 190

[§ 190] In General.

(1) *Conditions*. The Immigration Act (*supra*, §183) prescribes various conditions of eligibility for naturalization. (See 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2770 et seq.; 87 Cal. L. Rev. 1017 [meaningful oath requirement for mentally disabled citizenship applicants]; 66 Harv. L. Rev. 707 et seq.) The most important are:

(a) Literacy. (8 U.S.C., §1423(a); see 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2839 et seq.)

(b) Attachment to principles of Constitution and nonmembership in subversive organizations. (8 U.S.C., §1424; see 18 A.L.R.2d 268 [oath of allegiance or loyalty]; 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §§2832 et seq., 2850 et seq.; on subversive activity as ground for deportation, see *infra*, §476.)

(c) Continuous residency of 5 years after lawful admission and *physical presence* for half of this period preceding the application. (8 U.S.C., §1427(a); see 66 Harv. L. Rev. 713; 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2784 et seq.)

(d) Good moral character. (8 U.S.C., §1427(a); see 22 A.L.R.2d 244; 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2813 et seq.; *infra*, §191.)

(e) Willingness to bear arms or perform noncombatant services. (8 U.S.C., §1448(a); see 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §2916 et seq.; *infra*, §192.)

(2) *Ineligibility*. Conviction of murder, claim of exemption from military service on ground of alienage, conviction of desertion, or leaving the country to avoid the draft, render a person permanently ineligible. (8 U.S.C., §§1101(f)(8), 1425, 1426; see 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §§2816, 2892 et seq.; *infra*, §§191, 192.)

The immigration law originally excluded aliens of certain races; these were the "ineligible aliens" against whom our former Alien Land Law operated (see *infra*, §722). Subsequent amendments enlarged the eligible classes until only Japanese were excluded. (See 66 Harv. L. Rev. 706.) The Act removed all of these exclusions: "The right of a person to

become a naturalized citizen ... shall not be denied ... because of race." (8 U.S.C., §1422.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Conditions.* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2270 et seq.

(a) *Literacy:* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2326 et seq.

(b) *Attachment to principles of Constitution:* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §§2270 et seq., 2338 et seq.

(c) *Continuous residency:* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2281 et seq.

(d) *Good moral character:* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2303 et seq.

(e) *Willingness to bear arms:* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2386 et seq. (2) *Ineligibility.* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §§2306, 2365 et seq.



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b. Naturalization.

2. Eligibility.

bb. Moral Character.

7 *Witkin Sum. Cal. Law Const Law* § 191

[§ 191] Moral Character.

The Immigration Act (*supra*, §183) requires proof of good moral character for 5 years preceding the filing of the petition. (See *supra*, §190.) It also specifies categories of conduct, any of which defeats a claim of good moral character, including giving "false testimony for the purpose of obtaining any benefits" under the Act. (8 *U.S.C.*, §1101(f) [list not exclusive].)

In *Berenyi v. District Director, Immigration & Naturalization Service* (1967) 385 *U.S.* 630, 87 *S.Ct.* 666, 17 *L.Ed.2d* 656, petitioner, in a preliminary proceeding on his naturalization petition, was asked whether he had ever been a member of or associated with the Communist Party. He answered no, under oath. In the final hearing, the Government produced two witnesses who identified him as a Communist in Hungary, and petitioner produced witnesses in rebuttal. The district judge, evaluating the testimony, found that petitioner had testified falsely, and denied his application. *Held*, affirmed; unlike a denaturalization or deportation case, in which a heavy burden rests on the Government, this case involved no constitutional issue calling for independent determination of the facts by the *Supreme Court*. (87 *S.Ct.* 670, 17 *L.Ed.2d* 661.)

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b. Naturalization.

2. Eligibility.

cc. Military Service.

7 *Witkin Sum. Cal. Law Const Law* § 192

[§ 192] Military Service.

Aliens who desert or depart from the country to avoid military service or the draft, or who are relieved of military service because of their alien status, are permanently ineligible to become citizens. (See *supra*, §190; *Astrup v. Immigration & Naturalization Service* (1971) 402 U.S. 509, 91 S.Ct. 1583, 29 L.Ed.2d 68 [ineffective claim of exemption from draft does not result in ineligibility].)

Litigation under a former Immigration Act established the right of conscientious objectors to naturalization despite their unwillingness to bear arms. (See *Girouard v. United States* (1946) 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084.) The present Act accordingly recognizes the right to show religious opposition by clear and convincing proof, but requires that the applicant in these cases swear either to perform noncombatant service in the armed forces or work of national importance under civilian direction. (8 U.S.C., §1448(a); see *In re Jost* (1953) 117 C.A.2d 379, 382, 256 P.2d 71 [burden of proof not met].) (See 196 A.L.R. Fed 365 [naturalization through active duty service in armed forces during certain periods of military hostilities].)

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7 *Witkin Sum. Cal. Law Const Law* § 193

[§ 193] In General.

A naturalized citizen may be deprived of citizenship in a "denaturalization proceeding," i.e., an action by the Government to set aside the decree of naturalization for fraud or other grounds existing at the time it was rendered. (8 U.S.C., §1451; see *United States v. Zucca* (1956) 351 U.S. 91, 76 S.Ct. 671, 100 L.Ed. 964 [affidavit of good cause is jurisdictional prerequisite to action]; *United States v. Minker* (1956) 350 U.S. 179, 76 S.Ct. 281, 100 L.Ed. 185 [immigration officer was not authorized to subpoena person to obtain information for denaturalization affidavit]; *Klapprott v. United States* (1949) 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 [default judgment held improper under circumstances]; 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §3039 et seq.) The action is brought in the federal district court where the naturalized citizen resides. (8 U.S.C., §1451(a).) When citizenship is revoked, the court where the judgment is rendered must order cancellation of the certificate of naturalization and send a certified copy of the order and judgment to the Attorney General. (8 U.S.C., §1451(f).)

The federal proceeding was held exclusive in *Bindczyck v. Finucane* (1951) 342 U.S. 76, 72 S.Ct. 130, 132, 96 L.Ed. 100, 103, on the theory that jurisdiction exercised by different state courts would destroy the uniformity contemplated by Congress.

SUPPLEMENT: [This section is current through the latest supplement]

See 3C Am.Jur.2d (2005 ed.), Aliens and Citizens §§2493, 2494; 5 A.L.R. Fed 2d 525 [who is "national" of U.S. for removability purposes].



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CHAPTER X - Constitutional Law

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B. Citizenship. 3. Denaturalization. b. Proof of Grounds.

7 *Witkin Sum. Cal. Law Const Law* § 194

[§ 194] Proof of Grounds.

The principal ground of denaturalization is fraud, consisting of wilful misrepresentation or concealment of a material fact. (8 U.S.C., §1451(a); see 23 U.S.F. L. Rev. 415 [standards for denaturalization and deportation of persons accused of crimes prior to entry]; 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §3040 et seq.)

Decisions, both prior to and after the present Act, place a heavy burden of proof on the Government. (See *Schneiderman v. United States* (1943) 320 U.S. 118, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796, 1802 [proof was insufficient to show that active member of Communist Party was not attached to principles of Constitution when naturalized in 1927]; *Baumgartner v. United States* (1944) 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525 [proof was insufficient to show fraud of pro-German applicant in swearing allegiance]; *Nowak v. United States* (1958) 356 U.S. 660, 78 S.Ct. 955, 2 L.Ed.2d 1048 [answer to ambiguous question regarding political affiliations was insufficient]; *Chaunt v. United States* (1960) 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 [false answer as to previous arrests for minor offenses was insufficient]; but see *Costello v. United States* (1961) 365 U.S. 265, 81 S.Ct. 534, 538, 5 L.Ed.2d 551, 557 [representation by notorious bootlegger that occupation was "real estate" was sufficient]; *Fedorenko v. United States* (1981) 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 [fraud; application of test set forth in *Chaunt*,]; *Kungys v. United States* (1988) 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 [test of materiality of misrepresentation]; 22 *Santa Clara L. Rev.* 255 [*Fedorenko*]; 180 *A.L.R.Fed* 243 [evidence of Nazi-related conduct].)

SUPPLEMENT: [This section is current through the latest supplement]
See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2495 et seq.



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B. Citizenship.

4. Expatriation.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 195

[§ 195] In General.

(1) *Right To Give Up Citizenship*. The right of a person to give up citizenship by birth or naturalization has long been recognized. (See *Savorgnan v. United States* (1950) 338 U.S. 491, 70 S.Ct. 292, 295, 94 L.Ed. 287, 294; cf. *Mandoli v. Acheson* (1952) 344 U.S. 133, 73 S.Ct. 135, 97 L.Ed. 146 [child born here and taken by parents to Italy did not lose citizenship by remaining there after majority]; on rejection of doctrine by some countries, see *Coumas v. Superior Court* (1948) 31 C.2d 682, 685, 192 P.2d 449 [citizen of Greece, naturalized in U.S., retained Greek citizenship under Greek law].)

(2) *Statutory Provisions*. Acts that, if performed voluntarily "with the intention of relinquishing United States nationality," will result in a loss of American citizenship. (8 U.S.C., §1481; see 39 Cal. Western L. Rev. 263 [involuntary expatriation of native-born citizens]; 3C Am.Jur.2d (1998 ed.), Aliens and Citizens §3080 et seq.) These include:

(a) Expatriation by foreign naturalization or oath of allegiance after attaining the age of 18. (14 U.S.C., §1481(a)(1), (2); see *Savorgnan v. United States*, *supra*; 15 A.L.R.2d 550.) Even prior to the amendment in 1986 that added the language requiring expatriation to be voluntary and intentional, the Government was required to prove voluntary renunciation. (See *Kawakita v. United States* (1952) 343 U.S. 717, 72 S.Ct. 950, 959, 96 L.Ed. 1249, 1261; *Nishikawa v. Dulles* (1958) 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed.2d 659; *Vance v. Terrazas* (1980) 444 U.S. 252, 100 S.Ct. 540, 550, 62 L.Ed.2d 461, 472; 25 So. Cal. L. Rev. 196; 26 So. Cal. L. Rev. 438.)

(b) Expatriation by serving in the armed forces of a foreign state if (1) the armed forces are engaged in hostilities against the U.S., or (2) the person serves as a commissioned or noncommissioned officer. (8 U.S.C., §1481(a)(3).)

(c) Expatriation by "accepting, serving in, or performing the duties of any office, post, or employment" for a foreign government or one of its subdivisions if, after attaining the age of 18, the person (1) acquires the nationality of the foreign nation, or (2) an oath of allegiance for the position is required. (8 U.S.C., §1481(a)(4).)

(d) Expatriation by a formal renunciation of nationality pursuant to a prescribed form. (8 U.S.C., §1481(a)(5), (6).)

(e) Expatriation by conviction for "any act of treason against, or attempting by force to overthrow, or bearing arms against the United States," or for violating specified laws "by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them." (8 U.S.C., §1481(a)(7).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Provisions.* See 3C Am.Jur.2d (2005 ed.), *Aliens and Citizens* §2533 et seq.



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4. Expatriation.

b. Acts Not Resulting in Expatriation.

1. Residence in Foreign Country.

7 *Witkin Sum. Cal. Law Const Law* § 196

[§ 196] Residence in Foreign Country.

(1) *Naturalized Citizens*. 8 U.S.C., §§1484, 1485 formerly provided that a naturalized citizen would lose his or her citizenship by continuous residence for 3 years in a foreign state of which the person was formerly a national or that was his or her birthplace (with an exception for U.S. employment). This provision was held unconstitutional in *Schneider v. Rusk* (1964) 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218.

Plaintiff, a German national, acquired derivative American citizenship at age 16 through the naturalization of her mother. Later plaintiff went to Germany, married a German national, had children, continuously lived there for 8 years, and admitted that she had no intention of returning to this country. The U.S. denied her a passport on the ground that she had lost her citizenship. *Held*, she was a citizen.

(a) The power of Congress to take away citizenship for activities of the citizen is subject to the Fifth Amendment Due Process Clause, and although that Amendment contains no express statement on equal protection, due process forbids unjustifiable discrimination. (84 S.Ct. 1190, 12 L.Ed.2d 222; see *infra*, §694.)

(b) "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. ... A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons." (84 S.Ct. 1190, 12 L.Ed.2d 222.)

Three dissenting justices argued that the practice of expatriating naturalized citizens who voluntarily return to their native lands to reside has been consistently approved by the courts and by the United Nations Convention; that state nationals abroad are a source of much international friction, complicating foreign relations; and that plaintiff's dilemma was of her own choosing, deliberately created. She "wishes to retain her citizenship on a standby basis for her own benefit in the event of trouble. There is no constitutional necessity for Congress to accede to her wish." (84 S.Ct. 1195,

12 L.Ed.2d 228.) (See 78 Harv. L. Rev. 192; 12 U.C.L.A. L. Rev. 510.)

(2) *Distinction: Citizens by Birth Abroad.* Citizenship at birth is accorded by the Fourteenth Amendment to those born here, and by statute to those born abroad of a citizen parent who has resided here. (See supra, §182.) Those who become citizens at birth abroad may also be citizens or nationals of the country of birth. Formerly, statutes provided that dual nationals would be expatriated if (a) they failed to live here continuously for a specified period between ages 14-18, or (b) they resided in their country of nationality for 3 years after age 22 without taking a prior oath of allegiance to the U.S., or (c) their parent lost U.S. citizenship and they failed to establish residence here before age 25.

In *Rogers v. Bellei* (1971) 401 U.S. 815, 91 S.Ct. 1060, 28 L.Ed.2d 499, plaintiff, age 31, born in Italy of an Italian father and American citizen mother, had resided here only a few months on five brief visits. In this action for an injunction and declaratory relief, he attacked the continuous residency requirement which was then 5 years. *Held* (5-4), the statutory condition subsequent was valid.

(a) *Schneider v. Rusk*, supra, and *Afroyim v. Rusk* (1967) 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757, infra, §197, were inapplicable; in both cases, the citizen had resided here "for years," had "acquired citizenship here by the naturalization process," and was "covered explicitly by the Fourteenth Amendment's first sentence." Plaintiff, in contrast, was not naturalized in the U.S. and had not been subject to U.S. jurisdiction. Hence, he was not "a Fourteenth-Amendment-first-sentence citizen." (91 S.Ct. 1065, 1067, 28 L.Ed.2d 504, 507.)

(b) Given the legitimate concern of Congress over problems of dual nationality, the condition subsequent imposed for retention of statutory citizenship is not unreasonable. (91 S.Ct. 1069, 28 L.Ed.2d 510.)

(c) However: "The plaintiff is not stateless. His Italian citizenship remains. He has lived practically all his life in Italy. He has never lived in this country; although he has visited here five times, the stipulated facts contain no indication that he ever will live here. He asserts no claim of ignorance or of mistake or even of hardship. He was warned several times of the provision of the statute and of his need to take up residence in the United States prior to his 23d birthday." (91 S.Ct. 1071, 28 L.Ed.2d 512.)

The dissenting justices, asserting that the Fourteenth Amendment provides a comprehensive definition of American citizenship, condemned the "narrow view" that plaintiff "was not naturalized 'in the United States,' " and contended that the majority opinion relegated children born to Americans abroad "to the permanent status of second-class citizenship, subject to revocation at the will of Congress." (91 S.Ct. 1073, 28 L.Ed.2d 514.) (See 60 Cal. L. Rev. 1596; 85 Harv. L. Rev. 64; 2 Hastings Const. L. Q. 1003; 5 Loyola L.A. L. Rev. 589.)

The statutory provisions relating to dual nationals and divestiture of their nationality were subsequently repealed, and no comparable statutory provisions now exist.

SUPPLEMENT: [This section is current through the latest supplement]



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2. Voting in Foreign Election.

7 *Witkin Sum. Cal. Law Const Law* § 197

[§ 197] Voting in Foreign Election.

In *Perez v. Brownell* (1958) 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603, the constitutionality of the former statutory provision for involuntary expatriation by voting in a foreign election was upheld under the power to regulate foreign relations. (See 72 *Harv. L. Rev.* 167.) In *Afroyim v. Rusk* (1967) 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757, *Perez* was overruled.

(a) The theory that Congress has general power to take away an American's citizenship without his or her assent, as an implied attribute of sovereignty, is unsound; the Constitution does not grant this power expressly and none can be implied. (87 S.Ct. 1663, 18 L.Ed.2d 761.)

(b) Forfeiture is contrary to sound policy: "Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world--as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship." (87 S.Ct. 1668, 18 L.Ed.2d 767.)

(c) "We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." (87 S.Ct. 1668, 18 L.Ed.2d 767.)

The dissent attacked the majority's historical survey as "incomplete," and described its reliance on the language of the Fourteenth Amendment as an "arcane observation that the 'citizenry is the country and the country is its citizenry.'" (87 S.Ct. 1669, 18 L.Ed.2d 768.) (See 60 *Cal. L. Rev.* 1591; 4 *Cal. Western L. Rev.* 157; 81 *Harv. L. Rev.* 126; 2 *Hastings Const. L. Q.* 1003.)

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b. Acts Not Resulting in Expatriation.

3. Desertion or Draft Evasion.

7 *Witkin Sum. Cal. Law Const Law* § 198

[§ 198] Desertion or Draft Evasion.

(1) *Desertion*. In *Trop v. Dulles* (1958) 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630, petitioner was convicted of desertion in 1944, and was denied a passport in 1952 under the former statute providing for involuntary expatriation in this event. In his action for declaratory relief, the Government's motion for summary judgment was granted. *Held*, reversed, by a court divided in its reasons. (a) Four justices thought the provision was a cruel and unusual punishment, violative of the *Eighth Amendment*. (78 S.Ct. 598, 2 L.Ed.2d 642.) (b) Two of the same four also found unconstitutionality in the statutory delegation to the military of discretionary authority to restore citizenship by allowing the convicted soldier to return to duty. (78 S.Ct. 600, 2 L.Ed.2d 644.) (c) A fifth justice thought the statute could not be justified by the war power. "Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power." (78 S.Ct. 605, 2 L.Ed.2d 649.) Four justices dissented. (78 S.Ct. 605, 2 L.Ed.2d 649.) (See 72 *Harv. L. Rev.* 168.)

(2) *Draft Evasion*. In *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644, two native born Americans challenged the constitutionality of the statute providing for involuntary expatriation of those who depart from or remain outside the U.S. to avoid military service in time of war or national emergency. M, a dual Mexican national, was convicted of that offense and was ordered deported. C, not a dual national, refused to report for induction; he was indicted but not tried, and later was denied a renewal of his passport. *Held*, the statute was unconstitutional: (a) in providing for expatriation without any requirement of an administrative or judicial hearing (83 S.Ct. 565, 567, 9 L.Ed.2d 658, 660); and (b) as an additional punishment for draft avoidance in a special category of cases, without providing the safeguards of a criminal prosecution (83 S.Ct. 568, 9 L.Ed.2d 662).

The dissent argued that the statute was not inherently penal in nature, and that the provisions were rationally related to the war power. (83 S.Ct. 584, 589, 9 L.Ed.2d 679, 685.) (See *Rusk v. Cort* (1962) 369 U.S. 367, 82 S.Ct. 787, 7 L.Ed.2d 809 [procedure for asserting rights as citizen when denied them abroad]; 76 *Harv. L. Rev.* 195 [*Rusk*]; 77 *Harv. L. Rev.* 101 [*Kennedy*]; 10 *U.C.L.A. L. Rev.* 949 [*Rusk*].)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY C. Unreasonable Search and Seizure.

7 *Witkin Sum. Cal. Law Const Law* § 199

[§ 199] Unreasonable Search and Seizure.

The Fourth Amendment to the federal Constitution provides that the people are entitled "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," and that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Almost an identical guarantee is contained in Cal. Const., Art. I, §13. The protection extends to corporations as well as to natural persons. (*Silverthorne Lumber Co. v. United States* (1920) 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.)

The most important application of the right is in connection with the admissibility of evidence obtained, or the attempted production or discovery of evidence, by unconstitutional means. The right of privacy is one of the fundamental rights protected against state action by the Due Process Clause, and the admission of evidence obtained in violation of the guarantee is a denial of due process. (See *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081, 1090.) The ramifications of this subject are extensive, and have been fully treated in 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §§1 et seq., 29 et seq. (On "special needs" searches generally, see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §292 et seq.; on objections to substance abuse testing generally, see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §321 et seq.; on substance abuse testing as violation of California's right to privacy, see *infra*, §592 et seq.)

Under the "independent grounds doctrine," more exacting search and seizure standards were imposed in some situations by application of the California Constitution's guarantee. (See 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §30.) However, Proposition 8 (Cal. Const., Art. I, §28(d)) abolished the independent grounds basis for *exclusion of evidence*, leaving the federal Constitution as interpreted by controlling federal decisions as the sole basis for exclusion. (See 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §13.)

SUPPLEMENT: [This section is current through the latest supplement]

Independent grounds: Cal. Const., Art. II, §28(d), was relettered as Cal. Const., Art. II, §28(f), in 2008.



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Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY D. Slavery and Involuntary Servitude. 1. General Rule: No Imprisonment for Debt.

7 *Witkin Sum. Cal. Law Const Law* § 200

[§ 200] General Rule: No Imprisonment for Debt.

(1) *Federal Constitution*. Slavery and involuntary servitude are prohibited by the federal Constitution, except as a punishment for crime. (U.S. Const., Thirteenth Amendment; see 4 Rotunda, §19.6 et seq.; 30 *Loyola L.A. L. Rev.* 809, 977 [mandatory community service program for high school students as violation of Thirteenth Amendment prohibition of involuntary servitude]; 68 *So. Cal. L. Rev.* 1391 [same]; 28 *U.S.F. L. Rev.* 517 [same]; 28 *Pacific L. J.* 977, 1015 [unconstitutionality of slavery]; 36 *San Diego L. Rev.* 397 [Thirteenth Amendment strategy to abolish sweatshops in garment industry]; 45 *Am.Jur.2d* (1999 ed.), *Involuntary Servitude and Peonage* §3 et seq.)

(2) *California Constitution*. The California Constitution also prohibits slavery and involuntary servitude, except to punish crime. (Cal. Const., Art. I, §6.) And "[a] person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine." (Cal. Const., Art. I, §10; see 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §627.)

The California Constitution formerly contained an exception for "fraud," which was deleted as superfluous in 1974. The change was not intended to have any substantive effect. (*People v. Bishopp* (1976) 56 *C.A.3d Supp.* 8, 14, 128 *C.R.* 923, *infra*, §201.)

The constitutional protection cannot be evaded by the legislative device of making the mere nonpayment of a debt a crime. Hence, a criminal statute may be examined to determine whether the prohibited conduct comes within one of the exceptions to the guarantee. (See *In re Trombley* (1948) 31 *C.2d* 801, 804, 193 *P.2d* 734, *infra*, §201; *People v. Rohe* (1952) 114 *C.A.2d* 605, 610, 250 *P.2d* 647; *People v. Oester* (1957) 154 *C.A.2d Supp.* 888, 890, 316 *P.2d* 784, *infra*, §202.)

(3) *Peonage*. The most important example of conduct prohibited by the Thirteenth Amendment is peonage, i.e., compulsory service of a servant to discharge a debt owed to the master. In the typical case, a servant engages to work, receives an advance on future wages, and is convicted under the statute for quitting work prior to repayment of the advance. The Constitution and the federal Anti-Peonage Act render this kind of statute void. (*Bailey v. Alabama* (1911) 219 *U.S.* 219, 31 *S.Ct.* 145, 151, 55 *L.Ed.* 191, 200; *Pollock v. Williams* (1944) 322 *U.S.* 4, 64 *S.Ct.* 792, 796, 88 *L.Ed.* 1095, 1098, 1103; see 45 *Am.Jur.2d* (1999 ed.), *Involuntary Servitude and Peonage* §13 et seq.)

(4) *Crime of Obtaining Money or Property by Fraud*. The constitutional guarantee does not render invalid the

various statutes making it criminal to obtain money or property by fraud. (See *People v. Perry* (1931) 212 C. 186, 195, 298 P. 19 [regulation of fraudulent "cash buyers" of deciduous fruits].) Some of the "peonage" statutes were phrased in this language, i.e., they made it criminal to induce a prospective employer to pay advances in reliance on a promise to perform labor, without an intention to perform the promise; and it has been suggested that such a statute might be upheld if not accompanied by unfair presumptions of unlawful intent. (See *Pollock v. Williams*, *supra*, 64 S.Ct. 802, 88 L.Ed. 1106.)

West's Key Number Digest, Constitutional Law k.83(3)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Federal Constitution*. See 4 Rotunda 4th, §19.6 et seq.



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7 *Witkin Sum. Cal. Law Const Law* § 201

[§ 201] Economic Oppression.

An exception to the constitutional prohibition is recognized where the debtor (e.g., an employer) makes unfair use of his or her superior economic position in refusing to pay a needy creditor (e.g., an employee). This abuse was brought within the former "fraud" proviso of the California Constitution by *In re Trombley* (1948) 31 C.2d 801, 193 P.2d 734. *Lab.C. 216(a)* makes it a misdemeanor where an employer, "[h]aving the ability to pay, wilfully refuses to pay wages due and payable after demand has been made." Petitioner, convicted under this section, sought habeas corpus, attacking constitutionality on the ground that the statute did not expressly require an intent to defraud. *Held*, the statute was valid without this provision; it applies only where an employer who (1) is able to pay, (2) intentionally refuses to pay wages that (3) he or she knows are due.

The court explained the theory of its holding as follows: "The historical background of section 15 of article I [now Art. I, §10] and similar constitutional guarantees of other states clearly shows that the provisions were adopted to protect the poor but honest debtor who is unable to pay his debts, and were not intended to shield a dishonest man who takes an *unconscionable advantage* of another. ... It has long been recognized that wages are not ordinary debts ... and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential that he receive his pay when it is due. An employer who knows that wages are due, has ability to pay them, and still refuses to pay them, acts against good morals and fair dealing, and necessarily intentionally does the act which prejudices the rights of his employee. Such conduct amounts to a 'case of fraud' within the meaning of the exception to the constitutional prohibition." (31 C.2d 809.) (See *People v. Howard* (1969) 70 C.2d 618, 623, 75 C.R. 761, 451 P.2d 401 [following *Trombley*, and upholding P.C. 484b, on obtaining money for construction and wilful failure to use it for payment of laborers and materialmen]; *People v. Alves* (1957) 155 C.A.2d Supp. 870, 320 P.2d 623 [following *Trombley*, and upholding *Lab.C. 227*, punishing wilful failure to make payments into employees' health and welfare fund]; 78 A.L.R.3d 563 [validity and construction of statute providing criminal penalties for failure of contractor who has received payment from owner to pay laborers or materialmen].)

People v. Bishopp (1976) 56 C.A.3d Supp. 8, 128 C.R. 923, held that an employer could be prosecuted for violation of *Lab.C. 216(a)*, supra. The court thought that *In re Trombley*, supra, was dispositive despite the elimination of the fraud exception from the revised constitutional provision. "It is apparent from *Trombley's* analysis of the historical

background of the constitutional provision that the reach of the provision is no greater than to 'protect the poor but honest debtor' and that the provision was historically not intended to shield one who wilfully and intentionally committed a fraud by refusing to pay just debts." (56 C.A.3d Supp. 14.)

If, however, the statute does not require a showing of intent to defraud, or wilfulness or ability to pay, it will not be sustained. (See *People v. Holder* (1921) 53 C.A. 45, 50, 199 P. 832 [statute prohibiting contractor from using money received under contract for purposes other than payment of laborers and materialmen]; *In re Trombley*, supra, 31 C.2d 808 [distinguishing *Holder* case and *In re Crane* (1914) 26 C.A. 22, 145 P. 733, on this ground]; *People v. Rohe* (1952) 114 C.A.2d 605, 609, 250 P.2d 647 [statutes making it criminal for broker or dealer to fail to account and pay promptly for farm products after delivery].)

In *People v. Bell* (1996) 45 C.A.4th 1030, 53 C.R.2d 156, defendants were convicted of rent skimming in violation of C.C. 890 et seq. (see 2 Cal. Crim. Law (3d), *Crimes Against Property*, §234). That law prohibits a person from using rent money during the first year after acquiring property without first applying the money, or an equivalent amount, to payment of encumbrances on the property. Under specified circumstances, violation is a felony misdemeanor. Defendants claimed that their felony punishment amounted to imprisonment for debt. The court rejected the claim. The court canvassed the California cases in which similar claims have been made and concluded that the constitutional provision does not apply in cases of "fraud." (45 C.A.4th 1043, 1045.) In this context, fraud "includes any situation in which a person is able but does not make a payment required by law, that is, he willfully does not make the required payment. ... Since the statutes only criminalize the willful diversion of specific funds actually in the possession of the defendant, they do not violate the constitutional prohibition against imprisonment for debt." (45 C.A.4th 1045, 1046.)

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CHAPTER X - Constitutional Law

Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY

D. Slavery and Involuntary Servitude.

2. Exceptions.

b. Criminal Nonpayment of Fee or Tax.

7 Witkin Sum. Cal. Law Const Law § 202

[§ 202] Criminal Nonpayment of Fee or Tax.

(1) *Crime: Activity Without Required Payment or Deposit.* Statutes that make it a crime to engage in certain business or professional activities without paying a license tax are familiar. The punishment is not for failure to pay a debt but for carrying on the activity without a license. (See *In re Johnson* (1920) 47 C.A. 465, 467, 190 P. 852.) This principle has been applied to the requirement of the Financial Responsibility Law that an uninsured driver must, after an automobile accident, deposit security or surrender his or her license. (*Veh.C. 16020 et seq., 16070.*) In *People v. White* (1952) 109 C.A.2d 296, 240 P.2d 728, the conviction of defendant for driving while his license was so suspended was affirmed. His imprisonment "was not for debt nor for his failure to deposit security following the accident ... but rather, it was for his affirmative act in driving his automobile at a time when he was forbidden to do so." (109 C.A.2d 297.)

(2) *Wilful Failure To Pay Taxes.* The suggestion that the constitutional guarantee does not apply to the collection of taxes was repudiated in *People v. Oester* (1957) 154 C.A.2d Supp. 888, 891, 316 P.2d 784. The court pointed out that the cases cited for this proposition deal with business activity conducted without payment of a tax. But although mere failure to pay a tax cannot be made criminal, the statute is valid if it meets the test of the "fraud" exception (*In re Trombley* (1948) 31 C.2d 801, 193 P.2d 734, supra, §201), by embodying the element of wilful refusal or wilful neglect. *Unemp.Ins.C. 2110*, providing a criminal penalty against an employer who "knowingly withholds" workers' contributions to the Unemployment Insurance Fund, "and willfully fails or is willfully financially unable to pay such deductions," was accordingly upheld. The court construed the term "willfully" as modifying "financially unable," hence applying to an employer who wilfully divests himself or herself of the withheld contributions. (See 48 A.L.R.3d 1324 [Constitutional Provision Against Imprisonment for Debt as Applicable to Nonpayment of Tax].)

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7 *Witkin Sum. Cal. Law Const Law* § 203

[§ 203] Other Exceptions.

(1) *Crime: Violation of Property Right.* Where a debt is secured by a mortgage or other lien on property, a statute may make it criminal to dispose of the security. The crime is the violation of the creditor's property interest, and not the mere failure to pay a debt. (See P.C. 538 et seq.; 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §20.)

(2) *Imprisonment for Contempt.* Where the obligation, although in form a money debt, is created by an order of court to fulfill an obligation created by law rather than contract, the sanction of contempt may be imposed for disobedience. The common examples are refusals to comply with an order to pay spousal or child support. (See *Miller v. Superior Court* (1937) 9 C.2d 733, 737, 72 P.2d 868; *Moss v. Superior Court* (1998) 17 C.4th 396, 401, 71 C.R.2d 215, 950 P.2d 59, 10 *Summary* (10th), *Parent and Child*, §437 [wilful failure of parent to seek and accept employment commensurate with parent's skills and ability in order to comply with child support order]; 10 *Summary* (10th), *Parent and Child*, §437; 11 *Summary* (10th), *Husband and Wife*, §258 et seq.; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §334.)

(3) *Lawful Compulsory Service.* Traditionally, certain types of service, or service under special circumstances, may be made compulsory. Thus, the services of a seaman, and the military and naval services, may be compelled for the period of the enlistment or contract. (*Robertson v. Baldwin* (1897) 165 U.S. 275, 17 S.Ct. 326, 328, 41 L.Ed. 715, 717; see *Butler v. Perry* (1916) 240 U.S. 328, 36 S.Ct. 258, 60 L.Ed. 672 [enforcement of common law power to compel work on public roads and highways without compensation].)

(4) *Criminal Conviction for Nonsupport of Child.* P.C. 270 (see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §143 et seq.) is valid. The statutory obligation of a parent to support a minor child is not a debt, and a prosecution under P.C. 270, like a contempt proceeding, is not a civil action for debt. (*Lyons v. Municipal Court* (1977) 75 C.A.3d 829, 840, 142 C.R. 449.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Crim: Violation of Property Right.* See 79 *So. Cal. L. Rev.* 753 [Legislative Arrogance and Constitutional Accountability].

(2) *Imprisonment for Contempt.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §342.



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Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY E. Protection to Persons Accused of Crime. 1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 204

[§ 204] In General.

Persons accused of crime may invoke a number of important protections under the federal and state Constitutions. All except two are considered in detail in *California Evidence*, 4th Edition, and *California Criminal Law*, 3d Edition. The following outline will indicate the scope of the protections and the place of treatment:

(1) Prohibition of excessive bail. (U.S. Const., Eighth Amendment; Cal. Const., Art. I, §12; see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §90.)

(2) Writ of habeas corpus. (U.S. Const., Art. I, §9, cl. 2; Cal. Const., Art. I, §11; see 6 *Cal. Crim. Law* (3d), *Criminal Writs*, §10 et seq.)

(3) Speedy and public trial. (U.S. Const., Sixth Amendment; Cal. Const., Art. I, §15; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§273 et seq., 351 et seq.)

(4) Right to counsel. (U.S. Const., Sixth Amendment; Cal. Const., Art. I, §15; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §143 et seq.)

(5) Right to compel attendance of witnesses. (U.S. Const., Sixth Amendment; Cal. Const., Art. I, §15; see 2 *Cal. Evidence* (4th), *Witnesses*, §6 et seq.)

(6) Right to be confronted with adverse witnesses. (U.S. Const., Sixth Amendment; Cal. Const., Art. I, §15; see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §14 et seq.)

(7) Right to view the scene of a crime, when the jury is taken there. (See 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §28.)

(8) Protection against unreasonable search and seizure. (U.S. Const., Fourth Amendment; Cal. Const., Art. I, §13; see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §29 et seq.)

(9) Privilege against self-incrimination. (U.S. Const., Fifth Amendment; Cal. Const., Art. I, §15; see 2 *Cal. Evidence* (4th), *Witnesses*, §355 et seq.)

(10) Right to jury trial. (See *infra*, §§208, 213.)

(11) Defense of once in jeopardy. (U.S. Const., Fifth Amendment; Cal. Const., Art. I, §15; see 1 *Cal. Crim. Law (3d)*, *Defenses*, §103 et seq.)

(12) Protection against cruel and unusual punishments. (U.S. Const., Eighth Amendment; Cal. Const., Art. I, §17; see 3 *Cal. Crim. Law (3d)*, *Punishment*, §109.)

(13) Protection against excessive fines. (U.S. Const., Eighth Amendment; Cal. Const., Art. I, §17; see 3 *Cal. Crim. Law (3d)*, *Punishment*, §§207, 208.)

(14) Prohibition of ex post facto laws. (U.S. Const., Art. I, §9, cl. 3, Art. I, §10; Cal. Const., Art. I, §9; see 1 *Cal. Crim. Law (3d)*, *Introduction to Crimes*, §10 et seq.)

(15) Prohibition of bills of attainder. (See *infra*, §205 et seq.)

Many of these rights and some others are considered so fundamental that they are protected by the Due Process Clause of the Fourteenth Amendment against infringement by state action. (See *infra*, §220.) However, a few procedural "rights" have not been held sufficiently "fundamental" to come within the protection of the Due Process Clause; e.g., (1) charge by indictment--information may be substituted (Cal. Const., Art. I, §14; see 4 *Cal. Crim. Law (3d)*, *Pretrial Proceedings*, §169); (2) appeal from judgment of conviction (see 6 *Cal. Crim. Law (3d)*, *Criminal Appeal*, §5 et seq.).

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E. Protection to Persons Accused of Crime.

2. Bill of Attainder.

a. Nature of Prohibition.

7 *Witkin Sum. Cal. Law Const Law* § 205

[§ 205] Nature of Prohibition.

A bill of attainder is a legislative act that inflicts punishment without a judicial trial. Both Constitutions prohibit this kind of statute. (U.S. Const., Art. I, §9, cl. 3, Art. I, §10; Cal. Const., Art. I, §9; see *Pierce v. Carskadon* (1872) 83 U.S. 234, 21 L.Ed. 276 [state statute deprived persons who supported the confederacy in the Civil War of the right to bring certain actions in the courts]; *United States v. Brown* (1965) 381 U.S. 437, 85 S.Ct. 1707, 1711, 14 L.Ed.2d 484, 487, infra, §206; *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 97 S.Ct. 2777, 2803, 53 L.Ed.2d 867, 907; 2 Rotunda, §15.9(c); 2 Tribe, §10-4 et seq.; 5 *Hastings Const. L. Q.* 767 [survey of decisional law]; 44 *Stanf. L. Rev.* 727 [discussion of Corruption of Blood Principle and Bill of Attainder Clause]; 22 *Southwestern U. L. Rev.* 1077 [The Walter Nixon and Alcee Hastings impeachment cases]; 37 *U.C. Davis L. Rev.* 641 [discussing whether utility is protected individual]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §671 et seq.)

In *United States v. Lovett* (1946) 328 U.S. 303, 66 S.Ct. 1073, 1078, 90 L.Ed. 1252, 1259, a congressional committee investigated alleged un-American activities of federal employees. The Appropriation Act was thereafter amended to provide that no further salary or other compensation should be paid to three named individuals unless they should thereafter be reappointed and confirmed by the Senate. *Held*, the provision was unconstitutional. Its effect was to permanently prevent these persons from ever holding a government job; and, whether accomplished by direct prohibition or, as here, indirectly by cutting off their pay, this was punishment of a severe type. The doctrine of *Cummings v. Missouri* (1866) 71 U.S. 277, 18 L.Ed. 356, was restated as follows: "[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (66 S.Ct. 1079, 90 L.Ed. 1259.)

SUPPLEMENT: [This section is current through the latest supplement]
See 2 Rotunda 4th, §15.9(c).



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E. Protection to Persons Accused of Crime.
2. Bill of Attainder.
b. Crime of Communist Holding Union Office.

7 Witkin Sum. Cal. Law Const Law § 206

[§ 206] Crime of Communist Holding Union Office.

The rule stated in *United States v. Lovett* (1946) 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252, supra, §205, was given a far-reaching application in *United States v. Brown* (1965) 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484. Section 504 of the Labor Management Relations Act (29 U.S.C., §504) replaced the Taft-Hartley Act's non-Communist oath with a prohibition against a Communist serving as a union officer. Brown, an avowed and long time Communist, and an elected officer of the I.L.W.U., was convicted under the Act. *Held*, the statute was an unconstitutional bill of attainder.

(a) The constitutional provision is "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply--trial by legislature." (85 S.Ct. 1711, 14 L.Ed.2d 488.)

(b) Section 504 is, under the *Lovett* test, a bill of attainder. "The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability--members of the Communist Party." (85 S.Ct. 1715, 14 L.Ed.2d 492.)

(c) *American Communications Assn., C.I.O. v. Douds* (1950) 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, infra, §484, is not controlling, for the statutes are different, and the prohibited punishment need not be retribution--it may be deterrent and preventive. (85 S.Ct. 1720, 14 L.Ed.2d 496, 497.)

(d) The *Lovett* case cannot be distinguished on the ground that there three identified individuals were singled out; the Constitution is also violated by a bill of attainder directed against a group by description. (85 S.Ct. 1721, 14 L.Ed.2d 499.)

(e) The conclusion hedges slightly: "We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in *Lovett* that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in *Lovett*: that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under

our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals." (85 S.Ct. 1722, 14 L.Ed.2d 499.)

Four dissenters argue that the opinion is illogical and unsound; it overrules the *Doubs* case; it invalidates conflict-of-interest statutes denying positions of public importance to groups of persons identified by their business affiliations; it also invalidates statutes disqualifying felons from occupying certain positions; and that section 504 is not an invalid punitive measure but a reasonable and valid regulation. (85 S.Ct. 1727 et seq., 14 L.Ed.2d 501 et seq.) (See 55 Cal. L. Rev. 212; 79 Harv. L. Rev. 120.)

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7 *Witkin Sum. Cal. Law Const Law* § 207

[§ 207] Valid Legislation.

(1) *Punishment Is Test.* "In determining whether legislation which bases a disqualification on the happening of a certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was focused. Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified." (*Flemming v. Nestor* (1960) 363 U.S. 603, 80 S.Ct. 1367, 1374, 4 L.Ed.2d 1435, 1446.) Hence, statutory penalties imposed for a proper public purpose are not objectionable. (See *Department of Social Welfare v. Gardiner* (1949) 94 C.A.2d 431, 432, 210 P.2d 855.)

(2) *Denial of Benefit.* In *Flemming v. Nestor*, *supra* (a 5-4 decision), appellee, an alien immigrant, came here in 1913 and became eligible for Social Security benefits in 1955. But the statute was amended in 1954 to provide for termination of benefits for aliens deported for specified reasons, including Communist Party membership; and petitioner was deported in 1956 for such membership from 1933 to 1939. *Held*, the statute was not a bill of attainder; the sanction was merely the denial of a noncontractual governmental benefit, not an affirmative disability or restraint. (80 S.Ct. 1376, 4 L.Ed.2d 1448.)

In *Selective Service System v. Minnesota Public Interest Research Group* (1984) 468 U.S. 841, 104 S.Ct. 3348, 82 L.Ed.2d 632, section 1113 of the Department of Defense Authorization Act of 1983 (50 U.S.C. Appx., §462(f)), which denies federal financial assistance to male students who fail to register for the draft, was upheld. As in *Flemming v. Nestor*, the sanction was not a punishment but the mere denial of a noncontractual governmental benefit. Moreover, the deprivation was not permanent. Students may become eligible for aid by registering later. (104 S.Ct. 3356, 82 L.Ed.2d 644.) Thus, "Congress sought, not to punish anyone, but to promote compliance with the draft registration requirement and fairness in the allocation of scarce federal resources." (104 S.Ct. 3357, 82 L.Ed.2d 646.) (See 98 Harv. L. Rev. 87.)

(3) *Loyalty Regulations.* *Garner v. Board of Public Works of Los Angeles* (1951) 341 U.S. 716, 71 S.Ct. 909, 913, 95 L.Ed. 1317, 1322, *infra*, §482, held that governmental employees may be subjected to the requirements of a loyalty oath and affidavit of non-membership in the Communist Party. These regulations merely impose standards of qualification and eligibility for employment.

The attack on a statute requiring registration of the Communist Party was rejected in *Communist Party of the United States of America v. Subversive Activities Control Bd.* (1961) 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625, *infra*, §477. "The Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. ... The Subversive Activities Control Act is not of that kind. ... Present activity constitutes an operative element to which the statute attaches legal consequences, not merely a point of reference for the ascertainment of particular persons ineluctably designated by the legislature." (81 S.Ct. 1405, 6 L.Ed.2d 683.) (See *De Veau v. Braisted* (1960) 363 U.S. 144, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109, 1120, *supra*, §66 [statute involved no further implications of guilt]; but see *supra*, §206.)

(4) *Failure To Appropriate Funds.* Legislative failure to appropriate funds for salary increases of public employees (here, increases for academic personnel of University of California and California State Colleges, requested by Regents and Trustees) is not punishment within the meaning of the Constitution. (*California State Employees' Assn. v. Flournoy* (1973) 32 C.A.3d 219, 225, 108 C.R. 251 [distinguishing *United States v. Lovett* (1946) 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252, *supra*, §205, which contemplated salary appropriations and expressly forbade their use as compensation to named employees].)

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F. Jury Trial.

1. In Federal Courts.

a. Nature of Guarantee.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 208

[§ 208] In General.

(1) *Constitutional Provisions.* The federal Constitution provides that *criminal* cases and civil suits at *common law*, where the amount in controversy exceeds \$ 20, must be tried by jury. (U.S. Const., Art. III, §2; Sixth and Seventh Amendments; see *Galloway v. United States* (1943) 319 U.S. 372, 63 S.Ct. 1077, 1087, 87 L.Ed. 1458, 1470 [rejecting contention that practice of directed verdict violated guarantee]; *Singer v. United States* (1965) 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630, *infra*, §212; *Atlas Roofing Co. v. Occupational Safety & Health Review Com.* (1977) 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464, *infra*, §211; *Granfinanciera, S.A. v. Nordberg* (1989) 492 U.S. 33, 109 S.Ct. 2782, 2802, 106 L.Ed.2d 26, 55 [in suit by bankruptcy trustee to recover fraudulent conveyance, defendant who has not made claim against bankruptcy estate has Seventh Amendment right to jury trial]; 28 *Hastings L. J.* 1 [civil jury trial rights]; 37 *Hastings L. J.* 637 [right of state to civil jury trial as litigant in federal court]; 27 West L.A. L. Rev. 165 [Seventh Amendment and jury from the vicinage]; 47 *Am.Jur.2d* (1995 ed.), *Jury* §4.)

(2) *Action Based on Statute.* The constitutional guarantee is applicable to actions for damages where the cause of action is based on statute but involves rights and remedies of the sort typically enforced in an action at law. (*Curtis v. Loether* (1974) 415 U.S. 189, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260, 266 [suit by black plaintiff against white landlords for refusal to rent apartment in violation of fair housing provisions (Title VIII) or Civil Rights Act of 1968]; see *Tull v. United States* (1987) 481 U.S. 412, 107 S.Ct. 1831, 1836, 1838, 1839, 95 L.Ed.2d 365, 373, 376, 378 [suit by federal Government under Clear Water Act (33 U.S.C., §1319(b), (d)) for injunction and civil penalties; Seventh Amendment guarantees jury trial as to determination of civil liability, but not as to assessment of amount of civil penalties].)

(3) *Landlord's Summary Proceeding Against Tenant.* On the analogy of a common law action to recover possession of real property, the tenant defendant in a summary statutory eviction proceeding was held entitled to a jury trial. (*Pernell v. Southall Realty* (1974) 416 U.S. 363, 94 S.Ct. 1723, 1729, 1734, 40 L.Ed.2d 198, 208, 213 [District of Columbia statute].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Constitutional Provisions.* See 118 *Harv. L. Rev.* 1665 [The Twenty Dollars Clause]; 6 *A.L.R. Fed* 2d 213 [Construction and Application of Sixth Amendment Right to Trial by Jury--Supreme Court Cases]; 47 *Am.Jur.2d* (2006

ed.), Jury §4.



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F. Jury Trial.

1. In Federal Courts.
 - a. Nature of Guarantee.
2. Composition of Jury.

7 *Witkin Sum. Cal. Law Const Law* § 209

[§ 209] Composition of Jury.

United States v. Wood (1936) 299 U.S. 123, 57 S.Ct. 177, 179, 81 L.Ed. 78, 80, held that federal Government employees could be made eligible for jury service in criminal cases in the District of Columbia without violating the guarantee. And in *Frazier v. United States* (1948) 335 U.S. 497, 69 S.Ct. 201, 205, 93 L.Ed. 187, 196, a conviction for violation of the federal Narcotics Act was upheld, although the jury was composed solely of these employees. (See *Dennis v. United States* (1950) 339 U.S. 162, 70 S.Ct. 519, 523, 94 L.Ed. 734, 739 [reaffirming *Wood* rule].)

Several decisions have held the selection of juries improper, not on constitutional grounds, but in the exercise of the Supreme Court's "power of supervision over the administration of justice in the federal courts." (See *Glasser v. United States* (1942) 315 U.S. 60, 62 S.Ct. 457, 471, 86 L.Ed. 680, 707 ["blue-ribbon" juries]; *Thiel v. Southern Pac. Co.* (1946) 328 U.S. 217, 66 S.Ct. 984, 987, 90 L.Ed. 1181, 1185 [daily wage earners systematically excluded from jury panel]; *Ballard v. United States* (1946) 329 U.S. 187, 67 S.Ct. 261, 262, 91 L.Ed. 181, 185 [women systematically excluded]; 6 *Loyola L.A. L. Rev.* 247 [Federal Jury Reformation].)

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F. Jury Trial.

1. In Federal Courts.

a. Nature of Guarantee.

3. Size of Jury.

7 *Witkin Sum. Cal. Law Const Law* § 210

[§ 210] Size of Jury.

The constitutional guarantee does not require the typical common law jury of 12 persons. In *Williams v. Florida* (1970) 399 U.S. 78, 90 S.Ct. 1893, 1900, 26 L.Ed.2d 446, 454, a six-man jury was held acceptable in a state criminal trial; and in *Colgrove v. Battin* (1973) 413 U.S. 149, 93 S.Ct. 2448, 2454, 37 L.Ed.2d 522, 530, the *Williams* holding was applied to a federal civil trial: "[W]hile we express no view as to whether any number less than six would suffice, we conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases." (See 68 Cal. L. Rev. 1004; 12 Loyola L.A. L. Rev. 1103; 15 A.L.R.4th 213 [validity of agreement to accept verdict by number or proportion less than that constitutionally permitted]; *infra*, §215 [juries of less than six].)

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F. Jury Trial.

1. In Federal Courts.

b. Exceptions.

7 *Witkin Sum. Cal. Law Const Law* § 211

[§ 211] Exceptions.

(1) *In General.* The purpose of the constitutional amendments was not to enlarge the right to a jury trial, but to protect the right in cases in which it was then recognized, and in similar future cases. Thus, suits in *equity* and *admiralty* were exceptions to the rule requiring a jury trial previous to the adoption of the Constitution, and the requirement does not apply to them. (*Parsons v. Bedford, Breedlove & Robeson* (1830) 28 U.S. 433, 3 Pet. 433, 7 L.Ed. 732, 737; see 73 Harv. L. Rev. 186.) Likewise, offenses against the law of war may be tried by a military commission. (*Ex parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 2, 16, 87 L.Ed. 3, 18.) (For proposal to eliminate jury trials in complex civil litigation, see 8 *Pepperdine L. Rev.* 189.)

(2) *Criminal Contempt.* Traditionally, trials for criminal contempt have been held outside the constitutional guarantee. (See *In re Debs* (1895) 158 U.S. 564, 15 S.Ct. 900, 910, 39 L.Ed. 1092, 1106; *United States v. Barnett* (1964) 376 U.S. 681, 84 S.Ct. 984, 990, 12 L.Ed.2d 23, 31.) But the rule today is that there is a federal constitutional right to a jury trial in criminal contempt cases involving serious punishment. (See *Bloom v. Illinois* (1968) 391 U.S. 194, 88 S.Ct. 1477, 1480, 20 L.Ed.2d 522, 526; cf. *Frank v. United States* (1969) 395 U.S. 147, 89 S.Ct. 1503, 1505, 23 L.Ed.2d 162, 166 [contempt conviction for violating injunction, 3 years probation; held a petty offense and no jury required]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §439.) However, the imposition of a fine, even as high as \$ 10,000, against an unincorporated labor union, does not constitute serious punishment, and no jury trial is required. (*Muniz v. Hoffman* (1975) 422 U.S. 454, 95 S.Ct. 2178, 2190, 45 L.Ed.2d 319, 335.)

(3) *Petty Offenses.* In certain classes of minor or "petty" criminal offenses, triable prior to the adoption of the Constitution before inferior officers or tribunals, and involving punishment by a fine only, the constitutional guarantee does not apply, i.e., they are not "crimes" within the meaning of Article III. This was held to be the case where a statute made it an offense knowingly to purchase oleomargarine or receive it for sale and fixed a penalty of \$ 50. (*Schick v. United States* (1904) 195 U.S. 65, 24 S.Ct. 826, 827, 49 L.Ed. 99, 101.)

In *District of Columbia v. Colts* (1930) 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177, defendant was charged in a police court with violating a statute by operating a motor vehicle on certain streets at over 22 miles an hour "in such a manner as to endanger property and individuals," the offense being punishable by either fine or imprisonment. *Held*, he was entitled to a jury trial; the crime was "*malum in se*," a grave and not a petty offense. (51 S.Ct. 53, 77 L.Ed. 209, 221.)

But in *District of Columbia v. Clawans* (1937) 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843, defendant was convicted of engaging in the business of a dealer in secondhand personal property without a license. The maximum punishment prescribed by the statute was a \$ 300 fine or 90 days' imprisonment, and there was no absolute right of appeal. *Held*, a jury trial could be denied. The offense was not indictable at common law, but was merely an infringement of local police regulations, and the penalty was not so serious as to preclude summary proceedings. (57 S.Ct. 662, 81 L.Ed. 846.) (See 13 So. Cal. L. Rev. 33; 17 So. Cal. L. Rev. 41.)

(4) *Statutory Public Rights Adjudicated by Administrative Agency*. The federal Occupational Safety and Health Act (see 3 Summary (10th), *Agency and Employment*, §364 et seq.) created a new statutory duty to maintain safe and healthful working conditions and a new administrative agency--the Occupational Safety and Health Review Commission. The government was authorized to enforce the Act by proceedings before the Commission to obtain abatement orders and civil penalties. In *Atlas Roofing Co. v. Occupational Safety & Health Review Com.* (1977) 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464, petitioners were charged with serious violations, and after a hearing were assessed civil penalties of \$ 5,000 and \$ 600. They sought judicial review, contending that a proceeding by the government to collect a statutory penalty is in substance a common law suit for a money judgment, and that to commit the adjudication to an administrative agency without a jury trial was a violation of the Seventh Amendment. *Held*, the Seventh Amendment was not applicable.

(a) The earlier cases, as explained in *Curtis v. Loether* (1974) 415 U.S. 189, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260, 266, supra §208, and *Pernell v. Southall Realty* (1974) 416 U.S. 363, 94 S.Ct. 1723, 1729, 1734, 40 L.Ed.2d 198, 208, 213, supra, §208, held that when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible. (97 S.Ct. 1269, 51 L.Ed.2d 475.)

(b) Fact-finding was not the exclusive province of the jury at the time of adoption of the Seventh Amendment; courts of equity and admiralty decided fact questions. And the Seventh Amendment was declaratory of the existing law, requiring only that a jury trial in suits at common law be "preserved." (97 S.Ct. 1271, 51 L.Ed.2d 478.)

(c) "[T]he right to a jury trial turns not solely on the nature of the issue to be resolved, but also on the forum in which it is to be resolved. Congress found the common law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law." (97 S.Ct. 1271, 51 L.Ed.2d 479.) (See 21 *Hastings Const. L. Q.* 1013 [validity of public rights doctrine in light of historical rationale of Seventh Amendment].)

(5) *Suit Against Federal Government*. There is no right to a jury trial in an action against the federal Government unless Congress affirmatively granted the right in the statute authorizing the suit. (*Lehman v. Nakshian* (1981) 453 U.S. 156, 101 S.Ct. 2698, 2701, 2705, 69 L.Ed.2d 548, 553, 558.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY

F. Jury Trial.

1. In Federal Courts.

c. Waiver of Jury.

7 *Witkin Sum. Cal. Law Const Law* § 212

[§ 212] Waiver of Jury.

(1) *Effective Waiver in Criminal Trial.* The defendant's waiver of a jury trial, or his or her agreement to less than 12 jurors, will be effective where it is knowingly and intelligently made in open court. (See *Patton v. United States* (1930) 281 U.S. 276, 50 S.Ct. 253, 254, 263, 74 L.Ed. 854, 857, 870 [trial by 11 jurors]; *Adams v. United States* (1942) 317 U.S. 269, 63 S.Ct. 236, 240, 87 L.Ed. 268, 272 [personal waiver by intelligent defendant]; 97 A.L.R.3d 1253 [validity of accused's waiver of unanimous verdict].)

(2) *No Absolute Right To Waive in Criminal Trial.* The federal Constitution merely provides that the trial "shall be by jury." (U.S. Const., Art. III, §2.) The Federal Rules of Criminal Procedure allow the defendant to waive a jury with the approval of the court *and* consent of the government. In *Singer v. United States* (1965) 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630, petitioners, charged with 30 counts of mail fraud, offered to waive a jury "for the purpose of shortening the trial." The judge was willing but the government refused, and defendant was tried by a jury and convicted of 29 counts. On certiorari, he contended that the constitutional right of trial by jury carried with it the correlative right of waiver and trial by the judge alone if he desired it. *Held*, conviction affirmed. Neither the English common law nor the colonial experience justifies this interpretation of the constitutional guarantee. Nor is there any due process objection. The ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite; e.g., a defendant may waive his or her right to public trial but cannot insist on a private trial; the defendant may waive his or her right to confrontation but cannot compel the government to try the case by stipulation. Moreover, the trial is an adversary proceeding, and the government as a litigant has a legitimate interest in seeing that the case is tried before the tribunal the Constitution regards as most likely to produce a fair result.

The Court added a qualifying dictum: "We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to the defendant of an impartial trial." (85 S.Ct. 791, 13 L.Ed.2d 639.) (See 79 *Harv. L. Rev.* 174; 13 *U.C.L.A. L. Rev.* 189.)

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Witkin Summary of California Law IV. FUNDAMENTAL RIGHTS GENERALLY

F. Jury Trial.

2. In State Courts.

a. Right to Jury Trial.

7 *Witkin Sum. Cal. Law Const Law* § 213

[§ 213] Right to Jury Trial.

(1) *Federal Constitutional Right.* A jury trial in a criminal case in a state court is now a federal constitutional right, unless the charge is of a "petty offense." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491, 496; *Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 88 S.Ct. 1472, 1474, 20 L.Ed.2d 538, 542 [petty offense]; *Baldwin v. New York* (1970) 399 U.S. 66, 90 S.Ct. 1886, 1888, 26 L.Ed.2d 437, 440; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §438; on validity of Massachusetts two-tier procedure--jury usually available only on de novo appeal from conviction by judge--see *Ludwig v. Massachusetts* (1976) 427 U.S. 618, 96 S.Ct. 2781, 2783, 2785, 49 L.Ed.2d 732, 735, 738; 90 *Harv. L. Rev.* 78; on petty offenses, see *infra*, §217.)

The same is true of *criminal contempt* where it involves a serious punishment. (*Bloom v. Illinois* (1968) 391 U.S. 194, 88 S.Ct. 1477, 1480, 20 L.Ed.2d 522, 526, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §439; see 82 *Harv. L. Rev.* 153.)

(2) *California Constitution.* The California Constitution provides that the common law right of trial by jury is secured, subject to the following qualifications: (a) In civil actions and cases of misdemeanor, the parties may agree on any number less than 12; (b) in civil actions, three-fourths of the jury may render a verdict; (c) in any action, civil or criminal, a jury trial may be waived. (Cal. Const., Art. I, §16; on the right and waiver in criminal cases, see

5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§435 et seq., 452 et seq.; on the right and waiver in civil cases, see 7 *Cal. Proc.* (4th), *Trial*, §§89, 113 et seq.)

In *Mitchell v. Superior Court* (1989) 49 C.3d 1230, 265 C.R. 144, 783 P.2d 731, 7 *Cal. Proc.* (4th), *Trial*, §199, the court held that a defendant in a contempt proceeding under the Red Light Abatement Law (P.C. 11225 et seq.) was entitled to a jury trial. The Constitution does not distinguish between "serious" and "petty" criminal offenses, and the right to a jury extends to all misdemeanors. Hence, a proceeding under the Red Light Abatement Law, with a maximum penalty of fine or county jail sentence comparable to that imposed for a misdemeanor, calls for a jury trial. (49 C.3d 1244.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *California Constitution.*

Right and waiver in civil cases:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §§79 et seq., 101 et seq.

Mitchell case:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §186.



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F. Jury Trial.

2. In State Courts.

b. Nature of Guarantee.

1. California Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 214

[§ 214] California Constitution.

(1) *Kind of Jury Trial.* The type of jury trial guaranteed by the California Constitution is that which existed at common law, and the Legislature cannot abridge it. The essential elements of a jury in a criminal trial for a felony are (a) the number (12 persons), (b) impartiality, and (c) unanimity of verdict. (*People v. Galloway* (1927) 202 C. 81, 92, 259 P. 332; *People v. Superior Court (Thomas)* (1967) 67 C.2d 929, 932, 64 C.R. 327, 434 P.2d 623; see *Dorshkind v. Harry N. Koff Agency* (1976) 64 C.A.3d 302, 308, 134 C.R. 344 [trial jury's selection of its own foreman is element of constitutional right]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §437.)

(2) *Juror Qualifications.* Although in *People v. Powell* (1891) 87 C. 348, 354, 25 P. 481, it was said that the California Constitution guarantees a right to a jury selected from the "vicinage or county," there is no such express requirement in the Constitution, and later decisions have repudiated the theory. (See *People v. Prather* (1901) 134 C. 386, 66 P. 483; *People v. Richardson* (1934) 138 C.A. 404, 406, 32 P.2d 433; 27 West L.A. L. Rev. 165 [Seventh Amendment and jury from the vicinage].) The qualifications of jurors are subject to legislative control. (*In re Mana* (1918) 178 C. 213, 214, 172 P. 968; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §442 et seq.; 7 *Cal. Proc.* (4th), *Trial*, §125.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Juror Qualifications.*

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §111.



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- F. Jury Trial.
 - 2. In State Courts.
 - b. Nature of Guarantee.
 - 2. Federal Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 215

[§ 215] Federal Constitution.

(1) *In General*. The right to a jury in criminal cases, as an element of federal due process (see *supra*, §213), does not require a jury of 12 members. (*Williams v. Florida* (1970) 399 U.S. 78, 90 S.Ct. 1893, 1898, 26 L.Ed.2d 446, 452, 5 Cal. Crim. Law (3d), *Criminal Trial*, §440 [state criminal jury of six members upheld].) Nor does it require a unanimous verdict. (*Apodaca v. Oregon* (1972) 406 U.S. 404, 92 S.Ct. 1628, 1632, 32 L.Ed.2d 184, 189, 5 Cal. Crim. Law (3d), *Criminal Trial*, §441 [10-2 verdict upheld]; see *Johnson v. Louisiana* (1972) 406 U.S. 356, 92 S.Ct. 1620, 1624, 32 L.Ed.2d 152, 157, 5 Cal. Crim. Law (3d), *Criminal Trial*, §441 [9-3 verdict upheld]; on size of jury, see also *supra*, §210 and *infra*, §216; 11 *Pacific L. J.* 967 [arguing that deaf persons should be eligible to serve on juries].)

(2) *Fair Cross Section of Community*. A "fair cross section of the community" on venires, panels, or lists from which trial juries are drawn is a fundamental element of the constitutional right to a jury trial. "The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. ... This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial." (*Taylor v. Louisiana* (1975) 419 U.S. 522, 95 S.Ct. 692, 698, 42 L.Ed.2d 690, 698, *infra*, §767; see 89 *Harv. L. Rev.* 95.)

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F. Jury Trial.

2. In State Courts.

b. Nature of Guarantee.

3. Jury of Less Than Six Is Invalid.

7 *Witkin Sum. Cal. Law Const Law § 216*

[§ 216] Jury of Less Than Six Is Invalid.

In *Ballew v. Georgia* (1978) 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234, the Court held unconstitutional a Georgia statute dealing with a nonpetty offense (misdemeanor of distributing obscene materials, possible penalty of over 6 months' imprisonment) and providing for trial by a jury of five persons. The validity of a six-member jury had been upheld in *Williams v. Florida* (1970) 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446, *supra*, §215; the issue of whether a smaller number would satisfy the constitutional guarantee had been left open. (98 S.Ct. 1034, 55 L.Ed.2d 241.) But the Court here, mainly relying on empirical data in a large number of scholarly writings (see 98 S.Ct. 1034, 55 L.Ed.2d 241, footnote 10), found a substantial threat to the Sixth and Fourteenth Amendment guarantees by reason of the following:

First, progressively smaller juries are less likely to foster effective group deliberation. (98 S.Ct. 1035, 55 L.Ed.2d 242.)

Second, there are doubts as to the accuracy of the results achieved by smaller and smaller panels. (98 S.Ct. 1036, 55 L.Ed.2d 243.)

Third, verdicts in criminal cases will vary as juries become smaller and the variance amounts to an imbalance to the detriment of the defense. (98 S.Ct. 1037, 55 L.Ed.2d 244.)

Fourth, smaller juries raise problems of representation of minority groups in the community. (98 S.Ct. 1037, 55 L.Ed.2d 244.)

Fifth, research has revealed disparities in verdicts reached by larger and smaller juries. (98 S.Ct. 1037, 55 L.Ed.2d 245.)

The Court concludes: "We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts,

and that prevents juries from truly representing their communities, attains constitutional significance." (98 S.Ct. 1038, 55 L.Ed.2d 246.) The states use juries of less than 12 primarily for administrative reasons, and the savings in a reduction from six to five would be minimal. Hence, no sufficient interest of the state justified the reduction. (98 S.Ct. 1041, 55 L.Ed.2d 249.) (See *Burch v. Louisiana* (1979) 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96, 103 [conviction by nonunanimous six-person jury in state criminal trial for nonpetty offense was invalid]; *Brown v. Louisiana* (1980) 447 U.S. 323, 100 S.Ct. 2214, 2221, 65 L.Ed.2d 159, 167 [*Burch* rule is retroactive].)

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F. Jury Trial. 2. In State Courts. c. Exceptions.

7 *Witkin Sum. Cal. Law Const Law* § 217

[§ 217] Exceptions.

(1) *Criminal Trial for Petty Offense*. Petty offenses are not within the federal constitutional requirements for jury trial. (See *Baldwin v. New York* (1970) 399 U.S. 66, 90 S.Ct. 1886, 1888, 26 L.Ed.2d 437, 440, 5 Cal. Crim. Law (3d), *Criminal Trial*, §438 [divided court recognizing petty offense exception, but holding that possibility of 1-year sentence requires jury trial]; *Blanton v. North Las Vegas, Nevada* (1989) 489 U.S. 538, 109 S.Ct. 1289, 1293, 1294, 103 L.Ed.2d 550, 556, 558 [offense punishable by sentence of 6 months or less is presumed to be petty; additional penalties for first offense of driving under the influence (90-day license suspension, \$ 1,000 fine, alternative of 48 hours community service in distinctive clothing) not severe enough to make offense "serious"].) However, there is no "petty offense" exception in the California Constitution. (See *Mitchell v. Superior Court* (1989) 49 C.3d 1230, 1242, 265 C.R. 144, 783 P.2d 731, *supra*, §213.)

(2) *Trial for Infraction*. "Infractions" not punishable by imprisonment (P.C. 19c) are outside the jury trial guarantee. (*People v. Oppenheimer* (1974) 42 C.A.3d Supp. 4, 11, 116 C.R. 795 [violation of *Veh.C.* 21453, failure to stop for traffic signal].)

(3) *Juvenile Court Proceeding Involving Charge of Crime*. There is no constitutional right to a jury trial in juvenile court even though the minor is brought before the court on a charge of commission of a criminal act. (See *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 91 S.Ct. 1976, 1986, 29 L.Ed.2d 647, 661.)

(4) *Paternity Suit*. There is no right to a jury in an action to establish paternity and enforce child support. (*El Dorado v. Schneider* (1987) 191 C.A.3d 1263, 1280, 237 C.R. 51.)

(5) *Equity Suits*. There is no right to a common law jury in suits in equity. (See 3 Cal. Proc. (4th), *Actions*, §113 et seq.; 7 Cal. Proc. (4th), *Trial*, §101 et seq.)

(6) *Special Proceedings*. Special proceedings, as distinguished from actions, do not require a jury trial. (See 3 Cal. Proc. (4th), *Actions*, §§13, 14; 7 Cal. Proc. (4th), *Trial*, §104.)

(7) *Special Constitutional Tribunals*. The federal Constitution does not prevent the states from abolishing jury trials

in civil cases, and in California, this has been done for two important types of proceedings by amendment of our Constitution to provide for special tribunals: (a) The Workers' Compensation Appeals Board. (Cal. Const., Art. XIV, §4; see 2 *Summary* (10th), *Workers' Compensation*, §2.) (b) The Public Utilities Commission. (Cal. Const., Art. XII, §5, 6; see *infra*, §1084.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Equity Suits*.

Cross-References: 3 *Cal. Proc.* (5th), *Actions*, §119 et seq.; 7 *Cal. Proc.* (5th), *Trial*, §91 et seq.

(6) *Special Proceedings*.

Cross-References: 3 *Cal. Proc.* (5th), *Actions*, §§64, 65; 7 *Cal. Proc.* (5th), *Trial*, §91 et seq.



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Witkin Summary of California Law
IV. FUNDAMENTAL RIGHTS GENERALLY
G. Fundamental Rights Under Due Process Clause.
1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 218

[§ 218] In General.

Most of the rights and liberties regarded as fundamental are protected against national interference by the federal Constitution, and against state interference by state Constitutions. Occasionally, however, cases arise in which the highest state court refuses to give relief against what appears to be a denial of these rights or liberties. In a number of instances, particular rights and liberties have been held by the U.S. Supreme Court to constitute elements of due process under the Fourteenth Amendment, and hence available in state proceedings regardless of whether they are specified in the state Constitution, and irrespective of any limitations imposed by state law or applied by state courts. The ultimate result is to permit a review, and if necessary an independent examination of the record, by the U.S. Supreme Court, of state court decisions in these cases. (See *Palko v. Connecticut* (1937) 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288; *Benton v. Maryland* (1969) 395 U.S. 784, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707, 716; *infra*, §219 et seq.)

In *Palko v. Connecticut*, *supra*, 58 S.Ct. 152, 82 L.Ed. 292, the test laid down was whether the particular right is basic in a free society--"of the very essence of a scheme of ordered liberty"--so that to abolish it is to violate a "*principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*." Thus, there was no fixed catalogue of fundamental rights, for the line was not permanently drawn at any one time. A flexible and progressive course of decision was to be expected, the rules being developed by the traditional method of "inclusion and exclusion." (*Wolf v. Colorado* (1949) 338 U.S. 25, 69 S.Ct. 1359, 1361, 93 L.Ed.2d 1782, 1785; see *Bartkus v. Illinois* (1959) 359 U.S. 121, 79 S.Ct. 676, 678, 3 L.Ed.2d 684, 687.)

Within this test the states were free to develop their own procedures. (See *Bute v. Illinois* (1948) 333 U.S. 640, 68 S.Ct. 763, 772, 92 L.Ed. 986, 995 ["the Fourteenth Amendment does not ... have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights"]; *Adamson v. California* (1947) 332 U.S. 46, 67 S.Ct. 1672, 1678, 91 L.Ed. 1903, 1912.; *Williams v. New York* (1949) 337 U.S. 241, 69 S.Ct. 1079, 1085, 93 L.Ed. 1337, 1344.) (On repudiation of *Palko* test, see *infra*, §219.)

SUPPLEMENT: [This section is current through the latest supplement]
See 41 U.C. Davis L. Rev. 1969 [right to access experimental drugs].



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G. Fundamental Rights Under Due Process Clause.
2. Incorporation Theory.

7 Witkin Sum. Cal. Law Const Law § 219

[§ 219] Incorporation Theory.

(1) *Early Rejection of Incorporation Theory.* The argument has been constantly made that every restriction on the federal government contained in the Bill of Rights (first eight amendments) is, by virtue of the Fourteenth Amendment, also a restriction on the *states*. "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. ... The issue is closed." (*Wolf v. Colorado* (1949) 338 U.S. 25, 69 S.Ct. 1359, 1360, 93 L.Ed. 1782, 1785; see *Adamson v. California* (1947) 332 U.S. 46, 67 S.Ct. 1672, 1676, 91 L.Ed. 1903, 1909; *Bartkus v. Illinois* (1959) 359 U.S. 121, 79 S.Ct. 676, 678, 3 L.Ed.2d 684, 687.)

(2) *View of Later Decisions.* The Supreme Court's majority has steadily added rights to the list brought under the Fourteenth Amendment (see *infra*, §220 et seq.), and a strong minority has argued for full incorporation. (See *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 1491, 12 L.Ed.2d 653, 656.)

In *Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, the Court held that the Sixth Amendment right of confrontation was protected (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §531). In light of "opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment," statements made "generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law." (85 S.Ct. 1069, 13 L.Ed.2d 927.) (See *Klopper v. North Carolina* (1967) 386 U.S. 213, 87 S.Ct. 988, 995, 18 L.Ed.2d 1, 10 [concurring opinion criticizing doctrine].)

(3) *Repudiation of Palko Test.* *Palko v. Connecticut* (1937) 302 U.S. 319, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292, *supra*, §218, was repudiated, and its test virtually abolished, in *Benton v. Maryland* (1969) 395 U.S. 784, 89 S.Ct. 2056, 2070, 23 L.Ed.2d 707, 724: "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." (89 S.Ct. 2062, 23 L.Ed.2d 716.) *Palko* represented the approach of earlier cases already overruled. Hence: "The validity of petitioner's larceny conviction must be judged not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision." (89 S.Ct. 2063, 23 L.Ed.2d 717.) (See 2 *Rotunda*, §15.6; 2 *Tribe*, §11-2 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
(3) *Repudiation of Palko Test*. See 2 Rotunda 4th, §15.6.



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G. Fundamental Rights Under Due Process Clause.
3. Rights of Criminal Defendants.

7 *Witkin Sum. Cal. Law Const Law* § 220

[§ 220] Rights of Criminal Defendants.

The rights of criminal defendants protected by the Due Process Clause from impairment in federal or state criminal trials are principally covered in *California Criminal Law* and *California Evidence*. The following are illustrative:

(1) Protection against admission of illegally obtained evidence. (*Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §5.)

(2) Privilege against self-incrimination. (*Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; see 2 *Cal. Evidence* (4th), *Witnesses*, §§356, 433.)

(3) Exclusion of confession obtained by coercion. (*Ashcraft v. Tennessee* (1944) 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; see 1 *Cal. Evidence* (4th), *Hearsay*, §§64, 72.)

(4) Right of accused to notice of true nature of charge. (*Smith v. O'Grady* (1941) 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859; *In re Oliver* (1948) 333 U.S. 257, 68 S.Ct. 499, 507, 92 L.Ed. 682, 694; see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §177.)

(5) Right to counsel at interrogation stage. (*Escobedo v. Illinois* (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §90 et seq.)

(6) Right to counsel at lineup. (*United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; see 2 *Cal. Evidence* (4th), *Witnesses*, §392 et seq.)

(7) Right to counsel at trial, including effective appointment for indigent, and access to counsel. (*Powell v. Alabama* (1932) 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158; *Moore v. Michigan* (1957) 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2d 167; *Ferguson v. Georgia* (1961) 365 U.S. 570, 81 S.Ct. 756, 770, 5 L.Ed.2d 783, 798; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §143 et seq.)

(8) Right to trial by jury except where charge is of petty offense. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491; *Bloom v. Illinois* (1968) 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522; see *supra*, §213.)

(9) Right to trial or hearing before impartial judge. (*Tumey v. Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749; *In re Murchison* (1955) 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942; see *infra*, §642.)

(10) Right to trial free from domination by mob violence and from prejudicial publicity. (*Moore v. Dempsey* (1923) 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 [mob violence]; *Estes v. Texas* (1965) 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600; see 5 Cal. Crim. Law (3d), *Criminal Trial*, §361 et seq.)

(11) Burden on state to prove elements of crime beyond reasonable doubt. (*Morrison v. California* (1934) 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664; *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, 375; see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §§20, 21; 5 Cal. Crim. Law (3d), *Criminal Trial*, §521; for same rule in juvenile court where basis of petition is commission of criminal act, see *In re Winship*, *supra*, 90 S.Ct. 1074, 25 L.Ed.2d 376; 10 Summary (10th), *Parent and Child*, §878.)

(12) Right to be confronted by witnesses. (*Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; see 3 Cal. Evidence (4th), *Presentation at Trial*, §§20, 21; 5 Cal. Crim. Law (3d), *Criminal Trial*, §531; on defendant's right to view scene of crime, when the jury is taken there, see 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §28.)

(13) Protection against double jeopardy. (*Benton v. Maryland* (1969) 395 U.S. 784, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707, 716; *Waller v. Florida* (1970) 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435; see 1 Cal. Crim. Law (3d), *Defenses*, §103 et seq.)

(14) Right to new trial, despite lapse of time, where conviction was obtained through perjury knowingly used by the prosecution. (*Mooney v. Holohan* (1935) 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; *Napue v. Illinois* (1959) 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; see 6 Cal. Crim. Law (3d), *Criminal Writs*, §41 et seq.)

(15) Right to a hearing before revocation of probation or parole. (*People v. Youngs* (1972) 23 C.A.3d 180, 188, 99 C.R. 901, 3 Cal. Crim. Law (3d), *Punishment*, §580 [probation]; *Morrissey v. Brewer* (1972) 408 U.S. 471, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484, 495, 3 Cal. Crim. Law (3d), *Punishment*, §646 [parole].)

(16) Right to speedy trial. (*Klopfer v. North Carolina* (1967) 386 U.S. 213, 87 S.Ct. 988, 993, 18 L.Ed.2d 1, 7; *Barker v. Wingo* (1972) 407 U.S. 514, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 108; see 5 Cal. Crim. Law (3d), *Criminal Trial*, §273 et seq.)

(17) Right to public trial. (*In re Oliver* (1948) 333 U.S. 257, 68 S.Ct. 499, 509, 92 L.Ed. 682, 694; see 5 Cal. Crim. Law (3d), *Criminal Trial*, §351 et seq.)

(18) Right to trial by an impartial jury. (*Irvin v. Dowd* (1961) 366 U.S. 717, 81 S.Ct. 1639, 1641, 6 L.Ed.2d 751, 755; see 5 Cal. Crim. Law (3d), *Criminal Trial*, §442 et seq.)

(19) Right to compulsory process to obtain favorable witnesses. (*Washington v. Texas* (1967) 388 U.S. 14, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1022; see 3 Cal. Evidence (4th), *Presentation at Trial*, §5.)

(20) Protection against cruel and unusual punishment. (*Louisiana v. Resweber* (1947) 329 U.S. 459, 67 S.Ct. 374, 378, 91 L.Ed. 422, 426; *Robinson v. California* (1962) 370 U.S. 660, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758, 763; see 3 Cal. Crim. Law (3d), *Punishment*, §110 et seq.)

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G. Fundamental Rights Under Due Process Clause.
4. Fundamental Civil Rights.
a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 221

[§ 221] In General.

The following are significant rights and liberties held to be fundamental and therefore within the protection of the Due Process Clause, either under the earlier *Palko* test (supra, §218) or the expanded approach of later decisions (supra, §219). Each is separately considered at an appropriate place in this chapter or in other works:

(1) Freedom of speech, press, and assembly. (*Near v. Minnesota* (1931) 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; *De Jonge v. Oregon* (1937) 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; infra, §311 et seq.)

(2) Freedom of religion and belief. (*West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628; infra, §505 et seq.)

(3) Freedom of association with others. (*N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; *Bates v. Little Rock* (1960) 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; infra, §378 et seq.)

(4) Freedom of movement, or the right to travel. (*Kent v. Dulles* (1958) 357 U.S. 116, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204, 1210; infra, §§403, 404.)

(5) Freedom of mentally ill person from unnecessary confinement. (See *O'Connor v. Donaldson* (1975) 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396; infra, §222.)

(6) The right to acquire, enjoy, own, and dispose of property. (See *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Sei Fujii v. California* (1952) 38 C.2d 718, 242 P.2d 617; infra, §§722, 746.)

(7) The right to practice a profession or to work. (*Endler v. Schutzbank* (1968) 68 C.2d 162, 169, 65 C.R. 297, 436 P.2d 297; *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 17, 95 C.R. 329, 485 P.2d 529 ["right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness"]; *Hughes v. Board of Architectural Examiners* (1998) 17 C.4th 763, 790, 72 C.R.2d 624, 952 P.2d 641 [status as licensee does not ensure that license may not be revoked for prelicensure wrongful conduct]; infra, §§661, 765.)

(8) The right to vote. (*Williams v. Rhodes* (1968) 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24; infra, §227 et seq.)

(9) The right to hold public office. (*Zeilenga v. Nelson* (1971) 4 C.3d 716, 720, 94 C.R. 602, 484 P.2d 578; *Thompson v. Mellon* (1973) 9 C.3d 96, 107 C.R. 20, 507 P.2d 628; *Woo v. Superior Court* (2000) 83 C.A.4th 967, 977, 100 C.R.2d 156 [any ambiguity in law affecting right to hold public office "must be resolved in favor of eligibility to hold office"]; *infra*, §259 et seq.)

(10) The right to marry the person of one's choice. (*Perez v. Sharp* (1948) 32 C.2d 711, 714, 198 P.2d 17; *infra*, §747.)

(11) The right of privacy. (*Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; *infra*, §558 et seq.)

(12) The right to receive mail. (See *Lamont v. Postmaster General of the United States* (1965) 381 U.S. 301, 85 S.Ct. 1493, 1496, 14 L.Ed.2d 398, 401; *infra*, §370.)

SUPPLEMENT: [This section is current through the latest supplement]

See 120 Harv. L. Rev. 1323 [A Right To Learn?: Improving Educational Outcomes Through Substantive Due Process].(10) *Right to marry person of one's choice*: On marriage between persons of same sex, see Supp., *infra*, §226A.



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b. Rights of Mentally Ill Persons.
1. Freedom From Unnecessary Confinement.

7 *Witkin Sum. Cal. Law Const Law* § 222

[§ 222] Freedom From Unnecessary Confinement.

In *O'Connor v. Donaldson* (1975) 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396, Donaldson was civilly committed to confinement in the Florida State Hospital in 1957, in proceedings initiated by his father, who thought his son had "delusions." At the hearing, he was found to be suffering from "paranoid schizophrenia." For 15 years thereafter, Donaldson repeatedly and unsuccessfully sought release, and then brought this action for damages under 42 U.S.C., §1983 (infra, §816), against the hospital superintendent. The evidence at the trial showed that the hospital staff had the power to release a nondangerous patient, even if he had been lawfully committed and remained mentally ill; that Donaldson posed no danger to others or to himself at any time in his life; that responsible persons frequently sought his release and offered to assume responsibility for his welfare; that he was capable of earning his living and did, in fact, obtain a job immediately on his release; that his confinement was a simple regime of enforced custodial care, with no program of treatment of his supposed illness. The jury awarded compensatory damages of \$ 38,500, and punitive damages of \$ 10,000. *Held*, Donaldson's constitutional right was violated, but the trial court erred in failing to instruct on defendant's good faith reliance on state law (see supra, §105; 5 *Summary* (10th), *Torts*, §348).

(a) The Court of Appeals took the broad position that a mentally ill person in confinement has a constitutional right to receive treatment. This issue was not reached because the record showed no justification for continued confinement. And, even if confinement was initially ordered by a court on a constitutionally adequate basis, it could not constitutionally continue after that basis no longer existed. (95 S.Ct. 2493, 45 L.Ed.2d 406.)

(b) A finding of mental illness alone cannot justify indefinite custodial confinement of a person who is dangerous to no one and can live safely in freedom. (95 S.Ct. 2493, 45 L.Ed.2d 406.)

(c) The state may not confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community; a person may prefer his home to the comforts of an institution. (95 S.Ct. 2493, 45 L.Ed.2d 407.)

(d) The state may not "fence in" the harmless mentally ill solely to save its citizens from exposure to them, any more than it could incarcerate the physically unattractive or socially eccentric. (95 S.Ct. 2494, 45 L.Ed.2d 407.) (See 13 Cal. Western L. Rev. 168 [criticizing *O'Connor* Court's refusal to recognize constitutional right to treatment]; 89 *Harv.*

L. Rev. 70; 3 Hastings Const. L. Q. 599; 15 U.C. Davis L. Rev. 527.)

Vitek v. Jones (1980) 445 U.S. 480, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, 558, 561, 566, recognizes due process rights of notice and hearing where an incarcerated prisoner is transferred involuntarily to a state mental hospital. (See 29 *Hastings L. J.* 519 [right of eccentricity]; 47 *So. Cal. L. Rev.* 237 [Legislating Behavior Control]; 14 *U.S.F. L. Rev.* 675 [constitutional right to treatment services for noncommitted mentally disabled]; 188 *A.L.R. Fed* 285 [federal cases on forcible administration of antipsychotic medication to pretrial detainees]; on statutory rights of mentally ill persons, see *infra*, §224; on involuntary administration of drugs to render defendant competent to stand trial, see 3 *Cal. Crim. Law* (3d), *Punishment*, §24.)

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2. Constitutional Right to Treatment.

7 *Witkin Sum. Cal. Law Const Law* § 223

[§ 223] Constitutional Right to Treatment.

In *Youngberg v. Romeo* (1982) 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28, the Court considered "for the first time the substantive rights of involuntarily-committed mentally retarded persons under the Fourteenth Amendment to the Constitution." (102 S.Ct. 2457, 73 L.Ed.2d 36.) The Court's conclusion, based on a weighing of the interests, was this:

(a) The state owes a duty to provide adequate food, shelter, clothing, and medical care. It also has the duty to provide reasonable safety for all residents within the institution. It may not restrain residents except to the extent that professional judgment deems this necessary to assure safety or to provide needed training. (102 S.Ct. 2462, 73 L.Ed.2d 42.)

(b) "In this case, therefore, the state is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence." (102 S.Ct. 2462, 73 L.Ed.2d 42.) (See 96 Harv. L. Rev. 77; 25 San Diego L. Rev. 197.)

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3. Statutory Rights.

7 Witkin Sum. Cal. Law Const Law § 224

[§ 224] Statutory Rights.

Except as specifically limited by federal or state law, persons with mental illness have "the same legal rights and responsibilities guaranteed all other persons" by the federal and state Constitutions and laws. "No otherwise qualified person by reason of having been involuntarily detained for evaluation or treatment under provisions of this part or having been admitted as a voluntary patient to any health facility," as defined in *Health & Saf.C. 1250*, "in which psychiatric evaluation or treatment is offered shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds." (Welf.C. 5325.1.)

The Legislature intends that persons with mental illness have rights including, but not limited to, the following:

- (1) A right to treatment services that "promote the potential of the person to function independently. Treatment should be provided in ways that are least restrictive of the personal liberty of the individual." (Welf.C. 5325.1(a).)
- (2) "A right to dignity, privacy, and humane care." (Welf.C. 5325.1(b).)
- (3) "A right to be free from harm, including unnecessary or excessive physical restraint, isolation, medication, abuse, or neglect. Medication shall not be used as punishment, for the convenience of staff, as a substitute for program, or in quantities that interfere with the treatment program." (Welf.C. 5325.1(c).)
- (4) "A right to prompt medical care and treatment." (Welf.C. 5325.1(d).)
- (5) "A right to religious freedom and practice." (Welf.C. 5325.1(e).)
- (6) "A right to participate in appropriate programs of publicly supported education." (Welf.C. 5325.1(f).)
- (7) "A right to social interaction and participation in community activities." (Welf.C. 5325.1(g).)
- (8) "A right to physical exercise and recreational opportunities." (Welf.C. 5325.1(h).)

(9) "A right to be free from hazardous procedures." (Welf.C. 5325.1(i).) (On commitment under Lanterman-Petris-Short Act, Welf.C. 5000 et seq., see 3 *Cal. Proc.* (4th), *Actions*, §29 et seq.; on rights of involuntarily committed mental patient to refuse treatment with antipsychotic drugs, see 3 *Cal. Proc.* (4th), *Actions*, §34; 74 *A.L.R.4th* 1099; for discussion of mentally ill prisoner's right to refuse treatment, see 3 *Cal. Crim. Law* (3d), *Punishment*, §64.)

The Civil Rights of Institutionalized Persons Act authorizes the Attorney General to institute a civil action for equitable relief when he or she has reasonable cause to believe that a state or local government is depriving an institutionalized person of his or her civil rights. (42 U.S.C., §1997 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(9) *Right to be free of hazardous procedures:*

Commitment:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.

Right to refuse drug treatment:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §85.



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c. Maternity Leave Regulations.

7 *Witkin Sum. Cal. Law Const Law* § 225

[§ 225] Maternity Leave Regulations.

In *Cleveland Bd. of Education v. LaFleur* (1974) 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52, the Court held that school board regulations requiring teachers to take leaves of absence in the fifth or sixth month of pregnancy created conclusive presumptions of disability and violated due process. On the constitutional right, the opinion states: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause." And "overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." (94 S.Ct. 796, 39 L.Ed.2d 60.)

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d. Distinction: Corporal Punishment of Pupil.

7 *Witkin Sum. Cal. Law Const Law* § 226

[§ 226] Distinction: Corporal Punishment of Pupil.

In *Ingraham v. Wright* (1977) 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711, Florida junior high school students brought civil rights actions challenging the constitutionality of state-authorized corporal punishment, consisting of paddling, as a means of maintaining school discipline. *Held*, dismissal of action affirmed.

(a) The common law sanctioned the use of reasonable but not excessive force to discipline a child. The early cases viewed the authority of the teacher as deriving from the parents; but the modern view is that the state itself may impose this punishment as part of the educational process. Only a few states have elaborated on the common law test of reasonableness, e.g., by providing for approval or notification of the child's parents. (97 S.Ct. 1407, 1408, 51 L.Ed.2d 724, 725.)

(b) The Eighth Amendment prohibition against cruel and unusual punishments is inapplicable. It has always been regarded as referring to criminal punishment; and the school child, unlike a prisoner, has little need for this protection, for the schools are open to public scrutiny, the child is free to return home at the end of the school day, and the school is subject to supervision by the community. (97 S.Ct. 1410, 1412, 51 L.Ed.2d 727, 729.)

(c) The more important challenge is on due process grounds.

(1) Due process is required when a decision of the state implicates an interest within the protection of the Fourteenth Amendment. One *liberty* interest is in freedom from bodily restraint and punishment; and this interest is at stake when school authorities, acting under color of state law, decide to punish a child by restraint and infliction of physical pain. (97 S.Ct. 1414, 51 L.Ed. 732.)

(2) The common law remedies for excessive punishment constitute due process of law. (a) The child's liberty interest is subject to the historical limitation that no recovery can be had where the force was reasonable, and therefore privileged. (97 S.Ct. 1415, 51 L.Ed.2d 733.) (b) Florida law recognizes the common law right of action for damages for excessive punishment, and also imposes criminal sanctions where malice is shown. (97 S.Ct. 1415, 51 L.Ed.2d 734.) (c) In light of history and the current problems of school discipline, advance procedural safeguards--i.e., notice and hearing prior to the imposition of punishment--cannot be considered essential to due process. (97 S.Ct. 1418, 51 L.Ed.2d 737.)

Four justices dissented. (97 S.Ct. 1419, 1427, 51 L.Ed.2d 738, 748.) (See 91 *Harv. L. Rev.* 114; 94 *Harv. L. Rev.* 1106; 33 *Hastings L. J.* 1245; 52 *So. Cal. L. Rev.* 1331; for statutory prohibition of corporal punishment by school employees, see *Educ.C.* 49000 and 49001, 5 *Summary* (10th), *Torts*, §425.)

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e. (New) Marriage Between Persons of Same Sex.

7 *Witkin Sum. Cal. Law Const Law* § 226A

[§ 226A] (New) Marriage Between Persons of Same Sex.

(1) *Historical Development.* *Lockyer v. San Francisco* (2004) 33 C.4th 1055, 17 C.R.3d 225, 95 P.3d 459, text, §142, held that approximately 4,000 same-sex marriages performed in San Francisco were void because public officials acted unlawfully in issuing marriage licenses to same-sex couples in the absence of a judicial determination that the California statute limiting marriage to the union between a man and a woman was unconstitutional. The decision did not determine whether a statutory scheme that gives same-sex domestic partners virtually all the "substantive benefits and privileges" of married persons, but limits marriage to opposite-sex couples, violates the state's Constitution. While *Lockyer* was pending, a number of same-sex couples and the City and County of San Francisco filed a lawsuit alleging that *Family C. 308.5*, limiting marriage to opposite-sex couples, applied only to marriages solemnized outside of California and that, in any event, the statute was unconstitutional. These cases were coordinated, together with two cases seeking an immediate stay to stop the issuance of marriage licenses to same-sex couples in San Francisco, into a single proceeding, *In re Marriage Cases* (2008) 43 C.4th 757, 76 C.R.3d 683, 183 P.3d 384. The trial court determined that denying same-sex couples the right to marry violates the Equal Protection Clause of the California Constitution. The Court of Appeal reversed. *Held*, reversed. In limiting marriage to opposite-sex couples, the California statutory scheme violates both the fundamental right to marry protected by the due process (Cal. Const., Art. I, §7(a)) and privacy (Cal. Const., Art. I, §1) provisions of the California Constitution and the Equal Protection Clause (Cal. Const., Art. I, §7(a)).

(a) *California statutes governing marriage.* "From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." (43 C.4th 792.) *Family C. 308.5* (see 11 *Summary* (10th), *Husband and Wife*, §44), an initiative statute approved by the voters in 2000, provides that "[o]nly marriage between a man and a woman is valid or recognized in California." (43 C.4th 796.) There has been disagreement whether the statute applies only to out-of-state marriages or whether it also applies to marriages performed in California. Although the immediately preceding statute, *Family C. 308* (see 11 *Summary* (10th), *Husband and Wife*, §44), relates specifically to out-of-state marriages, *Family C. 308.5* does not contain limiting language. Because *Family C. 308.5* applies both to marriages that are "recognized" and "valid" in California, the average voter is likely to have understood the statute to apply to both in-state and out-of-state marriages. (43 C.4th 798.) Moreover, nothing in the background of the initiative indicates that it was intended to leave the Legislature free to authorize the

marriage of same-sex couples. (43 C.4th 799.) Discrimination in the treatment of in-state and out-of-state marriage "would be difficult to square with governing federal constitutional precedents." (43 C.4th 800.) Hence, the statute cannot properly be interpreted to apply only to marriages performed outside of *California*. (43 C.4th 797.)

(b) *California domestic partnership legislation*. With a few exceptions (43 C.4th 805, footnote 24) under the California Domestic Partner Rights and Responsibilities Act of 2003 (see 11 *Summary* (10th), *Husband and Wife*, §25 et seq.), the rights and responsibilities of domestic partners are virtually the same as those of spouses. (43 C.4th 802.) The Act does not purport to, and could not, modify the applicable provisions of federal law, which defines marriage, for purposes of federal law, as the union of a man and a woman. This would not change if California designated the official union of these couples a marriage rather than a domestic partnership. (43 C.4th 806.)

(c) *Marriage as fundamental right under California Constitution*.

(1) *Fundamental nature of right to marry*. Under California case law, the right to marry is "beyond question" a fundamental right protected by the *California Constitution*. (43 C.4th 809.) *Meyer v. Nebraska* (1923) 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, text, §1071, discussed the right to marry as an aspect of the fundamental substantive "liberty" protected by the Due Process Clause of the United States Constitution. In *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, text, §558, that right was identified as a component of the "right to privacy" protected by the United States Constitution. Since the 1972 addition of privacy to the inalienable rights protected by Cal. Const., Art. I, §1 (see text, §178), the state constitutional right to marry is both a liberty interest protected by the Due Process Clause and an interest in personal autonomy protected by the *Privacy Clause of the California Constitution*. (43 C.4th 810.)

(2) *Nature of right at issue*. The California Supreme Court in *Perez v. Sharp* (1948) 32 C.2d 711, 198 P.2d 17, text, §747, characterized the constitutional right that the plaintiffs sought as the right to marry "the person of one's choice," rather than the "right to interracial marriage." And in *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508, text, §573, the United States Supreme Court concluded that, in its prior decision in *Bowers v. Hardwick* (1986) 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140, text, §573, it had erred in characterizing the right sought by plaintiffs as the right to engage in intimate *homosexual* conduct. (43 C.4th 811.) The constitutional right at issue "should be understood in a broader and more neutral fashion so as to focus upon the substance of the interests that the constitutional right is intended to protect." Here, plaintiffs are not seeking to create a new constitutional right to same-sex marriage, but rather to come under the umbrella of the existing constitutional right to marry. (43 C.4th 812.)

(3) *Importance of marriage to society and individual*. *Meyer v. Nebraska*, *supra*, included the rights to marry, establish a home, and bring up a family, as within the scope of the liberty interest of the Due Process Clause. *Perez v. Sharp*, *supra*, described marriage as a "fundamental right of free men." *Perez* and other California cases have recognized marriage as the means available to the individual to establish a family, which is the basic unit and core of our society. (43 C.4th 813.) The right to establish a legally recognized family with the person of one's choice is of fundamental significance to both society and the individual. (43 C.4th 814.) Because the right to marry not only serves the interests of society, but implicates the due process and equal protection rights of the individual, the right is not one that exists only if the Legislature chooses to establish and retain it. (43 C.4th 818.)

(4) *Private and public nature of right*. While the right to marry includes the "negative" right to be free of governmental intrusion into marriage, i.e., the right of marital or familial privacy, it also includes a "positive" right to have the state take affirmative action to acknowledge and support the family unit. It obligates the state to grant public recognition to the couple's familial relationship. (43 C.4th 819.) "In light of the fundamental nature of the substantive rights embodied in the right to marry--and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society--the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation." (43 C.4th 820.)

(5) *Relationship of tradition and fundamental rights*. While traditionally in this state marriage has been limited to a union between a man and a woman, tradition alone has not been viewed as sufficient justification for perpetuating,

without examination, the denial of fundamental constitutional rights. (43 C.4th 820.) Once a fundamental right has been recognized, it cannot be denied to a group on the ground that the group has historically been denied that right. (43 C.4th 824.) California recognizes that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals, and they are entitled to protection from discrimination on the basis of their sexual orientation. (43 C.4th 823.)

(6) *Effect of decision on opposite-sex couples.* Unlike the decisions in *Johnson v. Calvert* (1993) 5 C.4th 84, 19 C.R.2d 494, 851 P.2d 776, 10 Summary (10th), *Parent and Child*, §22, and *Dawn D. v. Superior Court* (1998) 17 C.4th 932, 72 C.R.2d 871, 952 P.2d 1139, 10 Summary (10th), *Parent and Child*, Supp., §35, where the grant of a party's right would necessarily reduce or diminish the rights of others, the grant of the right to marry to same-sex couples will not impair the constitutional rights that opposite-sex couples have traditionally possessed. (43 C.4th 824, 825.)

(7) *Effect of ability to procreate.* That only a man and a woman can produce children biologically does not require that the constitutional right to marry be limited to opposite-sex couples. The constitutional right to marry has never been limited to those who are physically capable of producing children. (43 C.4th 825.) And while marriage may afford protection for the children of opposite-sex couples who are produced by those couples accidentally, no case discussing the right to marry has suggested that the constitutional right to marry is possessed only by individuals who are at risk of unintended pregnancy. (43 C.4th 826.) Moreover, past cases like *Griswold v. Connecticut*, *supra*, which upheld a married couple's right to use contraception to *prevent* procreation, make clear that the right to marry is not confined to or restrictively defined by that purpose alone. (43 C.4th 827.)

(8) *Impact on biological parenthood.* Allowing same-sex couples to marry does not "sever the link that marriage provides between procreation and child rearing." It simply confirms that a stable two-parent family, supported by state recognition and protection, is as important for children being raised by same-sex couples as for those being raised by opposite-sex couples, whether they are biological or adoptive parents. (43 C.4th 828.)

(9) *Effect of reserving different names for same rights.* Assigning the new and unfamiliar term "domestic partnership" to same-sex couples while reserving the historic and highly respected designation "marriage" to opposite-sex couples risks "denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry." (43 C.4th 831.)

(d) *Effect of equal protection on statutory scheme.*

(1) *Standard of review.* Under the conventional standard for reviewing economic and social welfare legislation in which classes are treated differently, the distinctions drawn must bear some rational relationship to a conceivable legitimate state purpose. The statute is presumed constitutional and the burden of demonstrating the invalidity of the classification rests on the party challenging it. In cases involving suspect classifications or bearing on fundamental interests, on the other hand, the classification is subject to a higher standard of strict scrutiny, and the state bears the burden of demonstrating that it has a compelling interest that justifies the law and that the distinctions drawn by the law are necessary to further that purpose. (43 C.4th 832.)

(2) *No sex discrimination.* While California cases have long established that statutes discriminating on the basis of sex or gender are subject to strict scrutiny, the statutory scheme under consideration here does not so discriminate. Persons of either gender are permitted to marry only persons of the opposite gender and are thus treated equally. (43 C.4th 833.)

(3) *Sexual orientation is suspect classification.* The statutory provisions restricting marriage to the union between a man and a woman do not merely have a disparate impact on gay persons. They classify and prescribe distinct treatment on the basis of sexual orientation, even though they do not explicitly ban marriage to a person of the same sex. (43 C.4th 833.) "By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation." (43 C.4th 839.) "[T]he

most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society." Thus, as stated in *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 95 C.R. 329, 485 P.2d 529, text, §765, "courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices." Sexual orientation clearly comes within this rationale. (43 C.4th 843.)

(4) *Intermediate scrutiny rejected.* Although an intermediate scrutiny has been suggested, California cases, unlike federal cases, have continued to review those statutes that impose differential treatment on the basis of race or gender under strict scrutiny. (43 C.4th 843.) There is no reason to apply a less rigorous standard to cases involving sexual orientation. (43 C.4th 844.)

(5) *Violation of privacy.* Strict scrutiny also applies because the classification drawn by the statutes impinges on the constitutionally protected privacy interest of same-sex couples. Denying these couples access to the established institution of marriage impinges on their right to have their family relationship accorded the respect and dignity equal to that accorded to the relationship of opposite-sex couples. (43 C.4th 845.) In light of the historical discrimination against gay people, there is a significant risk that the institution of domestic partnership will be viewed as a mark of second-class citizenship. And while marriage is well understood by the public generally, domestic partnership is not, which will result in difficulties for same-sex couples and their children not experienced by opposite-sex families. (43 C.4th 846.) In the numerous settings in which people are asked whether they are single or married, domestic partners will be forced to disclose their sexual orientation, even though that information is irrelevant in the setting in question. (43 C.4th 847.)

(6) *The state's interest.* The state does not have a compelling interest in reserving the designation of marriage to opposite-sex couples, nor is the statutory restriction necessary to serve a compelling state interest. Extending the designation to same-sex couples will not deprive opposite-sex couples or their children of the rights and benefits conferred by the marriage statutes. Nor will permitting same-sex couples to marry alter the nature of the institution or impinge on religious freedoms, as no religious officiant will be required to solemnize such a marriage. (43 C.4th 854.)

(7) *Role of court.* While the separation-of-powers doctrine prohibits a court from "redefining" marriage based on the court's view that public policy or the public interest would be better served by the revision, the long-standing definition of marriage is not exempt from constraints imposed by the California Constitution, nor is the court precluded from determining that constitutional question. (43 C.4th 849.) There are many examples of legal doctrines, like coverture and recrimination, that were once viewed as central to marriage that have been subjected to judicial scrutiny, and then modified or invalidated, when their fairness or continuing validity was challenged. (43 C.4th 850.)

(8) *Effect of initiative.* The fact that *Family C. 308.5* was enacted as an initiative measure does not shield it from constitutional scrutiny or justify a more deferential standard of review. Past cases have uniformly applied the same constitutional limitations applicable to statutes adopted by the Legislature to measures enacted through the initiative process when they violated guarantees provided by the *United States or California Constitution*. (43 C.4th 852.)

(e) *The remedy.* In view of the societal importance given to the designation of marriage, extending the designation of marriage to same-sex couples, rather than denying it to all couples, is the remedy most consistent with the state's general legislative policy. (43 C.4th 856.) The language in *Family C. 300* limiting marriage to a union "between a man and a woman" must be stricken from the statute, making marriage available to both same-sex and opposite-sex couples. *Family C. 308.5*, not being capable of any constitutional interpretation, cannot stand. (43 C.4th 857.)

One justice concurred (43 C.4th 857), and three justices concurred and dissented in two opinions (43 C.4th 860, 878).

See 59 *Hastings L. J.* 843 [Formalism: From Racial Integration to Same-Sex Marriage]; 1 *A.L.R. Fed* 2d 1 [Marriage Between Persons of Same Sex--United States and Canadian Cases].

(2) *Amendment of Constitution.* Proposition 8, adopted by the voters in the November, 2008, general election, adds Cal. Const., Art. I, §7.5, to the California Constitution. It provides: "Only marriage between a man and a woman is valid or recognized in California." The validity of this provision is being considered by the California Supreme Court.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
V. SUFFRAGE

A. Nature of Right To Vote.
1. Federal Constitution.

7 Witkin Sum. Cal. Law Const Law § 227

[§ 227] Federal Constitution.

(1) *In General.* The federal Constitution does not guarantee the right of suffrage as a necessary incident of citizenship, nor does it compel a fixed method of choosing state or local officers or representatives. (See *Rodriguez v. Popular Democratic Party* (1982) 457 U.S. 1, 102 S.Ct. 2194, 2199, 72 L.Ed.2d 628, 634 [statute may permit filling of legislative vacancies by appointment]; 88 Harv. L. Rev. 1117.) The only express provision in the original Constitution is in Article I, §2, stating the right of a qualified person to vote at a congressional election. (See *United States v. Classic* (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 [Congress could make criminal acts of individuals who falsely counted and wilfully altered ballots in Louisiana primary election]; 15 So. Cal. L. Rev. 99.)

(2) *Constitutional Amendments.* The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." This was intended to give Blacks the right to vote, but it does not do so directly; it merely prohibits discrimination on these grounds. The same is true of the Nineteenth Amendment, prohibiting discrimination "on account of sex." (See *Minor v. Happersett* (1874) 88 U.S. 162, 21 Wall. 162, 22 L.Ed. 627; *Pope v. Williams* (1904) 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817.) Likewise, the Twenty-Fourth Amendment prohibits denial of the right to vote in federal elections by reason of failure to pay a poll tax (see *infra*, §243), and the Twenty-Sixth Amendment prohibits denial of the right to persons 18 years of age or older on account of age (see *infra*, §237).

In addition to these constitutional amendments, the U.S. Supreme Court has relied on the Fourteenth Amendment to fashion a fundamental "right to vote," which is a "shorthand" reference to "the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified electors whenever the State had adopted an elective process for determining who will represent any segment of the State's population." (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, 44, footnote 78; see *Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506, 523, *infra*, §299; *Rodriguez v. Popular Democratic Party* (1982) 457 U.S. 1, 102 S.Ct. 2194, 2199, 72 L.Ed.2d 628, 634; 3 Rotunda, §18.31; 88 Harv. L. Rev. 1118; 17 Santa Clara L. Rev. 163 [Equal Protection: Analyzing the Dimensions of a Fundamental Right--The Right To Vote]; 27 U.S.F. L. Rev. 737 [Symposium on vote dilution].)

Further, the First Amendment establishes the right of every citizen to engage in political activity, and this has been said to encompass "a citizen's right to vote, a candidate's capacity to gain a place on the ballot, and the constituent's

chance to contribute to a chosen candidate." (*Lubin v. Wilson* (1991) 232 C.A.3d 1422, 1428, 284 C.R. 70 [citing Tribe].)

(3) *Statutes and Decisions*. Statutes and judicial decisions supplement the constitutional prohibitions against racial and other discrimination. (See *infra*, §228 et seq.) But reasonable regulations of voting procedure, as in the provisions for absentee ballots (see *infra*, §234), are valid. Thus, in *McDonald v. Board of Election Commrs. of Chicago* (1969) 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739, appellants, charged with crimes, were in jail awaiting trial (their offenses were nonbailable or they were unable to raise bail). The Illinois statute permitted persons physically handicapped to obtain absentee ballots, but made no provision for the "judicially incapacitated, pretrial detainee." *Held*, the failure of the state to extend the privilege to persons jailed was not a violation of appellants' constitutional rights. (a) The right to vote itself was not restricted. (b) The distinctions drawn by the statute were not arbitrary; absentee ballots in a jail might involve the risk of local officials attempting to influence the vote, with resulting injury to discipline. (89 S.Ct. 1409, 22 L.Ed.2d 746.)

The *McDonald* case was distinguished in *O'Brien v. Skinner* (1974) 414 U.S. 524, 94 S.Ct. 740, 38 L.Ed.2d 702. The Court limited the prior holding to a failure of proof; i.e., the appellants did not show that they were absolutely barred, for there was a possibility that the state might furnish some alternative means. In the instant case, New York statutes, as construed by its highest court, actually denied convicted misdemeanants and pretrial detainees the right to register and vote in their own counties, while persons awaiting trial in a county other than their residence were permitted to register by mail and vote by absentee ballot. This was held to be a denial of equal protection. (94 S.Ct. 743, 38 L.Ed.2d 707.) (See *Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530, 148 L.Ed.2d 388, 399 [state court erred in ordering recount of certain votes in presidential election in absence of procedure that comported with minimal constitutional standards]; 114 *Harv. L. Rev.* 2170 [legal resolution of 2000 election]; 115 *Harv. L. Rev.* 172 [*Bush v. Gore*]; 34 *Loyola L.A. L. Rev.* 979 [Symposium: Internet Voting and Democracy]; 34 *Loyola L.A. L. Rev.* 1297 [The Constitutionality of Online Vote Swapping]; 42 *Santa Clara L. Rev.* 185 [suggestions for reformation of electoral process]; 76 *So. Cal. L. Rev.* 953 [compulsory voting]; 103 *A.L.R.5th* 417 [challenges to punch card ballots and voting systems].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 121 *Harv. L. Rev.* 591 [case for compulsory voting]; 35 *Hastings Const. L. Q.* 643 [Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?]; 38 *McGeorge L. Rev.* 843 [Facilitating Voting as People Age: Implications of Cognitive Impairment]; 20 *A.L.R. Fed* 2d 183 [Challenges to Presidential Electoral College and Electors].

(2) *Constitutional Amendments*. See 4 Rotunda (4th), §18.31.(3) *Statutes and Decisions*. See 118 *Harv. L. Rev.* 2314 [Toward a Greater State Role in Election Administration]; 119 *Harv. L. Rev.* 1127 [Voting and Democracy]; 119 *Harv. L. Rev.* 2230 [Voter and Officeholder Qualifications]; 12 *A.L.R.6th* 523 [Electronic Voting Systems].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
V. SUFFRAGE

- A. Nature of Right To Vote.
- 2. Federal Voting Rights Act.
 - a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 228

[§ 228] In General.

(1) *Purpose and Scope.* Prior Civil Rights Acts (see *infra*, §814 et seq.), requiring case by case litigation to enforce the voting rights of individuals, failed to produce any substantial results in this area. Accordingly, Congress enacted the Voting Rights Act of 1965. (42 U.S.C., §1973 et seq.)

Section 2 of the Act contains a general prohibition against discriminatory voting practices (42 U.S.C., §1973; see *infra*, §229), and section 3 provides for proceedings to enforce the right to vote (42 U.S.C., §1973a). Its principal innovations, however, were its remedial provisions: (a) Section 4, prohibiting any tests or devices as prerequisites for voting in certain states and political subdivisions (42 U.S.C., §1973b; see *infra*, §§230, 231); and (b) section 5, requiring preclearance for voting law changes in those jurisdictions (42 U.S.C., §1973c; see *infra*, §232). The Act also provides for the assignment of federal voting examiners under sections 3 and 4 and other steps to insure nondiscriminatory registration and voting, including contempt proceedings and criminal prosecution for violations. (42 U.S.C., §1973d et seq.) (See *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 86 S.Ct. 803, 812, 15 L.Ed.2d 769, 779 [summarizing provisions, and setting forth entire Act in Appendix]; *N.A.A.C.P. v. New York* (1973) 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 [Supreme Court's jurisdiction on appeal by associations denied right to intervene in Voting Rights Act action]; 108 *Harv. L. Rev.* 109 [Voting Rights Act and cases]; 46 *Hastings L. J.* 1457 [future of Voting Rights Act after recent cases]; 22 *Pepperdine L. Rev.* 727 [effect of *Shaw v. Reno* (1993) 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, *infra*, §296, on Voting Rights Act]; 18 *Stanf. L. Rev.* 1, 13, 15 [detailed analysis of provisions and careful examination of constitutional issues raised by Act]; 25 *Am.Jur.2d* (2004 ed.), *Elections* §38 et seq.; 171 *A.L.R. Fed* 173 [special circumstances precluding attorney's fee award under Voting Rights Act]; on application of Voting Rights Act to *judicial elections*, see *Clark v. Roemer* (1991) 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691; *Chisom v. Roemer* (1991) 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348; *Houston Lawyers' Assn. v. Attorney General of Texas* (1991) 501 U.S. 419, 111 S.Ct. 2376, 115 L.Ed.2d 379; *Lopez v. Monterey* (1996) 519 U.S. 9, 117 S.Ct. 340, 136 L.Ed.2d 273; 105 *Harv. L. Rev.* 409 [*Chisom v. Roemer*]; 33 *Loyola L.A. L. Rev.* 51 [Voting Rights Act litigation and Los Angeles County judicial elections].)

The remedial provisions of the Act were extended by the Voting Rights Act Amendments of 1970, 1975, and 1982. The Voting Rights Act Amendments of 1970, also (a) lowered the minimum voting age in state and federal elections from 21 to 18 (see *infra*, §237), (b) barred the use of literacy and other tests in all state and federal elections (42 U.S.C.,

§1973(b); see *infra*, §240), and (c) forbade the use of state residency requirements to disqualify voters from voting for presidential and vice-presidential electors (42 U.S.C., §1973aa-1; see *infra*, §244). The Voting Rights Act Amendments of 1975 extended the protections of the Act to "language minorities." (42 U.S.C., §§1973, 1973b(f).)

(2) *Validity*. In *South Carolina v. Katzenbach*, *supra*, the Court held that a number of challenged sections were properly enacted to carry out the responsibilities of Congress under the Fifteenth Amendment, §2. The court first reviewed the history of devices for racial discrimination in voting in certain southern states, and the ineffectiveness of litigation attacking them. (86 S.Ct. 808, 15 L.Ed.2d 775.) Then it declared that, although the Amendment is self-executing and permits judicial attack on discriminatory state procedures, legislation is also expressly authorized. This legislation need not be confined to prohibitions against violation of the Amendment, but may, as here, give new remedies. (86 S.Ct. 817, 15 L.Ed.2d 785.) "After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. ... We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment." (86 S.Ct. 823, 15 L.Ed.2d 792.) (See *Allen v. State Bd. of Elections* (1969) 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1, *infra*, §232; 80 Harv. L. Rev. 165 [*Katzenbach*].)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 A.L.R. Fed 2d 251 [validity of Uniformed and Overseas Citizens Absentee Voting Act].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

V. SUFFRAGE

- A. Nature of Right To Vote.
- 2. Federal Voting Rights Act.
 - b. Prohibited Practices.

7 *Witkin Sum. Cal. Law Const Law* § 229

[§ 229] Prohibited Practices.

Section 2 of the Act (42 U.S.C., §1973), mirroring the Fifteenth Amendment (*supra*, §227), originally prohibited imposition of a voting qualification, practice, or procedure to deny or abridge the right to vote on account of race or color. In 1975, the prohibition was extended to protect "language minorities." (See *supra*, §228; 117 *Harv. L. Rev.* 2621 [coalitions and governance under Section 2].)

In *Mobile v. Bolden* (1980) 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, the Court held that proof of *discriminatory purpose* was necessary to establish a violation of section 2 and of the Fourteenth and Fifteenth Amendments. However, in response to *Mobile*, Section 2 was amended in 1982 to prohibit any voting qualification, practice, or procedure "which results" in a denial or abridgement of the right to vote on account of race or color or minority language status. (42 U.S.C., §1973(a).) And, as amended, Section 2(b) provides a "totality of circumstances" test under which the "extent to which members of a protected class have been elected" is "one circumstance," but "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." (42 U.S.C., §1973b.)

These statutes are often applied in minority vote dilution cases. (See *Thornburg v. Gingles* (1986) 478 U.S. 30, 106 S.Ct. 2752, 2763, 92 L.Ed.2d 25, 37 [factors to be considered]; *Grove v. Emison* (1993) 507 U.S. 25, 113 S.Ct. 1075, 1084, 1085, 122 L.Ed.2d 388, 403, 404 [discussing and applying conditions set forth in *Thornburg v. Gingles*, and holding that district court erred in not deferring to state court's efforts to redraw state legislative and federal congressional districts]; *Voinovich v. Quilter* (1993) 507 U.S. 146, 113 S.Ct. 1149, 1157, 122 L.Ed.2d 500, 513 [creation of legislative districts dominated by minority voters; dilution claim]; *Holder v. Hall* (1994) 512 U.S. 874, 114 S.Ct. 2581, 2585, 129 L.Ed.2d 687, 694 [size of governing body--here, single-commissioner county government--is not subject to vote dilution challenge]; *Johnson v. De Grandy* (1994) 512 U.S. 997, 114 S.Ct. 2647, 2651, 2662, 129 L.Ed.2d 775, 784, 798 [no violation found where, despite continuing discrimination and racial bloc voting, minority voters had roughly proportional representation in single-member districts; dilution cannot be inferred from mere failure to maximize number of majority-minority districts]; 94 *Harv. L. Rev.* 138 [*Mobile*]; 21 *Pacific L. J.* 619 [*Gingles*]; 47 *Stanf. L. Rev.* 295 [Voting Rights Act and *Gingles*]; 32 *U.C.L.A. L. Rev.* 1203 [remedy for violations under section 2]; 27 *U.S.F. L. Rev.* 549 [Symposium on Voting Rights Law; *Gingles*, racial bloc voting, and minority vote dilution].)

SUPPLEMENT: [This section is current through the latest supplement]

Minority vote dilution cases: See *League of United Latin Amer. Citizens v. Perry* (2006) 548 U.S. 399, 126 S.Ct. 2594, 2614, 2623, 165 L.Ed.2d 609, 636, 646 [applying conditions for establishing violation of Section 2 of Voting Rights Act set forth in *Thornburg v. Gingles* (1986) 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, text, p. 370, and *Johnson v. De Grandy* (1994) 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775, text, p. 371; totality of circumstances demonstrated violation where redistricting plan broke apart Hispanic opportunity district to protect incumbent congressman from growing dissatisfaction of cohesive Hispanic community, and created new district that combined two groups of Hispanics, hundreds of miles apart, representing different communities of interest].



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CHAPTER X - Constitutional Law

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V. SUFFRAGE

A. Nature of Right To Vote.

2. Federal Voting Rights Act.

c. Remedial Provisions.

1. States and Political Subdivisions.

7 *Witkin Sum. Cal. Law Const Law* § 230

[§ 230] States and Political Subdivisions.

(1) *In General.* The Act lays down a formula for defining the states and political subdivisions to which the new remedial provisions (see *infra*, §§231, 232) apply. It covers states and political subdivisions in which the Attorney General determined that tests or devices (see *infra*, §231) were in effect, and the Director of the Census determined that less than 50% of voting-age residents registered as of November 1, 1964, November 1, 1968, or November 1, 1972, or voted in the 1964, 1968, or 1972 presidential elections. (42 U.S.C., §1973b(b).) (On meaning and scope of "political subdivision," see *United States v. Board of Commrs. of Sheffield, Alabama* (1978) 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148; *Dougherty County, Georgia, Bd. of Education v. White* (1978) 439 U.S. 32, 99 S.Ct. 368, 375, 58 L.Ed.2d 269, 281, *infra*, §232 [term broadly construed to apply to all entities having power over any aspect of electoral process; here, county board of education].)

A determination or certification of the Attorney General or Director of the Census is not reviewable by any court. (42 U.S.C., §1973b(b); see *Briscoe v. Bell* (1977) 432 U.S. 404, 97 S.Ct. 2428, 53 L.Ed.2d 439.)

(2) *Bail-Out Provision.* A jurisdiction subject to the remedial provisions may seek to exempt itself from 42 U.S.C., §1973b and the preclearance requirement of 42 U.S.C., §1973c (see *infra*, §232) by bringing a declaratory judgment action before a three-judge panel of the U.S. District Court for the District of Columbia, and proving that no "test or device" has been used during the preceding 10 years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" or because of membership in a language minority group. (42 U.S.C., §1973b(a); see *Rome v. United States* (1980) 446 U.S. 156, 100 S.Ct. 1548, 1557, 64 L.Ed.2d 119, 133 [political unit of covered jurisdiction, such as a city, is not "political subdivision" under statute, and cannot independently bring bail-out action].)

SUPPLEMENT: [This section is current through the latest supplement]



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- 2. Tests and Devices Suspended.

7 *Witkin Sum. Cal. Law Const Law § 231*

[§ 231] Tests and Devices Suspended.

The Act prohibits a jurisdiction that is subject to the remedial provisions from denying any citizen "the right to vote in any federal, state, or local election because of his failure to comply with any test or device." (42 U.S.C., §1973b(a)(1).) "Test or device" is defined as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." (42 U.S.C., §1973b(c).)

The Voting Rights Act Amendments of 1975 extended the protections of the Act to "language minorities." (42 U.S.C., §1973b(f)(2).) For determining whether a jurisdiction was covered as of November, 1972, the term "test or device" was expanded to include English-only registration and voting materials. Covered jurisdictions are required to provide materials (or assistance if the language is only oral) in the language of the minority group. (42 U.S.C., §1973b(f)(3), (f)(4).)

Generally, any political subdivision in which more than 5% of the voting-age citizens are members of a "single language minority," with a illiteracy rate higher than the national rate, must provide voting notices, forms, instructions, assistance, or other materials and ballots in the minority language. (42 U.S.C., §1973aa-1a, effective until 2007.)

SUPPLEMENT: [This section is current through the latest supplement]



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- 3. Preclearance for Changes in Voting Regulations.

7 Witkin Sum. Cal. Law Const Law § 232

[§ 232] Preclearance for Changes in Voting Regulations.

(1) *In General.* Section 5 of the Act requires federal approval (by the Attorney General or district court for the District of Columbia) of state laws that alter "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" from that in force or effect on November 1, 1964, 1968, or 1972. (42 U.S.C., §1973c; see *Allen v. State Bd. of Elections* (1969) 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 [statutes changing from district voting to at-large voting for county supervisors, changing office of county superintendent of education from elective to appointive in certain counties, and increasing requirements for independent candidate to gain position on general election ballot]; *Hadnott v. Amos* (1969) 394 U.S. 358, 89 S.Ct. 1101, 22 L.Ed.2d 336 [statute authorizing disqualification of candidate who did not file declaration of intention]; *Perkins v. Matthews* (1971) 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 [location of polling place; annexations increasing number of eligible voters]; *Young v. Fordice* (1997) 520 U.S. 273, 117 S.Ct. 1228, 1235, 1236, 137 L.Ed.2d 448, 458 [minor and major changes in voting procedure must be precleared, even when changes are made to comply with federal law, so long as they reflect policy choices made by state or local officials; it does not matter for preclearance requirement whether change works in favor of, against, or is neutral in impact on ability of minorities to vote]; 91 Cal. L. Rev. 769 [Section 5 and recent cases on federalism; beginning of end of preclearance]; 25 Am.Jur.2d (2004 ed.), *Elections* §112 et seq.; 146 A.L.R. Fed 619 [what changes must be precleared under §5 of Voting Rights Act--Supreme Court cases].) (On applicability to reapportionment plan, see *McDaniel v. Sanchez* (1981) 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724; *Georgia v. Ashcroft* (2003) 539 U.S. 461, 123 S.Ct. 2498, 2510, 2511, 2512, 156 L.Ed.2d 428, 449, 451, 453 ["plan that merely preserves 'current voting strength' is entitled to §5 preclearance"; in retrogression inquiry, court must look at totality of circumstances, which includes examining whether new plan adds or subtracts "influence districts," where minority voters can play substantial, if not decisive, role in electoral process]; 117 Harv. L. Rev. 2598 [Ashcroft]; 25 Am.Jur.2d (2004 ed.), *Elections* §58 et seq.; on annexation reducing relative political strength of minority race, see *Richmond v. United States* (1975) 422 U.S. 358, 95 S.Ct. 2296, 2302, 45 L.Ed.2d 245, 254 [distinguishing *Perkins v. Matthews*]; *Port Arthur v. United States* (1982) 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 [distinguishing *Richmond*]; *Pleasant Grove v. United States* (1987) 479 U.S. 462, 107 S.Ct. 794, 798, 93 L.Ed.2d 866, 877 [following *Richmond*]; 89 Harv. L. Rev. 211 [Richmond].)

In *Dougherty County, Georgia, Bd. of Education v. White* (1978) 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269, a black employee of a county board of education became a candidate for public office, and the board then adopted a rule requiring an employee who does so to take a leave of absence without pay for the duration of his political activity. *Held*, preclearance under 42 U.S.C., §1973c was required. The board contended that its rule was simply a means of getting a full day's work for a full day's pay. This was a mischaracterization. The rule was not a neutral personnel practice governing absenteeism generally, but was specifically addressed to the electoral process. And it had precisely the inhibiting effect on candidacy of a large filing fee. (99 S.Ct. 373, 59 L.Ed.2d 279.) Hence, it was a "standard, practice, or procedure" with respect to voting. (99 S.Ct. 375, 59 L.Ed.2d 281.)

In *Presley v. Etowah County Com.* (1992) 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51, the Court held that preclearance was not required for changes in the decisionmaking authority of elected members of certain county commissions. "Our prior cases hold, and we reaffirm today, that every change in rules governing voting must be precleared. ... Neither the appellants nor the United States has pointed to anything we said ... to suggest that Congress meant other than what it said when it made §5 applicable to changes 'with respect to voting' rather than, say, changes 'with respect to governance.' " (112 S.Ct. 832, 117 L.Ed.2d 68.) (See 106 Harv. L. Rev. 367 [Presley].)

Changes that enhance the position of racial minorities do not violate 42 U.S.C., §1973c unless the new apportionment itself discriminates on the basis of race or color. (*Beer v. United States* (1976) 425 U.S. 130, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629, 639; see *United Jewish Organizations of Williamsburg v. Carey* (1977) 430 U.S. 144, 97 S.Ct. 996, 1007, 51 L.Ed.2d 229, 244; *Lockhart v. United States* (1983) 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 [applying *Beer* standards]; *Miller v. Johnson* (1995) 515 U.S. 900, 115 S.Ct. 2475, 2490, 2491, 132 L.Ed.2d 762, 782, 783, *infra*, §296 [desire to satisfy preclearance demands is not compelling interest for racial gerrymandering, where challenged plan is not reasonably necessary under Voting Rights Act]; 91 Harv. L. Rev. 284, 1847 [race-conscious reapportionment]; 5 *Hastings Const. L. Q.* 103.)

(2) *Procedure for Preclearance.* Preclearance for a voting law change may be obtained in one of two ways:

(a) The state or political subdivision may submit it to the Attorney General, who generally has 60 days to interpose an objection. (42 U.S.C., §1973c; see *Allen v. State Bd. of Elections, supra*, 89 S.Ct. 822, 22 L.Ed.2d 7; *Lopez v. Monterey, supra*, 117 S.Ct. 349, 136 L.Ed.2d 286 [three-judge district court lacks authority to consider discriminatory purpose or nature of voting changes; goal of district court facing Section 5 challenge is to ensure that covered jurisdiction submits election plan to appropriate federal authorities for preclearance as expeditiously as possible]; on effect of Attorney General's failure to object, see *Morris v. Gressette* (1977) 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506.)

(b) The state or political subdivision may institute a declaratory judgment action in the District of Columbia. Under this alternative, the change may not be implemented until the court enters judgment that it "will not have the effect of denying or abridging the right to vote." (42 U.S.C., §1973c; see *Allen v. State Bd. of Elections, supra*, 89 S.Ct. 822, 22 L.Ed.2d 7.)

The Attorney General or an individual may bring an injunctive action to prohibit the enforcement of a new regulation where the state has failed to obtain approval. (See *Allen v. State Bd. of Elections, supra*, 89 S.Ct. 829, 22 L.Ed.2d 14.) Moreover, "[n]either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." (42 U.S.C., §1973c.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 43 Cal. Western L. Rev. 1 [How Section 5 of the Voting Rights Act Failed Displaced New Orleans Voters]; 32 *Pepperdine L. Rev.* 265 [*Georgia v. Ashcroft*]. *Correction:* Page 374, fourth line of second full paragraph, "*United Jewish Organizations of Williamsburg*" should be "*United Jewish Organizations of Williamsburgh*".



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3. California Law.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 233

[§ 233] In General.

(1) *California Constitution*. Cal. Const., Art. II, §2, secures the right to vote at all elections to citizens of the state. This provision is self-executing, and the right cannot be abridged by legislation. (See *Communist Party of United States of America v. Peek* (1942) 20 C.2d 536, 542, 127 P.2d 889; *Arapajolu v. McMenamin* (1952) 113 C.A.2d 824, 830, 249 P.2d 318 [former version of Art. II, §1].) Moreover, the Legislature is specifically barred from imposing any *property* qualification on the right to vote or hold office. (Cal. Const., Art. I, §22.)

Prior to its revision in 1972, the California Constitution provided, in former Article II, §1, that "no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereinafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name" could vote.

The English literacy requirement was held unconstitutional (see *infra*, §242), and the provision on disenfranchisement of felons was judicially challenged (see *infra*, §246). Cal. Const., Art. II, §4 requires that the Legislature "prohibit improper practices that affect elections" and "provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony." (On disqualification of the mentally incompetent, see *Elec.C. 2201(b)* [cancellation of registration], *Elec.C. 2208* [disqualification for mental incompetency], *Elec.C. 2209* [annual review of disqualified voter's status, restoration of rights], *Elec.C. 2210* [disqualification contests; restoration of rights], *Elec.C. 2211* [person not guilty by reason of insanity or incompetent to stand trial; mentally disordered sex offender]; 80 A.L.R.3d 1116; on constitutionality of condition of citizenship, see *infra*, §731.)

(2) *Rights of Employees*. Voting rights of employees are protected by special statutes requiring time off with pay to vote, and prohibiting dismissal of an employee absenting himself or herself on election day to serve as an election officer. (See 3 *Summary* (10th), *Agency and Employment*, §§253, 423; *infra*, §1111.)

(3) *Illegal voting*. In *Gooch v. Hendrix* (1993) 5 C.4th 266, 19 C.R.2d 712, 851 P.2d 1321, the court held that, under former *Elec.C. 20024* (now *Elec.C. 16203*), an election may be annulled on clear and convincing evidence of illegal voting when it appears that the illegal votes affected the outcome of the election, even though it cannot otherwise

be determined precisely for whom the illegal votes were cast. (5 *C.4th* 269; see 21 *Pepperdine L. Rev.* 1024.)

Gooch was distinguished in *Bradley v. Perrodin* (2003) 106 *C.A.4th* 1153, 131 *C.R.2d* 402. The court held that an election may be annulled when the successful candidate is found to have committed an offense against the elective franchise, even if the number of unqualified voters fraudulently registered or the number of votes unlawfully solicited "were too few to have changed the outcome of the election." (106 *C.A.4th* 1167.) However, the trial court here erred in declaring another candidate elected after shifting legal votes between the two candidates. "Having annulled the winning candidate's election for misdeeds that did not change the election results, the court should have annulled *and set aside* the runoff election" under *Elec.C.* 16603. (106 *C.A.4th* 1170.) (On election contests generally, see *Elec.C.* 16000 et seq.)

(4) *California Voting Rights Act. Elec.C.* 14025 et seq. limits the use of at-large elections for the election of public officials in political subdivisions where an at-large method "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or abridgment of the rights of voters who are members of a protected class." (*Elec.C.* 14027; on determination of violation of protected class voter rights, see *Elec.C.* 14028.) A "protected class" is made up of voters of a race, color, or language group as defined in the federal Voting Rights Act (42 U.S.C., §1973 et seq.). (*Elec.C.* 14026(d).) District-based elections may be imposed as a remedy for violation of the Act. (*Elec.C.* 14029.)

(5) *California Voter Bill of Rights. Elec.C.* 2300 states that all voters must be U.S. citizens, and lists the rights of voters. The list must be printed in the voter pamphlet and made available to the public on election day. (*Elec.C.* 2300(a), (d).) (See 77 *So. Cal. L. Rev.* 151 [arguing for reenfranchisement of noncitizen legal permanent residents].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *California Constitution.* See 93 *Cal. L. Rev.* 271 [noncitizen voting rights in local school board elections].(3) *Illegal Voting.* On election contests, see Supp., *infra*, §270A.

(4) *California Voting Rights Act.* The California Voting Rights Act is constitutional. (*Sanchez v. Modesto* (2006) 145 *C.A.4th* 660, 680, 51 *C.R.3d* 821 [Act is not subject to strict scrutiny and it passes rational basis review].)(6) (*New Online Voter Registration.* A person with a valid California driver's license or state identification card will be permitted to register to vote online once the Secretary of State certifies that the state has a statewide voter registration database that complies with the federal Help America Vote Act of 2002. (*Elec.C.* 2196, added in 2008.)



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3. California Law.

b. Secrecy, Absentee Ballots, and Voting by Mail.

7 Witkin Sum. Cal. Law Const Law § 234

[§ 234] Secrecy, Absentee Ballots, and Voting by Mail.

"Voting shall be secret." (Cal. Const., Art. II, §7.) The Elections Code permits absentee voting and mail ballot elections in a number of situations, and both methods are widely used. (See *Elec.C. 300, 320, 3000* et seq. [application and voting procedures], *Elec.C. 300(b), Elec.C. 3100* et seq. [special absentee voters: armed forces members and their spouses, those temporarily living outside the United States, those serving on U.S. merchant ships], *Elec.C. 323, 3300* et seq. [implementing *42 U.S.C., §1973dd* et seq., by providing procedures for residents and former residents living outside U.S. to vote in federal elections], *Elec.C. 3200* [permanent absent voter]; *Elec.C. 4000* et seq. [mail ballot elections], *29 McGeorge L. Rev. 953* [legal obstacles to voting over Internet]; *58 So. Cal. L. Rev. 1261* [voting by mail].)

In *Peterson v. San Diego* (1983) *34 C.3d 225, 193 C.R. 533, 666 P.2d 975*, defendant city adopted an ordinance approving a lease in connection with construction of a convention center. A referendum petition was filed, and the city counsel authorized a special municipal election for approval of the lease, to be conducted by mail ballot pursuant to former *Elec.C. 1350* (now *Elec.C. 4100*), requiring the same procedures as for absentee voting. Plaintiff sought to enjoin the election as violative of the constitutional provision for voting secrecy. *Held*, the election is valid.

(a) Mail ballot voting (1) is often more convenient than voting at the polling place and increases voter participation; and (2) can provide significant economies by permitting special elections with relatively little cost to ascertain voter sentiment on pending issues. (*32 C.3d 229, 230.*)

(b) The right to vote is fundamental (see *supra*, §233), and reasonable efforts by the Legislature to facilitate and increase its exercise must be upheld. The secrecy provision of the Constitution was never intended to preclude absentee and mail ballot voting. (*34 C.3d 230.*) While mail balloting may provide a greater opportunity for fraud than voting booth elections, there has been no showing of significant wrongdoing in either absentee or mail ballot voting, and there are adequate statutory provisions to protect the integrity of elections. (*34 C.3d 231.*)

(c) The interest in permitting absentee balloting because otherwise absentees would be unable to vote is not present in mail balloting; but the interest in securing citizen participation in representative government is equally applicable to both. (*34 C.3d 231.*) (See *18 U.S.F. L. Rev. 635 [Peterson]*.)

In *Wilks v. Mouton* (1986) 42 C.3d 400, 229 C.R. 1, 772 P.2d 187, the court decided two other issues involving absentee voting: (a) Despite the constitutional requirement of secrecy, absentee ballots may be cast in the presence of or with the assistance of third persons. (42 C.3d 409.) (b) Former Elec.C. 1013 (now *Elec.C. 3017*), requiring return by mail or in person, is directory in nature; hence, noncompliance did not nullify the vote where the third party delivered the ballot at the voter's request and after the voter had signed and sealed the envelope. (42 C.3d 411.)

The 1987 Legislature amended the statute "to clarify the potential ambiguity contained in *Wilks v. Mouton*." (See Stats. 1987, Chap. 22, §1.) The provisions of the statute "*are mandatory, not directory, and no ballot shall be counted if it is not delivered in compliance with this section.*" However, an ill or disabled voter may designate a relative, as specified in the statute, or "a person residing in the same household as the absent voter," to return the ballot. (*Elec.C. 3017*.)

SUPPLEMENT: [This section is current through the latest supplement]

The Elections Code was amended in 2007 to redesignate, in most cases, an "absent" voter or an "absentee ballot" as a "vote by mail" voter or a "vote by mail" ballot. (See, e.g., *Elec.C. 300* and *3000* et seq.)

See *Bridgeman v. McPherson* (2006) 141 C.A.4th 277, 283, 45 C.R.3d 813 [relying on *Peterson v. San Diego* (1983) 34 C.3d 225, 193 C.R. 533, 666 P.2d 975, text, p. 377; secret ballot guarantee is not violated by statute permitting citizens outside country to vote by fax and, in doing so, to sign oath waiving right to secret ballot]; 29 A.L.R.6th 343 [validity and construction of early voting statutes]. *Elec.C. 3017*: As amended in 2007, *Elec.C. 3017* now refers to a "vote by mail" voter instead of an "absent" voter.



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c. Write-in Voting.

7 *Witkin Sum. Cal. Law Const Law* § 235

[§ 235] Write-in Voting.

In *Canaan v. Abdelnour* (1985) 40 C.3d 703, 221 C.R. 468, 710 P.2d 268, the court, in an elaborate opinion reviewing the case law, concluded that a ban on write-in voting at a general election, imposed by a municipal code provision of a charter city, was unconstitutional. The opinion adopts the First Amendment balancing process set forth in *Anderson v. Celebrezze* (1983) 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, *infra*, §262. (40 C.3d 712, 713.) On that analysis, the court states its conclusion as follows:

"The right to seek public office and the right to the unrestricted exercise of the franchise are fundamental. They are protected by the First Amendment and article I, section 2 of the California Constitution. San Diego's prohibition on write-in voting impermissibly restricts the exercise of those rights. Not only does the ban prevent voters from casting their ballots for the candidates of their choice, it renders the election process too restrictive. The ban may stifle political association and expression during the election season and leave the voters without meaningful options on election day." (40 C.3d 727.)

One justice dissented, adopting the superseded opinion of the Court of Appeal, and concluding that the ordinance was nondiscriminatory and placed only a de minimis burden on the electoral process. (40 C.3d 728.) (See *Burdick v. Takushi* (1992) 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 [upholding Hawaii's prohibition on write-in voting as part of the state's comprehensive election scheme affording adequate ballot access]; *Oxnard Harbor Dist. v. Local Agency Formation Com.* (1993) 16 C.A.4th 259, 268, 19 C.R.2d 819 [U.S. Supreme Court has rejected argument that law imposing burden on right to vote must be subject to strict scrutiny; citing *Burdick*]; 44 *Hastings L. J.* 727 [background of right to write-in; *Burdick* criticized]; 69 *A.L.R.4th* 948 [validity of state or local ban on write-in votes].)

In *Edelstein v. San Francisco* (2002) 29 C.4th 164, 126 C.R.2d 727, 56 P.3d 1029, the court held that a city charter provision prohibiting write-in voting in *runoff* elections for municipal offices did not violate California's free speech clause, Cal. Const., Art. I, §2(a). The court did not decide whether a total ban on write-in voting would violate the state Constitution. (29 C.4th 183.)

(a) *Elec.C. 15340*, authorizing write-in voting in "any election," does not prohibit the ban because the runoff election was the second part of the same election and voters had the opportunity to write-in their candidates in the first

round of voting. (29 C.4th 173.)

(b) The U.S. Supreme Court in *Burdick*, *supra*, and the California Supreme Court in *Canaan*, *supra*, came to opposite conclusions regarding the use of write-in voting in general elections. These different conclusions were based on how the courts approached "the preliminary question whether a ban on write-in voting is a *severe* restriction on voting rights" and their "differing assessments of the importance of the *expressive function* of voting." (29 C.4th 180, 181.) *Burdick*, assigning a lower value to the expressive function of voting, upheld a total ban, while *Canaan*, assigning a high value to the expressive function, struck down a less restrictive ban. (29 C.4th 181.)

(c) "By focusing on the *expressive* element of write-in voting, we do not mean to suggest that registering a protest is the only practical significance of write-in voting." (29 C.4th 182.) "However, if the function of the election process, generally, is to winnow out and finally reject all but the chosen candidates, not simply to provide an outlet for political expression ... , a fortiori, that is the function of a runoff election." (29 C.4th 182.) Permitting write-in votes in the runoff would defeat the purpose of having a runoff, i.e., "to ensure that the winning candidate receives a majority of the votes." (29 C.4th 182.) The prohibition here "was not a *severe* restriction on voting rights." It "imposed only a *limited burden* on voters' rights to make choices and to associate through the vote." (29 C.4th 182.) *Canaan* is overruled to the extent, "but only to the extent," it is inconsistent. (29 C.4th 183.)

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A. Nature of Right To Vote.

3. California Law.

d. New Citizen Voting.

7 *Witkin Sum. Cal. Law Const Law* § 236

[§ 236] New Citizen Voting.

Elec.C. 331 and *3500* et seq. provide for the voting rights of new citizens. A "new citizen" is "any person who meets all requirements of an elector of, and has established residency in, the State of California, except that he or she will become a United States citizen after the 15th day prior to an election but on or before the seventh day prior to that election." (*Elec.C. 331*; on proof of citizenship and residency, see *Elec.C. 3501*.)

A new citizen may register and vote at any time between the 14th and the 7th days before an election. (*Elec.C. 3500*.) The ballots of new citizens must "be received and canvassed at the same time and under the same procedure as absent voter ballots" (*Elec.C. 3502*), and the county elections official must keep open to public inspection a list of all persons who have registered as new citizens (*Elec.C. 3503*).

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As amended in 2007, *Elec.C. 3052* now refers to "vote by mail" ballots instead of "absent" voter ballots.



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A. Nature of Right To Vote.
4. 18-Year- Old Voters.

7 *Witkin Sum. Cal. Law Const Law* § 237

[§ 237] 18-Year- Old Voters.

(1) *Twenty-Sixth Amendment*. The Voting Rights Act Amendments of 1970 lowered the voting age to 18 years for both national and local elections. (See *supra*, §228.) It was, however, held unconstitutional as to local elections. (*Oregon v. Mitchell* (1970) 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272; see 85 Harv. L. Rev. 152.) Thereafter, in March, 1971, Congress submitted the Twenty-Sixth Amendment to the states, and its ratification by the 38th state took place on June 30, 1971. Section 1 of the Amendment states: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

(2) *Determination of Residence*. In *Jolicoeur v. Mihaly* (1971) 5 C.3d 565, 96 C.R. 697, 488 P.2d 1, petitioners, unmarried minors 18 years of age, sought to register to vote in the jurisdiction they claimed as their actual permanent residence. Respondents, registrars of voters, relying on California statutes interpreted in an Attorney General's Opinion, contended that for voting purposes, the residence of an unmarried minor is his or her parents' home. *Held*, mandamus granted to compel determination of each petitioner's residence in the manner used to determine residence of adults.

(a) *Construction of Twenty-Sixth Amendment*. The Amendment prohibits state abridgment of the right to vote on account of age. The word "abridge," as defined in various cases, covers a burden placed on the exercise of the right. Here, compelling young people living apart from their parents to travel to the parents' district to register and vote or to register and vote as absentees, is a burden that cannot be justified by the presumption of a minor's residence with his or her parents. (5 C.3d 571.) And the legislative history of the Amendment dispels any doubt that it was intended to compel adult treatment of 18-year-olds for voting purposes. Congressmen stressed the themes that today's youth is better informed and more mature than any other generation's, that there are many military deaths in the 18-20 age group, and that youth's idealism should be channelled within the political system. (5 C.3d 572.) "Respondents' refusal to treat petitioners as adults for voting purposes violates the letter and spirit of the Twenty-sixth Amendment." (5 C.3d 575.)

(b) *Construction of Elections Code*. Former Elec.C. 14282 (now Elec.C. 349) states the general rule that residence is a fixed habitation; former Elec.C. 14255 (now Elec.C. 14251) provides that doubt is to be resolved in favor of the challenged voter; former Elec.C. 14283 (now Elec.C. 2025) and former Elec.C. 14290 (now Elec.C. 2029) provide that soldiers, students, inmates of institutions, and wives living apart, may acquire domiciles where they live. A presumption that a given class of persons are not residents of the place in which they live would contravene both the text and spirit of the Code; and there are strong policy reasons in favor of having citizens vote where they know the issues and have an

interest in their solution. (5 C.3d 576, 578.)

(c) *Construction of Government Code and Civil Code.* Govt.C. 244, providing that an unmarried minor's residence is that of his or her parents and cannot be changed by his or her own act, has not been literally applied. Thus, the child's residence does not follow that of a parent who abandons the child. (5 C.3d 581, citing *Guardianship of Brazeal* (1953) 117 C.A.2d 59, 61, 254 P.2d 886; 2 Cal. Proc. (4th), *Jurisdiction*, Supp., §§151C, 151D.) And the emancipation statute (now *Family C. 7504*) must be considered in applying the Government Code section. A minor over 18 and living apart from his or her parents considers his or her own house a permanent home; and when the minor was given the right to vote, the minor was emancipated for all purposes relating to voting. (5 C.3d 581.)

(d) *Conclusion.* "We hold today that both the Twenty-sixth Amendment to the United States Constitution and California law require respondent registrars to treat all citizens 18 years of age or older alike for all purposes relating to voting. We do not imply that registrars may not question a citizen of any age as to his true domicile. ... We hold only that registrars may not specially question the validity of an affiant's claim of domicile on account of his or her age or occupational status." (5 C.3d 582.) (See 60 Cal. L. Rev. 806; 9 San Diego L. Rev. 329; 44 A.L.R.3d 797 [residence of students for voting purposes].)

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(2) *Determination of Residence.* Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §§129, 130.



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A-1. (New) Valid Restriction: Identification.

7 *Witkin Sum. Cal. Law Const Law* § 237A

[§ 237A] (New) Valid Restriction: Identification.

In *Crawford v. Marion County Election Bd.* (2008) 553 U.S. ___, 128 S.Ct. 1610, 170 L.Ed.2d 574, the Court upheld the constitutionality of the Indiana voter identification law against a facial attack. The law requires voters to present government-issued photo identification before voting in person. The lead opinion of three justices adopted the balancing approach of *Anderson v. Celebrezze* (1983) 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, text, §262, for testing burdens on the electoral process. *Anderson* calls for weighing the asserted injury to the right to vote against the relevant and legitimate interests put forward by the state to justify the burden imposed. (128 S.Ct. 1616, 170 L.Ed.2d 583, 584.) The state interests must be sufficiently weighty to justify the restriction. Here, the state identified three neutral and strong interests: (a) deterring and detecting voter fraud; (b) improving and modernizing election procedures; and (c) safeguarding voter confidence. (128 S.Ct. 1617, 1624, 170 L.Ed.2d 584, 591.) Most voters in Indiana already had a government-issued photo identification card, and the burden of obtaining a free card on those who did not was, in most instances, minimal. (128 S.Ct. 1620, 170 L.Ed.2d 588.)

Three justices concurred in the judgment. They would have decided the case based on the approach used in *Burdick v. Takushi* (1992) 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245, text, §235. *Burdick* "calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." (128 S.Ct. 1624, 170 L.Ed.2d 592.)

Three justices dissented in two opinions. (128 S.Ct. 1627, 1643, 170 L.Ed.2d 592, 612.) (See 121 *Harv. L. Rev.* 1737 [role of public opinion in challenge to voter identification requirements].)

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B. Invalid Restrictions.

1. Segregated Districts.

7 *Witkin Sum. Cal. Law Const Law* § 238

[§ 238] Segregated Districts.

In *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, the Alabama Legislature redefined the boundaries of the city of Tuskegee. Formerly a square, it became an irregular 28-sided figure. Petitioners, black citizens, asserted that this removed all but a few of its 400 black voters while keeping every white voter. *Held*, these allegations, if proved, would establish a violation of the Fifteenth Amendment, and the lower court erred in dismissing for lack of jurisdiction.

(a) *First*, the "political question" limitation was not applicable. In *Colegrove v. Green* (1946) 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed.2d 1432, *supra*, §88, the charge was only of dilution of strength of votes by inaction, while here, the complaint alleged *action* to deprive petitioners of their votes. (81 S.Ct. 130, 5 L.Ed.2d 116.)

(b) *Second*, the state's power over political subdivisions is not absolute. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." (81 S.Ct. 130, 5 L.Ed.2d 117.)

(c) *Third*, in the latter situation, the doctrine of unconstitutional conditions (*infra*, §812) applies: "Acts generally lawful may become unlawful when done to accomplish an unlawful end," and "constitutional power cannot be used by way of condition to attain an unconstitutional result." (81 S.Ct. 130, 5 L.Ed.2d 117.) Here, the complaint showed that the legislation was solely concerned with fencing black citizens out of town to deprive them of their constitutional right to vote. (See 75 *Harv. L. Rev.* 78, 136; 34 *So. Cal. L. Rev.* 179.)

In *Wright v. Rockefeller* (1964) 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, plaintiffs challenged the 1961 apportionment of New York County's 17th, 18th, 19th, and 20th districts (Manhattan). Statistical evidence was presented, but the federal district court held that plaintiffs had failed to prove that the districts were intentionally drawn on racially segregated lines. This finding was accepted, and judgment dismissing the complaint was affirmed. The dissenters (two justices) contended that a sufficient *prima facie* case was made and not rebutted by the state. (See 78 *Harv. L. Rev.* 252.)

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B. Invalid Restrictions.

2. Required Designation of Race.

7 *Witkin Sum. Cal. Law Const Law* § 239

[§ 239] Required Designation of Race.

A Louisiana statute requiring that a candidate's racial designation be stated on his or her declaration of candidacy and appear on the ballot, was upheld in a federal district court on the theory that all candidates, white and black, were treated alike. (See 15 *Stanf. L. Rev.* 339.) But in *Anderson v. Martin* (1964) 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430, the U.S. Supreme Court held the statute unconstitutional. "[B]y placing a racial label on a candidate at the most crucial stage in the electoral process--the instant before the vote is cast--the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. ... The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls." (84 S.Ct. 456, 11 L.Ed.2d 432.)

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B. Invalid Restrictions.

3. English Literacy Tests.

a. Discrimination Against Blacks.

7 *Witkin Sum. Cal. Law Const Law* § 240

[§ 240] Discrimination Against Blacks.

(1) *Statutes With Grandfather Clauses.* Early legislation in southern states imposed literacy tests but added a "Grandfather Clause," exempting persons who had been entitled to vote on January 1, 1866, "and their lineal descendants." The clause, intended to allow illiterate white persons to vote, was held unconstitutional. (*Guinn v. United States* (1915) 238 U.S. 347, 35 S.Ct. 926, 931, 59 L.Ed. 1340, 1348.)

(2) *Other Discriminatory Statutes or Practices.* A reasonable English literacy test applicable to all voters was originally thought to be valid. (See *Lassiter v. Northampton County Bd. of Elections* (1959) 360 U.S. 45, 79 S.Ct. 985, 990, 3 L.Ed.2d 1072, 1077 [upholding North Carolina statute requiring applicant for registration to "be able to read and write any section of the Constitution in the English language"; because ability to read and write has some relation to standards designed to promote intelligent use of ballot, state "might conclude that only those who are literate should exercise the franchise"].) But discriminatory statutes or other election practices designed to hamper the right of black citizens to vote were held unconstitutional.

In *United States v. Mississippi* (1965) 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717, the Attorney General brought an action against the state of Mississippi, members of the state board of election commissioners, and county registrars of voters. The complaint alleged that in 1890 a majority of the qualified voters in the state were Blacks, but the state Constitution specified, as a prerequisite for voting, the ability to read or understand or interpret any of its provisions. A 1954 amendment established all three as requisites. In 1960, a qualification of "good moral character" was added, and provision was made for destroying voting records where no appeal was taken. Further repressive statutes were adopted in 1962, including a requirement that forms be filled out properly without any assistance. *Held*, the complaint sufficiently alleged a common purpose running through the state's legal and administrative history to adopt whatever expedient seemed necessary to establish white political supremacy. (85 S.Ct. 816, 13 L.Ed.2d 727.)

The factual background was similar in *Louisiana v. United States* (1965) 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709. The voting test required the applicant to state a "reasonable interpretation" of any clause in the Louisiana or federal Constitutions, and gave registrars virtually uncontrolled discretion in administering the test, with the result that practically no Blacks were permitted to vote. The district court held the test unconstitutional, enjoined its future use, and the state appealed. *Held*, affirmed: "As the evidence showed, colored people, even some with the most advanced

education and scholarship, were declared by voting registrars with less education to have an unsatisfactory understanding of the constitution of Louisiana or of the United States. This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth." (85 S.Ct. 822, 13 L.Ed.2d 714.)

After the action in *Louisiana* was filed, the state, in 1962, adopted a new registration plan, allegedly establishing an objective test with indiscriminately drawn cards containing multiple choice questions. But the district court properly held that since white voters had already been allowed to register on less rigorous terms than black, the new test could not be used without a complete reregistration of voters. (85 S.Ct. 823, 13 L.Ed.2d 715.) (See *Gaston County, North Carolina v. United States* (1969) 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 [literacy test was invalid because, as result of prior school segregation, black residents of voting age did not have adequate opportunity to meet test].)

In *Hunter v. Underwood* (1985) 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222, a provision of the Alabama Constitution of 1901, disenfranchising persons convicted of "any crime ... involving moral turpitude" (i.e., including misdemeanors), while racially neutral on its face, violated equal protection because the evidence showed that discrimination against Blacks was the original motivating factor.

(3) *Statutes Prohibiting Discrimination*. The 1965 Voting Rights Act (see supra, §228 et seq.) prohibited discriminatory use of literacy tests wherever they had been used in the past. In 1970, Congress enacted a nationwide ban on all literacy tests. (See supra, §231.) This ban was upheld in *Oregon v. Mitchell* (1970) 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272, where the court emphasized the national scope of the problem: "[C]oncern with *educational inequality* was perhaps uppermost in the minds of the congressmen who sponsored the Act. ... Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments." (91 S.Ct. 269, 27 L.Ed.2d 286.) (See 59 Cal. L. Rev. 129; 85 Harv. L. Rev. 153; 27 Stanf. L. Rev. 609.)

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B. Invalid Restrictions.

3. English Literacy Tests.

b. Discrimination Against Non-English Speakers.

1. Federal Law.

7 *Witkin Sum. Cal. Law Const Law* § 241

[§ 241] Federal Law.

Section 4(e) of the Voting Rights Act of 1965 (42 U.S.C., §1973b(e)) prohibits denial of the right to vote for inability to read and write English to a person who has completed the 6th grade in an American-flag school (only in Puerto Rico). In *Katzenbach v. Morgan* (1966) 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828, the court held that this was a proper exercise of congressional power, and, under the Supremacy Clause, it nullified New York's English literacy requirement.

(a) *First*, New York contended that the power of Congress under section 5 of the Fourteenth Amendment is only exercisable where the state law would be unconstitutional under the Equal Protection Clause itself. But this is unsound. Regardless of whether the literacy requirement violates the Equal Protection Clause, Congress, under the Fourteenth Amendment, §5, and the Fifteenth Amendment, §2, has the same broad powers as expressed in the Necessary and Proper Clause of Article I, §8 (infra, §1293); i.e., to employ any means appropriate to a legitimate end. (86 S.Ct. 1723, 16 L.Ed.2d 833.)

(b) *Second*, the challenged provision was designed to relieve discrimination against the Puerto Rican community; and it is no objection that it is limited to American-flag schools, with which Congress was perhaps more familiar. (86 S.Ct. 1727, 16 L.Ed.2d 837.) (See 80 Harv. L. Rev. 169; 25 Stanf. L. Rev. 885; 27 Stanf. L. Rev. 603 [Congressional Power To Interpret Due Process and Equal Protection].)

The problem of *Katzenbach v. Morgan*, was presented in broader form, but not resolved, in *Cardona v. Power* (1966) 384 U.S. 672, 86 S.Ct. 1728, 16 L.Ed.2d 848. Plaintiff, in New York, was denied the right to vote because, although literate in Spanish, she was not literate in English. The case arose before the enactment of section 4(e), and the judgment against her was reversed for a consideration of her rights under the Act. (86 S.Ct. 1729, 16 L.Ed.2d 850.) Two justices thought that while a literacy test may be valid, in this multilingualistic nation, it cannot constitutionally be a single-language test. (86 S.Ct. 1730, 16 L.Ed.2d 851.) (See 80 Harv. L. Rev. 170.)

The 1975 Amendments extended the protections of the Voting Rights Act of 1965 to "language minorities." (See supra, §228 et seq.; 30 U.C. Davis L. Rev. 277 [discussing legitimacy of English as official language].)

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B. Invalid Restrictions.

3. English Literacy Tests.

b. Discrimination Against Non-English Speakers.

2. California Law.

7 *Witkin Sum. Cal. Law Const Law* § 242

[§ 242] California Law.

In *Castro v. California* (1970) 2 C.3d 223, 233, 85 C.R. 20, 466 P.2d 244, the court distinguished *Lassiter v. Northampton County Bd. of Elections* (1959) 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072, *supra*, §240 (where the appellant made no claim of literacy in any language), and also disparaged its approach, observing that later U.S. Supreme Court decisions have scrutinized restrictions more strictly and have applied more stringent equal protection standards.

Castro involved a challenge to former Cal. Const., Art. II, §1, providing that no person who is unable to read the Constitution in the English language could exercise the privileges of an elector, and also to several implementing Election Code sections. Petitioners, adult native-born American citizens residing in Los Angeles, were fully qualified to vote except for their inability to read English. They were, however, literate in Spanish, and had access to numerous newspapers and magazines in that language that covered the subjects on which voters should be informed. They were denied registration solely because of inability to pass the English literacy test. *Held*, the requirement was unconstitutional.

(a) The question whether the state's interest in an informed electorate necessitates a literacy requirement today, when nonwritten modes of communication are widely available, was not involved, since petitioners were literate, and written material was available to them on matters of national, state, and local political concern. (2 C.3d 239.)

(b) The cost and administrative complexity of a bilingual electoral system is not relevant to the constitutional issue; it may be assumed that voters literate in Spanish can prepare themselves in advance by studying sample ballots with the aid of translators. (2 C.3d 242.)

(c) Although inquiry into the motive of those who framed the provisions is hazardous, history shows that fear and hatred played a significant role in their passage. (2 C.3d 231.) "[I]t would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote." (2 C.3d 243.)

(d) As applied to petitioners and other residents of Los Angeles literate in Spanish, the English literacy requirement was a violation of equal protection. (2 C.3d 242.) However, the holding is not confined to Los Angeles County. "We do not intend to introduce into our jurisprudence the anomalies of geographically determined degrees of constitutional protection or county-by-county adjudications of eligibility to vote. Voter qualifications have traditionally been matters of statewide concern and application." Accordingly, the requirement cannot be applied to any California citizens literate in *Spanish*. (2 C.3d 242.) "Our holding, of course, will apply to any case in which otherwise qualified prospective voters, literate in a language other than English, are able to make a comparable demonstration of access to sources of political information." (2 C.3d 242.) (See 59 Cal. L. Rev. 124.)

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B. Invalid Restrictions.
4. Poll Tax.

7 *Witkin Sum. Cal. Law Const Law* § 243

[§ 243] Poll Tax.

(1) *Federal Elections.* The Twenty-Fourth Amendment, which became effective February 4, 1965, provides in Section 1: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." Section 2 authorizes Congress to enforce the Article by appropriate legislation.

The Amendment was construed and applied in *Harman v. Forssenius* (1965) 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50. On its adoption, Virginia retained its poll tax for state elections, but for federal elections gave the voter the option to pay a poll tax or file a notarized certificate of residence each year. *Held*, this was unconstitutional.

(a) *Purpose of the Amendment.* The considerations leading to its adoption were (1) the tax disenfranchised the poor; (2) taxes were required long before elections and were left unpaid by many who did not plan ahead; (3) it was a vehicle for fraudulent manipulation by machines making block payments; (4) it was used to discriminate against black voters. (85 S.Ct. 1184, 14 L.Ed.2d 59.)

(b) *Unconstitutional condition in Virginia statute.* The Amendment covers not only denial but abridgment of the right to vote, and the statute imposed a material requirement on those who refused to surrender their right to vote without payment of the tax. This requirement of annual reregistration was for some more burdensome than mailing the poll tax payment on receipt of a bill. But even if less onerous, it was still invalid, for a state may not impose this requirement solely because of refusal to waive constitutional immunity from the tax. The remote administrative benefit--proof of residence, serving the same purpose as a poll tax--could not justify the enactment; reregistration, purging of lists, and challenges have been found to be adequate in the other 46 states without poll taxes. (85 S.Ct. 1186, 14 L.Ed.2d 60.) (See 79 Harv. L. Rev. 139.)

(2) *State Elections.* In *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169, the Court overruled *Breedlove v. Suttles* (1937) 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252, and declared Virginia's poll tax unconstitutional. The Equal Protection Clause prevents states from fixing voter qualifications that invidiously discriminate, and a poll tax, making affluence of the voter or payment of any fee an electoral standard, violates the Clause. "[W]ealth or fee paying has ... no relation to voting qualifications; the right to vote is too precious, too

fundamental to be so burdened or conditioned." (86 S.Ct. 1083, 16 L.Ed.2d 175.) (See 80 Harv. L. Rev. 176; 82 Harv. L. Rev. 1180.)

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B. Invalid Restrictions.

5. Residence.

a. Discriminatory Provisions.

7 Witkin Sum. Cal. Law Const Law § 244

[§ 244] Discriminatory Provisions.

(1) *Discrimination Against Military Personnel.* A state may impose a bona fide reasonable residence qualification for voting, and various state laws of this kind have been enacted to meet the problem of transient military personnel.

In *Carrington v. Rash* (1965) 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, the Texas Constitution provided that a member of the armed services who moved his or her home to Texas during the course of military duty could never vote there so long as he or she remained in the service. Petitioner, an Army sergeant, entered the service in 1946 from Alabama. He became permanently domiciled in Texas in 1962, acquired a home where he lived with his wife and children, had a small business, paid property taxes, and had an automobile registered there. *Held*, the Texas law was unconstitutionally applied to him. The Court rejected two theories advanced in support of the law:

First, that the state has a legitimate interest in immunizing its elections from concentrated balloting of servicemen, whose collective voice may overwhelm a small civilian community on such matters as local police administration, school teaching policies, or bond issues. The Court responded that the state may not constitutionally "fence out" a class of persons because of the way its members may vote. (85 S.Ct. 779, 13 L.Ed.2d 679.)

Second, that because of the transient nature of military service in a particular state, servicemen will not have the same interest in politics and the same willingness to invest in the future of the area as permanent residents. The Court responded that the state has tests to determine the bona fides of a claim of residence, and gives civilians the opportunity to prove it; the state cannot do less with servicemen. "By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." (85 S.Ct. 780, 13 L.Ed.2d 680.) (See 79 Harv. L. Rev. 141.)

(2) *Resident of Federal Enclave.* In *Evans v. Cornman* (1970) 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370, appellants were residents of the National Institutes of Health, a federal enclave located in Maryland. It was purchased with consent over 30 years ago, and, under U.S. Const., Art. I, §8, cl. 17, Congress has exclusive legislative jurisdiction over it. (See *supra*, §27.) However, Congress has in recent years permitted the states to extend important aspects of state powers over federal enclaves. Thus, its residents are subject to Maryland income, gasoline, sales, and use taxes, to unemployment and workers' compensation laws, to automobile registration and drivers' permit laws, and to state court

proceedings. In other words, Maryland treats residents of the enclave as state residents, and in nearly every election they have a stake equal to that of other Maryland residents. *Held*, under *Carrington v. Rash*, *supra*, they have a right to vote in local state elections, and the attempt to deny their right was a violation of the Fourteenth Amendment.

(3) *Homeless Person*. In *Collier v. Menzel* (1985) 176 C.A.3d 24, 221 C.R. 110, plaintiffs, identifying themselves as "homeless" citizens and indigents of Santa Barbara County, submitted affidavits of registration to vote, listing as their residence "100 Montecito Street." Defendant County Clerk rejected their affidavits on the ground that the place was a city park in which sleeping overnight was prohibited by ordinance. The lower court denied mandamus and plaintiffs appealed. *Held*, reversed; plaintiffs were entitled to register and vote.

(a) Although the right to vote is guaranteed by the Constitution, proper registration is a condition to its exercise; and under former Elec.C. 17 (now Elec.C. 321), an elector must be a resident of an election precinct. (176 C.A.3d 30.) For voting purposes, residence depends on a fixed habitation and an intention of remaining at that place. (176 C.A.3d 31.) But a dwelling or habitation need not be a structure under former Elec.C. 207 (now Elec.C. 2027); it may be a vehicle or a camp ground. (176 C.A.3d 31.) Thus, the designation of the public park was sufficient, and the intent to remain there was shown by plaintiffs' signed affidavits. (176 C.A.3d 31.) And despite the lack of a postal address for the park, plaintiffs gave defendant a post office box number, thereby fulfilling the additional requirement of a mailing address of former Elec.C. 500(d) (now Elec.C. 2150(a)(4)). (176 C.A.3d 32.)

(b) The fact that the park was legally forbidden for use as a residence does not affect plaintiffs' right to vote, for their intent to remain in the park is legally independent of any intent to violate the ordinance. "We do not hold that respondent cannot enforce its ordinance making it illegal to live in a public park. We do hold that so long as petitioners actually reside there, they may register to vote in that precinct." (176 C.A.3d 32.)

(c) Defendant's refusal to allow plaintiffs to register was a denial of equal protection. Registration laws that deny classes of residents the right to vote receive strict scrutiny (176 C.A.3d 33), and defendant has not shown a compelling interest in rejecting the affidavits. Neither the prevention of fraud (176 C.A.3d 34) nor administrative feasibility (176 C.A.3d 35) justifies defendant's action. "Denying the opportunity to vote to a resident merely because he or she cannot afford housing denies a citizen's vote on the basis of economic status and is therefore an impermissible basis for determining the entitlement to vote." (176 C.A.3d 37.)

(4) *Voters Who Leave Domiciles Without Establishing New Domiciles*. In *Walters v. Weed* (1988) 45 C.3d 1, 246 C.R. 5, 752 P.2d 443, students at U.C. Santa Cruz lived and registered to vote on the university campus. When they returned to school in the autumn of 1983, they abandoned their campus domiciles, and at the time of the election, had not established new domiciles. They voted in their former campus precincts in a contested city council election, and the validity of their votes was challenged on the basis of former Elec.C. 200 (now Elec.C. 349). *Held*, the votes were valid.

(a) *Conflicting statutory provisions*. Former Elec.C. 200(b) states that "[a]t a given time, a person may only have one domicile." Former Elec.C. 202(b) (now Elec.C. 2021) provides that a person does not gain a domicile in a precinct into which the person comes for temporary purposes merely. Former Elec.C. 205 (now Elec.C. 2024) states that "[t]he mere intention to acquire a new domicile, without the fact of removal, avails nothing." Govt.C. 243 and 244 set forth the rules for determination of domicile (referred to as "legal residence" or "residence"). These statutes rest on the established principle that every person has in law a domicile, and that a domicile is not lost until a new one is acquired. (45 C.3d 7.)

(b) *Reconciliation of conflict*. Former Elec.C. 200(b) "declares that in order to establish one's domicile, one must have a fixed habitation, the intent to remain and, when absent, the intent to return. On the other hand, the remaining statutes in the scheme comprise a legislative mandate that everyone be domiciled somewhere and that the act of leaving one's domicile without the act and intention of establishing a new one does not extinguish the old." (45 C.3d 8.) The trial court attempted to reconcile the conflicting statutes by stating the following rule: "Even if a voter has left his residence with the intention not to return to it, that residence remains his domicile as long as he has not acquired a new

one." (45 C.3d 8.) This is the logical and correct view. The former domicile is the only location where the student has satisfied the statutory requirements; it is consistent with the statutory principle that one's domicile is unaffected by one's relocation without the intent to establish a new domicile; and "it ensures the continued integrity of the legislative mandate" codified in *Govt.C. 244* that no one can be without a domicile. (25 C.3d 12.)

(c) *Policy considerations.* The Court of Appeal decision invalidating the votes would have disenfranchised the students. "[A]nyone who moved from one domicile and had not yet established another would be left without a domicile and thus would be unable to vote anywhere during the period of travel. University students would be especially hard hit, as it is not uncommon for them to relocate at summer's beginning or end, precisely when voter registration periods close. In communities with large student populations and low vacancy rates, the student's search for a new domicile can be particularly exasperating--and time-consuming. ... Such a result is, in itself, intolerable; it also conflicts with our holding that no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible to any other meaning ... , and it ignores our holding that students 18 years of age or older must be treated the same as other California residents for voter registration purposes." (45 C.3d 13, 14, citing *Otsuka v. Hite* (1966) 64 C.2d 596, 51 C.R. 284, 414 P.2d 412, *infra*, §246, and *Jolicoeur v. Mihaly* (1971) 5 C.3d 565, 96 C.R. 697, 488 P.2d 1, *supra*, §237.)

A strong dissent of three justices, analyzing the statutes in their historical perspective, concludes with the observation that "[t]he construction adopted by the majority is both completely unrealistic and contrary to legislative intent." (45 C.3d 25.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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B. Invalid Restrictions.

5. Residence.

b. Period of Residence.

7 *Witkin Sum. Cal. Law Const Law* § 245

[§ 245] Period of Residence.

(1) *Traditional Lengthy Residence Requirements.* Former Cal. Const., Art. II, §1, contained residence requirements that were struck down in a series of decisions:

(a) *One year in state.* In *Keane v. Mihaly* (1970) 11 C.A.3d 1037, 90 C.R. 263, the court held the former voting requirement of 1-year residence in the state an unconstitutional denial of equal protection. The older standard was that a regulatory provision was valid unless it amounted to an irrational or unreasonable discrimination. The new standard calls for a showing of necessity to promote a compelling state interest. (11 C.A.3d 1041.) The principal state interest urged is the necessity for informed voting; but today channels of information make a long period wholly unnecessary. (11 C.A.3d 1044.) The other interest--preventing fraudulent declarations--does not require any period and there is no showing that it was used for this purpose. (11 C.A.3d 1045.) (See *Dunn v. Blumstein* (1972) 405 U.S. 330, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274, 285 [reaching same conclusion on Tennessee statute, and emphasizing not only right to vote but right to travel, both constitutionally protected]; *Young v. Gness* (1972) 7 C.3d 18, 22, 101 C.R. 533, 496 P.2d 445 [approving *Keane*].)

(b) *Ninety days in county.* In *Dunn v. Blumstein*, *supra*, the Tennessee 3-month county residence requirement was held invalid on the same reasoning as that which nullified California's 1-year requirement. And in *Young v. Gness*, *supra*, the court applied the *Dunn* holding to California's 90-day county residence requirement. (7 C.3d 22.) (See 86 Harv. L. Rev. 104; 13 Santa Clara Lawyer 334.)

(c) *Fifty-four days in precinct.* The voting precinct residence requirement of 54 days and former Elec.C. 203, providing for closing registration 54 days before the election, were also held unconstitutional in *Young v. Gness*, *supra*. (7 C.3d 27.)

(2) *Thirty-Day or Fifty-Day Requirements.* A residence requirement of 30 days was authorized for presidential elections by a 1970 amendment to the Voting Rights Act of 1965 (*supra*, §228). This provision, coupled with the right to an absentee ballot for those who move within the period, was upheld in *Oregon v. Mitchell* (1970) 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272. (See 85 Harv. L. Rev. 152.)

Although 30 days is not a constitutional maximum, 50 days comes close to one. (See *Marston v. Lewis* (1973) 410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed.2d 627 [Arizona's 50-day residence requirement was tied to closing of registration, and state relied on volunteer registrars whose work was reviewed by election officials; upheld]; *Burns v. Fortson* (1973) 410 U.S. 686, 93 S.Ct. 1209, 1210, 35 L.Ed.2d 633, 635 [closing of registration 50 days before a general election "approaches the outer constitutional limits in this area"].)

(3) *Current California Requirements.* Former Cal. Const., Art. II, §1, was amended in 1972 to delete the traditional requirements that were held invalid, and Cal. Const., Art. II, §3, delegates the power to define residency to the Legislature. The statutes provide that (a) to vote, one must be "a resident of an election precinct at least 15 days prior to an election" (*Elec.C.* 321); (b) registration must cease 14 days preceding the election (*Elec.C.* 2107); and (c) a person who is registered in a precinct but moves within 14 days prior to an election may vote in that election in the precinct from which he or she has moved (*Elec.C.* 2035).

Electors who move from one voter precinct to another more than 29 (now 15) days prior to an election, and who fail to reregister or otherwise notify the registrar of voters of a change of address, may properly be denied the right to vote. (*Kagan v. Kearney* (1978) 85 C.A.3d 1010, 1019, 149 C.R. 867.)

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B. Invalid Restrictions.

6. Disenfranchisement for Criminal Conviction.

a. Former California Law.

7 *Witkin Sum. Cal. Law Const Law* § 246

[§ 246] Former California Law.

(1) *California Constitution and Statutes.* Former Cal. Const., Art. II, §3, stated that the Legislature "shall provide" that no person convicted of "an infamous crime" or of "embezzlement or misappropriation of public money" shall exercise the privilege of an elector; and the statutes made the required provision. (For prohibitions in other states, see 36 *A.L.R.2d* 1238 [what constitutes "conviction"]; 39 *A.L.R.3d* 303 [effect of conviction under federal or other state's law]; 25 *Stanf. L. Rev.* 845.)

In *Truchon v. Toomey* (1953) 116 *C.A.2d* 736, 737, 254 *P.2d* 638, the court declared that every felony is an infamous crime. But in *Otsuka v. Hite* (1966) 64 *C.2d* 596, 51 *C.R.* 284, 414 *P.2d* 412, the California Supreme Court, in an exhaustive opinion, rejected this broad interpretation as possibly unconstitutional, and declared that the prohibition "must be limited to conviction of crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process." (64 *C.2d* 599.) Plaintiffs were conscientious objectors in World War II, who served federal prison terms for violation of the Selective Service Act. Over 20 years later, they brought this action to compel registration. *Held*, judgment denying relief reversed.

(a) *Constitutional right to vote.* Though not expressly declared in the First Amendment, the right to vote has been judicially described as fundamental to our democratic system, and not "a creature of the California Constitution." The state must therefore show a compelling interest in abridging it, and restrictions must be drawn with narrow specificity. (64 *C.2d* 601.)

(b) *The compelling state interest.* The restriction rests on the presumption that a person convicted of an offense indicative of moral turpitude is morally corrupt, and might sell or barter his or her vote or engage in other election frauds. Preserving the purity of the ballot by avoiding this danger is a sufficient state interest. (64 *C.2d* 602.)

(c) *Scope of the classification.* If, as *Truchon v. Toomey* held, the term "infamous crime" extends to any felony, it would include many that do not involve corruption, and the prohibition would have no reasonable relation to the purpose of protecting the integrity of the elective process. (64 *C.2d* 605.) The proper approach is to inquire into the nature of the offense, and determine whether its elements "are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process." (64 *C.2d* 611.)

(d) *Application of the test.* It was conceded that plaintiffs acted pursuant to high religious and humanitarian motives. Hence, it could not reasonably be said that their violation of the Selective Service Act "branded them as morally corrupt and dishonest men convicted of an 'infamous crime' " within the meaning of the constitutional provision. (64 C.2d 615.) (See 14 U.C.L.A. L. Rev. 699.)

(2) *Disenfranchisement Unconstitutional: California Decision.* The constitutional basis of disenfranchisement statutes has been vigorously challenged. (See 25 Stanf. L. Rev. 845.) And in *Ramirez v. Brown* (1973) 9 C.3d 199, 107 C.R. 137, 507 P.2d 1345, the court held the California provision unconstitutional.

(a) The test applied in *Otsuka, supra*, was that of "reasonable relationship" between the restriction and the state interest. In recent years, however, the test of a restriction on the right to vote has become more strict. It is constitutionally permissible only if it is *necessary* to promote the interest, and to be necessary, it must be the *least burdensome* alternative. (9 C.3d 207 et seq., citing *Kramer v. Union Free School Dist. No. 15* (1969) 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, *infra*, §304; *Castro v. California* (1970) 2 C.3d 223, 85 C.R. 20, 466 P.2d 244, *supra*, §242; and other cases.)

(b) In early days, the disenfranchisement provision may have been necessary to minimize election frauds, but statutory regulations and technological developments of the past hundred years "have radically diminished the possibility of election fraud in California." (9 C.3d 214.) And penal sanctions are numerous and adequate. (9 C.3d 214.)

(3) *Disenfranchisement Constitutional: U.S. Supreme Court Decision.* In *Richardson v. Ramirez* (1974) 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551, the U.S. Supreme Court reversed the California decision in *Ramirez v. Brown*. The Court concluded that legislative and judicial history supported the constitutionality of this restriction on the franchise, and that the argument for a modern view of rehabilitation of felons should be addressed to the legislatures. (94 S.Ct. 2671, 41 L.Ed.2d 571.) Three justices dissented. (See 88 Harv. L. Rev. 101.)

The U.S. Supreme Court decision left open for further consideration by the California Court whether a lack of uniformity in county election officials' enforcement was itself a denial of equal protection. But in the 1974 election, the California Constitution was amended to delete the provision on disenfranchisement of felons, and to provide merely for temporary "disqualification" during imprisonment or parole. (See *infra*, §247.) Hence, on remand, the California Supreme Court dismissed the proceedings as moot. (*Ramirez v. Brown* (1974) 12 C.3d 912, 117 C.R. 562, 528 P.2d 378.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *California Constitution and Statutes.* See 10 A.L.R.6th 31 [validity, construction, and application of state criminal disenfranchisement provisions; superseding 36 A.L.R.2d 1238, text, p. 393].



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B. Invalid Restrictions.

6. Disenfranchisement for Criminal Conviction.

b. California Constitutional Revision.

7 *Witkin Sum. Cal. Law Const Law* § 247

[§ 247] California Constitutional Revision.

Former Cal. Const., Art. II, §3, was amended in 1974, and in 1976 was renumbered as Cal. Const., Art. II, §4. This section requires the Legislature to "provide for the disqualification of electors while ... imprisoned or on parole for the conviction of a felony." (See 102 *Harv. L. Rev.* 1300 [argument against disenfranchisement of ex-felons]; 26 Thomas Jefferson *L. Rev.* 157 [same].)

In *Flood v. Riggs* (1978) 80 C.A.3d 138, 145 C.R. 573, the confusing legislative and judicial history on this subject was reviewed, and the following holding was stated: Cal. Const., Art. II, §4, is self-executing; hence, a person convicted of any felony in this state, a sister state, or federal jurisdiction is temporarily barred from voting while serving a sentence of imprisonment or undergoing an unexpired term of parole. (80 C.A.3d 155, 156.) "We realize that our conclusion will inevitably result in denial of the precious right of suffrage, albeit temporarily, to a significant number of persons who, like appellant, have successfully reentered society as law-abiding citizens leading useful and productive lives. Whatever may be the more enlightened view concerning restoration of the right of franchise to paroled felons during their period of rehabilitation, it is in nature a policy question to be decided by the people and not for the courts 'to choose one set of values over [an]other.' " (80 C.A.3d 155.)

SUPPLEMENT: [This section is current through the latest supplement]

Cal. Const., Art. II, §4, applies only to persons confined in state prison or on parole. It does not disenfranchise felony probationers and those convicted of felonies but sentenced to county jail. (*League of Women Voters of Calif. v. McPherson* (2006) 145 C.A.4th 1469, 1483, 52 C.R.3d 585.)

See 48 *Santa Clara L. Rev.* 181 [preserving felon disenfranchisement litigation under §2 of Voting Rights Act]; 57 *Stanf. L. Rev.* 611 [felon disenfranchisement as modern day literacy test]; 10 *A.L.R.6th* 31 [validity, construction, and application of state criminal disenfranchisement provisions].



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C. Political Parties and Candidates.

1. Regulation of Primary Elections.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 248

[§ 248] In General.

The growth of political parties and the importance of primary elections have led to many legislative attempts at regulation. Under Cal. Const., Art. II, §5, the Legislature may provide for primary elections for partisan offices. This provision is implemented by *Elec.C. 5100*, which excludes groups with negligible support by prescribing percentage restrictions on a party's right to participate; e.g., a small percentage of the vote at the preceding gubernatorial election, a petition signed by a percentage of the voters, etc. (On associational rights of political parties, see *infra*, §388.)

In upholding the constitutionality of this legislation, the court said in *Christian Nationalist Party v. Jordan* (1957) 49 C.2d 448, 453, 318 P.2d 473: "The number of citizens which constitutes a substantial group for purposes of an election law is not, of course, an absolute matter but a relative one which is to be measured in the light of the size of the entire voting population. Otherwise, a statute of the type before us would soon prove ineffective in a state which, like ours, is experiencing rapid growth. The standards for qualification ... , being stated in percentages of the total vote, are designed to respond to fluctuations in the size of the electorate, and they are set forth in the form of alternatives, so that provision is made for established parties, regardless of prior success, as well as for entirely new political groups." (See 70 A.L.R.2d 1162.)

However, the imposition of arbitrary and unreasonable conditions may be an unconstitutional deprivation of the right of suffrage. Thus, in *Communist Party of the United States of America v. Peek* (1942) 20 C.2d 536, 127 P.2d 889, the statute imposed an absolute requirement of a certain number of registered voters before the *preceding* primary election (2 years past). *Held*, this "test cannot possibly avoid impairing constitutional rights of suffrage by barring from the ballot political parties which represent substantial numbers of citizens." (20 C.2d 554.) (See *Green Party of Calif. v. Jones* (1995) 31 C.A.4th 747, 752, 37 C.R.2d 406 [trial judge erred in ordering Secretary of State to conduct primary elections in accordance with party's election rules, which, although designed to prevent minority control of access to ballot, conflicted with Elections Code; as remedy, rules were uncertain at best and did not outweigh state's interest in maintaining uniform ballot procedures]; *Peace & Freedom Party v. Shelley* (2004) 114 C.A.4th 1237, 1241, 8 C.R.3d 497 [Legislature's decision to exclude voters on inactive file of registered voters from calculation to determine whether political party has sufficient support to qualify for participation in primary election, pursuant to *Elec.C. 5100*, furthers state's compelling interest in protecting integrity of electoral process and is constitutional]; 88 Harv. L. Rev. 1121 [access to general election ballot by political parties and independent candidates]; 120 A.L.R.5th 1 [state statutes

governing "minor political parties"]; *120 A.L.R.5th 125* [Constitutionality of Voter Participation Provisions for Primary Elections]; *121 A.L.R.5th 1* [Constitutionality of Candidate Participation Provisions for Primary Elections].)

SUPPLEMENT: [This section is current through the latest supplement]

See *14 A.L.R.6th 543* [effect of irregularities or defects in primary petitions--state cases].



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C. Political Parties and Candidates.

1. Regulation of Primary Elections.

b. Federal Cases.

7 *Witkin Sum. Cal. Law Const Law* § 249

[§ 249] Federal Cases.

In *MacDougall v. Green* (1948) 335 U.S. 281, 69 S.Ct. 1, 93 L.Ed. 3, an Illinois statute provided that a petition to form a new political party must be signed by at least 25,000 qualified voters, 200 of whom must come from each of at least 50 (out of 102) counties. Petitioners, seeking a ballot place for the Progressive Party, contended that this statute discriminated against urban residents. They pointed out that Cook County alone had 52% of the state's registered voters and that 87% of the voters resided in the 49 most populous counties. The court refused relief.

MacDougall was overruled in *Moore v. Ogilvie* (1969) 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1. The use of nominating petitions by independents to obtain a place on the ballot is an integral part of the Illinois elective system; hence, it must pass the test of the Equal Protection Clause. And the law, applying an arbitrary formula to both sparsely settled counties and populous counties, discriminates in favor of rural sections.

In *Williams v. Rhodes* (1968) 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24, an Ohio law required minority parties either to obtain 10% of the vote in the last gubernatorial election, or to submit petitions equal to 15% of the votes cast in that election. *Held*, the statute was a denial of equal protection.

(a) U.S. Const., Art. II, §1, provides for appointment of electors as directed by the Legislature. But this does not give the state "absolute power" of regulation. Once the means of selection is determined to be by election, "no State can pass a law regulating elections that violates the Fourteenth Amendment's command" (the Equal Protection Clause). (89 S.Ct. 10, 21 L.Ed.2d 30.)

(b) Ohio's restrictions heavily burdened two fundamental rights: The right of individuals to associate for the advancement of political beliefs, and the right of qualified voters to cast their votes effectively. (89 S.Ct. 10, 21 L.Ed.2d 31.)

(c) The state's asserted compelling interests were not sufficient to justify imposition of the burdens:

(1) *Promotion of the two-party system.* Ohio "does not merely favor a 'two-party system'; it favors two particular parties--the Republicans and the Democrats, and in effect tends to give them a complete monopoly." (89 S.Ct. 11, 21

L.Ed.2d 32.)

(2) *Assurance of majority rule.* "Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters. But to grant the State power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties working to increase their strength from year to year." (89 S.Ct. 11, 21 *L.Ed.2d 32.*)

(3) *Assurance of choice of leadership.* "[A]ny leader who attempts to capitalize on the disaffection of ... a group is forced to submit to a primary in which other, possibly more attractive, leaders can raise the same issues and compete for the allegiance of the disaffected group." But while this goal may be desirable, Ohio's system cannot achieve it; its system "denies the 'disaffected' not only a choice of leadership but a choice of issues as well." (89 S.Ct. 11, 21 *L.Ed.2d 32.*)

(4) *Avoidance of confusion from large numbers of parties.* "[T]he experience of many other States, including Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required." (89 S.Ct. 12, 21 *L.Ed.2d 33.*) (See *American Party of Texas v. White* (1974) 415 U.S. 767, 94 S.Ct. 1296, 39 *L.Ed.2d 744* [upholding validity of Texas regulations]; *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 107 S.Ct. 533, 537, 93 *L.Ed.2d 499, 508* [upholding validity of Washington restrictions]; 83 *Harv. L. Rev.* 86 [*Williams v. Rhodes*]; 88 *Harv. L. Rev.* 91 [*American Party*]; 88 *Harv. L. Rev.* 1130 [*Williams v. Rhodes*]; 22 *Stanf. L. Rev.* 165 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Political Parties and Candidates.

1. Regulation of Primary Elections.

c. Independent Candidates.

7 *Witkin Sum. Cal. Law Const Law* § 250

[§ 250] Independent Candidates.

(1) *Validity of Regulations.* In *Storer v. Brown* (1974) 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714, the court examined several provisions of the California Elections Code.

(a) The Code denied a ballot place to an independent candidate if (1) he or she voted with a qualified political party in the immediately preceding primary, or (2) was registered with that party within 1 year prior to the immediately preceding primary (former Elec.C. 6830). *Held*, this part of the statute was valid. "It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternate course to the ballot. It works against independent candidates prompted by short-range political goals, pique or personal quarrel. It is also a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party." (94 S.Ct. 1281, 39 L.Ed.2d 726.)

(b) The Code further required that an independent candidate's nominating papers be signed by no less than 5% nor more than 6% of the entire vote cast in the preceding general election in the area, and that the signatures be obtained during a 24-day period following the primary and ending 60 days prior to the general election (former Elec.C. 6831, 6833); also, under former Elec.C. 6830(c), none of the signatures could be of persons who voted at the primary. *Held*, this part of the Code was of questionable validity, and the case was remanded to the district court to permit further findings as to the extent of the burden imposed on independent candidates for *President*. (94 S.Ct. 1284, 39 L.Ed.2d 729.) (See *Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 117 S.Ct. 1364, 1375, 137 L.Ed.2d 589, 605 [statute prohibiting candidate from appearing on ballot as candidate of more than one party did not violate candidate's associational rights; distinguishing *Storer*]; 88 *Harv. L. Rev.* 91, 1121 [*Storer*]; 111 *Harv. L. Rev.* 309 [*Timmons*].)

The Elections Code has since been repealed and reenacted. The valid requirement that an independent candidate not have been registered with a qualified party for a period prior to the preceding primary is now in *Elec.C. 8550(f)*. However, the time has been increased to the 13 months preceding the *general* election or, in the case of a special congressional or legislative election, decreased to the 3 months preceding the filing of the declaration of candidacy. (See *Elec.C. 8350*, exempting candidates for presidential elector, the House of Representatives, and the Senate from filing declaration of intention to become candidate.)

The "questionable" requirements have been altered; the requirements as to the number of signatures and the period within which to file them have been liberalized, and voting with a qualified party at the primary no longer disqualifies the candidate nor those who would sign his or her petition. Under these amendments, nominating papers for statewide offices must include the signatures of not less than 1% of the registered voters in the state, and for other offices, not less than 3% of the registered voters in the area. (*Elec.C. 8400.*) Nominating papers generally must be delivered to the county election official between 188 and 88 days before the election. (*Elec.C. 8403.*)

(2) *Signatures Requirement.* *Elec.C. 10704*, interpreted as requiring independent candidates for a special primary election to submit 500 valid signatures pursuant to *Elec.C. 8400*, while qualified party candidates need submit only 40 (see *Elec.C. 8062*) is valid; i.e., it is not an excessive requirement for demonstrating a popular political base, and does not deny equal protection. (*Kellam v. Eu* (1978) 83 C.A.3d 463, 469, 147 C.R. 884 [decided under former versions of these statutes].)

In *Illinois State Bd. of Elections v. Socialist Workers Party* (1979) 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230, the Illinois Election Code made different provisions for political parties and independent candidates in statewide elections and elections for office in political subdivisions. In statewide elections, they had to obtain signatures of 25,000 qualified voters; in local elections, 5% of the number of voters at the previous election. In the Chicago 1977 election, the result was that independent candidates and new parties had to get considerably more than 25,000 signatures. *Held*, applying the strict test of compelling state interest, this requirement was not the least restrictive means of protecting the state's objectives, and was unconstitutional. (99 S.Ct. 991, 992, 59 L.Ed.2d 241, 242.) (See *Norman v. Reed* (1992) 502 U.S. 279, 112 S.Ct. 698, 707, 116 L.Ed.2d 711, 725 [discussing and applying *Illinois State Bd. of Elections*].)

(3) *Designation of Candidate as "Independent."* *Elec.C. 13105* provides that candidates of qualified political parties are listed on the ballot as candidates of their parties; but one who has qualified by virtue of an independent nomination is listed as "Independent" instead of with the name of a political party. In *Libertarian Party v. Eu* (1980) 28 C.3d 535, 546, 170 C.R. 25, 620 P.2d 612, the court, following *Storer v. Brown*, *supra*, upheld a former version of the statute against an equal protection challenge.

(4) *Condition of Write-in Candidacy.* *Elec.C. 8605*, requiring that a write-in candidate in a party's primary election must have received at least 1% of the votes cast for the office at the preceding general election, is valid. (*Fridley v. Eu* (1982) 131 C.A.3d 100, 104, 182 C.R. 232 [decided under former *Elec.C. 6661(a)*].)

(5) *Runoff Elections.* Former *Elec.C. 7203* prevented an independent candidate in a special election from participating in a runoff election when no candidate received a majority vote in the primary. In *Libertarian Party v. Eu* (1978) 83 C.A.3d 470, 474, 147 C.R. 888, the court held that this exclusion of all candidates not affiliated with an established political party was unconstitutional. *Elec.C. 10706(b)* now provides that each qualified independent candidate will be on the ballot for the runoff election unless two or more are registered as "affiliated with the same political body," in which case only the one with the greatest primary vote will be on the ballot.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Validity of Regulations.* See 33 A.L.R.6th 513 [validity and construction of state statutory requirements concerning placement on ballot of independent candidates for president].



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CHAPTER X - Constitutional Law

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C. Political Parties and Candidates.

1. Regulation of Primary Elections.

d. Enrollment Deadline.

7 *Witkin Sum. Cal. Law Const Law* § 251

[§ 251] Enrollment Deadline.

In *Rosario v. Rockefeller* (1973) 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1, a New York law required voters to enroll in the party of their choice 30 days before the November general election to be eligible to vote in the next primary election. Petitioners, who could have met the cut-off date, waited too long. *Held*, the statute was constitutional.

(a) *Carrington v. Rash* (1965) 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, *supra*, §244; *Evans v. Cornman* (1970) 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370, *supra*, §244; and *Dunn v. Blumstein* (1972) 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274, *supra*, §245, are distinguishable. In each of those cases, the electoral franchise was totally denied; here, it was merely subjected to a time deadline. (93 S.Ct. 1249, 36 L.Ed.2d 6.)

(b) The time period between the enrollment deadline and the next primary election is lengthy, but is not arbitrary; its legitimate purpose is to inhibit "raiding," a practice in which voters of one party designate themselves as voters of another to influence the other's primary. (93 S.Ct. 1251, 36 L.Ed.2d 8.)

Four justices dissented. They found no justification for an enrollment deadline 8 or 11 months prior to election, and contended that, under the strict test of a statute restricting exercise of a fundamental right, the deterrence of "raiding" cannot be considered a compelling state interest. (93 S.Ct. 1255, 36 L.Ed.2d 14.)

In *Kusper v. Pontikes* (1973) 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260, the court held the Illinois antiraiding statute unconstitutional, distinguishing *Rosario v. Rockefeller*. The Illinois law prohibited a person from voting at a party's primary if he or she voted at the primary of another party within the preceding 23 months. (a) Under the New York law, the voter was not prevented from participating in the party primary of his or her choice at the next election; the voter merely had to meet the time limit on enrollment. (b) Under the Illinois statute, the voter was "locked" into his or her preexisting party affiliation from one primary to the next, and could break the "lock" only by foregoing voting in any primary for almost 2 years. (94 S.Ct. 309, 38 L.Ed.2d 269.) (See 88 Harv. L. Rev. 1163.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Rights of Blacks.

7 *Witkin Sum. Cal. Law Const Law* § 252

[§ 252] Rights of Blacks.

The failure of efforts to prohibit Blacks from voting (see *supra*, §238 et seq.) led to abortive attempts to exclude them from Democratic Party primaries in states where the result of the primary determined the election.

(1) State legislation of this type was held unconstitutional as a denial of privileges and immunities of U.S. citizenship (*infra*, §608). The Court declared that this violation of the Fourteenth Amendment made it unnecessary to consider the Fifteenth Amendment. (*Nixon v. Herndon* (1927) 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759.)

(2) The same conclusion was reached in *Nixon v. Condon* (1932) 286 U.S. 73, 52 S.Ct. 484, 487, 76 L.Ed. 984, 990, where individuals acted under the authority of state legislation. The statute provided that the state executive committee of each political party should have the power to prescribe the qualifications of its members, and the executive committee of the Democratic Party ruled that only "white Democrats" could participate in the primary elections. *Held*, the exclusion of Blacks was unconstitutional. Although the political party was private in origin, the executive committee had, independently of the party itself, been invested by statute with authority to act as an instrument or agency in carrying out the functions of government. Hence, the principles of *Nixon v. Herndon* were applicable.

(3) In *Grove v. Townsend* (1935) 295 U.S. 45, 55 S.Ct. 622, 624, 79 L.Ed. 1292, 1294, the state Democratic Party Convention, acting under its own rules, and without relying on any statutory authority, denied Blacks the privilege of membership in the party. The Court held that there was no violation of the Constitution, for the party convention was not an agency of the state. But in *Smith v. Allwright* (1944) 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, the *Grove* case was overruled. "[W]hen primaries become a part of the machinery for choosing officials ... the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election," and the right to vote cannot be nullified by a state "through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." (64 S.Ct. 765, 88 L.Ed. 998.)

(4) In *Terry v. Adams* (1953) 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, the Jaybird Democratic Association, a Texas county organization open only to whites, held a *pre-primary election* in May to pick a white candidate. In the regular July Democratic primary, Blacks could vote but never effectively. *Held*, this was an unconstitutional attempt to circumvent the Fifteenth Amendment. "The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. ... The effect of the whole procedure, Jaybird primary plus Democratic primary

plus general election, is to do precisely that which the Fifteenth Amendment forbids--strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens." (73 S.Ct. 813, 97 L.Ed. 1160.) (See 88 Harv. L. Rev. 1155; 117 Harv L. Rev. 2318 [presidential nomination process]; 57 So. Cal. L. Rev. 213.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Political Parties and Candidates.

3. Political Activities of Public Employees.

a. Federal Employees.

7 *Witkin Sum. Cal. Law Const Law* § 253

[§ 253] Federal Employees.

(1) *Former Provisions.* The federal Hatch Act (5 U.S.C., §7301 et seq.) formerly prohibited officers and employees in the executive branch from taking "an active part in political management or in political campaigns." (See former 5 U.S.C., §7324(a)(2); 4 Rotunda, §20.52.)

The validity of the Hatch Act was sustained, against a challenge based on the First, *Ninth, and Tenth Amendments*, in *United Public Workers of America (C.I.O.) v. Mitchell* (1947) 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754. "Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. ... When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required." (67 S.Ct. 571, 91 L.Ed. 774.)

The Hatch Act was again sustained in *United States Civil Service Com. v. National Assn. of Letter Carriers, AFL-CIO* (1973) 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796, against a challenge for overbreadth.

(a) The interests promoted by the Act are (1) impartial execution of the laws without partisan bias or favoritism; (2) avoidance of even an appearance of bias or favoritism; (3) avoidance of the use of state power to build partisan political power; and (4) insulation of public employees from partisan political pressure. (93 S.Ct. 2890, 37 L.Ed.2d 809.)

(b) The provisions of the Act and the rulings of the Civil Service Commission are sufficiently clear, and the Commission has established a procedure for an employee to seek advice and remove doubts as to a proposed course of conduct. (93 S.Ct. 2897, 37 L.Ed.2d 817.) And even if the provisions forbidding partisan campaign endorsements and speechmaking were in some respects unconstitutionally overbroad, the remainder of the Act "covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of federal employees." (93 S.Ct. 2898, 37 L.Ed.2d 817.)

Three justices dissented, pointing out that the Act incorporates many prior rulings of the Civil Service Commission and contending that the new three-volume work of the Commission contains ambiguous rulings that have a "chilling effect" on First Amendment rights. (93 S.Ct. 2905, 37 L.Ed.2d 826.) (See 87 *Harv. L. Rev.* 141.)

(2) *Statutory Revision.* In 1993, Congress adopted the Hatch Act Reform Amendments. (See 5 U.S.C., §7301 et seq.) The new Act encourages public employees to participate in the political process, except as expressly prohibited. (See 5 U.S.C., §§7321, 7323.) Generally, a public employee may not engage in political activities while engaged in the following:

(a) Being on duty. (5 U.S.C., §7324(a)(1).)

(b) Being in a "room or building occupied in the discharge of official duties by an individual employed or holding office" in the federal government or a federal agency or instrumentality. (5 U.S.C., §7324(a)(2).)

(c) Wearing an identifying uniform or official insignia. (5 U.S.C., §7324(a)(3).)

(d) Using a government vehicle. (5 U.S.C., §7324(a)(4); for other prohibited activity, see 5 U.S.C., §7323.)

Penalties for violation of the Act include the employee's removal or suspension without pay for at least 30 days. (See 5 U.S.C., §7326.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Former Provisions.* See 5 Rotunda 4th, §20.52.



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b. California Employees.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 254

[§ 254] In General.

The Hatch Act (*supra*, §253) applies as well to state and local employees whose principal employment is in connection with an activity financed by federal loans or grants, and prohibits them from running for elective office. (See *Lee v. Civil Service Com.* (1982) 129 C.A.3d 9, 11, footnote 1, 180 C.R. 822.)

California statutory regulations also cover the political activities of public employees. (See *Govt.C. 3201* [matter of statewide concern], *Govt.C. 3202* [definitions], *Govt.C. 3203* [no restrictions except as provided by this code or federal law], *Govt.C. 3204* [unlawful use of influence], *Govt.C. 3205* [political solicitation within local agency prohibited], *Govt.C. 3206* [political activities while in uniform prohibited], *Govt.C. 3207* [permitted local rules and regulations], *Govt.C. 3208* [no other restrictions on state employees except as provided by *Govt.C. 19990* (conduct conflicting with duties)], *Govt.C. 3209* [soliciting during nonworking hours to support or defeat ballot measures affecting public employment permitted]; 3 *Summary* (10th), *Agency and Employment*, §279.)

California statutes prohibit public office holders and seekers from offering or arranging for any increase in compensation for a state or local agency employee in exchange for a contribution or loan to a committee controlled by the office holder or seeker. (*Govt.C. 3205.5*.) And officers, employees, and consultants of local agencies are prohibited from spending or authorizing the expenditure of agency funds to support or oppose a candidate or ballot measure. (*Govt.C. 54964*.) However, a "local agency" does *not* include school or community college districts. (*Govt.C. 54964(b)(4)*.) The statute does not prohibit spending funds for informational activities if specified conditions are met. (*Govt.C. 54964(c)*.) (On requirement that judges take leave of absence to run for public office, see 2 *Cal. Proc.* (4th), *Courts*, §61; on statutes of other states, see *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830; 87 *Harv. L. Rev.* 149; 10 *Hastings Const. L. Q.* 341; 19 *U.C.L.A. L. Rev.* 963; 51 *A.L.R.4th* 702.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §63.



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3. Political Activities of Public Employees.

b. California Employees.

2. Case Law.

7 *Witkin Sum. Cal. Law Const Law* § 255

[§ 255] Case Law.

Political rights of California public employees have been the subject of a number of decisions.

Fort v. Civil Service Com. of Alameda (1964) 61 C.2d 331, 38 C.R. 625, 392 P.2d 385, involved a county charter provision that no officer or employee in the classified civil service may take part in a "political campaign or election" other than to cast a vote or privately express an opinion. Petitioner, director of the Center for Treatment of Alcoholism, acted as chairman of a speakers' bureau for his own county's campaign committee in a gubernatorial election, and was dismissed. *Held*, the provision was unconstitutional and he was entitled to reinstatement.

(a) *Rights of public employees.* Although there is no constitutional right to public employment, a person cannot properly be barred or removed from public employment arbitrarily or in disregard of his or her constitutional rights. (61 C.2d 334.)

(b) *Political activity is a fundamental right.* "The freedom of the individual to participate in political activity is a fundamental principle of a democratic society and is the premise upon which our form of government is based." (61 C.2d 334.)

(c) *The charter provision violated that right.* It was so broad as to cover any political activity, partisan or not, including support of propositions that affect the employee, and perhaps even membership in a political organization or attendance at political gatherings; and it applied to all elections, national and state. (61 C.2d 335, 336.)

(d) *A narrowly drawn statute may be valid.* The (former) Hatch Act, prohibiting active participation in partisan politics, was held in *United Public Workers of America (C.I.O.) v. Mitchell* (1947) 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754, *supra*, §253, to be a reasonable restriction to protect against the dangers in discharging an official duty. (61 C.2d 336.) And state laws, such as *Govt.C. 3201 et seq.* (*supra*, §254), are also sufficiently restricted in scope to be sustainable. (61 C.2d 340.) "No one can reasonably deny the need to limit some political activities such as the use of official influence to coerce political action, the solicitation of political contributions from fellow employees, and the pursuit of political purposes during those hours that the employee should be discharging the duties of his position. A

strong case, we think, can also be made for the view that permitting a public employee to run or campaign against his own superior has so disruptive an effect on the public service as to warrant restriction. It is, of course, possible to draw a restrictive provision narrowly in order to deal specifically with such abuses." (61 C.2d 338.)

(e) *A statute too broad in scope cannot stand.* Where First Amendment rights are involved, the state regulation can prevail only if (1) there is a compelling interest in the limitation, and (2) the restriction is drawn with narrow specificity. (61 C.2d 337.) There cannot be wholesale restrictions on political activities merely because the persons affected are public employees, of whom today there are reportedly 12 million in the country. (61 C.2d 337.)

In *Kinnear v. San Francisco* (1964) 61 C.2d 341, 38 C.R. 631, 392 P.2d 391, the San Francisco charter contained a provision forfeiting the office of an appointive officer or employee who became a candidate for election to any public office. Plaintiff, a permanent civil service deputy sheriff, filed a declaration of candidacy for the office of sheriff, and was notified of automatic forfeiture. *Held*, the provision was too broad. It related to all public offices, partisan or nonpartisan, and national, state, and local. No compelling interest of the county was shown to justify so sweeping a restriction of the fundamental right. (61 C.2d 343.)

In *Belshaw v. Berkeley* (1966) 246 C.A.2d 493, 54 C.R. 727, defendant city had a regulation that employees should conduct themselves in a manner as "to reflect no discredit" on the city, and the fire department had a regulation prohibiting adverse criticism of superiors and public disapproval of policies and practices. Petitioner, a fireman, was suspended after he wrote a letter to the local newspaper criticizing the city manager and other officials for alleged discrimination in pay between policemen and firemen. *Held*, mandamus granted to expunge the order of suspension; these rules violated his constitutional right of free speech. (246 C.A.2d 497.)

In *Bagley v. Washington Township Hosp. Dist.* (1966) 65 C.2d 499, 55 C.R. 401, 421 P.2d 409, plaintiff was hired by defendant hospital district as a nurse's aide. A number of citizens, including district employees, were dissatisfied with the board's policies. They commenced a recall campaign aimed at some directors, and plaintiff actively participated in the campaign on off-duty hours. The hospital administrator gave written notice that this activity was unlawful and grounds for dismissal under *Govt.C. 3205*, prohibiting political solicitation within local agencies. Plaintiff sued to enjoin the district from threatening reprisals for his activity. She was discharged, and amended her complaint to seek reinstatement and damages. *Held*, the restraints were unconstitutional.

Defendant contended that, where no civil service or merit system is in force, employees serve at the pleasure of the agency and may be discharged without cause. The court's answer was unequivocal: "Despite the antiquity of this argument, its reasoning today stands utterly discredited." (65 C.2d 503.) The doctrine of unconstitutional conditions (see *infra*, §813) negatives any such broad power, and the *Fort* case makes it clear that a governmental agency that would require a waiver of constitutional rights as a condition of public employment must prove three things: (a) That the restraints rationally relate to the enhancement of the public service; (b) that the public benefits outweigh the resulting impairment of rights; and (c) that no alternatives less subversive of rights are available. These tests were not met here. (65 C.2d 509.) (See *Rosenfield v. Malcolm* (1967) 65 C.2d 559, 562, 55 C.R. 505, 421 P.2d 697 [*Fort* and *Bagley* applied to nullify dismissal of assistant health officer with probationary status who joined organization devoted to eradication of racial discrimination]; 55 Cal. L. Rev. 1083 [*Bagley*]; 55 Cal. L. Rev. 1069 [*Rosenfield*].)

In *Eldridge v. Sierra View Local Hosp. Dist.* (1990) 224 C.A.3d 311, 273 C.R. 654, plaintiff, a nurse employed by defendant hospital district, announced her candidacy for a vacant position on the district's board of directors. The board, believing that the two positions were incompatible and fraught with conflicts of interest, adopted a bylaw providing that such an employee could not assume office without resigning from employment. Plaintiff nevertheless accepted the elective office and the board terminated her employment. She sought mandamus to compel reinstatement, claiming violation of her civil rights, and the trial court granted defendant's motion for summary judgment. *Held*, reversed.

(a) *Govt.C. 3203* states that, except for exceptions under state or federal law, "no restriction shall be placed on the political activities of any officer or employee of a state or local agency." (224 C.A.3d 317.) And *Govt.C. 3201* declares

that "political activities of public employees are of significant statewide concern." (224 C.A.3d 317.) Defendant contended that its bylaw did not violate *Govt.C. 3203* because it did not prevent plaintiff from holding office. But *Fort, supra*, rejected a similar argument in a constitutional context; and "the principle set forth in *Fort* applies to the exercise of a clearly defined statutory right to be free from interference with political rights (§3203), particularly where the statutory provision finds its genesis in constitutional principles." Hence the hospital could not burden the exercise of the statutory rights in *Govt.C. 3203* with the penalty of loss of employment. (224 C.A.3d 319.)

(b) Conflict of interest situations may arise after a person takes office; but "the effect of a person" with a conflict participating in a decision is to subject him or her to fines and penalties, and render void the action in which the person participated, not to disqualify him or her from holding office. (224 C.A.3d 320.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Political Parties and Candidates.

4. Federal Regulation of Campaigns.

a. Election Campaign Act.

7 *Witkin Sum. Cal. Law Const Law* § 256

[§ 256] Election Campaign Act.

The Federal Election Campaign Act of 1971 (FECA), as amended in 1974, regulated many aspects of federal election campaigns. (See *Buckley v. Valeo* (1976) 424 U.S. 1, 96 S.Ct. 612, 694, 46 L.Ed.2d 659, 759 [Appendix setting forth major provisions].) In an elaborate per curiam opinion in *Buckley*, the Court considered the constitutionality of the following major provisions of the Act and statutes providing for public financing of presidential election campaigns:

(a) *Contribution limitations.* Provisions limiting contributions by individuals and groups to candidates and authorized campaign committees, limiting contributions by political committees, limiting volunteers' incidental expenses, and imposing a limitation on total annual contributions by a contributor are valid. (96 S.Ct. 612, 631, 46 L.Ed.2d 690.) (See 4 Rotunda, §20.51.)

(b) *Reporting and disclosure requirements.* Provisions requiring political committees to report their contributors, and requiring individuals and groups to report contributions to or expenditures on behalf of candidates are valid. (96 S.Ct. 621, 46 L.Ed.2d 711.) (See 4 Rotunda, §20.51.)

(c) *Public financing of presidential election campaigns.* Provisions for the public financing of presidential election campaigns from general revenues in the aggregate amount designated by individual taxpayers were upheld. (96 S.Ct. 633, 46 L.Ed.2d 725.) (On provision making it a criminal offense for independent political committees to expend funds to further election of presidential candidate receiving public financing, see *infra*, §258.)

(d) *Composition of the Federal Election Commission.* Provisions for the appointment of the majority of the members of the Commission by the President pro tempore of the Senate and the Speaker of the House were violative of the Appointments Clause and the doctrine of separation of powers. (96 S.Ct. 670, 46 L.Ed.2d 739.)

(e) *Expenditure limitations.* "[T]he limitations on campaign expenditures, on independent expenditures by individuals or groups, and on expenditures by a candidate from his personal funds are constitutionally infirm." (96 S.Ct. 694, 46 L.Ed.2d 758.)

(f) *Underlying theory.* The underlying theory of the decision appears in the following statement: "A restriction on

the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." (96 S.Ct. 634, 46 L.Ed.2d 687.) (See 90 Harv. L. Rev. 171 [Buckley]; 50 U.C.L.A. L. Rev. [same].)

In response to *Buckley*, Congress enacted the Federal Election Campaign Act Amendments of 1976, eliminating the provisions found unconstitutional and making other changes. The Amendments also codified all election law provisions in Title 2 of the United States Code (2 U.S.C., §431 et seq.), except for the Presidential Campaign Fund Act (26 U.S.C., §9001) and the Hatch Act (supra, §253). The FECA has been amended several times since 1976. (See 116 Harv. L. Rev. 2610 [using campaign donations to influence lawmaking]; 73 Cal. L. Rev. 1045; 91 Cal. L. Rev. 643 [symposium on campaign finance reform]; 10 Hastings Const. L. Q. [Symposium on campaign finance reform]; 40 San Diego L. Rev. 19 [Campaign Finance Reform]; 18 Santa Clara L. Rev. 1 [Buckley and 1976 amendments]; 50 Stanf. L. Rev. 837 [mandating donor anonymity to disrupt market for political influence]; 50 Stanf. L. Rev. 893 [The Democratic Paradox of Campaign Finance Reform]; 31 U.C. Davis L. Rev. 1065, 1083 [political money and freedom of speech]; 50 U.C.L.A. L. Rev. 1141 [increasing voter competence through increased campaign finance disclosure]; on access to broadcast facilities of candidates seeking federal office, see *CBS v. Federal Communications Commission* (1981) 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d 706; 95 Harv. L. Rev. 221 [CBS].)

Due to continuing circumvention of FECA limitations on the sources and amounts of contributions, and the need to protect elections from the appearance of corruption, Congress adopted the Bipartisan Campaign Reform Act of 2002 (BCRA), which contains a series of amendments to the FECA and the federal Communications Act. (See *McConnell v. Federal Election Com.* (2003) 540 U.S. 93, 124 S.Ct. 619, 719, 773, 157 L.Ed.2d 491, 613, 673 [Appendices setting forth major provisions].) In a three-part opinion written by different justices, *McConnell* considered constitutional challenges to the new provisions, holding as follows:

(a) *Soft-money restrictions.* The principal purpose of Title I of the BCRA is to plug the "soft-money loophole." (124 S.Ct. 654, 157 L.Ed.2d 542.) Soft money consists of contributions to political parties for activities intended to influence state or local elections, which funds were not subject to the FECA. (124 S.Ct. 648, 157 L.Ed.2d 535.) The BCRA prohibits: (1) national party committees, their agents, and federal candidates and officeholders from soliciting, receiving, directing, or spending soft money, (2) state and local party committees from using soft-money funds for activities affecting federal elections, (3) political parties from soliciting and donating funds to tax exempt organizations that engage in electioneering, and (4) state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates. These provisions are valid. (124 S.Ct. 654, 686, 157 L.Ed.2d 542, 576.)

(b) *Disclosure requirements for funding electioneering communications.* Title II of the BCRA expands the reach of FECA disclosure requirements to "electioneering communications," which encompass any "broadcast, cable, or satellite communication" that refers to a clearly identified candidate for federal office within a specified time before an election. (124 S.Ct. 686, 157 L.Ed.2d 577.) This provision and other amendments specifying significant disclosure requirements for funding electioneering communication, and restricting that funding by corporations and labor unions, are valid. (124 S.Ct. 694, 698, 157 L.Ed.2d 585, 589.)

(c) *Restrictions on party spending during preelection period.* The provision requiring parties to choose between coordinated and independent expenditures after they nominate a candidate for federal office constitutes an unconstitutional burden on the parties' right to make unlimited independent expenditures. (124 S.Ct. 700, 157 L.Ed.2d 592.)

(d) *Restrictions on contributions by minors.* The provision prohibiting minors from making contributions to candidates or political parties violates the First Amendment rights of minors. (124 S.Ct. 711, 157 L.Ed.2d 603.)

(e) *Records of broadcasting requests.* Provisions requiring broadcasters to keep records of politically related broadcasting requests publicly available are not unduly burdensome and are valid. (124 S.Ct. 712, 157 L.Ed.2d 605.)

Three justices filed separate opinions in which they concurred and dissented in part (124 S.Ct. 720, 729, 742, 157 L.Ed.2d 614, 624, 638), and two justices filed separate opinions in which they dissented in part (124 S.Ct. 777, 784, 157 L.Ed.2d 678, 687).

SUPPLEMENT: [This section is current through the latest supplement]

See 5 Rotunda 4th, §20.51; 58 *Stanf. L. Rev.* 1499 [proposal for taking FECA online]; 19 *A.L.R. Fed* 2d 1 [Validity, Construction, and Application of Campaign Finance Laws--Supreme Court Cases]. *Bipartisan Campaign Reform Act*: In *Federal Election Com. v. Wisconsin Right to Life* (2007) 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329, plaintiff nonprofit advocacy corporation challenged the constitutionality of §203 of the BCRA, which prohibits the use of corporate or union treasury funds to pay for an "electioneering communication" broadcast within a specified time before an election. Plaintiff was forced to pull its ads before the blackout period commenced to avoid violating §203. The ads, while complaining about United States Senators using a filibuster to block the appointment of judicial nominees, called on viewers to complain about the filibuster to a specific senator who was running in the state Democratic primary. On remand, the District Court held that §203 was unconstitutional as applied to plaintiff's ads. *Held*, affirmed. In the lead opinion, two justices agreed that §203 was unconstitutional as applied because the ads did not constitute express advocacy, or its functional equivalent, and defendants failed to identify a sufficiently compelling interest to justify burdening plaintiff's speech. (127 S.Ct. 2667, 2671, 168 L.Ed.2d 346, 350.) In an opinion concurring in the judgment, three justices stated that the holding in *McConnell v. Federal Election Com.* (2003) 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491, text, p. 410, "that § 203 is facially valid because the vast majority of pre-election issue ads can constitutionally be proscribed," was wrong, and should not be enforced. (127 S.Ct. 2684, 2686, 168 L.Ed.2d 365, 368.) Four justices dissented, stating that §203 is constitutional and that *McConnell* should be upheld. (127 S.Ct. 2687, 168 L.Ed.2d 368.) (See 121 *Harv. L. Rev.* 285 [Wisconsin Right to Life].)

In *Davis v. Federal Election Com.* (2008) 554 U.S. ___, 128 S.Ct. 2759, 171 L.Ed.2d 737, plaintiff candidate for the United States House of Representatives challenged the constitutionality of §319(a) of the BCRA, which raised campaign limits for the non-self-financing candidate when a self-financing candidate's expenditure of personal funds caused the "opposition personal funds amount" threshold of \$ 350,000 to be exceeded. The provision operated, under certain circumstances, to impose different campaign limits on candidates competing for the same congressional seat. The District Court held that plaintiff had standing but rejected his claims on the merits. Plaintiff filed a direct appeal to the United States Supreme Court. *Held*, reversed. §319(a) is an unconstitutional burden on plaintiff's First Amendment Right to spend his own money for campaign speech, and §319(b), which implements the asymmetrical contribution limits through compelled disclosures, also is unconstitutional. (128 S.Ct. 2771, 2775, 171 L.Ed.2d 751, 755.) §319(a) cannot stand unless its burden on campaign speech is justified by a compelling state interest. That burden is not justified here by any governmental interest in eliminating corruption or the perception of corruption. (128 S.Ct. 2772, 171 L.Ed.2d 752.) Leveling the electoral opportunities for candidates with differing levels of wealth is not a legitimate governmental interest that justifies the asymmetrical limits. (128 S.Ct. 2773, 171 L.Ed.2d 753.) Four justices concurred and dissented in part in two opinions. (128 S.Ct. 2777, 2782, 171 L.Ed.2d 757, 763.)

See 118 *Harv. L. Rev.* 364 [Bipartisan Campaign Reform Act]; 56 *Hastings L. J.* 77 [Supreme Court's campaign finance dilemma]; 78 *So. Cal. L. Rev.* 591 [Paying for Politics].



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CHAPTER X - Constitutional Law

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4. Federal Regulation of Campaigns.

b. Contributions From Corporations or Labor Organizations.

7 *Witkin Sum. Cal. Law Const Law* § 257

[§ 257] Contributions From Corporations or Labor Organizations.

The Federal Corrupt Practices Act prohibits any corporation or labor organization from making "a contribution or expenditure" in connection with an election for federal office. (2 U.S.C., §441b; *Cort v. Ash* (1975) 422 U.S. 66, 95 S.Ct. 2080, 2091, 45 L.Ed.2d 26, 39 [no private right of action by shareholder against corporation; decided under predecessor statute]; see *United States v. International Union United Automobile, Aircraft & Agricultural Implement Workers of America (UAW-CIO)* (1957) 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563; 4 Rotunda, §20.51; 71 Harv. L. Rev. 120; 46 Cal. L. Rev. 439; 20 U.C.L.A. L. Rev. 1327; 2 Western State L. Rev. 33; 190 A.L.R. Fed 169 [validity and application of 2 U.S.C., §441b].)

In *Pipefitters Local Union No. 562 v. United States* (1972) 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11, a union established a separate political fund under its control, and collected contributions from members at rates based on hours worked. The union and three officers were convicted of conspiracy to violate the Act. *Held*, reversed for failure of the trial judge to instruct that the jury must find that contributions were actually or in effect union dues or assessments.

(a) The statute does not prohibit unions from making contributions in federal elections through a political fund if the contributions are volunteered. (92 S.Ct. 2257, 33 L.Ed.2d 23.) This construction is confirmed by the 1972 amendment, enacted after the convictions. (92 S.Ct. 2261, 33 L.Ed.2d 27.)

(b) The fund need not be entirely free from union influence. It must be separate only in the sense that there must be "a strict segregation of its monies from union dues and assessments." And solicitation by union officials is permissible, if "conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power." (92 S.Ct. 2264, 33 L.Ed.2d 30.) This construction is also confirmed by the 1972 amendment. (92 S.Ct. 2267, 2270, 33 L.Ed.2d 34, 37.)

In *Federal Election Com. v. Massachusetts Citizens for Life* (1986) 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, the court held the statute unconstitutional as applied to a nonprofit corporation (MCFL) formed for the purpose of promoting "pro-life" causes through educational and political activities.

(a) Corporate spending on political activity is regulated because of concern that wealth amassed in the economic arena might be used in the political arena, even though a corporation's wealth may be no indication of the power of its ideas. (107 S.Ct. 627, 93 L.Ed.2d 555.)

(b) "Regulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed *to disseminate political ideas, not to amass capital*. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." (107 S.Ct. 628, 93 L.Ed.2d 557.) As applied to MCFL, §441b is therefore unconstitutional, "for it infringes protected speech without a compelling justification for such infringement." (107 S.Ct. 631, 93 L.Ed.2d 560.) (See *Federal Election Com. v. Beaumont* (2003) 539 U.S. 146, 123 S.Ct. 2200, 2209, 156 L.Ed.2d 179, 192 [statutory prohibition of contributions by corporations applies to nonprofit advocacy corporations]; 101 Harv. L. Rev. 199 [Massachusetts Citizens].)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Rotunda 4th, §20.51.



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4. Federal Regulation of Campaigns.

c. Restrictions on Political Committees.

7 *Witkin Sum. Cal. Law Const Law* § 258

[§ 258] Restrictions on Political Committees.

In *Federal Election Com. v. National Conservative Political Action Committee* (1985) 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455, the Court sustained a challenge to the Presidential Election Campaign Fund Act (26 U.S.C., §9001 et seq.). This statute offered presidential candidates of major political parties the option of receiving public financing for their general election campaigns. If a candidate elected public financing, it was a criminal offense for independent "political committees" to expend more than \$ 1,000 to further that candidate's election. *Held*, the provision is unconstitutional on its face.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling governmental interests thus far identified for restricting campaign finances. In *Buckley* we struck down the FECA's limitation on individuals' independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find §9012(f)'s limitation on independent expenditures by political committees to be constitutionally infirm." (105 S.Ct. 1459, 84 L.Ed.2d 469; citing *Buckley v. Valeo* (1976) 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, *supra*, §256.)

"Even were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, §9012(f) is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate." (105 S.Ct. 1469, 84 L.Ed.2d 470.)

Three justices dissented. (On regulation of campaign expenditures by political action committees, see 99 *Harv. L. Rev.* 223; 71 *Cal. L. Rev.* 673.)

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C. Political Parties and Candidates.

5. Candidates.

a. Residence Requirement.

1. Invalid Period.

7 *Witkin Sum. Cal. Law Const Law* § 259

[§ 259] Invalid Period.

In California counties governed by the general law (*Govt.C. 25041*), a candidate for county supervisor formerly had to be a resident of the county for 1 year. In *Zeilenga v. Nelson* (1971) 4 C.3d 716, 94 C.R. 602, 484 P.2d 578, petitioner, a candidate in Butte County with 1.5 years residence, challenged a local charter requirement of 5 years. *Held*, the charter provision was unconstitutional.

(a) The right to hold public office by election or appointment is a fundamental right of citizenship protected against invidious discrimination. (4 C.3d 720.)

(b) The public interest in having "a knowledgeable candidate" does not justify this long period. *Sheehan v. Scott* (1905) 145 C. 684, 686, 79 P. 350, upholding a 5-year requirement in the San Francisco charter, was decided in the "horse and buggy days." With today's public transportation and rapid dissemination of news, this type of period is simply "a built-in device to prevent competition against the county's oldtimers." (4 C.3d 722.) *Sheehan* is therefore overruled. (4 C.3d 718.)

(c) *Lindsey v. Dominguez* (1933) 217 C. 533, 535, 20 P.2d 327, upheld a 2-year qualification for city council members in Los Angeles. This case was decided before the new compelling interest test was announced in *Carrington v. Rash* (1965) 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, *supra*, §244, and *Keane v. Mihaly* (1970) 11 C.A.3d 1037, 90 C.R. 263, *supra*, §245, as well as before the new era of communications. Hence, "We express no opinion on its validity today." (4 C.3d 723, footnote 3.) (See *Camara v. Mellon* (1971) 4 C.3d 714, 94 C.R. 601, 484 P.2d 577 [on authority of *Zeilenga*, 3-year requirement of Santa Cruz charter for city council candidate was invalid]; *Martinez v. Newton* (1973) 8 C.3d 756, 758, 106 C.R. 105, 505 P.2d 529 [4-year requirement of Santa Barbara charter for city council candidate was invalid]; 60 Cal. L. Rev. 819; 45 So. Cal. L. Rev. 996.)

The problem was reexamined in *Thompson v. Mellon* (1973) 9 C.3d 96, 107 C.R. 20, 507 P.2d 628, but a sharply divided court failed to reach agreement on a test for the validity of these requirements. Thus, the decision is authority only for the holding that a 2-year period is invalid, and the validity of periods less than that is uncertain. The case arose when Santa Cruz, in response to *Camara, supra*, reduced the time period to 2 years. *Held*, the provision was

unconstitutional, and mandamus issued to compel filing of petitioner's nomination papers. (See 88 Harv. L. Rev. 1225; 62 Cal. L. Rev. 450; 65 A.L.R.3d 1048 [Validity of Requirement that Candidate or Public Officer Have Been Resident of Governmental Unit for Specified Period].)

In *Smith v. Evans* (1974) 42 C.A.3d 154, 116 C.R. 684, the court held unconstitutional a Chico city charter requirement of 1-year residency for city council candidates.

(a) *Prior decisions on candidates and voters.* *Thompson v. Mellon* did not have a majority against a 1-year requirement. (42 C.A.3d 157.) *Gage v. Allison* (1971) 22 C.A.3d 85, 87, 99 C.R. 95, upheld a 1-year requirement for county supervisorial candidates, but relied on *Lindsey v. Dominguez*, which was dissipated as authority by *Zeilenga v. Nelson*. (42 C.A.3d 157.) Voter cases, dealing with a closely related right, reject 1-year requirements. (42 C.A.3d 158, citing *Dunn v. Blumstein* (1972) 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 and *Keane v. Mihaly*, *supra*.)

(b) *Tests and factors.* Even under the less stringent "reasonable necessity" test, the requirement is invalid when the three factors are considered:

(1) *First factor: residential requirement as an adjunct of the election machinery.* Although the objective of voter identification laws (to prevent voting by ineligible and repeaters) and that of candidate identification laws (to attain an informed electorate) are different, the dictum in the first *Thompson* opinion, that 30 days is enough, is consistent with the administrative necessities of the election process. (42 C.A.3d 160.)

(2) *Second factor: knowledge of community conditions and issues.* This is the one most frequently advanced, but a 1-year waiting period "distributes eligibility and ineligibility among the aware and unaware alike." (42 C.A.3d 161.) It ignores individual qualities of candidates and the nature of problems faced by them. "Familiarity with community issues and problems need not await the lapse of time. In today's communities many local issues are not local at all; rather, they emerge as standard and recurring symptoms of American social history. Urban decay and suburban sprawl, racial and ethnic integration, law enforcement, education, public transit, the tax rate--these are some of the characteristic problems of American communities generally. In any one voting enclave the characteristic issues are likely to outnumber the unique issues. Many newcomers arrive with ready-made sensitivity and awareness of these characteristic problems. Their imported ideas may be more efficacious than homegrown ideas. A one-year candidate residence requirement fails as a practical fulfillment of the public need for knowledgeable candidates." (42 C.A.3d 161.)

(3) *Third factor: interest of those disadvantaged by the classification.* (a) To the prospective candidate the 1-year requirement imposes a practical limitation far more extensive than the minimum; staggered terms of office, deadlines for filing, and elections in odd-numbered years, mean that a candidate will often have to wait 3 or 5 years. (42 C.A.3d 162.) (b) The electorate also suffers. Voters desiring fresh faces and fresh ideas have narrowed choices; and the waiting period penalizes the fundamental right to travel. "Citizen participation in the political process through voting and candidacy is the elemental, indispensable and abiding need of a democratic republic. Durational residence tests impose 'dead periods' upon the exercise of political rights. They interrupt an abiding civic need. In a relatively rural society of relative population stability, these parochial restrictions dealt the body politic only a feeble loss. Today the republic is urbanized and industrialized, featured by the incessant relocation of citizens from one state or community to another. In this era of heightened mobility, repeated and widespread interruptions of political rights inflict exacerbated injury upon the body politic. The dead periods caused by durational residence laws affect more people frequently. The fluidity of our times sensitizes the equal protection guaranty into vigorous negation of restrictions which the quiet past might have tolerated." (42 C.A.3d 163.)

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5. Candidates.

a. Residence Requirement.

2. Valid Period.

7 *Witkin Sum. Cal. Law Const Law* § 260

[§ 260] Valid Period.

(1) *In General.* In *Johnson v. Hamilton* (1975) 15 C.3d 461, 125 C.R. 129, 541 P.2d 881, the court held invalid the provisions of the Long Beach charter requiring 1-year residency in the city and 6-months residency in the district.

(a) *Strict scrutiny test applies.* The burden is on the state to show that a compelling interest justifies the law and that the distinctions drawn are necessary to further its purpose. (15 C.3d 466, 468; see *infra*, §704.)

(b) *Invalidity of long periods.* Under the principles set forth in *Thompson v. Mellon* (1973) 9 C.3d 96, 107 C.R. 20, 507 P.2d 628, *supra*, §259, and *Smith v. Evans* (1974) 42 C.A.3d 154, 116 C.R. 684, *supra*, §259, there is no compelling interest justifying the restrictions in question. (15 C.3d 472, disapproving *Gage v. Allison* (1971) 22 C.A.3d 85, 87, 99 C.R. 95, *supra*, §259.)

(c) *Validity of 30-day period.* There are compelling reasons for requiring candidates to establish residence within a reasonable and fixed time prior to the election, not more than 30 days. (15 C.3d 472.) "A 30-day prefiling residence requirement seems reasonably necessary and convenient to accommodate the needs of election officials in their task of timely verification of the candidate's true residence prior to the preparation and distribution of ballots. Accordingly, we hold that any durational residence requirement for candidates for local office in excess of the foregoing period is violative of the equal protection clause of the Fourteenth Amendment." (15 C.3d 472.)

Two justices, concurring with reluctance under the compulsion of U.S. Supreme Court decisions, saw in this decision and in *Dunn v. Blumstein* (1972) 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274, *supra*, §245, "the danger of roving candidates picking their elections and bringing their voters with them." They assert that, in rural areas with small voter bases, it is possible for imported voters to outvote an existing majority of bona fide residents. (15 C.3d 473.)

(2) *Codification.* A candidate must have been a registered voter of the district that he or she "seeks to represent for at least 30 days immediately preceding the deadline for filing nomination documents." (Govt.C. 25041; see *Daniels v. Tergeson* (1989) 211 C.A.3d 1204, 1207, 1210, 259 C.R. 879 [Govt.C. 25041 is constitutional and requires strict compliance with 30-day period; candidate who registered 28 days before election was ineligible].)

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5. Candidates.

b. Filing Fee.

7 *Witkin Sum. Cal. Law Const Law* § 261

[§ 261] Filing Fee.

(1) *Bullock v. Carter Rule*. Filing fees for candidates, often substantial in amount, have been subjected to strong constitutional attack. (See *Bullock v. Carter* (1972) 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92; *Brown v. Chote* (1973) 411 U.S. 452, 93 S.Ct. 1732, 36 L.Ed.2d 420 [challenge of former Elec.C. 6552, 6553 (now Elec.C. 8103, 8104), requiring fee from candidate for House of Representatives of one percent of salary of office; preliminary injunction upheld, but case remanded to consider constitutional issues on better record].)

In *Bullock v. Carter, supra*, the court examined a Texas law under which primary elections were financed by large fees fixed by the county executive committee of the political party. In the Democratic primary election of 1970, the system was challenged by several candidates, including one seeking the office of county commissioner (fee set at \$ 1,424.60) and one seeking the office of county judge (fee set at \$ 6,300). *Held*, the law was unconstitutional.

(a) The filing fee requirement, though limited to party primaries, was state action. (92 S.Ct. 854, 31 L.Ed.2d 98.)

(b) The initial impact of the fee is felt by aspirants for office, but its effect in excluding office seekers lacking personal wealth or affluent backers tends to deprive some voters of the opportunity to vote for a candidate of their choice. Thus, the scheme has a "real and appreciable impact on the exercise of the franchise," and is subject to the close scrutiny rule of the poll tax case (*supra*, §243). (92 S.Ct. 856, 31 L.Ed.2d 100.)

(c) The state's interest in regulating the number of candidates, to deter frivolous or fraudulent filings, cannot justify a totally arbitrary system that excludes legitimate as well as frivolous candidates. (92 S.Ct. 857, 31 L.Ed.2d 101.)

(d) The other state interest--relieving the state treasury of the cost of conducting primary elections--also does not meet the test of necessity for this invasion of voters' rights. "It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth." (92 S.Ct. 858, 31 L.Ed.2d 102.)

(e) Reasonable filing fees are valid; but "[b]y requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas

has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice." (92 S.Ct. 859, 31 L.Ed.2d 103.) (See 60 Cal. L. Rev. 1371.)

Lubin v. Panish (1974) 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702, took the *Bullock* rule a step further. Petitioner, seeking election to the Los Angeles County Board of Supervisors, stated under oath that he had no assets or income and could not pay the filing fee of \$ 701.60; thus, his claim of indigency challenged the validity of any filing fee--reasonable or unreasonable. The court reaffirmed the legitimate state interest in keeping ballots within manageable size, and in eliminating frivolous candidacy, but flatly declared that "the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." (94 S.Ct. 1320, 39 L.Ed.2d 709.)

"The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants. As we have noted, the payment of a fee is an absolute, not an alternative, condition, and failure to meet it is a disqualification from running for office. Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." (94 S.Ct. 1320, 39 L.Ed.2d 709.) (See 88 Harv. L. Rev. 1144.)

Following the *Lubin* decision, the California Supreme Court rejected the contention that *Bullock* invalidated only unreasonable fees, and concluded that the California Elections Code fee provisions were unconstitutional. (*Knoll v. Davidson* (1974) 12 C.3d 335, 349, 116 C.R. 97, 525 P.2d 1273; see *Donovan v. Brown* (1974) 11 C.3d 571, 573, 115 C.R. 41, 524 P.2d 137.)

(2) *Alternatives to Fee Requirements.* *Lubin* points out that there are tests of the seriousness of a candidacy that can be validly imposed; e.g., a required number of voters signing a petition on behalf of the candidate. (94 S.Ct. 1321, 39 L.Ed.2d 710.) The California Legislature responded in 1974 by amending the Elections Code to permit a candidate, in lieu of paying the statutory filing fee (see *Elec.C.* 8103, 8104), to submit a petition containing a specified number of signatures of registered voters. (See *Elec.C.* 8106; *Govt.C.* 16100.6; *Bill v. Williams* (1977) 70 C.A.3d 531, 139 C.R. 19 [attack on predecessor signature statute rejected]; 6 *Pacific L. J.* 319.)

In *Green v. Layton* (1975) 14 C.3d 922, 123 C.R. 97, 538 P.2d 225, the court considered the validity of the following provisions in the election regulations of the city of Los Angeles. (a) The candidate must file a declaration of intention to run. (b) He or she may pay a \$ 300 filing fee, at least half at the time of filing the declaration. (c) In lieu of the filing fee, the candidate may submit a petition containing 500 signatures (in addition to those on the nominating petition). If the candidate decides to follow the "in lieu" procedure, he or she must declare this choice in writing at the time of filing the declaration, and the choice is irrevocable. Petitioners did not challenge the reasonableness of the signature requirements or the necessity of indicating their preference. However, when their nominating petitions were rejected because of insufficiency of the signatures, they sought to pay the filing fee. Respondent clerk refused to accept the fee. *Held*, the irrevocable choice requirement could not be justified by the slight administrative convenience gained, and it bore no relationship to measuring the seriousness of a candidate's purpose. One who gathers a substantial number of signatures and who thereafter offers to pay a fee instead of gathering additional names has demonstrated his or her intentions to at least as great a degree as the candidate who chooses to pay a fee. (14 C.3d 927.)

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c. Filing Deadline.

7 *Witkin Sum. Cal. Law Const Law* § 262

[§ 262] Filing Deadline.

In *Anderson v. Celebrezze* (1983) 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, an Ohio statute required an independent candidate for President to file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November. *Held*, the early filing deadline was unconstitutional: The burdens placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, outweighed the state's minimal interest in imposing the deadline. (103 S.Ct. 1570, 1571, 1572, 1579, 75 L.Ed.2d 558, 559, 560, 569.) Four justices dissented. (See 97 Harv. L. Rev. 156.)

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d. Disqualification of Recalled Officer.

7 *Witkin Sum. Cal. Law Const Law* § 263

[§ 263] Disqualification of Recalled Officer.

Former Elec.C. 27521, disqualifying a recalled city officer of a general law city from running for the same office for a period of 1 year, was held invalid in *De Bottari v. Melendez* (1975) 44 C.A.3d 910, 119 C.R. 256.

(a) The interest of the state in the stability of municipal government might be furthered by preventing too frequent recalls. (44 C.A.3d 910.) But the 1-year period is excessive, as compared with the 6-month limitation on new recall proceedings. (44 C.A.3d 922.) If the danger is repeated recalls, the appropriate remedy is limiting the frequency of the recall itself, not barring the candidacy of the recalled official. (44 C.A.3d 922.)

(b) There are no similar disqualifications in the statutes on recalled school, county, or state officials; and although it is common knowledge that recall elections are frequent in school districts, "the Legislature has apparently not felt it necessary to the stability of governing boards of school districts that a recalled school official be disqualified from being a candidate for one year, six months, or any period at all." (44 C.A.3d 923.) (For constitutional provisions governing recalls, see Cal. Const., Art. II, §13 et seq.)

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e. Payment of Costs of Election Pamphlet.

7 *Witkin Sum. Cal. Law Const Law* § 264

[§ 264] Payment of Costs of Election Pamphlet.

In *East Bay Mun. Util. Dist. v. Appellate Department* (1979) 23 C.3d 839, 153 C.R. 597, 591 P.2d 1249, an election was held for the Board of Directors of East Bay Municipal Utility District, and, pursuant to former Elec.C. 10012 (now Elec.C. 13307), the District billed each candidate a pro rata share of the expense of the voter pamphlet containing the statements of qualifications for the office. Certain candidates, not claiming indigency, nevertheless refused to pay, and the District sued to collect and obtained judgment. *Held*, the judgment was valid.

(a) *Knoll v. Davidson* (1974) 12 C.3d 335, 116 C.R. 97, 525 P.2d 1273, held that a governmental agency cannot constitutionally require *prepayment* of costs as a condition to printing statements of qualifications; but the court recognized that the agency may bill the candidate for his or her pro rata share of the actual costs after the pamphlet has been printed and distributed. This view is reaffirmed: "Inequality is eliminated when all candidates are permitted to make a statement of qualifications without prepayment. Equal protection does not further require that candidates be relieved of their pro rata costs of publication any more than they are entitled to relief from other personal costs of candidacy." (23 C.3d 843.)

(b) The charge is not precluded by the provision in Cal. Const., Art. II, §3, stating that the Legislature must provide for free elections. "A 'free election' does not mandate a free ride from all election campaign expense and particularly not from the pro rata cost of publicizing personal qualifications for the office one seeks." (23 C.3d 845.)

Two justices joined in a brief dissent, asserting that "an election is not free, within the meaning of article II, section 3, if a government is allowed to assess any of its costs to the candidates." (23 C.3d 846.) (See *Mackey v. Panish* (1980) 106 C.A.3d 7, 12, 164 C.R. 771 [following *East Bay Mun. Util. Dist.*].)

SUPPLEMENT: [This section is current through the latest supplement]

See Elec.C. 9084, amended in 2008 [candidates for U.S. Senator may purchase space to place statement in state ballot pamphlet]; Elec.C. 13307.5, added in 2008 [candidates for U.S. Representative may purchase space to place statement in voter information portion of sample ballot].



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f. Content of Candidate's Statement.

7 *Witkin Sum. Cal. Law Const Law* § 265

[§ 265] Content of Candidate's Statement.

Each candidate for nonpartisan elective office may prepare a candidate's statement including his or her name, age, and occupation, and a brief description of the candidate's education and qualifications. (*Elec.C. 13307*.) The list of items in the statute is not intended to be restrictive; the candidate's statement may include other information regarding his or her qualifications. (*Loza v. Panish* (1980) 102 C.A.3d 821, 824, 162 C.R. 596 [decided under predecessor statute]; *Hammond v. Agran* (1999) 76 C.A.4th 1181, 1189, 90 C.R.2d 876 [following *Loza v. Panish*; candidates' ideas and views that do not include attacks on opponents may constitute "qualifications" for purposes of candidates' statements in voter pamphlets]; for additional restrictions on statements of candidates for judicial office, see *Elec.C. 13308*.)

A former version of the statute also provided that the clerk "shall reject" a statement that "contains any obscene, vulgar, profane, scandalous, libelous or defamatory matter, or any language which in any way incites, counsels, promotes or advocates hatred, abuse, violence or hostility toward, or which tends to cast ridicule or shame upon any person or group of persons by reason of sex, race, color, religion or manner of worship, or any language or matter the circulation of which through the mails is prohibited by Congress." This provision was held to be a violation of the constitutional right of freedom of expression (*Loza v. Panish, supra*, 102 C.A.3d 826) and was deleted from the statute in 1983.

One who knowingly makes a false statement of a material fact with intent to mislead the voters is subject to a \$ 1,000 fine. (*Elec.C. 18351*.)

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g. Candidate's Preelection Promise.

7 *Witkin Sum. Cal. Law Const Law* § 266

[§ 266] Candidate's Preelection Promise.

In *Brown v. Hartlage* (1982) 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732, Brown, a candidate for county commissioner, announced during his campaign that he intended to serve at a salary less than that fixed by law. The Kentucky court of appeals held that this was a violation of the state Corrupt Practices Act, prohibiting a promise in consideration for a vote. *Held*, the statute as thus construed was an unconstitutional restriction on First Amendment freedom of speech.

(a) The First Amendment protects political discussion, and a candidate, like any other person, has the right to advocate his or her own election. (102 S.Ct. 1529, 71 L.Ed.2d 742.) Some kinds of promises, e.g., those that amount to buying votes, may be declared illegal; but others, even though appealing to a voter's own self-interest, may be legitimate exercises of the constitutional right. "So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot." (102 S.Ct. 1530, 71 L.Ed.2d 743.)

(b) "Brown's statement can only be construed as an expression of his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens. If Brown's expressed intention had an individualized appeal to some taxpayers who felt themselves the likely beneficiaries of his form of fiscal restraint, that fact is of little constitutional significance. The benefits of most public policy changes accrue not only to the undifferentiated 'public,' but more directly to particular individuals or groups. Like a promise to lower taxes, to increase efficiency in government, or indeed to increase taxes in order to provide some group with a desired public benefit or public service, Brown's promise to reduce his salary cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding." (102 S.Ct. 1531, 71 L.Ed.2d 744.)

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h. Party's Endorsement of Candidate.

7 *Witkin Sum. Cal. Law Const Law* § 267

[§ 267] Party's Endorsement of Candidate.

Unger v. Superior Court (1984) 37 C.3d 612, 209 C.R. 474, 692 P.2d 238, construed Cal. Const., Art. II, §6, which provides that "[j]udicial, school, county, and city offices shall be nonpartisan." *Held*, this general declaration does not prohibit political parties from endorsing, supporting, or opposing candidates for nonpartisan office. The only limitation on the conduct of political parties in elections for nonpartisan office is the Elections Code provision (now *Elec.C.* 334) that a political party may not nominate a candidate for a nonpartisan office. (37 C.3d 615, 617.) Two assigned justices joined in a strong dissenting opinion. (37 C.3d 625.)

Eu v. San Francisco County Democratic Cen. Committee (1989) 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271, held that former Elections Code provisions banning the governing bodies of political parties from endorsing or opposing candidates in primary elections, and making it a misdemeanor for a candidate to claim this kind of endorsement, were unconstitutional.

(a) The ban on primary endorsements directly burdens both speech and association. It prohibits a party from informing voters whether a candidate is qualified or adheres to party tenets and also prevents the party and its members from identifying the persons who constitute the association and best represent its beliefs. (109 S.Ct. 1020, 1021, 103 L.Ed.2d 282, 283.)

(b) The state failed to show that the ban is necessary to maintain a stable political system, and its claim that the ban advances party stability is untenable. A state may prevent disruption of a party from without but has no interest in preventing disruption from within. (109 S.Ct. 1022, 103 L.Ed.2d 284, 285.)

(c) The claim that the ban on endorsements protects voters from confusion and undue influence is not supported by any evidence. (109 S.Ct. 1023, 103 L.Ed.2d 285, 286.) (See 104 *Harv. L. Rev.* 973 [Ninth Circuit case]; on power of Republican state central committee to prohibit county central committees from endorsing or opposing candidates in primary elections for partisan office, see *Elec.C.* 7389.)

In *Renne v. Geary* (1991) 501 U.S. 312, 111 S.Ct. 2331, 115 L.Ed.2d 288, a First Amendment constitutional challenge to Cal. Const., Art. II, §6, was brought by voters, party central committees, and committee members in the

federal district court. The Supreme Court held that the question whether the provision violated the First Amendment was not justiciable; the standing of the challengers was questionable, and there was no ripe controversy. (*111 S.Ct. 2338, 2339, 115 L.Ed.2d 301, 302.*) (For discussion of Proposition 198 on open primaries, and associational rights of political parties generally, see *infra*, §388.)

SUPPLEMENT: [This section is current through the latest supplement]
Elec.C. 7389 was repealed and replaced by *Elec.C. 7354* in 2007.



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C. Political Parties and Candidates.

6. Term Limits.

a. United States Congress.

7 *Witkin Sum. Cal. Law Const Law* § 268

[§ 268] United States Congress.

(1) *Term Limits Are Unconstitutional.* In *United States Term Limits v. Thornton* (1995) 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881, Arkansas attempted to make anyone elected to three terms in the House of Representatives from Arkansas, or two terms in the Senate from Arkansas, ineligible for those offices. *Held*, the reasoning of *Powell v. McCormack* (1969) 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491, *supra*, §152, extends to the states; neither Congress nor the states may adopt qualifications different from those prescribed in the Constitution.

After an exhaustive review of the cases, the legislative history, and learned comment, the Court rejected arguments that (a) under the Tenth Amendment, the power to adopt qualifications for Congress was reserved to the states, and (b) the adoption of term limits was consistent with the form of government. With respect to the first requirement, the Court said: "In short, as the Framers recognized, electing representatives to the National Legislature was a *new* right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess *reserved* power to add qualifications to those that are fixed in the Constitution. Instead, any state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist." (115 S.Ct. 1856, 131 L.Ed.2d 901, 902.)

With respect to the second argument, the Court said: "We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather--as have other important changes in the electoral process--through the Amendment procedures set forth in Article V. The Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a 'more perfect union.'

" (115 S.Ct. 1871, 131 L.Ed.2d 921.)

A dissenting opinion, joined by three justices, argued that "[n]othing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress." (115 S.Ct. 1975, 131 L.Ed.2d 926.) (See 29 *Loyola L.A. L. Rev.* 1163 [term limits and Tenth Amendment; discussing *Thornton*]; 24 *Pepperdine L. Rev.* 649 [*Thornton*]; for discussion of Proposition 140, the term limits initiative for elected state officials, see *infra*, §269.)

(2) *Proposed Constitutional Amendment. Elec.C. 10204.1 et seq.*, the Congressional Term Limits Act, enacted in 1998 as Proposition 225, call for a Constitutional amendment limiting the terms of office for the U.S. Senate and House of Representatives, and for printing a notation next to nonsupporting candidates' names that they "disregarded voters' instructions on term limits" or that they "declined to pledge to support term limits." Proposition 225 was held unconstitutional in *Bramberg v. Jones* (1999) 20 C.4th 1045, 86 C.R.2d 319, 978 P.2d 1240. The proposition conflicts with the amendment process authorized by Article V of the federal Constitution; it instructs and attempts to coerce "California's congressional and state legislators in the exercise of their federal and constitutional functions of preparing and ratifying amendments to the United States Constitution." (20 C.4th 1048.) (See *Cook v. Gralike* (2001) 531 U.S. 510, 121 S.Ct. 1029, 1038, 149 L.Ed.2d 44, 57 [following *Thornton*; state law requiring statement on ballot next to names of candidates who do not support term limits is unconstitutional attempt to "dictate electoral outcomes"]; 33 *U.C. Davis L. Rev.* 1 [term limits and Article V].)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Term Limits.

b. State Government.

7 *Witkin Sum. Cal. Law Const Law* § 269

[§ 269] State Government.

The Political Reform Act of 1990, amending various sections of the Constitution, was adopted at the November 6, 1990, general election as Proposition 140. The basic provisions are as follows:

(1) *Statement of purpose and findings.* "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited." (Cal. Const., Art. IV, §1.5.)

(2) *Term limitations.* Persons elected or appointed on or after November 6, 1990, to the office of Governor (Cal. Const., Art. V, §2), Lieutenant Governor, Attorney General, Controller, Secretary of State, or Treasurer (Cal. Const., Art. V, §11), Superintendent of Public Instruction (Cal. Const., Art. IX, §2), the State Board of Equalization (Cal. Const., Art. XIII, §17), or the State Senate (Cal. Const., Art. IV, §2(a)) are limited to two terms. Members of the Assembly are limited to three terms. (Cal. Const., Art. IV, §2(a).)

(3) *Budgetary limitations.* "[T]he total aggregate expenditures of the Legislature for the compensation of members and employees of, and the operating expenses and equipment for, the Legislature" may not exceed \$ 950,000 per member for the forthcoming fiscal year, or 80% of the amount expended for these purposes in the preceding year, whichever is less. (Cal. Const., Art. IV, §7.5.)

(4) *Pension limitations.* The state will contribute the employer's share to the federal Social Security system on behalf of participating legislators elected or serving on or after November 1, 1990, but "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation." However, "[t]his Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law." (Cal. Const., Art. IV, §4.5.)

Legislature v. Eu (1991) 54 C.3d 492, 286 C.R. 283, 816 P.2d 1309, involved constitutional challenges to Proposition 140. Petitioners (including the Legislature and individual legislators, citizens, voters, and taxpayers) sought mandamus to prevent enforcement. Respondents were public officials responsible for implementing, enforcing, or applying the measure. The intervenor was the organization that sponsored the measure (Californians for a Citizen

Government). The Supreme Court, taking original jurisdiction over the writ proceeding, *held* that, except as to pension restrictions affecting incumbent legislators, the measure was valid.

(a) *Lifetime ban on consecutive terms.* Respondent contended that the term limitation is directed only at the incumbent office holder, and that a former legislator might run for a new term of office if he or she is not currently holding that office. Although the language of the measure is ambiguous, the legislative history supports the conclusion that the term limitations extend over the lifetime of each affected office holder. (54 C.3d 504, 505, 506.)

(b) *Constitutional amendment.* Petitioners contended that the measure effected a constitutional revision rather than a mere amendment, and hence was improperly adopted under the holding in *Raven v. Deukmejian* (1990) 52 C.3d 336, 276 C.R. 326, 801 P.2d 1077, *supra*, §72. They argued that the term and budgetary limitations would make it impossible for the Legislature to discharge its traditional duties, and that Proposition 140 has achieved a qualitative revision of the *Constitution*. (54 C.3d 507.) This is unsound: "Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched." (54 C.3d 509.)

(c) *Single subject requirement.* Petitioners contended that the measure violates the single subject provision (see *supra*, §131) by combining such "disparate" subjects as term and budgetary limitations and pension restrictions, and that it is broader than mere reform of the legislative branch because it also imposes term limitations on various constitutional officers. But the single subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship; it is enough that they are reasonably related to a common theme or purpose. (54 C.3d 513.) And "[t]he unifying theme or common purpose of Proposition 140 is incumbency reform, a subject not excessively general when compared with prior measures upheld by this court." (54 C.3d 512.)

(d) *Effect on voting and candidacy rights.* Petitioners argued that the lifetime term limitations, under which office holders are forever banned from running for the office they held, substantially burdens two fundamental rights--the right to vote and the right to be a candidate for public office--and therefore violate the First and Fourteenth Amendments to the federal Constitution. However, under the balancing test of *Anderson v. Celebrezze* (1983) 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, *supra*, §262, the provisions are valid:

(1) *Character and extent of injury to protected rights.*

First, the effect on candidates: Petitioners assert that qualified persons will be "purged" solely to seat "massive numbers" of inexperienced "newcomers." (54 C.3d 517.) Respondents characterize the term limitations as additional candidacy requirements, akin to age, integrity, training or residency, which have generally been upheld. (54 C.3d 518.) Respondents also stress three features of the measure that mitigate the severity of the lifetime ban: (a) An incumbent is not barred from seeking any other public office; (b) the term limitations arise only after the incumbent has held office for a significant period; and, (c) except for some incumbent senators, past terms do not count in calculating the limitation. (54 C.3d 518.)

Second, the effect on voters: Petitioners assert that voters are denied the right to vote for persons who arguably possess the best qualifications; respondents note that voter choice is not restricted on the basis of content of expression, political affiliation, or inherently arbitrary factors such as race, religion, or sex; thus, First Amendment protection of political expression and promotion of the marketplace for ideas continue unabated. (54 C.3d 519.)

"In sum, although Proposition 140 does affect the rights of voters and candidates to a degree, there are several mitigating aspects, including the voters' continued right to vote for any qualified candidates, as well as the candidates' ability to run for other public offices, their entitlement to a significant period of service in office before the time limitations apply, and the 'prospective' application of the limitation provisions." (54 C.3d 519.)

(2) *Interests of the State*. These interests are set forth in the legislative statement of purpose, and are recognized in judicial decisions. Thus, in *Maloney v. McCartney* (W.Va., 1976), the court said: "The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure." (54 C.3d 520.) "Maloney's ... analysis is quite pertinent to our determination whether permanent incumbency limitations are supported by legitimate and compelling considerations. We conclude they are so supported." (54 C.3d 522.)

(3) *Necessity of imposing restrictions*. Petitioners contend that a lifetime ban on candidacy was unnecessary, and that other less "drastic" alternatives would have been sufficient to promote the state interests. Respondents' answer is correct. "Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, incumbents do indeed appear to enjoy considerable advantages over other candidates." (54 C.3d 523.)

(4) *Validity of voting and candidacy restriction*. "In sum, it would be anomalous to hold that a statewide initiative measure aimed at 'restor[ing] a free and democratic system of fair elections,' and 'encourag[ing] qualified candidates to seek public office' ... is invalid as an unwarranted infringement of the right to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency." (54 C.3d 524.)

(e) *Not a bill of attainder*. Under the accepted tests (54 C.3d 526; see *infra*, §205), the measure does not constitute an unlawful bill of attainder. "Although it is unquestionable the proponents sought to limit the terms of incumbent legislators, including such long-term legislators as Brown and Roberti, we find no evidence of an intent to single out and punish those individuals for any supposed misconduct on their part." (54 C.3d 527.)

(f) *Invalid impairment of contract*. Cal. Const., Art. IV, §4.5, provides that no other pension or retirement benefit shall accrue as a result of service in the Legislature; and petitioners contend that this constitutes an improper impairment of their vested contractual right to continued participation in the Legislators' Retirement System (LRS). Their position is supported by California cases holding that both the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment. (54 C.3d 528; see *infra*, §1286.) "We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service. ... We also conclude that the pension restriction of Proposition 140 must be deemed an impairment, not a mere 'modification' or 'adjustment,' of the vested pension rights of incumbent legislators." (54 C.3d 530.) This invalid provision, however, fulfills the three criteria for severability: it is "grammatically, functionally, and volitionally" severable. (54 C.3d 535.)

One justice, concurring in the holding on impairment of contract, dissented from the rest of the judgment, arguing that Proposition 140 violates the single subject rule and amounts to an unconstitutional revision of the *Constitution*. (54 C.3d 536.) (See *Schabarum v. California Legislature* (1998) 60 C.A.4th 1205, 1221, 70 C.R.2d 745, *supra*, §88 [budget for Legislative Counsel may be excluded from "net operating expenses and equipment for" Legislature within meaning of budgetary limitation provisions of Proposition 140]; *Schweisinger v. Jones* (1998) 68 C.A.4th 1320, 1325, 81 C.R.2d 183 [under term limit provisions, service of any part of term counts as service of full term, except where person is elected or appointed to unexpired term of less than half of full term]; 105 Harv. L. Rev. 953; 30 McGeorge L. Rev. 235; 23 Pacific L. J. 1677; 20 Pepperdine L. Rev. 353; 112 A.L.R.5th 1; on term limits for elected municipal officials, see *infra*, §999.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Rippon v. Bowen* (2008) 160 C.A.4th 1308, 1319, 1321, 73 C.R.3d 421 [challenge to constitutionality of term limits was foreclosed by *Legislature v. Eu* (1991) 54 C.3d 492, 286 C.R.283, 816 P.2d 1309, text, p. 426, which decided question whether Proposition 140 constituted constitutional amendment or revision; although labeled "as applied" challenge based on effects of term limits on Legislature, same facial challenge was made in *Eu*; additional evidence was irrelevant to determine whether Proposition on its face necessarily and inevitably changed basic form of government].



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C. Political Parties and Candidates.

7. Ballot Regulations.

7 Witkin Sum. Cal. Law Const Law § 270

[§ 270] Ballot Regulations.

(1) *Candidate Designations.* *Elec.C. 10101* states that the Elections Code applies to all municipal elections except where the charter provides otherwise. *Elec.C. 10102*, a later addition, states that the ballot designation section (*Elec.C. 13107*) applies to municipal elections even of a chartered city. Under *Elec.C. 13107(a)(3)*, a candidate may designate his or her profession, vocation, or occupation. *Rees v. Layton* (1970) 6 C.A.3d 815, 86 C.R. 268, involved the Los Angeles Charter, which provided that no candidate except an incumbent should have any designation after his or her name. Thus, the charter and state law were inconsistent. Petitioners, candidates for city offices, challenged the charter on grounds of state preemption and denial of equal protection. *Held*, the charter provision was invalid. (a) The conduct of municipal elections is a municipal affair, and the charter therefore prevailed over the general law. (6 C.A.3d 820; see *infra*, §§993, 997.) (b) However, the charter gave an unfair advantage to incumbents, without rational basis, and therefore violated the equal protection guarantee. (6 C.A.3d 823.)

In *Andal v. Miller* (1994) 28 C.A.4th 358, 34 C.R.2d 88, a state senator's election opponent challenged the senator's ballot designation as "Senator/Peace Officer." *Held*, mandamus issued directing the words "peace officer" to be stricken. The Elections Code permits the designation of a candidate's principal professions, vocations, or occupations. The senator had recently been appointed as a reserve deputy sheriff, but he had done nothing pursuant to the appointment and would not be compensated for his service in the position. Hence, "peace officer" was not one of the senator's principal professions, vocations, or occupations. (28 C.A.4th 363, 367.) (See *Andrews v. Valdez* (1995) 40 C.A.4th 492, 494, 495, 46 C.R.2d 744 [ballot designation accurately listing candidate for municipal judge as "administrative law judge" was not misleading].)

(2) *Giving Incumbents First Place.* The contention that giving incumbents first place on the ballot results in an unconstitutional preference was left open in *Mexican-Amer. Political Assn. v. Brown* (1973) 8 C.3d 733, 106 C.R. 12, 505 P.2d 204, where the court denied a writ of mandamus on the ground that the existence of the alleged preference was a question of fact to be decided in the trial court. (See 45 So. Cal. L. Rev. 365.) But in *Gould v. Grubb* (1975) 14 C.3d 661, 122 C.R. 377, 536 P.2d 1337, the court, applying the "strict test" of equal protection (see *infra*, §704), held that the procedure was invalid.

(a) The evidence showed that the top ballot position gives an incumbent a significant advantage. (14 C.3d 668.) Hence, this procedure violates the equal protection clause, for no sufficient state interest justifies it. Identification of the

incumbent is adequately made by the ballot designation. (14 C.3d 672, 674.)

(b) An alphabetical order ballot, although not irrational, and promotive of some efficiency, would also be impermissible: It would give a substantial advantage to candidates whose names begin with early letters of the alphabet. (14 C.3d 675.)

(c) A rotational method is the most equitable, is feasible, and would be valid. (14 C.3d 676.) However, other nondiscriminatory means may be found by the legislative bodies, including a lottery system. (14 C.3d 676.) (See 64 Cal. L. Rev. 329.)

(3) *Randomized Alphabet*. Former Elec.C. 3020 et seq. (now Elec.C. 13111 et seq.) were added after *Brown and Gould* to provide for the listing of candidates in accordance with a "randomized alphabet." (See *Bradley v. Perrodin* (2003) 106 C.A.4th 1153, 1163, 1173, 131 C.R.2d 402, supra, §233 [runoff election is merely second round of voting in single election; thus, clerk need not request new randomized alphabet for runoff election that has no new filing period or new candidates; error in order of listing names, in absence of fraud and resulting purely from unintentional clerical error, is not valid ground for election contest under Elec.C. 16100].)

(4) *Foreign-Language Ballots*. Counties subject to the minority-language provisions of the Voting Rights Act of 1965 are required to provide voting notices, forms, instructions, assistance, and other materials and ballots in the minority language. (See supra, §228 et seq.) Other counties are required to post and provide facsimile ballots, with the ballot measures and ballot instructions, printed in Spanish and, "if a significant and substantial need is found by the clerk," in other languages as well. (Elec.C. 14201 [posting], Elec.C. 14219 [providing].)

(5) *Restrictions on Language Used*. The use of partisan language to elaborate on prescribed ballot language may be sufficiently egregious to fall outside the limits of substantial compliance with statutory requirements. (See *Citizens for Responsible Government v. Albany* (1997) 56 C.A.4th 1199, 1224, 1228, 66 C.R.2d 102 [city failed to substantially comply with ballot requirement regarding approval of licensing of new gaming club where, in asking voters whether they favored or disfavored allowing club, city added language that proposed club would provide revenue to city, create jobs, and provide access to regional trail and waterfront; decided under former B. & P.C. 19819].)

There is no requirement of relevancy in Elec.C. 9295, governing the content of voter pamphlets in municipal elections. The statute merely requires that an argument be "for or against any city measure." And a trial court may strike a statement only if it is "false, misleading, or inconsistent." Thus, for a partisan statement in a ballot argument to be properly stricken as irrelevant, "it must have absolutely *no* relationship to the city measure at issue." However, partisan language in the ballot itself may be stricken as a violation of equal protection and freedom of speech. (*Huntington Beach City Council v. Superior Court* (2002) 94 C.A.4th 1417, 1422, 1423, 1433, 115 C.R.2d 439 [striking many words and sentences in ballot and voter pamphlet as misleading]; see *Horneff v. San Francisco* (2003) 110 C.A.4th 814, 821, 2 C.R.3d 79 [trial court erred in ordering amendment of impartial digest prepared for voter information pamphlet; purpose of digest is to provide simplified summary of measure, not complete catalogue of every detail, and digest fairly stated chief purpose and points of measure without addition of auxiliary material].)

(6) *Fee for Printing Ballot Argument*. *Gebert v. Patterson* (1986) 186 C.A.3d 868, 231 C.R. 150, invalidated a local regulation requiring the proponent of a ballot argument to pay a \$ 500 fee for publishing the argument in the voter's handbook. The court observed that the issue was closely analogous to that in cases involving equal protection challenges to filing fees (see supra, §261). "By permitting individuals to submit ballot arguments for publication in the voter's information pamphlet, the City and County of San Francisco has created a forum for the exercise of political expression. But San Francisco Administrative Code section 5.74 limits admission to this forum to those who pay \$ 500. By doing so, the ordinance denies equal access to a political arena as guaranteed by the equal protection clause of the Fourteenth Amendment, but also impedes free expression as guaranteed by the First Amendment." (186 C.A.3d 876.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Candidate Designations*. No designation will appear under a candidate's name on the ballot if the candidate fails to include a ballot designation worksheet with the nomination documents. (*Elec.C. 13107.3*, added in 2007.)

See *Cook v. Superior Court* (2008) 161 C.A.4th 569, 579, 73 C.R.3d 895 [Secretary of State, not local official, makes determinations about candidate designations in congressional primaries].(4) *Foreign-Language Ballots*. When it is necessary to translate the ballot title and condensed statement into a language other than English, the Secretary of State must provide the translation and local officials must use that translation. (*Elec.C. 9054*, added in 2006.)

(5) *Restrictions on Language Used*. See *Monette-Shaw v. San Francisco Bd. of Supervisors* (2006) 139 C.A.4th 1210, 1217, 43 C.R.3d 659 [language in nonpartisan digest included in city voter pamphlet, which conflicted with ballot proposition submitted to voters, did not create ambiguity requiring city to disregard plain language of ballot proposition]; *Martinez v. Superior Court* (2006) 142 C.A.4th 1245, 1248, 48 C.R.3d 660 [ballot title need not be most accurate, most comprehensive, or fairest language that is possible, but it must not be false, misleading, or partial to one side].



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V. SUFFRAGE
C. Political Parties and Candidates.
8. (New) Election Contests.

7 *Witkin Sum. Cal. Law Const Law* § 270A

[§ 270A] (New) Election Contests.

(1) *In General.* An elector may seek mandamus "alleging that an error or omission has occurred, or is about to occur, in the placing of any name on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or that any neglect of duty has occurred, or is about to occur." (*Elec.C. 13314*; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §87.)

(2) *Grounds for Post-Election Contest.* An elector of a city or county, or of a political subdivision of either, may contest an election held there for any of the following reasons:

(a) The precinct board or a member of the board is guilty of "malconduct." (*Elec.C. 16100(a)*; on what constitutes malconduct, see *Elec.C. 16201*; on effect of malconduct, see *Elec.C. 16202*.)

(b) The person declared elected was not, at the time of the election, eligible for that office. (*Elec.C. 16100(b)*.)

(c) The defendant has bribed or rewarded an elector or member of a precinct board, has offered a bribe or reward to procure his or her election, or has committed an offense against the elective franchise, as defined in *Elec.C. 18000*. (*Elec.C. 16100(c)*.)

(d) Illegal votes were cast. (*Elec.C. 16100(d)*; on effect of illegal votes, see *Elec.C. 16203*; *Gooch v. Hendrix* (1993) 5 *C.4th* 266, 19 *C.R.2d* 712, 851 *P.2d* 1321, text, §233.)

(e) Eligible voters attempted to vote but were denied their right. (*Elec.C. 16100(e)*; on effect of denial of right to vote, see *Elec.C. 16204*.)

(f) The precinct board, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election regarding a person who was declared to be elected. (*Elec.C. 16100(f)*.)

(g) There was an error in the vote-counting programs or summation of ballot counts. (*Elec.C. 16100(g)*.)

These grounds for a post-election contest are exclusive. (*McKinney v. Superior Court* (2004) 124 *C.A.4th* 951, 958, 960, 21 *C.R.3d* 773 [post-election challenge must be based on statutory grounds or on violation of constitutional rights;

plaintiff had preelection remedy to challenge eligibility of write-in candidate and could not contest election based on theory that allowing write-in candidate on ballot in run-off election affected election results; only if ineligible candidate is declared winner could post-election challenge be brought[.] (On form of contest statement, see *Elec.C. 16400* et seq.; on contest procedures, see *Elec.C. 16500* et seq.)

(3) *Appeal of General Election Contest.* Election contests should normally be reviewed by appeal to the Court of Appeal. (*Nguyen v. Superior Court* (2007) 150 C.A.4th 1006, 1010, 58 C.R.3d 802 [speedy writ proceeding generally is not necessary in election contests; removing sitting official from office should be taken only on complete record of proceedings in trial court, with time to prepare briefs and for adequate reflection by appellate court].) These appeals are given preference in hearing in the Court of Appeal. (C.C.P. 44.) During the pendency of proceedings on appeal, and until final determination, the person declared elected by the superior court is entitled to the office as if no appeal had been taken. (*Elec.C. 16900*.)

(4) *Contest of Primary Election.* A candidate at a primary election may contest the right of another candidate to be nominated to the same office by filing an affidavit alleging any of the following grounds:

(a) The defendant is not eligible for the office. (*Elec.C. 16101(a)*.)

(b) The defendant has committed an offense against the elective franchise, as defined in *Elec.C. 18000* et seq. (*Elec.C. 16101(b)*.)

(c) A sufficient number of votes were illegal, fraudulent, forged, or otherwise improper, and the defendant would not have received as many votes as the contestant had those votes not been counted. (*Elec.C. 16101(c)*.)

(d) A sufficient number of eligible voters who attempted to vote were denied their right to vote, and the defendant would not have received as many votes as the contestant had those voters been permitted to vote. (*Elec.C. 16101(d)*.)

(e) Due to mistake, error, or misconduct, the votes in a precinct were so incorrectly counted as to change the election result. (*Elec.C. 16101(e)*); on contests involving recount, see *Elec.C. 16460* et seq., 16540, 16640 et seq.)

A nomination must be annulled or set aside for an irregularity or for improper conduct only if it appears that illegal votes in the precinct were given to the defendant, which if taken from him or her, would reduce the number of his or her "legal votes below the number of votes given to the contestant." (*Elec.C. 16300*.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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D. California Political Reform Act.

1. In General.

a. Nature and Purpose of Act.

7 Witkin Sum. Cal. Law Const Law § 271

[§ 271] Nature and Purpose of Act.

The Political Reform Act of 1974, an initiative measure adopted June 4, 1974, and extensively amended (*Govt.C. 81000 et seq.*), regulates a number of aspects of the election process for state and local officials. (See comprehensive study in 7 *Southwestern L. Rev.* 453, with Appendices showing changes made in other laws; 6 *Pacific L. J.* 631; 7 *Pacific L. J.* 847; for discussion of constitutional problems, see 4 *Hastings Const. L. Q.* 165; 8 *Pacific L. J.* 939; 94 *A.L.R.3d* 944.)

Chapter 1 of the Act recites findings of greatly increased costs of election campaigns, with the adverse effects of large contributions from wealthy individuals and organizations, and the inadequacy of existing laws to cope with objectionable political practices. (*Govt.C. 81001.*) Accordingly, the following purposes of the enactment are declared in *Govt.C. 81002*:

(1) "Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." (*Govt.C. 81002(a).*)

(2) "The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials." (*Govt.C. 81002(b).*)

(3) "Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided." (*Govt.C. 81002(c).*)

(4) "The state ballot pamphlet should be converted into a useful document so that voters will not be entirely dependent on paid advertising for information regarding state measures." (*Govt.C. 81002(d).*)

(5) "Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly." (*Govt.C. 81002(e).*)

(6) "Adequate enforcement mechanisms should be provided to public officials and private citizens in order that this title will be vigorously enforced." (*Govt.C. 81002(f).*)

The objectives of the act--to inform the electorate and prevent corruption of the political process--promote a compelling state interest and are valid regulations of the right to engage in political expression and association. (*Socialist Workers 1974 Calif. Campaign Committee v. Brown* (1975) 53 C.A.3d 879, 888, 125 C.R. 915; see *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 C.A.4th 449, 471, 125 C.R.2d 534 [organization that had aired television advertisement critical of Governor's handling of energy crisis was not subject to reporting requirements of Act; although advertisement criticized Governor, it did not contain express language of advocacy subject to regulation, no campaign or election was mentioned, no election was imminent, and no call for his defeat was expressed].)

SUPPLEMENT: [This section is current through the latest supplement]

On California Fair Elections Act of 2008, which establishes a Fair Elections pilot program for public financing of campaigns for Secretary of State, see *Govt.C. 91015* et seq.



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D. California Political Reform Act.

1. In General.

b. Statutory Framework.

7 *Witkin Sum. Cal. Law Const Law* § 272

[§ 272] Statutory Framework.

The Act is in 13 chapters:

(1) *General*. (Legislative findings, intent, construction, filing and mailing, inspection, etc.; see *Govt.C. 81001, 81002*, supra, §271.)

(2) *Definitions*. (Many terms are given special meanings; see *Govt.C. 82001* et seq.)

(3) *Fair Political Practices Commission*. (See *Govt.C. 83100* et seq., infra, §274.)

(4) *Campaign Disclosure*. (See *Govt.C. 84100* et seq., infra, §275 et seq.)

(5) *Online Disclosure*. (See *Govt.C. 84600* et seq.)

(6) *Limitations on Expenditures*. (See *Govt.C. 85100* et seq., infra, §287 et seq.)

(7) *Lobbyists*. (See *Govt.C. 86100* et seq., infra, §§279, 280.)

(8) *Conflicts of Interest*. (See *Govt.C. 87100* et seq., infra, §281 et seq.)

(9) *Ballot Pamphlet*. (Preparation, contents, legislative analyst's analysis, printing, public inspection, etc.; see *Govt.C. 88000* et seq.)

(10) *Incumbency*. (Order of names on ballot, no legislative newsletters of elected officers at public expense; see *Govt.C. 89000* et seq.)

(11) *Ethics*. (Honoraria, gifts, travel, campaign funds; see *Govt.C. 89500* et seq., infra, §§286, 291.)

(12) *Auditing*. (Audits by Franchise Tax Board, reports, confidentiality of information, etc.; see *Govt.C. 90000* et seq.)

(13) *Enforcement*. (See *Govt.C. 91000* et seq., *infra*, §273.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. California Political Reform Act.

1. In General.

c. Enforcement.

7 *Witkin Sum. Cal. Law Const Law* § 273

[§ 273] Enforcement.

(1) *In General.* Chapter 11 (*Govt.C. 91000 et seq.*) sets forth detailed procedures to enforce the provisions of the Act. (See 7 Southwestern L. Rev. 519, 521, 534.) In applying the statutory remedies and sanctions, consideration must be given to whether "a violation is inadvertent, negligent or deliberate, and the presence or absence of good faith." (*Govt.C. 91001(c)*.) Nothing in the Chapter exempts any person from applicable provisions of any other laws of the state. (*Govt.C. 91014.*) *Govt.C. 91000 et seq.* are not applicable to violations of *Govt.C. 83116.5* (liability for causing another to violate the Act). (*Govt.C. 91015*; see *McCauley v. BFC Direct Marketing* (1993) 16 C.A.4th 1262, 1268, 1269, 20 C.R.2d 498 [under *Govt.C. 83116.5* and *91015*, liability of *campaign manager* for violations of reporting requirements must be addressed in administrative action, not in action by private citizen; however, because *campaign treasurer* has statutory duty to report expenditures, he or she may be held liable in action by private citizen]; *McCauley v. Howard Jarvis Taxpayers Assn.* (1998) 68 C.A.4th 1255, 1264, 80 C.R.2d 900 [Political Reform Act did not apply to mailers sent after election that solicited money to refill coffers after campaign to defeat proposition].)

(2) *Criminal Penalties.* A knowing and wilful violation of any provision of the Act is punishable as a misdemeanor. (*Govt.C. 91000(a)*.) In addition to other penalties provided by law, a conviction for each violation is punishable by a fine of up to \$ 10,000, or three times the amount the defendant "failed to report properly or unlawfully contributed, expended, gave or received," whichever is greater. (*Govt.C. 91000(b)*.) A convicted person is disqualified from holding elective office or acting as a lobbyist for a period of 4 years after conviction unless the court holds otherwise. (*Govt.C. 91002*; see *People v. Ballard* (1980) 104 C.A.3d 757, 764, 164 C.R. 81 [*Govt.C. 91002* is constitutional].) (See *Govt.C. 91000(c)* [4-year statute of limitations]; *Govt.C. 91001(a)* [powers of Attorney General and district attorneys]; *Govt.C. 91001.5* [powers of elected city attorney of charter city].)

(3) *Civil Damages and Penalties.* A person who intentionally or negligently violates a reporting requirement of the Act is liable in a civil action, brought by the civil prosecutor or by a person residing within the jurisdiction, for not more than the amount or value that was not properly reported. (*Govt.C. 91004.*) A person who makes or receives a contribution, gift, or expenditure in violation of specified statutory provisions is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount up to \$ 1,000, or three times the amount of the unlawful contribution, gift, or expenditure, whichever is greater. (*Govt.C. 91005(a)*.) A designated employee or public official, other than an elected state officer, who realizes an economic benefit as a result of specified violations or

conflicts of interest, is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount up to three times the value of the benefit. (*Govt.C. 91005(b).*)

The court may award a prevailing plaintiff or defendant, other than an agency, costs of litigation, including reasonable attorneys' fees. On motion of any party, a court must require a private plaintiff to post a bond in a reasonable amount at any stage of the litigation to guarantee payment of costs. (*Govt.C. 91012*; see *Rhodes v. Superior Court* (1979) 90 C.A.3d 484, 489, 153 C.R. 495 [bond provision meets procedural due process requirements]; *People v. Roger Hedgecock for Mayor Committee* (1986) 183 C.A.3d 810, 815, 817, 228 C.R. 424 [prevailing defendant is entitled to attorneys' fees only if suit is frivolous, unreasonable, or without foundation]; *Dunn v. Jurupa Unified School Dist.* (2000) 79 C.A.4th 957, 961, 962, 94 C.R.2d 529 [*Govt.C. 91012* does not require finding that action is frivolous before requiring bond to be posted; fact that agency, which is precluded from recovering costs, defends individual does not preclude individual from recovering costs and thus does not affect individual's right to require posting of bond].)

Numerous other statutes govern civil enforcement of the Act. (See *Govt.C. 91001(b)* [powers of civil prosecutor, Attorney General, district attorneys, and Commission]; *Govt.C. 91001.5* [powers of elected city attorney of charter city]; *Govt.C. 91003.5* [agency discipline]; *Govt.C. 91005.5* [civil action for violation of provision containing no specific penalty]; *Govt.C. 91006* [joint and several liability]; *Govt.C. 91007* [request to civil prosecutor to act before filing private civil action]; *Govt.C. 91008* [handling of multiple actions]; *Govt.C. 91008.5* [civil action after Commission has issued order for same violation]; *Govt.C. 91009* [determining liability and 50% award of recovery to plaintiff]; *Govt.C. 91010* [audit as prerequisite to request to civil prosecutor under *Govt.C. 91007*]; *Govt.C. 91011* [statute of limitations]; *Govt.C. 91013* [fees for late filing of statement or report]; *Govt.C. 91013.5* [civil action to collect unpaid penalties or fees].)

(4) *Injunctive Relief.* Any person residing in the jurisdiction may sue for injunctive relief to enjoin violations or to compel compliance with the Act. However, the court, in its discretion, may require any plaintiff other than the Commission to file a complaint with the Commission prior to seeking injunctive relief. The court may award costs of litigation, including reasonable attorneys' fees, to a prevailing plaintiff or defendant. (*Govt.C. 91003(a)*; see *Downey Cares v. Downey Community Dev. Com.* (1987) 196 C.A.3d 983, 993, 242 C.R. 272 [mandamus invalidating city ordinance which amended city's redevelopment plan, and substantial award of attorneys' fees to opponents of plan; upheld under *Govt.C. 91003(a)*].) A court may restrain the execution of an official action where specified violations have occurred. (*Govt.C. 91003(b).*) (See *Vernon v. Central Basin Mun. Water Dist.* (1999) 69 C.A.4th 508, 517, 81 C.R.2d 650 [*Govt.C. 91003(a)* authorizes injunctive relief against future conduct by official that would violate *Govt.C. 87100*, "independently of whether the official action taken as a result of the unlawful conduct should be set aside" under *Govt.C. 91003(b)*].)

In *Kunec v. Brea Redevelopment Agency* (1997) 55 C.A.4th 511, 64 C.R.2d 143, the court held that a property owner had standing to challenge the fairness of a redevelopment agency's authorization to condemn his commercial property even though he did not reside in the city when the agency adopted its resolution of necessity. There is no durational residency requirement in *Govt.C. 91003*, and the property owner resided in the city during the pendency of the action. (55 C.A.4th 518.) The Political Reform Act (PRA) "on its face is intended to extend standing, not limit it . . . It would be Kafkaesque to say that the person most directly affected--the condemnee whose property would be taken--lacks standing to claim the action is void because of PRA violations." (55 C.A.4th 519.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 C.4th 239, 259, 52 C.R.3d 659, 148 P.3d 1126 [state, through Fair Political Practices Commission, may sue Indian tribe for violating state campaign contribution requirements under Political Reform Act].



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D. California Political Reform Act.

2. Fair Political Practices Commission.

7 *Witkin Sum. Cal. Law Const Law* § 274

[§ 274] Fair Political Practices Commission.

Chapter 3 (*Govt.C. 83100 et seq.*) establishes the Fair Political Practices Commission. (See 7 *Southwestern L. Rev.* 520, 536.)

(1) *Membership and Appointment.* There are five members of the Commission. The Governor must appoint the chairman and one member, and the Attorney General, Secretary of State, and Controller each appoints one member. No more than three may be members of the same political party, and the Governor's appointees cannot be members of the same political party. (*Govt.C. 83100, 83101, 83102.*) The members serve 4-year terms. (*Govt.C. 83103.*) (On qualifications, conflicting activities, and removal, see *Govt.C. 83105*; on principal office and meetings, see *Govt.C. 83110.*)

(2) *Duties and Powers.* The Commission has primary responsibility for the administration of the Act (*Govt.C. 83111*), including adjusting the contribution and voluntary expenditure limitations (*Govt.C. 83124*). It may adopt rules and regulations (*Govt.C. 83112*), prescribe forms, and prepare manuals (*Govt.C. 83113*). It may conduct investigations (*Govt.C. 83115*), hold hearings (*Govt.C. 83116*), compel attendance of witnesses and production of evidence (*Govt.C. 83118*), and give immunity to witnesses compelled to testify (*Govt.C. 83119*).

(3) *Hearings and Orders.* When the Commission determines that there is probable cause to believe that a violation of the Act has occurred, it may hold a hearing on notice, in accordance with the Administrative Procedure Act (see 9 *Cal. Proc. (4th), Administrative Proceedings, §79 et seq.*). On a decision that the violation has occurred, it may order the violator to do any or all of the following: (a) to cease and desist; (b) to file required reports or other material; or (c) to pay a penalty of up to \$ 5,000. (*Govt.C. 83116.*) (On liability for violations by persons with filing or reporting responsibilities and persons compensated for planning, organizing, or directing campaigns, see *Govt.C. 83116.5*; *McCauley v. BFC Direct Marketing* (1993) 16 *C.A.4th* 1262, 1268, 1269, 20 *C.R.2d* 498 [distinction between campaign manager and campaign treasurer for purposes of liability under statute]; 16 *Pacific L. J.* 663.)

(4) *Statute of Limitations.* An administrative action brought pursuant to *Govt.C. 83100 et seq.* must be commenced within 5 years after the date on which the violation occurred. (*Govt.C. 91000.5.*)

(5) *Advisory Opinions.* On request of any person, the Commission may issue an advisory opinion, which is a public

record and may be published. One who acts in good faith on an opinion is not subject to civil or criminal penalties. (*Govt.C. 83114.*) The opinions are published online on the Fair Political Practices Commission website. (See www.fppc.ca.gov.)

(6) *Division of Local Enforcement.* The Commission must establish a division of local enforcement to administer, interpret, and enforce provisions of the Act relating to local government agencies. (*Govt.C. 83123*; see *Govt.C. 82041* ["local government agencies" defined].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Hearings and Orders.*

Cross-Reference: 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §96 et seq.



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D. California Political Reform Act.

3. Campaign Disclosure.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 275

[§ 275] In General.

Chapter 4 (*Govt.C. 84100* et seq.) lays down strict rules on disclosure of campaign funds. (See 12 *Pacific L. J.* 425; 7 *Southwestern U. L. Rev.* 507, 530; on filing required statements and disclosures online, see *Govt.C. 84600* et seq.)

(1) *Committee Organizational Statement.* A committee, broadly defined as any person or combination of persons who, in specified amounts, directly or indirectly receives contributions, makes independent expenditures, or makes contributions to or at the behest of candidates or committees (*Govt.C. 82013*), must have a treasurer who handles contributions and expenditures. (*Govt.C. 84100*.) If an individual or group becomes a committee by virtue of having received or made expenditures of \$ 1000 or more in a calendar year, the committee must file an organizational statement giving prescribed information with the Secretary of State. (*Govt.C. 84101(a)(c)*, *84102*.) (On statements of slate mailer organizations, see *Govt.C. 84108*; *infra*, §276.)

A copy of the report must be filed with any local filing officer with whom the committee is required to file campaign reports pursuant to *Govt.C. 84215*. (*Govt.C. 84101(a)(c)*.)

Committees that qualify before an election but after the closing date for the last campaign statement required under *Govt.C. 84200.7*, and *84200.8* (*infra*, §276), must also file the information to be in the organizational statement with the officer who will receive the original of campaign statements, by facsimile statement, guaranteed overnight delivery, or personal delivery within 24 hours after qualifying. (*Govt.C. 84101(b)*.) A committee that does not support or oppose candidates or ballot measures as its primary activity must provide "a brief description of its political activities, including whether it supports or opposes candidates or measures and whether such candidates or measures have common characteristics such as a political party affiliation." (*Govt.C. 84102(d)*.)

(2) *Other Required Disclosures.*

(a) A candidate or committee receiving a contribution of \$ 5,000 or more from any person must inform the contributor that he or she may be required to file campaign reports. (*Govt.C. 84105*; see 16 *Pacific L. J.* 663.)

(b) A "sponsored committee" (see *Govt.C. 82048.7*) must use only one name in its organizational statement, and

must identify itself with that name whenever identification is required. (*Govt.C. 84106.*)

(c) The name of the committee must include or be accompanied by the name of the person or entity that controls the committee. (*Govt.C. 84106.5.*)

(d) A committee that is primarily formed to support or oppose a ballot measure must so identify itself in all required self-references. (*Govt.C. 84107.*)

(e) Disclosure must be made in the advertisement itself when a spokesperson is paid \$ 5,000 or more to appear in an advertisement supporting or opposing a ballot measure. (*Govt.C. 84511.*) (See 48 *U.C.L.A. L. Rev.* 265, 285 [disclosure of contributions and expenditures funding "sham issue advocacy" (advertising that lacks words of express advocacy, but that is intended to influence election)].)

(3) *Exemptions Prohibited.* The Commission has no power to exempt a person, candidate, or committee from the campaign disclosure requirements of the Act. (*Govt.C. 84400*; see 9 *Pacific L. J.* 513.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Campaign Disclosure.

b. Campaign Statements.

7 *Witkin Sum. Cal. Law Const Law* § 276

[§ 276] Campaign Statements.

(1) *Semiannual Statements.* Committees receiving \$ 1,000 or more in a calendar year (*Govt.C. 82013(a)*), elected officers, and candidates must file *semiannual* campaign statements, except as provided. (*Govt.C. 84200(a)*; see *Govt.C. 84202.7* [time limitations for filing campaign statements].) The following exceptions are stated:

(a) A candidate need not file a statement for a period in which he or she has filed a declaration pursuant to *Govt.C. 84206* (infra, this section). (*Govt.C. 84200(a)(1)*.)

(b) Elected officers whose salaries are less than \$ 200 per month, judges, judicial candidates, and their controlled committees need not file a statement for any period in which they have not made or received contributions or made expenditures. (*Govt.C. 84200(a)(1)*.)

(c) A judge who is not listed on the ballot during a calendar year need not file a statement for any 6-month period in that year if the judge (1) has received no contributions, and (2) made no expenditures during the year except for contributions from his or her personal funds to other candidates or committees totaling less than \$ 1,000. (*Govt.C. 84200(a)(3)*.)

(d) Committees pursuant to *Govt.C. 82013(b)* or *82013(c)* are required to file the semiannual statement if they made contributions or independent expenditures, including payments to a slate mailer, during the period. (*Govt.C. 84200(b)*.)

(2) *Statewide Direct Primary Election Statements.* Campaign statements are required in connection with a statewide direct primary held in March of an even-numbered year, and any other election held on the same day. (*Govt.C. 84200.3, 84200.4*.)

(3) *Preelection Statements.* In addition to the campaign statements, elected officers, candidates, and committees must file preelection statements. (See *Govt.C. 84200.5*; *Govt.C. 84200.7* [time limitations for filing preelection statements]; *Govt.C. 84200.8* [additional time limitations for filing preelection statements].)

(4) *Additional Special Statements and Reports.* All candidates and committees must file the following special

statements and reports: (a) Supplemental preelection statements when required by *Govt.C. 84202.5*; (b) late contribution reports when required by *Govt.C. 84203*; (c) independent expenditure reports when required by *Govt.C. 84203.5*; and (d) late independent expenditure reports when required by *Govt.C. 84204*. (*Govt.C. 84200.6*.)

Committees formed primarily to support or oppose ballot measures must file quarterly campaign statements. (*Govt.C. 84202.3(a)*.) However, this statute does not apply to any semiannual period in which the committee is required to file preelection statements under *Govt.C. 84200.5(a)*, (b), (c) (*Govt.C. 84202.3(b)*) or to the period following the election, unless the committee makes contributions or expenditures to support or oppose another ballot measure (*Govt.C. 84202.3(c)*). (See *Yes on Measure A v. Lake Forest* (1997) 60 C.A.4th 620, 625, 70 C.R.2d 517 [city's preelection challenge to ballot measure based on claim of unconstitutionality or illegality is not attempt to influence electorate, and expenditure reporting requirements of Political Reform Act do not attach].)

(5) *Alternative Forms*. The following alternative forms are authorized: (a) combined statements and reports (*Govt.C. 84205*); (b) short forms (*Govt.C. 84206*); and (c) consolidated statements (*Govt.C. 84209*).

(6) *Content of Statements*. Campaign statements must include prescribed information, including the total amounts of contributions and expenditures, the total amounts received from those giving \$ 100 or more and from those giving less, the cash balances at the beginning and end of the period, information as to persons contributing or loaning \$ 100 or more, information as to persons liable for loans, the total amount of expenditures to those receiving \$ 100 or more and to those receiving less, information as to persons receiving an expenditure of \$ 100 or more, additional information from certain committees and candidates, and information as to the person or committee filing the report. (*Govt.C. 84211*; see *Fair Political Practices Com. v. Suitt* (1979) 90 C.A.3d 125, 132, 153 C.R. 311 [legislative caucus's contribution of services of state-paid employee is required to be reported]; *Thirteen Committee v. Weinreb* (1985) 168 C.A.3d 528, 536, 214 C.R. 297 [attorneys' fees incurred and paid by candidate to prosecute defamation action against opponent are political expenditures required to be reported].)

(7) *Slate Mailers*. Several statutory provisions regulate slate mailers and slate mailer organizations. (See *Govt.C. 82048.3* ["slate mailer" means mass mailing that "supports or opposes a total of four or more candidates or ballot measures"]; *Govt.C. 82048.4* ["slate mailer organization" defined]; *Los Angeles Taxpayers Alliance v. Fair Political Practices Com.* (1993) 14 C.A.4th 1214, 1222, 18 C.R.2d 472 [in determining whether mass mailing supports or opposes four or more candidates within meaning of *Govt.C. 82048.3*, opponents of candidates supported in mailing are not counted; hence, mailing that supported three candidates for separate offices and expressly opposed one candidate's opponent did not constitute slate mailer].)

(8) *Miscellaneous Statutes*. Other statutes relating to campaign statements include: *Govt.C. 84213* [verification of statements]; *Govt.C. 84215* [filing; copies]; *Govt.C. 84216* [loans constituting contributions; reporting requirements]; *Govt.C. 84216.5* [loans of campaign funds; reporting requirements]; *Govt.C. 84217* [Secretary of State's distribution of federal statements]; *Govt.C. 84306* [prompt reporting of contributions]; *Govt.C. 84308(c)* [contributions to agency officers (*infra*, §278)].

The Act sets forth certain filing requirements and prescribes the contents of required statements and reports. (See *Govt.C. 84108* [statement of organization]; *Govt.C. 84218(a)* [semiannual campaign statement]; *Govt.C. 84218(b)* [preelection statement]; *Govt.C. 84219* [contents of campaign report]; *Govt.C. 84220* [report of payments above specified amount]; *Govt.C. 84221* [termination of filing obligations]; *Govt.C. 84305.5* [contents and required warning for slate mailer organization primarily formed to support or oppose ballot measures].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statewide Direct Primary Election Statements*. *Govt.C. 84200.3* and *84200.4* were repealed in 2005.



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3. Campaign Disclosure.

c. Anonymous Mass Mailings.

7 *Witkin Sum. Cal. Law Const Law* § 277

[§ 277] Anonymous Mass Mailings.

The Act prohibits a candidate or committee from sending a mass mailing that is not properly identified with the name, address, and city of the sender. (*Govt.C. 84305*.) This provision was challenged by G, a city council candidate, in *Griset v. Fair Political Practices Com.* (1994) 8 C.4th 851, 35 C.R.2d 659, 884 P.2d 116. *Held*, the statute does not violate the First Amendment rights of candidates or their committees.

(a) The U.S. Supreme Court has not addressed the precise issue involved here--whether a prohibition on anonymous mass mailings by candidates or their committees violates the *First Amendment*. (8 C.4th 856.) However, prior decisions have established (1) that governmental limitations on the right to remain anonymous while exercising First Amendment rights must be carefully examined; and (2) that the interest in conducting fair and honest elections and in providing voters with the information necessary to make an informed choice may justify a requirement that persons identify themselves when they engage in speech designed to influence the outcome of elections. (8 C.4th 859.)

(b) *Govt.C. 84305* implicates First Amendment rights because it prohibits anonymous political speech. (8 C.4th 860.) Whether the statute may be upheld only if it meets the compelling governmental interest test, or whether the lesser degree of scrutiny applied to a statute prohibiting write-in voting in *Burdick v. Takushi* (1992) 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245, is appropriate, need not be decided. Under either test, the statute as applied here is valid. (8 C.4th 861.) The state's interest in a well-informed electorate is compelling, and the restraint imposed--a requirement of identification for a narrow range of public speech--is carefully limited. (8 C.4th 862.)

(c) Relying on *Schuster v. Municipal Court* (1980) 109 C.A.3d 887, 167 C.R. 447, *infra*, §469, G argues that the statute's failure to distinguish between protected and unprotected speech renders it unconstitutional. However, the theory that only false or defamatory speech can be subject to compelled disclosure cannot be reconciled with the decision in *Buckley v. Valeo* (1976) 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, *supra*, §256, which upheld disclosure requirements not aimed at false or defamatory speech. (8 C.4th 864, 865.)

(d) The identification requirement of *Govt.C. 84305* does not necessarily reduce the quantity of expression; it merely requires candidates and the committees they control to identify themselves in their mass mailings to prospective voters. The statute is narrowly tailored to serve the compelling state interest of providing voters with information to

assist them in making their choice at the polls, the ultimate expression of their First Amendment rights. Accordingly, as applied to candidates and their controlled committees, the statute does not violate the *First Amendment*. (8 C.4th 866.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Campaign Disclosure.

d. Prohibited Practices.

7 *Witkin Sum. Cal. Law Const Law* § 278

[§ 278] Prohibited Practices.

Govt.C. 84300 et seq. list a number of prohibitions relating to campaign disclosure:

(1) No contribution of \$ 100 or more may be made or received in cash (*Govt.C. 84300(a)*), and no expenditure of \$ 100 or more may be made in cash (*Govt.C. 84300(b)*). Contributions of \$ 100 or more, other than in-kind contributions, must be made only by a written instrument containing the names of the donor and payee and drawn from the donor's or intermediary's account (*Govt.C. 84300(c)*), and the value of all in-kind contributions of \$ 100 or more must be reported to the recipient on his or her written request (*Govt.C. 84300(d)*).

(2) No contribution may be made in a name other than the person's legal name. (*Govt.C. 84301.*)

(3) No person may make a contribution as an agent without disclosing his or her own name, address, and occupation, and those of his or her employer. (*Govt.C. 84302.*)

(4) No campaign expenditure of \$ 500 or more may be made by an agent or independent contractor unless it is reported by the candidate or committee on whose behalf it was made. (*Govt.C. 84303.*)

(5) No person may make an anonymous contribution of \$ 100 or more in a calendar year. (*Govt.C. 84304.*)

(6) No contribution may be commingled with the personal funds of the recipient or any other person. (*Govt.C. 84307*; see *People v. Ballard* (1980) 104 C.A.3d 757, 766, 164 C.R. 81 [predecessor statute prohibited commingling by candidates for political office, as well as other persons, and was not unconstitutionally vague].)

(7) No officer of an agency may accept, solicit, or direct a contribution of more than \$ 250 from parties, participants (if the officer knows or has reason to know of a "financial interest"), and their agents, to any agency proceeding involving a license, permit, or other entitlement; the prohibition continues until 3 months after a final decision is rendered. (*Govt.C. 84308(b)*; for definitions, see *Govt.C. 84308(a)*.) And the parties to the proceeding, and their agents, are prohibited from making these contributions. (*Govt.C. 84308(d)*.) If the officer has wilfully or knowingly received a contribution of more than \$ 250 within the preceding 12 months from a party, participant, or agent, who the officer knows or has reason to know has a financial interest, the officer must disclose it on the record and

may not participate in or influence the decision, unless he or she returns the contribution within 30 days after the officer knows or should have known of the contribution and the agency proceeding. (*Govt.C. 84308(c).*)

(8) No person may receive or personally deliver, or attempt to deliver, a contribution in specified state buildings. (*Govt.C. 84309.*)

SUPPLEMENT: [This section is current through the latest supplement]



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D. California Political Reform Act.

4. Lobbyists.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 279

[§ 279] In General.

Chapter 6 (*Govt.C. 86100* et seq.) deals with "lobbyists," "lobbying firms," and "lobbyist employers." (See 17 *Pacific L. J.* 614.)

(1) *Definitions.* The terms are defined as follows:

(a) "Lobbyist" is defined as any individual who receives \$ 2,000 or more "in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action." (*Govt.C. 82039(a)*.) However, no person is a lobbyist by reason of activities described in *Govt.C. 86300* (elected public official acting in official capacity or public employee acting in scope of employment; newspaper, periodical, broadcaster, etc., publishing comment or advertisements, or appearing before legislative committee or state agency; person representing church or religious society to protect right to practice its doctrines). (*Govt.C. 82039(a)*.) A partner, owner, officer, or employee of a business entity that qualifies as a "lobbying firm" under *Govt.C. 82038.5(a)(1)* is a "lobbyist." (*Govt.C. 82038.5(a)(1)*.)

(b) "Lobbying firm" is defined as any "business entity, including an individual contract lobbyist," that either (1) "receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action on behalf of any other person" (*Govt.C. 82038.5(a)(1)*), or (2) "receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, to communicate directly with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action on behalf of any other person, if a substantial or regular portion of the activities for which the business entity receives compensation is for the purpose of influencing legislation or administrative action" (*Govt.C. 82038.5(a)(2)*). No business entity is a lobbying firm by reason of activities described in *Govt.C. 86300*, *supra*. (*Govt.C. 82038.5(b)*.)

(c) "Lobbyist employer" means any person other than a "lobbying firm" who (1) employs "one or more lobbyists for economic consideration, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action," or (2) contracts "for the services of a lobbyist firm for economic consideration,

other than reimbursement for reasonable travel expense, for the purpose of influencing legislative or administrative action." (*Govt.C. 82039.5*.)

(2) *Registration*. Lobbying firms and lobbyist employers that employ lobbyists must register with the Secretary of State. (*Govt.C. 86100(b)(c)*.) Individual lobbyists must prepare lobbyist certifications (*Govt.C. 86103*), which are filed as part of the registration by their lobbying firm or lobbyist employer. (*Govt.C. 86100(a)*.) (See *Govt.C. 86101* [period within which to register]; *Govt.C. 86102* [registration fee]; *Govt.C. 86104* [contents of registration of lobbying firm]; *Govt.C. 86105* [contents of registration of lobbyist employer]; *Govt.C. 86106* [renewal of registration]; *Govt.C. 86107* [amended registration statements; notice of termination]; *Govt.C. 86108* [Secretary of State must print all registration information]; *Govt.C. 86109* [Secretary of State must publish directory of lobbyists, lobbying firms, and lobbyist employers].)

(3) *Accounts and Expenses*. Lobbyists, lobbying firms, and lobbyist employers with reportable receipts, payments, and incurred expenses must "keep detailed accounts, records, bills, and receipts as shall be required by regulations adopted by the commission to expedite the performance of all obligations imposed." (*Govt.C. 86110*.)

(4) *Reports*. Elaborate provision is made for periodic reports by lobbyists (*Govt.C. 86113*), lobbying firms (*Govt.C. 86114*), and by lobbyist employers and specified persons who make payments to influence legislation (*Govt.C. 86115* [who must file]; *Govt.C. 86116* [information required]). Further, state and local agencies must disclose all payments of \$ 250 or more. (*Govt.C. 86116.5*.) (See *Govt.C. 86117* [filing dates]; *Govt.C. 86118* [filing with Secretary of State]; *Govt.C. 86112.5* [person who files report must provide specified information to beneficiaries of gifts listed in report]; *Govt.C. 86112.3* [written invitation to elected state official from person who files report must disclose that attendance constitutes acceptance of reportable gift].)

Former *Govt.C. 86107(d)*, *(e)* and *86109(d)*, *(e)*, which required lobbyists to report transactions with officials, including transactions entirely unrelated to lobbying activities, were declared invalid as an unnecessary curtailment of the right to petition. (*Fair Political Practices Com. v. Superior Court (1979) 25 C.3d 33, 48, 49, 157 C.R. 855, 599 P.2d 46.*) The current statutes require reports of every "activity expense," which is defined in *Govt.C. 86111(a)* as an expense or payment that "benefits in whole or in part any elective state official, legislative official, agency official, state candidate" or a member of his or her immediate family; however, campaign contributions are excluded (see *infra*, §280).

SUPPLEMENT: [This section is current through the latest supplement]

See *35 A.L.R.6th 1* [validity and construction of state and municipal enactments regulating lobbying].(2) *Registration*. *Govt.C. 86102* was repealed in 2008. *Govt.C. 20600*, added in 2008, requires lobbyists to pay a nonrefundable fee to the Secretary of State every 2 years.



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D. California Political Reform Act.

4. Lobbyists.

b. Prohibited Acts.

7 *Witkin Sum. Cal. Law Const Law* § 280

[§ 280] Prohibited Acts.

Lobbyists and lobbying firms are prohibited from making gifts aggregating more than \$ 10 per month to legislative and agency officials, elected state officers, and state candidates. (*Govt.C. 86201* ["gift" defined], *Govt.C. 86203* [prohibition]; see *Govt.C. 86204* [unlawful to receive gift prohibited by *Govt.C. 86203*].) And lobbyists and lobbying firms are prohibited from doing anything with the purpose of placing these persons under obligation to the lobbyist, lobbying firm, or lobbyist's or firm's employer. (*Govt.C. 86205(a)*.) Also prohibited are various kinds of fraudulent or deceptive acts (*Govt.C. 86205(b)*, (c), (d), (e)), and contingent fees (*Govt.C. 86205(f)*). (See *People v. Snyder (2000)* 22 *C.4th* 304, 310, 92 *C.R.2d* 734, 992 *P.2d* 1102 [administrative sanctions provided in *Govt.C. 83116.5* do not exempt lobbyists from criminal liability for violating proscription against making campaign contributions in someone else's name].)

Under former *Govt.C. 86202*, lobbyists were prohibited from making or arranging *contributions* to state officials and the committees supporting them, but this prohibition was declared invalid prior to its repeal in 1984. (See *Fair Political Practices Com. v. Superior Court (1979)* 25 *C.3d* 33, 43, 157 *C.R.* 855, 599 *P.2d* 46 [under test of *Buckley v. Valeo (1976)* 424 *U.S.* 1, 96 *S.Ct.* 612, 46 *L.Ed.2d* 659, *supra*, §256, statute was not narrowly directed to aspects of political association where potential corruption might be identified, and resulted in unnecessary abridgment of associational freedoms]; *Institute of Governmental Advocates v. Younger (1977)* 70 *C.A.3d* 878, 884, 139 *C.R.* 233 [part of statute making it unlawful for lobbyist "to arrange for the making of any contribution by himself or by any other person," was unconstitutionally overbroad as inhibiting full and factual communication between lobbyist and his or her employer].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. California Political Reform Act.

5. Conflicts of Interest.

a. Prohibited Acts.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 281

[§ 281] In General.

Chapter 7 (*Govt.C. 87100 et seq.*) covers conflicts of interest. (See 7 *Pacific L. J.* 847.)

(1) *General Prohibition.* Except where required by law (*Govt.C. 87101*), no state or local public official may make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision in which the official knows or has reason to know that he or she has a financial interest. (*Govt.C. 87100*; see *Hamilton v. Los Gatos* (1989) 213 C.A.3d 1050, 1059, 261 C.R. 888 [under *Govt.C. 87100*, city council member who was prohibited from participating in closed session because of conflict of interest was also prohibited from obtaining record of closed session]; on prohibition regarding officers and employees of local agencies spending agency funds to support or oppose candidate or ballot measure, see *supra*, §254.)

(2) *Financial Interest.* As used in *Govt.C. 87100*, an official has a "financial interest" if "it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family," or on specified business, property, and commercial interests. (*Govt.C. 87103*; see *Woodland Hills Residents Assn. v. City Council* (1980) 26 C.3d 938, 946, 164 C.R. 255, 609 P.2d 1029, *infra*, §669 [campaign contributions are expressly excluded from the definition of "financial interest" by *Govt.C. 87103(c)* and *82030(b)*; thus city council members could consider subdivision application even though they had received contributions from the applicants]; *Smith v. Superior Court* (1994) 31 C.A.4th 205, 211, 36 C.R.2d 897 [even though member of county board of supervisors and his wife were county physicians, member could vote to appeal federal injunction that halted construction of replacement county hospital where he worked, because it was not "reasonably foreseeable," within meaning of *Govt.C. 87103*, that injunction would affect security of their employment]; *BreakZone Billiards v. Torrance* (2000) 81 C.A.4th 1205, 1228, 97 C.R.2d 467 [following *Woodland Hills*].)

In *Witt v. Morrow* (1977) 70 C.A.3d 817, 139 C.R. 161, a city council member was enjoined from participating in decisions concerning a shopping center project. He was an officer of, and attorney for, a nonprofit corporation owning property across the street from the proposed center, and received a fixed monthly salary from the corporation. *Held*, affirmed. The fact that an employee's salary is fixed does not make his or her financial interest too remote. (70 C.A.3d 822.) "It is not just actual improprieties which the law seeks to forestall but also the appearance of possible

improprieties. Any employee, in the private or public sector, wishes to keep his job and maintain good relations with his employer. A person who must make decisions which may affect his employer's purse is in a situation where he may not give full consideration to the merits of the decision." (70 C.A.3d 823.)

In *Consumers Union of United States v. California Milk Producers Advisory Bd.* (1978) 82 C.A.3d 433, 147 C.R. 265, Govt.C. 87103 was construed to permit participation of industry representatives in decisions of regulatory boards and commissions. "Merely because a board member derives income from within a given industry, he or she does not lose the ability to be objective. Nor does that person lose the capacity to make decisions beneficial to the public's interest. The public interest emerges from the competing interests of various groups in our society, including those from a given industry. The act does not disallow that board member, who has knowledge and a comprehension of how the industry interacts with society, from participating in governmental decisions which affect that industry." (82 C.A.3d 448.)

(3) *Loans.* Govt.C. 87460 prohibits the receipt of personal loans by public officials and elected officers from specified government officers, employees, members, and consultants, and from persons who have contracts with the state or governmental agency over which the public official's or elected officer's agency has direction or control. (Govt.C. 87460(a).) The prohibition does not apply to (a) loans made to the campaign committee of an elected officer or candidate for elective office, (b) loans from specified family members, and (c) loans that do not exceed \$ 250. (Govt.C. 87460(e); see Govt.C. 87461 [requirement of writing for loans of \$ 500 or more]; Govt.C. 87462 [when loan becomes gift].)

(4) *Action as Agent or Attorney.* No public official of a state agency may, for compensation, act as an agent or attorney for, or otherwise represent, another person by appearing formally or informally before, or by communicating orally or in writing to, the official's agency, its officers or employees, if done for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use. (Govt.C. 87104(a); see Govt.C. 87104(b) [definition of "public official"].)

(5) *State Administrative Officials.* "[N]o state administrative official shall make, participate in making, or use his or her official position to influence any governmental decision directly relating to any contract where the state administrative official knows or has reason to know that any party to the contract is a person with whom the state administrative official, or any member of his or her immediate family, has engaged in any business transaction or transactions on terms not made available to members of the public, regarding any investment or interest in real property, or the rendering of goods or services totaling in value one thousand dollars (\$ 1,000) or more within 12 months prior to the time the official action is to be performed." (Govt.C. 87450(a); see Govt.C. 87400 [defining "state administrative official"].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. California Political Reform Act.

5. Conflicts of Interest.

a. Prohibited Acts.

2. Exceptions.

7 *Witkin Sum. Cal. Law Const Law* § 282

[§ 282] Exceptions.

Govt.C. 87100, supra, §281, "does not prevent a public official from making or participating in the making of a governmental decision to the extent his participation is *legally required* for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section." (*Govt.C. 87101*; see *Govt.C. 87100.1* [exceptions for professional engineers and surveyors rendering services as consultants]; *Affordable Housing Alliance v. Feinstein* (1986) 179 C.A.3d 484, 489, 224 C.R. 557 [city's charter required mayor to approve or veto legislation, and provided that mayor's failure to act constituted approval; hence, mayor's action of vetoing ordinance was legally required]; *Kunec v. Brea Redevelopment Agency* (1997) 55 C.A.4th 511, 522, 64 C.R.2d 143 [agency's decision to invoke "rule of necessity" when two of five members had conflicts of interest regarding condemnation of property violated Political Reform Act in absence of explanation of financial interests involved or whether other governmental body could have decided issue]; *Brown v. Fair Political Practices Com.* (2000) 84 C.A.4th 137, 140, 151, 100 C.R.2d 606 [broad scope of mayor's authority under city charter over matters of economic development required relatively broad exemption under *Govt.C. 87100*; thus, even though mayor owned property that would benefit from redevelopment project nearby, his participation in project was "legally required" under statute].)

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5. Conflicts of Interest.

b. Disclosures.

7 *Witkin Sum. Cal. Law Const Law* § 283

[§ 283] Disclosures.

Govt.C. 87200 et seq., covering disclosures, are applicable to elected state officers, judges and commissioners of courts of the judicial branch of government, members of specified state commissions, specified local officers, and candidates for any of these offices. (*Govt.C. 87200.*)

(1) *Statements of Investments, Real Property Interests, and Income.* Statements disclosing investments, interests in real property, and income received during the preceding 12 months are required of (a) every person elected, appointed, or nominated to an office specified in *Govt.C. 87200* (*Govt.C. 87202(a)*), and (b) every candidate for these offices "other than a justice of an appellate court or the Supreme Court" (*Govt.C. 87201*).

(2) *Statement of Business Positions.* Every person specified in *Govt.C. 87200* must disclose any business position held in a business entity that has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business in the jurisdiction at any time during the preceding 2 years. (*Govt.C. 87209.*)

(3) *Financial Interest.* A public official identified in *Govt.C. 87200* who has a financial interest described in *Govt.C. 87100* (supra, §281) must (a) publicly identify the interest, (b) recuse himself or herself, and (c) leave the room while the matter is discussed and voted on, although the official may speak on the issue when the general public does so. (*Govt.C. 87105.*)

(4) *Supplemental and Departing Statements.* Supplemental statements disclosing investments, interests in real property, and income are required annually as specified by commission regulations (*Govt.C. 87203*), and on leaving office (*Govt.C. 87204*). (For contents of statement on investments and interests in real property, see *Govt.C. 87206*; for contents of statement on income, see *Govt.C. 87207*; on disclosure of identity of donor, see *Govt.C. 87210.*)

Prior to amendment in 1984, *Govt.C. 87207(b)* required lawyers and brokers to identify persons who paid them \$ 1,000 or more, while it required members of all other businesses and professions to identify persons who paid them \$ 10,000 or more. This provision was held unconstitutional in *Hays v. Wood* (1979) 25 C.3d 772, 160 C.R. 102, 603 P.2d 19. (a) The underinclusiveness of a classification must have a rational basis. (25 C.3d 791.) (b) A lawyer's special role in the private sector, often representing private interests in dealings with government, does not support the assumed

conclusion that he or she will be more likely than other professionals to have conflicts of interest. (25 C.3d 792.) (c) The possible abuse of retainer fees is only one of many means to effect a bribe of a public official. (25 C.3d 794.) (d) The classification cannot be supported on the ground that more disclosure may be required from attorneys to ensure that they are acting for the public rather than private interests. (25 C.3d 795.)

(5) *Substitute Statements*. Statements under *Govt.C. 87201* and *87202* may be substituted for one another, and a statement under *Govt.C. 87203* may be substituted for either, if the statement is filed for the same jurisdiction within 60 days prior to the time the person filed as a candidate or assumed office. (*Govt.C. 87201, 87202(a)*; see *Govt.C. 87208* [incorporation by reference]; *Govt.C. 87350* [multiagency statement for designated employee of more than one joint powers insurance agency].) Elected state officers who assume office in December or January must file a statement under *Govt.C. 87203*, rather than under *Govt.C. 87202(a)*. (*Govt.C. 87202(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statements of Investments, Real Property Interests, and Income*. *Govt.C. 87302.3*, added in 2007, provides for disclosure of investments, business and real property interests, and income by a candidate for an elective office that is designated in a conflict of interest code (see text, §284).



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5. Conflicts of Interest.

c. Conflict of Interest Codes.

7 *Witkin Sum. Cal. Law Const Law* § 284

[§ 284] Conflict of Interest Codes.

Every state or local government agency must adopt and promulgate a "Conflict of Interest Code," which has the force of law. (*Govt.C. 87300, 87301.*) It must (1) enumerate the positions within the agency involving decisionmaking, (2) require statements at prescribed times and under specified circumstances from designated employees (other than those specified in *Govt.C. 87200*) disclosing reportable investments, business positions, interests in real property, and income, and (3) set forth the circumstances for disqualification from making or participating in decisions. (*Govt.C. 87302.*)

The proposed code must be submitted by the agency to a "code reviewing body," which, depending on the agency, could be the Commission, board of supervisors, city council, Attorney General, Chief Justice or presiding justices, State Bar Board of Governors, or the Judicial Council (see *Govt.C. 82011*). The code-reviewing body must (a) approve the code, (b) revise it and approve it as revised, or (c) return it to the agency for revision and resubmission. (*Govt.C. 87303.*) If the code reviewing body fails to act within 6 months, judicial relief may be sought (*Govt.C. 87305*), and any action of a code reviewing body is subject to judicial review (*Govt.C. 87308*).

No code or amendment may be approved by the code reviewing body or upheld by a court if it fails (1) "to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented;" (2) "to provide to each affected person a clear and specific statement of his duties under the Code;" or (3) "to adequately differentiate between designated employees with different powers and responsibilities." (*Govt.C. 87309.*)

A code may not provide for a case-by-case determination whether a particular interest falls within objectively defined categories that require disclosure; *Govt.C. 87302(b)* requires disclosure of all covered interests. The provisions of *Govt.C. 87103* (*supra*, §281), which permit participation when the disclosed interest does not differ from that of the public generally, have no application to the disclosure requirements of the Act. (*Metropolitan Water Dist. v. Fair Political Practices Com. (1977) 73 C.A.3d 650, 657, 658, 141 C.R. 8.*)

Uncompensated members of the Commission on California State Government Organization and Economy (see *Govt.C. 8501 et seq.*) are not exempt from the disclosure requirements of the Act. While the duties of the Commission are facially advisory only, its discretionary investigative powers and its influence on state agencies render its functions decisionmaking in nature. (*Commission on Calif. State Government Organization & Economy v. Fair Political*

Practices Com. (1977) 75 C.A.3d 716, 721, 723, 724, 142 C.R. 468.)

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5. Conflicts of Interest.

d. Restrictions on Former Officials.

7 *Witkin Sum. Cal. Law Const Law* § 285

[§ 285] Restrictions on Former Officials.

(1) *Administrative Officials.* *Govt.C. 87400* et seq. restrict the activities of former state administrative officials (defined in *Govt.C. 87400(b)*) who, for compensation, represent any person, other than the state, before a court or state administrative agency (defined in *Govt.C. 87400(a)*) in connection with any judicial, quasi-judicial, or other proceeding (defined in *Govt.C. 87400(c)*). (See *Govt.C. 87401*.)

The former official is prohibited from making either a formal or informal appearance in the proceeding, or from submitting an oral or written communication for compensation, if (a) the state is a party or has a direct and substantial interest, *and* (b) the proceeding is one in which the official participated (defined in *Govt.C. 87400(d)*). (*Govt.C. 87401*.) Indirect participation through assisting the representation is also prohibited. (*Govt.C. 87402*.)

However, the former official (1) may give a statement based on his or her own special knowledge, if the official receives no compensation other than that regularly provided for witnesses; (2) may provide communications solely to furnish information, if the official has outstanding and otherwise unavailable qualifications, is acting with respect to a matter requiring these qualifications, and is serving the public interest thereby; or (3) may appear or submit communications in a completed proceeding in which the court or agency has retained jurisdiction, if at least 5 years have elapsed since the official left the government, and the public interest would not be harmed. (*Govt.C. 87403*.)

On petition of any interested party, the court or the presiding or other officer may, after notice and an opportunity for hearing, exclude any person violating *Govt.C. 87400* et seq. from further participation in the proceeding, or from assisting or counseling any other participant. (*Govt.C. 87404*.)

(2) *Legislators, Elected Officials, and Officers and Employees of Administrative Agencies.* For a period of 1 year after leaving office or employment, (a) former members of the Legislature are prohibited from representing any other person before the Legislature for the purpose of influencing legislative action (*Govt.C. 87406(b)*); (b) former elected officials are prohibited from representing any other person before any state administrative agency for the purpose of influencing any administrative action (*Govt.C. 87406(c)*); and (c) former officers and employees of administrative agencies are prohibited from representing any other person before any state administrative agency for the purpose of influencing any administrative or legislative action (*Govt.C. 87406(d)*). However, an appearance before a state

administrative agency "does not include an appearance in a court of law, before the administrative law judge, or before the Workers' Compensation Appeals Board." (*Govt.C. 87406(c), (d).*) (See *Govt.C. 87406.1* [imposing similar restrictions on former board members and designated former officers and employees of air pollution control and air quality management districts].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Legislators, Elected Officials, and Officers and Employees of Administrative Agencies.* *Govt.C. 87406.3*, added in 2005, prohibits specified former local officials, for 1 year after leaving office, from acting as an attorney or agent for another person, for compensation, to influence administrative or legislative action by the former official's local government agency or committee. (See *37 McGeorge L. Rev. 251.*)



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D. California Political Reform Act.

6. Restrictions on Honoraria, Gifts, and Travel Expenses.

7 *Witkin Sum. Cal. Law Const Law* § 286

[§ 286] Restrictions on Honoraria, Gifts, and Travel Expenses.

(1) *Honoraria*. Chapter 9.5 (*Govt.C. 89500* et seq.) prohibits the acceptance of an honorarium by local elected officeholders, elected state officers, designated candidates for office, members of state or local boards or commissions, and designated employees of state and local agencies. (*Govt.C. 89502*; see *Govt.C. 89502(d)* [exclusions].) "Honorarium" is defined as a "payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering." (*Govt.C. 89501*.)

(2) *Gifts*. The Act limits the amount local elected officeholders, elected state officers, designated candidates for office, members of state or local boards or commissions, and designated employees of state and local agencies may accept as gifts. Gifts valued in excess of \$ 250 generally may not be accepted from any single source in any calendar year. (*Govt.C. 89503*; see *Govt.C. 89503(e)* [exclusions].)

(3) *Travel Expenses*. Payment or reimbursement for travel expenses that are reasonably related to a legislative or governmental purpose or public policy issue is not limited if (a) the travel is in the United States in connection with a speech given by the designated official, employee, or candidate, and the expenses are limited to the day before, the day of, and the day after the speech, or (b) the travel is provided by a government or governmental agency or authority, an educational institution, a nonprofit organization, or a person domiciled outside the U.S. who qualifies for tax exempt status. (*Govt.C. 89506(a)*.) Except as provided in *Govt.C. 89506(a)*, a gift of travel is subject to the limitations of *Govt.C. 89503*. (*Govt.C. 89506(b)*; see *Govt.C. 89506(c)* [exclusions].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. California Political Reform Act.

7. Limitations on Campaign Spending and Contributions.

a. Statutory Development.

7 *Witkin Sum. Cal. Law Const Law* § 287

[§ 287] Statutory Development.

Former Govt.C. 85300 et seq. imposed limits on expenditures for candidates and measures. (See 6 *Pacific L. J.* 631; 7 *Southwestern L. Rev.* 470, 484.) The limitations were held unconstitutional as violative of the First Amendment guarantee of freedom of speech in *Citizens for Jobs & Energy v. Fair Political Practices Com.* (1976) 16 C.3d 671, 675, 129 C.R. 106, 547 P.2d 1386, and the statutes were repealed in 1977. The limitations on expenditures for circulation of statewide petitions were held invalid in *Hardie v. Eu* (1976) 18 C.3d 371, 376, 134 C.R. 201, 556 P.2d 301. A local measure prohibiting a business organization from making a contribution to a candidate or political committee supporting or opposing a candidate or a measure was held unconstitutional in *Pacific Gas & Elec. Co. v. Berkeley* (1976) 60 C.A.3d 123, 127, 131 C.R. 350. And a provision of the same municipal election reform act limiting the size of contributions to committees formed to support or oppose ballot measures was ultimately held unconstitutional as an infringement on both the right of association and the right of expression in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley* (1981) 454 U.S. 290, 102 S.Ct. 434, 439, 70 L.Ed.2d 492, 501. (See 96 *Harv. L. Rev.* 161 [*Citizens Against Rent Control*]; 15 *Hastings Const. L. Q.* 155 [proposed ballot initiative to limit campaign spending].)

Since voters adopted the Political Reform Act in 1974 (see *supra*, §271), they have attempted to put further limitations on campaign contributions and expenditures.

(1) *Propositions 68 and 73.* In June, 1988, voters approved Propositions 68 and 73, which limited campaign spending and contributions. Both measures were codified as Govt.C. 85100 et seq. Proposition 73 received the most votes and thus prevailed. (See *Taxpayers to Limit Campaign Spending v. Fair Political Practices Com.* (1990) 51 C.3d 744, 274 C.R. 787, 799 P.2d 1220 [rejecting claim that reconcilable portions of Proposition 68 should be saved]; 20 *Pacific L. J.* 615.) Proposition 73 became operative on January 1, 1989. The initiative limited contributions but not expenditures. (See *Gerken v. Fair Political Practices Com.* (1993) 6 C.4th 707, 717, 25 C.R.2d 449, 863 P.2d 694 [rejecting claim that Proposition 68 should be revived because Proposition 73 had been invalidated in federal court proceedings]; *Kopp v. Fair Political Practices Com.* (1995) 11 C.4th 607, 660, 47 C.R.2d 108, 905 P.2d 1248 [no reformation of invalid portions of Proposition]; 20 *Pacific L. J.* 616.)

(2) *Proposition 208.* Proposition 208 was adopted by the voters in November, 1996. In setting new contribution limits and a voluntary ceiling on expenditures, it repealed most of the provisions of Proposition 73. (See *Californians*

for Political Reform Foundation v. Fair Political Practices Com. (1998) 61 C.A.4th 472, 71 C.R.2d 606 [upholding emergency regulation excepting payments by sponsoring organization to establish and administer its political action committee from statutory definition of "contribution"]; *infra*, §288.)

(3) *Proposition 34*. Proposition 34 was adopted by the voters in November, 2000. It establishes limits on campaign contributions and loans, and sets voluntary limits on the total expenditures of candidates for elective state offices. Proposition 34 repeals and replaces many of the provisions of both Propositions 73 and 208. (See 33 *McGeorge L. Rev.* 279 [campaign finance reform and Proposition 34]; *infra*, §289 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See 95 *Cal. L.Rev.* 123 [candidate-controlled ballot measure committees in California politics; reexamining *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*]; 78 *So. Cal. L. Rev.* 885, 927, 939 [contribution and expenditure limits in ballot measure campaigns].



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D. California Political Reform Act.

7. Limitations on Campaign Spending and Contributions.

b. Filing and Account Requirements.

7 *Witkin Sum. Cal. Law Const Law* § 288

[§ 288] Filing and Account Requirements.

(1) *Statement of Intent.* A person who intends to be a candidate for elective state office must file an original statement of intent with the Secretary of State before soliciting or receiving contributions or loans. (*Govt.C. 85200.*) A candidate for any other elective office must file the statement of intention as provided in *Govt.C. 84215(c), (d), (e).* (See *supra*, §276.)

(2) *Filing Requirements.* Both candidates for elective state office and committees primarily formed to support a ballot measure that must file reports pursuant to *Govt.C. 84605* must file "online or electronically" with the Secretary of State a report disclosing receipt of contributions of \$ 1,000 or more received during an election cycle. These reports must be filed within 24 hours of receipt of the contributions. (*Govt.C. 85309(a), (b).*) Within 10 business days of receipt, these candidates and committees must file, online or electronically, reports disclosing contributions of \$ 5,000 or more "received at any other time than during an election cycle." (*Govt.C. 85309(c), (d).*) (On Online Disclosure Act, see *Govt.C. 84600 et seq.*)

(3) *Campaign Contribution Account.* The candidate must open one campaign contribution account at a financial institution in the state, must deposit all contributions, loans, and personal funds to be used in the campaign into this account, and must make all campaign expenditures from the account. (*Govt.C. 85201(a), (c), (d), (e);* see *Govt.C. 85200* [terms "contribution" and "loan" do not include payments from candidate's personal funds for candidate filing fee or statement of qualifications fee]; *Govt.C. 85201(f)* [payment for filing fee and statement of qualifications from personal funds need not be deposited in account before expenditure]; *23 Pacific L. J. 631.*)

These requirements do not apply to a candidate who will not receive contributions and who makes expenditures from personal funds of less than \$ 1,000 in a calendar year; payment for the filing fee and statement of qualifications fee is not included in calculating total expenditures. (*Govt.C. 85201(g).*) However, a candidate who raises or spends less than \$ 1,000 in a calendar year, and who does not qualify as a committee under *Govt.C. 82013*, must establish a campaign contribution account pursuant to *Govt.C. 85201(a)*, but is not required to file a committee organizational statement as required by *Govt.C. 84101*, or other bank account informational statement. (*Govt.C. 85201(h).*)

(4) *Who May Contribute.* Campaign contributions may be accepted only from persons, political committees, and

small contributor committees. (*Govt.C. 85301 et seq.*) Public moneys may not be spent or accepted. (*Govt.C. 85300*; see *Govt.C. 85206* [definition of "public moneys"].) Foreign governments and foreign principals are prohibited from making contributions or expenditures, and persons and committees are prohibited from soliciting or accepting contributions, in connection with the qualification or support of, or opposition to, any state or local ballot measure. (*Govt.C. 85320.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Filing Requirements.* A committee that is required to file reports pursuant to *Govt.C. 84605* and that makes independent expenditures of \$ 1,000 or more during an election cycle in connection with a candidate or a state ballot measure must file, online or electronically, a report with the Secretary of State disclosing the expenditure within 24 hours of the time it is made. (*Govt.C. 85500(a)*; see *Californians for Fair Representation--No on 77 v. Superior Court* (2006) 138 C.A.4th 15, 25, 41 C.R.3d 148 [expenditures for radio and television advertisements by supporters of ballot measure during 90-day period before election qualified as independent expenditures that were required by *Govt.C. 85500(a)* to be reported within 24 hours if \$ 1,000 or more].)

A committee that is required to file reports pursuant to *Govt.C. 84605* must file a report with the Secretary of State disclosing contributions or expenditures totaling \$ 5,000 or more to support or oppose the qualification or passage of a state ballot measure. The report must be filed online or electronically within 10 business days of making the contribution or expenditure. (*Govt.C. 84204.5*, added in 2006.)(4) *Who May Contribute.* *Govt.C. 85300* was repealed in 2008. On California Fair Elections Act of 2008, which establishes a Fair Elections pilot program for public financing of campaigns for Secretary of State, see *Govt.C. 91015 et seq.*



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7. Limitations on Campaign Spending and Contributions.

c. Contribution Limits.

7 Witkin Sum. Cal. Law Const Law § 289

[§ 289] Contribution Limits.

Proposition 34 (see *supra*, §287) establishes the following limits for contributions:

(1) A *person* other than the candidate may not *make* a contribution to a candidate for Governor totaling more than \$ 20,000, to a candidate for any other statewide elective office of more than \$ 5,000, and to a candidate for any other elective state office of more than \$ 3,000, per election. These limits also apply to the candidates' ability to *accept* contributions from any person. (*Govt.C. 85301.*)

(2) A *small contributor committee*, as defined in *Govt.C. 85203*, may not *make* any contribution to a candidate for Governor totaling more than \$ 20,000, to a candidate for any other statewide elective office of more than \$ 10,000, and to a candidate for any other elective state office of more than \$ 6,000, per election. These limitations also apply to the candidates' ability to *accept* contributions from small contributor committees. (*Govt.C. 85302.*)

(3) A person may not make a contribution to any committee, other than a political party committee as defined in *Govt.C. 85205*, totaling more than \$ 5,000 per calendar year for the purpose of making contributions to candidates for elective state office. (*Govt.C. 85303(a).*) A person may not make a contribution to any political party committee totaling more than \$ 25,000 to make contributions for the support or defeat of candidates for elective state office. (*Govt.C. 85303(b).*) However, except as provided in *Govt.C. 85310*, a person's contributions to a committee or political party committee are not limited if they are used for purposes other than making contributions to candidates for elective state office. (*Govt.C. 85303(c).*)

(4) A candidate for elective state office may transfer contributions in excess of any amount necessary to defray the candidate's expenses for election-related activities or holding office to a political party committee provided they are used for purposes consistent with *Govt.C. 89519(b)(4)* (*infra*, §291). (*Govt.C. 85303(d).*) Further, a "candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state office of the same candidate." (*Govt.C. 85306(a).*)

(5) A candidate for elective state office may not personally loan his or her campaign an amount exceeding \$ 100,000, and may not charge interest on the loan. (*Govt.C. 85307(b).*) "Contributions made by a husband and wife may

not be aggregated." (*Govt.C. 85308(a).*) A contribution made by a child under 18 is presumed to be a contribution from the child's parent or guardian. (*Govt.C. 85308(b).*)

(6) A candidate or committee must return any contribution of \$ 100 or more when the contributor's name, address, occupation, and employer are not on file. (*Govt.C. 85700.*)

SUPPLEMENT: [This section is current through the latest supplement]

See *Citizens to Save California v. California Fair Political Practices Com.* (2006) 145 C.A.4th 736, 748, 52 C.R.3d 17 [defendant commission exceeded its statutory authority in promulgating regulation that limited contributions to ballot measure committees controlled by candidates; regulation conflicted with several provisions of Political Reform Act and was invalid as matter of law]; 24 A.L.R.6th 179 [Constitutional Validity of State or Local Regulation of Contributions by or to Political Action Committees]; 19 A.L.R. Fed 2d 1 [Validity, Construction, and Application of Campaign Finance Laws--Supreme Court Cases].



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D. California Political Reform Act.

7. Limitations on Campaign Spending and Contributions.

d. Voluntary Expenditure Limits.

7 Witkin Sum. Cal. Law Const Law § 290

[§ 290] Voluntary Expenditure Limits.

Proposition 34 (see *supra*, §287) sets voluntary limits on the total expenditures of candidates for elective state offices. (See *Govt.C. 85400*.) Each candidate must elect whether to be governed by the voluntary limits when he or she files the statement of intention specified in *Govt.C. 85200*. (*Govt.C. 85401(a)*.) A candidate who has elected to be bound by the voluntary limits will not be so bound "if an opposing candidate contributes personal funds to his or her own campaign in excess of the limits." (*Govt.C. 85402(a)*.) A designation will be made in the ballot pamphlet of those candidates who have voluntarily agreed to the expenditure limits. (*Govt.C. 85600*.) A violation of the limits is subject to the remedies outlined in *Govt.C. 83100* et seq. and *Govt.C. 91000* et seq. (see *supra*, §§273, 274). (*Govt.C. 85403*.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. California Political Reform Act.

7. Limitations on Campaign Spending and Contributions.

e. Use of Funds.

7 *Witkin Sum. Cal. Law Const Law* § 291

[§ 291] Use of Funds.

(1) *In General.* *Govt.C. 89510* et seq. impose limitations on the use of campaign funds. (For definitions, see *Govt.C. 89511*.) The statutes apply to expenditures by candidates, elected officers, and committees. (*Govt.C. 89511(a)*; see *Schroeder v. Irvine City Council* (2002) 97 C.A.4th 174, 185, 118 C.R.2d 330 [city's expenditures to increase voter registration and participation, which did not support or oppose candidate or cause, were not unlawful political expenditures under Political Reform Act].) Expenditures by a candidate that are "reasonably related to a political purpose" and by an officer that are "reasonably related to a legislative or governmental purpose" are allowed. (*Govt.C. 89512*.)

The statute describes in detail the circumstances under which expenditures for specific purposes will be deemed to meet the "reasonably related" test. (See *Govt.C. 89513* [travel, lodging, professional services, fines or penalties, clothing, tickets to fundraising events, personal gifts, and loans]; *Govt.C. 89514* [attorneys' fees and other litigation costs]; *Govt.C. 89515* [charitable donations]; *Govt.C. 89516* [vehicle expenses]; *Govt.C. 89517* [purchase, lease, or refurbishing of property]; *Govt.C. 89518* [compensation for performance of duties].)

(2) *Surplus Campaign Funds.* The permissible uses of surplus campaign funds after an elected official leaves office or a candidate is defeated for election are limited to specified purposes, including the payment of campaign debts, repayment of contributions, contributions to a political party committee that will not be used to support or oppose candidates for elective office, and charitable contributions that do not have a material financial effect on the candidate or officer or his or her family or the campaign treasurer. (*Govt.C. 89519(b)*; see *Govt.C. 89519(a)* [defining "surplus campaign funds"].) Surplus campaign funds may also be used for payment to or reimbursement of the state for installation and monitoring of home and office security systems for a candidate or elected officer who has received threats to his or her physical safety. (*Govt.C. 89519(c)*.)

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E. Code of Fair Campaign Practices.

7 *Witkin Sum. Cal. Law Const Law* § 292

[§ 292] Code of Fair Campaign Practices.

The fair campaign practices statutes provide for *voluntary* subscription by a candidate for public office to a Code of Fair Campaign Practices (*Elec.C. 20400, 20444*); require the Secretary of State to supply printed forms to county clerks (*Elec.C. 20444*); and require the county clerk to give blank forms to candidates and inform them that subscription is voluntary (*Elec.C. 20440*). Subscribed forms are public records open for public inspection (*Elec.C. 20443*), and must be retained by the clerk until 30 days after the election (*Elec.C. 20442*).

The text of the Code is set forth in *Elec.C. 20440*:

"CODE OF FAIR CAMPAIGN PRACTICES

There are basic principles of decency, honesty, and fair play which every candidate for public office in the State of California has a moral obligation to observe and uphold, in order that, after vigorously contested, but fairly conducted campaigns, our citizens may exercise their constitutional right to a free and untrammelled choice and the will of the people may be fully and clearly expressed on the issues.

THEREFORE:

(1) I SHALL CONDUCT my campaign openly and publicly, discussing the issues as I see them, presenting my record and policies with sincerity and frankness, and criticizing without fear or favor the record and policies of my opponents or political parties which merit such criticism.

(2) I SHALL NOT USE OR PERMIT the use of character defamation, whispering campaigns, libel, slander, or scurrilous attacks on any candidate or his or her personal or family life.

(3) I SHALL NOT USE OR PERMIT any appeal to negative prejudice based on race, sex, religion, national origin, physical health status, or age.

(4) I SHALL NOT USE OR PERMIT any dishonest or unethical practice which tends to corrupt or undermine our American system of free elections, or which hampers or prevents the full and free expression of the will of the voters including acts intended to hinder or prevent any eligible person from registering to vote, enrolling to vote, or voting.

(5) I SHALL NOT coerce election help or campaign contributions for myself or for any other candidate from my employees.

(6) I SHALL IMMEDIATELY AND PUBLICLY REPUDIATE support deriving from any individual or group which resorts, on behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics which I condemn. I shall accept responsibility to take firm action against any subordinate who violates any provision of this code or the laws governing elections.

(7) I SHALL DEFEND AND UPHOLD the right of every qualified American voter to full and equal participation in the electoral process.

I, the undersigned, candidate for election to public office in the State of California or treasurer or chairman of a committee making any independent expenditures, hereby voluntarily endorse, subscribe to, and solemnly pledge myself to conduct my campaign in accordance with the above principles and practices."

SUPPLEMENT: [This section is current through the latest supplement]

The text of the Code of Fair Campaign Practices set out in *Elec.C. 20440* was amended in 2006. Most of the amendments are nonsubstantive. For instance, commas were deleted in the preamble following "observe and uphold" and "vigorously contested." In Paragraph (1), "such" was changed to "this." In paragraphs (1), (4), and (6), "which" was changed to "that." Paragraph (3) was more extensively amended. It now provides:

"(3) I SHALL NOT USE OR PERMIT any appeal to negative prejudice based on a candidate's actual or perceived race, religious creed, color, national origin, ancestry, physical disability, mental disability, mental condition, marital status, age, sexual orientation, sex, including gender identity, or any other characteristic set forth in *Section 12940 of the Government Code*, or association with another person who has any of the actual or perceived characteristics set forth in *Section 12940 of the Government Code*."



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F. Regulation of Political Advertising.

7 Witkin Sum. Cal. Law Const Law § 293

[§ 293] Regulation of Political Advertising.

The Truth in Political Advertising Act was enacted in 1998. (*Elec.C. 20010*.) It prohibits the production, distribution, publication, or broadcast, with *actual malice*, of campaign material that contains (1) "a picture or photograph of a person or persons into which the image of a candidate for public office is superimposed" or (2) "a picture or photograph of a candidate for public office into which the image of another person or persons is superimposed." "Actual malice" means knowledge that a person's image has been superimposed to create a false representation, or a reckless disregard of whether or not it creates a false representation. "Campaign material" includes printed matter, television commercials, and computer images. (*Elec.C. 20010(a)*.)

A superimposed picture or photograph may be used if it includes an adjacent statement, in specified size type, that "[t]his picture is not an accurate representation of fact." (*Elec.C. 20010(b)*.)

Any registered voter may seek a temporary restraining order and an injunction prohibiting the publication, distribution, or broadcast of offending campaign material, and a candidate whose likeness appears in an offending picture or photograph may bring a civil action for damages in an amount equal to the cost of producing, distributing, or broadcasting the offending campaign material, in addition to attorneys' fees and costs. (*Elec.C. 20010(c)*.)

The Act does not apply to a licensee under the federal Communications Act of 1934 (*47 U.S.C., §151 et seq.*), nor to the publisher or employee of a newspaper, magazine, or other regularly published periodical the primary purpose of which is not the publication of campaign advertising or communication. (*Elec.C. 20010(d)*.) (See 78 Proof of Facts 3d 1 [Equal Opportunity for Broadcast Time for Political Candidates].)

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G. Reapportionment.

1. Justiciable Issue.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 294

[§ 294] In General.

In *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, the Court, in a striking break with tradition, held that the issue of discriminatory apportionment of election districts, formerly thought to be a nonjusticiable "political question" (see *supra*, §87), was justiciable and was properly raised in a voters' representative suit. The action was brought by Tennessee voters in the federal district court under the Civil Rights Acts (42 U.S.C., §§1983, 1988; *infra*, §814 et seq.). The complaint alleged that the 1901 Tennessee statute apportioning members of the Legislature among the state's 95 counties denied them equal protection of the laws. The three-judge district court, relying on *Colegrove v. Green* (1946) 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, *supra*, §88, dismissed the action for lack of jurisdiction of the subject matter and failure to state a cause of action. *Held*, reversed for trial of the issue: "[W]e hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) ... that the appellants have standing to challenge the Tennessee apportionment statutes." (82 S.Ct. 699, 7 L.Ed.2d 674.)

(a) The federal district court had jurisdiction of the subject matter. A substantial claim of violation of the Constitution was asserted, the subject was within the federal judicial power, and even in *Colegrove v. Green*, the court's jurisdiction was recognized. (82 S.Ct. 700-703, 7 L.Ed.2d 674-677.)

(b) Plaintiffs had standing to sue. The question of standing is, essentially, whether the plaintiffs alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (82 S.Ct. 703, 7 L.Ed.2d 678.) The right to vote free of arbitrary impairment by state action is a recognized constitutional right, entitled to protection against a false tally, refusal to count votes, or ballot stuffing. Plaintiffs asserted a plain, direct and adequate interest in maintaining the effectiveness of their votes, and an injury suffered by the legislative classification that unjustifiably disfavored the voters in their counties and favored those in other counties. (82 S.Ct. 705, 7 L.Ed.2d 680.)

(c) Plaintiffs stated a justiciable cause of action. The fact that the suit sought protection of a *political right* did not mean that it presented a nonjusticiable *political question*. "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' " In other words, nonjusticiability "is primarily a function of the separation of powers."

(82 S.Ct. 706, 7 L.Ed.2d 682.) The elements of such a nonjusticiable question are "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (82 S.Ct. 710, 7 L.Ed.2d 686.) In brief, the doctrine is one of "political questions," not "political cases"; the courts cannot reject a bona fide controversy as to whether some "political" action exceeds constitutional authority. (82 S.Ct. 710, 7 L.Ed.2d 686.)

(d) The Guaranty Clause cases, i.e., those dealing with the guarantee of a republican form of government (supra, §87), are distinguishable. The Clause does not present "judicially manageable standards" that a court can apply to identify a state's lawful government. (82 S.Ct. 714, 7 L.Ed.2d 689.)

(e) The Court summed up the answers to the "political question" objection in these words: "The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of the government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." (82 S.Ct. 715, 7 L.Ed.2d 691.)

Three concurring opinions were filed. (82 S.Ct. 723, 727, 736, 7 L.Ed.2d 700, 705, 713.) Two dissenting opinions asserted that the majority reversed a uniform course of decision and failed to offer guidelines for remedies that they authorized. (82 S.Ct. 737, 771, 7 L.Ed.2d 706, 751.) (On distinction, for purposes of review by U.S. Supreme Court, between legislatively enacted and judicially imposed reapportionments, see *Wise v. Lipscomb* (1978) 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411.)

Commentary on reapportionment has been extensive. (For analyses of this extraordinary decision and speculation as to its effects, see 76 *Harv. L. Rev.* 54; 78 *Harv. L. Rev.* 149; 50 *Cal. L. Rev.* 245; 51 *Cal. L. Rev.* 535; for subsequent developments, see *infra*, §297 et seq.; on general problem, see 79 *Harv. L. Rev.* 1226 [exhaustive note]; 88 *Harv. L. Rev.* 1111 [Developments in the Law--Elections]; 111 *Harv. L. Rev.* 576 [Standing To Challenge Pro-Minority Gerrymandering]; 114 *Harv. L. Rev.* 878 [Federal Court Involvement in Redistricting Litigation]; 26 *Hastings L. J.* 190 [Fair and Effective Representation: Power to the People]; 34 *So. Cal. L. Rev.* 179; 38 *So. Cal. L. Rev.* 540; 42 *So. Cal. L. Rev.* 169; 17 *Stanf. L. Rev.* 863; 12 *U.C.L.A. L. Rev.* 1381; 13 *U.C.L.A. L. Rev.* 1345 [problem of remedy]; 1 *Western State L. Rev.* 29 [One Person, One Vote Doctrine--A Dead-End Street?]; 143 *A.L.R. Fed.* 631 [Inequalities in Population of Election Districts or Voting Units, Other than Districts or Units for Election to Congress or State or Territorial Offices, As Rendering Apportionment Violative of Federal Constitution].)

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See *Nadler v. Schwarzenegger* (2006) 137 C.A.4th 1327, 1335, 41 C.R.3d 92, Supp., *infra*, §301 [claim that reapportionment plan did not conform to requirements of California Constitution was justiciable]; 92 *Cal. L. Rev.* 1589 [Resolving the Dilemma of Minority Representation]; 121 *Harv. L. Rev.* 1842 [redistricting reform].



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G. Reapportionment.

1. Justiciable Issue.

b. Gerrymandering.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 295

[§ 295] In General.

While irregular districts for the purpose of excluding black voters were struck down in *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, supra, §238, and reapportionment based on population has been required (see infra, §297 et seq.), the basic question has remained: whether true "gerrymandering"--the deliberate and arbitrary distortion of political boundaries for political purposes--presented a justiciable issue; and if so, what was required to establish a violation of equal protection. (See 114 *Harv. L. Rev.* 878 [Federal Court Involvement in Redistricting Litigation]; 116 *Harv. L. Rev.* 593, 649, 684 [gerrymandering and political cartels]; 117 *Harv. L. Rev.* 1196 [partisan gerrymandering as federalism injury]; 40 *Hastings L. J.* 1067 [The Lack of Judicial Direction in Political Gerrymandering]; 4 *Pepperdine L. Rev.* 243; 42 *Stanf. L. Rev.* 1549 [judicial restraint as justifying intervention to remedy partisan gerrymandering]; 50 *Stanf. L. Rev.* 607, 779 [gerrymandering]; 33 *U.C.L.A. L. Rev.* 1 [entire issue].)

In *Davis v. Bandemer* (1986) 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85, the Indiana Legislature approved a legislative district reapportionment plan recommended by a conference committee consisting entirely of Republicans. Democratic members were excluded from the mapmaking process and had only 40 hours to examine the plan. In this action by Democrats against state officials, plaintiffs alleged that the reapportionment plan violated their right to equal protection. A three-judge federal district panel held that the issue was justiciable and that plaintiffs had made a sufficient showing of intentional discrimination based on political affiliation to justify injunction and other relief. *Held*, reversed, by a divided court. The lead opinion held that (a) political gerrymandering cases are justiciable under the Equal Protection Clause, but (b) plaintiffs had not made the necessary threshold showing of discriminatory vote dilution to make a prima facie case of violation of equal protection. (106 S.Ct. 2807, 2816, 92 L.Ed.2d 102, 112.) Three justices thought that partisan gerrymandering claims of major political parties raised a nonjusticiable political question. (106 S.Ct. 2816, 92 L.Ed.2d 112.) (See 100 *Harv. L. Rev.* 153.)

Bandemer was overruled in *Vieth v. Jubelirer* (2004) 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546, where another divided Court held that *political* gerrymandering claims are nonjusticiable. The legacy of the *Bandemer* test "is one long record of puzzlement and consternation" that "has been criticized for its indeterminacy by a host of academic commentators." (124 S.Ct. 1779, 158 L.Ed.2d 561.) Plaintiffs' suggested "predominant intent" standard is equally unworkable, partly because it "is impossible to assess the effects of partisan gerrymandering, to fashion a standard for

evaluating a violation, and finally to craft a remedy." (124 S.Ct. 1782, 158 L.Ed.2d 563.) The fact that the four dissenting justices came up with three different standards, all of which are different from the two standards proposed in *Bandemer* and the one imposed by plaintiffs here, goes to show that "there is no constitutionally discernible standard" to determine political gerrymandering claims. (124 S.Ct. 1784, 158 L.Ed.2d 566.)

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See 118 Harv. L. Rev. 343 [*Vieth v. Jubelirer*]; 119 Harv. L. Rev. 1576 [An Interstate Process Perspective on Political Gerrymandering].



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G. Reapportionment.

1. Justiciable Issue.

b. Gerrymandering.

2. To Benefit Racial Minority Groups.

7 *Witkin Sum. Cal. Law Const Law* § 296

[§ 296] To Benefit Racial Minority Groups.

(1) *In General.* In *Shaw v. Reno* (1993) 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the Court introduced its opinion as follows: "This case involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional 'right' to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups." (113 S.Ct. 2819, 125 L.Ed.2d 520.)

The first of two majority-black districts is centered in the northeast portion of North Carolina. It moves southward until it tapers to a narrow bank, then with finger-like extensions, reaches far into the southernmost part of the state. The second is approximately 160 miles long, and "winds in snake-like fashion" through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." (113 S.Ct. 2820, 2821, 125 L.Ed.2d 521.) Appellants, five North Carolina residents, filed this action against state and federal officials, claiming that the state had created an unconstitutional racial gerrymander. *Held*, appellants stated a claim under the *Equal Protection Clause*. (113 S.Ct. 2824, 125 L.Ed.2d 525.)

(a) "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. ... By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." (113 S.Ct. 2827, 125 L.Ed.2d 529.)

(b) "The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." (113 S.Ct. 2827, 125 L.Ed.2d 529.)

(c) "For these reasons, we conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification. It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim. ... We hold only that, on the facts of this case, plaintiffs have stated a claim sufficient to defeat the state appellees' motion to dismiss." (113 S.Ct. 2828, 125 L.Ed.2d 530.)

Three justices joined in a dissenting opinion. (113 S.Ct. 2834, 125 L.Ed.2d 537.) Two filed separate dissenting opinions. (113 S.Ct. 2843, 2845, 125 L.Ed.2d 548, 550.) (See 107 Harv. L. Rev. 194; 22 Pepperdine L. Rev. 727.)

(2) *Necessary Proof.* In *Miller v. Johnson* (1995) 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762, the Court considered the type of proof necessary to show racial gerrymandering under *Shaw*. *Miller* involved a Georgia congressional districting plan with three majority-black districts; the plan was adopted after the Justice Department refused to preclear, under the Voting Rights Act, two earlier plans that each contained only two majority-black districts. The new Eleventh District, which joined metropolitan black neighborhoods together with poor black coastal areas 260 miles away, was challenged as a racial gerrymander; the district court agreed, holding that evidence of the Georgia Legislature's purpose, as well as the district's irregular borders, showed that race was the overriding and predominant force in the districting determination. *Held*, affirmed.

(a) A threshold showing of bizarreness is not required when a district is challenged on the ground of racial gerrymandering. "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting." (115 S.Ct. 2486, 132 L.Ed.2d 777.)

(b) "The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." (115 S.Ct. 2488, 132 L.Ed.2d 779, 780.)

(c) The district court's finding that race was the predominant factor motivating the Eleventh District's drawing was not clearly erroneous. In addition to evidence of the district's shape and racial demographics, there was evidence that the Georgia Legislature was motivated by an overriding desire to create a third majority-black district in order to comply with the Justice Department's maximization demands. (115 S.Ct. 2488, 2489, 132 L.Ed.2d 780.)

(d) Because race was the predominant factor in drawing the Eleventh District, Georgia's redistricting plan is subject to strict scrutiny and can be upheld only if it is narrowly tailored to achieve a compelling interest. (115 S.Ct. 2490, 132 L.Ed.2d 782.) There is a significant state interest in eradicating the effects of past racial discrimination, but Georgia does not argue that as its motive. Georgia's true interest was to satisfy the Justice Department's preclearance demands. But compliance with federal antidiscrimination laws cannot justify race-based districting where, as here, the challenged plan is not reasonably necessary under those laws. (115 S.Ct. 2490, 2491, 132 L.Ed.2d 782, 783.) (See *United States v. Hays* (1995) 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 [state residents living in one congressional district lacked standing to raise racial gerrymandering claim with respect to different congressional district]; *Shaw v. Hunt* (1996) 517

U.S. 899, 116 S.Ct. 1894, 1901, 1905, 135 L.Ed.2d 207, 219, 225 [North Carolina redistricting plan that added majority-black district violated Equal Protection Clause because race was predominant consideration and plan could not withstand strict scrutiny]; *Bush v. Vera* (1996) 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 [Texas redistricting plan that created three minority districts violated Fourteenth Amendment because districts were not narrowly tailored to serve compelling state interest]; 109 *Harv. L. Rev.* 160 [Miller]; 111 *Harv. L. Rev.* 2276 [Standing and Misunderstanding in Voting Rights Law]; 114 *Harv. L. Rev.* 1663 [Shaw cases]; 116 *Harv. L. Rev.* 2208 [future of majority-minority districts in light of declining racially polarized voting]; 23 *Pepperdine L. Rev.* 1317 [Miller]; 49 *Stanf. L. Rev.* 381 [Standing in Racial Gerrymandering Cases]; 50 *Stanf. L. Rev.* 731 [reapportionment after 2000 census]; 50 *Stanf. L. Rev.* 765 [partisan impact of Voting Rights Law]; 50 *Stanf. L. Rev.* 915 [hybrid nature of political rights].)

(3) *Burden of Proof.* In *Easley v. Cromartie* (2001) 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430, the Court addressed the burden of proving that racial considerations are "dominant and controlling," as required by *Miller*. Where majority-minority districts "are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternate ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." (121 S.Ct. 1466, 149 L.Ed.2d 453.) This burden was not met here. (121 S.Ct. 1466, 149 L.Ed.2d 453.) (See 115 *Harv. L. Rev.* 386 [Easley]; 29 *Hastings Const. L. Q.* 61 [Colorblind Redistricting: Racial Proxies as a Solution to the Court's Voting Rights Act Quandary].)

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G. Reapportionment.

2. Discriminatory Weighted Voting.

7 *Witkin Sum. Cal. Law Const Law* § 297

[§ 297] Discriminatory Weighted Voting.

Another unprecedented step was taken in *Gray v. Sanders* (1963) 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821, which invalidated county unit voting in primary elections. Under Georgia law, candidates for Senator and Governor in statewide primaries were chosen on a system under which the winner of the majority of popular votes in a particular county carried the county and received its two votes for the nomination. The result was a heavily weighted rural vote (e.g., one unit vote in E County represented 938 residents, while one in F County represented 92,721 residents). An action for an injunction and declaratory relief was brought by a qualified voter. At the time of the hearing in the three-judge federal district court, Georgia amended the statutes to establish a "bracket system," which gave additional unit votes to larger counties, based on certain multiples of increased population. The district court held that the modified system was insufficient to meet constitutional objections, although the decision did not completely outlaw any weighting of votes. After the decision, the state Democratic Committee voted to hold the 1962 primary election on a popular basis.

The Supreme Court held preliminarily that the practice of the Democratic Party was state action under *United States v. Classic* (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, and *Smith v. Allwright* (1944) 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, that the voter, whose vote was impaired, had standing to sue under *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, supra, §294; and that the proceeding was not rendered moot by the 1962 change, for the unit law was still in effect and could be followed in future elections. (83 S.Ct. 805, 806, 9 L.Ed.2d 827.) On the merits, the court reasoned as follows:

(a) The right of a state to choose one house of a bicameral legislature without regard to population is not questioned. (83 S.Ct. 806, 9 L.Ed.2d 828.) (But see *infra*, §299, for rejection of this view.)

(b) The method of the electoral college, which the district court thought permissible in justifying equivalent weighting of votes, is improper in a statewide election in a state. (83 S.Ct. 807, 9 L.Ed.2d 829.)

(c) States can within limits (not defined) specify qualifications of voters in both state and federal elections, e.g., by literacy tests. But they cannot abridge the voting right of a Black or a woman (Fifteenth, Nineteenth Amendments), and a system that weighted the white or male vote more heavily than the black or female would be unconstitutional. (83 S.Ct. 808, 9 L.Ed.2d 829.) The same principle applies to favoring the rural over the urban vote. "How then can one

person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." (83 S.Ct. 808, 9 L.Ed.2d 829.)

(d) The only weighting of votes sanctioned by the Constitution concerns matters of *representation* (such as allocation of senators irrespective of population) and the constitutionally established *electoral college for choice of a President*. In elections, once the class of eligible voters is determined, the Constitution requires equality of voting power--"one person, one vote." (83 S.Ct. 809, 9 L.Ed.2d 830.) (See 77 Harv. L. Rev. 132; 79 Harv. L. Rev. 1228; 88 Harv. L. Rev. 1182.)

In *Fortson v. Morris* (1966) 385 U.S. 231, 87 S.Ct. 446, 17 L.Ed.2d 330, a 5-4 opinion, the majority confined the holding of *Gray v. Sanders* to voters' rights. In Georgia's 1966 election for Governor, none of the three candidates received a majority. The General Assembly, pursuant to a state constitutional directive, elected the Governor from the two receiving the highest votes. *Held*, a state may elect a Governor initially by a vote of the Legislature, and it may use this method as an alternative to a costly reelection. (87 S.Ct. 448, 17 L.Ed.2d 333.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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G. Reapportionment.
3. Congressional Districts.

7 *Witkin Sum. Cal. Law Const Law* § 298

[§ 298] Congressional Districts.

(1) *In General. Wesberry v. Sanders* (1964) 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, interpreted the crucial provision of Article I, §2, of the federal Constitution: "The House of Representatives shall be composed of Members chosen ... by the People of the several states." While it may not be possible to draw congressional districts with mathematical precision, the plain objective of the Constitution is that there must be equal representation for equal numbers of people in the House. Accordingly, Georgia's apportionment of districts was held invalid on a showing that the Fifth District had only one Congressman, while others, with much less population, also had one *Congressman each*. (84 S.Ct. 535, 11 L.Ed.2d 492.) Three justices dissented, taking the position that the constitutional provision gives the courts no mandate to require that congressional districts be equal in population. (84 S.Ct. 536, 11 L.Ed.2d 494.) (See 78 *Harv. L. Rev.* 244; 79 *Harv. L. Rev.* 1228; 38 *So. Cal. L. Rev.* 67; on Congressional apportionment of number of seats allowed to each state, see *United States Dept. of Commerce v. Montana* (1992) 503 U.S. 442, 112 S.Ct. 1415, 1429, 118 L.Ed.2d 87, 105 [discussing history, various apportionment methods, and difficulties in achieving mathematical equality; Congress has "measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders"].)

Two subsequent decisions held to the tight line laid down in *Wesberry v. Sanders*:

In *Kirkpatrick v. Preisler* (1969) 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519, a Missouri statute created districts that were unequal. The most populous district was 3.13% above the mathematical ideal, and the least populous 2.83% below. The district court found that the legislature had not in fact relied on the census figures, and had rejected a plan that provided for smaller variances. Missouri argued that the variances were so small as to be considered *de minimis*, and hence that they met the "as nearly as practicable" standard of *Wesberry*, and that there were other justifications for the variances, including representation of distinct interest groups, integrity of county lines, compactness of districts, population trends, high proportion of military personnel and other nonvoters in some districts, and political realities of "legislative interplay." *Held*, the district court's refusal to approve the statute was proper.

(a) No fixed variance is *de minimis*. The "as nearly as practicable" approach requires "a good faith effort to achieve precise mathematical equality." (89 S.Ct. 1228, 22 L.Ed.2d 524.) Missouri did not make this effort.

(b) The other justifications were unacceptable: (1) Specific interest orientations are "antithetical" to the basic

premises of equal representation. (2) "Legislative interplay," i.e., compromise resulting from partisan politics, cannot justify improper apportionment; and the same is true of avoidance of fragmenting political subdivisions--this also is merely "practical politics." (3) Taking a count of nonvoters was haphazard--no attempt was made to ascertain the number of eligible voters and apportion accordingly. (4) Anticipated population shifts must be documented in a scientific, not an ad hoc manner. (5) The attempt to ensure geographically compact districts, based solely on the appearance of the map, cannot justify variances. (See *Karcher v. Daggett* (1983) 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 [following *Kirkpatrick*]; 97 Harv. L. Rev. 135 [Karcher].)

In *Wells v. Rockefeller* (1969) 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535, the heart of the redistricting scheme was to treat seven sections of the state as homogeneous regions, dividing each region into districts of virtually identical population. Thirty-one districts were constructed on that principle; the 10 remaining were composed of grouping of whole counties. *Held*, this was not a good faith effort to achieve precise mathematical equality. It created equal districts only within each of "seven sub-states," to keep regions with distinct interests intact. To accept the scheme would permit groups of districts with defined interest orientations to be over-represented at the expense of districts with different interest orientations. "Equality of population among districts in a sub-state is not a justification for inequality among all the districts in the State." (89 S.Ct. 1237, 22 L.Ed.2d 539.)

(2) *California Constitutional Provision*. Cal.Const., Art. XXI, §1, specifies that, in the year after the national census is taken at the beginning of each decade, boundary lines for senatorial, assembly, and congressional districts must be adjusted so that each district of a particular type is "reasonably equal." (Cal.Const., Art. XXI, §1(b).) Every district must be contiguous. (Cal.Const., Art. XXI, §1(c).) The geographical integrity of cities, counties, and geographic regions must "be respected to the extent possible without violating" other constitutional mandates. (Cal.Const., Art. XXI, §1(e).) (See 10 *San Diego L. Rev.* 757 [California reapportionment problems].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 79 *So. Cal. L. Rev.* 165 [evaluating California's proposed redistricting commission]. (2) *California Constitutional Provision*. An amendment to Cal. Const., Art. XXI, was adopted by the voters at the November 2008, general election. The redistricting of senatorial, assembly, and congressional districts must be performed by an independent Citizens Redistricting Commission made up of five Republicans, five Democrats, and four persons not affiliated with either major party. (Cal. Const., Art. XXI, §2, added in 2008.) The new redistricting provisions are implemented by *Govt.C. 8251 et seq.*, added in 2008. The Commission must draw the districts based on strict, nonpartisan rules designed to ensure fair representation, including an open hearing process for public input. (See *Govt.C. 8253*.)



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G. Reapportionment.

4. State Legislative Districts.

a. Reynolds v. Sims.

7 *Witkin Sum. Cal. Law Const Law* § 299

[§ 299] Reynolds v. Sims.

In *Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, the requirement of equality was extended to districting for both houses of a state legislature. Alabama voters of Jefferson County brought a class suit in the federal district court. They showed that the constitutional and legislative provisions on apportionment were based on a 1900 federal census, and the Legislature had consistently failed to reapportion. The district court took judicial notice of the essential facts of nonreapportionment, and withheld immediate orders pending action by the Alabama Legislature. But the plans proposed, like the original, kept the basic idea of one senator for each senatorial district, regardless of population, and also kept the House of Representatives with unequal voting power (ratios of up to 41-1 in Senate, 16-1 in House). The district court found the plans unconstitutional, ordered a temporary reapportionment plan, and retained jurisdiction to hear plaintiff's application for an injunction until the provisionally reapportioned Legislature had an opportunity to provide for true reapportionment in 1965. *Held*, affirmed, in an exhaustive opinion.

(a) *The constitutional right to vote.* The federal Constitution protects the right of all qualified citizens to vote in state as well as federal elections, and the right is denied by dilution of the weight of a vote. (84 S.Ct. 1378, 12 L.Ed.2d 523.)

(b) *Principles established by prior reapportionment cases.* (1) *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, *supra*, §294, held that the Equal Protection Clause provides standards to be applied by lower courts. (84 S.Ct. 1379, 12 L.Ed.2d 524.) (2) *Gray v. Sanders* (1963) 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821, *supra*, §297, and *Wesberry v. Sanders* (1964) 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, *supra*, §298, though dealing with different problems, established the basic principle of equality of voters within a state. (84 S.Ct. 1381, 12 L.Ed.2d 526.)

(c) *Basic consideration controlling instant case.* Voting rights are individual and personal; legislators represent people, not areas or economic interests. Hence, "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen has an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less." (84 S.Ct. 1383, 12 L.Ed.2d 529.)

(d) *The constitutional principle.* "We hold that as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." (84 S.Ct. 1385, 12 L.Ed.2d 531.)

(e) *Rejection of the federal analogy.* The system of the two federal houses is "ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic." (84 S.Ct. 1388, 12 L.Ed.2d 534.)

(f) *The equality principle applies to a bicameral legislature.* The Equal Protection Clause necessarily requires that both houses be apportioned on a population basis; otherwise the right would be effectively thwarted. "[W]e can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature." (84 S.Ct. 1389, 12 L.Ed.2d 536.) The concept of bicameralism is not rendered anachronistic and meaningless by this holding. A prime reason for bicameralism today is to insure mature and deliberate consideration of measures. Although apportionment will be the same, there may be differences in the composition of the two bodies: different constituencies, single or multimember districts, terms of different length, numerical size of the bodies, etc. (84 S.Ct. 1389, 12 L.Ed.2d 536.)

(g) *Standards to be worked out by lower courts.* Periodic revision--usually decennial reapportionment--is a rational approach; if accomplished with less frequency, it is constitutionally suspect. (84 S.Ct. 1393, 12 L.Ed.2d 541.) And the federal district court acted with proper judicial restraint, in ordering its own temporary plan into effect for current elections, and in retaining jurisdiction to hear the matter of a final injunction. (84 S.Ct. 1394, 12 L.Ed.2d 541.)

The dissenting opinion vigorously attacks the majority's historical analysis and its declaration of constitutional principles, arguing that the decision places basic aspects of state political systems under "pervasive overlordship of the federal judiciary" (84 S.Ct. 1396, 12 L.Ed.2d 543); that no principle of logic or politics establishes its exclusion of factors formerly deemed proper in establishing districts (84 S.Ct. 1413, 12 L.Ed.2d 562); that the problems are not amenable to the development of fixed standards; that judicial entry into this realm "is profoundly ill-advised and constitutionally impermissible", and that the validity of our political system is weakened by reliance on the judiciary for political reform (84 S.Ct. 1414, 12 L.Ed.2d 563).

SUPPLEMENT: [This section is current through the latest supplement]

See 79 So. Cal. L. Rev. 165 [evaluating California's proposed redistricting commission].



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4. State Legislative Districts.

b. Subsequent United States Supreme Court Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 300

[§ 300] Subsequent United States Supreme Court Decisions.

In *Fortson v. Dorsey* (1965) 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401, the challenge was to Georgia's attempt to solve its problem by a constitutional amendment authorizing legislative creation of senatorial districts as a unit. The 1962 reapportionment statute apportioned the 54 seats among the 159 counties, as follows: (a) 33 senatorial districts were made up of one to eight counties each, voters in these districts to elect senators by a district-wide vote; (b) 21 districts were allotted in groups of from two to seven among the seven most populous counties, voters to join with those of the other districts of the counties in county-wide votes. *Held*, this complies with *Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, *supra*, §299. Equal protection does not necessarily require formation of single-member districts, and the Georgia plan resulted in "substantial equality of population" among the 54 districts. The contention that county-wide voting in multidistrict counties could, as a matter of mathematics, result in nullification of the unanimous choice of the voters of a district, was rejected as ignoring practical realities. (85 S.Ct. 500, 13 L.Ed.2d 404.)

In *WMCA v. Lomenzo* (1964) 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568, the New York legislative apportionment was held unconstitutional. An analysis of the state Constitution, statutes, and practice disclosed formulae that "demonstrably include a built-in bias against voters living in the State's more populous counties." (84 S.Ct. 1428, 12 L.Ed.2d 580.) A strong dissent attacked the majority holding, stating that the Court's view that each state's bicameral electoral constituencies must be apportioned on a population basis is "woefully wrong." It was not the colonial system, the national government system, the practice of states before the Fourteenth Amendment, or the practice of states today. (84 S.Ct. 1430, 12 L.Ed.2d 582.)

The special problem of Hawaii was considered in *Burns v. Richardson* (1966) 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376. Under the Hawaiian Constitution, three small counties elected 15 state senators; the fourth, with 79% of the total population, elected only 10, but that county had 36 of 51 seats in the lower House, apportioned on the basis of registered voters. On order of the federal district court, the Legislature submitted an interim plan allocating to the most populous county 19 of the 25 senatorial seats on the basis of registered voters, to be elected from multimember districts. *Held*, the interim plan was valid.

(a) Multimember districts are not inherently unconstitutional; they are invalid only if the apportionment would

minimize or cancel out the voting strength of racial or political elements of the population. (86 S.Ct. 1294, 16 L.Ed.2d 388.)

(b) The registered voter basis is, under proper circumstances, a valid measure. The Equal Protection Clause does not require the use of total population figures derived from the federal census; e.g., the states need not include aliens, transients, or short-term or temporary residents. (86 S.Ct. 1296, 16 L.Ed.2d 390.)

(c) The use of registered or actual voters as a basis is susceptible of improper influences by those in political power, and to sudden and substantial fluctuations caused by such fortuitous factors as a peculiarly controversial election issue or a particularly popular candidate. (86 S.Ct. 1297, 16 L.Ed.2d 391.) However, total population figures would also constitute a distorted reflection of the distribution of state citizenry, for tourists and the military are largely confined to particular areas of Oahu. Hence, a finding that registered-voter distribution does not approximate total population distribution is insufficient to establish constitutional deficiency. "It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base." (86 S.Ct. 1298, 16 L.Ed.2d 392.)

(d) "We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances . . . Use of presidential election year figures might both assure a high level of participation and reduce the likelihood that varying degrees of local interest in the outcome of the election would produce different patterns of political activity over the State. Other measures, such as a system of permanent personal registration, might also contribute to the stability and accuracy of the registered voters figure as an apportionment basis. Future litigation may reveal infirmities, temporary or permanent, not established by the present record." (86 S.Ct. 1299, 16 L.Ed.2d 393.) (For cases upholding multimember districts, see *Whitcomb v. Chavis* (1971) 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363; *Mahan v. Howell* (1973) 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320; *Georgia v. United States* (1973) 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472; *Gaffney v. Cummings* (1973) 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298; 85 Harv. L. Rev. 135 [*Whitcomb v. Chavis*]; 87 Harv. L. Rev. 85 [*Mahan v. Howell*]; 87 Harv. L. Rev. 85 [*Gaffney v. Cummings*]; on compensatory apportionment, see 25 Stanf. L. Rev. 84.)

Many other decisions have, on various grounds, held apportionment plans invalid. (See *Maryland Committee for Fair Representation v. Tawes* (1964) 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 [Maryland]; *Davis v. Mann* (1964) 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609 [Virginia]; *Roman v. Sincok* (1964) 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620 [Delaware]; *Lucas v. Forty-Fourth General Assembly of Colorado* (1964) 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 [Colorado]; *White v. Regester* (1973) 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 [multimember Texas Senate and House districts, designed to discriminate against Blacks]; *Chapman v. Meier* (1975) 420 U.S. 1, 95 S.Ct. 751, 766, 42 L.Ed.2d 766, 784 [North Dakota multimember district plan ordered by federal district court; "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation"]; *Connor v. Finch* (1977) 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 [Mississippi]; *Rogers v. Lodge* (1982) 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 [*White v. Regester* followed].)

Other cases have upheld apportionment plans. (See *Mobile v. Bolden* (1980) 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, supra, §229 [city's system of government by at-large, multimember commission upheld]; *Brown v. Thomson* (1983) 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 [upholding plan allocating one of 64 seats in state's legislature to county with small population]; 94 Harv. L. Rev. 138 [*Mobile*]; 34 *Hastings Const. L. Q.* 1 [from *Reynolds v. Sims* to *Mobile v. Bolden*].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. State Legislative Districts.

c. California Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 301

[§ 301] California Decisions.

(1) *Invalidity of Former Districts.* Shortly after the rendition of the U.S. Supreme Court decisions requiring substantial equality in voting districts (see *supra*, §§299, 300), the California legislative districting was challenged in the federal district court and the California Supreme Court. The federal district court directed reapportionment of Senate districts by July 1, 1965 (see 38 *So. Cal. L. Rev.* 726), but the California Supreme Court then took jurisdiction and made its own order directing action. (*Silver v. Brown* (1965) 63 *C.2d* 270, 46 *C.R.* 308, 405 *P.2d* 132.) (For California constitutional provision mandating adjustment of district boundaries after each national census, see Cal.Const., Art. XXI, §1, *supra*, §298.)

In *Silver v. Brown*, petitioners sought mandamus to compel the Governor, Secretary of State, and members of the Senate and Assembly to reapportion districts in compliance with the Equal Protection Clause. The court reviewed the legislative and judicial history of this controversy and set forth definitive standards for legislative action, with an alternative plan of its own.

(a) *Invalidity of present districting.* The federal district court decision, affirmed by the U.S. Supreme Court without opinion, conclusively determined the invalidity of the existing apportionment of Senate districts. (63 *C.2d* 275.) The apportionment of Assembly districts is likewise invalid; of the 80, 24 depart from the ideal by more than 15%, and a minority of 44.83% of the voters could elect a majority of assembly members. (63 *C.2d* 276.) And (former) Cal. Const., Art. IV, §6, cannot be wholly reconciled with the equality requirement (e.g., in its prohibitions against more than one Senate district in a county and against certain joinder of counties). Hence, some of its provisions must be disregarded. (63 *C.2d* 279.)

(b) *Judicial declaration of standards.* Although the U.S. Supreme Court has not demanded rigid mathematical equality, its decisions do require substantial equality. Hence, "we deem it only fair to the Legislature to set forth limits within which an apportionment would at least carry a strong presumption of validity under the equal protection clause and beyond which it would be seriously suspected. Those limits are that no district depart from the ideal size by more than 15 per cent and that a majority of the members of each house be elected by the voters of districts containing at least 48 per cent of the total population." (63 *C.2d* 279.)

(c) *Legislative implementation.* "The makeup and apportionment of the Legislature involve peculiarly political questions that are not appropriate for this court to decide. They are far better entrusted to the collective political wisdom of the Legislature subject to the power of initiative and referendum reserved to the people. Our function under the decisions of the United States Supreme Court is to assure adherence to the requirements of the equal protection clause, not to resolve the purely political questions also inherent in legislative apportionment." (63 C.2d 280.)

(d) *Reservation of jurisdiction.* The court set its deadline of December 9, 1965, and reserved jurisdiction (1) to review reapportionment legislation, and (2) in the event of failure to enact valid legislation, to order into effect, for a 2-year period, its own temporary plan, set forth in an Appendix to the opinion. (63 C.2d 282, 283.)

In a later opinion, *Silver v. Brown* (1966) 63 C.2d 841, 48 C.R. 609, 409 P.2d 689, the 1965 reapportionment of the Senate and Assembly was upheld. (See 40 So. Cal. L. Rev. 646 [criticizing *Silver* cases and proposing new reapportionment section for California Constitution].)

(2) *Reapportionment Commission and Court Order To Reapportion.* Former Cal.Const., Art. IV, §6, adopted in 1926, provided for legislative reapportionment and for the creation of a "Reapportionment Commission" of designated state officers in the event of failure of the Legislature to act. The Legislature did act, and, although its reapportionment was eventually held invalid, the Commission was not required to act. (See *Yorty v. Anderson* (1963) 60 C.2d 312, 33 C.R. 97, 384 P.2d 417.)

In 1971, the Legislature passed reapportionment bills which the Governor vetoed. The Commission then asserted authority to reapportion. In *Legislature v. Reinecke* (1972) 6 C.3d 595, 99 C.R. 481, 492 P.2d 385, the court held that the Commission had no power to act, and that the only proper course was to adopt the legislative plan as the court's plan for the imminent 1972 elections. But jurisdiction was retained to draft a new reapportionment if the Legislature did not act by the close of its 1972 regular session. (6 C.3d 603.) (See *Legislature v. Reinecke* (1972) 7 C.3d 92, 101 C.R. 552, 496 P.2d 464 [at request of state Senate, court will refrain from exercising jurisdiction if Legislature in 1972 enacts valid statutes]; 61 Cal. L. Rev. 605.)

(3) *Court Reapportionment in 1973.* The 1972 Legislature did not enact reapportionment statutes, and the court appointed special masters to undertake a study and make a recommendation to the court. In 1973, while the study was in progress, the Legislature did adopt statutes but these were vetoed by the Governor. The Masters' Report was filed in August 1973, briefs and communications from various interested groups were received, and in *Legislature v. Reinecke* (1973) 10 C.3d 396, 110 C.R. 718, 516 P.2d 6, the court approved the Report by ordering judgment final forthwith. The opinion reviews in summary form the goal of the Masters, the criteria used by them, the principal objections to their reapportionment plan, and their resolution of conflicts among the criteria. The entire Report is set forth in a 42-page Appendix. (10 C.3d 408.)

(a) *Goal sought.* "[I]nnumerable districts ideal for particular communities can be constructed if each is considered in isolation but when the entire state is divided into a specified number of districts, that which may appear ideal for one place or another must be subordinated to the goal of fair and reasonable reapportionment of the whole state. That is the goal sought and upon which the recommendations to the Court are based." (10 C.3d 403.)

(b) *Criteria used.* "(1) The districts in each plan should be equal in population, with strict equality in the case of congressional districts and reasonable equality in the case of legislative districts. (2) The territory included within a district should be contiguous and compact. (3) Insofar as practical, counties and cities should be maintained intact. (4) Insofar as possible, the integrity of the state's basic geographical regions should be preserved. (5) The community of interests of the population of an area should be considered in determining whether the area should be included within or excluded from a proposed district so that all of the citizens of the district may be represented reasonably, fairly and effectively. (6) State senatorial districts should be formed by combining adjacent assembly districts, and, to the degree practicable, assembly district boundaries should be used as congressional district boundaries. (7) The basis for reapportionment should be the 1970 census, and in counties where census tracts exist, such tracts should be used as the

basic unit for district formation." (10 C.3d 402.) (For detailed discussion and citation of authorities, see *Appendix*, 10 C.3d 410.)

(c) *Rejection of criterion favoring incumbents.* Although there are values in maintaining relationships between incumbents and their constituencies, these should not call for design of district boundaries to preserve the status quo and thereby promote the reelection of incumbents; in nearly all cases "incumbent-neutral districting" will permit an incumbent to seek reelection in a new district that will contain a substantial part of his or her former constituency. (10 C.3d 403.)

(d) *Staggered terms.* The state Senate is constitutionally organized with 40 4-year terms, 20 to begin every 2 years. Adherence to this staggered term arrangement following reapportionment is not unconstitutionally discriminatory. (10 C.3d 406.)

(e) *Durational residence requirements are inapplicable.* Cal.Const. Art. IV, §2(c), imposes a 1-year district residence requirement for candidates for the Legislature. This provision contemplates that districts will be established at least a year before the election, and, since this will not be true when the reapportionment plan goes into effect, the constitutional provision by its own terms is inapplicable. Hence, a candidate will be eligible if he or she becomes a resident of the district by January 28, 1974 (the first day for filing the declaration of intention under former Elec.C. 25500, now Elec.C. 8022). (10 C.3d 406.)

(4) *Court Reapportionment in 1981.* The 1981 reapportionment statutes were the subject of elaborate majority and dissenting opinions in *Assembly of Calif. v. Deukmejian* (1982) 30 C.3d 638, 180 C.R. 297, 639 P.2d 939.

(5) *Court Reapportionment in 1991.* In *Wilson v. Eu* (1991) 54 C.3d 471, 286 C.R. 280, 816 P.2d 1306, petitioner, Governor of California, brought mandamus proceedings against respondent Secretary of State, to resolve the impasse created by the failure of the Legislature to pass legislative and congressional reapportionment bills acceptable to him in time for the 1992 primary and general elections. The Supreme Court issued the writ, declaring that "it is now incumbent on this court to exercise its original jurisdiction and arrange for the drafting and adoption of appropriate reapportionment plans." (54 C.3d 472.) The opinion provides for the appointment of three Special Masters authorized (a) to employ counsel, experts, and other necessary personnel, (b) to hold public hearings on proposed plans of reapportionment, and thereafter (c) to file their report and recommendations to the court no later than November 29, 1991. (54 C.3d 473.) "If at any time during these proceedings congressional and legislative reapportionment plans are validly enacted, this court will entertain an application to dismiss these proceedings." (54 C.3d 474.)

The recommendations of the Special Masters were adopted by the Supreme Court in *Wilson v. Eu* (1992) 1 C.4th 707, 4 C.R.2d 379, 823 P.2d 545. The majority opinion describes the procedure followed in public hearings leading to the *Report and Recommendations* (1 C.4th 713), and reviews some of the highlights of the *Report* (1 C.4th 714). An *Appendix* sets forth the *Report and Recommendations*. (1 C.4th 741.)

The opinion concludes: "We specifically endorse the Masters' analyses and recommendations regarding the proper weight and application of the various reapportionment criteria. Although we likewise approve the Masters' interpretation and application of the Voting Rights Act, we acknowledge that any questions arising thereunder are essentially ones of federal law, and that any definitive answers to these complex questions ultimately must be provided by the United States Supreme Court. We are satisfied that, by reason of the Masters' successful efforts to maximize the actual and potential voting strength of all geographically compact minority groups of significant voting age population, a federal Voting Rights Act challenge would lack merit." (1 C.4th 729.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *(New) Court Reapportionment in 2001.* "[A] reapportionment plan enacted by the Legislature and approved by the Governor is entitled to significant judicial deference." Although the California Constitution calls for respecting the geographical integrity of cities and counties, this standard is flexible, and the dictates of federal principles of equal

protection and the Voting Rights Act must be considered. (*Nadler v. Schwarzenegger* (2006) 137 C.A.4th 1327, 1337, 1339, 1344, 41 C.R.3d 92 [in challenging reapportionment plan, plaintiff has burden of demonstrating that adopted plan poses total and fatal conflict with applicable constitutional provisions; Legislature may properly choose plan that minimizes chance of challenge based on Voting Rights Act].)

(7) (*New*) *California Constitutional Provision*. Under Cal. Const., Art. XXI, as amended in 2008, the redistricting of state legislative districts must be performed by an independent Citizens Redistricting Commission made up of an equal number of Republicans and Democrats, with participation of independent voters. (See Supp., *supra*, §298.)



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G. Reapportionment.
5. County Supervisorial Districts.

7 *Witkin Sum. Cal. Law Const Law* § 302

[§ 302] County Supervisorial Districts.

Boundaries of county supervisorial districts must be adjusted following each decennial federal census to make the districts nearly equal in population, and considering other factors such as topography, contiguity, and community of interests. (*Elec.C. 21500*; see *Elec.C. 21500.1* [board must hold at least one public hearing on any proposed adjustment].) In several cases, however, it was found that gross inequalities were present and that the boards refused to take steps to redistrict. Accordingly, writs of mandamus issued, directing redistricting, with reserved jurisdiction in the event of noncompliance within a reasonable time. (See *Griffin v. Board of Supervisors of Monterey County* (1963) 60 C.2d 318, 320, 33 C.R. 101, 384 P.2d 421 [Monterey County]; *Henderson v. Superior Court* (1964) 61 C.2d 883, 37 C.R. 438, 390 P.2d 206 [Marin County; memorandum decision]; *Miller v. Board of Supervisors of Santa Clara County* (1964) 61 C.2d 885, 37 C.R. 440, 390 P.2d 208 [Santa Clara County; memorandum decision]; for examples of redistricting plans held valid, see *Griffin v. Board of Supervisors of Monterey County* (1964) 60 C.2d 751, 36 C.R. 616, 388 P.2d 888 [Monterey County redistricting upheld]; *Griswold v. San Diego* (1973) 32 C.A.3d 56, 107 C.R. 845.)

In *Miller v. Board of Supervisors of Santa Clara County* (1965) 63 C.2d 343, 46 C.R. 617, 405 P.2d 857, the court, reviewing the Santa Clara redistricting under its reserved jurisdiction, found that too great a disparity still existed, and directed reapportionment that would eliminate any district with more than 23% or less than 17% of the overall population. The same general standards, and similar methods of implementation, apply to legislative and local reapportionment: "Although we are not here dealing with voting apportionment at the level of the state legislature ... no reason appears why equal protection assures representative voting to the electors of the State of California as a whole but not of the County of Santa Clara." (63 C.2d 348.) (See 4 Santa Clara Lawyer 201 [Miller].)

Avery v. Midland County, Texas (1968) 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45, applied the one man-one vote principle of *Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, supra, §299, to the election of local government officials. "[I]t is now beyond question that a state's political subdivisions must comply with the Fourteenth Amendment." (88 S.Ct. 1118, 20 L.Ed.2d 49.) (See *Abate v. Mundt* (1971) 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 [plan upheld]; 82 Harv. L. Rev. 118 [Avery]; 85 Harv. L. Rev. 146 [Abate]; 23 Hastings L. J. 763 [impact of Fourteenth Amendment on structure of local governments].)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Reapportionment.

6. City Council Districts.

7 *Witkin Sum. Cal. Law Const Law* § 303

[§ 303] City Council Districts.

In *Calderon v. Los Angeles* (1971) 4 C.3d 251, 93 C.R. 361, 481 P.2d 489, the court nullified a Los Angeles city charter provision for 15 city council districts based on the number of voters rather than *people*.

(a) *One man-one vote principle*. The language of Supreme Court decisions has not been precise: inhabitant, citizen, resident, and voter have been used interchangeably. (4 C.3d 255.) And cases use population and voter standards as similar when they are quite distinct. But in *Burns v. Richardson* (1966) 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376, supra, §300, the court recognized the distinction, and laid down the principle that a voter standard is valid only if it produces a distribution of legislators not substantially different from that which would have resulted from a population standard. (4 C.3d 256.)

(b) *Principle applies to city councils*. The one man-one vote principle and the *Burns* rule apply to apportionment of voting districts for council seats. (4 C.3d 257.) And, in addition to the controlling decisions, considerations of policy favor this result. Persons who may not be voters are nonetheless interested in having representatives to communicate with (4 C.3d 259), and a showing was made of severe underrepresentation of districts with heavy concentrations of Blacks and Mexican-Americans (4 C.3d 260).

(c) *Validity of a properly devised voter-based apportionment*. The *Burns* factors are guidelines. (1) Voter registration must show a significant correlation to population distribution, (2) reapportionment must take place frequently, (3) registration statistics from presidential elections should be used to reduce the likelihood of fluctuations in local interest and erratic patterns of political activity, and (4) a system of permanent personal registration must be introduced. (4 C.3d 265.)

(d) *Allowable deviation*. The charter permits districts to deviate by not more than 10%. Early decisions did not insist on mathematical exactness, but "in recent years the Supreme Court has shown a steadfast determination to tolerate progressively smaller deviations from numerical equality." (4 C.3d 266, citing *Kirkpatrick v. Preisler* (1969) 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519, supra, §298 [invalidating congressional districting with 3.13% above and 3.84% below], and *Wells v. Rockefeller* (1969) 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535, supra, §298 [rejecting 6% variance].) To choose a mathematical cutoff point is not only difficult, but encourages draftsmen to employ the acceptable variations as a starting point, instead of striving for equality. (4 C.3d 269.) Here, as a result of the permitted

10% variation, at least five of the 15 districts deviate nearly 5 to 8%. (4 C.3d 270.) The city must therefore abandon the mathematical yardstick; but whether it substitutes its former "as nearly as practicable" standard or merely deletes numerical reference is in its discretion. It need only apportion to produce districts of "substantially equal" population. If it does, "it will satisfy the constitutional imperative, regardless of the precise wording of its charter." (4 C.3d 271.)

(e) *Conclusion*. "In summary, we hold that on the record before us, the judgment on the pleadings in favor of the City cannot be sustained for two reasons: first, the registered voter apportionment standard appears constitutionally faulty in view of the substantial variance between population and registered voters on a per-district basis; and second, the 10 percent provision authorizes too great a deviation from equality." (4 C.3d 271.) (See *Elec.C.* 21620 [where governing body of chartered city is nominated by districts, these must be of nearly equal population]; *Board of Estimate of New York v. Morris* (1989) 489 U.S. 688, 109 S.Ct. 1433, 1436, 1443, 103 L.Ed.2d 717, 725, 733 [Board of Estimate, composed of three citywide members with two votes each and elected presidents of five city boroughs with widely disparate populations, violates equal protection; city showed no justification for 78% deviation]; *Castorena v. Los Angeles* (1973) 34 C.A.3d 901, 110 C.R. 569 [valid ordinance adopted in response to *Calderon*]; 60 Cal. L. Rev. 793 [*Calderon*]; 23 *Hastings L. J.* 763 [impact of Fourteenth Amendment on structure of regional governments].)

SUPPLEMENT: [This section is current through the latest supplement]



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H. Restricted Eligibility in Local Elections.

1. School District Elections.

7 *Witkin Sum. Cal. Law Const Law* § 304

[§ 304] School District Elections.

In *Sailors v. Board of Education of Kent County* (1967) 387 U.S. 105, 87 S.Ct. 1549, 1552, 18 L.Ed.2d 650, 653, a county school board was chosen by delegates from local boards. The Court, assuming arguendo that an elective board would have to meet the requirements of *Gray v. Sanders* (1963) 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821, supra, §297, and *Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, supra, §299, nevertheless declared: "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election."

However, in *Kramer v. Union Free School Dist. No. 15* (1969) 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, eligible voters in a rural school district in New York were those who owned or leased property or had a child in school. The object of the law was to limit electors to persons primarily interested in the district. *Held*, this was a denial of equal protection. It disenfranchised other interested persons, such as clergy, military personnel living on tax-exempt property, boarders and lodgers, and parents without property whose children were too young for school. (89 S.Ct. 1891, 23 L.Ed.2d 591.) (See 93 Harv. L. Rev. 1493 [State Restrictions on Municipal Elections: An Equal Protection Analysis]; 20 U.C.L.A. L. Rev. 1116 [Kramer].)

In *Hadley v. Junior College Dist. of Metropolitan Kansas City, Missouri* (1970) 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45, defendant district's trustees had general governmental powers, including the power to levy taxes, issue bonds, hire and fire teachers, condemn, etc. The court observed that, although these powers were not as broad as in *Avery v. Midland County, Texas* (1968) 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45, supra, §302, they had sufficient impact to compel application of the *Avery* principle. No valid constitutional distinction can be drawn on the basis and purpose of the election; the principle, that voting should be apportioned according to population on an equal basis as far as practicable, applies in congressional, state legislative, and local elections. (90 S.Ct. 794, 25 L.Ed.2d 50.)

The opinion concludes with a sweeping declaration: "We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." (90 S.Ct. 795, 25 L.Ed.2d 50.)

Three justices dissented, arguing that it is necessary to preserve flexibility in design of local governmental units that serve specialized functions and must meet particular local conditions. (90 S.Ct. 797, 25 L.Ed.2d 52.)

SUPPLEMENT: [This section is current through the latest supplement]
See 93 Cal. L. Rev. 271 [noncitizen voting rights in local school board elections].



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H. Restricted Eligibility in Local Elections.

2. Special District Elections.

a. Valid Provisions.

7 *Witkin Sum. Cal. Law Const Law* § 305

[§ 305] Valid Provisions.

A number of California cases deal with unsuccessful challenges to special districts.

In *Cooper v. Leslie Salt Co.* (1969) 70 C.2d 627, 75 C.R. 766, 451 P.2d 406, a municipal improvement district was created in 1960, comprising 418 uninhabited acres. Subsequent annexation increased the acreage to 2,600. The statute provided that the owners were to have voting power at the outset, with a gradual shift to resident voters by the close of 1971. *Held*, this was a proper provision. (70 C.2d 637.) Three justices dissented, contending that the one man-one vote rule of *Avery v. Midland County, Texas* (1968) 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45, *supra*, §302, should be applied to discrimination here between voters who owned and those who did not own property in the district, as well as between small and large landowners. (70 C.2d 640.) (See *Burrey v. Embarcadero Mun. Imp. Dist.* (1971) 5 C.3d 671, 97 C.R. 203, 488 P.2d 395, *infra*, §306 [statute was unconstitutional where there was no prompt shift to voting based on residency].)

In *Schindler v. Palo Verde Irr. Dist.* (1969) 1 C.A.3d 831, 82 C.R. 61, defendant irrigation district, like many other districts formed by special act, was governed by a board of trustees elected by landowners in the district. A landowner was entitled to one vote for each \$ 100 of assessed value of his or her property. Plaintiff landowner, conceding the validity of the property qualification, contended that the apportionment of voting rights discriminated against small landowners. He sought a decree giving landowners the alternatives of cumulative voting, or one vote for each landowner, or division of the district into seven parts with one trustee elected from each. *Held*, judgment for defendant on demurrer affirmed.

(a) The one man-one vote principle was not involved; there was no claimed dilution of voter influence through improper districting. (1 C.A.3d 836.) The same constitutional standards of fairness should govern distribution of the election franchise for school district elections as in *Kramer v. Union Free School Dist. No. 15* (1969) 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, *supra*, §304, and elections in special entities exercising other limited governmental functions. The fact that the service is one that could be provided by a private agency is not a valid ground of distinction. (1 C.A.3d 837.)

(b) The statute met the *Kramer* test. The state has a compelling interest in reclamation of waste lands through flood

protection, drainage, and irrigation works; the grant of the election franchise to landowners was essential to creation and functioning of the district; and, since benefits and burdens accrue to each landowner in proportion to the extent of land owned, the statute fairly distributes voting influence among those primarily interested in direct proportion to his or her stake in the district. (1 C.A.3d 839.) (See *Girth v. Thompson* (1970) 11 C.A.3d 325, 331, 89 C.R. 823 [irrigation district; following *Schindler*]; but see comment in *Burrey v. Embarcadero Mun. Imp. Dist.*, *supra*, 5 C.3d 682, footnote 8.)

Riverside v. Whitlock (1972) 22 C.A.3d 863, 99 C.R. 710, involved the Majority Protest Act of 1931. Under the statute, if owners of more than half the land in an assessment district make written protests, the project has to be abandoned unless the protests are overruled by a four-fifths vote of the legislative body. In this action, appellants contended that the statutory scheme is in effect a referendum, subject to the one man-one vote principle, and that use of the land area as the measure of sufficiency of a protest discriminates against small landowners and excludes resident nonlandowners. The court held that, in special assessment proceedings, an election is not provided or constitutionally required. The proceeding is not one for the formation of a public entity to exercise general governmental powers; the district simply denotes the land area benefited and to be assessed. Landowners have no constitutional right to abate the proceeding by protests; this right is purely a creature of statute. There are no general obligation bonds; because only landowners directly benefited are charged with the cost, and in proportion to the benefit conferred, there is a rational basis for making the decision subject to protest in the manner specified. (22 C.A.3d 876.) (See *Oxnard Harbor Dist. v. Local Agency Formation Com.* (1993) 16 C.A.4th 259, 269, 271, 19 C.R.2d 819 [applying rational basis standard, Govt.C. 57075(a)(3), permitting annexation to or detachment from district without election unless 25% of registered voters file written protests, is constitutional].)

In *Salier Land Co. v. Tulare Lake Basin Water Storage Dist.* (1973) 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659, the Court considered a challenge to the California Water Storage District Act (*Water C. 41000, 41001*). The Act provides that only landowners may vote in a water storage district election, and votes are apportioned according to the assessed value of land owned. The particular district consisted of 193,000 acres, with a resident population of 77 persons, including 18 children, most of whom worked for the four corporations that farmed 85% of the land. Several of the smaller landowners had only one vote, while the largest corporation had 37,825. *Held*, the Act was valid.

(a) By reason of its special limited purpose and the disproportionate effect of its activities on landowners as a group, the district was not subject to the rulings in *Phoenix v. Kolodziejski* (1970) 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523, *infra*, §307, *Cipriano v. Houma* (1969) 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, and *Kramer, supra*, and accordingly, the requirement of *Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, *supra*, §299, did not apply. (93 S.Ct. 1229, 35 L.Ed.2d 666.)

(b) There was no denial of equal protection to residents. Assessments against the landowners were the sole means of meeting expenses of the district, and it was therefore not inequitable to give the franchise to landowners and not to residents. (93 S.Ct. 1231, 35 L.Ed.2d 668.)

(c) It was likewise proper to deny the franchise to lessees, who might be mere month-to-month tenants, subject to manipulation by large landowners. The Legislature might also have felt that landowners would be unwilling to join in the forming of a water storage district if the lessees, whose fortunes were not tied to the land, were to have a major vote. (93 S.Ct. 1232, 35 L.Ed.2d 668.)

(d) Apportionment of votes on the basis of assessed value of land holdings was valid in placing the benefits and burdens in proportion to this value. (93 S.Ct. 1233, 35 L.Ed.2d 670.) (See *Associated Enterprises v. Toltec Watershed Imp. Dist.* (1973) 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 [upholding Wyoming statute authorizing creation of watershed district by weighted vote of landowners dependent on acres owned]; *Philippart v. Hotchkiss Tract Reclamation Dist.* 799 (1976) 54 C.A.3d 797, 801, 127 C.R. 42 [following *Schindler* and *Salier*]; *Ball v. James* (1981) 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150; 95 Harv. L. Rev. 181 [*Ball v. James*]; 14 Santa Clara Lawyer 31 [*Salier*]; 7 Loyola L.A. L. Rev. 227 [same]; 6 Pacific L. J. 318 [same]; 17 U.S.F. L. Rev. 507 [constitutionality of voting inequity: case of special purpose districts].)

In *Southern Calif. Rapid Transit Dist. v. Bolen* (1992) 1 C.4th 654, 3 C.R.2d 843, 822 P.2d 875, plaintiff transit district (SCRTD) was the agency for construction of a mass rapid transit system in southern California and particularly Los Angeles County. To help defray part of the cost the Legislature authorized SCRTD to establish special benefit assessment districts surrounding planned subway stations along the rapid transit corridor. (1 C.4th 660.) In this action by the district against its secretary to require certification of the district board resolutions, the trial court granted mandamus to compel certification, the Court of Appeal reversed, and the Supreme Court reversed the judgment of the Court of Appeal. The issue raised was whether the one man-one vote rule of *Reynolds v. Sims*, applied, or whether the circumstances called for the exception set forth in *Avery v. Midland County*, for special-purpose units of government. (1 C.4th 664.)

(a) "The political entities constitutionally relevant to the challenged voting scheme are the limited-purpose benefit districts, the organizing principle of which is the recoupment of some of the added economic value conferred on commercial property resulting from its proximity to the transit stations. The narrow purpose for which the districts are established is reflected in a voting scheme that limits the franchise to those who will directly and primarily enjoy the benefits of transit station siting and shoulder the reciprocal burden of assessments--owners of commercial property within the two proposed districts. In light of that congruence, we are satisfied that the governmental units at issue lack the indicia of 'general governmental powers' and, on this leg of the equal protection inquiry, qualify as the sort of 'special-purpose units of government' that are not subject to the strict requirements of *Reynolds*." (1 C.4th 670.)

(b) The challenged voting classification was supported by a "genuine difference in the relevant interests" of those enfranchised and those excluded. (1 C.4th 670.)

(c) Special assessment districts in recent years have been used to finance "the construction of massive urban rapid transit systems, the extraordinary capital costs of which have heightened pressure for the exploration of novel forms of financing. Grounded in the fact that the installation of a transit station and related facilities at a point along a rapid transit corridor enhances the value of real property in the immediate vicinity by generating intensified commercial activity, the special assessment has been promoted as a means by which transit authorities can recoup some of the value added to the surrounding real property and the resulting 'windfall' enrichment of property owners." (1 C.4th 661.)

Two justices joined in a dissent. (1 C.4th 681.) (See *Not About Water Committee v. Board of Supervisors* (2002) 95 C.A.4th 982, 999, 1001, 116 C.R.2d 526 [following *Bolen*; one man-one vote standard was not applicable to formation of water district that lacked general governmental powers; use of weighted voting scheme in balloting on assessment district was compelled by Cal. Const., Art. XIII D, §4(e)]; 20 *Pepperdine L. Rev.* 270 [*Bolen*].)

SUPPLEMENT: [This section is current through the latest supplement]

See 27 *Thomas Jefferson L. Rev.* 57 [participatory analysis of voting rights in special purpose districts].



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H. Restricted Eligibility in Local Elections.

2. Special District Elections.

b. Invalid Provisions.

7 *Witkin Sum. Cal. Law Const Law* § 306

[§ 306] Invalid Provisions.

A successful challenge was made in *Burrey v. Embarcadero Mun. Imp. Dist.* (1971) 5 C.3d 671, 97 C.R. 203, 488 P.2d 395. Defendant district was created by legislative authorization to bring municipal improvements to an uninhabited area and to facilitate the development of a private small craft harbor. The district had most of the powers of a city; e.g., it could operate a police force and fire department, create public utilities, condemn, tax, and incur bonded indebtedness. Its directors, however, were elected on the basis of landownership, with the result that control of the district was in the hands of the developing landowner for an indefinite period. Petitioners, residents of the district, attacked the voting scheme as giving too much power to one class of voters and as precluding nonlandowning residents from voting. *Held*, the provisions were unconstitutional.

(a) *One man-one vote principle applies.* The powers of defendant district were greater than those in *Hadley v. Junior College Dist. of Metropolitan Kansas City, Missouri* (1970) 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45, supra, §304, and close to those in *Avery v. Midland County, Texas* (1968) 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45, supra, §302. Hence, the one person-one vote rule must apply. (5 C.3d 677.)

(b) *Invalid weighting of votes by landownership.* The weighting by district malapportionment (*Reynolds v. Sims* (1964) 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, supra, §299) or by landownership (this case) is unconstitutional. It makes no difference to the voter "whether it is his next door neighbor, a stranger in another district, or a nonresident land developer" whose vote gets substantially more weight than his or her own. (5 C.3d 678.) Indeed, inequality based on landownership is even more questionable than that based on district apportionment; affluence of the voter cannot be an electoral standard. "Like the feudal landlords of old, the land-wealthy developer, under the EMID's voting system, controls the destiny of the EMID community while the 'land poor' residents have no effective vote in selecting those who will be governing the affairs with which they are so vitally concerned." (5 C.3d 679.) The result is that the developer corporation, holding more than 65% of the assessed valuation of land, can guarantee that its candidates will win and that the district will issue general obligation bonds if it desires. "Instead of 'one person, one vote' we have here a case of 'one corporation, 285,689 votes.'" (5 C.3d 679.)

(c) *Invalid exclusion of nonlandowner residents.* Under the principles of *Kramer v. Union Free School Dist. No. 15* (1969) 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, supra, §304, *Cipriano v. Houma* (1969) 395 U.S. 701, 89 S.Ct.

1897, 23 L.Ed.2d 647, and *Phoenix v. Kolodziejski* (1970) 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523, *infra*, §307, nonlandowner residents are as interested as landowners in public utilities, the tax rate, sewage services, police and fire protection, and the power to pass regulations having the force of law. (5 C.3d 681.) No compelling state interest justifies their exclusion. Exclusion may be proper at the beginning of the project, to insure the carrying out of the subdivision and development. But later, when the district begins to serve as a general governmental unit, voting power must shift to the resident registered voters. (5 C.3d 681.) The statutory shift provided in *Cooper v. Leslie Salt Co.* (1969) 70 C.2d 627, 75 C.R. 766, 451 P.2d 406, *supra*, §305, was lacking here. And the argument that gradual selling of property will bring about an even spread of voting is unsound. The developer could retain large parcels, such as the proposed yacht harbor, shopping center, or other business properties, long after the community had developed. (5 C.3d 683.)

(d) *Conclusion*. "The Legislature has seen fit to create a district with extensive and pervasive powers over the land and the people within it. Its concurrent failure to provide a voting system which early transfers the voting power from those who presently hold it under sections 20 and 24 of the act to its proper recipients, the interested, affected and otherwise qualified voters within the district, renders those sections unconstitutional." (5 C.3d 683.) "We do not, by this holding, foreclose alternative legislative schemes which facilitate the development of the district without conflicting with the provisions of this decision." (5 C.3d 684, footnote 12.)

The property qualification for a candidate for director of an irrigation district in *Water C. 21100* was held unconstitutional as to the Imperial Irrigation District in *Choudry v. Free* (1976) 17 C.3d 660, 131 C.R. 654, 552 P.2d 438.

(a) *Controlling cases on right to vote in district elections.*

(1) Decisions of the U.S. Supreme Court, e.g., *Kramer*, *Phoenix*, *Cipriano*, *supra*, and *Hill v. Stone* (1975) 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172, have invalidated statutes requiring property qualifications for voting in special purpose districts. "The consistent theme of these cases is that in order to deny the franchise to some voters the excluded class must be substantially less affected by the results of the election than those who are entitled to vote. In applying this rule, it was held that all voters have an important interest in the benefits of adequate service and favorable rates of a utility district (*Cipriano*), that both property owners and those who do not own property are called upon either directly or indirectly to pay for the improvements acquired from the proceeds of bonds (*Phoenix*, *Hill*), and that those who do not own property may have as direct an interest in school affairs (*Kramer*) or in a library (*Hill*) as those who do." (17 C.3d 666.)

(2) *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.* (1973) 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659, *supra*, §305, is distinguishable: (a) The water storage district involved there did not have as extensive powers as an irrigation district (17 C.3d 667); (b) in *Salyer*, assessments against land were the sole means by which the district's expenses were paid; an irrigation district may collect charges from nonlandowners for the sale of domestic water, electric power, sewage disposal, and other services, and is authorized to pay its bonds from revenues other than assessments (17 C.3d 667); (c) in *Salyer*, there were only 77 residents; here, there were 100,000 urban residents (17 C.3d 668).

(b) *Right to hold office as director*. The Legislature did give nonlandowners the right to vote, thus indicating that they have an appreciable stake in the affairs of the district. And, applying the strict scrutiny test for the classification (17 C.3d 664, 668; see *infra*, §704), no compelling state interest is furthered by excluding nonlandowners from eligibility to the office of director. The statute therefore "deprives both candidates and voters" in the district of equal protection of the laws. (17 C.3d 668.)

(c) *Scope of decision*. The court confined its decision to the Imperial Irrigation District, which has more residents, land, and employees than the others (17 C.3d 669). Three justices joined in a concurring opinion suggesting that the constitutionality of *Water C. 21100* as to other districts should be determined in light of the principles announced in *Salyer* (17 C.3d 670).

SUPPLEMENT: [This section is current through the latest supplement]

See 27 Thomas Jefferson L. Rev. 57 [participatory analysis of voting rights in special purpose districts].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

V. SUFFRAGE

I. General Bond Elections.

1. Vote Restricted to Property Taxpayers.

7 *Witkin Sum. Cal. Law Const Law* § 307

[§ 307] Vote Restricted to Property Taxpayers.

May a state restrict to real property taxpayers the right to vote in elections to approve issuance of general obligation bonds to finance municipal improvements such as city sewers, parks, playgrounds, police and public safety buildings, and libraries? In *Phoenix v. Kolodziejewski* (1970) 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523, the court held that kind of restriction is unconstitutional, but made its decision prospective. (90 S.Ct. 1996, 26 L.Ed.2d 530.) The court rejected the argument that, because general obligation bonds are supported by taxes mainly imposed on property owners, nonproperty owners may properly be excluded from the franchise. All residents of a city have an interest in the public facilities to be constructed with the proceeds of the bond issue; other revenues may be reached to support the bonds; and, in the case of rental and commercial property, the tax burden may be shifted to persons other than the landowners. (90 S.Ct. 1994, 26 L.Ed.2d 528.) (See *Cipriano v. Houma* (1969) 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 [Louisiana law providing that only property taxpayers could vote in election to approve issuance of revenue bonds by municipal utility is invalid]; *Hill v. Stone* (1975) 421 U.S. 289, 95 S.Ct. 1637, 1642, 44 L.Ed.2d 172, 179 [following *Phoenix* and *Cipriano*].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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I. General Bond Elections.
2. Requirement of More Than Majority.

7 *Witkin Sum. Cal. Law Const Law* § 308

[§ 308] Requirement of More Than Majority.

(1) *In General.* Cal. Const., Art. XVI, §18 (formerly Art. XI, §18) provided that general obligation bond proposals of counties, cities, and school districts must be approved by a two-thirds majority of the voters in a popular referendum. In *Westbrook v. Mihaly* (1970) 2 C.3d 765, 87 C.R. 839, 471 P.2d 487, this provision was held to be a violation of the Equal Protection Clause of the Fourteenth Amendment. (a) The provision had its origin in the financial depression and was designed to curtail governmental mismanagement in authorizing indebtedness. (2 C.3d 777.) But it creates two classes of voters: those who favor a proposed bond issue and those who oppose it; and one group has a weighted vote. (2 C.3d 782.) (b) No compelling state interest justifies this discrimination; it is not necessary to insure fiscal security. (2 C.3d 792.) (See 4 U.S.F. L. Rev. 309 [before the decision]; 59 Cal. L. Rev. 140.)

However, the U.S. Supreme Court reached the opposite conclusion in *Gordon v. Lance* (1971) 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273. The West Virginia Constitution and statutes require 60% of the voters in a referendum election for approval of a bond issue of political subdivisions. This was challenged by parties on the basis of six defeats in school bond issues, each by reason of less than 60% vote although a majority favored the bonds. The West Virginia Supreme Court of Appeals held the provision violative of the Equal Protection Clause. *Held*, reversed; the provisions were constitutional.

(a) Reliance on *Gray v. Sanders* (1963) 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821, *supra*, §297, and *Cipriano v. Houma* (1969) 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, is misplaced. No independently identifiable group favors bonded indebtedness over other forms of financing, hence no sector of the population is "fenced out," as in *Carrington v. Rash* (1965) 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, *supra*, §244. (91 S.Ct. 1892, 29 L.Ed.2d 275.)

(b) Although any departure from strict majority rule gives disproportionate power to the minority, "there is nothing in the language of the Constitution, our history or our cases that requires that a majority always prevail on every issue." (91 S.Ct. 1892, 29 L.Ed.2d 276.) Thus, there is no constitutional barrier to selection of a governor by a state Legislature after no candidate receives a majority of the vote; the federal Constitution itself requires more than a majority vote on some issues, e.g., impeachment and ratification; the Bill of Rights wholly removes areas of legislation from the concept of majoritarian supremacy; and constitutions of many states prohibit or severely limit the power of the Legislature to levy new taxes or create bonded indebtedness, thereby insulating entire areas from majority control. (91 S.Ct. 1892, 29 L.Ed.2d 277.)

(c) As long as these "provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause. We see no meaningful distinction between such absolute provisions on debt, changeable only by constitutional amendment, and provisions that legislative decisions on the same issues require more than a majority vote in the legislature." (91 S.Ct. 1892, 29 L.Ed.2d 272.) (See *Coffineau v. Eu* (1977) 68 C.A.3d 138, 143, 138 C.R. 90 [former Govt.C. 34507, requiring two-thirds vote to change name of general law city, was valid, under reasoning of *Gordon v. Lance*]; 10 Cal. Western L. Rev. 551, 572 [*Gordon v. Lance*]; 83 Harv. L. Rev. 1911 [*Gordon v. Lance* decision in lower court]; 18 Santa Clara L. Rev. 1095 [*Coffineau*].)

Following *Gordon v. Lance*, the U.S. Supreme Court granted certiorari to the losing parties in *Westbrook*, and remanded the case to the California Supreme Court; the California court then denied the petition for mandamus by minute order without opinion.

In *Santa Clara County Local Trans. Authority v. Guardino* (1995) 11 C.4th 220, 254, 258, 45 C.R.2d 207, 902 P.2d 225, 9 Summary (10th), *Taxation*, §134, the court held that the rule of *Gordon v. Lance* is not limited to bond elections, but applies equally to tax elections. Hence, *Govt.C. 53722* (9 Summary (10th), *Taxation*, §§131, 133 et seq.), requiring that local special taxes be approved by two-thirds of the electorate, does not deny proponents of special taxes equal protection of the law.

(2) *Proposition 39*. Cal. Const., Art. XVI, §18, amended by Proposition 39 in 2000, provides for approval by 55% of school district or county voters on a proposition to incur indebtedness through general obligation bonds for the acquisition or lease, construction, rehabilitation, or replacement of school facilities, furnishings, or equipment. (Cal. Const., Art. XVI, §18(b); on majority vote for bonds issued to repair or replace school buildings declared to be structurally unsafe, see Cal. Const., Art. XVI, §18(a).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 28 A.L.R.6th 439 [Validity of Super-Majority Voting Requirements in Constitutional, Statutory, and Other Public Provisions].



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CHAPTER X - Constitutional Law

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J. Incorporation of City or Annexation.

7 Witkin Sum. Cal. Law Const Law § 309

[§ 309] Incorporation of City or Annexation.

(1) *Incorporation.* In *Curtis v. Board of Supervisors* (1972) 7 C.3d 942, 104 C.R. 297, 501 P.2d 537, 63.6% of the landowners, representing 42.8% of the assessed land valuation within a proposed new city, petitioned the county board of supervisors for an incorporation election. The board refused, relying on former Govt.C. 34311, which provided that written protests of landowners representing 51% of the assessed valuation may block incorporation for a 1-year period. *Held*, mandamus issued to compel incorporation proceedings; the statute was a denial of the equal protection guarantees of both the federal and state Constitutions.

(a) Classifications affecting the right to vote are subject to the strict test, imposing the burden on the state to establish that a compelling interest justifies the law, and that the distinction drawn is necessary for the achievement of its purpose. (7 C.3d 951.)

(b) The landowner's interest in the power of the prospective city to tax and regulate use of land is not a compelling state interest. (7 C.3d 956, citing *Kramer v. Union Free School Dist. No. 15* (1969) 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, *supra*, §304, *Cipriano v. Houma* (1969) 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, and *Phoenix v. Kolodziejewski* (1970) 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523, *supra*, §307.)

(c) *Gordon v. Lance* (1971) 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273, *supra*, §308, is distinguishable. It involved no classification of voters, but only "the quantification of votes required to incur public indebtedness." (7 C.3d 958.)

(d) The issue of incorporation affects nonlandowners as well as landowners. All residents share a substantial interest in the government of their state, city, county, school district, and other agencies of general governmental power. (7 C.3d 959, 960, citing *Burrey v. Embarcadero Mun. Imp. Dist.* (1971) 5 C.3d 671, 97 C.R. 203, 488 P.2d 395, *supra*, §306.)

(e) Although this case deals with a new situation--creation of a governmental entity--the same general principle applies; nonlandowners cannot be excluded from the group empowered to decide on incorporation, and no compelling interest is served by allocating power within that group on the basis of assessed value of land. (7 C.3d 960.)

(f) The contention that the statute merely provides for concurrent approval of both residents and landowners is unsound; it gives the latter not only a voice but a veto. (7 C.3d 962.) And it irrationally allocates power among

landowners on the basis of land alone, though taxes are based on land and improvements. (7 C.3d 963.) "The practical effect of the classification of section 34311 is that a city cannot be formed in Rancho Palos Verdes, or in many other areas of the state, without the tacit consent of the relatively few owners of large tracts of land. The present case presents a spectacle where the desires of the 63 percent of the resident landowners who signed the petition for incorporation would be overridden by a protest composed primarily of nonresident and absentee corporate owners. Thus under a literal application of section 34311 the right of the residents of a region to self-government, to establish and enjoy the amenities of civic life, would be subordinated to a few persons whose economic interests lie in maintaining low property taxes and lax land use regulations. The perpetuation of this condition cannot realistically nor constitutionally be described as a compelling interest of the State of California." (7 C.3d 965.) (See 6 *Loyola L.A. L. Rev.* 240.)

In response to the *Curtis* decision, the 1973 Legislature amended former Govt.C. 34303 to provide that proceedings could be initiated by a petition of either 25% of the registered voters or 25% of the qualified owners representing 25% of the assessed value of the land. (See Govt.C. 57108, 57109 [providing for initiation of proceedings for incorporation or district merger by 10% of registered voters or 10% of qualified owners representing 10% of assessed value of land].)

In *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 C.4th 903, 13 C.R.2d 245, 838 P.2d 1198, the court considered the constitutionality of former Govt.C. 57103 (now Govt.C. 57118). This provision of the Cortese-Knox Act requires that all voters in an election to incorporate a city reside in the territory to be incorporated. *Held*, the statute did not violate the Equal Protection guaranties of the federal or California Constitutions, either on its face or as applied to the proposed incorporation. In reaching this conclusion the court rejected the strict scrutiny standard and applied the deferential rational basis test.

(a) "When a law impinges on certain fundamental rights--and the right to vote may be the most fundamental of all ... --it will ordinarily be subject to strict judicial scrutiny. Under this very severe standard, a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible." (3 C.4th 913.) (On strict scrutiny test generally, see *infra*, §704.)

(b) "For most legislation, however, a court will apply the rational basis test. The 'standard formulation of the text for minimum rationality' ... is whether the classification is 'rationally related to a legitimate governmental purpose.' ... Put another way, the classification must bear some fair relationship to a legitimate public purpose." (3 C.4th 913.)

(c) Govt.C. 57103 (now Govt.C. 57118) does not compel the strict scrutiny test.

(1) The statute touches on the right to vote, but that fact does not necessarily require the application of strict scrutiny; the compelling interest measure must be applied if a classification has a "real and appreciable impact" on the equality, fairness, and integrity of the electoral process. The impact of Govt.C. 57103 falls well short of the "real and appreciable," for "individual interests in voting are much attenuated by the state's plenary power to oversee and regulate the formation of its political subdivisions, and the same power entitles the state to identify as differing in degree the interests of those who may vote under section 57103 and those who may not." (3 C.4th 914.)

(2) "In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the state's sufferance. ... Accordingly, the United States Supreme Court has long recognized the states' plenary power to create and dissolve their political subdivisions." (3 C.4th 914.)

(3) Prior decisions of this court are not controlling. (3 C.4th 918.) In *Citizens Against Forced Annexation v. Local Agency Formation Com.* (1982) 32 C.3d 816, 187 C.R. 423, 654 P.2d 193, "a bare majority" concurred in the reasoning, and "we conclude in hindsight that the reasoning in that case was questionable." (3 C.4th 920.) "[U]nder applicable precedent we should apply a deferential standard in evaluating the classification set forth on the face of section 57103. The Legislature's traditional power to regulate the formation of political subdivisions allows it to decide that the county residents living outside the territory to be incorporated have a lesser degree of interest in the proposed incorporation

than those within, in which case the classification must be denied effect only if it lacks a rational basis." (3 C.4th 922.)

(4) "[S]ection 57103 is fairly related to the Legislature's declared purpose, for, if large, relatively disinterested majorities could veto incorporations decided through the Cortese-Knox Act's elaborate process, the result might well hinder orderly growth and development." (3 C.4th 923.) The Act's accommodation of competing local interests may be imperfect, but that is not enough, by itself, to offend constitutional principles. (3 C.4th 924.)

(2) *Annexation*. In *Levinsohn v. San Rafael* (1974) 40 C.A.3d 656, 658, 115 C.R. 309, the court followed *Curtis*, and struck down statutes giving veto power to persons holding 50% or more of the assessed value of the land sought to be annexed. (See *Citizens Against Forced Annexation*, *supra* [upholding statute limiting franchise in annexation election to residents of territory to be annexed; reasoning of case questioned in *Board of Supervisors*, *supra*]; 88 Harv. L. Rev. 1571 [right to vote in municipal annexations]; 20 U.C.L.A. L. Rev. 1116 [annexation elections].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Annexation*. See *Citizens for Responsible Open Space v. San Mateo County Local Agency Formation Com.* (2008) 159 C.A.4th 717, 731, 71 C.R.3d 813 [in action to invalidate annexation of land to open space district, trial court erred in excluding protests by registered voters that did not include residence address within annexation area].



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CHAPTER X - Constitutional Law

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V. SUFFRAGE

K. Referendum on County Charter.

7 *Witkin Sum. Cal. Law Const Law* § 310

[§ 310] Referendum on County Charter.

In *Lockport v. Citizens for Community Action at Local Level* (1977) 430 U.S. 259, 97 S.Ct. 1047, 51 L.Ed.2d 313, the Court upheld a New York law providing that a new county charter requires approval in a referendum election by separate majorities of voters who live in cities within the county and those who live outside the cities. The court distinguished cases requiring equality in voting for legislators, as inapplicable to the situation involved in a "single-shot" referendum. (97 S.Ct. 1052, 51 L.Ed.2d 321.) "[T]he challenged provisions of New York law rest on the State's identification of the distinctive interests of the residents of the cities and towns within a county rather than their interests as residents of the county as a homogeneous unit. This identification is based in the realities of the distribution of governmental powers in New York, and is consistent with our cases that recognize both the wide discretion the States have in forming and allocating governmental tasks to local subdivisions, and the discrete interests that such local governmental units may have *qua* units." (97 S.Ct. 1054, 51 L.Ed.2d 323.)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY A. Nature of Guarantees. 1. Constitutional Provisions. a. Federal Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 311

[§ 311] Federal Constitution.

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." Although the First Amendment is a limitation only on Congress, it is now settled that the liberties of speech, press, and assembly are fundamental rights protected by the Fourteenth Amendment, which restricts the states. Hence, even in the absence of state constitutional protections, a state law infringing on any of these rights is a violation of the *Due Process Clause* of the Fourteenth Amendment. (*Fiske v. Kansas* (1927) 274 U.S. 380, 47 S.Ct. 655, 657, 71 L.Ed. 1108, 1111; *Near v. Minnesota* (1931) 283 U.S. 697, 51 S.Ct. 625, 633, 75 L.Ed. 1357, 1371; *Grosjean v. American Press Co.* (1936) 297 U.S. 233, 56 S.Ct. 444, 446, 80 L.Ed. 660, 665; *Intel Corp. v. Hamidi* (2003) 30 C.4th 1342, 1364, 1 C.R.3d 32, 71 P.2d 296, 5 *Summary* (10th), *Torts*, §720 ["use of government power, whether in enforcement of a statute or ordinance or by an award of damages or an injunction in a private lawsuit, is state action that must comply with First Amendment limits"]; *Sun Co. of San Bernardino v. Superior Court* (1973) 29 C.A.3d 815, 821, 105 C.R. 873, *infra*, §415; see 4 Rotunda, §20.1 et seq.; 2 Tribe, §12-1 et seq.; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §450 et seq.; Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §4:1 et seq. [text and forms]; *supra*, §218 et seq.; for law reviews, see *infra*, §313.)

In *Sipple v. Des Moines Register & Tribune Co.* (1978) 82 C.A.3d 143, 147 C.R. 59, the court rejected the notion that the constitutional guarantee of free press requires a stricter rule on contacts sufficient for in personam jurisdiction over an out-of-state newspaper. The court examined recent declarations of courts and scholars (82 C.A.3d 148 et seq.), and concluded that newspapers have no greater First Amendment rights than individuals. (82 C.A.3d 149, 150.) The decision, however, was that defendants' activities were not sufficient to support California jurisdiction. (82 C.A.3d 152.)

West's Key Number Digest, Constitutional Law k.90 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Rotunda 4th, §20.1 et seq.



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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY A. Nature of Guarantees. 1. Constitutional Provisions. b. California Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 312

[§ 312] California Constitution.

(1) *Constitutional Provisions.* "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., Art. I, §2(a).) "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." (Cal. Const., Art. I, §3(a).) (See Cal. Const., Art. I, §3(b) [people's right of access to public meetings and writings of public officials and agencies].)

(2) *Broad Construction.* The language of California's free speech provisions is different than that of the First Amendment (see *supra*, §311), and they have been construed by our courts as "more protective, definitive and inclusive of rights to expression of speech" than their federal counterparts. (See *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899, 908, 153 C.R. 854, 592 P.2d 341, *infra*, §316; *Spiritual Psychic Science Church v. Azusa* (1985) 39 C.3d 501, 519, 217 C.R. 225, 703 P.2d 1119, *infra*, §356; *Blatty v. New York Times Co.* (1986) 42 C.3d 1033, 1041, 232 C.R. 542, 728 P.2d 1177, 5 *Summary* (10th), *Torts*, §765; *Los Angeles Alliance for Survival v. Los Angeles* (2000) 22 C.4th 352, 365, 93 C.R.2d 1, 993 P.2d 334, *infra*, §349; *Gerawan Farming v. Lyons* (2000) 24 C.4th 468, 491, 509, 101 C.R.2d 470, 12 P.3d 720, *infra*, §333 [although plaintiff grower's right to free speech under First Amendment was not implicated by marketing order compelling growers to fund generic advertising, marketing order does implicate plaintiff's right to free speech under Cal. Const., Art. I]; *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 C.A.3d 1157, 1163, 201 C.R. 837, *infra*, §395; Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §4:1 *et seq.* [text and forms].)

In *Pines v. Tomson* (1984) 160 C.A.3d 370, 392, 206 C.R. 866, the trial court enjoined defendant publishers of a business telephone directory from publishing any "concept" statement on editorial policy in the directory. *Held*, the order violated the free speech guarantee of both the federal and California Constitutions.

(a) The California provision is comprised of three subparts: "(1) an affirmation that all persons may freely speak, write and publish their 'sentiments,' (2) a provision allowing for liability once that right is abused, and (3) a prohibition against laws which infringe freedom of speech or the press." Only the third subpart is paralleled in the *First Amendment*. (160 C.A.3d 392.)

(b) Although the section does not use the term "prior restraint," the plain meaning of the first sentence is that "sentiments" are protected from any prepublication sanctions. (160 C.A.3d 393.) "Sentiments" include statements of editorial thought, emotion, and opinion; hence, statements of editorial opinion may not be restrained prior to publication. (160 C.A.3d 395.)

(3) *No Money Damages*. Nothing in the language or history of Cal. Const., Art. I, §2(a), indicates an implied right to seek money damages for its violation. (*Degrassi v. Cook* (2002) 29 C.4th 333, 342, 344, 127 C.R.2d 508, 58 P.3d 306, 5 Summary (10th), *Torts*, §17 [action claiming that defendants interfered with plaintiff's functioning and effectiveness as legislator did not support recognition of constitutional tort for damages; plaintiff had meaningful alternative remedies]; *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 C.A.4th 97, 119, 18 C.R.3d 562 [following *Degrassi*; provisional teacher whose contract was not renewed had no right under California Constitution to recover damages for deprivation of free speech rights].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Broad Construction*. See *Gallo Cattle Co. v. Kawamura* (2008) 159 C.A.4th 948, 955, 72 C.R.3d 1, Supp., *infra*, §339 [nothing in language or history of Cal. Const., Art. I, §2, suggests that California should reject reasoning of U.S. Supreme Court in determining free speech issues arising under California Constitution relating to assessments on milk producers for generic advertising].



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

1. Constitutional Provisions.

c. Commentary.

7 *Witkin Sum. Cal. Law Const Law* § 313

[§ 313] Commentary.

Commentary on this subject is enormous:

(1) *Freedom of Speech*. (See 67 *Cal. L. Rev.* 283 [Copyright and Free Speech]; 70 *Cal. L. Rev.* 107 [A Graphic Review of the Free Speech Clause]; 79 *Cal. L. Rev.* 1229 [Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State]; 80 *Cal. L. Rev.* 391 [Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension]; 88 *Cal. L. Rev.* 2353 [reconciling theory and doctrine]; 37 *Cal. Western L. Rev.* 395 [using tort litigation to silence hate groups]; 99 *Harv. L. Rev.* 361 [free speech and "slippery slope" arguments]; 105 *Harv. L. Rev.* 554 [Free Speech Without Romance: Public Choice and the First Amendment]; 112 *Harv. L. Rev.* 84 [Principles, Institutions, and the First Amendment]; 117 *Harv. L. Rev.* 1765 [boundaries of First Amendment]; 11 *Hastings Const. L. Q.* 189 [protection of political, commercial, and labor speech under Burger Court]; 25 *Hastings Const. L. Q.* 209 [Discrimination, Distribution, and City Regulation of Speech]; 28 *Hastings Const. L. Q.* 305 [Free Speech for Lawyers]; 44 *Hastings L. J.* 809 [Symposium: The Changing Face of Constitutional Interpretation: The Supreme Court and the First Amendment]; 30 *Lincoln L. Rev.* 75 [Should Cyber Protests Be Constitutionally Protected?]; 34 *McGeorge L. Rev.* 595 [Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations]; 24 *San Diego L. Rev.* 1153 [Justice Brennan and freedom of speech]; 44 *Santa Clara L. Rev.* 269 [First Amendment, public policy, and our failure to protect dissent]; 61 *So. Cal. L. Rev.* 1 [freedom of speech in public sector workplaces]; 74 *So. Cal. L. Rev.* 49 [Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application]; 75 *So. Cal. L. Rev.* 1493 [implications of protecting Internet hate speech]; 10 *Southwestern L. Rev.* 237 [Toward a Metatheory of Free Speech]; 29 *Southwestern U. L. Rev.* 223 [five-step analytical framework for navigating Free Speech Clause]; 36 *Stanf. L. Rev.* 1349 [free speech and Justice Holmes]; 45 *Stanf. L. Rev.* 47 [The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History]; 45 *Stanf. L. Rev.* 783 [book review essay on Collins & Skover, *Carnival Culture: The Trashing of Taste in America*]; 47 *Stanf. L. Rev.* 1249 [Recuperating First Amendment Doctrine]; 53 *Stanf. L. Rev.* 767 [The First Amendment's Purpose]; 54 *Stanf. L. Rev.* 1 [Locating Copyright Within the First Amendment]; 55 *Stanf. L. Rev.* 191 [freedom of expressive association and the press]; 19 *U.C. Davis L. Rev.* 669 [linkage between free speech and discovery of truth]; 25 *U.C.L.A. L. Rev.* 964 [scope of free speech amendment]; 30 *U.C.L.A. L. Rev.* 671 [An Attack on Categorical Approaches to Freedom of Speech]; 34 *U.C.L.A. L. Rev.* 595, 1837 [free speech]; 45 *U.C.L.A. L. Rev.* 1537

[symposium: free speech restrictions by private parties]; 46 *U.C.L.A. L. Rev.* 1567 [Free Speech and Good Character]; 48 *U.C.L.A.* 1057 [Copyright's First Amendment]; 51 *U.C.L.A. L. Rev.* 705 [restrictions on speech intended to influence court decisions].)

(2) *Freedom of the Press.* (See 111 *Harv. L. Rev.* 1086 [Privacy, Photography, and the Press]; 112 *Harv. L. Rev.* 84 [Principles, Institutions, and the First Amendment]; 68 *Cal. L. Rev.* 482 [An Informed Public, an Informing Press]; 26 *Hastings L. J.* 639 [what does "freedom of press" add to "freedom of speech"]; 28 *Hastings L. J.* 761 [hazards to press of claiming "preferred position"]; 12 *Loyola L.A. L. Rev.* 357 [right of press to gather information]; 11 *Pacific L. J.* 65 [Affirmative Action and a Free Press]; 8 *Pepperdine L. Rev.* 157 [A Barometer of Freedom of the Press: The Opinions of Mr. Justice White]; 8 *Southwestern L. Rev.* 61 [Free Press in Sweden and America]; 16 *Southwestern L. Rev.* 723 [state regulation of news media]; 23 *U.C.L.A. L. Rev.* 77, 120 [Speech and Press Clauses]; 30 *U.C.L.A. L. Rev.* 455 [origins of Press Clause]; 32 *U.C.L.A. L. Rev.* 177 [same].)

(3) *Other Aspects of the Subject.* (See 83 *Harv. L. Rev.* 518 [remedies for denial of rights]; 87 *Harv. L. Rev.* 374 [analysis of constitutional language and new approach to its interpretation]; 92 *Harv. L. Rev.* 1550 [First Amendment right to disseminate discovery materials]; 96 *Harv. L. Rev.* 1854 [Content Regulation and the Dimensions of Free Expression]; 104 *Harv. L. Rev.* 43 [Taking Freedom Seriously; critical analysis of decisions affecting individual rights during 1989 term]; 104 *Harv. L. Rev.* 896 [Bicentennial of Bill of Rights]; 67 *Cal. L. Rev.* 1104 [suggestion that courts should read the First Amendment to contain an implied prohibition against "political establishment"]; 68 *Cal. L. Rev.* 422 [First Amendment Doctrine and the Burger Court]; 79 *Cal. L. Rev.* 267 [Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications]; 21 *Cal. Western L. Rev.* 47 [freedom of expression and employment security in public service]; 4 *Hastings Const. L. Q.* 109 ["constitutional right to know"]; 7 *Hastings Const. L. Q.* 579 [same]; 18 *Hastings Const. L. Q.* 259 [The First Amendment at Its Third Century: Reckoning With the Ravages of Time]; 18 *Hastings Const. L. Q.* 295 [From Widmar to Mergens: The Winding Road of First Amendment Analysis]; 19 *Hastings Const. L. Q.* 85 [redefining captive audience doctrine]; 29 *Hastings Const. L. Q.* 527 [constitutional right of anonymity as applied to anonymous e-commerce]; 45 *So. Cal. L. Rev.* 1083 [remedies for denial of rights]; 55 *So. Cal. L. Rev.* 293 [process of change and liberty theory of First Amendment]; 60 *So. Cal. L. Rev.* 649 [tolerance as rationale for protecting freedom of expression]; 11 *Southwestern L. Rev.* 1345 [The Bill of Rights: Physics, Idealism and Pragmatism]; 27 *Stanf. L. Rev.* 719 [Learned Hand and the Origins of Modern First Amendment Doctrine]; 34 *Stanf. L. Rev.* 113 [implications of reviewing restrictions turning on content of expression more strictly than those concerned with other matters]; 51 *Stanf. L. Rev.* 387 [The Medium is the Mistake: The Law of Software for the First Amendment]; 34 *U.C.L.A. L. Rev.* 1615 [practical reason and First Amendment]; 31 *Western State L. Rev.* 79 [The Constitutionality of Pager Ban Provisions in Gang Injunctions]; 106 *A.L.R.5th* 337 [First Amendment Protection Afforded to Commercial and Home Video Games].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Freedom of Speech.* See 93 *Cal. L. Rev.* 1413 [Deterring Speech: When Is It "McCarthyism"? When Is It Proper?]; 94 *Cal. L. Rev.* 1791 [online public speech]; 44 *Cal. Western L. Rev.* 477 [blogosphere: preserving unfettered development of alternative journalism]; 118 *Harv. L. Rev.* 1314 [unsolicited communication in marketplace of ideas]; 37 *Loyola L.A. L. Rev.* 1771 [securing physicians' First Amendment right to recommend medical marijuana to their patients]; 46 *Santa Clara L. Rev.* 889 [finding proper balance between expression and exploitation in works of art]; 57 *Stanf. L. Rev.* 1095 [Crime-Facilitating Speech]; 52 *U.C.L.A. L. Rev.* 1149 [data privacy and First Amendment]; 54 *U.C.L.A. L. Rev.* 1463 [free speech at work]; 54 *U.C.L.A. L. Rev.* 1635 [excessive institutional tailoring of First Amendment doctrine]; 8 *A.L.R.6th* 639 [constitutionality of state statutes regulating words or messages on special or vanity license plates]; 30 *A.L.R.6th* 299 [First Amendment Protection Afforded to Web Site Operators]; 35 *A.L.R.6th* 407 [First Amendment Protection Afforded to Blogs and Bloggers]; 24 *A.L.R. Fed 2d* 587 [Requirement That Employees Speak English in Workplace as Violative of Federal Constitutional and Statutory Law]. (2) *Freedom of the Press.* See 93 *Cal. L. Rev.* 929 [Free But Not Independent: The Real First Amendment Issue for the Press].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY
A. Nature of Guarantees.
2. Rights on Private Property.
a. Company-Owned Town.

7 *Witkin Sum. Cal. Law Const Law* § 314

[§ 314] Company-Owned Town.

In *Marsh v. Alabama* (1946) 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, the entire area of an Alabama town was owned by a private corporation, which had given notice of a rule against solicitation. Petitioner, a member of Jehovah's Witnesses, attempted to distribute literature on a sidewalk, and was convicted under a state statute of the crime of remaining on the premises of another after being warned not to do so. *Held*, the conviction violated the Fourteenth Amendment.

If a municipal ordinance were involved, the regulation would clearly be invalid; and the fact that a single company has legal title to all the town cannot justify a different holding. United States citizens live in company-owned towns; they must make decisions affecting the welfare of the community and nation, and in order to act as good citizens must be able to obtain uncensored information. "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." (66 S.Ct. 279, 90 L.Ed. 269.) (For case somewhat similar in its result, although involving different issue, see *N.L.R.B. v. Stowe Spinning Co.* (1949) 336 U.S. 226, 69 S.Ct. 541, 544, 93 L.Ed. 638, 644 [upholding board's order requiring employer to rent company-owned meeting hall, the only one available, to union organizer].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

- A. Nature of Guarantees.
- 2. Rights on Private Property.
 - b. Shopping Center.
- 1. Under Federal Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 315

[§ 315] Under Federal Constitution.

In *Diamond v. Bland* (1970) 3 C.3d 653, 91 C.R. 501, 477 P.2d 733 (*Diamond I*), defendants owned a huge shopping center located in a nonresidential area in the city of San Bernardino. It contained three major department stores and 72 single businesses, all fronting on a "common aisleway" of a pedestrian mall. Defendants' regulations prohibited any activity except business to take place on its premises. Plaintiffs, seeking signatures for initiative petitions on anti-pollution measures, violated the regulations by soliciting signatures, collecting donations, and distributing literature from a card table in the mall area. They were ordered to leave on pain of arrest for trespass. They did so and then brought this action for injunctive and declaratory relief. *Held*, judgment denying injunction reversed.

(a) "We start from the premise that peaceful and orderly solicitation of signatures, discussion of issues, and distribution of information are First Amendment protected activities which may not be prohibited broadly and absolutely on public streets, parks, and similar public places traditionally associated with the exercise of First Amendment rights." (3 C.3d 657.) This general principle was applied to privately owned property treated as publicly held, in a company town, in *Marsh v. Alabama* (1946) 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, *supra*, §314. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* (1968) 391 U.S. 308, 88 S.Ct. 1601, 1609, 20 L.Ed.2d 603, 614, 3 Summary (10th), *Agency and Employment*, §648, the court invoked *Marsh* to invalidate a shopping center's blanket prohibition of picketing on its premises. (3 C.3d 658, 659.) "The implication is clear from *Logan* that modern-day shopping centers, serving as the business districts for the surrounding residential communities, have important public functions, and their owners may not rely on their private ownership to justify blanket prohibitions on First Amendment activities that could lawfully be conducted on public property. Indeed, in many instances the contemporary shopping center serves as the analogue of the traditional town square." (3 C.3d 660.)

(b) The *Logan Valley* decision and California cases have established the right of union picketing in a shopping center and on a privately owned sidewalk in front of a supermarket. (See *infra*, §397.) These cases upheld activities related to the normal use of the shopping center. The instant case involves the distinct problem of nonbusiness-related First Amendment activities, but the distinction is not controlling. (3 C.3d 661.)

(c) Plaintiff's interest is more substantial. Although the shopping center is not the only effective site for their

activities, it is a most effective and desirable one--a place to reach thousands of persons daily to disseminate their ideas. And, as pointed out in *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31* (1964) 61 C.2d 766, 40 C.R. 233, 394 P.2d 921, 3 Summary (10th), *Agency and Employment*, §648, and *Logan Valley*, the interest of a property owner is largely theoretical. (3 C.3d 662.)

(d) Persuasive authority rejects the distinction. *In re Hoffman* (1967) 67 C.2d 845, 64 C.R. 97, 434 P.2d 353, held that an ordinance could not prevent distribution of antiwar leaflets at a private railway station; i.e., the bare title of owners was not a sufficient interest to outweigh the interest in exercise of First Amendment rights. Defendant's contention that a shopping center is not as noisy or crowded as a railway station makes only a difference of degree; the shopping center does not need the quiet of a public library or courthouse. (3 C.3d 665.)

(e) Reasonable regulations of time, place, and manner, similar to those now applied to business promotions and displays, and not repressive in scope, can be devised, and are proper. But, unless there is obstruction of or undue interference with normal business operations, the bare title of the property owners does not outweigh "the substantial interest of individuals and groups to engage in peaceful and orderly First Amendment activities on the premises of shopping centers open to the public." (3 C.3d 666.)

The U.S. Supreme Court came to the opposite conclusion in *Lloyd Corp., Ltd. v. Tanner* (1972) 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131. Petitioner owned a 50-acre shopping center bounded by four public streets. Its 60 commercial tenants were all located within a single multi-level complex with a series of interior malls. The area was posted as private property, and handbill distribution was prohibited. Respondents attempted to distribute leaflets protesting the draft and the Vietnam War. They were prevented from doing so, and obtained a judgment for injunctive and declaratory relief in the federal district court. *Held*, reversed.

(a) *Marsh* and *Logan Valley* are distinguishable. The first concerned a company owned town--"an anachronism ... now rarely found." (92 S.Ct. 2223, 33 L.Ed.2d 138.) The second involved peaceful picketing of one store when it would have been difficult to communicate with patrons on the public street. (92 S.Ct. 2225, 33 L.Ed.2d 139.) *Logan Valley* did not extend the *Marsh* doctrine to a general principle that a center's walkways are functionally equivalent for First Amendment purposes to municipally owned streets and sidewalks. The holding was carefully limited to situations in which the picketing was "directly related in its purpose to the use to which the shopping center property was being put" and where "no other reasonable opportunities for the pickets to convey their message as to their intended audience were available." (92 S.Ct. 2226, 33 L.Ed.2d 140.)

(b) The basic issue is whether respondents may distribute handbills on the center's property contrary to its policy against all handbilling. The First and Fourteenth Amendments safeguard the rights of free speech and assembly by limiting *state* action, and the Fifth and Fourteenth Amendment Due Process Clauses protect rights of property. Thus, while the First Amendment enjoys a preferred position, "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." (92 S.Ct. 2228, 33 L.Ed.2d 142.)

(c) The argument that, by reason of its size, the center served the same purposes as the business district in a city, likewise "reaches too far." "The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping area." (92 S.Ct. 2229, 33 L.Ed.2d 142.)

Four justices dissented. (92 S.Ct. 2230, 33 L.Ed.2d 144.)

In *Diamond v. Bland* (1974) 11 C.3d 331, 113 C.R. 468, 521 P.2d 460 (*Diamond II*), the matter in *Diamond I* again came before the trial court. (3 C.3d 653.) The judge dissolved the injunction on the authority of *Lloyd Corp., Ltd. v. Tanner*. *Held*, affirmed.

"*Lloyd's* rationale is controlling here. In this case, as in *Lloyd*, plaintiffs have alternative, effective channels of

communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside. Unlike the situation in *Marsh* and *Logan*, no reason appears why such alternative means of communication would be ineffective, and plaintiffs concede that, unlike *Logan*, their initiative petition bears no particular relation to the shopping center, its individual stores or patrons. Under these circumstances, we must conclude that defendants' private property interests outweigh plaintiffs' own interests in exercising First Amendment rights in the manner sought herein." (11 C.3d 335.)

A dissenting opinion argued that the prior California decision can and should rest on the *California Constitution*. (11 C.3d 335.) (See *Hudgens v. N.L.R.B.* (1976) 424 U.S. 507, 96 S.Ct. 1029, 1036, 47 L.Ed.2d 196, 206 [rationale of *Logan Valley* did not survive Court's decision in *Lloyd*].)

SUPPLEMENT: [This section is current through the latest supplement]

See 37 *Loyola L.A. L. Rev.* 1799 [constitutionality of rule prohibiting naming mall tenants in union handbills distributed to customers].



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CHAPTER X - Constitutional Law

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

2. Rights on Private Property.

b. Shopping Center.

2. Under California Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 316

[§ 316] Under California Constitution.

Robins v. Pruneyard Shopping Center (1979) 23 C.3d 899, 153 C.R. 854, 592 P.2d 341, approached the subject of free speech in a different way. Plaintiff high school students attempted to solicit signatures in defendant's central courtyard for a petition to the White House opposing a United Nations resolution. Defendant's policy was to prohibit any publicly expressive activity not directly related to the commercial purposes of the center, and plaintiffs were ordered to leave. They did so and then brought this action to enjoin defendant from denying access to its property for the purpose of circulating their petition. *Held*, judgment denying injunction reversed.

(a) *Lloyd Corp., Ltd. v. Tanner* (1972) 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, *supra*, §315, did not recognize property rights protected by the federal Constitution; it was decided on the basis of the First Amendment. Hence, it does not preclude state regulation of private property which protects the rights of free speech and petition to the government. (23 C.3d 904, 907.)

(b) Cal. Const., Art. I, §§2, 3 (*supra*, §312) are broader provisions than those in the *First Amendment*. (23 C.3d 908.) And the dissenting opinion in *Diamond II* points out that shopping centers are an essential and invaluable forum for exercising the rights of free speech and petition. Hence, these two sections of the California Constitution "protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (23 C.3d 910, overruling *Diamond v. Bland* (1974) 11 C.3d 331, 113 C.R. 468, 521 P.2d 460, *supra*, §315.) (23 C.3d 910.)

Three justices dissented. "The lesson to be learned from *Lloyd* is unmistakable and irrefutable: A private shopping center owner is protected by the *federal* Constitution from unauthorized invasions by persons who enter the premises to conduct general 'free speech' activities unrelated to the shopping center's purposes and functions. Nor is the foregoing principle in any way diminished or affected by the fact that the claimed free speech rights are purportedly sanctioned by the California Constitution, given the overriding supremacy of the federal Constitution." (23 C.3d 914.) (See 68 Cal. L. Rev. 641; 10 Golden Gate L. Rev. 805; 20 Santa Clara L. Rev. 245; 52 A.L.R.5th 195 [Validity, Under State Constitutions of Private Shopping Center's Prohibition or Regulation of Political, Social, or Religious Expression or Activity].)

The California Supreme Court's majority view was upheld, and the dissenters' position rejected, in *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741. "[N]either appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state protected rights of expression and petition on appellants' property." (100 S.Ct. 2044, 64 L.Ed.2d 756.) (See 94 Harv. L. Rev. 169; 21 Santa Clara L. Rev. 801.)

In *H-CHH Associates v. Citizens for Representative Government* (1987) 193 C.A.3d 1193, 238 C.R. 841, plaintiff owners of a shopping center adopted elaborate rules to govern "political petitioning" on the premises, and the trial court granted an injunction against defendant association prohibiting political activity in violation of the center's rules. The Court of Appeal reversed, after a review of *Pruneyard* and other leading cases (193 C.A.3d 1206 et seq.), holding that "much of plaintiffs' application procedure, encompassing the registration form, the unwritten rules mandating written application and conferring unbridled discretion to deny an application on the basis of general subjective criteria only and rule 1 requiring a designated 'responsible person's acceptance of all liability,' is overbroad and therefore constitutionally invalid." (193 C.A.3d 1311.) The court also suggested the type of objective written standard for this kind of regulation that would withstand constitutional scrutiny. (193 C.A.3d 1212.)

In *Savage v. Trammell Crow Co.* (1990) 223 C.A.3d 1562, 273 C.R. 302, defendant, the manager of a private shopping center, adopted rules that banned leafletting in its parking lot but allowed use of the center's sidewalks for political expression. Plaintiff sought an injunction to allow him to distribute religious literature in the parking lot. Injunctive relief was denied, and judgment for defendant was rendered on demurrer. *Held*, affirmed in part and reversed in part.

(a) Under *Pruneyard*, a private property owner may establish reasonable time, place, and manner rules, provided they are content-neutral, narrowly tailored, and leave ample alternative means of communication. (223 C.A.3d 1572, 1573.) The restrictions on leafletting meet all these requirements: The ban was adopted to prevent litter and traffic problems in the parking lot; it was content-neutral; and leafletters were allowed the alternative of handing out leaflets on the center's sidewalks. (223 C.A.3d 1574, 1575, 1576.)

(b) However, the ban on religious activity at the center violated Cal. Const., Art. I, §2(a). Neither federal nor state cases make any material distinction between political and religious expression, *Pruneyard* does not support a distinction, and for California to grant use of a forum for political but not religious expression would violate the federal Constitution. (223 C.A.3d 1578, 1579, 1580.)

In *Westside Sane/Freeze v. Ernest W. Hahn* (1990) 224 C.A.3d 546, 274 C.R. 51, the court said: "This appeal from an order granting a preliminary injunction arises from appellants' tenacious, erroneous view that the California constitutional rights of free speech and petition at shopping centers ... are limited to activity connected with enrollment of signatures on petitions." (224 C.A.3d 549.) In rejecting this view, the court declared that *Pruneyard* recognizes the right to free speech independent of physical petitioning. (224 C.A.3d 554, 555, 556.) (See *Union of Needletrades, Industrial & Textile Employees, AFL-CIO v. Superior Court* (1997) 56 C.A.4th 996, 1016, 1019, 65 C.R.2d 838 [discussing *H-CHH Associates*, and distinguishing *Forsyth, Georgia v. Nationalist Movement* (1992) 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101, *infra*, §456; requirement of insurance by picketers of stores in shopping malls was valid where decision whether to require insurance was based on objective criteria; prior identification of picketers was necessary to decision regarding insurance]; *Slauson Partnership v. Ochoa* (2003) 112 C.A.4th 1005, 1029, 5 C.R.3d 668 [trial court did not err in limiting defendant's protest against adult strip club located in center of mini-mall to demonstrating on public sidewalk; protestors had violated terms of stipulated injunction giving them generous access to property by accosting patrons, defacing property, and yelling on bullhorns after midnight in residential area].)

SUPPLEMENT: [This section is current through the latest supplement]

In *Fashion Valley Mall, LLC v. N.L.R.B.* (2007) 42 C.4th 850, 69 C.R.3d 288, 172 P.3d 742, the court answered a question from the United States Court of Appeals: whether, under California law, a shopping mall may enforce a rule prohibiting speech that advocates the boycott of a mall tenant. Union employees of a newspaper publishing company

sought to hand out leaflets in front of a department store in the mall urging customers to boycott the store because it advertised in their employer's newspaper. Mall officials asked the leafleters to leave because they had not obtained a permit in advance, which would have been futile because a mall rule prohibited speech urging a boycott of the stores in the mall. *Held*, the shopping center rule violated Cal. Const., Art. I, §2.

(a) As pointed out in *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899, 153 C.R. 854, 592 P.2d 341, text, p. 504, the free speech provision of Cal. Const., Art. I, §2, is broader than that in the First Amendment to the United States Constitution. *Pruneyard* held that a shopping mall is a public forum in which people may exercise their free speech rights under the *California Constitution*. (42 C.4th 857, 862.)

(b) The mall rule prohibiting speech that advocates a boycott is not a permissible time, place, and manner restriction because it is not content neutral. The rule bans speech urging a boycott because of its content. Hence, it is subject to strict scrutiny. The rule cannot "be justified by legitimate concerns that are unrelated to content. Peacefully urging a boycott in a mall does not by its nature cause congestion, nor does it promote fraud or duress" like the solicitations in *Los Angeles Alliance for Survival v. Los Angeles* (2000) 22 C.4th 352, 93 C.R.2d 1, 993 P.2d 334, text, §349. (42 C.4th 867.) Also, unlike the ordinance in *Alliance*, which restricted the solicitation of funds in public places, the rule here is concerned with the impact the speech has on its listeners, not with its intrusive nature. The mall seeks to prohibit speech urging a boycott solely because it disagrees with the message of the speech, which might persuade some customers not to patronize its stores. (42 C.4th 868.) Maximizing profits of the stores in the mall is not a compelling interest compared to the union's right to free expression. (42 C.4th 869.)

(c) *H-CHH Associates v. Citizens for Representative Government* (1987) 193 C.A.3d 1193, 238 C.R. 841, text, p. 506, which predated *Alliance*, permitted a shopping center to prohibit the solicitation of contributions on its premises simply because the solicitation competed with its tenants for the funds of patrons. (42 C.4th 868.) This decision was incorrect because the restriction was too broad, and the decision is disapproved to the extent it states a contrary view. (42 C.4th 868, 869, footnote 12.)

Three justices dissented, stating that they would overrule *Pruneyard*. (42 C.4th 870.)



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A. Nature of Guarantees.

2. Rights on Private Property.

c. Stand-Alone Business.

7 Witkin Sum. Cal. Law Const Law § 317

[§ 317] Stand-Alone Business.

Bank of Stockton v. Church of Soldiers of the Cross of Christ (1996) 44 C.A.4th 1623, 52 C.R.2d 429, involved a bank, located in a two-story building with an adjoining parking lot, which sought to prohibit a church from soliciting donations on bank property. After reviewing prior federal and state cases, the court concluded that the bank was a "modest retail establishment" to which *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899, 153 C.R. 854, 592 P.2d 341, supra, §316, does not apply, and affirmed the trial court's issuance of a preliminary injunction. (44 C.A.4th 1625, 1631.) (See *Trader Joe's Co. v. Progressive Campaigns* (1999) 73 C.A.4th 425, 434, 437, 86 C.R.2d 442 [criticizing *Bank of Stockton*; *Pruneyard* rights did not extend to single store that did not have "public character"; size of store is not determinative]; *Lushbaugh v. Home Depot U.S.A.* (2001) 93 C.A.4th 1159, 1166, 113 C.R.2d 700 [stand-alone warehouse store's regulations requiring those exercising free speech rights to stay within prescribed area outside entry satisfied reasonable time, place, and manner requirements]; *Costco Cos. v. Gallant* (2002) 96 C.A.4th 740, 754, 117 C.R.2d 344 [following *Trader Joe's*; unlike shopping center in *Pruneyard*, plaintiff's stand-alone warehouse stores "are not essential or invaluable forums for the general exercise of free speech"; thus, expressive activity may be prohibited]; *Albertson's v. Young* (2003) 107 C.A.4th 106, 120, 125, 131 C.R.2d 721 [fact that retail grocery store was located in shopping center and that it had established reasonable time, place, and manner rules for use of its property for expressive activity did not automatically impress it with character of traditional public forum; center lacked walkways, courtyards, etc. where public could congregate, and restrictive covenants precluded businesses that would encourage this congregation].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Van v. Target Corp.* (2007) 155 C.A.4th 1375, 1388, 66 C.R.3d 497 [following *Albertson's v. Young* (2003) 107 C.A.4th 106, 131 C.R.2d 721; in action by signature gatherers for violation of First Amendment rights, trial court did not err in granting summary judgment to big-box retail stores that were located in large retail developments; perimeter and apron areas in front of entrances did not act as functional equivalent of traditional public forum].



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2. Rights on Private Property.

d. Medical Facility.

7 *Witkin Sum. Cal. Law Const Law* § 318

[§ 318] Medical Facility.

In *Allred v. Shawley* (1991) 232 C.A.3d 1489, 284 C.R. 140, defendants picketed plaintiff's Family Planning Associates Medical Group, at first on the public sidewalk, but later in the private parking lot. The trial court granted a permanent injunction against the latter activity, on the grounds that the lot had been maintained as private, and alternative methods of communication were available. *Held*, affirmed. The opinion reviews the recent cases (232 C.A.3d 1496) and points out that the activities of defendants interfered with patients' access to the building and presented a safety hazard. (232 C.A.3d 1503.) (See *Planned Parenthood v. Wilson* (1991) 234 C.A.3d 1662, 1671, 286 C.R. 427 [private medical center]; *Allred v. Harris* (1993) 14 C.A.4th 1386, 1391, 1392, 18 C.R.2d 530 [same; following *Planned Parenthood* and *Allred v. Shawley*]; *Feminist Women's Health Center v. Blythe* (1993) 17 C.A.4th 1543, 22 C.R.2d 184, *infra*, §399 [same]; 24 U.C. Davis L. Rev. 1073 [Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services]; on picketing of abortion clinics, see *infra*, §399 et seq.)

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 - e. Church.

7 *Witkin Sum. Cal. Law Const Law* § 319

[§ 319] Church.

A person's right of free speech does not trump a church's right to prohibit disruptive conduct on its property. A church is not an open forum, and inappropriate expression may be barred. (*Church of Christ in Hollywood v. Superior Court* (2002) 99 C.A.4th 1244, 1252, 1255, 121 C.R.2d 810.)

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f. Private Residential Housing Project.

7 *Witkin Sum. Cal. Law Const Law* § 320

[§ 320] Private Residential Housing Project.

In *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 C.A.3d 816, 182 C.R. 813, defendant Golden Rain owned the streets, sidewalks, and other common areas of Leisure World, a private residential, walled community where only resident-approved access was permitted through guarded security gates. For years, Golden West Publishing Corp. had been accorded the exclusive privilege of entry to distribute its unsolicited give-away newspaper, Leisure World News. Plaintiff Laguna Publishing Co. was denied the privilege of access to distribute its similar newspaper, Laguna News Post, and brought this action for injunctive relief and damages. *Held*, exclusion of plaintiff's newspaper was an unconstitutional discrimination calling for injunctive relief, and damages might also be recoverable on a proper showing.

(a) *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899, 153 C.R. 854, 592 P.2d 341, *supra*, §316, held that the limitations on plaintiff's free speech rights were impermissibly proscribed because the public had been invited onto the private property. (131 C.A.3d 838.) The instant case includes two ingredients not found in *Pruneyard*: (1) While the public is not invited, there is substantial traffic into Leisure World of vendors and service persons whom the residents do invite, including the carriers of newspapers to which the residents have subscribed. (2) The other give-away paper has been given unrestricted entry even though it has not been invited by any resident. (131 C.A.3d 839, 840.)

(b) "[K]eeping in view the greater status of the rights of free speech and free press existing under the California Constitution as delineated in *Pruneyard*, and keeping in mind also that discriminatory proscription of free speech on private property may even be questionable under the federal Constitution, as suggested by *Lloyd*, we hold that Golden Rain, acting with the implicit sanction of the state's police power behind it, impermissibly discriminated against the free speech and free press rights of plaintiff, guaranteed to it under the state Constitution, by excluding it from Leisure World after it, Golden Rain, without authority from the residents of Leisure World, had chosen to permit the unsolicited delivery of the Leisure World News to the residents of Leisure World." (131 C.A.3d 844; referring to *Lloyd Corp., Ltd. v. Tanner* (1972) 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, *supra*, §315.)

(c) "[I]f this activity represents an unacceptable intrusion upon the privacy of the residents of Leisure World, a privacy which it is argued they paid for when they bought homes there, then Golden Rain should cease its discrimination and exclude *all* newspapers to which individual residents have not *personally* subscribed." (131 C.A.3d

845.)

(d) This holding will not result in requiring unrestricted admission of such uninvited persons as religious evangelists, political campaigners, assorted salespeople, and signature solicitors; it will compel admission only of those who wish to deliver a newspaper that is a competitor of *Leisure World News* for the same advertising dollars. The property owners will otherwise remain in complete control of admission to *Leisure World*. (131 C.A.3d 845.) Nothing in the record indicates that the owners of the residences have taken any position on the distribution of give-away newspapers. The discriminatory exclusion was imposed solely by the owner of the common areas, without concern for the preferences of the residents. (131 C.A.3d 847.)

(e) Independently of the new California constitutional right of privacy (see *infra*, §575), the early case of *Melvin v. Reid* (1931) 112 C.A. 285, 297 P. 91, 5 Summary (10th), *Torts*, §664, upheld a tort action on the ground that the right of privacy was guaranteed by Cal. Const., Art. I, §1. (131 C.A.3d 852.) Hence, plaintiff had a right to sue for damages suffered by its exclusion from *Leisure World*. (131 C.A.3d 853, 857.)

One justice concurred and dissented, disagreeing with the holding on the right of action for damages. (131 C.A.3d 857.) (See *San Jose v. Superior Court (Thompson)* (1995) 32 C.A.4th 330, 38 C.R.2d 205, *infra*, §398 [picketing at private residence]; *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 C.4th 1013, 1033, 1035, 111 C.R.2d 336, 29 P.3d 797 [Cal. Const., Art. I, §2(a), does not afford tenant's association right to distribute unsolicited newsletters to individual apartments in privately owned apartment buildings from which general public is excluded; no majority on issue whether California Free Speech Clause protects only against state action]; 54 Hastings L. Rev. 1745 [*Golden Gateway*]; 32 Southwestern U. L. Rev 383 [same]; 51 U.C.L.A. L. Rev. 1437 [access for solicitors in common interest communities].)

The methodology used by the court in *Laguna Publishing* to suggest that damages might be recoverable for a violation of plaintiff's free speech and press rights under the California Constitution was disapproved in *Katzberg v. Regents of Univ. of Calif.* (2002) 29 C.4th 300, 328, 127 C.R.2d 482, 58 P.3d 339, 5 Summary (10th), *Torts*, §17, to the extent it is inconsistent with that opinion. (On right to recover damages under California Constitution, see *supra*, §312.)

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3. Right of Private Corporation.

a. Impermissible Restriction.

7 *Witkin Sum. Cal. Law Const Law* § 321

[§ 321] Impermissible Restriction.

In *First Nat. Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, a Massachusetts statute (1) prohibited banks and business corporations from making expenditures "for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," and (2) stated that no question submitted to the voters "solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." The legislation was admittedly "tailor-made" to prevent corporate campaign contributions opposing a graduated income tax constitutional amendment, which had repeatedly failed to survive a referendum. Criminal penalties of fine or imprisonment were provided for violation of the statute. Plaintiffs, two national banking corporations, and three business corporations, seeking to publicize their views on the proposed amendment, brought an action to have the statute declared unconstitutional. The Massachusetts court upheld the law, distinguishing First Amendment rights of natural persons from those of corporations. *Held*, reversed.

(a) *Nature of First Amendment protection.* The Amendment guarantees the liberty to discuss publicly and truthfully all matters of public concern; and if the speakers were not corporations no one would suggest that the state could silence their proposed speech, which is of the type that is indispensable to decisionmaking in a democracy. (98 S.Ct. 1416, 55 L.Ed.2d 718.) "The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge." (98 S.Ct. 1416, 55 L.Ed.2d 718, footnote 12.)

(b) *Effect of corporate identity of speaker.* The state court reasoned that the corporation's First Amendment rights derive from its *property* rights under the Fourteenth Amendment. This is unsound:

(1) The First Amendment liberty of speech and press is within the "liberty" safeguarded by the *Fourteenth Amendment*. (98 S.Ct. 1417, 55 L.Ed.2d 719, citing *Grosjean v. American Press Co.* (1936) 297 U.S. 233, 56 S.Ct. 444, 449, 80 L.Ed. 660, 668, *infra*, §362, which rejected the very reasoning of the Massachusetts court.)

(2) Defendant contends that First Amendment rights have been afforded only to corporations engaged in the communications business and to the commercial speech of business corporations; but the cases do not rely on these

factors of the business of the corporation or the subject of the communication. (a) The press cases emphasize the role of the institution in informing the public and providing a forum for discussion, but the press does not have a monopoly on either the First Amendment or the ability to enlighten. The decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression "but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." (98 S.Ct. 1419, 55 L.Ed.2d 721, 722.) (b) The commercial speech cases also show that the First Amendment goes beyond protection of the press and self-expression of individuals. "A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.' " (98 S.Ct. 1419, 55 L.Ed.2d 722; see infra, §325.)

(3) The legislation therefore improperly restricts communication by a corporation on certain referendum subjects, and also improperly singles out one kind of ballot question (individual taxation) on which corporations are not permitted to speak. "[T]he legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. ... If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations--religious, charitable, or civic--to their respective 'business' when addressing the public." (98 S.Ct. 1420, 55 L.Ed.2d 723.)

(c) *Asserted governmental interests necessitating the legislation.*

(1) The Massachusetts court, under its theory that the First Amendment did not apply, failed to apply the strict scrutiny test; but that test applies, and the burden is on the state to show a compelling interest. (98 S.Ct. 1421, 55 L.Ed.2d 724.)

(2) The first interest advanced is that of the state in sustaining the active role of the individual citizen in the electoral process. It is contended that corporate participation in discussion of a referendum issue would exert an undue influence on the outcome and destroy public confidence in the democratic process. There has been no such showing, and the decisions of this Court do not support the argument. The risk of corruption in cases involving candidate elections is not present in a popular vote on a public issue. "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it." (98 S.Ct. 1423, 55 L.Ed.2d 726, 727.) The people, in making their judgment, may consider the sources and credibility of the advocate; and any danger that they cannot evaluate the information given by plaintiffs is a danger contemplated by the framers of the *First Amendment*. (98 S.Ct. 1424, 55 L.Ed.2d 728.)

(3) The second interest urged is the protection of corporate shareholders whose views may differ from those expressed by the corporate management. This purpose is belied by the provisions of the statute:

First, it is under-inclusive. Corporate activity designed to pass or defeat legislation is permitted, even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters; and corporate activity is permitted until an issue becomes the subject of a referendum. Moreover, the statute does not restrict entities or organized groups with large resources, in which minorities may have interests comparable to those of corporate shareholders; e.g., business trusts, real estate investment trusts, and labor unions. (98 S.Ct. 1425, 55 L.Ed.2d 728.)

Second, it is over-inclusive. It would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the expenditure. And minority shareholders have power, through election of directors, intra-corporate remedies, and derivative suits, to challenge corporate disbursements made for improper purposes. (98 S.Ct. 1426, 55 L.Ed.2d 729.)

Hence, assuming that protection of shareholders is a compelling interest, there is no substantially relevant correlation between the interest asserted and the state's effort to prohibit plaintiffs from speaking. (98 S.Ct. 1426, 55 L.Ed.2d 730.)

Four justices dissented. (98 S.Ct. 1439, 1442, 55 L.Ed.2d 744, 747.) (See *Barnes v. State Farm Mut. Auto Ins. Co.* (1993) 16 C.A.4th 365, 374, 377, 20 C.R.2d 87 [rejecting claim that corporate right of free speech does not extend to mutual insurance company]; 92 Harv. L. Rev. 163 [Bellotti]; 13 U.S.F. L. Rev. 158 [same]; 6 Pepperdine L. Rev. 529 [same]; 59 So. Cal. L. Rev. 1227 [same]; 61 So. Cal. L. Rev. 459 [corporate image advertising].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Federal Election Com. v. Wisconsin Right to Life* (2007) 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329, Supp., supra, §256 [provision of Bipartisan Campaign Reform Act prohibiting broadcast of certain political ads paid for by corporate or union treasury funds during specified time prior to election was unconstitutional as applied to plaintiff's ads].



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b. Permissible Restriction.

7 *Witkin Sum. Cal. Law Const Law* § 322

[§ 322] Permissible Restriction.

In *Austin v. Michigan Chamber of Commerce* (1990) 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, the Michigan Campaign Finance Act prohibited corporations from using corporate treasury funds for independent expenditures in support of or in opposition to any candidate in elections for state office. The Michigan Chamber of Commerce, a nonprofit corporation, challenged the law as a violation of its First Amendment rights. *Held*, the statute was constitutional as applied to the chamber; it was narrowly tailored to serve a compelling state interest. (110 S.Ct. 1396, 1397, 1398, 108 L.Ed.2d 663, 664, 665.) The Court rejected the contention that the statute cannot constitutionally be applied to a "nonprofit ideological corporation" like a chamber of commerce, observing that the chamber's members are somewhat similar to shareholders of a business corporation. (110 S.Ct. 1399, 108 L.Ed.2d 666.)

"Michigan identified as a serious danger the significant possibility that corporate political expenditures will undermine the integrity of the political process, and it has implemented a narrowly tailored solution to that problem. By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections." (110 S.Ct. 1402, 108 L.Ed.2d 670.) (See 104 Harv. L. Rev. 209 [*Austin*]; 18 *Hastings Const. L. Q.* 541 [same]; 32 *Loyola L.A. L. Rev.* 133 [evolution of law of corporate political speech on ballot initiatives]; 27 *Hastings Const. L. Q.* 309 [*Austin*]; 14 *Pacific L. J.* 209 [corporate political free speech and federal statute prohibiting corporations from making contributions to candidates].)

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A. Nature of Guarantees.

4. Entertainment and Symbolic Speech.

7 *Witkin Sum. Cal. Law Const Law* § 323

[§ 323] Entertainment and Symbolic Speech.

The First Amendment extends to all forms of expression designed to communicate ideas.

(1) *Entertainment*. Dancing, music, theatrical performances, and motion pictures are within the protection of the First Amendment. (See *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 674, *infra*, §464 [music as protected speech]; *In re Giannini* (1968) 69 C.2d 563, 569, 72 C.R. 655, 446 P.2d 535, *infra*, §453 [dancing]; *Burton v. Municipal Court of Los Angeles* (1968) 68 C.2d 684, 68 C.R. 721, 441 P.2d 281, *infra*, §371 [motion pictures]; *Barrows v. Municipal Court* (1970) 1 C.3d 821, 83 C.R. 819, 464 P.2d 483, 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §114 [theatrical performance]; *Olivia N. v. National Broadcasting Co.* (1977) 74 C.A.3d 383, 388, 141 C.R. 511, *Olivia N. v. National Broadcasting Co.* (1981) 126 C.A.3d 488, 492, 178 C.R. 888, 6 Summary (10th), *Torts*, §915 [television broadcast of film]; *Morris v. Municipal Court* (1982) 32 C.3d 553, 564, 568, 186 C.R. 494, 652 P.2d 51, *infra*, §454 [nonobscene nude dancing]; *McCollum v. CBS* (1988) 202 C.A.3d 989, 998, 249 C.R. 187, 6 Summary (10th), *Torts*, §916; 84 Cal. L. Rev. 1499 [hate speech, pornography, and problem for artistic expression]; 25 Loyola L.A. L. Rev. 453 [*Ward v. Rock Against Racism*]; 52 So. Cal. L. Rev. 529 [*Olivia N.*]; 66 So. Cal. L. Rev. 2583 [Bach, Beethoven and the (Home) Boys: Censoring Violent Rap Music in America]; 25 U.S.F. L. Rev. 627 [*Ward v. Rock Against Racism*].)

(2) *Symbolic Speech*. The First Amendment also protects symbolic expression of ideas. (*Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, *infra*, §492 [wearing armbands]; *Texas v. Johnson* (1989) 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342, *infra*, §474 [flag burning].) (See 15 *Hastings Const. L. Q.* 587 [Symbolic Expression Reconsidered]; 17 *Hastings Const. L. Q.* 369 [Pure Symbols and the First Amendment]; 4 *Rotunda*, §§20.48, 20.49.)

In *Schacht v. United States* (1970) 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44, a federal statute prohibited the wearing of an American military uniform by a person not a member of the armed forces, but a final clause allowed an actor to do so if the portrayal did not "tend to discredit" the armed forces. Defendant actor wore a uniform in an anti-war street skit, and was convicted. *Held*, reversed; a conviction for an expression critical of the government's war policy and armed forces, while permitting the same type of expression praising them, violates the First Amendment; hence the final clause was unconstitutional. (See *Kahn v. Department of Motor Vehicles* (1993) 16 C.A.4th 159, 166, 20 C.R.2d 6.)

(3) *Permissible State Regulation*. "[A]s the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes, the scope of permissible state regulation significantly increases." (*California v. LaRue* (1972) 409 U.S. 109, 93 S.Ct. 390, 396, 34 L.Ed.2d 342, 351, *infra*, §453 [regulations prohibiting live sexual entertainment and films in bars]; see *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, *infra*, §473 [burning draft card]; 21 U.C.L.A. L. Rev. 29 [LaRue and O'Brien]; 22 U.C.L.A. L. Rev. 969 [same].) Thus, a statute regulating collection agencies may be validly applied to a business that sells collection forms to creditors, because the forms are tools of a trade, not expressions of ideas. (*Powers v. Floersheim* (1967) 256 C.A.2d 223, 233, 63 C.R. 913.) And an "escort bureau" (business furnishing escorts) is not a constitutionally protected activity. (*People v. Katrinak* (1982) 136 C.A.3d 145, 152, 154, 185 C.R. 869.)

In *People v. Morone* (1983) 150 C.A.3d Supp. 18, 198 C.R. 316, defendants operated a business in which patrons were provided with rooms to assemble, discuss, and practice "swinging" (free heterosexual activity between temporary, uncommitted partners of the opposite sex). They were convicted of the misdemeanor of conducting a "health club" without a license, and challenged the application of the law on First Amendment grounds. *Held*, conviction affirmed. The guarantees of freedom of speech and association do not embrace purely physical activity such as "swinging." The First Amendment protects the right of patrons to discuss the philosophy of swinging, but when speech and nonspeech elements are combined in the same course of conduct, the nonspeech element may be regulated. Here, the nonspeech element appears in the use of a jacuzzi, showers, saunas, and bedding, at a commercial establishment. (150 C.A.3d Supp. 22.)

In *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221, a United States Park Service regulation prohibiting camping in certain areas was held properly applied to prohibit demonstrators from sleeping in a park in connection with a demonstration intended to call attention to the plight of the homeless. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." (104 S.Ct. 3069, 82 L.Ed.2d 227.) (See 98 Harv. L. Rev. 216.)

West's Key Number Digest, Constitutional Law k.90.1(6)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Entertainment*. See 41 Cal. Western L. Rev. 325 [First Amendment and media: lessons learned from 2004 cases].

(2) *Symbolic Speech*. See 5 Rotunda 4th, §§20.48, 20.49. (3) *Permissible State Regulation*. See 31 *Hastings Const. L. Q.* 447 [Viewpoint Neutral Zoning of Adult Entertainment Businesses].



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A. Nature of Guarantees.

5. Commercial Speech.

a. In General.

1. Historical Development.

7 *Witkin Sum. Cal. Law Const Law* § 324

[§ 324] Historical Development.

(1) *Valid Regulation of Commercial Solicitation.* In *Pittsford v. Los Angeles* (1942) 50 C.A.2d 25, 31, 122 P.2d 535, an ordinance prohibited distribution of commercial advertising on city streets, expressly exempting religious, political, and sociological material. *Held*, it was validly applied to the "candid camera" business of snapping a picture of a pedestrian and offering him or her an order blank. (See *Valentine v. Chrestensen* (1942) 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262; *Jamison v. Texas* (1943) 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869.)

In *re Mares* (1946) 75 C.A.2d 798, 171 P.2d 762, following the theory of the *Pittsford* case, upheld a San Francisco ordinance prohibiting the solicitation of magazine subscriptions on public streets and sidewalks. The court thought that the accosting of pedestrians and the consequent interruption of traffic on busy sidewalks was an evil that could be so regulated, although the noncommercial solicitation of subscriptions by religious groups could not be prohibited (see *infra*, §521). (75 C.A.2d 800.) (See *People v. Uffindell* (1949) 90 C.A.2d Supp. 881, 882, 202 P.2d 874 [ordinance prohibiting deposit of advertising matter in parked motor vehicle]; *In re Porterfield* (1946) 28 C.2d 91, 101, 168 P.2d 706 [freedom of speech does not protect "commercial activities to which speech is only an incident or means"].)

In *Breard v. Alexandria* (1951) 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233, the same theory was applied in upholding an ordinance prohibiting house-to-house magazine solicitors. The Court distinguished *Martin v. Struthers* (1943) 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, *infra*, §521, as involving no element of the commercial, and recognized that the case called for a balancing of the conveniences between some householder's desire for privacy and the publisher's right to distribute publications in a way thought productive of the best results. "[T]hose communities that have found these methods of sale obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use that guarantee to force a community to admit the solicitors of publications to the home premises of its residents." (71 S.Ct. 934, 95 L.Ed. 1249.) (See *Varanelli v. Structural Pest Control Bd.* (1969) 1 C.A.3d 217, 226, 81 C.R. 492 [Structural Pest Control Act (B. & P.C. 8500 et seq.) validly applied to door-to-door solicitors of free structural pest control inspections]; 65 *Harv. L. Rev.* 137 [*Breard*]; 11 *Santa Clara Lawyer* 109 [same].)

(2) *Valid Regulation of Newspaper Advertising.* In *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*

(1973) 443 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669, petitioner, a newspaper, printed "help wanted" notices in sex-designated columns pursuant to its advertisers' requests, although it added a general notice that, unless a specific ad indicated otherwise, readers should not assume that the jobs listed were limited to one sex. A city ordinance prohibited publication of advertisements discriminating on the basis of sex, and the City Commission on Human Relations ordered petitioner to classify its advertisements without reference to sex. *Held*, the order, as restricted to advertisements within the scope of the ordinance, was valid.

(a) Under *Valentine v. Chrestensen*, *supra*, purely commercial advertisements are not protected by the First Amendment, although the question is not resolved by the mere form of the message, for under *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, *infra*, §426, an advertisement can be addressed to social and political issues. Here, however, it is clear that the advertisements come within the *Chrestensen* category. "None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech." (93 S.Ct. 2559, 37 L.Ed.2d 677.)

(b) The ordinance did not unconstitutionally restrict petitioner's editorial judgment on placement of the advertisement. "Nothing in a sex-designated column heading sufficiently dissociates the designation from the want-ads placed beneath it to make the placement severable for First Amendment purposes from the want-ads themselves. The combination, which conveys essentially the same message as an overtly discriminatory want-ad, is in practical effect an integrated commercial statement." (93 S.Ct. 2560, 37 L.Ed.2d 678.)

(c) There is no merit in the suggestion that the distinction between commercial and other speech should be abrogated in this case because of the importance of exchange of the information. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." (93 S.Ct. 2561, 37 L.Ed.2d 679.)

Four dissenting justices objected to extension of the *Chrestensen* doctrine to the area of editorial layout, and also viewed the Commission's orders as an impermissible prior restraint. (93 S.Ct. 2562, 37 L.Ed.2d 681.) (See 87 Harv. L. Rev. 153; 26 Hastings L. J. 745.)

(3) *Valid Regulation of Street Activities*. In *San Francisco Street Artists Guild v. Scott* (1974) 37 C.A.3d 667, 112 C.R. 502, plaintiffs, wishing to sell paintings and sculptures and other artistic creations on San Francisco streets, were denied peddlers' permits. They challenged the ordinance forbidding unlicensed peddling as a violation of First Amendment rights. *Held*, the ordinance was valid, under *Pittsford* and *Mares*, *supra*. The court distinguished the right to use the streets for dissemination of information, or for expression of political, economic, religious, or social tenets: "[T]he sale of the described artifacts does not reach this high level of expression, even though the items sold may have about them something of the personality of their creators. A good deal of the merchandise sold in department stores, small shops, art galleries, and other commercial establishments is of artistic value and communicates to the purchaser the maker's concepts over and above whatever utilitarian value the articles may have. To hold that First Amendment rights attach to the kind of merchandising described in the pleadings would be to open large segments of public property to private enterprise, because where First Amendment rights are present controls must be held to a minimum." (37 C.A.3d 671.)

(4) *Invalid Regulations*. In *Bigelow v. Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600, a Virginia statute made it a misdemeanor, by sale or circulation of a publication, to encourage the procuring of an abortion. Defendant, editor of a weekly newspaper, published an advertisement of "Women's Pavilion," a legal institution in New York City, offering appropriate medical help for women with unwanted pregnancies. *Held*, the statute, as applied in this case, infringed First Amendment rights. (a) Defendant had standing to challenge the constitutionality of the statute, because he complained of an injury to himself as an editor and publisher of a newspaper. (95 S.Ct. 2230, 44 L.Ed.2d

609; see *supra*, §85.) (b) *Valentine v. Chrestensen*, *supra*, as interpreted in later cases, does not support the broad proposition that regulation of commercial advertising is immune from constitutional challenge. (95 S.Ct. 2232, 44 L.Ed.2d 610.) (c) Both *Chrestensen* and *Pittsburg Press*, *supra*, are distinguishable. The advertisement in the instant case contained factual information of potential interest and value to a diverse audience about legally sanctioned activity in another state. (95 S.Ct. 2233, 44 L.Ed.2d 612.) (d) If the Virginia statute were upheld, that state could exert its power over a wide variety of national publications or interstate newspapers, and other states might do the same, thereby impairing the proper functioning of these publications. (95 S.Ct. 2236, 44 L.Ed.2d 615.) (See 89 Harv. L. Rev. 111; 12 A.L.R.4th 851 [validity of restrictions on distribution of commercial advertising to private residences after *Bigelow v. Virginia*].)

In *Young v. Municipal Court* (1971) 16 C.A.3d 766, 94 C.R. 331, a Sacramento ordinance prohibited peddling or giving away goods or wares "along or upon" public roads and highways in the unincorporated area of the county. The legislative finding on which it was based declared that hawking articles on public streets interferes with traffic flow and creates danger. Petitioner was arrested for sitting on a sidewalk and displaying an activist periodical for sale to passing motorists. *Held*, the ordinance was unconstitutionally overbroad. (a) It covered peddling not only on busy avenues but also on quiet residential streets with little automobile traffic; (b) it prohibited pedestrian-addressed activities when a restriction on vehicle-addressed activities would have served its purpose. (16 C.A.3d 770.)

In *People v. Singer* (1975) 50 C.A.3d Supp. 9, 123 C.R. 460, a Los Angeles ordinance prohibited commercial activity at the Los Angeles International Airport without a permit from a board; and the latter granted Host, a concessionaire, the exclusive license to sell newspapers at the airport. *Held*, the ordinance was void. "The city has, in effect, attempted to give Host the power to limit distribution to such newspapers as it selects, including selection on the basis of 'the content of the ideas sought to be expressed.' ... Such discretion cannot be constitutionally imparted to Host." (50 C.A.3d Supp. 13.)

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A. Nature of Guarantees.

5. Commercial Speech.

a. In General.

2. Virginia State Board Case.

7 *Witkin Sum. Cal. Law Const Law* § 325

[§ 325] Virginia State Board Case.

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, the Court held that commercial speech, in this case advertising the prices of prescription drugs, was within the protection of the First Amendment and not subject to prohibition by state law. A Virginia statute made it unprofessional conduct for a licensed pharmacist to advertise the price or terms for drugs dispensed only by prescription. This action was brought by consumers of prescription drugs to enjoin the state regulatory board from enforcing the regulation. The district court declared the statute void and issued the injunction. *Held*, affirmed.

(a) *Right of recipient of communication.* The challenge to constitutionality was properly made by the plaintiffs as recipients of the information. Prior decisions have made it clear that "the protection afforded is to the communication, to its source and to its recipients both." (96 S.Ct. 1823, 48 L.Ed.2d 355, citing *Lamont v. Postmaster General of the United States* (1965) 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398, *infra*, §370.) Hence: "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." (96 S.Ct. 1823, 48 L.Ed.2d 355.)

(b) *Prior decisions on commercial speech.* *Valentine v. Chrestensen* (1942) 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 and *Breard v. Alexandria* (1951) 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233, *supra*, §324, indicated that commercial speech is not protected by the First Amendment; and in later opinions the court sometimes stressed the fact that the communications involved were not "purely commercial." But the simplistic approach of *Breard*, criticized by some members of the Court, was avoided in *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations* (1973) 443 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669, *supra*, §324; and in *Bigelow v. Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600, *supra*, §324, "the notion of unprotected 'commercial speech' all but passed from the scene." (96 S.Ct. 1824, 48 L.Ed.2d 357.)

(c) *Issue presented in this case.* The element of "public interest" in the commercial publication in *Bigelow* is not involved here. "Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.'" (96 S.Ct. 1825, 48 L.Ed.2d 358.)

(d) *Interests involved: parties and society.*

(1) The advertiser's interest is purely economic. But this does not disqualify him from First Amendment protection: Participants in a labor dispute have economic interests, but both employee and employer have First Amendment rights of expression on the merits of their particular dispute. (96 S.Ct. 1826, 48 L.Ed.2d 359.)

(2) The particular consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." The suppression of prescription drug price information has its harshest effects on the poor, the sick, and the aged; and, with drug prices varying as strikingly as they do, information "could mean the alleviation of physical pain or the enjoyment of basic necessities." (96 S.Ct. 1826, 1827, 48 L.Ed.2d 359, 360.)

(3) Society may have a strong interest in the free flow of commercial information, and no line can be drawn between publicly "interesting" or "important" commercial advertising and the opposite kind. "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." And "it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." (96 S.Ct. 1827, 48 L.Ed.2d 360.)

(e) *Asserted justifications for advertising ban.* The supporters of the legislation argue that it is necessary for the maintenance of a high degree of professionalism on the part of licensed pharmacists, and that price advertising may place in jeopardy the pharmacist's expertise, lower the quality of their professional services, and impair the stable pharmacist-customer relationships. These considerations were formerly held sufficient to sustain advertising bans attacked on due process and equal protection grounds, but they are inadequate to overcome a First Amendment challenge. The state regulatory agencies can see that professional standards are observed, and the paternalistic approach of the legislation--based on the advantages of keeping people in ignorance of the entirely lawful terms that competing pharmacists are offering--is unacceptable. "In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. We so hold." (96 S.Ct. 1830, 48 L.Ed.2d 363.)

(f) *Permitted regulations of commercial speech.* Some forms of regulation are constitutional; e.g., time, place, and manner restrictions that leave alternative channels for communication available, and prohibition of false or deceptive advertising, or advertising of illegal transactions. (96 S.Ct. 1830, 48 L.Ed.2d 363; see *infra*, §334.)

(g) *Other professions: questions left open.* This case deals solely with the regulation of commercial advertising by pharmacists. "Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." (96 S.Ct. 1831, 48 L.Ed.2d 365, footnote 25.)

Two justices filed brief concurring opinions (96 S.Ct. 1831, 1832, 48 L.Ed.2d 365, 366); one dissenter doubted the standing of plaintiffs to raise the issue, and thought that the majority had unduly extended First Amendment protections (96 S.Ct. 1835, 48 L.Ed.2d 370). (See *Board of Med. Examiners v. Terminal-Hudson Electronics* (1977) 73 C.A.3d 376, 385, 140 C.R. 757 [statutes prohibiting price advertising by registered dispensing opticians; following *Virginia State Bd.*]; 90 Harv. L. Rev. 142 [*Virginia State Bd.*]; 91 Harv. L. Rev. 198 [same]; 13 Cal. Western L. Rev. 430 [same]; 3 *Hastings Const. L. Q.* 761[same]; 5 *Hastings Const. L. Q.* 368 [same]; 14 *San Diego L. Rev.* 357 [same]; 32 *Stanf. L. Rev.* 121 [Corrective Advertising and the Limits of *Virginia State Bd.*].)

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3. No Least-Restrictive-Means Test.

7 *Witkin Sum. Cal. Law Const Law* § 326

[§ 326] No Least-Restrictive-Means Test.

In *Board of Trustees of the State University of New York v. Fox* (1989) 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388, the question was "whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end." (109 S.Ct. 3030, 106 L.Ed.2d 398.) The Court rejected this test.

(a) "We have refrained from imposing a least-restrictive-means requirement--even where core political speech is at issue--in assessing the validity of so-called time, place and manner restrictions. We uphold such restrictions so long as they are 'narrowly tailored' to serve a significant governmental interest, ... a standard that we have not interpreted to require elimination of less restrictive alternatives. ... Similarly with respect to Government regulation of expressive conduct, including conduct expressive of political views," regulation must be narrowly tailored to serve an important or substantial state interest, and must not burden substantially more speech than is necessary to further that interest. While these rules do not govern here, "we think it would be incompatible with the asserted 'subordinate position [of commercial speech] in the scale of First Amendment values' to apply a more rigid standard in the present context." (109 S.Ct. 3033, 106 L.Ed.2d 402.)

(b) "In sum, while we have insisted that 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing ... the harmless from the harmful,' ... we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends, ... a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' ... ; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." (109 S.Ct. 3034, 106 L.Ed.2d 404.)

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4. Texts and Law Reviews.

7 Witkin Sum. Cal. Law Const Law § 327

[§ 327] Texts and Law Reviews.

Commentary on First Amendment aspects of commercial speech is extensive. (See 4 Rotunda, §20.26 et seq.; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §480 et seq.; 78 *Harv. L. Rev.* 1191 [freedom of expression in a commercial context]; 30 *Cal. L. Rev.* 655 [commercial solicitation]; 78 *Cal. L. Rev.* 359 [critical analysis of commercial speech doctrine]; 7 *Hastings Const. L. Q.* 129 [proposed restrictions on telephone solicitation]; 14 *Hastings Const. L. Q.* 869 [distinction between commercial and noncommercial speech]; 29 *Loyola L.A. L. Rev.* 1219 [analysis under commercial speech doctrine of proposed federal restrictions on cigarette advertising]; 10 *Pacific L. J.* 1013 [Price Advertising in the Healing Arts]; 11 *Pacific L. J.* 143 [Unsolicited Commercial Telephone Calls and the First Amendment]; 27 *Southwestern U. L. Rev.* 379 [Fighting the Tobacco Wars on First Amendment Grounds]; 27 *Southwestern U. L. Rev.* 401 [regulation of tobacco advertising]; 13 *U.C. Davis L. Rev.* 175 ["The Uncharted Area"--Commercial Speech and the First Amendment]; 19 *U.C. Davis L. Rev.* 539 [First Amendment privilege to use names and likenesses in commercial advertising]; 39 *U.C.L.A. L. Rev.* 633 [First Amendment Crossroads--Extending Constitutional Defamation Protection to Commercial Speech]; 48 *U.C.L.A. L. Rev.* 1 [commercial speech]; 9 *A.L.R.2d* 728 [municipal regulation of solicitation of magazine subscriptions]; 35 *A.L.R.2d* 355 [municipal regulation of door-to-door soliciting and peddling]; 12 *A.L.R.4th* 851 [validity of restrictions on distribution of commercial advertising to private residences--modern cases]; 121 *A.L.R.5th* 427 [Validity of Statutes and Ordinances Restricting Hours of "Adult Entertainment" or Sex-Oriented Businesses]; 164 *A.L.R. Fed* 1 [Protection of Commercial Speech Under First Amendment--Supreme Court Cases].)

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See 5 Rotunda 4th, §20.26 et seq.; 120 *Harv. L. Rev.* 1892 [Dissent, Corporate Cartels, and the Commercial Speech Doctrine]; 39 *Loyola L.A. L. Rev.* 507 [commercial speech doctrine and junk food advertising to children]; 41 *Loyola L.A. L. Rev.* 1 [Symposium on commercial speech].

(b) Restrictions on Advertising and Publicity.



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1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 328

[§ 328] In General.

In *United States v. Edge Broadcasting Co.* (1993) 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345, the issue was "whether federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery, are ... consistent with the First Amendment." (113 S.Ct. 2700, 125 L.Ed.2d 351.)

In holding the statutes valid, the Court analyzed and applied the four-factor test for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, *infra*, §358. (113 S.Ct. 2703, 125 L.Ed.2d 355.) And in response to respondent Edge's claim that the statutes violated *Central Hudson* only as applied to it, the Court criticized "the piecemeal approach" as vitiating the Government's ability to accommodate states with differing policies. (113 S.Ct. 2708, 125 L.Ed.2d 360.) "Edge has chosen to transmit from a location near the border between two jurisdictions with different rules, and rests its case on the spillover from the jurisdiction across the border. Were we to adopt Edge's approach, we would treat a station that is close to the line as if it were on the other side of it, effectively extending the legal regime of Virginia inside North Carolina. One result ... might well be that additional North Carolina communities, farther from the Virginia border, would receive broadcast lottery advertising from Edge. Broadcasters licensed to these communities, as well as other broadcasters serving Elizabeth City, would then be able to complain that lottery advertising from Edge and other similar broadcasters renders the federal statute ineffective as applied to them. Because the approach Edge advocates has no logical stopping point once state boundaries are ignored, this process might be repeated until the policy of supporting North Carolina's ban on lotteries would be seriously eroded. We are unwilling to start down that road." (113 S.Ct. 2708, 125 L.Ed.2d 360, 361.)

Two justices joined in a brief concurring opinion (113 S.Ct. 2708, 125 L.Ed.2d 361), and two others joined in a dissenting opinion (113 S.Ct. 2708, 125 L.Ed.2d 361). (See *Kaufman v. ACS Systems* (2003) 110 C.A.4th 886, 911, 2 C.R.3d 296 [restrictions on advertisers' use of unsolicited faxes did not violate advertisers' free speech rights; government has substantial interest in regulating fax advertisements, which tie up fax machines, interfere with receipt of legitimate messages, and unfairly shift cost of advertising to consumer].)

Other cases have held the manner of regulation unconstitutional. (See *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469, 483 [federal statute prohibiting mailing of unsolicited advertisements for contraceptive held unconstitutional]; *Thompson v. Western States Med. Center* (2002) 535 U.S. 357, 122 S.Ct. 1497, 1504, 152 L.Ed.2d 563, 574 [under *Central Hudson* test, federal ban on advertising of pharmacies' drug compounding services, i.e., mixing medicines tailored to needs of individual patients, is unconstitutional; Government had means other than restricting speech to achieve interest in preventing large scale manufacturing of unapproved drugs]; 37 U.C. Davis L. Rev. 1389 [Thompson].)

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2. Advertising by Lawyers.

7 *Witkin Sum. Cal. Law Const Law* § 329

[§ 329] Advertising by Lawyers.

In *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, the Arizona Supreme Court Disciplinary Rule against advertising by attorneys (taken from former A.B.A. Rule 2-101(B); see 1 *Cal. Proc.* (4th), *Attorneys*, §§482, 577) was challenged as a violation of the Sherman Antitrust Act and the First Amendment. The Court rejected the antitrust attack, holding that the state-action exemption applied to this regulation imposed by the *Arizona Supreme Court*. (97 S.Ct. 2697, 2698, 53 L.Ed.2d 822.) The First Amendment challenge was upheld under the reasoning of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, *supra*, §325. However, *Virginia State Bd.* reserved judgment as to other professions, and the instant case deals expressly with restrictions on price advertising by attorneys.

(a) *Justifications for restrictions insufficient.* The following justifications were examined and rejected:

First, the adverse effect on professionalism; i.e., the argument that price advertising will bring about commercialization, adversely affect the profession's service orientation, erode the client's trust, and tarnish the dignified public image of the profession. *Answer*: "[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception." Also, the ABA Code (former E.C. 2-19; see 1 *Cal. Proc.* (4th), *Attorneys*, §426) advises that an attorney should promptly reach a clear agreement with his or her client as to the fee. "If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office." (97 S.Ct. 2701, 53 L.Ed.2d 826.) Moreover, the absence of advertising may be seen to reflect the profession's failure to reach out and serve the community; and cynicism may be created by the fact that the profession has publicly eschewed advertising "while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients." (97 S.Ct. 2702, 53 L.Ed.2d 828.)

Second, the inherently misleading nature of attorney advertising; i.e., that services are so individualized as to prevent informed comparison, the consumer is unable to determine in advance what services he or she needs, and

advertising will highlight irrelevant factors and fail to show the relevant factor of skill. *Answer*: "The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." And the argument that advertising does not provide a consumer with complete information assumes that the public is not sophisticated enough to realize the limitations of advertising, and is better kept in ignorance than trusted with correct but incomplete information. The preferred remedy is more disclosure, rather than less; it is the bar's role to assure that the public is sufficiently informed. (97 S.Ct. 2704, 53 L.Ed.2d 828.)

Third, the adverse effect on the administration of justice; i.e., that advertising stirs up litigation. *Answer*: "[W]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." The middle 70% of our population is not being served adequately by the legal profession, in part because of the fear of the cost and the inability to locate a suitable lawyer. Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange, and a rule allowing restrained advertising would be in accord with the bar's obligation to facilitate the process of intelligent selection of lawyers and to assist in making legal services fully available. (97 S.Ct. 2705, 53 L.Ed.2d 831.)

Fourth, the undesirable economic effects of advertising; i.e., that it will increase overhead costs with a resulting increase in fees, and will create a substantial entry barrier deterring or preventing young attorneys from penetrating the market. *Answer*: Both arguments are unpersuasive. It is entirely possible that advertising will serve to reduce the cost of legal services, and the ban in fact serves to perpetuate the market position of established attorneys. (97 S.Ct. 2706, 53 L.Ed.2d 831.)

Fifth, the adverse effect of advertising on the quality of service; i.e., that the attorney will provide a standard package at a set price regardless of whether it fits the client's needs. *Answer*: Restraints on advertising are an ineffective way of deterring shoddy work, and the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized. "Even if advertising leads to the creation of 'legal clinics' like that of appellants'--clinics that emphasize standardized procedures for routine problems--it is possible that such clinics will improve service by reducing the likelihood of error." (97 S.Ct. 2706, 53 L.Ed.2d 832.)

Sixth, the difficulties of enforcement: i.e., that, because the public may be particularly susceptible to misleading or deceptive advertising, a regulatory agency will be required and the overseeing of advertising will be burdensome. *Answer*: It is incongruous for the opponents of advertising to extol the altruism of the profession while asserting that its members will seize the opportunity to mislead. Most lawyers will abide by their oaths, and it will be in their interest--as in other cases of misconduct--to assist in weeding out the few who abuse their trust. (97 S.Ct. 2706, 2707, 53 L.Ed.2d 832, 833.)

(b) *Overbreadth analysis inapplicable*. In the usual case involving an unconstitutional restraint on speech, it is unnecessary to show that the specific acts of the challenger are protected by the First Amendment. But the overbreadth doctrine (see *infra*, §408) should not be applied to professional advertising, and it is therefore necessary to consider appellants' advertisement to see whether it is misleading and therefore unprotected. On an examination (see *Appendix*, 97 S.Ct. 2710, 53 L.Ed.2d 837), it is clear that the advertisement contains nothing that would justify its suppression. (97 S.Ct. 2708, 53 L.Ed.2d 835.)

(c) *Permissible limitations on advertising*. This holding does not preclude restraints on false, deceptive, or misleading advertising, such as claims as to quality of services, which are not susceptible to measurement or verification, or on in-person solicitation. "[W]e recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." (97 S.Ct. 2709, 53 L.Ed.2d 836.) Also, there may be reasonable restrictions on the time, place, and manner of advertising; and the special problems of advertising on the electronic broadcast media will warrant special consideration. (97 S.Ct. 2709, 53 L.Ed.2d 836.)

Four justices concurred in part and dissented in part in three opinions. (97 S.Ct 2709, 2711, 2719, 53 L.Ed.2d 838, 839, 849.) (See 91 Harv. L. Rev. 198.)

In *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444, the Court upheld state disciplinary rules prohibiting personal solicitation of professional employment by lawyers. However, *In re Primus* (1978) 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417, distinguishing *Ohralik*, reversed a disciplinary judgment where there was no solicitation for pecuniary gain but an offer of free legal assistance in connection with an allegedly unconstitutional invasion of a right--an expression of personal political beliefs. (For full discussion of opinions, see 1 Cal. Proc. (4th), Attorneys, §§586, 587; 92 Harv. L. Rev. 185; 13 Hastings Const. L. Q. 487.)

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985) 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652, 1 Cal. Proc. (4th), Attorneys, §578, the Court held that an attorney cannot be disciplined for soliciting legal business through printed advertising that contains truthful and nondeceptive legal advice on a specific legal problem and uses accurate and nondeceptive illustrations. (105 S.Ct. 2276, 2280, 2281, 85 L.Ed.2d 665, 670, 671.) (See 99 Harv. L. Rev. 193; 13 Hastings Const. L. Q. 487.) (Cf. *Leoni v. State Bar* (1985) 39 C.3d 609, 217 C.R. 423, 704 P.2d 183, 1 Cal. Proc. (4th), Attorneys, §579 [California's (former) disciplinary Rule 2-101(A) upheld as permissible regulation of misleading advertising; see 1 Cal. Proc. (4th), Attorneys, §482 et seq.].)

Zauderer was followed by a divided court in *Shapero v. Kentucky Bar Assn.* (1988) 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475, 1 Cal. Proc. (4th), Attorneys, §578, holding invalid a Kentucky rule prohibiting the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." Petitioner, a member of the bar, proposed to send a letter to potential clients who have had foreclosure suits filed against them, advising them that they could have foreclosure postponed, and to call his office for free information. "The First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those to whom it would most interest is somehow inherently objectionable." (108 S.Ct. 1921, 100 L.Ed.2d 484.)

The opinion concludes: "[S]o long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient." (108 S.Ct. 1924, 100 L.Ed.2d 488.) (See *People v. Morse* (1993) 21 C.A.4th 259, 266, 25 C.R.2d 816 [permanent injunction enjoining attorney from mailing solicitations to public concerning homestead declarations without complying with B. & P.C. 17537.6, which prohibits untrue or misleading statements in such solicitations, did not violate his right to free speech]; *In re Morse* (1995) 11 C.4th 184, 199, 203, 44 C.R.2d 620, 900 P.2d 1170, 1 Cal. Proc. (4th), Attorneys, §579 [disciplinary proceeding against same attorney; agreeing with *People v. Morse* that attorney's advertisements were misleading and that his First Amendment rights were not violated by B. & P.C. 17537.6]; *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 [state accountancy board could not reprimand attorney for truthfully referring in advertising to her status as Certified Public Accountant (CPA) and Certified Financial Planner (CFP)].)

SUPPLEMENT: [This section is current through the latest supplement]
Former A.B.A. Rule:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §516. Former EC-2-19:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §408. *Ohralik* case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §§524, 525.

Zauderer case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §517.

Leoni case:

Cross-References: 1 *Cal. Proc.* (5th), *Attorneys*, §§518, 416 et seq.

Shapero case:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §517.*In re Morse case:*

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §518.



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

5. Commercial Speech.

b. Restrictions on Advertising and Publicity.

3. Publicizing Services of Legal Clinic.

7 *Witkin Sum. Cal. Law Const Law* § 330

[§ 330] Publicizing Services of Legal Clinic.

In *Jacoby v. State Bar* (1977) 19 C.3d 359, 138 C.R. 77, 562 P.2d 1326, decided before *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, supra, §329, the court expressed similar views (19 C.3d 378 et seq.), but did not actually reach the issue of the constitutionality of (former) Rule 2-101, which prohibited professional advertising. (19 C.3d 363, 380.) Petitioners opened a law office called the "Legal Clinic of Jacoby and Meyers" to provide low cost legal services to people unable to meet indigency standards of legal aid programs but not affluent enough to retain most law firms. They instituted a number of cost-saving measures, which attracted the attention of the media, and petitioners participated in interviews and conferences with news reporters. As a result, articles appeared in newspapers and magazines describing the operation. The State Bar Disciplinary Board recommended a brief suspension from practice, on a finding that petitioners' conduct was principally directed to solicitation of clients. *Held*, the finding was unsupportable, and the conduct was not subject to discipline.

(a) The basic issue, whether a lawyer may be prohibited from participating in the preparation of a news article about himself or herself, has had little judicial attention, and must be decided on an analysis of principles developed in First Amendment cases. *First*, lawyers have the same freedom as other citizens. "Petitioners have a right not only to respond to questions from the media on important issues, but also a right to seek out the media to express their views." (19 C.3d 368.) *Second*, society has a right to hear their beliefs; i.e., the protection of the First Amendment is given to both the source and the recipients of the communication. (19 C.3d 368.) "[T]he threat of discipline has in many cases deterred lawyers from talking to journalists, and hence has prevented laymen from learning important facts about the legal profession. While this aura of secrecy may create a mystique about lawyers, surely it is preferable to encourage freedom of information." (19 C.3d 369.)

(b) The State Bar, citing *Belli v. State Bar* (1974) 10 C.3d 824, 112 C.R. 527, 519 P.2d 575, 1 Cal. Proc. (4th), Attorneys, §581, contended that a communication is outside the scope of First Amendment protection if it contains *any* language that can objectively be viewed as directed toward solicitation of clients. But *Belli*, read in connection with *Bigelow v. Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600, supra, §324, requires consideration of the communication in its entirety. (19 C.3d 370, 371.) "If the State Bar's interpretation of *Belli* were adopted, a lawyer speaking to the media would be compelled to measure his every word. As even the most articulate political candidates

have not infrequently discovered, slips of the tongue and remarks later reconsidered are not uncommon in press interviews. While this fact of life has rarely discouraged office seekers, it might have a more sobering effect on attorneys, whose gaffes could cause them not mere political embarrassment but loss of livelihood. Lawyers by training are a cautious breed. If they are aware that any statements they make to the press will be scrutinized line by line by bar authorities in order to uncover a subtle intent to solicit business, their reaction will be predictable: they will avoid the 'prohibited zone' by simply declining press interviews altogether Such a result is unacceptable in a free society." (19 C.3d 371.)

(c) The State Bar argued that petitioners continued to engage in interviews even though articles had focused on them rather than on the general concept of the legal clinic. The underlying assumption of this argument--that the First Amendment protects only abstract discussion--has long been repudiated; and news reporters naturally sought to attract reader interest in an important public issue by reporting on the actual operation of petitioners' legal clinic. "That petitioners may also have suspected the resulting publicity could attract clients does not strip their communication of First Amendment protection. To hold otherwise would subject to motivational scrutiny lawyers who write books about their major cases--all of which, by their accounts, resulted in glorious victories, or at least valiant defeats; attorneys who stand as candidates in political campaigns which have little chance of success but inevitably make their names known to the public; and lawyers who participate in community activities likely to engender favorable publicity." (19 C.3d 373.)

(d) Even to the extent that petitioners' statements could be interpreted as subtle solicitation, they still have First Amendment value, under the decisions on furnishing group legal services (see *infra*, §383) and on prescription drug advertising (see *supra*, §325). (19 C.3d 374, 375.)

SUPPLEMENT: [This section is current through the latest supplement]
Belli case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §520.



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4. Advertising by Gambling Casino.

7 *Witkin Sum. Cal. Law Const Law* § 331

[§ 331] Advertising by Gambling Casino.

In *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico* (1986) 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266, the Puerto Rico Legislature, to promote tourism and obtain additional revenue, legalized certain forms of casino gambling, but prohibited advertising of these gambling facilities to residents of Puerto Rico. Plaintiff, doing business in Puerto Rico as Condado Holiday Inn Hotel and Sands Casino, sought a declaratory judgment that the statute and regulation impermissibly suppressed commercial speech. The Puerto Rico superior court entered a judgment narrowly construing the statute to permit certain kinds of advertising and the Puerto Rico Supreme Court dismissed plaintiff's appeal. The U.S. Supreme Court, accepting the narrowing construction, rejected the constitutional challenge.

(a) The four-step analysis of *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, *infra*, §358, is used in determining the validity of a restriction on commercial speech, and the requirements are satisfied here. (106 S.Ct. 2976, 92 L.Ed.2d 279, 280.)

(1) Advertising of casino gambling concerns a lawful activity and is not misleading or fraudulent. (106 S.Ct. 2976, 92 L.Ed.2d 280.)

(2) Puerto Rico has a substantial interest at stake: reduction of demand for casino gambling by its residents. This is the same concern that has motivated the vast majority of the 50 states to prohibit casino gambling. (106 S.Ct. 2976, 92 L.Ed.2d 280, 281.)

(3) The challenged restrictions directly advance the government's interests. (106 S.Ct. 2977, 92 L.Ed.2d 281.) The argument that the restrictions are underinclusive because other traditional kinds of gambling may be advertised to residents is misplaced. The Legislature's interest is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling; i.e., the Legislature reasonably concluded that the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds. (106 S.Ct. 2977, 92 L.Ed.2d 281.)

(4) Plaintiff contended that a program aimed at discouraging casino gambling would be an adequate, less extensive

means of accomplishing the legislative objective, but it was for the Legislature to decide whether this "counterspeech" policy would be as effective as a restriction on advertising. (106 S.Ct. 2978, 92 L.Ed.2d 282.)

(b) *Carey v. Population Services, Int.* (1977) 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 and *Bigelow v. Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600, supra, §324, are distinguishable. In these cases, the underlying conduct that was the subject of the advertising restrictions (contraceptives, abortion clinic) was constitutionally protected; here, casino gambling by residents could have been prohibited, and the greater power to ban includes the lesser power to prohibit advertising. (106 S.Ct. 2979, 92 L.Ed.2d 283.)

(d) Plaintiff also contends that having chosen to legalize casino gambling for residents, the Legislature cannot use restrictions on advertising to reduce the demand for casino gambling. The answer is that, because the government could prohibit the conduct, it may take the less intrusive step of allowing it with restrictions on advertising. (106 S.Ct. 2979, 92 L.Ed.2d 284.)

Four justices dissented in two opinions disagreeing with the majority on all points. (106 S.Ct. 2980, 2986, 92 L.Ed.2d 285, 292.) (See 100 Harv. L. Rev. 172.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Advertising of Alcohol and Tobacco.

7 *Witkin Sum. Cal. Law Const Law* § 332

[§ 332] Advertising of Alcohol and Tobacco.

Many regulations restricting or prohibiting the advertising of alcohol and tobacco products have been held unconstitutional. (See *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 115 S.Ct. 1585, 1591, 131 L.Ed.2d 532, 541 [statute prohibiting display of alcoholic content on beer labels was not designed to meet substantial governmental interest in preventing strength wars]; 44 *Liquormart v. Rhode Island* (1996) 517 U.S. 484, 116 S.Ct. 1495, 1501, 1514, 134 L.Ed.2d 711, 719, 736 [Rhode Island statute completely banning off-site advertisement of liquor prices; reasoning of *California v. LaRue* (1972) 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, *infra*, §453, disavowed to extent that it relied on Twenty-First Amendment as qualifying First Amendment]; *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 121 S.Ct. 2404, 2425, 150 L.Ed.2d 532, 563 [applying test of *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, *infra*, §358; restrictions on advertising of tobacco products were more extensive than necessary to advance state's substantial interest in preventing underage tobacco use, and height restrictions on indoor advertising failed to advance that interest]; 110 *Harv. L. Rev.* 216 [44 *Liquormart*]; 34 *U.C.L.A. L. Rev.* 1139 [regulation of alcoholic beverage advertising].) However, a regulation requiring retailers to keep tobacco products behind their counters does not offend the First Amendment. (*Lorillard Tobacco Co.*, *supra*.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Required Funding for Generic Advertising.

7 *Witkin Sum. Cal. Law Const Law* § 333

[§ 333] Required Funding for Generic Advertising.

In *Glickman v. Wileman Bros. & Elliott* (1997) 521 U.S. 457, 117 S.Ct. 2130, 2141, 138 L.Ed.2d 585, 604, a case of first impression, fruit producers and handlers challenged mandatory financial contributions for generic advertising intended to stimulate consumer demand for an agricultural product in a regulated market. *Held*, the contributions are consistent with the regulatory goals of the overall statutory scheme and do not abridge freedom of speech. The Court of Appeals' reliance on the test outlined in *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, *infra*, §358, was inconsistent with the nature and purpose of the collective action program at issue. (117 S.Ct. 2141, 138 L.Ed.2d 603.)

Four justices dissented in two separate opinions. (117 S.Ct. 2142, 2155, 138 L.Ed.2d 605, 621.) (See *United States v. United Foods* (2001) 533 U.S. 405, 121 S.Ct. 2334, 2338, 150 L.Ed.2d 438, 445 [distinguishing *Glickman*; federal statute mandating assessments for generic mushroom advertising that was not part of comprehensive regulatory scheme was unconstitutional under First Amendment]; 111 *Harv. L. Rev.* 319 [*Glickman*]; 186 *A.L.R. Fed* 533 [Act advancing generic advertising of beef].)

In *Gerawan Farming v. Lyons* (2000) 24 C.4th 468, 101 C.R.2d 470, 12 P.3d 720 (*Gerawan I*), another case of first impression, the court considered whether a marketing order issued by California's Secretary of Food and Agriculture, which compelled funding of generic advertising by plum producers and handlers, violated plaintiff grower's free speech rights under either the First Amendment or Cal. Const., Art. I. *Held*, judgment on the pleadings vacated and case remanded. No right to freedom of speech is implicated under the First Amendment, but the order does implicate a right to free speech under Article I.

(a) *First Amendment.*

(1) The First Amendment right to freedom of speech provides limited protection to commercial speech. It "affords such protection as it does to 'truthful and nonmisleading ... messages about lawful products and services.' ... It affords none whatsoever to other sorts of messages about other sorts of products and services." (24 C.4th 487, quoting 44 *Liquormart v. Rhode Island* (1996) 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711.) "Just as speech results from what a

speaker chooses to say and what he chooses not to say, so too it results from what speech a speaker chooses to fund and what speech he chooses not to fund." (24 C.4th 488.) It would appear that, "without more, the First Amendment's right to freedom of speech would *not* allow compelling one who engages in commercial speech to fund speech in the form of advertising what he would otherwise not, when his message is about a lawful product or service and is not otherwise false and misleading." (24 C.4th 499.) However, *Glickman* concluded that the marketing order involved in that case did not violate the First Amendment right to freedom of speech by compelling funding of generic advertising. (24 C.4th 500.) In other words, there is "no First Amendment right to be free of coerced subsidization of commercial speech" whatsoever." (24 C.4th 502, quoting *Glickman*, dissenting opinion.) "Although the soundness of the *Glickman* majority's analysis is open to serious question, its authority is not." (24 C.4th 505.)

(2) Here, plaintiff fails to allege facts that would implicate its First Amendment right to freedom of speech under *Glickman*. (24 C.4th 505.) (a) Plaintiff failed to allege facts that would establish that the marketing order imposed any restraint on its freedom of speech. The fact that the compelled funding reduces the amount of money available to plaintiff for its own advertising is not enough. (b) Plaintiff failed to allege facts that would establish that the marketing order compels it to engage in any speech. The marketing program does not require plaintiff to speak itself, nor to be publicly identified or associated with the marketing board's message. (c) Plaintiff failed to allege facts that would establish that the marketing program compels it to fund any political or ideological speech. Any objection to generic advertising as promoting socialistic or collectivist programs must be dismissed as "trivial." (24 C.4th 506.)

(b) *California Constitution.*

(1) The right to freedom of speech under the California Constitution is broader and greater than under the *First Amendment*. (24 C.4th 491; see supra, §312.) Unlike the First Amendment, Cal. Const., Art. I, §2 "specifies a 'right' to freedom of speech explicitly and not merely by implication" (24 C.4th 491); it is unbounded in range, running "against the world, including private parties as well as governmental actors" (24 C.4th 492); and it is unlimited in scope (24 C.4th 493). Further, from the history of Article I, there is "no reason to reject protection for commercial speech, at least in the form of truthful and nonmisleading messages about lawful products and services." (24 C.4th 496.)

(2) Here, plaintiff alleges facts "to the effect that it produces and handles plums; plums constitute a lawful product; it has developed, and uses, a brand for marketing purposes; it engages in commercial speech about its own branded plums through advertising; its message is not false or misleading; it is nevertheless compelled by the California Plum Marketing Program to fund commercial speech in the form of generic advertising about plums as a commodity against its will; and the compulsion of funding reduces the amount of money available for its own advertising." These "factual allegations are sufficient at least to implicate its article I right to freedom of speech." (24 C.4th 510.) The advertising "is intended not to prevent or correct any otherwise false or misleading message in the interest of consumer protection, but solely to develop and promote sales in the interest of producer welfare." (24 C.4th 510.)

Three justices joined in a lengthy dissent, writing that the challenged marketing program should be upheld under both the federal and state *Constitutions*. (24 C.4th 517.)

In *Gerawan Farming v. Kawamura* (2004) 33 C.4th 1, 14 C.R.3d 14, 90 P.3d 1179 (*Gerawan II*), the Court of Appeal on remand held that the generic advertising program for plums was unconstitutional because "it was not supported by a valid governmental interest, owing to the fact that it had to be approved by a private association." The California Supreme Court reaffirmed its holding in *Gerawan I* that the generic advertising program does not violate the *First Amendment*. (33 C.4th 20.) However, the court held that other issues could not be decided on the pleadings, and remanded the case for further factfinding on whether the program violates Cal. Const., Art. I, and whether the advertising program constitutes government speech.

(a) The intermediate scrutiny standard articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, *infra*, §358, applies to the determination whether the program violates Cal. Const., Art. I. "[T]he compelled funding of commercial speech neither warrants application of the

strictest scrutiny reserved for such matters as the censorship or compelled utterance of noncommercial speech ... , nor can it pass muster simply because it is rationally based." (33 C.4th 22.)

(b) The first prong of the *Central Hudson* test is satisfied. The right not to contribute financially to a commercial message is protected by the First Amendment, and plaintiff seeks to exercise a right that has nothing to do with untruthful or misleading speech on its part. (33 C.4th 22.) However, further fact-finding is necessary to determine whether (1) the government has a substantial interest in promoting generic advertising schemes, (2) the scheme directly advances the asserted governmental interest, and (3) the scheme is not more extensive than necessary to serve that interest. (33 C.4th 23.)

(c) The fact that the marketing program must be approved by the growers does not by itself constitutionally invalidate the program. The government still must show that the program "serves a substantial public interest and not merely private interests." (33 C.4th 26.)

(d) As suggested in *United Foods*, whether the fact that the Secretary of Food and Agriculture must ultimately approve the generic advertising makes the speech that of the government partially depends on whether the approval is *pro forma*. (33 C.4th 27.) If the message is decided by the Secretary pursuant to statutorily derived regulatory authority, the speech may be considered government speech. (33 C.4th 28.)

Three justices concurred and dissented in two opinions. (33 C.4th 28, 33.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Gallo Cattle Co. v. Kawamura* (2008) 159 C.A.4th 948, 963, 72 C.R.3d 1, Supp., infra, §339 [in action involving assessments on milk producer for generic advertising, marketing program did not compel speech in violation of Cal. Const., Art. I, §2, by using "Real California Cheese" package certification seal on labels to boost sales of cheese makers who agree to use it]; 44 Cal. Western L. Rev. 329 [Listener Interests in Compelled Speech Cases]; 31 *Hastings Const L. Q.* 163 [*United Foods*]; 38 *U.C. Davis L. Rev.* 1087 [The Very Idea of a First Amendment Right Against Compelled Subsidization]; for a decision holding that promotional campaigns of the Beef Board, funded by compelled contributions of beef producers, constitute government speech immune from First Amendment concerns, see *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896, Supp., infra, §339.



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7. Deceptive or Misleading Advertising.

7 Witkin Sum. Cal. Law Const Law § 334

[§ 334] Deceptive or Misleading Advertising.

(1) *In General.* B. & P.C. 17500 et seq., prohibiting false advertising, do not violate the First Amendment. (*People v. Superior Court (Olson)* (1979) 96 C.A.3d 181, 195, 157 C.R. 628; see *People v. Anderson* (1991) 235 C.A.3d 586, 589, 591, 286 C.R. 734 [P.C. 653w, requiring disclosure of origin of sound recording when possessed or distributed for gain, is constitutional; state has compelling interest in protecting public from false and deceptive practices of "bootleggers," and statute proscribes only commercial speech, as to which state need only show reasonable relationship between statute and state interest].)

In *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118, defendant was an attorney practicing law in Florida. She was also a Certified Public Accountant (CPA) and a Certified Financial Planner (CFP), and her advertising and other communications with the public referred to her credentials as a CPA and a CFP. Although the communications were apparently truthful, the state accountancy board reprimanded her for engaging in "false, deceptive, and misleading" advertising. *Held*, the board failed to carry its burden of showing that defendant's actions were either inherently or potentially misleading, and the board's censure is therefore incompatible with the *First Amendment*. (114 S.Ct. 2086, 129 L.Ed.2d 123.)

In *Kasky v. Nike* (2002) 27 C.4th 939, 119 C.R.2d 296, 45 P.3d 243, defendant athletic shoe and apparel manufacturer, in response to adverse publicity, made allegedly false and misleading statements defending its labor practices in advertisements, press releases, and letters to newspapers and universities. *Held*, the statements are commercial speech that may be regulated.

(a) "When a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." (27 C.4th 960.) Here there is a commercial speaker communicating with actual and potential purchasers of its products about working conditions and labor practices in its own business operations. (27 C.4th 963.)

(b) Government regulation of defendant's speech about working conditions in its factories "is consistent with

traditional governmental authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices. Trade regulation laws have traditionally sought to suppress and prevent not only false or misleading statements about products or services in themselves but also false or misleading statements about where a product was made ... , or by whom." (27 C.4th 964.)

(c) Defendant's speech is not removed from the category of commercial speech even though it is intermingled with noncommercial speech. To the extent defendant's press release and letters discuss policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards ought to be observed in these factories, the statements are noncommercial speech. A content-based regulation of noncommercial messages would be subject to the strict scrutiny test for fully protected speech. But defendant "may not 'immunize false or misleading product information from government regulation simply by including references to public issues.'" (27 C.4th 966, quoting *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469.)

Three justices dissented in two opinions, stating that the majority denies defendant the same First Amendment protection its critics enjoy (27 C.4th 970, 971), and that defendant's "commercial statements about its labor practices cannot be separated from its noncommercial statements about a public issue, because its labor practices *are* the public issue." (27 C.4th 977, 980.) The U.S. Supreme Court initially granted certiorari, but the writ was later dismissed as "improvidently granted." (*Nike v. Kasky* (2003) 539 U.S. 654, 123 S.Ct. 2554, 156 L.Ed.2d 580.) (See *Nagel v. Twin Laboratories* (2003) 109 C.A.4th 39, 48, 134 C.R.2d 420 [following *Nike*; list of product ingredients on label and website is commercial speech that is not protected by First Amendment]; *Bernardo v. Planned Parenthood Federation of America* (2004) 115 C.A.4th 322, 343, 9 C.R.3d 197 [distinguishing *Nike*; statements on defendant birth control organization's website that were not made in connection with offer to sell abortion services and did not propose commercial transaction, but rather were educational in nature, asserting defendant's position on disputed scientific and medical issues, did not constitute commercial speech and were protected by First Amendment].)

(2) *Use of Trade Name.* In *Friedman v. Rogers* (1979) 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100, Texas enacted a statute prohibiting the practice of optometry under an assumed name, trade name, or corporate name. *Held*, the regulation was constitutional.

(a) Both *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, *supra*, §325, and *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, *supra*, §329, dealt with truthful advertising; and both opinions emphasized that some forms of commercial speech regulation are permissible, e.g., restrictions on false, deceptive, and misleading speech. (99 S.Ct. 894, 59 L.Ed.2d 109.)

(b) Use of a trade name is a different form of commercial speech from that considered in *Virginia State Bd.* and *Bates*. A trade name conveys no information about the price and nature of the services until it acquires meaning over a period of time, and it can be used to mislead the public. Thus, the trade name of an optometrical practice can remain unchanged despite changes in the staff on whose skill and care the public depends; and an optometrist may assume a new trade name if negligence or misconduct casts a shadow over the old one. Also, by using different trade names at shops under his or her common ownership, an optometrist can give the public the false impression of competition among the shops. (99 S.Ct. 895, 896, 59 L.Ed.2d 111, 112.)

(c) The state's interest in protecting the public from the deceptive and misleading use of optometrical trade names is substantial. And the incidental effect on the content of commercial speech is slight, for the optometrist may advertise his or her services, prices, and method of operation. Thus, the statute does not stifle commercial speech, but "ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past." (99 S.Ct. 897, 59 L.Ed.2d 113, 114.)

(3) *False Representation of Professional Status.* In *Moore v. California State Bd. of Accountancy* (1992) 2 C.4th 999, 9 C.R.2d 358, 831 P.2d 798, plaintiffs, not licensed by the State Board of Accountancy as public accountants,

nevertheless used the terms "accountant" and "accounting" in referring to the services they offered to the public. The trial court granted the board's request for an injunction under *B. & P.C. 5058*. The Court of Appeal reversed the trial court's judgment, and the Supreme Court affirmed the judgment of the Court of Appeal.

(a) "California's statutory scheme reserves the practice of public accountancy to the Board's licensees--persons who have been certified as qualified to offer and perform the full gamut of accounting services, and whose education, experience, and ethical qualifications have been established as a prerequisite to licensing. To protect members of the public from the unlicensed practice of public accountancy, section 5058 prohibits the use by an unlicensed person of *any* designation or term describing the person's profession, or service he or she offers, that is likely to cause a layperson to believe that the provider is licensed." (2 *C.4th* 1004.)

(b) The board's Regulation 2, implementing the catchall language of *B. & P.C. 5058*, declares that the generic terms "accountant" and "accounting" are likely to be confused with "certified public accountant" and "public accountant." This regulation appears reasonably necessary to effectuate the purpose and intent behind *B. & P.C. 5058*. (2 *C.4th* 1015.) Also, the administrative construction for nearly half a century, and the Legislature's presumed awareness of it, supports this view. (2 *C.4th* 1017, 1019.)

(c) The statute "may constitutionally ban only those uses of the generic terms 'account' and 'accounting' that stand to potentially mislead the public regarding the user's licensee or nonlicensee status." The evidence here supports the long-standing interpretation of *B. & P.C. 5058* "as including within its ban the *unqualified* use of those terms as potentially misleading, to the public's detriment. In contrast, where the generic terms are used in conjunction with a modifier or modifiers that serve to dispel any possibility of confusion--for example, an express disclaimer stating that the 'accounting' services being offered do not require a state license--their use in such a context may not be constitutionally enjoined." (2 *C.4th* 1023.)

Three justices dissented in two opinions (2 *C.4th* 1025, 1027.) (See 20 *Pepperdine L. Rev.* 811 [Moore].)

(4) *False Representation on Book or Videotape Cover*. In *Keimer v. Buena Vista Books* (1999) 75 *C.A.4th* 1220, 1231, 89 *C.R.2d* 781, the court held that the First Amendment did not protect a publisher from an action under the Unfair Trade Practices Act for false advertising on book and videotape covers that reiterates protected false statements contained in the books and videotapes themselves.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Bronco Wine Co. v. Jolly* (2005) 129 *C.A.4th* 988, 1003, 29 *C.R.3d* 462 [applying *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 *U.S.* 557, 100 *S.Ct.* 2343, 65 *L.Ed.2d* 341, text, §358; *B. & P.C. 25241*, prohibiting use of brand name with "Napa" on wine label unless at least 75% of grapes used are from Napa County, regulates deceptive and misleading commercial speech that is not protected by First Amendment; "Napa" has geographic and viticultural significance and its use in brand name is inherently likely to mislead consumers when grapes used to make wine are not grown in that county]; *People v. PuriTec* (2007) 153 *C.A.4th* 1524, 1534, 1536, 64 *C.R.3d* 270 [applying *Central Hudson* test; statutes prohibiting sellers of water treatment devices from advertising health or safety benefits when devices had not been certified by state did not infringe on commercial free speech]; 58 *Hastings L. J.* 299 [debate on geographical indications]; 35 *Southwestern U. L. Rev.* 603 [geographic indicators versus trademarks].



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CHAPTER X - Constitutional Law

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

5. Commercial Speech.

c. Other Restrictions.

1. In General.

7 Witkin Sum. Cal. Law Const Law § 335

[§ 335] In General.

(1) *Cases Holding Manner of Regulation Unconstitutional.* The principles of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, supra, §325, were applied in *Welton v. Los Angeles* (1976) 18 C.3d 497, 134 C.R. 668, 556 P.2d 1119. A Los Angeles ordinance prohibited the sale of merchandise on the street and the sale of a news publication or other printed matter on the roadway of a street, but permitted the sale of news publications on a sidewalk or parkway. Petitioner published a copyrighted map depicting the addresses and routes to movie star homes, and sold the maps to the public on the parkway of a street. She sought declaratory relief, and the trial court held that her activity was commercial speech unprotected by the First Amendment. She was then held in contempt for violation of an injunction against sale of her maps. *Held*, on habeas corpus, the ordinance was unconstitutionally applied to her.

(a) Under *Virginia State Bd.*, the commercial character of her speech did not remove it from First Amendment protection; and the fact that the map lacked opinion or information of social worth was irrelevant. It was as much entitled to protection as a political pamphlet. (18 C.3d 504.)

(b) The police power may be exercised to control street traffic (18 C.3d 504, citing the text), and the ordinance was therefore valid in its prohibition of the sale of printed matter on the roadway (that part of the street travelled by vehicles). (18 C.3d 505.) But the prohibition of the sale of printed matter on sidewalks and parkways, places historically associated with the exercise of First Amendment rights, was not a proper exercise of police power. (18 C.3d 505.) The ordinance was upheld, however, by construing it to eliminate the overbreadth. (18 C.3d 506, 507; see supra, §119.)

In *Linmark Associates v. Willingboro* (1977) 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155, the council of the township of Willingboro, a racially integrated residential community, became concerned about a decline in its white population, attributed to "panic selling" by whites who feared that an increase in the black population threatened real estate values. The council adopted an ordinance prohibiting posting "For Sale" or "Sold" signs on all but model homes. *Held*, the ordinance was unconstitutional.

(a) The argument that the ordinance did not prohibit but merely regulated the time, place, and manner of speech is

unpersuasive. (1) Although in theory sellers are free to employ other alternatives, their options realistically are relegated to newspaper advertising and listing with real estate agents--both more costly and sometimes less effective than a sign in front of the house. (97 S.Ct. 1618, 52 L.Ed.2d 162.) (2) The ordinance is not genuinely concerned with either the place or manner of speech, for it does not prohibit all lawn signs, and seeks neither an aesthetic objective nor the protection of privacy. "Willingboro has proscribed particular types of signs based on their content because it fears their 'primary' effect--that they will cause those receiving the information to act upon it." (97 S.Ct. 1619, 52 L.Ed.2d 163.)

(b) The argument that the goal of the ordinance is to promote racially integrated housing does not serve to distinguish *Virginia State Bd.* (1) The record does not show that the prohibition is necessary to assure that the community remains integrated. (2) More important, however, is the fact that the information which residents are prevented from obtaining is of vital interest to them, bearing on one of the most important decisions they have a right to make: where to live. "If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.'" *Virginia Pharmacy* denies government such sweeping powers." (97 S.Ct. 1620, 52 L.Ed.2d 164.) (See 5 *Hastings Const. L. Q.* 398; on right to post residential signs generally, see *infra*, §354.)

People v. Moon (1978) 89 C.A.3d Supp. 1, 152 C.R. 704, applied the *Linmark* reasoning to a city ordinance prohibiting parking a vehicle on a street "for the principal purpose of demonstrating it or displaying it for sale." (a) The seller of an automobile has few realistic options; he or she is relegated almost exclusively to newspaper advertising, which is more costly and less likely to communicate the facts concerning the vehicle. (89 C.A.3d Supp. 4.) (b) The ordinance was not concerned with the place of communication, for other kinds of advertising on vehicles--political, philosophical, religious, etc.--are permitted. (89 C.A.3d Supp. 4.) (c) The ordinance as drafted was over-broad and not necessary to protect the aesthetic interests of the city or to achieve better traffic management. (89 C.A.3d Supp. 6.) (See *Spiritual Psychic Science Church v. Azusa* (1985) 39 C.3d 501, 511, 217 C.R. 225, 703 P.2d 1119, *infra*, §356 [ordinance prohibiting fortune-telling]; *Anderson v. Department of Real Estate* (1979) 93 C.A.3d 696, 702, 705, 155 C.R. 307 [licensing requirements for "advance fee rental agents" were held invalid as applied to activity involving only ascertainment of available housing, publication of lists, and solicitation of customers].)

(2) *Cases Holding Manner of Regulation Constitutional.* In *Loska v. Superior Court* (1986) 188 C.A.3d 569, 233 C.R. 213, a municipal ordinance prohibited the sale or resale or offer to sell or resell tickets of admission to a public assemblage in any public place. *Held*, construing it narrowly, the ordinance was constitutional. The "offer to sell" is commercial speech, and involves a lawful activity. (188 C.A.3d 582.) Prohibition where the solicitation and the completed transaction occur on public property by a ticket seller in the business of ticket selling directly advances the city's asserted interest in preventing counterfeiting, but it would be unconstitutional to prohibit an individual ticket holder from disposing of his or her extra ticket at face value or below anywhere on public property. (188 C.A.3d 583.) Hence, to save the ordinance, it must be construed to apply only to ticket sellers in the business where both the solicitation and proposed sale are on public property. (188 C.A.3d 584.) (See *Redwood Empire Publishing Co. v. State Bd. of Equalization* (1989) 207 C.A.3d 1334, 1341, 1343, 255 C.R. 514 [regulation defining newspapers and periodicals, for purpose of sales tax exemption, to exclude publications with more than 90% advertising, is constitutional]; *Xiloj-Itzep v. Agoura Hills* (1994) 24 C.A.4th 620, 636, 29 C.R.2d 879 [ordinance prohibiting solicitation from persons travelling in vehicles on city streets was constitutional, because it was content-neutral, served legitimate public safety interest, was narrowly tailored to achieve its purpose, and left alternative avenues of communication].)

West's Key Number Digest, Constitutional Law k.90.2

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Cases Holding Manner of Regulation Unconstitutional.* See *Baba v. Board of Supervisors of San Francisco* (2004) 124 C.A.4th 504, 514, 21 C.R.3d 428 [rent control ordinance subjecting landlords and their assistants to criminal liability for making bad faith eviction threats or requests that tenants move is unconstitutional on its face; applying test of *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65

L.Ed.2d 341, text, §358, even though ordinance is not principally directed at commercial speech, and distinguishing *Kasky v. Nike* (2002) 27 C.4th 939, 119 C.R.2d 296, 45 P.3d 243, text, §334]; *U.D. Registry v. California* (2006) 144 C.A.4th 405, 426, 50 C.R.3d 647 [applying *Central Hudson* test; statute seeking to protect consumers from identity theft by banning dissemination of certain credit reports was unconstitutional as applied to plaintiff; credit-related information provided by plaintiff to land- lords and property managers was culled from public records; statute could not be judicially reformed to apply to plaintiff].(2) *Cases Holding Manner of Regulation Constitutional*. See *Tennessee Secondary School Athletic Assn. v. Brentwood Academy* (2007) 551 U.S. 291, 127 S.Ct. 2489, 2495, 168 L.Ed.2d 166, 173 [athletic league rule prohibiting member high schools from using undue influence in recruiting middle school students for athletic programs did not violate free speech rights].



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A. Nature of Guarantees.

5. Commercial Speech.

c. Other Restrictions.

2. Moratorium on Solicitation of Accident Victims.

7 *Witkin Sum. Cal. Law Const Law* § 336

[§ 336] Moratorium on Solicitation of Accident Victims.

In *Florida Bar v. Went For It* (1995) 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541, the Court upheld Florida Bar rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster.

(a) Under *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, *infra*, §358, a restriction on truthful commercial speech is permissible if the government (1) asserts a substantial interest, (2) demonstrates that the restriction directly and materially advances that interest, and (3) shows that the regulation is narrowly drawn. (115 S.Ct. 2376, 132 L.Ed.2d 549.)

(b) The interests asserted by the Florida Bar--protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers, and, by so doing, preventing the erosion of public confidence in the legal profession that these intrusions engender--are substantial. (115 S.Ct. 2376, 132 L.Ed.2d 550.)

(c) The harms targeted by the ban are quite real, as demonstrated by a Bar study containing extensive statistical and anecdotal data showing that the public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly on the profession. (115 S.Ct. 2377, 132 L.Ed.2d 551.)

(d) "The Bar's rule is reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession." (115 S.Ct. 2380, 132 L.Ed.2d 555.) The ban is of limited duration--30 days--and ample alternatives exist for receipt of information during that time. (115 S.Ct. 2380, 2381, 132 L.Ed.2d 555, 556.)

Four justices dissented, arguing that attorneys who communicate their willingness to assist potential clients are engaged in protected speech, and that the majority's opinion undercuts this guarantee in an important class of cases at the expense of victims most in need of legal assistance. (115 S.Ct. 2381, 132 L.Ed.2d 556.) (See 109 *Harv. L. Rev.* 190; 22 *Pepperdine L. Rev.* 1143.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Other Restrictions.

3. Solicitation by Accountant.

7 *Witkin Sum. Cal. Law Const Law* § 337

[§ 337] Solicitation by Accountant.

In *Edenfield v. Fane* (1993) 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543, the Court held that Florida's prohibition of personal solicitation of clients by certified public accountants was unconstitutional. Plaintiff, a licensed CPA in New Jersey, often obtained business clients by making unsolicited telephone calls to arrange meetings and explain his services and expertise. This practice was permitted under New Jersey law, but when plaintiff moved to Florida he found that the Board of Accountancy had a comprehensive rule prohibiting direct personal solicitation. He sued the board, seeking declaratory and injunctive relief. *Held*, summary judgment for plaintiff affirmed.

(a) "Whatever ambiguities may exist at the margins of the category of commercial speech, ... it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply. ... There are, no doubt, detrimental aspects to personal commercial solicitation in certain circumstance, ... but these detriments are not so inherent or ubiquitous that solicitation of this sort is removed from the ambit of First Amendment protection." (113 S.Ct. 1797, 123 L.Ed.2d 551.) "Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. A seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact. Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service, and allows both parties to discuss and negotiate the desired form for the transaction or professional relation. Solicitation also enables the seller to direct his proposals toward those consumers who he has a reason to believe would be most interested in what he has to sell. For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market. In particular, with respect to nonstandard products like the professional services offered by CPAs, these benefits are significant." (113 S.Ct. 1797, 123 L.Ed.2d 552.)

(b) However, commercial speech is "linked inextricably" with the commercial arrangement that it proposes; so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. "For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." (113 S.Ct. 1798, 123 L.Ed.2d 552.)

(c) The board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interest in any direct and material way; it presents no studies suggesting that personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the board claims to fear. (113 S.Ct. 1800, 123 L.Ed. 555.)

(d) The board, relying on *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444, supra, §329, seeks to justify the ban as a prophylactic rule. But *Ohralik* does not support blanket bans on personal solicitation by all types of professionals; its holding was narrow and depended on certain unique features of in-person solicitation by lawyers that were present in the circumstances of that case. (113 S.Ct. 1802, 123 L.Ed.2d 557.) If *Ohralik* were read in the manner the board proposes, "the protection afforded commercial speech would be reduced almost to nothing; comprehensive bans on certain categories of commercial speech would be permitted as a matter of course." (113 S.Ct. 1803, 123 L.Ed.2d 559.) (See 22 *Pepperdine L. Rev.* 1143 [state of commercial speech doctrine after *Edenfield v. Fane*].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Nature of Guarantees.

5. Commercial Speech.

c. Other Restrictions.

4. Unlawful Conduct.

7 *Witkin Sum. Cal. Law Const Law* § 338

[§ 338] Unlawful Conduct.

(1) *In General*. It is not an abridgment of freedom of speech or press "to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." (*National Subscription Television v. Formula Int.* (1984) 153 C.A.3d 308, 313, 200 C.R. 213 [quoting U.S. Supreme Court].)

In *National Subscription Television*, plaintiff National operated a subscription television business using a scrambled signal and furnishing decoders to provide intelligible reception. Defendant Formula, a retail distributor of electronic parts, sold decoder kits containing components and assembly instructions. The lower court granted an injunction, and defendant appealed, contending that it merely sold individual parts with an independent dissemination of technical information on assembly. *Held*, injunction affirmed. Under federal statutes, the unauthorized sale of assembled decoders is unlawful, and the assembly instructions were merely incidental to sale of the kits. (153 C.A.3d 313.) (See 22 *Santa Clara L. Rev.* 839 [Subscription Television Decoders: Can California Prohibit Their Manufacture and Sale?].)

(2) *Adult Bookstore and Prostitution*. *Arcara v. Cloud Books* (1986) 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568, is another illustration of unlawful conduct connected with protected speech. Defendant operated an "adult" bookstore selling sexually explicit books and magazines with booths available for viewing sexually explicit movies. No obscenity charge was made, but the district attorney brought this statutory action to close down the store on a showing that solicitation of prostitution was occurring on the premises. *Held*, the First Amendment did not bar the closure. Under the test laid down in *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, *infra*, §473, the New York statute authorizing summary closure, although incidentally restricting speech (by imposing a burden on defendant's bookselling activities), was valid. "The legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises." (106 S.Ct. 3178, 92 L.Ed.2d 578.) (See *People v. Morone* (1983) 150 C.A.3d Supp. 18, 198 C.R. 316, *supra*, §323.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Nature of Guarantees.

6. Government Speech.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 339

[§ 339] In General.

In 1971, the Legislature created the Commission on the Status of Women with specified duties (see *Govt.C. 8240* et seq.). In 1972, the Legislature ratified the proposed Equal Rights Amendment (see *infra*, §762). In 1976, plaintiffs filed a complaint against the Commission alleging that it unlawfully promoted the ratification in California and elsewhere. In *Miller v. Miller* (1978) 87 C.A.3d 762, 151 C.R. 197, the court held that the Commission's advocacy lacked specific legislative authorization. The 1982 Legislature then enacted *Govt.C. 8246*: The Commission "is expressly authorized to inform the Legislature of its position on any legislative proposal pending before the Legislature and to urge the introduction of legislative proposals." (*Govt.C. 8246(a)*.) "The commission is expressly authorized to state its position and viewpoint on issues developed in the performance of its duties and responsibilities as specified in this chapter." (*Govt.C. 8246(b)*.)

In *Miller v. California Com. on Status of Women* (1984) 151 C.A.3d 693, 198 C.R. 877, plaintiffs attacked the activities of the Commission on the constitutional grounds of equal protection (*infra*, §762 et seq.) and free speech. The trial judge granted the requested relief, ordering that the Commission refrain from expressing to the Legislature or the public any opinion on issues of women's education and employment problems, needs, and opportunities. *Held*, reversed. The main argument of plaintiffs, that to permit the Commission to speak its views on controversial "women's issues" infringes their First Amendment right to freedom of speech, is unsound.

(a) The government may not compel citizens to express a view or suppress their views; but it may add its own voice on issues. "The first amendment does not, for example, prevent government from promoting respect for the flag by proclaiming Flag Day or by using public property to display the flag." (151 C.A.3d 700, quoting *Tribe*.) If the government (i.e., the Governor and legislative leaders) cannot appoint a commission to speak on the topic of women's status, it may not address any other "controversial" topic, and cannot govern. (151 C.A.3d 701.)

(b) This is not a case in which the government has established a forum for speech and is precluding expression of some points of view. (151 C.A.3d 701.) Nor is this a case in which government speech drowns out private communication. "The speech activities of the commission are in essence these: responses to inquiries; lobbying legislators; circulation of a newsletter to persons and groups that ask to receive it, and issuance of press releases on 'women's issues.' Granting that the commission has engaged in advocacy and promotion of its views in the course of

these activities, neither the scale of that speech nor the vehicles employed appear likely to drown out plaintiffs' contrary views. That the imprimatur of government has conferred an advantage upon the commissioners is undeniable. That advantage, however, has not risen to the level of drowning out plaintiffs." (151 C.A.3d 702.)

(c) "We perceive no reason grounded in plaintiffs' right to freedom of speech to uphold or extend the judgment's mandate of neutrality in these circumstances. Plaintiffs' generalized umbrage is aimed at the ideological content of the commission's speech and not with the concept of a commission speaking about the status of women. To the extent plaintiffs take offense from the ideas of equality of social and economic opportunity for women their remedy is amendment of the constitution, to reflect their views. To the extent they accept these ideas but desire to change the tone of the commission's speech, i.e., to emphasize how measures which may enhance the ability of women to choose to enter the work force may implicate other values, they must seek redress from the Legislature and the public officers to whom that body has granted the power to appoint members of the commission." (151 C.A.3d 702.) (See *League of Women Voters v. Countywide Criminal Justice Coordination Committee* (1988) 203 C.A.3d 529, 540, 250 C.R. 161 [creation by county board of supervisors of committee to improve criminal justice, and committee's appointment of subcommittee to draft and seek sponsor for initiative measure, with accompanying expenditure of public funds, were lawful]; 93 Harv. L. Rev. 535 [constitutionality of municipal advocacy in statewide referendum campaigns]; 117 Harv. L. Rev. 2411 [relationship between compelled speech and government speech doctrines]; 67 So. Cal. L. Rev. 229 [Government Speech as Government Censorship]; 21 Southwestern U. L. Rev. 241 [government speech that interferes with individual First Amendment rights]; 37 U.C. Davis L. Rev. 1317 [government's interest in protecting integrity of its own expression]; 27 U.C.L.A. L. Rev. 565 [government speech generally]; on designating foreign films as "political propaganda" and requiring registration and disclosure, see *Meese v. Keene* (1987) 481 U.S. 465, 107 S.Ct. 1862, 95 L.Ed.2d 415; 101 Harv. L. Rev. 209; 17 Southwestern L. Rev. 373.)

In *Lebron v. National R. Passenger Corp.* (1995) 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902, the Court held that AMTRAK was a governmental entity for First Amendment purposes. "[W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." (115 S.Ct. 974, 130 L.Ed.2d 922.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896, the Court distinguished *United States v. United Foods* (2001) 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438, which invalidated the compelled funding of what was presumed to be private speech due to the lack of a comprehensive regulatory scheme. (See text, §333.) Here, the Court upheld compelled exactions from beef producers that were used by the Beef Board to fund generic advertising of beef because the ads constituted government speech. The message of the promotional campaigns was controlled by the Secretary of Agriculture. The Secretary, who was accountable to Congress, imposed the assessments, appointed the members of the board, and approved each promotional campaign and its content. Thus, the message set out in the promotions was "from beginning to end the message established by the Federal Government." (125 S.Ct. 2062, 161 L.Ed.2d 907.) "Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object." (125 S.Ct. 2063, 161 L.Ed.2d 908.)

One justice concurred in the judgment, disagreeing that the beef ads were government speech, but stating that they qualified as permissible economic regulation. (125 S.Ct. 2067, 161 L.Ed.2d 913.) Three justices dissented, also disagreeing that the beef ads constituted government speech, and asserting that, under *United Foods*, the mandatory assessment provisions of the Beef Act are unconstitutional. (125 S.Ct. 2068, 161 L.Ed.2d 913.) (See 119 Harv. L. Rev. 277 [Johanns]; 44 Cal. Western L. Rev. 329 [Listener Interests in Compelled Speech Cases]; 31 Hastings Const. L. Q. 71 [special public purpose forum and endorsement relationships].)

Johanns applies to free speech rights under the California Constitution. (*Gallo Cattle Co. v. Kawamura* (2008) 159

C.A.4th 948, 955, 72 *C.R.3d* 1 [nothing in language or history of Cal. Const., Art. I, §2, or in California doctrine, suggests that *Johanns* should be rejected].)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

6. Government Speech.

b. Funding Restrictions.

7 *Witkin Sum. Cal. Law Const Law* § 340

[§ 340] Funding Restrictions.

In *Rust v. Sullivan* (1991) 500 U.S. 173, 111 S.Ct. 1759, 1772, 114 L.Ed.2d 233, 255, *infra*, §568, the Court held that government regulations that limit the ability of Title X fund recipients to provide abortion counseling do not violate the First Amendment.

Rust was distinguished in *Legal Services Corp. v. Velazquez* (2001) 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63. The Court considered the constitutionality of a government restriction applicable to legal aid providers receiving federal funds, which prohibited representation involving challenges to existing welfare laws. The restriction would prevent an attorney from arguing that a state statute conflicts with a federal statute or that either a state or federal statute is unconstitutional. *Held*, the funding condition is unconstitutional.

(a) The government may advance its own idea or position through the disbursement of public funds. (121 S.Ct. 1048, 149 L.Ed.2d 72, citing *Rosenberger v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, *infra*, §341.) However, "[n]either the latitude for government speech nor its rationale applies in every instance." (121 S.Ct. 1049, 149 L.Ed.2d 72.) The program here was designed to use the legal profession and state judiciaries "to accomplish its end of assisting welfare claimants in determination or receipt of their benefits. The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*." (121 S.Ct. 1049, 149 L.Ed.2d 73.)

(b) The funding restriction distorts the legal system by altering the traditional role of attorneys and the courts. On determining that a question of statutory validity is present in any case, the government-funded attorney must cease representation. (121 S.Ct. 1050, 149 L.Ed.2d 74.) If the attorney withdraws, it is unlikely the client will find other representation or receive vital information respecting his or her constitutional or statutory rights. (121 S.Ct. 1051, 149 L.Ed.2d 75.) "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." (121 S.Ct. 1051, 149 L.Ed.2d 752.)

(c) Through the funding restriction, the government asks us "to permit Congress to define the scope of the litigation

it funds to exclude certain vital theories and ideas. The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." (121 S.Ct. 1052, 149 L.Ed.2d 77.)

Four justices dissented, stating that there is no difference between this statutory scheme and the one upheld in *Rust*. Further, the dissent objected to the majority's refusal to address the question of severability, which allowed "the program to go forward under a version of the statute Congress never enacted." (121 S.Ct. 1053, 149 L.Ed.2d 77.) (See 115 Harv. L. Rev. 426 [Velazquez]; 51 U.C.L.A. L. Rev. 705 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Evans v. Berkeley* (2006) 38 C.4th 1, 40 C.R.3d 205, 129 P.3d 394, Supp., infra, §391A [withdrawal of free berths in city's marina from group affiliated with Boy Scouts of America].



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

6. Government Speech.

c. Viewpoint Discrimination.

7 *Witkin Sum. Cal. Law Const Law* § 341

[§ 341] Viewpoint Discrimination.

(1) *Use of School Facilities.* In *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352, the New York Education Law authorized local school boards to adopt regulations for the use of school property for specified purposes when the property was not in use for school purposes. The list did not include meetings for religious purposes, and the Moriches School District adopted a rule providing that the school premises "shall not be used by any group for religious purposes." Petitioner church brought this action challenging the constitutionality of the district's refusal of its request to use the school facilities for a religious oriented film dealing with family and child-rearing issues faced by parents. *Held*, the district's rule violated the Free Speech Clause of the First Amendment.

(a) The district, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated, and need not have permitted after-hours use for any of the uses permitted by the state education law. (113 S.Ct. 2146, 124 L.Ed.2d 360.) But the district did open its property for two of the permitted uses; and the film involved here dealt with a subject otherwise permissible under the district rule. (113 S.Ct. 2147, 124 L.Ed.2d 362.) Hence, the applicable principle is that the government may not regulate speech in ways that favor some viewpoints or ideas at the expense of others. (113 S.Ct. 2147, 124 L.Ed.2d 362.)

(b) The district also contended that to permit use of its property for religious purposes would violate the Establishment Clause (see *infra*, §507). This contention is answered by *Widmar v. Vincent* (1981) 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440, *infra*, §509: "The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there could have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." (113 S.Ct. 2148, 124 L.Ed.2d 363.) (See *Good News Club v. Milford Cen. School* (2001) 533 U.S. 98, 121 S.Ct. 2093, 2100, 2103, 150 L.Ed.2d 151, 162, 166 [school's exclusion of religious club from use of its facilities pursuant to its community use policy constituted impermissible viewpoint discrimination; following *Lamb's Chapel* and *Widmar*]; 115 *Harv. L. Rev.* 396 [*Good News Club*]; 34 *Golden Gate L. Rev.* 217 [same].)

(2) *Use of Student Funds for Religious Newspaper.* In *Rosenberger v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, the University of Virginia, a state institution, maintained a Student Activities Fund (SAF), which supported a broad range of extracurricular student activities and was funded by mandatory student fees. Student groups that qualified as "Contracted Independent Organizations" (CIOs) could seek payment from the SAF to outside contractors for the printing costs of the groups' publications. CIOs were required to include in their dealings with third parties and in written materials a disclaimer stating that they were independent of the university and that the university was not responsible for them. Wide Awake Productions (WAP), a qualified CIO, requested payment for the costs of printing its newspaper, "Wide Awake: A Christian Perspective at the University of Virginia." The request was denied solely because the paper "primarily promoted or manifested a particular belief in or about a deity or an ultimate reality" and thus was a "religious activity" excluded from SAF support under university guidelines. WAP sued under 42 U.S.C., §1983, claiming violation of its First Amendment right to freedom of speech, but both the district court and the Court of Appeals ruled in favor of the University. *Held*, reversed.

(a) The state may create a limited public forum and may confine use of that forum to the limited purposes for which it was created. Thus the state may reserve a forum for certain groups or for the discussion of certain topics. The state may not, however, exclude speech where exclusion is not reasonable in light of the forum's purpose, nor may it discriminate against speech on the basis of its viewpoint. (115 S.Ct. 2516, 132 L.Ed.2d 715.) "Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." (115 S.Ct. 2517, 132 L.Ed.2d 715.)

(b) The University argues that the distinction here is based on content, not viewpoint. Viewpoint discrimination is a subset of content discrimination, and the distinction is not precise. However, "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications." (115 S.Ct. 2517, 132 L.Ed.2d 716.)

(c) The University seeks to distinguish this case from *Lamb's Chapel* by urging that this case involves providing funds rather than access to facilities. The state may regulate the content of expression when it is the speaker or when it enlists private entities to convey its own message. (115 S.Ct. 2518, 2519, 132 L.Ed.2d 717, 718.) "It does not follow, however, ... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." (115 S.Ct. 2519, 132 L.Ed.2d 718.)

(d) The University's argument that money is scarce and physical facilities are not, and hence that viewpoint discrimination in the funding of speech is permissible, is wrong. Scarcity of resources may require that they be rationed on some acceptable neutral principle; but scarcity does not give the state the right to exercise viewpoint discrimination that is otherwise impermissible. (115 S.Ct. 2519, 132 L.Ed.2d 719.)

(e) The Court of Appeals holding was based on the necessity of avoiding a violation of the Establishment Clause. However, the program at issue is neutral toward religion. The SAF was created not to promote religion, but to provide a forum for diverse forms of student speech. "WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was." (115 S.Ct. 2522, 132 L.Ed.2d 722.) Neutrality also appears from the fact that the university has taken pains to disassociate itself from the private speech involved in this case. (115 S.Ct. 2522, 2523, 132 L.Ed.2d 723.)

(f) No public funds flow directly into WAP's coffers. The mere fact that public moneys are involved does not preclude the government from providing access to services on a religion-neutral basis to groups that use those services for sectarian purposes. There is no difference between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. Here, the university provides routine, secular printing services to a broad spectrum of student newspapers, and any benefit to religion is incidental. (115 S.Ct. 2523, 132 L.Ed.2d 724, 725.)

Two justices wrote concurring opinions. (115 S.Ct. 2525, 2528, 132 L.Ed.2d 726, 730.) Four justices dissented, expressing the view that the Court, for the first time, was approving direct funding of core religious activities, in violation of the *Establishment Clause*. (115 S.Ct. 2533, 132 L.Ed.2d 737.) (See 109 Harv. L. Rev. 210; 70 So. Cal. L. Rev. 1049; 52 Stanf. L. Rev. 929; 27 West L.A. L. Rev. 489.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

7. Political Speech.

a. In General.

7 Witkin Sum. Cal. Law Const Law § 342

[§ 342] In General.

In *Boos v. Barry* (1988) 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333, Congress enacted provisions of the District of Columbia Code, (1) prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute" (*the display clause*), and (2) prohibiting any congregation of three or more persons within 500 feet of a foreign embassy (*the congregation clause*). Congress acted pursuant to its authority under U.S. Const., Art. I, §8, cl. 10, to "define and punish ... Offenses Against the Law of Nations." Petitioners, three individuals, carried signs critical of the governments of the Soviet Union and Nicaragua on the public sidewalks within 500 feet of the embassies of these governments, and attempted to congregate with others within 500 feet of official foreign buildings. *Held*, the display clause was unconstitutional, but the congregation clause, narrowly construed, was valid.

(a) *Nature and effect of the display clause.* (1) The display clause prohibits petitioners from engaging in "classically political speech." (108 S.Ct. 1162, 99 L.Ed.2d 343.) (2) It bars this speech on public streets and sidewalks, traditional public fora. (108 S.Ct. 1162, 99 L.Ed.2d 343.) (3) It is content-based: Whether individuals may picket in front of a foreign embassy depends entirely on whether their picket signs are critical of the foreign government or not. (108 S.Ct. 1162, 99 L.Ed.2d 343.) The contention that it is content-neutral because the government itself is not selecting between viewpoints is not persuasive. "The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments. While this prevents the display clause from being directly viewpoint-based, ... it does not render the statute content-neutral. ... Here the government has determined that an entire category of speech--signs or displays critical of foreign governments--is not to be permitted." (108 S.Ct. 1163, 99 L.Ed.2d 343.)

(b) *Governmental interest and strict scrutiny requirement.* As a content-based restriction on political speech in a public forum, the statute must be subjected to the most exacting scrutiny. (198 S.Ct. 1164, 99 L.Ed.2d 345.)

(1) The governmental interest in protecting the dignity of foreign diplomatic personnel has a long history and noble purpose, particularly in today's global economy; and the concept of reciprocity gives us an additional parochial reason to protect foreign diplomats in this country. (108 S.Ct. 1164, 1165, 99 L.Ed.2d 345, 346.) However, to protect First Amendment freedoms, our own citizens must tolerate insulting and even outrageous speech; and "[w]e are not

persuaded that the differences between foreign officials and American citizens require us to deviate from these principles here." (108 S.Ct. 1164, 99 L.Ed.2d 345.)

(2) No agreement with a foreign nation can confer power on Congress free from constitutional restraints. (108 S.Ct. 1165, 99 L.Ed.2d 346.) "Thus, the fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis. We need not decide today whether, or to what extent, the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials. Even if we assume that international law recognizes a dignity interest and that it should be considered sufficiently 'compelling' to support a content-based restriction on speech," this statute is narrowly tailored to serve that interest. (108 S.Ct. 1165, 99 L.Ed.2d 347.)

(3) As Congress itself has recognized in the enactment of an analogous statute, the availability of alternatives demonstrates that the display clause "is not crafted with sufficient precision to withstand First Amendment scrutiny." (108 S.Ct. 1168, 99 L.Ed.2d 350.)

(c) *Congregation clause, narrowly construed, is valid.* The federal courts have the power to adopt narrowing constructions of federal legislation, and the construction adopted by the Court of Appeals in this case was proper. The clause merely regulates the place and manner of certain demonstrations, and does not prohibit peaceful congregations; its reach is limited to groups posing a security threat. These two limitations make it consistent with the *First Amendment*. (108 S.Ct. 1169, 99 L.Ed.2d 350.)

(d) *No denial of equal protection.* Petitioners contended that both clauses improperly exclude labor picketing from their prohibitions. However, (1) the congregation clause, as narrowly construed by the Court of Appeals, does not prohibit picketing; it merely regulates the place and manner of certain demonstrations; and (2) the statute evinces an intent to protect only "bona fide" labor disputes, not violent conduct. (108 S.Ct. 1170, 99 L.Ed.2d 351.) (See 102 Harv. L. Rev. 1904.)

In *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694, the Court struck down the Minnesota Supreme Court's "announce clause," which prohibited judicial candidates from stating their views on disputed political issues. This restriction on speech about judges' qualifications for public office calls for application of the strict scrutiny test. (122 S.Ct. 2534, 153 L.Ed.2d 704.)

(a) The State failed to carry its burden that the announce clause serves its asserted interest in preserving the impartiality, or appearance of impartiality, of the judiciary. (122 S.Ct. 2535, 153 L.Ed.2d 705.) Debate on the qualifications of candidates is central to our electoral process and free speech rights. "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election." (122 S.Ct. 2538, 153 L.Ed. 2d 709.)

(b) Even if the First Amendment were to allow greater regulation of judicial election campaigns than legislative ones, the announce clause would still fail "strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms." And "this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times." (122 S.Ct. 2539, 153 L.Ed.2d 710.)

Four justices dissented in two opinions. (122 S.Ct. 2546, 2550, 153 L.Ed.2d 718, 722.) (See *Huntington Beach City Council v. Superior Court* (2002) 94 C.A.4th 1417, 1428, 115 C.R.2d 439 [Elec.C. 9295, governing content of voter pamphlet arguments, only allows trial court to strike statements that are "false, misleading, or inconsistent" with statutory requirements; statute implies some minimal relevancy requirement, but free speech demands that this requirement be "extremely light burden to carry"]; 116 Harv. L. Rev. 272 [Republican Party]; 30 Hastings Const. L. Q. 197 [same]; 44 Santa Clara L. Rev. 235 [same]; 77 So. Cal. L. Rev. 433 [same]; 51 U.C.L.A. L. Rev. 705 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Showing Animals Respect & Kindness v. West Hollywood* (2008) 166 C.A.4th 815, 823, 83 C.R.3d 134 [ordinance banning mobile billboard advertising was constitutional; ordinance was content-neutral, applied both to commercial and noncommercial speech, and was designed to promote legitimate government interests, including traffic safety, and not to suppress ideas]; 40 U.S.F. L. Rev. 179 [fighting abuses of political organizations with more speech, not more regulation].



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

7. Political Speech.

b. Advertising on Public Transit Vehicles.

7 *Witkin Sum. Cal. Law Const Law* § 343

[§ 343] Advertising on Public Transit Vehicles.

(1) *Restrictions on Particular Political Speech.* In *Wirta v. Alameda-Contra Costa Transit Dist.* (1967) 68 C.2d 51, 64 C.R. 430, 434 P.2d 982, defendant district operated buses for transportation of passengers within Alameda and Contra Costa counties and from those counties to San Francisco. The district leased advertising space above the passengers' seats to Metro Corp., which re-leased to advertisers. The district's agreement with Metro provided that political advertisements and those on controversial subjects were not acceptable unless approved by the district, and the district's policy was to permit only commercial advertising and political advertising in connection with an election, with space available to opposing candidates or sides. Plaintiffs, officers of Women for Peace, an unincorporated association, offered an advertisement on ending the Vietnam war, and, on refusal, brought this action for an injunction. The trial judge granted a preliminary injunction to restrain defendants from refusing the advertisement. *Held*, affirmed.

(a) Defendants, having opened a forum for expression of ideas by providing advertising facilities, cannot for reasons of administrative convenience decline to accept those expressing opinions and beliefs within the ambit of First Amendment protection. (68 C.2d 55, citing *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 171 P.2d 885, *infra*, §394.) The restriction here was broader than in *Danskin*. The vice was not in preferring one point of view over another, but in choosing between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected and banning all others--a most pervasive form of censorship. (68 C.2d 56.)

(b) Commercial messages may be regulated or prohibited, where protected ideas may not. (See *supra*, §324 et seq.) Here, perversely, the policies were reversed, with preference given to commercial advertising over nonmercantile messages. (68 C.2d 57.) The dangers of this policy are great: e.g., a cigarette company could advertise the desirability of smoking its brand, but a cancer society would not be entitled to caution that smoking is dangerous. (68 C.2d 57.)

(c) The district's contention that the only problem was equal protection, and that its classification was reasonable, was unsound. The general reasonableness test cannot be applied to First Amendment freedoms. (68 C.2d 60.)

(d) The district's final contention was that its overriding consideration was to keep the government out of partisan affairs, and that compelling it to accept everything would be difficult. But while practical problems may be vexatious they cannot be controlling. (68 C.2d 61.)

(e) "Transit advertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale and those who wish to express ideas relating to elections access to such forum while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld." (68 C.2d 63.)

The dissenting opinion of three justices challenged the majority's assumption that the district had opened up the advertising spaces as a forum for ideas, arguing that only commercial advertising, not First Amendment rights, was involved; that the district was established to meet transportation needs, and is not like a public park, school, street, or meeting hall; that advertising was sought simply to increase revenues; and that the policy decision to avoid controversial ideas that might antagonize or lead to disorder was within its discretion. (See 82 Harv. L. Rev. 1379; 56 Cal. L. Rev. 1659; 5 San Diego L. Rev. 380.)

(2) *Restrictions on All Political Speech.* In *Lehman v. Shaker Heights* (1974) 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770, the U.S. Supreme Court reached a conclusion directly opposite to that in *Wirta*. Petitioner, a candidate for the Ohio State Legislature, sought to purchase advertising space in defendant city's public transit system. The city's refusal was based on a fixed policy to allow only commercial advertising, and it was shown that in 26 years of its operation no political advertising had been permitted. *Held*, there was no unconstitutional denial of First Amendment rights.

(a) There is a difference between advertising in newspapers or other periodicals and in billboards or streetcars. The streetcar audience is a captive audience. And the city, engaged in a commercial venture, must provide satisfactory service to commuters, and has discretion to make reasonable choices concerning the type of advertising that may be displayed. (94 S.Ct. 2717, 41 L.Ed.2d 777.) Revenue earned from long-term commercial advertising could be jeopardized by requiring display of political advertisements. "Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parcelling out limited space to eager politicians." (94 S.Ct. 2718, 41 L.Ed.2d 778.)

(b) There was no meeting hall, park, street corner, or other open space involved; i.e., there was no "First Amendment forum." "The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity." (94 S.Ct. 2718, 41 L.Ed.2d 778.)

Four justices dissented, arguing that the city created and opened up a forum and was thereafter barred from discriminating solely on the basis of message content. (See 88 Harv. L. Rev. 149; 28 Stanf. L. Rev. 117.)

Lehman was followed in *Women's Int. League for Peace & Freedom, Fresno Branch v. Fresno* (1986) 186 C.A.3d 30, 237 C.R. 577. A Fresno municipal code section prohibited all political advertising on municipally owned and operated buses. Plaintiff, seeking to display its advertisement opposed to war, brought an action to enjoin enforcement of the section, and the trial judge declared it unconstitutional. *Held*, reversed.

(a) The city "decided to permit commercial advertising which it could regulate as nonprotected expression, but tried to avoid controversy by excluding *all* protected forms of political communication. ... Thus the ultimate question: To avoid the constitutional challenge, must City prohibit all commercial advertising to avoid opening the forum on buses?" (186 C.A.3d 41.)

(b) "Courts are well aware that public transportation exposes passengers to increasingly unpleasant experiences. Sensitivity to the safety and personal feelings of passengers may permit reasonable restrictions against forms of activity and expression which may come into conflict with the constitutionally protected privacy rights of the passengers. In this case the public entity chose to avoid advertisements which could not be restricted." (186 C.A.3d 41.)

(c) "Assuming City's decision to limit advertising sign space to commercial material requires a strict scrutiny review, we have no hesitancy to find the privacy rights of the 'captive audience' justified the exclusion within transit

buses of all forms of expression which could not otherwise be restricted. California has constitutionally memorialized the right to privacy (Cal. Const., Art. I, §1), and although that right is not absolute ... , its role in public transportation deserves fair consideration." (186 C.A.3d 41.) Hence, "we hold that the area within a transit bus is not a public forum worthy of constitutional protection under the California Constitution." (186 C.A.3d 41; see *infra*, §346.) (See 17 Southwestern U. L. Rev. 287.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Nature of Guarantees.

7. Political Speech.

c. Restrictions on Initiatives.

7 Witkin Sum. Cal. Law Const Law § 344

[§ 344] Restrictions on Initiatives.

In *Meyer v. Grant* (1988) 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425, a Colorado statute made it a felony to pay circulators of initiative petitions. Proponents of an initiative measure to remove carriers from the jurisdiction of the state Public Utilities Commission concluded that they needed assistance of paid personnel to obtain the required number of signatures within the allotted time, and brought an action in the federal district court for a declaratory judgment. *Held*, the statute was an unconstitutional limitation on political speech.

(a) "The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " (108 S.Ct. 1891, 100 L.Ed.2d 434.)

(b) "The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter focus of statewide discussion." (108 S.Ct. 1892, 100 L.Ed.2d 435.)

(c) "That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economic avenue of political discourse, direct one-on-one communication. That it leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression. ... The First Amendment protects appellees right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." (108 S.Ct. 1893, 100 L.Ed.2d 436.) (See 30 *Loyola L.A. L. Rev.* 1539 [negative political advertising]; 21 *Southwestern U. L. Rev.* 185 [The Case For Re-Regulation of Campaign Broadcasting]; 30 *U.C. Davis L. Rev.* 663 [Political Money and Freedom of Speech]; 28

West L.A. L. Rev. 1 [protecting free expression in election campaign context].)

Buckley v. American Constitutional Law Foundation (1999) 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599, held that three state regulations on the initiative process excessively restricted political speech: (a) Requiring initiative petition circulators to be registered voters impermissibly limits the number of message carriers in the ballot access arena without sufficient cause. (119 S.Ct. 644, 142 L.Ed.2d 611.) (b) Requiring circulators to wear name badges impermissibly discourages participation by forcing name identification without sufficient cause. (119 S.Ct. 646, 142 L.Ed.2d 614.) (c) Requiring paid circulators and their income from circulation to be listed impermissibly forces paid circulators to surrender the anonymity enjoyed by their volunteer counterparts. (119 S.Ct. 648, 142 L.Ed.2d 617.) (See 113 Harv. L. Rev. 286 [Buckley].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Preserve Shorecliff Homeowners v. San Clemente* (2008) 158 C.A.4th 1427, 1448, 71 C.R.3d 332 [requirement in Elec.C. 9209 and 9238(c) that circulators of referendum petitions be voters or be qualified to register as voters in city where they circulate petitions too severely restricts pool of qualified circulators and is unconstitutional].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

7. Political Speech.

d. Restrictions on Electioneering.

7 *Witkin Sum. Cal. Law Const Law* § 345

[§ 345] Restrictions on Electioneering.

(1) *Invalid Provision.* In *Mills v. Alabama* (1966) 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484, an Alabama statute made it a crime "to do any electioneering or to solicit any votes" in support of or opposition to a candidate or proposition on the *day of the election*. On the day of a Birmingham election on a proposition relating to the form of local government, defendant, editor of the local newspaper, published an editorial strongly urging adoption of the mayor-council form. He was convicted of violation of the law. *Held*, reversed.

The Alabama Supreme Court thought that this obvious limitation on free speech was minor in character and a reasonable protection of the public against last-minute charges and countercharges that cannot be answered in time. But the law left people free to make campaign charges up to the last minute of the day before election, too late for reply, and silenced the press at a time when it could be most effective. "[N]o test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." (86 S.Ct. 1437, 16 L.Ed.2d 489.)

(2) *Valid Provision.* In *Burson v. Freeman* (1992) 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5, the Court pointed out that *Mills* did not involve the extent of a state's power to regulate conduct in and around the polls. Here, the issue was whether a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place violates the *First Amendment*. (112 S.Ct. 1848, 119 L.Ed.2d 11.) The Tennessee Supreme Court held that the statute was not narrowly tailored to protect the state's interest. *Held*, reversed.

(a) As a facially content-based restriction on political speech in a public forum, the statute must be subjected to exacting scrutiny; and this case presents the Court with a particularly difficult reconciliation: "the accommodation of the right to engage in political discourse with the right to vote--a right at the heart of our democracy." (112 S.Ct. 1851, 119 L.Ed.2d 14.)

(b) "[A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 states, together with numerous other western democracies, settled on the same solution: a secret ballot secured in part by

a restricted zone around the voting compartments. We find that this wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." (112 S.Ct. 1855, 119 L.Ed.2d 19.)

(c) This is the "rare case in which we have held that a law survives strict scrutiny. ... Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise." (112 S.Ct. 1857, 119 L.Ed.2d 22.)

Three justices dissented. (112 S.Ct. 1861, 119 L.Ed.2d 26.)

West's Key Number Digest, Constitutional Law k.90.1 (1.2)

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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

7. Political Speech.

e. Distinction: Nonpublic Forum.

7 Witkin Sum. Cal. Law Const Law § 346

[§ 346] Distinction: Nonpublic Forum.

In *Clark v. Burleigh* (1992) 4 C.4th 474, 14 C.R.2d 455, 841 P.2d 975, the court reviewed the constitutionality of a statute prescribing the content of the candidate's statement that a candidate for local office may prepare and file for inclusion in the voter's pamphlet. "The statute provides that such a statement must be limited to the candidate's name, age, occupation, and a brief description of the candidate's own background and qualifications, and must not refer to those of other candidates for the office." *Held*, the statute violates neither the free speech guaranty of the First Amendment nor the Fourteenth Amendment's guaranty of equal protection of the laws. (4 C.4th 478.)

In June, 1990, an election was scheduled in Monterey County to fill a position on the superior court. Judge S, the incumbent, filed for reelection; municipal Judge B filed for the same office. In Judge B's candidate's statement, contrary to the restrictions laid down in former Elec.C. 10012.1 (now *Elec.C. 13308*), he made a number of derogatory references to Judge S and his decisions. The registrar of voters, although authorized to determine whether a candidate's statement violates the statute, instead filed an action for declaratory relief. Judge B filed a cross-petition for mandamus to compel publication of his statement. The trial judge concluded that the statement violated the statute and that the statute was constitutional, but nevertheless merely struck from the statement the references to Judge S and directed the registrar to print the remainder. Judge B appealed, and a divided Court of Appeal held the statute unconstitutional and reversed the judgment. The Supreme Court reversed the judgment of the Court of Appeal with directions to affirm the judgment of the trial court.

(a) The statute limits what a candidate for local judicial office may say in a statement distributed to the electorate, and therefore implicates the candidate's First Amendment rights. But the determination that the statement is protected political speech merely begins the inquiry, for protected speech is not equally permissible in all places and at all times. The U.S. Supreme Court has adopted a forum analysis as a means of determining when the Government's interest in limiting use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. (4 C.4th 482, citing *Cornelius v. N.A.A.C.P. Legal Defense & Educational Fund* (1985) 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567, *infra*, §347.)

(b) For purposes of forum analysis the U.S. Supreme Court has divided all public property into three categories:

(1) The traditional public forum; e.g., public streets and parks. Laws regulating the content of speech in these forums are subject to strict scrutiny. (4 C.4th 482, citing *Cornelius*, *supra*.)

(2) The "designated public forum" or "limited public forum," where the state property has been opened for expressive activity by part or all of the public. Regulation of speech in this forum is likewise subject to strict scrutiny. (4 C.4th 483, and footnote 8.)

(3) All remaining public property, a category usually referred to as the "nonpublic forum." The challenged regulation need only be reasonable, as long as it is not an attempt to suppress the speaker's activity due to disagreement with his or her view. (4 C.4th 483, and footnote 9, citing *International Soc. for Krishna Consciousness v. Lee* (1992) 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (ISKCON), *infra*, §348.)

(c) "To apply the public forum doctrine a court proceeds in a series of steps. In step one the court defines the 'forum' by deciding whether the forum is the entire property to which access is sought or only a portion of that property. In step two the court decides whether the forum thus defined is a traditional 'public forum,' a 'designated public forum,' or a 'nonpublic forum.' If it is either of the first two kinds of forums, in step three the court decides whether the challenged law restricts the content of speech in that forum or only its time, place, or manner. And in step four the court tests the challenged law by the standard that governs both the class of forum it has selected in step two and, if relevant, the type of speech restriction it has identified in step three." (4 C.4th 484.)

(d) Beginning with step one: The forum is not the voter's pamphlet as a whole but simply the candidate's statement. Judge B sought access only to the specific portion of the pamphlet represented by his candidate's statement. (4 C.4th 485.)

(e) Step two involves the question whether the forum is public or nonpublic in nature. (4 C.4th 485.) On a review of recent case law (4 C.4th 485), the reasoning of *ISKCON* is applicable: "The question is whether the Legislature, by creating the statutory 'candidate's statement,' intentionally opened a public forum that candidates for local judicial office may use for the purposes of attacking their opponents. Under the foregoing precedents the answer is no. There is no doubt that the Legislature has not explicitly authorized the candidate's statement to be used for such expressive activity. And there is no showing of a legislative policy or practice consistent with an intent to permit such use." On the contrary, the statute specifically lists the permissible contents (candidate's name, age, occupation, and brief description of candidate's education and qualifications in no more than 200 words). "The negative implication of this specific list, of course, is that the Legislature did not intend the statutory candidate's statement to contain any other material." (4 C.4th 488.)

(f) The last step is to test the challenged law by the standard governing the class of forum:

(1) In the nonpublic forum, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. (4 C.4th 491, discussing *Cornelius* and other decisions.) The reasoning of these cases is applicable to the case at bar. "Elections for local judicial offices are normally low-profile events. They are frequently uncontested; even if contested, they usually arouse minimal public interest. The voters have little knowledge of the requirements of the job and still less of the qualifications of the candidates; in turn, the candidates frequently have neither the inclination nor the time to inform the voters by means of a traditional political campaign, and in any event may lack the means of doing so--e.g., campaign staff, fundraising committees, media advisers, and so on. To help fill this informational void the Legislature created the statutory candidate's statement. From its terms and conditions we may reasonably infer that its primary purpose is to give the voters at least a minimal amount--200 words' worth--of basic information about the background and qualifications of little-known candidates. In light of that purpose it is plainly reasonable for the Legislature to provide ... that the statement should not also be used by the candidates as a partisan campaign device to attack their opponents." (4 C.4th 493.)

(2) To so misuse a statutory statement could well impair its effectiveness. The voters could be distracted or confused by the mixed messages; the statement is so brief that to the extent a candidate devotes it to attacking others it would convey even less factual information about the candidate; and because the statements remain confidential until publication, all candidates would have an incentive to misuse them by attacking their opponents to avoid the possibility of unanswered attacks by others. (4 C.4th 493.)

(3) The statute restricts only one channel of communication with the voters; substantial alternative channels are open to the candidates, e.g., advertisements or interviews in local newspapers or on local radio and television programs, direct mailings, neighborhood distribution of handbills, and personal appearances at local functions. (4 C.4th 494.) (See 21 *Pepperdine L. Rev.* 620 [Clark].)

Other decisions have addressed nonpublic forum issues. (See *Arkansas Education Television Commonwealth v. Forbes* (1998) 523 U.S. 666, 118 S.Ct. 1633, 1643, 140 L.Ed.2d 875, 889 [following *Cornelius*; candidate debate at government-owned television station was nonpublic forum; although station could not exclude candidate for his viewpoint, it could do so based on voters' lack of interest in his candidacy]; *DiLoreto v. Board of Education of Downey Unified School Dist.* (1999) 74 C.A.4th 267, 280, 87 C.R.2d 791 [high school was nonpublic forum, as matter of law; under Establishment Clause considerations, officials could ban advertisement reciting Ten Commandments on baseball field fence]; *San Francisco Forty-Niners v. Nishioka* (1999) 75 C.A.4th 637, 648, 89 C.R.2d 388 [extending *Clark* to initiative petition; state has legitimate interest in preserving integrity of initiative process from intentional falsehoods designed to mislead voters]; *Reeves v. Rocklin Unified School Dist.* (2003) 109 C.A.4th 652, 663, 135 C.R.2d 213 [because high schools are nonpublic forums, antiabortion leafleteers who would have been disruptive of normal school activities were properly denied access to school property]; 27 *Pepperdine L. Rev.* 629 [Forbes].)

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CHAPTER X - Constitutional Law

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

8. Charitable Appeals for Funds.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 347

[§ 347] In General.

(1) *Charitable and Religious Activity Distinguished.* In *Gospel Army v. Los Angeles* (1945) 27 C.2d 232, 163 P.2d 704, the Los Angeles Municipal Code regulated the business of junk and secondhand dealers by a permit requirement, and regulated solicitation of money contributions by requirements of license, bond, and information about the solicitor or promoter. Plaintiff, a religious association, collected salvage for resale and solicited funds from the public. All net proceeds from these operations were used for religious and charitable purposes, including payment of compensation of the solicitors. *Held*, the regulations could validly be applied to plaintiff. Many activities of religious organizations are secular in nature; and, though the practice of charity may be regarded as a religious duty, it is not exclusively a religious activity, and the protection of the public against fraud in this field requires these regulations.

The court added this warning: "Religious organizations engage in various activities such as founding colonies, operating libraries, schools, wineries, farms, industrial and other commercial enterprises. Conceivably they may engage in any worldly activity, but it does not follow they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and general welfare. With that power so easily diminished, there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty." (27 C.2d 245.) (See *Rescue Army v. Municipal Court of Los Angeles* (1946) 28 C.2d 460, 471, 171 P.2d 8 [upholding permit requirement for soliciting charitable contributions by means of receptacles in public places]; *Hillman v. Britton* (1980) 111 C.A.3d 810, 811, 818, 821, 168 C.R. 852 [ordinance violating procedural and substantive due process]; *People v. Knueppel* (1980) 117 C.A.3d 958, 173 C.R. 466 [virtually uncontrolled discretion in police chief to deny permit]; 75 *Harv. L. Rev.* 1649 [right of charity to engage in door-to-door solicitation of funds].)

(2) *Solicitation of Funds as Protected Speech.* "Prior authorities ... clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes--that are within the protection of the First Amendment." (*Village of Schaumburg v. Citizens for a Better Environment* (1980) 444 U.S. 620, 100 S.Ct. 826, 833, 63 L.Ed.2d 73, 89 [ordinance prohibiting solicitation of contributions by charitable organizations that do not use at least 75% for charitable purposes, held unconstitutionally overbroad]; see 13 *Loyola L.A. L. Rev.* 953.)

In *Riley v. National Federation of the Blind of North Carolina* (1988) 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669, a North Carolina statute regulated the solicitation of charitable contributions by professional fundraisers. The Act (a) prohibited charging unreasonable fees, (b) required disclosure to potential donors of the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity, and (c) imposed a license requirement. The Court, citing *Village of Schaumburg*, *supra*, and *Secretary of State of Maryland v. Joseph H. Munson Co.* (1984) 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786, held the statute unconstitutional in all three respects. (108 S.Ct. 2676, 101 L.Ed.2d 693.) (See *United States v. Kokinda* (1990) 497 U.S. 720, 110 S.Ct. 3115, 3125, 3126, 111 L.Ed.2d 571, 588, 590 [regulation prohibiting solicitation of funds on postal premises is constitutional]; *People v. Orange County Charitable Services* (1999) 73 C.A.4th 1054, 1078, 1079, 87 C.R.2d 253 [distinguishing *Riley*; requiring commercial fundraiser to disclose fund raising expense percentages, which it is required by law to keep, to prospective donors on request is not violation of free speech rights]; 19 *Hastings Const. L. Q.* 167 [*Kokinda*]; 64 *So. Cal. L. Rev.* 605 [*Village of Schaumburg*]; 24 *U.S.F. L. Rev.* 205 [*Riley*]; 24 *U.S.F. L. Rev.* 571 [Fundraising in the 1990's: State Regulation of Charitable Solicitation After *Riley*].)

(3) *Restrictions on Fund Raising Drives.* In *Cornelius v. N.A.A.C.P. Legal Defense & Educational Fund* (1985) 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567, an Executive Order, designed to prevent disruption of the work environment of federal employees, placed limits on the number and kinds of charitable organizations allowed to participate in the Combined Federal Campaign (CFC). Respondent, seeking to solicit funds for legal defense and political advocacy, was excluded. *Held*, although charitable solicitation is protected speech, the federal workplace is only a "nonpublic forum," and access to it may be refused on reasonable grounds. "We conclude that the Government does not violate the First Amendment when it limits participation in the CFC in order to minimize disruption to the federal workplace, to ensure the success of the fund-raising effort, or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups." (108 S.Ct. 3455, 87 L.Ed.2d 587.) (See 99 *Harv. L. Rev.* 202 [*Cornelius*].)

(4) *Distinction: Liability for Intentional Misrepresentations.* There is no blanket exemption under the First Amendment from liability for fraud by a fundraiser who intentionally misleads prospective donors on the amount of proceeds that will actually go to charitable purposes. (*Illinois v. Telemarketing Associates* (2003) 538 U.S. 600, 123 S.Ct. 1829, 1841, 155 L.Ed.2d 793, 811.)

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

8. Charitable Appeals for Funds.

b. Solicitation Inside Airport Terminal.

7 *Witkin Sum. Cal. Law Const Law* § 348

[§ 348] Solicitation Inside Airport Terminal.

In *International Soc. for Krishna Consciousness v. Lee* (1992) 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (ISKCON), the issue was "whether an airport terminal operated by a public authority is a public forum and whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment." (112 S.Ct. 2703, 120 L.Ed.2d 547.) Petitioner ISKCON is a nonprofit religious corporation whose members perform the ritual of *sankirtan*: going into public places, disseminating religious literature, and soliciting funds to support the movement. Respondent Lee was the police superintendent of the Port Authority of New York and New Jersey, which operates three major airports in the greater New York City area. The Port Authority adopted a regulation forbidding within the terminals the repetitive solicitation of money or distribution of literature. However, solicitation and distribution on the sidewalks outside the terminal buildings were permitted.

Petitioner brought suit under 42 U.S.C., §1983 (see *infra*, §816) seeking declaratory and injunctive relief. The district court granted petitioner summary judgment; the Court of Appeals concluded that the ban on solicitation was reasonable, but the ban on distribution was not; the Supreme Court affirmed the Court of Appeals judgment sustaining the ban on solicitation.

(a) The solicitation at issue is a form of speech protected under the First Amendment; but the government need not permit all forms of speech on property that it owns and controls. "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." (112 S.Ct. 2705, 120 L.Ed.2d 549.)

(b) The cases reflect a "forum-based" approach for assessing restrictions that the Government seeks to place on the use of its property. "Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. ... The second category of public property is the designated public forum, whether of a limited or unlimited character--property that the state has opened for expressive activity by part or all of the public. ... Regulation of such property is subject to the same limitations as that governing a traditional public forum. ... Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of

property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." (112 S.Ct. 2705, 120 L.Ed.2d 550.)

(c) The airport terminals are not public fora. "[T]he tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidencing the operators' objections belies any such claim. ... In short, there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice, has resolved the issue in petitioner's favor." (112 S.Ct. 2706, 120 L.Ed.2d 551.)

(d) Petitioner points to the variety of speech activity that it claims historically occurred at various "transportation nodes" such as rail stations, bus stations, wharves, and Ellis Island. But these sites traditionally have had private ownership, and the practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport. (112 S.Ct. 2707, 120 L.Ed.2d 551.) And the relevant unit for our inquiry is an airport, not "transportation nodes" generally. "When new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity." (112 S.Ct. 2707, 120 L.Ed.2d 551.)

(e) The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness; and under this standard the prohibition on solicitation passes muster:

(1) "Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. ... Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. ... This is especially so in an airport, where 'air travelers, who are often weighted down by cumbersome baggage ... may be hurrying to catch a plane or to arrange ground transportation.' ... Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience." (112 S.Ct. 2708, 120 L.Ed.2d 553.)

(2) "In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. ... The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. ... Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly." (112 S.Ct. 2708, 120 L.Ed.2d 553.)

(3) "The Port Authority has concluded that its interest in monitoring the activities can best be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals. ... This sidewalk area is frequented by an overwhelming percentage of airport users. ... Thus the resulting access of those who would solicit the general public is quite complete." (112 S.Ct. 2708, 120 L.Ed.2d 553, 554.) (See 106 Harv. L. Rev. 279; 26 Loyola L.A. L. Rev. 241.)

In *Lee v. International Soc. for Krishna Consciousness* (1992) 505 U.S. 830, 112 S.Ct. 2709, 120 L.Ed.2d 669, the Court in a per curiam opinion held invalid the ban on distribution of literature in the Port Authority. Four justices dissented. (112 S.Ct. 2710, 120 L.Ed.2d 672.)

Several separate opinions were filed. (See 112 S.Ct. 2711, 120 L.Ed.2d 554 [one justice concurring in one, and

concurring in the judgment in another]; *112 S.Ct. 2715, 120 L.Ed.2d 559* [four justices concurring in the judgment]; *112 S.Ct. 2724, 120 L.Ed.2d 570* [three justices concurring in the judgment in one, and dissenting in the other].)

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A. Nature of Guarantees.

8. Charitable Appeals for Funds.

c. Distinction: Begging or Soliciting Alms.

7 *Witkin Sum. Cal. Law Const Law* § 349

[§ 349] Distinction: Begging or Soliciting Alms.

(1) *In General*. It is a misdemeanor to accost other persons in a public place or any place open to the public "for the purpose of begging or soliciting alms." (P.C. 647(c).) The statute has been upheld against challenges based on the First Amendment and the Equal Protection Clause. (See *Ulmer v. Municipal Court* (1976) 55 C.A.3d 263, 266, 127 C.R. 445; 2 *Cal Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §61.)

People v. Zimmerman (1993) 15 C.A.4th Supp. 7, 19 C.R.2d 486, follows *Ulmer* (15 C.A.4th Supp. 11), and explains the distinction between valid charitable appeals and prohibited begging: "Charitable appeals 'involve a variety of speech interests,' including 'communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.' " (15 C.A.4th Supp. 13, quoting *Village of Schaumburg v. Citizens for a Better Environment* (1980) 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73, supra, §347.) "Unlike begging or soliciting alms, charitable solicitations are 'characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues. ... Thus, the nexus between charitable solicitations and the communication of information and advocacy of causes implicates interests protected by the First Amendment. ... On the other hand, with or without words, the object of begging ... is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct. ... Thus, for purposes of protection under the First Amendment, charitable solicitations are distinguishable from begging and soliciting alms.' " (15 C.A.4th Supp. 13.)

"Since begging and soliciting alms is not constitutionally protected activity, the statute does not impinge upon a fundamental right. Additionally, beggars do not constitute a suspect class for purposes of equal protection analysis. Thus, the 'rational relationship' test applies here." (15 C.A.4th Supp. 13.) *Ulmer* indicates that the Legislature determined that the act of accosting others in a public place constitutes a public nuisance; hence, "the statute bears a rational relationship to the state's legitimate interest in protecting its citizens from intimidation, harassment, and other improprieties which may accompany such confrontation." (15 C.A.4th Supp. 14.) (See 23 *Hastings Const. L. Q.* 557 [constitutionality of aggressive panhandling legislation]; 28 *U.S.F. L. Rev.* 309 [First Amendment rights of beggars]; 7 *A.L.R.5th* 455 [laws regulating begging, panhandling, or similar activity by poor or homeless persons].)

(2) *California Constitution*. In *Los Angeles Alliance for Survival v. Los Angeles* (2000) 22 C.4th 352, 93 C.R.2d 1,

993 P.2d 334, on a certified question from the Ninth Circuit, the court concluded that defendant city's antipanhhandling ordinance was content neutral for purposes of the California liberty of speech clause, Cal. Const., Art. I, §2(a). Thus, the ordinance "should be evaluated under the intermediate scrutiny standard applicable to time, place, and manner regulations, rather than under the strict scrutiny standard." (22 C.4th 357.) The ordinance bans two categories of solicitation: (1) in all public places, "aggressive" soliciting, which includes actions intended to cause fear of bodily harm or intimidation, intentional touching or blocking, and violent or threatening gestures or language, and (2) all solicitation in certain defined places, including within 15 feet of automated teller machines, in parking lots after dark, in public transportation vehicles, and in restaurant dining areas. (22 C.4th 363.)

(a) Merely because Cal. Const., Art. I, §2(a) is worded more expansively and has been interpreted as being more protective than the Free Speech Clause of the First Amendment, "does not mean that it is broader than the First Amendment in all its applications." (22 C.4th 367.)

(b) A restriction is content neutral if it is justified without reference to content. (22 C.4th 367, citing *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, supra, §323.) The three U.S. Supreme Court opinions that have addressed content neutrality in the context of solicitation all have classified these laws as content neutral. (22 C.4th 368, discussing *Heffron v. International Soc. for Krishna Consciousness* (1981) 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298, infra, §521; *United States v. Kokinda* (1990) 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571; *International Soc. for Krishna Consciousness v. Lee* (1992) 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541, supra, §348.) These cases "establish that a restriction on solicitation for immediate donation or exchange of funds may be found to be content neutral for purposes of the First Amendment even if the measure regulates such solicitation while leaving other types of speech untouched, so long as the regulation predominantly is addressed to the inherently intrusive and potentially coercive nature of that *kind* of speech, and not to the content of the speech." (22 C.4th 372.)

(c) *Alternatives for Calif. Women v. Contra Costa* (1983) 145 C.A.3d 436, 193 C.R. 384, infra, §352, relying on a literal interpretation of the phrase "content neutral," invalidated an ordinance banning door-to-door charitable solicitation after 7:00 p.m. In so doing, the court ignored a considerable body of California cases that have failed to hold regulations singling out solicitation as constitutionally suspect. (22 C.4th 374.) Further, the court ignored the theoretical underpinnings of the content-based doctrine and the reasons content-based distinctions are constitutionally suspect. (22 C.4th 376.) Thus, with respect to Cal. Const., Art. I, §2(a), *Alternatives* is disapproved. (22 C.4th 374.)

Two justices dissented in separate opinions. (22 C.4th 379, 383.) (See 29 Western State L. Rev. 147 [*Los Angeles Alliance*].)

West's Key Number Digest, Constitutional Law k.90.1 (1.1)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees. 9. Right To Circulate or Distribute. a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 350

[§ 350] In General.

In *Schneider v. New Jersey* (1939) 308 U.S. 147, 60 S.Ct. 146, 151, 84 L.Ed. 155, 165, municipal ordinances prohibiting the distribution of handbills to persons in streets, parks, or cars were held invalid. The object, to prevent littering of streets with discarded papers, must be accomplished by means other than denial of the constitutional right to distribute literature to those willing to receive it.

The *Schneider* doctrine, that an anti-littering ordinance must be narrowly confined to littering, was the basis of an elaborate opinion in *Van Nuys Publishing Co. v. Thousand Oaks* (1971) 5 C.3d 817, 97 C.R. 777, 489 P.2d 809. Defendant city adopted an ordinance prohibiting distribution of any written material by depositing it on property without first obtaining permission of the owner or occupant. *Held*, it was unconstitutionally overbroad.

(a) The control of littering, i.e., strewing papers on lawns or sidewalks, is a legitimate objective of a narrowly drawn ordinance. (5 C.3d 821.)

(b) The present ordinance goes beyond activities constituting littering. It prohibits all distribution, even by entering on property to deliver papers to persons there, or by taking care to secure papers and avoid littering. (5 C.3d 822.)

(c) The *Schneider* case barred distribution on public streets, while the present ordinance only precludes distribution at private residences. But the *Schneider* doctrine nevertheless applies, for house-to-house distribution has also been recognized as a means of implementing the First Amendment right of communication. (5 C.3d 823, citing *Martin v. Struthers* (1943) 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, *infra*, §521.)

(d) The chief contention of defendant was that the ordinance did not, as in *Schneider*, prohibit distribution, but merely conditioned it on prior consent of the occupant; and that the constitutional right is only to distribute material to willing recipients, not to force ideas on unwilling subjects. *Di Lorenzo v. Pacific Grove* (1968) 260 C.A.2d 68, 74, 67 C.R. 3, so held, but the case is wrong and is disapproved (5 C.3d 827, footnote 6) for two reasons:

(1) Where private residences are involved, a requirement of prior consent involves so many possible visits of a time-consuming and expensive nature as to amount in practice to a complete curtailment of this kind of communication;

and in political campaigns it would virtually eliminate distribution of literature. (5 C.3d 824.)

(2) The distributor is entitled to an opportunity to win the attention of persons and thus obtain willing listeners. Hence, the initial burden should be on the homeowner to express an objection, in order to sustain constitutionality of the ordinance. (5 C.3d 826, 827, citing *Rowan v. United States Post Office Dept.* (1970) 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736, *infra*, §370.)

(e) *Martin v. Struthers* and *Rowan v. United States Post Office Dept.*, *supra*, establish guidelines for a constitutional ordinance prohibiting distribution to a home in defiance of the owner's previously expressed will: "The homeowner can, of course, express his objection to distribution in a variety of ways; he might, for example, post a sign on his property or, in the case of 'regular' distributors, write or telephone the disseminator to instruct him to discontinue delivery. Alternatively, the city might adopt the *Rowan* procedure as a model, and establish a municipal office both to channel complaints to offending distributors and to monitor distributors' responses." (5 C.3d 827.) (On door-to-door soliciting generally, see *infra*, §352.)

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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

9. Right To Circulate or Distribute.

b. Newsracks.

7 *Witkin Sum. Cal. Law Const Law* § 351

[§ 351] Newsracks.

(1) *Newsracks on Public Sidewalks*. Newspaper vending boxes on public sidewalks are a means of distribution that cannot be wholly prohibited; but reasonable regulations on the time, place, and manner of their use are valid. (*Kash Enterprises v. Los Angeles* (1977) 19 C.3d 294, 302, 305, 138 C.R. 53, 562 P.2d 1302.)

In *Kash*, the court found the regulations valid, but held invalid provisions for seizure and removal without a hearing on the merits on two grounds: (a) violation of the constitutional right to procedural due process (see *infra*, §657 et seq.), and (b) violation of "First Amendment due process." The latter holding was based on the principle that a summary seizure provision must be narrowly drafted to minimize interference with First Amendment rights. (19 C.3d 309.) The court pointed out that removal was authorized for any violation of the regulations, however minor, and concluded that this "creates a very real risk that individual enforcement officers may consider a variety of extraneous factors, including the contents of a newsrack, in determining whether or not a particular rack should be removed from a public sidewalk." (19 C.3d 312.) Thus, the failure of the ordinance to limit the officer's seizure authority to situations in which immediate removal is mandated by public need, brought it into conflict with the *First Amendment*. (19 C.3d 313.) (See *Gluck v. Los Angeles* (1979) 93 C.A.3d 121, 134, 155 C.R. 435 [following *Kash*]; 18 *Santa Clara L. Rev.* 1087 [*Kash*].)

Lakewood v. Plain Dealer Publishing Co. (1988) 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771, held unconstitutional a local ordinance giving the mayor unfettered discretion over which publishers may place newsracks on public property and where the newsracks may be placed. (108 S.Ct. 2152, 100 L.Ed.2d 792.) Three justices dissented. (See 102 *Harv. L. Rev.* 251.)

Sebago v. Alameda (1989) 211 C.A.3d 1372, 259 C.R. 918, held unconstitutional an ordinance restricting the sale of adult newspapers or periodicals from newsracks in defendant city. "The ordinance does not meet the constitutional requirement that it be a content-neutral regulation aimed at preventing secondary effects of adult newsracks in the surrounding neighborhood or be a content-based regulation justified by a compelling state interest." (211 C.A.3d 1377.)

(a) *Controlling cases*. *Kash* and *Lakewood*, *supra*, hold that First Amendment protections are applicable to the public distribution of newspapers and periodicals through newsracks. (211 C.A.3d 1381.) *Renton v. Playtime Theatres* (1986) 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, *infra*, §443, holds that content-neutral time, place, and manner

regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. (211 C.A.3d 1382, 1383.)

(b) *Alameda's content-based regulation.* The ordinance identifies as one of its aims the prevention of urban blight, and the city contends that newsracks from which adult newspapers are sold create the same secondary effects as adult bookstores and theaters. But newsracks are different from adult bookstores and theaters. There are no flashing lights or gaudy displays, no steady stream of lingering customers; and the product is not intended to be consumed at the site of its purchase. (211 C.A.3d 1384.)

(c) *No constitutional justification for ordinance.* Because the ordinance is content-based, the city must show that it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. It has not made this showing; the newspaper involved is neither obscene nor harmful to minors under state law. (211 C.A.3d 1386, citing *Sable Communications of Calif. v. Federal Communications Com.* (1989) 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93, infra, §447.) "If such a publication is not harmful to minors, there cannot possibly be a compelling state interest in protecting them from it, sufficient to justify a content-based infringement of the First Amendment. Indisputably, Alameda has a compelling interest in protecting minors from unsupervised access to *harmful* adult bookstore materials, but this ordinance is not narrowly drawn to achieve that end." (211 C.A.3d 1386.) Additionally, the relationship between the ordinance and the asserted governmental interest is tenuous. The ordinance merely moves the newsracks away from residential areas, and "[a]ny determined teenager can seek out the relocated newsracks." (211 C.A.3d 1386.) (See *Berry v. Santa Barbara* (1995) 40 C.A.4th 1075, 1080, 1087, 1088, 47 C.R.2d 661 [upholding ordinance requiring that publications publicly displaying material harmful to minors be placed in blinder racks, but construing ordinance to include scienter requirement and holding that blinders are required only if front page itself contains harmful matter].)

In *Cincinnati v. Discovery Network* (1993) 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99, the city had given permission to respondents to install a number of newsracks at approved locations for advertising promotional material. In 1990 the city notified respondents that the permits were revoked because each publication was a "commercial handbill" within the meaning of the Municipal Code and could not be distributed on public property. Respondents brought an action in the federal district court, which held that the city had not met its burden of establishing "a reasonable fit" between the legislative ends and the means chosen to accomplish them. (113 S.Ct. 1509, 123 L.Ed.2d 106.) The Court of Appeals agreed, and the Supreme Court affirmed the judgment of the Court of Appeals, holding that the city's newsrack policy was neither content-neutral nor narrowly tailored:

"Cincinnati has enacted a sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech. ... The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests that Cincinnati has asserted are unrelated to any distinction between 'commercial handbills' and 'newspapers.' Moreover, because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place or manner restriction on protected speech. For these reasons, Cincinnati's categorical ban on the distribution, via newsrack, of 'commercial handbills' cannot be squared with the dictates of the First Amendment." (113 S.Ct. 1517, 123 L.Ed.2d 117.) (See 107 Harv. L. Rev. 224 [Cincinnati].)

(2) *Newsracks in Stores.* In *Judlo v. The Vons Cos.* (1989) 211 C.A.3d 1020, 259 C.R. 624, plaintiff J, publisher of the Desert Weekly, a giveaway paper, was permitted by the manager of defendant's chain grocery store to place its newsrack inside the store. When newsracks in front of the store reached a volume deemed unsightly by defendant's management, local managers were told to select newsracks to remain and reject others. The local manager selected newsracks for certain major newspapers and rejected others, including plaintiff's publication. In this action the trial judge granted a preliminary injunction against removal of plaintiff's newsrack until trial or court approval of a nondiscriminatory plan of selection. *Held*, reversed. Defendant's decision to permit placement of some newsracks on its property did not create a public forum requiring it to allow other newspapers the same privilege. (211 C.A.3d 1027, 1028.)

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A. Nature of Guarantees.

9. Right To Circulate or Distribute.

c. Door-to-Door.

7 *Witkin Sum. Cal. Law Const Law* § 352

[§ 352] Door-to-Door.

In *Alternatives for Calif. Women v. Contra Costa* (1983) 145 C.A.3d 436, 193 C.R. 384, a county ordinance prohibited door-to-door soliciting in the unincorporated area of the county between 7 p.m. and 8 a.m. Plaintiff, a nonprofit corporation organized and operated for charitable and political purposes, distributes information on social welfare issues concerning women and children, and solicits funds by door-to-door canvassing. It brought this action seeking injunctive relief against enforcement of the ordinance. *Held*, the ordinance was unconstitutional.

(a) The First Amendment protects the door-to-door dissemination of information, printed matter, and ideas, and also the solicitation of financial contributions in conjunction with those activities. (145 C.A.3d 448, 451, citing *Martin v. Struthers* (1943) 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, *infra*, §521, and *Van Nuys Publishing Co. v. Thousand Oaks* (1971) 5 C.3d 817, 97 C.R. 777, 489 P.2d 809, *supra*, §350.)

(b) The county's interests can be advanced by less restrictive means, including (1) enforcement of existing laws against fraud, trespass, breach of the peace, and any other substantive offenses; (2) adoption of registration and identification procedures to protect against spurious solicitors; and (3) punishment of those who call at a home in defiance of the previously expressed will of the occupant. (145 C.A.3d 449.) (See *Fresno v. Press Communications* (1994) 31 C.A.4th 32, 39, 36 C.R.2d 456 [city ordinance that prohibited any advertisement, unauthorized newspaper, or campaign material, under certain conditions, from being distributed to any business or residence, but that did not cover other forms of speech, was content-based, and city failed to meet its burden of showing content-neutral justification for it; hence, it was unconstitutional on its face]; 75 *Harv. L. Rev.* 1649 [right of charity to engage in door-to-door solicitation of funds].)

Alternatives for Calif. Women was disapproved in *Los Angeles Alliance for Survival v. Los Angeles* (2000) 22 C.4th 352, 374, 93 C.R.2d 1, 993 P.2d 334, *supra*, §349, with respect to the liberty of speech clause of the California Constitution.

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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

10. Right To Post.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 353

[§ 353] In General.

(1) *Posting on Utility Poles.* In *Dulaney v. Municipal Court* (1974) 11 C.3d 77, 112 C.R. 777, 520 P.2d 1, a San Francisco ordinance made it unlawful to affix a notice or poster on utility poles without permission first obtained from the owner and from the city Department of Public Works. Petitioners were arrested for posting a notice on a city-owned pole announcing an antiwar rally and march. *Held*, prohibition granted to prevent criminal proceedings.

(a) *Theory of "opening the forum."* In making the poles accessible for posting notices where consent of the owner and the Department is obtained, the city opened a forum as in *Marsh v. Alabama* (1946) 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, *supra*, §314, *Wirta v. Alameda-Contra Costa Transit Dist.* (1967) 68 C.2d 51, 64 C.R. 430, 434 P.2d 982, *supra*, §343, and *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 171 P.2d 885, *infra*, §394. (11 C.3d 82.)

(b) *Posting as form of expression.* Although the ordinance regulates only the posting, not the content, of the notices, it still conflicts with the constitutional protection of *dissemination*; i.e., posting is not unlike picketing and distribution or circulation of printed matter (see *supra*, §352; *infra*, §§360, 396 et seq.). "[T]he posting of notices on utility poles is a form of expression coming within the protective umbrella of the First Amendment." (11 C.3d 84.)

(c) *Test of regulation.* Applying the balancing test of *Dillon v. Municipal Court* (1971) 4 C.3d 860, 94 C.R. 777, 484 P.2d 945, *infra*, §456, the ordinance is invalid. It establishes a licensing scheme by requiring a permit for posting, but states no conditions or standards for granting permission. (11 C.3d 86.) In other words, having made the poles available for an exercise of First Amendment rights, the city may not regulate their use by a standardless licensing scheme that allows officials unbounded discretion in granting or denying permits. (11 C.3d 88.)

Three dissenting justices thought the ordinance should be construed to apply only to unprotected commercial material, and should be held unconstitutional only in the part requiring prior consent from the city Department; it would then be a valid regulation imposing sanctions for trespass on private property without the owner's prior consent. (11 C.3d 89.)

(2) *Posting Signs on Public Property.* *Sussli v. San Mateo* (1981) 120 C.A.3d 1, 173 C.R. 781, upheld the validity

of a city ordinance prohibiting the posting of signs on public property, noting that 48 California cities had adopted such regulations. Plaintiff, a candidate for the City Council, had posted signs supporting his candidacy. He contended that the absolute ban of the ordinance was an infringement of the First Amendment right of free speech. The court, rejecting the attack, reasoned as follows:

(a) The courts, following a balancing approach, must determine whether the exercise of police power to prohibit the means or mode of communication was justified by sufficiently important governmental interests involved. (120 C.A.3d 6.)

(b) The government has the burden of establishing that the regulation was narrowly drawn to serve a compelling state interest. (120 C.A.3d 9.) That burden was met here. "In weighing the competing interests at stake, we attach special significance to the compelling interest of the public in maintaining some semblance of visual harmony in the areas where they live. Thousands of tattered derelict signs from past elections testify to the difficulty of protecting public property from unsightly signs even where laws forbid public posting. Without such laws one foresees an absolute end to the already eroded aesthetic integrity of public places in a tidal wave of publicly sponsored graffiti." (120 C.A.3d 9.) "The rational basis for differentiating between political signs relating to specific elections and those which pertain to the conduct of government in general seems tenuous at best. ... If the subject ordinance falls, it is difficult to rationalize a valid basis for prohibiting the public posting of signs ranging from 'Question Authority' to 'Save the Red Brigade' or 'Down with the Shah.' It is, indeed, probable that the county could then be required to provide public space for any noncommercial message, such as 'Roommate Desired' or 'Merry Christmas.'" (120 C.A.3d 10, footnote 10.)

A strong dissenting opinion argues that the ordinance, with its sweeping prohibition of all posters and signs, temporary or otherwise, on any public property, is an invalid restriction on a long established method of political expression, and that the city could have achieved its objectives by a more narrowly drawn ordinance relating to public placement of temporary political signs. (120 C.A.3d 13.)

(3) *Posting Signs on Private Property.* In *Indio v. Arroyo* (1983) 143 C.A.3d 151, 191 C.R. 565, plaintiff city attempted to apply its sign regulation ordinance to an outdoor mural on a private business establishment. The mural depicted aspects of Mexican heritage, including social advancements of Mexican people in contemporary society. *Held*, the mural was ideological expression, entitled to a high degree of constitutional protection, and the ordinance was overbroad as applied to it. "The city's legitimate interest in its esthetic environment cannot be a justification for suppressing the rights of those private persons who seek to improve that environment." (143 C.A.3d 158, 159.)

In *Gonzales v. Superior Court* (1986) 180 C.A.3d 1116, 226 C.R. 164, a city ordinance banned temporary noncommercial signs announcing or pertaining to specific events (e.g., an election), but allowed permanent signs and various commercial signs. Petitioner had four signs critical of city government in his car legally parked on a state highway in the city. The city confiscated the signs, and petitioner sought mandamus directing the lower court to enjoin enforcement of the ordinance. *Held*, writ granted; the ordinance was unconstitutional on its face.

(a) By opening a traditional public forum to the display of some signs, the city could not justify its purported interests in aesthetics and traffic safety by banning certain other noncommercial signs. (180 C.A.3d 1121, 1123, 1126.) And the ordinance also attempted to restrict noncommercial messages on private property (the car). (180 C.A.3d 1124.)

(b) The ordinance allowed a single governmental official to determine what signs would be permitted by a permit system; this prior restraint was an unconstitutional restriction of free speech. (180 C.A.3d 1124, 1128.) (See *infra*, §360.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Posting Signs on Private Property.* The Director of Transportation "may not regulate noncommercial, protected speech contained within any advertising display authorized by, or exempted from," the Outdoor Advertising Act. (B. & P.C. 5275, added in 2007.)



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A. Nature of Guarantees.

10. Right To Post.

b. Residential Signs.

7 *Witkin Sum. Cal. Law Const Law* § 354

[§ 354] Residential Signs.

In *Ladue v. Gilleo* (1994) 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, a city ordinance, with limited exceptions, prohibited homeowners from displaying signs on their property. Gilleo, a resident, challenged the ordinance, claiming that it violated her right to free speech by prohibiting her from displaying an antiwar sign from her home. *Held*, the ordinance is unconstitutional.

(a) Several prior decisions have considered the propriety of ordinances regulating outdoor signs. (114 S.Ct. 2042, 2043, 129 L.Ed.2d 43, 44, discussing *Linmark Associates v. Willingboro* (1977) 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155, *supra*, §335, *Metromedia v. San Diego* (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800, *infra*, §1066, and *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772, *infra*, §1068.) "These decisions identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. ... Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech." (114 S.Ct. 2043, 129 L.Ed.2d 44.)

(b) Assuming that the ordinance's various exemptions are free of impermissible content or viewpoint discrimination, the ordinance is too broad. The city "has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression." (114 S.Ct. 2045, 129 L.Ed.2d 47.)

(c) Ordinances that ban an entire medium of expression are of particular concern and have been held invalid in prior decisions. "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent--by eliminating a common means of speaking, such measures can suppress too much speech." (114 S.Ct. 2045, 129 L.Ed.2d 47.)

(d) The ordinance cannot be justified as a mere time, place, or manner regulation. Displaying a sign from one's own residence often carries a distinct message that cannot be conveyed by other means or by a sign in another location. Residential signs offer a cheap and convenient form of communication, and the intended audience--one's neighbors--cannot be reached nearly as well by other means. (*114 S.Ct. 2046, 129 L.Ed.2d 48.*)

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

11. Other Areas.

a. Ban on Receipt of Honoraria.

7 *Witkin Sum. Cal. Law Const Law* § 355

[§ 355] Ban on Receipt of Honoraria.

In *United States v. National Treasury Employees Union* (1995) 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964, Congress, on the recommendation of two commissions, passed the Ethics Reform Act of 1989 (5 U.S.C. Appx., §101 et seq.), which in conjunction with a 25% pay increase for members of Congress, federal judges, and executive employees above a GS-15, prohibits the receipt of honoraria by practically all federal employees while they are members, officers, or employees. Honorarium is defined as the receipt of money or a thing of value for an appearance, speech, or article, regardless of whether the speech or the article, or the person paying for it, has any connection with the employee's official duties. However, if a series of appearances, speeches, or articles is given, such a connection must exist. (5 U.S.C. Appx., §505(3).) The Act provides that executive employees, instead of being subject to it, are governed by rules issued by the Office of Government Ethics (OGE), which are more liberal in that they permit reimbursement for certain expenses relating to appearances, speeches, or articles, and exclude such activities as giving a sermon or reading a work of fiction. Violations are punishable by recovery of \$ 10,000 or the amount of the honorarium, whichever is larger.

Plaintiffs were two unions and several individual employees of the executive branch. One of the unions was certified as a representative of the class composed of all executive branch employees below the grade GS-16, all of whom, but for the Ethics Reform Act, would receive honoraria. Both the trial judge and the Court of Appeals held that the statute was unconstitutional as applied to all executive branch employees, and the latter went so far as to rewrite 5 U.S.C. Appx., §501(b) to exclude such employees. *Held*, judgment affirmed insofar as it prohibits enforcement against plaintiffs, but reversed insofar as it grants relief to parties not before the Court.

(a) *Balancing test.*

(1) Past federal employees such as Nathaniel Hawthorne, Herman Melville, Walt Whitman, and Bret Harte have received honoraria while making significant contributions to the marketplace of ideas. As announced in cases like *Pickering v. Board of Education of Township High School Dist. 205, Will, Illinois* (1968) 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 3 Summary (10th), *Agency and Employment*, §283, the test is the balancing of the right of the employee, as a citizen, to comment on matters of public concern, weighed against the interest of the Government, as an employer, in promoting the efficiency of the services that it performs through its employees. If the speech is on a private matter, the test is not applied, and the Government's burden is easy, but when the speech involves a matter of public

concern, the Government bears a difficult burden of proof. Here, clearly protected speech is involved because it relates to matters of general interest instead of to a private matter, such as the employees' job. (115 S.Ct. 1012, 1013, 130 L.Ed.2d 978, 979.)

(2) The sweep of the statute makes the government's burden especially difficult because it involves the wholesale ban of future speech of a large number of employees instead of the past speech of a single employee. This is so even though greater weight is usually given to Congressional judgment than to a single executive's disciplinary action. It should be noted that, while the ban on honoraria does not actually ban any speech, it does place a powerful burden on expressive activity, a burden that is heavier on lower paid employees than on higher paid policymakers, who will probably continue to speak so long as travel is reimbursed. It should also be noted that the ban poses a heavy burden on the public's right to know what the employee would otherwise have said. In other words, "we cannot ignore the risk that it might deprive us of the works of a future Melville or Hawthorne." (115 S.Ct. 1013, 130 L.Ed.2d 981.)

(3) The Government attempted to meet its burden by arguing that the receipt of honoraria would interfere with the efficiency of public service, relying on *United Public Workers of America (C.I.O.) v. Mitchell* (1947) 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754, supra, §90, which upheld the Hatch Act's prohibition on all partisan political activity by federal employees. However, that Act was designed to protect the rights of workers. The Government did not show how a ban on the receipt of honoraria would protect employees, instead of threaten their morale and liberty. (115 S.Ct. 1010, 130 L.Ed.2d 982.)

(4) The Government's main concern was that the receipt of honoraria would involve an actual or apparent abuse of power. This might be true of members of Congress and high-ranking judiciary and executive officials who have the power to do favors for those who pay them honoraria. The Government failed to extend this concern to lower ranking executive employees who lack the power to do favors for those who pay them to speak. It is difficult to see how receipt of an honorarium by a mechanic would involve an actual or apparent abuse of power. (115 S.Ct. 1016, 130 L.Ed.2d 983.)

(5) The Government argued that honoraria were so threatening to the efficiency of the federal service that a total ban was necessary. However, the ban is not total. Honoraria are banned for a series of appearances, speeches, or articles only if they are connected with the employee's work. The Government's only argument for having a total ban is that the administrative costs are lower than they would be if a nexus had to be found in each case, a position that is hardly a justification for the blanket suppression of speech and one that undermines the argument that a nexus requirement is too difficult to enforce. Also, the Government claimed that speech posed a special threat to efficiency. However, the commissions' recommendations show a judgment that compensation for an appearance, speech, or article poses no greater danger than compensation for other services that an employee might perform in his or her free time. Congress, however, chose to restrict only speech, instead of other activities, a result that is anomalous considering the favored position of speech in the constitutional firmament. (115 S.Ct. 1016, 1017, 130 L.Ed.2d 984.)

(6) The OGE regulations limit the definition of "appearance, speech, or article" by excluding a number of activities that are not related to one's work. This diminishes the Government's arguments that such an exclusion, i.e., for speech not related to work, cannot be made, and that honoraria for lower level employees for speech totally unrelated to their jobs jeopardizes the efficiency of the federal service. (115 S.Ct. 1018, 130 L.Ed.2d 985.)

(7) Finally, the fact that the Ethics Act singles out expressive activity heightens the Government's burden. It is not enough for the Government to show mere speculation that serious harm might result. It must show a reasonable ground to fear that serious harm will result if free speech is practiced, and that the danger will be averted by the statute in question. (115 S.Ct. 1017, 130 L.Ed.2d 985.)

(b) *Remedy.*

(1) The solution of the trial judge and the Court of Appeals was to enjoin the receipt of honoraria against the entire

executive department, regardless of whether the speech was, or was not, connected to an employee's job. For the following reasons, the judgment is modified to apply only to those parties before the Court: "First, ... we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants. ... In this case, granting full relief to respondents--who include all Executive Branch employees below Grade GS-16--does not require passing on the applicability of §501(b) to senior executives who received a 25 percent salary increase that offsets the honoraria ban's disincentive to speak and write. Second, the Government conceivably might advance a different justification for an honoraria ban limited to more senior officials, thus presenting a different constitutional question than the one we decide today. ... Third, as the Court of Appeals recognized, its remedy required it to tamper with the text of the statute, a practice we strive to avoid." (*115 S.Ct. 1018, 1019, 130 L.Ed.2d 986, 987.*)

(2) The obligation to avoid judicial legislation makes it necessary to reject the government's second suggestion, i.e., that the remedy be modified by crafting a nexus requirement for the honorarium. "We cannot be sure that our attempt to redraft the statute to limit its coverage to cases involving an undesirable nexus between the speaker's official duties and either the subject matter of the speaker's expression or the identity of the payor would correctly identify the nexus Congress would have adopted in a more limited honoraria ban. ... The process of drawing a proper nexus, even more than the defense of the statute's application to senior employees, would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case. We believe the Court of Appeals properly left to Congress the task of drafting a narrower statute." (*115 S.Ct. 1019, 130 L.Ed.2d 987.*)

A concurring and dissenting justice agreed that the honoraria ban was unconstitutional, but thought that the remedy was painted with too broad a brush. (*115 S.Ct. 1019, 130 L.Ed.2d 988.*) Three dissenting justices thought that there were compelling governmental reasons for the ban. (*115 S.Ct. 1024, 130 L.Ed.2d 994.*) (See *109 Harv. L. Rev. 200.*)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

A. Nature of Guarantees.

11. Other Areas.

b. Fortune-Telling.

7 *Witkin Sum. Cal. Law Const Law* § 356

[§ 356] Fortune-Telling.

In *Spiritual Psychic Science Church v. Azusa* (1985) 39 C.3d 501, 217 C.R. 225, 703 P.2d 1119, the court held that fortunetelling was protected speech, and that an ordinance prohibiting it was a violation of the California Constitution's free speech guarantee (Cal. Const., Art. I, §2, *supra*, §312).

An ordinance of defendant city provided: "No person shall practice or profess to practice or engage in the business or art of astrology, augury, card or tea reading, cartomancy, clairvoyance, crystal gazing, divination, fortune telling, hypnotism, magic, mediumship, necromancy, palmistry, phrenology, prophecy, or spiritual reading, or any similar business or art, who either solicits or receives a gift or fee or other consideration for such practice, or where admission is charged for such practice." Plaintiff Stevens, an ordained minister of plaintiff church, told fortunes at her place of business, charging a fee for the service. Defendant city revoked the church's business license, and threatened to prosecute Stevens. The church and Stevens then brought this action for injunctive relief. *Held*, the ordinance was unconstitutional.

(a) *Fortune-telling as protected speech.* Defendant city conceded that Stevens could practice fortune-telling and solicit funds for the church's religious activities, but contended that engaging in the business of telling fortunes for money was commercial activity. This is unsound:

(1) Fortune-telling "involves the communication of a message directly from the fortune-teller to the recipient." This communication between persons "is at the very core of what is known as speech." (39 C.3d 508, 519.) And speech does not lose its protected character when engaged in for profit. (39 C.3d 509.)

(2) The city contended that if it is speech, it is commercial speech that is not entitled to the same high level of protection as noncommercial speech. This is likewise unsound. Commercial speech "has but one purpose--to advance an economic transaction. By contrast, noncommercial speech encompasses activities extending beyond that purpose." (39 C.3d 511.) The art of fortune-telling involves the passing of ideas and information--valid, questionable, or false--between the fortune-teller and the client; and the consideration is not the object of the communication. "When Stevens charges a fee for fortunetelling, she sells her services, not an advertisement of her services. ... If we were to accept the City's theory, a lecture for or against Marxism, abortion, nuclear power, or racial supremacy would be

commercial speech if people paid an admission charge to hear it, because the lecture would complete the transaction." (39 C.3d 511.)

(3) The city further contended that fortune-telling is not constitutionally protected speech because it does not concern or affect the political process. This argument fails to comprehend the broad scope and purpose of the constitutional guaranty. "First, it is impossible to say that fortunetellers impart no political message in their communications. In their vision of the future there may be a view of society as they perceive it may one day be. Such a communication conceivably could contain the spark of a political flame. Second, fortune-telling may fire the imagination and stimulate discussion of the future. That some--even a majority--may find this mode of communication distasteful, ridiculous or even corrupt is irrelevant to constitutional concerns." (39 C.3d 512.)

(b) *Distinction: unprotected speech.* The city contends that fortunetelling is inherently deceptive and therefore is within the "fraud" exception (see *infra*, §424). But this does not save the ordinance:

(1) Many fortune-tellers have no belief in their power to predict the future, and if they obtain consideration for their services, their activity could be deemed fraudulent. However, some believe they possess the power to predict, and when they impart their beliefs to others, they are communicating protected opinions. (39 C.3d 515.) Moreover, many other persons purport to predict the future: e.g., "astrology columnists in daily newspapers, economists who prognosticate interest rates and other business conditions, investment counsellors who forecast stock market trends, sportswriters and oddsmakers who predict the winners of athletic contests, horserace handicappers, pollsters who forecast election returns, and clergymen who describe the concept of a hereafter." (39 C.3d 515.)

(2) It is within the legislative province to prohibit fraudulent fortunetelling; but a regulation is invalid for overbreadth "if it prohibits protected expression, even though it also guards the public from fraud." (39 C.3d 515.) Here, "the prohibition against 'spiritual reading' could encompass Bible lessons, the bar against 'hypnotism' could include hypnosis as an accepted technique of the psychotherapist, the banning of 'magic' could prevent numerous popular theatrical performances, and the prohibition of 'prophecy' could interfere with many religious services." (39 C.3d 516.)

(c) *Balancing test for regulation not aimed at communicative element.* The city's objective--prohibiting fraud in telling fortunes--can be achieved by means less drastic than this overbroad ordinance, e.g., by such a statute as P.C. 332. (39 C.3d 518.) Thus: "Any marginal interest the City may have in more complete and convenient regulation in this area by a total ban on fortunetelling for compensation is outweighed by the interest in free and open speech on all subjects." (39 C.3d 519.)

(d) *No room for judicial construction.* An overbroad statute may sometimes be construed to avoid unconstitutionality. (39 C.3d 519.) This is not possible here. "Although the ordinance in the case at bar contains an obvious defect that could be cured by limiting its reach to fraudulent activity carried out by fortunetellers, we would abuse our power by adding such language to the measure. This is not a case like *Welton*, in which the ordinance could stand on its own without the invalid reference. Before us now is an enactment that is invalid in its essence; we would be required to rewrite it in order to save it. This we may not do." (39 C.3d 520, citing *Welton v. Los Angeles* (1976) 18 C.3d 497, 134 C.R. 668, 556 P.2d 1119, *supra*, §335.)

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A. Nature of Guarantees.

11. Other Areas.

c. Police Surveillance of College.

7 *Witkin Sum. Cal. Law Const Law* § 357

[§ 357] Police Surveillance of College.

White v. Davis (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, involved a question of first impression. Plaintiff, a professor at U.C.L.A., filed a taxpayer's suit to enjoin defendant Chief of Police of Los Angeles from spending money for an intelligence gathering program. The complaint alleged that members of the police department registered as students at U.C.L.A., attended classes, and joined student organizations, and then made reports of discussions heard, which became part of police dossiers; and that this covert surveillance pertained to no illegal activity. *Held*, plaintiff had standing to sue (see *supra*, §88), and the complaint stated a cause of action.

(a) Normal undercover police operations, employed to detect criminal activity, are regularly sanctioned; but limitations imposed by the Fourth Amendment on improper surveillance (e.g., of private residences or public restrooms) have been repeatedly stated. (13 C.3d 766; see *Wirin v. Parker* (1957) 48 C.2d 890, 313 P.2d 844, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §354, and *People v. Triggs* (1973) 8 C.3d 884, 106 C.R. 408, 506 P.2d 232, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §207.)

(b) Police surveillance violates the First Amendment if it chills protected activity. And the threat is "considerably exacerbated" when it focuses on university classrooms and their environs. The protection of constitutional freedoms "is nowhere more vital than in the community of American schools." (13 C.3d 769.)

(c) "The crucible of new thought is the university classroom; the campus is the sacred ground of free discussion. Once we expose the teacher or the student to possible future prosecution for the ideas he may express, we forfeit the security that nourishes change and advancement. The censorship of totalitarian regimes that so often condemns developments in art, science and politics is but a step removed from the inchoate surveillance of free discussion in the university; such intrusion stifles creativity and to a large degree shackles democracy." (13 C.3d 770.)

(d) In view of the substantial chilling effect, the activity may be sustained only if defendant can demonstrate a compelling state interest that justifies the deterrent and that cannot be served by alternative means less intrusive on fundamental rights. Because this case arises on demurrer, the interest has not been shown here. (13 C.3d 772, 773.) (For alternative ground of invasion of right of privacy, see *infra*, §575.)

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A. Nature of Guarantees.

11. Other Areas.

d. Promotional Advertising by Public Utility.

7 *Witkin Sum. Cal. Law Const Law* § 358

[§ 358] Promotional Advertising by Public Utility.

(1) *Billing Inserts Discussing Controversial Issues of Public Policy.* In *Consolidated Edison of New York Co. v. Public Service Com. of New York* (1980) 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319, a utility placed material in its monthly electric bills arguing the benefits of nuclear power. The Public Service Commission issued an order prohibiting any bill inserts expressing opinions "on controversial issues of public policy." *Held*, the order was unconstitutional. Pointing out that members of the "captive audience" may escape exposure to objectionable material "by transferring the bill insert from envelope to wastebasket" (100 S.Ct. 2336, 65 L.Ed.2d 331), the Court concluded:

"The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments. The state action is neither a valid time, place or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest." (100 S.Ct. 2336, 65 L.Ed.2d 332.) (See *Pacific Gas & Elec. Co. v. Public Util. Com.* (2000) 85 C.A.4th 86, 93, 102 C.R.2d 20 [following *Consolidated Edison*; statute prohibiting utilities from inserting political literature in billing envelopes is facially unconstitutional]; 70 Cal. L. Rev. 1221 [*Consolidated Edison*].)

(2) *Promotional Advertising by Electrical Utility.* In *Central Hudson Gas & Elec. Corp. v. Public Service Com. of New York* (1980) 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, the Commission prohibited all advertising promoting the use of electricity, declaring it contrary to the national policy of conserving energy. *Held*, the total ban was unconstitutional. The Court first set forth the four-part analysis used in commercial speech cases: "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (100 S.Ct. 2351, 65 L.Ed.2d 351.)

The Court concluded that the Commission had not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation; e.g., by restricting the format and content of the advertising by a requirement that the advertisements include information about the relative efficiency and expense of the offered services under current conditions and for the foreseeable future. (100 S.Ct. 2354, 65 L.Ed.2d 354.) (See 94 Harv. L. Rev. 34, 159.)

(3) *Compelled Distribution of Other Material*. The issue in *Pacific Gas & Elec. Co. v. Public Util. Com. of Calif.* (1986) 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1, arose out of the utility's distribution of a newsletter ("Progress") in its monthly billing envelope, including in it political editorials, feature stories on matters of public interest, tips on energy conservation, and information about utility services and bills. The Public Utilities Commission determined that there was extra space in the envelope for other materials, i.e., space that would not increase postage cost, and it ordered the utility to permit TURN--a ratepayers' organization representing a significant group of the utility's residential customers--to use the extra space four times a year for any material it wished to enclose. The California Supreme Court denied review. *Held*, the order was an infringement of the utility's First Amendment rights.

(a) The utility's newsletter, like a small newspaper, includes discussion of matters of public concern that are protected by the *First Amendment*. (106 S.Ct. 907, 89 L.Ed.2d 7.)

(b) Compelled access penalizes the expression of points of view and forces speakers to alter their speech to conform with an agenda they do not set. The concerns that required invalidation of the right-of-reply statute in *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730, *infra*, §364, apply to the utility as well as to the institutional press. (106 S.Ct. 909, 89 L.Ed.2d 8, 9.) The state is not free either to restrict the utility's speech to certain topics or views or to force it to respond to views that others may hold; and under *Tornillo*, a forced access rule that would accomplish these purposes indirectly is similarly forbidden. (106 S.Ct. 909, 89 L.Ed.2d 9, 10.)

(c) The Commission's order requires the utility to assist in disseminating TURN's view; it does not equally constrain both sides of the debate about utility regulation. This kind of favoritism goes beyond the fundamentally content-neutral subsidies sustained in *Buckley v. Valeo* (1976) 424 U.S. 1, 96 S.Ct. 612, 694, 46 L.Ed.2d 659, 759, *supra*, §256. (106 S.Ct. 911, 89 L.Ed.2d 11.) The order also impermissibly requires the utility to associate with speech with which it may disagree, and forces it to respond. "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." (106 S.Ct. 912, 89 L.Ed.2d 12, citing *Wooley v. Maynard* (1977) 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752, *infra*, §557.)

(d) "We conclude that the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the view of other speakers, and because it selects the other speakers on the basis of their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation." (106 S.Ct. 914, 89 L.Ed.2d 15.) (See 100 Harv. L. Rev. 182; 21 San Diego L. Rev. 391 [Access to Public Utility Communications: Limits Under the Fifth and First Amendments]; 41 San Diego L. Rev. 483 [criticizing reasoning and holding of *Pacific Gas & Elec.*]; 27 Santa Clara L. Rev. 485 [same].)

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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

1. Freedom From Previous Restraint.

a. General Principle.

7 *Witkin Sum. Cal. Law Const Law* § 359

[§ 359] General Principle.

The constitutional guarantee clearly protects against previous restraints on publication or speech, thus preventing censorship or prohibition of publication by injunction. (*Near v. Minnesota* (1931) 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; *Staub v. Baxley* (1958) 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302; *New York Times Co. v. United States* (1971) 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, *infra*, §363; *Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448; *Wilson v. Superior Court* (1975) 13 C.3d 652, 658, 119 C.R. 468, 532 P.2d 116, *infra*, §361; *Tily B. v. Newport Beach* (1998) 69 C.A.4th 1, 10, 81 C.R.2d 6 [city's licensing scheme for restaurants was unconstitutional prior restraint as applied to bar and restaurant seeking to offer nude entertainment, but amendment of ordinance cured defect and city was not required to issue use permit; following *Perrine v. Municipal Court* (1971) 5 C.3d 656, 97 C.R. 320, 488 P.2d 648, *infra*, §360]; *Parris v. Superior Court* (2003) 109 C.A.4th 285, 298, 135 C.R.2d 90, 4 Cal. Proc (4th), *Pleading*, Supp., §283 [absent specific evidence of abuse, order prohibiting or limiting precertification communication among parties to putative class action and potential class members is invalid prior restraint]; see 4 Rotunda, §20.16 et seq.; 79 *Harv. L. Rev.* 1; 83 *Harv. L. Rev.* 518; 28 *Hastings Const. L. Q.* 799 [non-obscene sexually explicit speech]; 51 *So. Cal. L. Rev.* 1215, 1281 [scientist's right to research]; 31 *U.C.L.A. L. Rev.* 128 [validity of governmental restrictions on race-IQ research]; 52 *U.C.L.A. L. Rev.* 333 [restraints for converged media]; 17 *U.S.F. L. Rev.* 171 [private search as a prior restraint]; 19 *U.S.F. L. Rev.* 91 [right of school officials to restrict flow of information to students]; 118 *A.L.R.5th* 213 [First Amendment Protection Afforded to Comic Books, Comic Strips, and Cartoons]; on judicial control of media relating to trial proceedings as prior restraint, see *infra*, §413 et seq.; on exception for motion picture censorship, see *infra*, §371.)

In *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1, plaintiff was a racially integrated community organization in the Austin neighborhood of Chicago. Defendant was a real estate broker. Plaintiff charged him with "panic peddling" or "blockbusting," i.e., frightening white residents by warning of black infiltration of the residential area and thereby securing listings to sell to Blacks. Plaintiffs and others urged defendant to sign an agreement not to solicit listings in the community, and when he refused they distributed leaflets in the city of Westchester, defendant's residence, describing his activities. The trial judge found that the distribution was peaceful, but nevertheless concluded that it was coercive and an invasion of privacy, and therefore granted an injunction against distribution in the city of Westchester. *Held*, reversed. "No prior decisions support the claim that the interest of an

individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." (91 S.Ct. 1578, 29 L.Ed.2d 6.)

Rowan v. United States Post Office Dept. (1970) 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736, *infra*, §370, is distinguishable. The right of privacy protected there was that of a houseowner attempting to stop the flow of information into his own household; here, defendant attempted to stop the flow of information to the public. (91 S.Ct. 1578, 29 L.Ed.2d 6.)

DVD Copy Control Assn. v. Bunner (2003) 31 C.4th 864, 4 C.R.3d 69, 75 P.3d 1, involved a preliminary injunction prohibiting defendant from continuing to post plaintiff's trade secrets on his Internet website. *Held*, the injunction did not violate the First Amendment or California's Free Speech provision, Cal. Const., Art. I, §2.

(a) Assuming that the injunction was properly issued under California's trade secret law, the injunction was content neutral and not subject to strict scrutiny under the test stated in *Madsen v. Women's Health Center* (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, *infra*, §401. (31 C.4th 877.) The injunction sought to protect plaintiff's property interest in information, not to suppress the content of defendant's speech. (31 C.4th 878.) It achieved the requisite balance, and burdened no more speech than was necessary to serve governmental interests in protecting trade secrets. (31 C.4th 880.)

(b) *Bartnicki v. Vopper* (2001) 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787, *infra*, §431, is distinguishable. There, privacy concerns gave way to the public's interest in matters of public importance. (31 C.4th 883.) Here, defendant did not post plaintiff's trade secrets "to comment on any public issue or to participate in any public debate." The posted information was highly technical and targeted a limited audience of computer encryption enthusiasts. (31 C.4th 884.)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Rotunda 4th, §20.16 et seq.

Parris case:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §316.



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B. Scope of Protection.

1. Freedom From Previous Restraint.
- b. Requirement of License or Permit.

7 *Witkin Sum. Cal. Law Const Law* § 360

[§ 360] Requirement of License or Permit.

The requirement of a license or permit to speak or to distribute literature is invalid if used as a means of prohibition or censorship.

In *Lovell v. Griffin* (1938) 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, defendant distributed a religious tract in violation of an ordinance prohibiting distribution of any kind of circulars or literature without prior written permission from the city manager. *Held*, the ordinance was void, because (a) it was not limited to literature that was obscene, or advocated unlawful conduct, and (b) it was not limited to improper methods of distribution, such as those involving disorderly conduct, molestation of people, or misuse or littering of streets. The Court also made it clear that liberty of *circulating* is as essential as liberty of *publishing*. (See 12 So. Cal. L. Rev. 466.)

In *Staub v. Baxley* (1958) 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302, a city ordinance required that anyone soliciting membership for an organization or union that charged membership fees or dues should apply for a permit from the mayor and council, which could refuse it if they did not approve of the applicant, the organization, or the latter's effect on the welfare of the citizens. Appellant, a union organizer, talked to a number of employees about joining the union, and was convicted of violation of the ordinance. *Held*, reversed. The ordinance, giving uncontrolled discretion to the city officials to grant or withhold a permit, was an unconstitutional censorship or prior restraint on freedom of speech. (78 S.Ct. 284, 2 L.Ed.2d 313.)

In *Perrine v. Municipal Court* (1971) 5 C.3d 656, 97 C.R. 320, 488 P.2d 648, a Los Angeles County ordinance prohibited operation of a bookstore without a license from the county Public Welfare Commission. One of the grounds for discretionary denial was prior conviction or commission of one of many listed crimes. Petitioner, an existing bookstore operator, admitted a prior conviction for selling obscene matter, and was denied a license without an explanatory opinion. He nevertheless continued to operate, was arrested and charged with a misdemeanor, and sought prohibition to prevent the trial. *Held*, writ issued.

(a) The ordinance contained no standards, and gave the Commission unlimited authority to deny the application of an applicant who met all the conditions. (5 C.3d 662.)

(b) Even if limited to disqualification for actual conviction of crime it would still be invalid. There is no reasonable relation between qualifications to operate a bookstore and past conviction of one of a vast number of offenses (sex crimes and crimes of violence against the person, including trivial assaults and batteries). (5 C.3d 663.) "The penalty for violating section 311.2 does not include a forfeiture of First Amendment rights, and the risk that criminal sanctions will be insufficient to deter future violations of that section cannot justify the county's attempted forfeiture of those rights on the theory that past violators are unfit to operate bookstores." (5 C.3d 662.)

The dissent argued that an operator of a bookstore is in daily contact with the public, including young people, and that the municipality should not be required to rely exclusively on enforcement of obscenity laws in controlling distribution of obscene matter. (5 C.3d 665.)

Littleton v. Z.J. Gifts D-4, LLC (2004) 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84, upheld a city ordinance requiring adult business licenses for adult book, novelty, and video stores. The ordinance did not seek to censor material, and it set objective criteria for determining when a license "shall" be denied. (124 S.Ct. 2225, 159 L.Ed.2d 93.) Thus, the ordinance was not unconstitutional in failing to provide an unusually speedy review procedure as required in *Freedman v. Maryland* (1965) 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, *infra*, §371. "Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly." (124 S.Ct. 2224, 159 L.Ed.2d 92.)

Many other cases condemn the use of licenses as a means of censorship. (See *Saia v. New York* (1948) 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574, *infra*, §464; *People v. Fogelson* (1978) 21 C.3d 158, 167, 169, 145 C.R. 542, 577 P.2d 677 [Los Angeles ordinance giving licensing authorities unlimited discretion to grant or deny permission to solicit on city property; challenged by member of Hare Krishna religious group and held unconstitutional]; *EWAP v. Los Angeles* (1979) 97 C.A.3d 179, 187, 158 C.R. 579 [following *Perrine v. Municipal Court*]; *Barry v. Oceanside* (1980) 107 C.A.3d 257, 261, 263, 165 C.R. 697 [same]; *Vo v. Garden Grove* (2004) 115 C.A.4th 425, 435, 9 C.R.3d 257 [part of ordinance requiring existing CyberCafes to apply for conditional use permit by certain date was invalid where city administrator has unbridled discretion to grant or deny application]; 67 Cal. L. Rev. 701 [Fogelson]; for cases applying same principle to absolute prohibition, see *supra*, §350 et seq.; to peaceable assembly, see *infra*, §392; on expedited review of issuance or denial of permit or other entitlement for expressive conduct protected by First Amendment, see C.C.P. 1094.8, 9 Cal. Proc. (4th), *Administrative Proceedings*, Supp., §125B.) (On requiring personal identification as precondition of right to communicate, see *Talley v. California* (1960) 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559, *infra*, §466; *Huntley v. Public Util. Com.* (1968) 69 C.2d 67, 69 C.R. 605, 442 P.2d 685, *infra*, §467.)

West's Key Number Digest, Constitutional Law k.90.1(1.1)

SUPPLEMENT: [This section is current through the latest supplement]
C.C.P. 1094.8:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §153.



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

1. Freedom From Previous Restraint.

c. Invalid Restraint by Injunction.

7 *Witkin Sum. Cal. Law Const Law* § 361

[§ 361] Invalid Restraint by Injunction.

In *Wilson v. Superior Court* (1975) 13 C.3d 652, 119 C.R. 468, 532 P.2d 116, Wilson was a candidate for Assessor of Los Angeles. In 1974, he distributed a leaflet entitled "Newsletter" in which he reprinted portions of articles from the Los Angeles Times, undated, relating that his opponent, the incumbent assessor Watson, had been indicted for bribery. The Newsletter printed the actual date of another reprinted article in a blurred fashion making it difficult to read. The Newsletter also solicited funds for Wilson's campaign "to prevent the type of corruption" suffered over the years. In fact, the articles had appeared in the Times in 1966 and 1967, and Watson had been acquitted at the trial.

Watson sued for libel and slander and an injunction. The trial judge issued a temporary restraining order and afterwards a preliminary injunction, despite some amendments Wilson made--putting in dates in figures, and stating the fact of Watson's acquittal. The judge's theory was that Wilson's publication must present a fair and balanced presentation of the facts, with the source and date of the article. *Held*, reversed.

(a) *Invalidity of prior restraints*. Many authorities (see *supra*, §359) establish the principle that, under the federal Constitution, "the truth or falsity of a statement on a public issue is irrelevant to the question whether it should be repressed in advance of publication." (13 C.3d 658.) "A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press." (13 C.3d 658, quoting Cal. Const., Art. I, §2: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.")

(b) *Preliminary injunction is prior restraint*. The injunction, prohibiting publication of any articles except in a fair and balanced manner, was clearly an invalid prior restraint. "The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form." (13 C.3d 659.) Libel cases (*infra*, §425) are distinguishable; and the "clear and present danger" doctrine (*infra*, §407) is no more applicable than in the Pentagon Papers case (*New York Times Co. v. United States* (1971) 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, *infra*, §363). "We think it evident that if publication of the Pentagon Papers did not constitute a sufficiently serious threat to justify creation of an exception to the established principles set forth above, the circulation of election campaign charges, even if deemed extravagant or misleading, does not present a danger of sufficient magnitude to warrant a prior restraint." (13 C.3d 660.)

(c) *Principles applied.* The circumstances of this case demonstrate the wisdom of the rule against prior restraints. In the contempt proceeding, Wilson said he did not know where he stood, and requested the court's guidance on what kind of publication would be acceptable; thus, he was placed in the position of speculating on his attempts to comply. "The result was not merely a theoretical chilling of his right to publish, but actual acquiescence by him, under threat of contempt, in refraining from future publication of any of the four versions of the circular. ... By the restraining order the court also devised for itself an intolerable role: it was called upon to determine whether various versions of the Newsletter presented 'too narrow a view of the truth' and whether successive publications were 'substantially similar' to the original circular. It even went so far as to specify such details of publication as the size of type which would give a 'fair' presentation. The court thus aggressively assumed the role of governmental censor, approving its version of a 'fair' presentation, and disapproving a 'too narrow view of the truth.'" (13 C.3d 661.)

(d) *Exceptional situations.* Extraordinary circumstances may justify a prior restraint; e.g., disclosure of military secrets in time of war, and utterance of words that may have the effect of force. Also, restraint may be justified to protect private rights (see *infra*, §424), or to prevent deceptive commercial practices. "However, we have not discovered any case upholding the power of a court to restrain publication of a statement regarding the official conduct of a public officer on the ground that the statement was not wholly true or was presented in a deceptive manner." (13 C.3d 662.)

(e) *Conclusion.* "We hold, therefore, that the preliminary injunction violated petitioner's rights of freedom of expression under the United States Constitution, and for an independent ground, under the broader terms of the California Constitution." (13 C.3d 662.)

In *Gilbert v. National Enquirer* (1996) 43 C.A.4th 1135, 51 C.R.2d 91, plaintiff, a well-known actress, brought a defamation and invasion of privacy action against her ex-husband regarding remarks in a newspaper article that had been critical of her performance as a mother. The article had allegedly been published in answer to earlier articles that had praised plaintiff as a mother and had been derogatory towards defendant. Claiming that defendant threatened to reveal private information about plaintiff unless he was dismissed without prejudice, plaintiff, without notice to defendant, obtained a temporary restraining order and a preliminary injunction. Finding that plaintiff's privacy rights outweighed defendant's First Amendment rights, and that defendant's motives were mainly financial and retaliatory, the trial judge made the preliminary injunction apply to all disclosures regarding plaintiff, whenever or to whomever made, except as necessary to prepare a defense in the case. *Held*, preliminary injunction reversed.

(a) Prior restraints are disfavored and presumptively invalid. They have been declared invalid in circumstances more urgent than these and, in addition, are not permitted to stop the publication of defamatory statements. (43 C.A.4th 1144.)

(b) Plaintiff argued that the preliminary injunction was necessary to maintain the sanctity of the former marital relationship. However, the injunction applied to any information concerning plaintiff's substance abuse and sexual relationships obtained at any time during defendant's union with plaintiff, was not limited to communications made during the marriage itself, and arguably covered statements made to defendant by the parties' son upon returning from plaintiff's home. Hence, the restriction was too broad. While defendant may, in later tort actions, be held responsible for abusing the right to speak freely, he has the initial right to say what he chooses without censorship. (43 C.A.4th 1145.)

(c) Unlike *In re Marriage of Candiotti* (1995) 34 C.A.4th 718, 40 C.R.2d 299, a child custody case where information obtained during discovery was properly restrained, this case did not involve child custody or visitation. However, even if this were a family law action, the preliminary injunction went beyond precluding defendant from making disparaging remarks about plaintiff in their child's presence. Defendant, instead, was restrained from talking privately to anyone concerning his dissatisfaction with plaintiff as a parent. (43 C.A.4th 1146.)

(d) Plaintiff was a well-known actress. While public figures do not relinquish all privacy rights, the public's heightened interest in their personal activities is a factor to be weighed in balancing the competing interests, especially where there have been other articles on this subject at the public figure's behest. (43 C.A.4th 1146.) (See 31 Western

State L. Rev. 79 [constitutionality of pager ban provision in gang injunction].)

A number of additional decisions deal with invalid restraint by injunction:

Pines v. Tomson (1984) 160 C.A.3d 370, 397, 206 C.R. 866 [expression of religious opinion].

KCST-TV Channel 39 v. Municipal Court (1988) 201 C.A.3d 143, 145, 246 C.R. 869 [order temporarily prohibiting television station from exhibiting drawing of criminal defendant, lawfully made by artist during court hearing, was invalid prior restraint].

Paradise Hills Associates v. Procel (1991) 235 C.A.3d 1528, 1545, 1547, 1 C.R.2d 514 [signs on home disparaging plaintiff developer are protected speech to extent they provide truthful information and opinions about plaintiff's business, and any injunction issued in future must clearly and narrowly define scope of proscribed activities].

San Diego Unified Port Dist. v. United States Citizens Patrol (1998) 63 C.A.4th 964, 972, 74 C.R.2d 364 [portions of preliminary injunction effectively banning citizens' group from engaging in any speech or expressive activities inside airport terminals unrelated to transacting business with airline or other airport tenant unnecessarily burdened group's free speech rights].

Levy v. Santa Monica (2004) 114 C.A.4th 1252, 1255, 1260, 8 C.R.3d 507 [enjoining council member, under charter provision requiring council members to deal with administrative services solely through City Manager and not to give orders to subordinates of City Manager, from speaking with planning department employees on behalf of constituent, would be invalid prior restraint].

SUPPLEMENT: [This section is current through the latest supplement]

Additional decisions:

Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA (2005) 129 C.A.4th 1228, 1265, 29 C.R.3d 521, 6 Cal. Proc. (5th), *Provisional Remedies*, §318 [preliminary injunction precluding animal rights organization from coming within 100 feet of plaintiff's employees or their real property was overbroad; there was no evidence that defendant was involved in trespass or vandalism, and injunction could be tailored to prohibit continuing threats of violence on defendant's website].

Balboa Island Village Inn v. Lemen (2007) 40 C.4th 1141, 1155, 57 C.R.3d 320, 156 P.3d 339 [although injunction here was overbroad, injunction limited to prohibiting defendant from repeating statements about plaintiff that already had been determined at trial to be defamatory would not infringe defendant's free speech rights].

Evans v. Evans (2008) 162 C.A.4th 1157, 1169, 76 C.R.3d 859 [relying on and distinguishing *Balboa Island Village Inn*; preliminary injunction prohibiting ex-wife from publishing "false and defamatory" statements on Internet was constitutionally invalid because it had not yet been determined at trial that statements were defamatory; restrictions prohibiting ex-wife from publishing husband's confidential information on Internet and limiting her contact with sheriff's department, his employer, to 911 calls were overly broad].



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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

1. Freedom From Previous Restraint.

d. Discriminatory Special Tax.

7 *Witkin Sum. Cal. Law Const Law* § 362

[§ 362] Discriminatory Special Tax.

Another type of indirect prohibition or censorship was condemned in *Grosjean v. American Press Co.* (1936) 297 U.S. 233, 56 S.Ct. 444, 449, 80 L.Ed. 660, 668. A high state tax on gross receipts of newspapers of over 20,000 circulation, the object of which appeared to be to curtail their distribution and hence to limit the dissemination of information to the public, was held unconstitutional. (See 4 Rotunda, §20.22; 19 *Hastings Const. L. Q.* 535 ["Small Numbers" and Strict Scrutiny: Differential Taxation of the Press].)

In *Minneapolis Star & Tribune Co. v. Minnesota Commr. of Revenue* (1983) 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, Minnesota, which exempted newspapers from its sales tax, imposed a use tax on the cost of paper and ink products consumed in production. Appellant Star Tribune, which paid two-thirds of the total tax collected from the newspapers in the state, challenged its constitutionality. *Held*, the tax violated the First Amendment. *Grosjean*, involving a deliberate attempt to limit the circulation, was not controlling. (103 S.Ct. 1369, 75 L.Ed.2d 301.) But by creating the special use tax, the state singled out the press for special treatment, and this burden on rights protected by the First Amendment was not justified by any compelling governmental interest. (103 S.Ct. 1372, 137, 75 L.Ed.2d 303, 308.) (See 97 *Harv. L. Rev.* 172.)

Minneapolis Star was followed in *Alameda v. Premier Communications Network* (1984) 156 C.A.3d 148, 202 C.R. 684. Plaintiff city imposed license taxes of various types on many kinds of businesses. The tax on television subscription service businesses was different from and more burdensome than that imposed on the great majority of other businesses. *Held*, it was an unconstitutional infringement on free speech; the only governmental interest asserted was the generation of revenue, and that interest cannot, standing alone, justify special treatment of a segment of the media that disseminated protected speech. (156 C.A.3d 156.) (See *Arkansas Writers' Project v. Ragland* (1987) 481 U.S. 221, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209, 216 [following *Minneapolis Star*]; *Times Mirror Co. v. Los Angeles* (1987) 192 C.A.3d 170, 182, 237 C.R. 346 [distinguishing *Alameda v. Premier Communications*; tax for revenue only, press was not singled out for differential treatment].)

In *United Artists Communications v. Montclair* (1989) 209 C.A.3d 245, 257 C.R. 124, a city imposed an admissions tax on a broad range of events, but because events held for charitable purposes or by nonprofit organizations were exempt, 90% of the tax would be paid by two movie theaters and two adult bookstores. *Held*, following *Minneapolis*

Star and Festival Enterprises v. Pleasant Hill (1986) 182 C.A.3d 960, 227 C.R. 601, the tax as applied to plaintiff theater owners was unconstitutional. It "appears to apply to a broad range of businesses, but in reality its burden falls disproportionately upon businesses engaged in protected speech." (209 C.A.3d 252.)

In *Leathers v. Medlock* (1991) 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494, Arkansas extended its sales tax to distribution of cable television and satellite services while exempting the print media. *Held*, the tax was valid.

(a) *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project* demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. (111 S.Ct. 1443, 113 L.Ed.2d 503.)

(b) Here, however, the tax is one of general applicability. There is no indication that the state has targeted cable television in a purposeful attempt to interfere with its First Amendment activities; nor is the tax structured so as to raise suspicion that it was intended to do so. (111 S.Ct. 1444, 113 L.Ed.2d 504.) And the tax is not content-based. (111 S.Ct. 1445, 113 L.Ed.2d 505.) (See *Sacramento Cable Television v. Sacramento* (1991) 234 C.A.3d 232, 240, 286 C.R. 470 [following *Leathers*].)

SUPPLEMENT: [This section is current through the latest supplement]

See 5 Rotunda 4th, §20.22; 23 A.L.R.6th 165 [Cable Television Equipment or Services as Subject to Sales or Use Tax].



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B. Scope of Protection.

1. Freedom From Previous Restraint.

e. Restrictions on Newspapers and Magazines.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 363

[§ 363] In General.

In *Near v. Minnesota* (1931) 283 U.S. 697, 51 S.Ct. 625, 633, 75 L.Ed. 1357, 1371, a statute authorized the abatement by injunction, as a public nuisance, of a "malicious, scandalous and defamatory" newspaper or other periodical. On a full review of the principles and authorities, the court held it an unconstitutional "previous restraint" or censorship.

In *Winters v. New York* (1948) 333 U.S. 507, 68 S.Ct. 665, 667, 92 L.Ed. 840, 847, reversing a conviction under a statute prohibiting the distribution of magazines stressing crime news, the court said: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

The heavy burden on the Government to show justification for a prior restraint was again stressed in *New York Times Co. v. United States* (1971) 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822. The United States sought to enjoin the New York Times and the Washington Post from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." In a per curiam opinion, the court held that the burden had not been met, and therefore that no injunction could issue. Differing reasons were given in six concurring opinions, and three justices filed individual dissents. (See *Sun Co. of San Bernardino v. Superior Court* (1973) 29 C.A.3d 815, 829, 105 C.R. 873, *infra*, §415; 4 Rotunda, §20.17; 85 Harv. L. Rev. 25, 199 [New York Times]; 64 Cal. L. Rev. 108 [Government Information Leaks]; 5 Loyola L.A. L. Rev. 392 [New York Times]; 22 Pepperdine L. Rev. 405 [applicability of "collateral bar" rule, under which party may not disobey judicial order and then challenge its validity on appeal, to First Amendment cases involving media organizations]; 26 Stanf. L. Rev. 311 [National Security Secrets v. Free Speech]; on restraint by discriminatory special tax, see *supra*, §362; on "Son of Sam" laws regulating revenues to criminals from crime-related book, etc., see *infra*, §369.)

West's Key Number Digest, Constitutional Law k.90.1(8)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Rotunda 4th, §20.17; 41 *U.C. Davis L. Rev.* 1547 [media ownership regulation].



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1. Freedom From Previous Restraint.

e. Restrictions on Newspapers and Magazines.

2. Requirement of Free Space.

7 *Witkin Sum. Cal. Law Const Law* § 364

[§ 364] Requirement of Free Space.

The Florida "right of reply" statute was held unconstitutional in *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730. The court reviewed the arguments of proponents of an enforceable right of access to the press, and took note of the dangers of monopoly control and lack of public responsibility, but nevertheless concluded that governmental coercion violated the First Amendment. "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant from publishing specified matter." Faced with the criminal penalties that might be imposed (the statute made violation a misdemeanor), "editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." (94 S.Ct. 2389, 41 L.Ed.2d 741.)

An additional freedom objection was also found: "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (94 S.Ct. 2389, 41 L.Ed.2d 741.) (See 4 Rotunda, §20.18; on access to *state-owned* communications media, see 26 U.C.L.A. L. Rev. 1410.)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Rotunda 4th, §20.18.



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B. Scope of Protection.

1. Freedom From Previous Restraint.

e. Restrictions on Newspapers and Magazines.

3. Other Restrictions.

7 *Witkin Sum. Cal. Law Const Law* § 365

[§ 365] Other Restrictions.

(1) *Censorship of Prisoners' Newspaper*. In *Bailey v. Loggins* (1982) 32 C.3d 907, 187 C.R. 575, 654 P.2d 758, the court examined the power of the Department of Corrections to censor items in an inmate newspaper edited and published at the state prison and financed by the inmate welfare fund. The lead opinion of two justices resolved: "The department regulations and practices evidence an intention to allow publication of a prison newspaper which serves several purposes: aiding the education and morale of the prisoners; providing information from the administration and on events within the institution; and providing a limited forum in which prisoners can express their views and opinions on matters affecting them. Consequently, although the department retains greater powers to regulate and censor than would be appropriate outside the prison walls, it does not have total or arbitrary power, but must exercise its authority even-handedly and with sensitivity to the values protected by the First Amendment and corresponding California constitutional and statutory provisions." (32 C.3d 921.)

Two justices concurred in separate opinions (32 C.3d 923), and two dissented (32 C.3d 923, 928). (See *Diaz v. Watts* (1987) 189 C.A.3d 657, 665, 234 C.R. 334 [extended analysis of *Bailey*, concluding that "at least five justices interpret the constitutional and statutory law as permitting broad discretionary control and censorship of prison newspapers by prison authorities based on their perceived need for prison security, public safety, and valid penological purposes"]; 18 U.S.F. L. Rev. 599 [*Bailey*]; on other restrictions on prisoners, see *infra*, §387.)

(2) *Prohibiting Illustration of Federal Currency*. In *Regan v. Time* (1984) 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 487, federal statutes restricting the use of photographic reproductions of currency were held invalid in part and valid in part. (a) The purpose requirement was invalid as an overbroad regulation of the content or subject matter of speech. (104 S.Ct. 3267, 82 L.Ed.2d 494.) (b) The color and size limitations were reasonable regulations of the manner of publication. (104 S.Ct. 3271, 3272, 82 L.Ed.2d 499, 501.) (c) The valid provisions were severable. (104 S.Ct. 3269, 3272, 82 L.Ed.2d 496, 501.)

(3) *Valid Regulations*. In *Associated Press v. N.L.R.B.* (1937) 301 U.S. 103, 57 S.Ct. 650, 654, 81 L.Ed. 953, 960, an editorial employee of petitioner was discharged for union labor activity, and respondent board ordered his reinstatement. Petitioner contended that its widespread news service required complete freedom of control over editorial

employees to prevent news distortion, and that any regulation limiting that control infringed freedom of the press. *Held*, the objection was unsound. Newspapers are subject to regulation, being answerable for libel, contempt of court, and violation of antitrust laws; they may be subjected to equitable and nondiscriminatory taxes; and the present regulation, having no relation to the impartial distribution of the news, is valid. (See *Lorain Journal Co. v. United States* (1951) 342 U.S. 143, 72 S.Ct. 181, 187, 96 L.Ed. 162, 172; 51 Harv. L. Rev. 163 [Associated Press]; 66 Harv. L. Rev. 139 [Lorain Journal].)

A newspaper or periodical may also be required to publish a statement of the names of the editor, publisher, owner, stockholders, principal creditors, etc., as a condition to obtaining second-class mailing privileges. (*Lewis Publishing Co. v. Morgan* (1913) 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190.)

P.C. 409.5(d) permits members of the press to enter a disaster site that has been closed to the public. (See 2 *Cal. Crim. Law* (4th), *Crimes Against Public Peace and Welfare*, §15.) However, press access may be restricted if the presence of news personnel will interfere with emergency operations or the investigation of a crime. (*Leiserson v. San Diego* (1986) 184 C.A.3d 41, 51, 52, 229 C.R. 22 [facts were insufficient to justify denial of access to airplane crash site on basis of interference with emergency operations, but sufficient to warrant exclusion on grounds that crime was being investigated]; see 47 U.C.L.A. L. Rev. 243 [Breaking News: Proposing a Pooling Requirement for Media Coverage of Live Hostage Situations].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Distinction: Action for Breach of Promise of Confidentiality.

7 *Witkin Sum. Cal. Law Const Law* § 366

[§ 366] Distinction: Action for Breach of Promise of Confidentiality.

In *Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586, plaintiff, a supporter of the independent Republican candidate for governor of Minnesota, offered reporters of defendant newspapers information on the prior criminal record of the Democratic candidate on condition that plaintiff's identity not be disclosed. The reporters orally agreed, but later, after an investigation, defendant ran a story on the campaign that identified plaintiff as the source of the court records. Plaintiff was then discharged by his employer. Plaintiff sued for damages for breach of the promise, relying on the state's promissory estoppel law. The state court held that the First Amendment precluded recovery. *Held*, reversed.

(a) A private cause of action for promissory estoppel involves "state action"; i.e., the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes state action under the *Fourteenth Amendment*. (111 S.Ct. 2517, 115 L.Ed.2d 596.)

(b) However, generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. (111 S.Ct. 2518, 115 L.Ed.2d 596.) And the Minnesota doctrine of promissory estoppel is a law of general applicability. (111 S.Ct. 2518, 115 L.Ed.2d 597.)

(c) Plaintiff is not attempting to use a promissory estoppel cause of action to avoid the strict requirements for a defamation claim. He is not seeking damages for injury to reputation, but for loss of his job and his lowered earning capacity. (111 S.Ct. 2519, 115 L.Ed.2d 598.) (See 105 Harv. L. Rev. 277; 20 Pepperdine L. Rev. 115; 52 Stanf. L. Rev. 1003; 25 U.C. Davis L. Rev. 1099.)

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1. Freedom From Previous Restraint.

f. Restrictions on Books.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 367

[§ 367] In General.

An attempt by local ordinance to prohibit the sale of a "crime comic book" to children under 18 was held invalid in *Katzev v. Los Angeles* (1959) 52 C.2d 360, 341 P.2d 310. The court concluded that (a) there was no clear and present danger that circulation of these books would encourage crime or juvenile delinquency; (b) the exemptions of true stories, religious writings, and newspaper strips were unreasonable and discriminatory; (c) the definition of the crime and standards of guilt were fatally uncertain. (52 C.2d 367.) (On regulation of book advertisements by Federal Trade Commission, see 82 Harv. L. Rev. 1352 [health books]; on prohibitions directed at obscene books, see *infra*, §434 et seq., 451; on restraint by discriminatory special tax, see *supra*, §362; on "Son of Sam" laws regulating revenues to criminals from crime-related book, see *infra*, §369.)

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2. Censorship by Listing.

7 *Witkin Sum. Cal. Law Const Law* § 368

[§ 368] Censorship by Listing.

In *Bantam Books v. Sullivan* (1963) 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584, the Rhode Island Legislature created a Commission with the duty to "investigate and recommend the prosecution" of violations of the obscenity laws. The Commission's practice was to notify a distributor that certain designated books or magazines had been found objectionable for sale to youths under 18, and to remind the distributor of its duty to recommend prosecution. The distributor, to avoid trouble, would invariably stop circulation of the works and return unsold copies to the publishers. Four publishers of listed books sued to enjoin the Commission from so acting. *Held*, they were entitled to relief.

(a) The state's contention that the Commission neither regulated nor suppressed, but simply exhorted booksellers and advised them of their legal rights, and had no power to apply formal legal sanctions, was rejected. "[T]he Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." (83 S.Ct. 637, 9 L.Ed.2d 591.)

(b) The contention that the bookseller voluntarily complied was likewise rejected as contrary to the facts. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around. ... The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*. It would be naive to credit the state's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity." (83 S.Ct. 638, 9 L.Ed.2d 592.)

(c) The vice of the system was that the Commission superimposed its regulation on the state's criminal regulation of obscenity, making the latter largely unnecessary, and in doing so eliminated the safeguards of the criminal process. There was no judicial supervision of the notices or judicial review of the determinations, and the publisher or distributor was not even entitled to notice and hearing. "We hold that the system of informal censorship disclosed by this record violates the Fourteenth Amendment." (83 S.Ct. 640, 9 L.Ed 594.) (On test of obscenity, see *infra*, §436 et seq.)

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3. Income From Work Describing Crime.

7 *Witkin Sum. Cal. Law Const Law* § 369

[§ 369] Income From Work Describing Crime.

Simon & Schuster v. Members of the New York State Crime Victims Bd. (1991) 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476, deals with the New York "Son of Sam" law. In 1977, New York was terrorized by a serial killer popularly known as the Son of Sam. When David Berkowitz was identified as the killer and apprehended, the rights to his story were worth a substantial amount. The New York Legislature then enacted a statute requiring that an accused or convicted criminal's income from works describing his or her crime be deposited in an escrow account, and that the funds be made available to the victims of the crime and the criminal's other creditors. *Held*, the New York law was inconsistent with the First Amendment.

(a) A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. This notion is one manifestation of a far broader principle: Regulations that permit the Government to discriminate on the basis of the content of the message are unconstitutional. (112 S.Ct. 508, 116 L.Ed.2d 486, 487, citing *Leathers v. Medlock* (1991) 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494, *supra*, §362.) "In the context of financial regulation, it bears repeating, as we did in *Leathers*, that the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." (112 S.Ct. 508, 116 L.Ed.2d 487.)

(b) "The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." (112 S.Ct. 508, 116 L.Ed.2d 487.) To justify this differential treatment, the state must show that its regulation is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end. (112 S.Ct. 509, 116 L.Ed.2d 488.)

(c) The state has a compelling interest in ensuring that victims of crime are compensated by those who harm them. (112 S.Ct. 509, 116 L.Ed.2d 489.) And it has a compelling interest in depriving criminals of the profits of their crimes. But the state has no greater interest in compensating victims from the proceeds of a criminal's storytelling than from any of the criminal's other assets. (112 S.Ct. 510, 116 L.Ed.2d 489.) "In short, the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime. We must therefore determine whether the Son of Sam law is narrowly

tailored to advance the former, not the latter, objective." (112 S.Ct. 511, 116 L.Ed.2d 470.)

(d) As a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive. It applies to works on any subject, provided that they express the author's thoughts or recollections about the crime, however tangentially or incidentally; and it thereby encompasses a potentially very large number of works. (112 S.Ct. 511, 116 L.Ed.2d 490.) Thus, should a prominent figure write an autobiography at the end of his or her career, and include in any early chapter a brief recollection of having stolen a nearly worthless item as a youthful prank, the board could control his or her entire income from the book for 5 years, and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run. (112 S.Ct. 512, 116 L.Ed.2d 491.)

(e) "The Federal Government and many of the States have enacted statutes designed to serve purposes similar to that served by the Son of Sam law. Some of these statutes may be quite different from New York's, and we have no occasion to determine the constitutionality of these other laws. We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment." (112 S.Ct. 512, 116 L.Ed.2d 491.)

A concurring justice took the position that the regulation of content has the full protection of the First Amendment, and that this is a sufficient reason for holding the statute unconstitutional. Hence, it is both unnecessary and incorrect to make the inquiry into the state's compelling interest. (112 S.Ct. 512, 116 L.Ed.2d 492.) (See 60 A.L.R.4th 1210.)

In *Keenan v. Superior Court* (2002) 27 C.4th 413, 117 C.R.2d 1, 40 P.3d 718, the court followed the analysis of *Simon & Schuster* in striking down California's Son of Sam law, C.C. 2225(b)(1) (see 3 Cal. Crim. Law (3d), *Punishment*, §67). The statute "imposes a content-based financial penalty on protected speech." (27 C.4th 418.) It "penalizes the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes," C.C. 2225(b)(1) does not confine itself to that income, but confiscates *all* a convicted felon's proceeds from speech or expression on *any* theme or subject that includes the story of the felony, except by passing mention. By this financial disincentive, the statute, like its New York counterpart, "discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds." (27 C.4th 431.)

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B. Scope of Protection.

1. Freedom From Previous Restraint.

g. Restrictions on Mail.

7 *Witkin Sum. Cal. Law Const Law* § 370

[§ 370] Restrictions on Mail.

(1) *Post Office Censorship of Foreign Subversive Mail.* In *Lamont v. Postmaster General of the United States* (1965) 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398, the Court examined a 1963 federal statute providing that unsealed mail coming from a foreign country, which the Secretary of the Treasury determines to be Communist political propaganda, must be detained by the Postmaster General on arrival, with notification of the addressee as to each piece, which he or she may obtain on request. The act was held unconstitutional under the principles declared in *Lovell v. Griffin, Georgia* (1938) 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, *supra*, §360, and *Thomas v. Collins* (1945) 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, *infra*, §465. "Just as the licensing or taxing authorities ... sought to control the flow of ideas to the public so here federal agencies regulate the flow of mail." (85 S.Ct. 1496, 14 L.Ed.2d 402.) The affirmative obligation to request delivery would certainly have a deterrent effect, particularly on those in sensitive positions whose livelihood depends on security clearance. (85 S.Ct. 1496, 14 L.Ed.2d 402.)

Two concurring justices were more definitive: The issue, they thought, was not the *senders'* rights but the *receivers'* rights. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market-place of ideas that had only sellers and not buyers." (85 S.Ct. 1497, 14 L.Ed.2d 403.)

(2) *Post Office Censorship of Obscene Mail.* A federal statute authorized the Postmaster General, on satisfactory evidence to (a) halt use of the mails for obscene matter by returning letters to the sender marked "Unlawful," and (b) forbid payment of a money order to that person. An administrative hearing and appeal were provided by regulations. (Former 39 U.S.C., §3006; see 39 U.S.C., §3007 [authorizing detention of mail of persons conducting schemes or devices to obtain money by false representations, or of persons conducting lotteries].) In *Blount v. Rizzi* (1971) 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498, the statute was held unconstitutional.

(a) A scheme of administrative censorship must place the burden of initiating judicial review and proving that the material is not constitutionally protected expression on the censor; it must require prompt judicial review; and it must limit advance restraint to the shortest possible fixed period. (91 S.Ct. 428, 27 L.Ed.2d 503, citing *Freedman v. Maryland* (1965) 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, *infra*, §371.)

(b) The present statute has none of these safeguards. The burden of initiating judicial proceedings is on the distributor, the injunction may be granted merely on a showing of probable cause, and there is no requirement of a prompt final judicial determination. (91 S.Ct. 431, 27 L.Ed.2d 506.) (See *Manual Enterprises v. Day* (1962) 370 U.S. 478, 82 S.Ct. 1432, 1437, 8 L.Ed.2d 639, 647 [reversing ban on shipment of magazines found obscene in administrative hearing]; 11 A.L.R.3d 1276 [effect of objectionable material on envelope, postcard, or wrapper]; on test of obscenity, see *infra*, §436 et seq.; on permissible censorship of fraudulent matter, see *infra*, §424.)

(3) *Distinction: Addressee's Right To Prevent Delivery.* Congressional concern over mailing of obscene matter led to the enactment of 39 U.S.C., §3008, which established a procedure for the addressee to request an order directing the sender to refrain from further mailing of any kind. In *Rowan v. United States Post Office Dept.* (1970) 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736, persons engaged in mail order business and in buying and selling mailing lists challenged the constitutionality of the section. *Held*, it was valid.

(a) Today's mail is overwhelmingly composed of material from persons not known; and a householder, who may bar solicitors, hawkers, and peddlers from his or her property, has the same right to bar an equivalent trespass by unwanted mail. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even a king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another." (90 S.Ct. 1490, 25 L.Ed.2d 743.)

(b) The statute extends, and properly, to any material. "If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." (90 S.Ct. 1491, 25 L.Ed.2d 744.) (See 84 Harv. L. Rev. 117.)

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B. Scope of Protection.

1. Freedom From Previous Restraint.

h. Restrictions on Motion Pictures and Plays.

7 *Witkin Sum. Cal. Law Const Law* § 371

[§ 371] Restrictions on Motion Pictures and Plays.

(1) *Constitutionally Protected Entertainment.* In *Mutual Film Corp. v. Industrial Com. of Ohio* (1915) 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552, the Court took the position that a state could require distributors of motion pictures to submit them to a state agency for censorship. As a result, this kind of censorship became widespread.

The underlying basis of this decision, that moving pictures were entertainment and not protected by the First Amendment, was shaken by dicta in *Winters v. New York* (1948) 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840, *supra*, §363, and was repudiated in *Joseph Burstyn v. Wilson* (1952) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098. A New York statute made it unlawful to exhibit or sell, etc., a motion picture film without a license, and the licensing agency (a division of the department of education) had authority to ban a picture that was "obscene, indecent, immoral, inhuman, sacrilegious" or tending to corrupt morals or incite to crime. A license was refused to show "The Miracle," an Italian film, on the determination that it was "sacrilegious." The New York court upheld this action and the Supreme Court reversed. "[M]otion pictures are a significant medium for the communication of ideas," protected by the free speech and free press guarantees, and the inconsistent view of the *Mutual Film Corp.* case is no longer law. (72 S.Ct. 780, 781, 96 L.Ed. 1105.)

The Court observed that there is no absolute freedom to exhibit motion pictures, and that it was unnecessary to decide whether, by a clearly drawn statute, a state could censor obscene films. The basis of censorship here, however, was unconstitutional; "the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views." (72 S.Ct. 782, 96 L.Ed. 1108.)

(2) *Valid Censorship Procedures.* In *Times Film Corp. v. Chicago* (1961) 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403, the Chicago Municipal Code required submission of motion pictures to the Commissioner of Police for a permit prior to public exhibition. His refusal, with an appeal to the mayor, was final. The Code called for refusal where the picture was immoral or obscene, portrayed depravity or criminality of a class, tended to produce a breach of the peace, etc. Petitioner applied for a permit to show the film "Don Juan," but refused to submit it for examination, and brought suit in the federal district court to require issuance of the permit. Thus, neither the standards of the ordinance nor the content of the film were in issue; petitioner challenged the constitutionality of the Code provision on its face as a prior restraint or censorship. *Held*, it was not void on its face.

Petitioner argued that all prior restraints or censorship necessarily violate the First Amendment, and that the only constitutional procedure open to the state is criminal prosecution after exhibition. The Court squarely rejected this contention as "without sanction in our cases." (81 S.Ct. 394, 5 L.Ed.2d 407.) "Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of such an evil, previous restraint cannot be justified. With this we cannot agree." (81 S.Ct. 395, 5 L.Ed.2d 407.) Because of the restricted issue raised, the Court cautioned that "we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record." (81 S.Ct. 395, 5 L.Ed.2d 408.)

Strong dissenting opinions (four justices) described the practices of existing movie boards and warned of the dangers of the practice. "The perniciousness of a system of censorship is that the exhibitor's belief that his film is constitutionally protected is irrelevant. Once the censor has made his estimation that the film is 'bad' and has refused to issue a permit, there is ordinarily no defense to a prosecution for showing the film without a license. Thus, the film is not shown, perhaps not for years and sometimes not ever." (81 S.Ct. 408, 5 L.Ed.2d 421.) (See *People v. Mitchell Bros.' Santa Ana Theater* (1981) 118 C.A.3d 863, 173 C.R. 476 [procedure for preliminary injunction to abate nuisance under C.C.P. 527 was sufficient]; 34 So. Cal. L. Rev. 362 [Times Film].)

(3) *Invalid Censorship Procedures*. In *Freedman v. Maryland* (1965) 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, there was no issue of obscenity; the film was admittedly one that would have been licensed for exhibition. But appellant refused to submit it to the Maryland State Board of Censors, attacking the statute on the ground that its procedure failed to give adequate judicial protection to the freedom to exhibit. *Held*, conviction reversed.

(a) The *Times Film* case established the validity of a properly drawn movie censorship law. (85 S.Ct. 736, 740, 13 L.Ed.2d 651, 656.)

(b) The Maryland law did not contain the procedural safeguards of a valid statute, in particular, that the burden of proving the film objectionable must rest on the censor. The Maryland law placed the burden on the exhibitor to initiate judicial proceedings challenging the ruling of the Board, and exhibition was prohibited pending judicial review, which might take months. This was a fatal defect. "[W]hile the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. ... To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. ... Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (85 S.Ct. 739, 13 L.Ed.2d 654.)

In *Burton v. Municipal Court* (1968) 68 C.2d 684, 68 C.R. 721, 441 P.2d 281, an ordinance required a permit from the Board of Police Commissioners to engage in the business of exhibiting motion pictures. The permit could be denied if the applicant lacked "good moral character" or was "unfit to be trusted," or if the "general welfare of the public" required denial. *Held*, the ordinance was void. "It is difficult to conceive more pervasive indicia of censorship under the cloak of regulation of business activity." (68 C.2d 695.) (See *Interstate Circuit v. Dallas* (1968) 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 [ordinance giving board power to classify picture as "not suitable for young persons," was unconstitutionally vague]; *Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 [applying principles of *Freedman v. Maryland* to petitioner's rejected application to present musical play "Hair"]; *FW/PBS v. Dallas* (1990) 493 U.S. 215, 110 S.Ct. 596, 606, 107 L.Ed.2d 603, 620 [following *Freedman*; ordinance failed to provide reasonable time for grant or denial of license and for prompt judicial review of adverse decision]; *People v. Library One* (1991) 229 C.A.3d 973, 986, 280 C.R. 400 [applying *Freedman* and *FW/PBS* holdings to refusal

to grant conditional use permit]; 58 *Cal. L. Rev.* 160 [*Burton*]; 62 *So. Cal. L. Rev.* 685 [censorship of international circulation of films under Beirut Agreement and Foreign Agents Registration Act]; on "Son of Sam" laws regulating revenues to criminals from crime-related book, etc., see *supra*, §369; on regulation of theaters exhibiting obscene films and plays, see *infra*, §442 et seq.)

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See 41 *Cal. Western L. Rev.* 325 [First Amendment and media: lessons learned from 2004 cases].



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B. Scope of Protection.

1. Freedom From Previous Restraint.
- i. Restrictions on Radio and Television.
 1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 372

[§ 372] In General.

(1) *Rights of Viewers and Listeners.* Although broadcasting is a medium protected by the First Amendment, its special characteristics justify differences in First Amendment standards. Hence, an F.C.C. order requiring a station to furnish a person attacked with a tape or summary of the broadcast, and to provide time for response, without proof of inability to pay, did not invade First Amendment freedom. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." (*Red Lion Broadcasting Co. v. Federal Communications Com.* (1969) 395 U.S. 367, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371, 389; see *Federal Communications Com. v. Pacifica Foundation* (1978) 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 [F.C.C. regulation of "indecent" language (dirty words monologue) upheld]; 83 *Harv. L. Rev.* 133 [*Red Lion*]; 92 *Harv. L. Rev.* 148 [*Pacifica*]; 6 *Hastings Const. L. Q.* 55 [same]; 3 *Loyola L.A. L. Rev.* 451 [*Red Lion*]; on "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, see *supra*, §369.)

The F.C.C. may require divestiture in cases of common ownership of a broadcast station and a daily newspaper in the same community. (*Federal Communications Com. v. National Citizens Committee for Broadcasting* (1978) 436 U.S. 775, 98 S.Ct. 2096, 2114, 56 L.Ed.2d 697, 715.)

(2) *Texts and Law Reviews.* Regulation of radio and television broadcasting has been the subject of extensive commentary. (See 4 Rotunda, §20.18; 108 *Harv. L. Rev.* 1145 [Forty Megahertz and a Mule: Ensuring Minority Ownership of the Electromagnetic Spectrum]; 69 *Cal. L. Rev.* 442 [student symposium: communications regulation]; 85 *Cal. L. Rev.* 1687 [Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation]; 88 *Cal. L. Rev.* 499 [Television and the Public Interest]; 26 *Hastings L. J.* 797 [Chaos on the Citizens Band]; 28 *Hastings L. J.* 149 [sex role stereotyping in television advertising]; 39 *Hastings L. J.* 165 [fairness doctrine]; 5 *Loyola L.A. L. Rev.* 329 [F.C.C. and First Amendment]; 33 *McGeorge L. Rev.* 617 [open society and violence in media]; 11 *Santa Clara Lawyer* 229 [Radio, T.V. and the Community]; 37 *Santa Clara L. Rev.* 785 [The V-Chip: Giving Parents the Ability To Regulate Television Violence]; 43 *So. Cal. L. Rev.* 826 [Rights of T.V. Viewers]; 58 *So. Cal. L. Rev.* 1351 [Controlling the Content of Print and Broadcast]; 70 *So. Cal. L. Rev.* 239 [FCC's enforcement of indecency forfeiture orders]; 8 *Southwestern L. Rev.* 991 [equal opportunity in political broadcasting]; 15 *Southwestern L. Rev.* 653 [responsibility of electronic press to juvenile audiences]; 27 *Stanf. L. Rev.* 1527 [television broadcaster's code]; 21

U.C.L.A. L. Rev. 1290 [F.C.C. regulation of children's television]; 25 *U.C.L.A. L. Rev.* 1131 [advertising to children]; 47 *U.C.L.A. L. Rev.* 243 [Breaking News: Proposing a Pooling Requirement for Media Coverage of Live Hostage Situations]; 28 *U.S.F. L. Rev.* 793 [criticizing FCC's reliance on market incentives to provide diverse viewpoints on matters of public importance as violating First Amendment right to receive critical information]; 10 *West L.A. L. Rev.* 123 [The First Amendment and the Electronic Press]; 12 *West L.A. L. Rev.* 81 [censorship of television violence]; 27 *A.L.R.4th* 375 [state regulation of content of and representation on program presented by "public broadcasting" television or radio station]; 78 *Proof of Facts* 3d 1 [equal opportunity for broadcast time for political candidates].)

West's Key Number Digest, Constitutional Law k.90.1(9)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Law Reviews*. See 5 *Rotunda* 4th, §20.18; 41 *Cal. Western L. Rev.* 325 [First Amendment and media: lessons learned from 2004 cases]; 78 *So. Cal. L. Rev.* 669 [Architectural Censorship and the FCC]; 78 *So. Cal. L. Rev.* 733 [response to "Architectural Censorship and the FCC"]; 41 *U.C. Davis L. Rev.* 1547 [media ownership regulation].



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B. Scope of Protection.

1. Freedom From Previous Restraint.
 - i. Restrictions on Radio and Television.
2. Cable Television and Satellite Broadcasting.

7 Witkin Sum. Cal. Law Const Law § 373

[§ 373] Cable Television and Satellite Broadcasting.

(1) *Cable Television*. Cable television has been the subject of extensive statutory regulation. (See *Federal Communications Com. v. Midwest Video Corp.* (1979) 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 [F.C.C. lacked authority to promulgate mandatory access regulations for cable systems]; *Federal Communications Com. v. Florida Power Corp.* (1987) 480 U.S. 245, 107 S.Ct. 1107, 1113, 94 L.Ed.2d 282, 291 [F.C.C. order under 47 U.S.C., §224, Pole Attachments Act, limiting rates utility can charge cable companies for using utility poles, is not taking of property without compensation in violation of Fifth Amendment]; *Denver Area Educational Telecommunications Consortium v. Federal Communications Com.* (1996) 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 [provision of Cable Television Consumer Protection and Competition Act of 1992 permitting cable operator to prohibit indecent programming on leased access channels was valid under First Amendment; provisions permitting cable operator to prohibit indecent programming on public access channels, and requiring segregation and blocking of patently offensive programming on leased access channels, was invalid]; 110 Harv. L. Rev. 246 [Denver]; 33 Hastings L. J. 1009 [Midwest Video Corp.]; 17 Southwestern L. Rev. 321 [Florida Power Corp.]; on restrictions on sexually oriented programming, see *infra*, §374.)

The Cable Communications Policy Act of 1984 (47 U.S.C., §521 et seq.), as amended in 1992 and 1996, establishes a national policy concerning cable communications, particularly by providing guidelines for the exercise of federal, state, and local authority. (See 47 U.S.C., §521 [statutory purposes]; 47 U.S.C., §522 [definitions]; 47 U.S.C., §531, 47 U.S.C., §532 [use of cable channels]; 47 U.S.C., §533 [ownership restrictions]; 47 U.S.C., §534 et seq. [carriage requirements]; 47 U.S.C., §541 et seq. [franchising and regulation of cable systems]; 47 U.S.C., §551 [protection of subscriber privacy]; 47 U.S.C., §552 [consumer protection]; 47 U.S.C., §553 [unauthorized reception of cable service]; 47 U.S.C., §554 [equal employment opportunity]; 47 U.S.C., §555 [judicial proceedings]; 47 U.S.C., §555a [limitation of franchising authority liability]; 47 U.S.C., §§556, 557 [coordination of federal, state, and local authority]; 47 U.S.C., §§558, 559 [criminal and civil liability]; 47 U.S.C., §560, 47 U.S.C., §561 [scrambling of channels]; *New York v. Federal Communications Com.* (1988) 486 U.S. 57, 108 S.Ct. 1637, 1643, 100 L.Ed.2d 48, 58 [FCC acted within its authority under 47 U.S.C., §544(e) "when it pre-empted state and local technical standards governing the quality of cable television signals"]; *Federal Communications Com. v. Beach Communications* (1993) 508 U.S. 307, 113 S.Ct.

2096, 2099, 124 L.Ed.2d 211, 218 [upholding validity of common ownership distinction in treatment of cable television facilities that do not use public rights-of-way]; on validity of must-carry rules for cable television systems, see *infra*, §375; on California statutes governing community antenna television systems, see *Govt.C. 53066 et seq.*)

In *Weaver v. Jordan* (1966) 64 C.2d 235, 49 C.R. 537, 411 P.2d 289, Proposition 15 (the "Free Television Act"), an initiative measure adopted in the November, 1964, general election, prohibited the home subscription television business. Accordingly, defendant Secretary of State refused to accept articles of incorporation from plaintiff seeking to engage in the business. *Held*, the Act was unconstitutional.

(a) The free speech guarantee safeguards both the content of communication and the means employed for dissemination. Communication by motion picture, radio, and television are protected; distribution and reception are covered, and amusement and entertainment, as well as exposition of ideas, are included. (64 C.2d 241.)

(b) The Act attempted to totally prohibit home subscription television when a charge is made to home viewers, thus amounting to total censorship in advance. There is no danger under the clear and present danger test (*infra*, §407). The supposed evil--adverse effect on existing television business--is debatable and in part illusory; if monopoly practices actually occur regulation can be instituted, but the power to regulate does not necessarily mean the power to prohibit. (64 C.2d 244.) (See 53 Cal. L. Rev. 1378 [before the decision]; 4 San Diego L. Rev. 162 [on the decision].)

(2) *Satellite Broadcasting*. The transmission and reception of satellite signals has also been the subject of statutory regulation. (See 47 U.S.C., §605 [unauthorized publication or use of communications]; P.C. 593e [prohibiting unauthorized interception or decoding of subscription television service transmission]; *People v. Babylon* (1985) 39 C.3d 719, 727, 216 C.R. 123, 702 P.2d 205 [P.C. 593e does not prohibit sale of equipment designed to receive in intelligible form unencoded microwave transmissions broadcast by multipoint distribution service]; *California Satellite Systems v. Nichols* (1985) 170 C.A.3d 56, 61, 216 C.R. 180 [preliminary injunction properly issued to restrain sale or distribution of equipment capable of intercepting programs sent by microwave signal; sale constituted probable violation of 47 U.S.C., §605]; 195 A.L.R. Fed 565 [applicability of 47 U.S.C., §605 to sale and use of cable decoding equipment].)

(3) *Law Reviews*. Cable television and satellite broadcasting have generated much commentary. (See 97 Harv. L. Rev. 565 [argument for minimal regulation of cable networks designed to serve business, government, and professional communities]; 81 Cal. L. Rev. 1103 [Broadcasting and Speech]; 81 Cal. L. Rev. 1209 [Review Essay; recent books on American telecommunications regulation]; 29 Cal. Western L. Rev. 393 [need to lift regulatory restrictions on sharing and using telecommunications services]; 11 Hastings Const. L. Q. 551 [promoting freedom of expression through cable television]; 20 Loyola L.A. L. Rev. 145 [Who Owns the Air? Unscrambling the Satellite Viewing Rights Dilemma]; 10 Pepperdine L. Rev. 691 [state preemption of cable television]; 27 San Diego L. Rev. 493 [arguing that restriction of offensive programming (47 U.S.C., §532) violates First Amendment]; 22 Santa Clara L. Rev. 839 [Subscription Television Decoders: Can California Prohibit Their Manufacture and Sale?]; 54 So. Cal. L. Rev. 1001 [Deregulation of Cable Television and the Problem of Access Under the First Amendment]; 13 Southwestern L. Rev. 287 [Should Candidates for Federal Elective Office Have an Affirmative Right of Access to Your Cable Television Channels?]; 15 Southwestern L. Rev. 181 [local control of cable television]; 26 U.C. Davis L. Rev. 87 [Redefining Diversity in Telecommunications: Uniform Regulatory Framework for Mass Communications]; 23 U.C.L.A. L. Rev. 879 [The First Amendment and Television Broadcasting by Satellite].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

1. Freedom From Previous Restraint.
- i. Restrictions on Radio and Television.
3. Sexually Oriented Programming.

7 *Witkin Sum. Cal. Law Const Law* § 374

[§ 374] Sexually Oriented Programming.

In *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865, an entertainment group challenged the constitutionality of §505 of the Telecommunications Act of 1996 (47 U.S.C., §561) as violative of the First Amendment. That section requires cable television operators providing channels "primarily dedicated to sexually-oriented programming" either to "fully scramble or otherwise fully block" those channels or to limit their transmission to the hours of 10 p.m. and 6 a.m., when children are not likely to be viewing. Because signal scrambling is imperfect, the majority of cable operators adopted the second approach, eliminating altogether the transmission of the targeted programming outside the prescribed hours in affected cable service areas. The District Court said that there were less restrictive alternatives to §505 and declared the statute unconstitutional. *Held*, affirmed.

(a) *Effect of content-based restrictions.* Section 505 is a content-based restriction singling out "sexually explicit adult programming." It also singles out particular programmers, applying only to channels "primarily dedicated to sexually-oriented programming." (120 S.Ct. 1885, 146 L.Ed.2d 878.) Because the statute "burdens speech because of its content, it must receive strict scrutiny." (120 S.Ct. 1887, 146 L.Ed.2d 880.) And the usual presumption of constitutionality afforded to congressional enactments is reversed. (120 S.Ct. 1888, 146 L.Ed.2d 882.)

(b) *Availability of less restrictive alternative.* With adequate publicity, §504 of the Act provides a less restrictive alternative to the content-based restriction of §505. Section 504 requires a cable operator to scramble or block channels a subscriber does not want to receive. (120 S.Ct. 1884, 146 L.Ed.2d 877.) Cable systems are able to block unwanted channels on a household-by-household basis. Targeted blocking "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners--listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." (120 S.Ct. 1887, 146 L.Ed.2d 881.)

(c) *Government's failure to meet burden of proof.* The Government "failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban." (120 S.Ct. 1891, 146 L.Ed.2d 885.) Further, the Government failed to prove that §504, with adequate notice, would be an ineffective alternative. (120 S.Ct. 1891, 146 L.Ed.2d 885.)

"It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." (120 S.Ct. 1892, 146 L.Ed.2d 886.)

Two justices concurred in two separate opinions. (120 S.Ct. 1894, 146 L.Ed.2d 889.) Four justices joined in a dissent (120 S.Ct. 1898, 146 L.Ed.2d 893), with one also filing a separate dissent (120 S.Ct. 1895, 146 L.Ed.2d 890).

SUPPLEMENT: [This section is current through the latest supplement]
See 79 So. Cal. L. Rev. 1451 [government regulation of indecent broadcasts].



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B. Scope of Protection.

1. Freedom From Previous Restraint.

i. Restrictions on Radio and Television.

4. Must-Carry Requirements.

7 *Witkin Sum. Cal. Law Const Law* § 375

[§ 375] Must-Carry Requirements.

In *Turner Broadcasting System v. Federal Communications Com.* (1994) 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497, cable programmers and operators challenged the constitutionality of the must-carry provisions of §§ 4, 5 of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C., §§534, 535), under which cable television systems must devote a specified portion of their channels to transmission of local commercial and broadcast stations. *Held*, "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." (114 S.Ct. 2469, 129 L.Ed.2d 530, citing *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, *infra*, §473, and *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, *infra*, §464.)

(a) Cable programmers and operators are entitled to First Amendment protections. By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two ways: They reduce the number of channels over which cable operators have unfettered control, and they limit the channels available to cable programmers. (114 S.Ct. 2456, 129 L.Ed.2d 514.)

(b) The Government argues that the less rigorous First Amendment standard that applies to broadcast television should also apply to cable television. However, the physical limitations that justify that review--the dual problems of spectrum scarcity and signal interference--do not exist in cable television. Hence, the more relaxed standard of *Red Lion Broadcasting Co. v. Federal Communications Com.* (1969) 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371, *supra*, §372, is inapt in judging cable regulation. (114 S.Ct. 2456, 2457, 129 L.Ed.2d 514, 515.) Because the must-carry provisions impose special obligations and burdens on cable operators and programmers, some measure of heightened First Amendment scrutiny is demanded. (114 S.Ct. 2458, 129 L.Ed.2d 517.)

(c) The must-carry rules are content-neutral. On their face, they distinguish only on the basis of the manner in which messages are transmitted, not on the basis of the messages themselves. (114 S.Ct. 2460, 129 L.Ed.2d 519.) The purpose for the rules is also content-neutral. Congress' overriding objective was to prevent cable operators from exploiting their economic power at the expense of broadcasters, and thus to preserve access to free television programming for all Americans, especially those without cable. (114 S.Ct. 2461, 2462, 129 L.Ed.2d 520, 522.)

(d) It is claimed that the must-carry provisions compel cable operators to transmit speech not of their choosing, but the must-carry rules are content-neutral in application and will not force cable operators to alter their own messages. (114 S.Ct. 2464, 2465, 129 L.Ed.2d 524, 526.) Also, cable operators have far greater control than newspapers over access to the relevant medium. "When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." (114 S.Ct. 2466, 129 L.Ed.2d 526.)

(e) The claim is also made that the must-carry provisions favor broadcast programmers over cable programmers. But this preference is based not on the content of the programming, but on the belief that broadcast programming is in economic peril. (114 S.Ct. 2466, 2467, 129 L.Ed.2d 527, 528.)

(f) It is also claimed that the rules single out certain members of the press for disfavored treatment. However, the differential treatment is justified by the cable operators' bottleneck monopoly and the dangers posed to broadcast television, and the must-carry provisions are structured so that they pose no risk of undermining First Amendment interests. (114 S.Ct. 2467, 2468, 129 L.Ed.2d 528, 529.)

(g) "In sum, the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny." Hence, the *O'Brien* intermediate level of scrutiny is appropriate. (114 S.Ct. 2469, 129 L.Ed.2d 530.)

(h) Under *O'Brien*, a content-neutral regulation will be upheld if it furthers an important governmental interest unrelated to the suppression of speech, and if the incidental restriction on speech is no greater than is essential to furtherance of that interest. The regulation need not be the least speech-restrictive means available. (114 S.Ct. 2469, 129 L.Ed.2d 530.) The governmental interests asserted here--preserving the benefits of free, over-the-air programming, promoting the widespread dissemination of information from a variety of sources, and promoting fair competition in television programming--are, in the abstract, sufficiently important to justify the must-carry rules. (114 S.Ct. 2469, 2470, 129 L.Ed.2d 530, 531.)

A dissent joined by four justices argued that, in reserving over one-third of the cable channels for broadcasters, the must-carry rules reflected a content-based preference requiring strict scrutiny, and that they were unconstitutional under the rule of *Pacific Gas & Elec. Co. v. Public Util. Com. of Calif.* (1986) 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1, supra, §358. (114 S.Ct. 2475, 2479, 129 L.Ed.2d 538, 542.) (See 108 Harv. L. Rev. 261; 29 U.S.F. L. Rev. 999.)

Turner was affirmed on appeal after remand. (See *Turner Broadcasting System v. Federal Communications Com.* (1997) 520 U.S. 180, 117 S.Ct. 1174, 1190, 1199, 137 L.Ed.2d 369, 392, 404 [substantial evidence on remand supported conclusion that real threat justified enactment of must-carry provisions; burden imposed by must-carry rules is narrowly tailored to preserve multiplicity of broadcast stations for 40% of American households without cable]; 29 McGeorge L. Rev. 78 [discussing both *Turner* decisions].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Scope of Protection.

1. Freedom From Previous Restraint.
- i. Restrictions on Radio and Television.
5. Refusal To Accept Political Advertisements.

7 *Witkin Sum. Cal. Law Const Law* § 376

[§ 376] Refusal To Accept Political Advertisements.

In *Columbia Broadcasting System v. Democratic Nat. Committee* (1973) 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772, the Court rejected the contention that the First Amendment required acceptance by a broadcasting station of paid political advertisements (e.g., spot announcements expressing group's antiwar views). (See 85 *Harv. L. Rev.* 689 [decision by Court of Appeals]; 28 *Stanf. L. Rev.* 563; 22 *U.C.L.A. L. Rev.* 258 [argument for congressional action to provide limited access for paid editorial advertising].)

SUPPLEMENT: [This section is current through the latest supplement]
See 33 *Hastings Const. L. Q.* 255 [right to broadcast "advertorials"].



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

1. Freedom From Previous Restraint.

i. Restrictions on Radio and Television.

6. Prohibition of Editorializing.

7 *Witkin Sum. Cal. Law Const Law* § 377

[§ 377] Prohibition of Editorializing.

In *Federal Communications Com. v. League of Women Voters of Calif.* (1984) 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278, Pacifica Foundation, a nonprofit corporation operating noncommercial educational broadcasting stations, challenged the constitutionality of § 399 of the federal Public Broadcasting Act (47 U.S.C., §390 et seq.). The section forbade any noncommercial educational broadcasting station that "receives a grant" of federal funds from the Corporation for Public Broadcasting "to engage in editorializing." *Held*, the ban on editorializing was a violation of the First Amendment.

(a) *Power of Congress to regulate broadcasting.* This power to assure a balanced presentation of information on issues of public importance is now well established; and regulations not allowed with respect to the print media are justified by differences in the characteristics of the new media. (104 S.Ct. 3116, 82 L.Ed.2d 290.) However, restrictions have been upheld only when narrowly tailored to further a substantial governmental interest. (104 S.Ct. 3118, 82 L.Ed.2d 292.)

(b) *Editorializing as protected speech.* The expression of editorial opinion "lies at the heart of First Amendment protection." (104 S.Ct. 3118, 82 L.Ed.2d 292.) And the statutory ban "is defined solely on the basis of the content of the suppressed speech." (104 S.Ct. 3119, 82 L.Ed.2d 294.)

(c) *Availability of less restrictive means of satisfying governmental interest.* The asserted purposes of the ban are "first, to protect noncommercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for governmental propagandizing or the objects of governmental influence; and second, to keep these stations from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints." (104 S.Ct. 3120, 82 L.Ed.2d 295.) But the governmental interest can be satisfied by less restrictive means. "To address this important concern, Congress could simply require public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding." (104 S.Ct. 3126, 82 L.Ed.2d 301.)

(d) *Scope of holding.* "We do not hold that the Congress or the FCC are without power to regulate the content, timing, or character of speech by noncommercial educational broadcasting stations. Rather, we hold only that the specific interests sought to be advanced by §399's ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects." (104 S.Ct. 3129, 82 L.Ed.2d 305, 306.)

Four justices dissented, mainly on the ground that Congress properly placed the condition against editorializing on the grant of public funds. (104 S.Ct. 3129 et seq., 82 L.Ed.2d 306 et seq.) (See 98 Harv. L. Rev. 205.)

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B. Scope of Protection.

2. Freedom of Association.

a. In General.

7 Witkin Sum. Cal. Law Const Law § 378

[§ 378] In General.

(1) *First and Fourteenth Amendments.* Freedom of association in organizations, and the related right to refuse disclosure of membership, are well established First Amendment rights. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. ... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause." (*N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, *infra*, §379; see *Healy v. James* (1972) 408 U.S. 169, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266, 280, *infra*, §488 ["While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition"]; *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 3259, 82 L.Ed.2d 462, *infra*, §389 [constitutional guaranty includes freedom of "intimate association" and freedom of "expressive association"]; *Los Altos v. Barnes* (1992) 3 C.A.4th 1193, 1201, 5 C.R.2d 77, *infra*, §1033 [zoning ordinance permitting home occupations in residential zones but prohibiting employment of assistants and requiring that occupations be carried on only by occupants does not violate right of free association]; *Hart v. Cult Awareness Network* (1993) 13 C.A.4th 777, 787, 16 C.R.2d 705, *infra*, §903 [distinguishing *Roberts v. United States Jaycees*, *supra*; application of Unruh Civil Rights Act here would violate constitutionally protected freedom of association].)

(2) *Incidental and Unsubstantial Impact.* An incidental and unsubstantial impact on the right of association will not support a First Amendment challenge. Thus, in *Lyng v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America, UAW* (1988) 485 U.S. 360, 108 S.Ct. 1184, 99 L.Ed.2d 380, Congress amended the Food Stamp Act (7 U.S.C., §2011 *et seq.*) to provide that no household will become eligible to participate in the food stamp program during the time that any member of the household is on strike and the allotment of food stamps will not increase because the income of the striking member has decreased. *Held*, the amendment was valid.

(a) The statute does not directly and substantially interfere with the associational rights of plaintiff union members and their unions. "It does not 'order' appellees not to associate together for the purpose of conducting a strike, or for any other purpose, and it does not 'prevent' them from associating together or burden their ability to do so in any significant manner." (108 S.Ct. 1189, 99 L.Ed.2d 388.) Any impact on associational rights results from the Government's refusal to extend food stamp benefits to those on strike. Denying these benefits exerts pressure on them to abandon their union,

but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right. (108 S.Ct. 1190, 99 L.Ed.2d 389.)

(b) The statute does not abridge plaintiffs' right to express themselves about union matters free of coercion by the Government. "[I]t does not 'coerce' belief, and it does not require appellees to participate in political activities or support political views with which they disagree. It merely declines to extend additional food stamp assistance to striking individuals merely because their decision to strike inevitably leads to a decline in their income. And this Court has explicitly stated that even where the Constitution prohibits coercive governmental interference with specific individual rights, it 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.' " (108 S.Ct. 1191, 99 L.Ed.2d 390.) (See *Bailey v. National City* (1991) 226 C.A.3d 1319, 1330, 277 C.R. 427 [rule regulating only right of "intimate" association did not permit overbreadth challenge based on violation of First Amendment freedoms]; 102 Harv. L. Rev. 242 [Lyng].)

(3) *Substantial Impact*. In *Louisiana v. N.A.A.C.P.* (1961) 366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301, the Attorney General of Louisiana sued to enjoin the N.A.A.C.P. from doing business in the state, and the N.A.A.C.P. sought a declaratory judgment of unconstitutionality of the Louisiana statute under which he acted. This statute prohibited any "non-trading" association from doing business in Louisiana if affiliated with an out-of-state association having any subversive person as an officer or director, and required annual affidavits on this subject. The N.A.A.C.P. was a New York corporation with 48 directors, 20 vice-presidents, and 10 chief executive officers, only a few of whom worked in Louisiana. The district court found that it would be impossible for local officers to comply. *Held*, the statute was invalid. "It is not consonant with due process to require a person to swear to a fact that he cannot be expected to know ... or alternatively to refrain from a wholly lawful activity." (81 S.Ct. 1335, 6 L.Ed.2d 303.)

In *N.A.A.C.P. v. Alabama* (1964) 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325, such charges as furnishing funds to black students to enroll at the University, and allegedly false statements about state officials, were found wholly insufficient to justify ouster of the association from the state. (84 S.Ct. 1311, 1315, 12 L.Ed.2d 336, 338.) (See 16 *Hastings L. J.* 491.)

(4) *Texts and Law Reviews*. Freedom of association has been the subject of extensive commentary. (See 4 Rotunda, §20.41 et seq.; 85 Harv. L. Rev. 1130 [National Security Interest and Civil Liberties]; 86 Cal. L. Rev. 1131 [gay student groups and the First Amendment]; 91 Cal. L. Rev. 1209 [racial identity, electoral structures, and right of association]; 25 *Pepperdine L. Rev.* 495 [discrimination at country clubs]; 56 So. Cal. L. Rev. 207 [law enforcement infiltration of political groups]; 55 *Stanf. L. Rev.* 191 [freedom of expressive association and the press]; 15 *U.C. Davis L. Rev.* 53 [Political Association Under the Burger Court: Fading Protection]; 35 *U.C. Davis L. Rev.* 821 [constitutional bounds of right of association]; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §539 et seq.; 15 *A.L.R.5th* 900 [laws prohibiting or regulating "escort" or similar services used to carry on prostitution, challenged on various grounds, including violation of freedom of association].)

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SUPPLEMENT: [This section is current through the latest supplement]

(4) *Texts and Law Reviews*. See 5 Rotunda 4th, §20.41 et seq.; 58 *Stanf. L. Rev.* 1919 [Freedom of Expressive Association and Government Subsidies].

The following annotations discuss the validity of statutes and ordinances regulating the operation of sexually oriented businesses; they supersede 15 *A.L.R.5th* 900, cited in the text, p. 621: 20 *A.L.R.6th* 161 [legal issues and principles]; 21 *A.L.R.6th* 425 [types of businesses regulated]; 23 *A.L.R.6th* 573 [nature of regulation].



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B. Scope of Protection.

2. Freedom of Association.

b. Confidentiality of Membership.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 379

[§ 379] In General.

In *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, the State of Alabama sought to enjoin petitioner, a nonprofit membership corporation, from allegedly doing business as a foreign corporation without complying with its qualification statute. Prior to the hearing, the lower court, on the state's motion, ordered production of petitioner's membership lists. Petitioner showed that revealing the identity of its black members would expose them to economic reprisal, loss of employment, and other public hostility, and the state failed to show any important bearing of the lists on the issues. *Held*, the production order was a violation of the constitutional rights of the members. The Court stressed the "vital relationship between freedom to associate and privacy in one's associations" (78 S.Ct. 1172, 2 L.Ed.2d 1499), and declared that the claimed immunity "is here so related to the right of the members to pursue their lawful private interest privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." (78 S.Ct. 1174, 2 L.Ed.2d 1502.) (See 72 Harv. L. Rev. 193.)

In *Bates v. Little Rock* (1960) 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480, two Arkansas cities, authorized by statute to levy license taxes on businesses or occupations, had a general license tax that excepted charitable corporations. In 1957, they amended the ordinances to require that any organization operating in the municipalities supply information on officers, members, contributors, etc. Petitioners, custodians of N.A.A.C.P. records, furnished all information except members and contributors, and were convicted of violation. *Held*, reversed; the amendments were unconstitutional.

(a) "It is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." (80 S.Ct. 416, 4 L.Ed.2d 485.)

(b) The record shows that compulsory disclosure of the lists would subject members to harassment, threats of bodily harm, and economic pressures, and would discourage membership. "Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote." (80 S.Ct. 417, 4 L.Ed.2d 486.)

(c) The mere assertion in the preamble of the ordinance that this is an adjunct to the taxing power does not prove

the necessary relationship where the action threatens constitutionally protected freedom. There is no suggestion that the N.A.A.C.P. type of activity would or ever did fall into the occupational classifications for which a license is required. Hence the municipalities have failed to demonstrate a controlling justification for this deterrence of free association. (80 S.Ct. 417, 419, 4 L.Ed.2d 487, 488.)

In *Shelton v. Tucker* (1960) 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, an Arkansas statute compelled every teacher, as a condition of employment in a state supported school or college, to file an annual affidavit listing every organization to which he or she belonged or regularly contributed within the past 5 years. Plaintiffs, schoolteachers and a college professor, refused to file. *Held*, the statute was unconstitutional.

(a) The state may investigate the competence and fitness of teachers (see *infra*, §480); hence, unlike the disclosure requirement in *N.A.A.C.P. v. Alabama* and *Bates v. Little Rock*, this inquiry was relevant. But to compel a teacher to disclose every associational tie is to impair his or her right of free association, "a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." (81 S.Ct. 251, 5 L.Ed.2d 236.) The statute does not make the information confidential; there is evidence that it will be publicly disclosed; and even if there were not, the pressure on a teacher to avoid ties that might displease authorities would be heavy, making for caution and timidity. (81 S.Ct. 251, 5 L.Ed.2d 236.)

(b) Despite the proper purpose, the statutory means of accomplishing it was invalid. A teacher was required to reveal his or her church, political party, every political organization, in short, "every conceivable kind of associational tie--social, professional, political, avocational, or religious." (81 S.Ct. 252, 5 L.Ed.2d 237.) "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers." (81 S.Ct. 253, 5 L.Ed.2d 238.) (See 75 Harv. L. Rev. 127.)

In *Gibson v. Florida Legislative Investigation Committee* (1963) 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929, a Florida legislative investigating committee, inquiring into Communist infiltration into organizations, called the president of the Miami N.A.A.C.P. as a witness, and ordered him to bring his membership records. He answered questions concerning 14 alleged Communists, denying that they were N.A.A.C.P. members, but he refused to produce the records on the ground that this would violate the associational rights of members and prospective members. *Held*, contempt adjudication reversed. "This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments. ... And it is equally clear that the guarantee encompasses protection of privacy of association in organizations such as that of which the petitioner is president." (83 S.Ct. 892, 9 L.Ed.2d 934.) The test for a governmental interest in an investigation of this kind is whether there is some relationship between the branch of the N.A.A.C.P. and Communist activities; and the hearsay testimony that in years past some 14 asserted Communists or sympathizers attended occasional meetings of the branch (which had a total membership of about 1,000) utterly failed to demonstrate the existence of that relationship. (83 S.Ct. 898, 9 L.Ed.2d 940.)

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B. Scope of Protection.

2. Freedom of Association.

b. Confidentiality of Membership.

2. Private Social Club.

7 *Witkin Sum. Cal. Law Const Law* § 380

[§ 380] Private Social Club.

In *Pacific-Union Club v. Superior Court* (1991) 232 C.A.3d 60, 283 C.R. 287, plaintiff State Franchise Tax Board filed a petition for an administrative subpoena to obtain Pacific-Union Club's private membership list. The club is a purely private social organization that maintains a restaurant and other club facilities for the exclusive use of members and guests. Members are prohibited from conducting business on the premises, and must certify that charges for use of the facilities were not incurred for business purposes. The board adopted a regulation that business expense tax deductions will not be allowed with respect to payments to a club which restricts membership on the basis of age, sex, race, religion, color, ancestry, or national origin. The club admittedly discriminates on the basis of age by requiring prospective members to be at least 25. Plaintiff sought the records to enable it to determine whether members took improper tax deductions. The trial judge granted enforcement of the subpoena, and the club sought mandamus to compel the court to vacate the order. *Held*, writ granted.

(a) Under *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, *infra*, §389, there are two kinds of freedom of association: intimate and expressive; but only the freedom of intimate association is pertinent here. The club does not claim that it engages in any expressive activities such as advocacy of social or political points of view; its sole stated purpose is the promotion of friendship and camaraderie. (232 C.A.3d 71.)

(b) As a purely private social group it is entitled to protection of the freedom of intimate association. Unlike the Jaycees and Rotary, the club has a small fixed membership with no formal national organization; and it exists solely for the enjoyment of social intercourse among members carefully chosen for their congeniality and social compatibility. (232 C.A.3d 73, 74.)

(c) The protection extends to the nondisclosure of the membership list. "If prospective members of an organization know that they will be subject to random tax audits solely by virtue of their membership, they may decline to become a member of the group." (232 C.A.3d 76.) The board's assertion that the names and addresses will be kept confidential and used only for legitimate tax collection purposes is not persuasive. "[T]he Club's main privacy objection is to the dissemination to the Board itself, who will use the heretofore confidential information to conduct a tax audit on selected Club members. The right to privacy exists to permit the citizen to shield him or herself from the prying eyes of

government agents; government intrusion must have some other justification than the promise that the information will not be shared with other citizens." (232 C.A.3d 77.)

(d) There is no compelling state interest to justify disclosure. The board has no evidence or reason to suspect that club members are violating the regulation; it "candidly admits that it wants the membership list *so it can determine whether or not* a violation occurred by conducting random audits of members of the Club." (232 C.A.3d 79.) And, even assuming a compelling state interest, the board failed to show why less intrusive measures, such as changes in state tax forms, could not be employed. (232 C.A.3d 80.)

(e) "We conclude that the Club is constitutionally entitled to protect its membership list from disclosure to the government on the circumstances here presented, where the Board has neither met its burden of showing a compelling state interest nor established that the elephant gun of membership list disclosure is the only way to bring down the flea of the occasional tax cheat." (232 C.A.3d 81.)

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3. Membership Applications.

7 *Witkin Sum. Cal. Law Const Law* § 381

[§ 381] Membership Applications.

In *Olympic Club v. Superior Court* (1991) 229 C.A.3d 358, 282 C.R. 1, plaintiff City of San Francisco sued defendant Olympic Club for an injunction against membership practices said to discriminate on the bases of sex and race in violation of the Unruh Civil Rights Act (*infra*, §898). In an effort to investigate the claims of racial discrimination, plaintiff asked defendant for a list of names and business addresses of the 41 applicants who were rejected for membership between 1980 and 1989. Defendant resisted, asserting the privacy rights of the rejected applicants. The trial judge ordered defendant to turn over names and addresses under protective order preventing the city from divulging the information. Defendant sought mandamus. *Held*, the order for disclosure was within the court's discretion, but it should be amended to require prior notice to and opportunity for individual rejected applicants to object to disclosure.

(a) "Associational privacy rights extend to applications for membership. The right to apply for membership without governmental scrutiny is a natural adjunct to the right of associational privacy. Government access to lists of applicants could easily threaten associational freedom as could access to an organization's membership list." (229 C.A.3d 361.)

(b) An intrusion on associational privacy may be permitted only on a demonstration of a compelling state interest, and the scope of the compelled disclosure must be narrowly circumscribed. (229 C.A.3d 362, citing *Britt v. Superior Court* (1978) 20 C.3d 844, 143 C.R. 695, 574 P.2d 766, *infra*, §382.) Such an interest is shown here. In the absence of an admission by the club, the city has a need to discover whether the rejected applicants were barred because of race. (229 C.A.3d 363.)

(c) In ordinary civil litigation, a plaintiff's need for information will not easily override a third party's privacy rights. But an Unruh Act suit is not ordinary civil litigation. By authorizing the city attorney to sue on behalf of the People, the Legislature "has signaled that enforcement of the law should not depend upon willingness of individual victims of discrimination to come forward." (229 C.A.3d 363.)

(d) "We conclude that the balance here favors disclosure provided that the lower court properly protects the rejected applicants from disclosure of their identity beyond the lawsuit and permits them to apply for such further protections as they consider appropriate." (229 C.A.3d 364.) "The trial court should require the Club to send a letter to rejected

applicants informing them that the City is seeking to contact them about their applications and advising them to petition the court for protective orders if they seek anonymity. ... Those who successfully seek protective orders will be removed from the list of names and addresses furnished by the Club to the City." (229 C.A.3d 365.)

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B. Scope of Protection.

2. Freedom of Association.

b. Confidentiality of Membership.

4. Limited Right of Discovery.

7 *Witkin Sum. Cal. Law Const Law* § 382

[§ 382] Limited Right of Discovery.

(1) *Development of Law.* In *Bakman v. Superior Court* (1976) 63 C.A.3d 306, 133 C.R. 703, plaintiffs, 70 homeowners, brought an action against defendant city of Fresno, on theories of inverse condemnation and nuisance, seeking damages for diminution of the market value of their properties, personal injuries, and emotional distress, allegedly caused by the operation of the city's air terminal. Defendant city served interrogatories on plaintiffs asking for the names and addresses of persons who attended meetings that gave rise to the lawsuit, and of every organization involved in the controversy. Plaintiffs refused to answer on the ground that the inquiries violated their First Amendment right to freedom of association. The lower court overruled their objection, and they sought relief by extraordinary writ. *Held*, prohibition denied.

(a) The constitutional right of association is well recognized (see *supra*, §378), and the lower court's order requiring them to answer the interrogatories was state action. (63 C.A.3d 312, 313.)

(b) However, the discovery statutes have an important public purpose, and defendant city properly invoked the procedure for the purpose of obtaining the names of witnesses or other evidence that could be used in its defense to the action. (63 C.A.3d 314.) Plaintiffs themselves had no valid objections in their own right; by bringing the lawsuit they subjected themselves to the discovery process. (63 C.A.3d 314.)

(c) Persons who do not bring a lawsuit may, under some circumstances, object to disclosure of membership in an association or group. (See *supra*, §379.) But this constitutional privilege must yield here to a more compelling state purpose. The persons attending the meetings were engaged in generating a lawsuit and were potential witnesses; the disclosure of their names would result in no more burden or harassment than that suffered by any witness at a deposition or trial. Any minimal deterring effect on the right of freedom of association was outweighed by the objects of the *Discovery Act*. (63 C.A.3d 316.)

The Supreme Court denied a hearing in *Bakman*, but in *Britt v. Superior Court* (1978) 20 C.3d 844, 862, footnote 5, 143 C.R. 695, 574 P.2d 766, the court overruled it by a 4-3 decision.

(2) *No Blanket Waiver of Rights.* The facts of *Britt* were similar to those of *Bakman*: Plaintiffs, 936 owners and residents of homes located near the San Diego International Airport, sued the San Diego Unified Port District for damages for diminution of property values, personal injuries, and emotional distress allegedly caused by noise, vibrations, air pollution, and smoke. Defendant sought extensive discovery of plaintiffs' local political activities, including membership in organizations opposed to the Port District operations, meetings attended, persons in attendance, content of discussion, financial contributions to these organizations, etc. Interrogatories were also served that called for a complete account of plaintiffs' lifetime medical histories. The trial judge ordered plaintiffs to answer. *Held*, mandamus granted to prevent enforcement of the order.

(a) *Nondisclosure as part of constitutional right.* The right of lawful associational activity includes the right to protection against disclosure of affiliations and activities when disclosure threatens the free exercise of the right. (20 C.3d 852, discussing *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, supra, §379.) This rule applies not only to members of groups espousing unorthodox or unpopular views; all legitimate organizations are entitled to this protection. (20 C.3d 854.) Here, an individual's participation in the advocacy organizations could raise the ire of municipal authorities or others with substantial interests in the airport operations. Hence, "we reject defendant's contention that the 'nondissident' nature of the private associations in question immunizes the present discovery order from First Amendment attack." (20 C.3d 855.)

(b) *Test for compelled disclosure.* The government bears the burden of demonstrating the justification for compelled disclosure by showing a compelling state purpose and a narrowly circumscribed disclosure that avoids undue interference with the rights. Defendant has failed to show justification for the wide-ranging inquiries. (20 C.3d 855.)

(c) *Private lawsuit contention.* Defendant argues that the general rule does not apply to discovery in a private lawsuit as distinguished from a governmental inquiry; and that California cases establish a policy in favor of broad discovery. However, the chilling effect on First Amendment rights is not diminished simply because the disclosure is compelled in a litigation-oriented discovery order; indeed, the threat may be more severe, since the party directing the inquiry may attempt to harass his or her opponent and gain strategic advantage by probing deeply into confidential areas. (20 C.3d 856, 857.)

(d) *Waiver contention.* Defendant contends that by bringing the lawsuit plaintiffs have waived their right to associational privacy, just as a plaintiff may waive his or her evidentiary privilege by raising a particular issue. While a plaintiff may well waive this right to some extent by bringing an action, the waiver did not justify the extensive discovery here: (1) The disclosures sought reached far beyond the privacy interests of plaintiffs, and directly impinged on the constitutional rights of nonparties who had spoken at or attended meetings. (2) Even as to plaintiffs, the order was impermissibly overbroad. When the associational activities are directly relevant to a plaintiff's claim, disclosure, narrowly drawn to assure maximum protection of the constitutional right, is proper. Here, however, plaintiffs' complaints do not relate to or put in issue any aspect of their private associational conduct; i.e., they do not seek damages for injury to their associational interests, do not claim that they were injured as a result of pursuing associational activities, and do not request any relief with respect to defendant's relationship with the associations. (20 C.3d 859.)

(e) *Relevancy to defenses contention.* Defendant argues that its inquiry meets the "compelling interest" standard because plaintiffs' associational activities may be relevant to the defenses of statute of limitations, res judicata, and failure to mitigate damages. The argument is based on speculation (20 C.3d 860, footnote 4); but even if it be assumed that an order for limited disclosures directed to these issues might be proper, the order involved was not so limited. Its very breadth shows that the trial court did not heed the requirement of precision of disclosure to prevent undue curtailment of the constitutional right. (20 C.3d 861.)

(f) *No right to medical histories.* The unlimited disclosure of lifetime medical histories is improper on statutory grounds, i.e., the waiver of physician-patient and psychotherapist-patient privileges extends only to information relating to medical conditions in question. (20 C.3d 862.)

Three justices joined in a dissent, stressing the court's prior approval of broad discovery in civil cases (20 C.3d 866), distinguishing *N.A.A.C.P. v. Alabama* (20 C.3d 868), and strongly approving the reasoning and conclusion in *Bakman* (20 C.3d 871, 877). (See *Church of Hakeem v. Superior Court* (1980) 110 C.A.3d 384, 389, 390, 168 C.R. 13 [following *Britt*; desire of dissident members of church to obtain list in furtherance of plaintiff's class action was not sufficient showing of compelling state interest]; *Bodenheimer v. Superior Court* (1980) 108 C.A.3d 885, 889, 167 C.R. 26 [distinguishing *Britt*; questions asked of petitioner--whether he was member of association and knew any members--were closely related to issues in defamation action against association and others].)

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2. Freedom of Association.

c. Furnishing Attorneys for Group Members.

7 *Witkin Sum. Cal. Law Const Law* § 383

[§ 383] Furnishing Attorneys for Group Members.

In *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, Virginia tried to stop the N.A.A.C.P. from furnishing its staff counsel for Blacks in civil rights litigation. The statute, an amendment to the "runner or capper" law, included in the definition an agent for an organization that retained a lawyer in connection with an action to which it was not a party. *Held*, the statute was unconstitutional. The argument that the state was merely regulating unlawful practice of the law by members of the legal profession was found untenable. And the contention that "solicitation" is outside the area of protected freedoms was also rejected: "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." (83 S.Ct. 336, 9 L.Ed.2d 416.)

The litigation encouraged by the N.A.A.C.P. is not a technique for resolving private differences, but a form of political expression, and the N.A.A.C.P. is not the only group to turn to the courts when unable to attain its objectives through the ballot. "The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association." (83 S.Ct. 337, 9 L.Ed.2d 417.) (For additional ground of "void for vagueness," see *infra*, §408.)

In *Brotherhood of Railroad Trainmen v. Virginia* (1964) 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89, the Brotherhood of Railroad Trainmen, founded in 1883 as a fraternal and mutual benefit society, was instrumental in obtaining enactment of the Safety Appliance Act and the Federal Employers' Liability Act. Thereafter, to meet the additional evils of persuasive claims adjusters and incompetent or otherwise unsatisfactory plaintiffs' lawyers, the organization set up its Department of Legal Counsel. In 16 regions, on advice of local lawyers and judges, a lawyer or firm was chosen, and, after injury or death of a worker, the local Brotherhood official would recommend that counsel to the worker or his or her survivors. The Virginia State Bar obtained an injunction against this channeling of claims to selected lawyers. *Held*, reversed; the injunction violated First Amendment freedoms.

(a) The First Amendment guarantees the right of workers to gather and advise one another, and thus, through the Department of the Brotherhood, to advise concerning the need for legal service and a lawyer who can be relied on. (84

S.Ct. 1116, 12 L.Ed.2d 93.)

(b) This right cannot be infringed by a state acting under its power to regulate law practice. The activity is not ambulance chasing; railroad workers in making the recommendations are not engaging in the practice of law or in soliciting business. Laymen cannot be expected to know how to protect their rights against carefully counseled adversaries, and the state can no more prevent them from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts. (*84 S.Ct. 1117, 12 L.Ed.2d 94.*) (See *11 A.L.R.3d 1206.*)

The *Trainmen* theory was extended in *United Mine Workers of America, Dist. 12 v. Illinois State Bar Assn.* (1967) *389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426*. In 1912, the United Mine Workers Union established the following system to protect its members from abuse in handling their workers' compensation claims (particularly large attorneys' fees): The Union employed an attorney on a salary basis. Injured employees reported to that attorney, who made their applications and attempted to reach settlement. If this could not be had, the attorney represented the employee at the hearing. The employee was free to obtain his or her own counsel, make his or her own decision on settlement, and received the entire amount paid by settlement or award--the attorney's compensation was solely the union salary. Thus, unlike the *Trainmen* situation, this plan involved actual hiring of an attorney by the Union. *Held*, nevertheless, the activity could not be enjoined as illegal practice. "We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." (*88 S.Ct. 355, 19 L.Ed.2d 430.*) (See *82 Harv. L. Rev. 138.*)

In a later decision, the Court restated its view as follows: "The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. That was the holding in *United Mine Workers, Trainmen*, and *NAACP v. Button*." (*United Trans. Union v. State Bar of Michigan* (1971) *401 U.S. 576, 91 S.Ct. 1076, 1082, 28 L.Ed.2d 339, 347.*)

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B. Scope of Protection.

2. Freedom of Association.

d. Patronage Appointment of Public Employees.

7 *Witkin Sum. Cal. Law Const Law* § 384

[§ 384] Patronage Appointment of Public Employees.

The long-established practice of selecting public employees for noncivil service positions solely from members of the successful political party was challenged in *Elrod v. Burns* (1976) 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547. The newly elected Sheriff of Cook County, Illinois, was a Democrat who replaced a Republican. He discharged the noncivil service Republican employees, who brought this action for declaratory and injunctive relief. A plurality (three justices) held that the practice was an unconstitutional interference with freedom of association, under the principle declared in *Keyishian v. Board of Regents of University of State of New York* (1967) 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629, *infra*, §483, and *Perry v. Sindermann* (1972) 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570, *infra*, §691. The following excerpts from the plurality opinion indicate the scope of the proposed new doctrine:

(a) *Violation of First Amendment rights.* "Patronage practice falls squarely within the prohibitions of *Keyishian* and *Perry*. Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise. The belief and association which Government may not ordain directly are achieved by indirection. And regardless of how evenhandedly these restraints may operate in the long run, after political office has changed hands several times, protected interests are still infringed and thus the violation remains." (96 S.Ct. 2683, 49 L.Ed.2d 557.)

(b) *Test of valid restriction on First Amendment rights.* "[I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." (96 S.Ct. 2685, 49 L.Ed.2d 559.)

(c) *Patronage practice does not meet test.* "Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end. There is also a need to insure that policies which the electorate has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policymaking positions. Finally, patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and equally effective methods. More fundamentally, however, any

contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms." (96 S.Ct. 2689, 49 L.Ed.2d 565.)

Two concurring justices refused to join in the constitutional declaration, and in a brief statement, expressed the view that under *Perry v. Sindermann* "a nonpolicymaking, nonconfidential government employee" cannot be discharged from a job he or she is satisfactorily performing on "the sole ground of his political beliefs." (96 S.Ct. 2690, 49 L.Ed.2d 566.)

Three justices joined in a strong dissent against holding unconstitutional "a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics." (96 S.Ct. 2691, 49 L.Ed.2d 567.) And, assuming that the constitutional issue must be reached, "I would hold that a state or local government may elect to condition employment on the political affiliation of a prospective employee and on the political fortunes of the hiring incumbent." (96 S.Ct. 2697, 49 L.Ed.2d 574.) (See 90 Harv. L. Rev. 186; 66 Cal. L. Rev. 767.)

Branti v. Finkel (1980) 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, following *Elrod*, held that "the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government." (100 S.Ct. 1295, 63 L.Ed.2d 584.) (See *O'Hare Truck Service v. Northlake* (1996) 518 U.S. 712, 116 S.Ct. 2353, 2361, 135 L.Ed.2d 874, 886 [extending *Elrod* and *Branti* to political association rights of independent contractors working for government].)

In *Rutan v. Republican Party of Illinois* (1990) 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52, the Governor of Illinois issued an executive order prohibiting state officials from hiring new employees, filling vacancies, creating new positions, or taking similar action without the governor's "express permission." The order was challenged on the ground that the governor granted permission to fill positions on the basis of an applicant's support of the Republican Party, and hence, he was operating a political patronage system. Held, the rule of *Elrod* and *Branti*, holding patronage appointment practices unconstitutional, "extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support." (110 S.Ct. 2739, 111 L.Ed.2d 69.) (See 104 Harv. L. Rev. 227 [Rutan].)

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B. Scope of Protection. 2. Freedom of Association. e. Agency Shop for Public Employees.

7 *Witkin Sum. Cal. Law Const Law* § 385

[§ 385] Agency Shop for Public Employees.

(1) *In General.* In *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, Michigan enacted legislation authorizing an agency shop for local governmental employees. Under this arrangement an employee could elect not to join a union, but was required to pay the union, as a condition of employment, a service fee equal to union dues. Plaintiff employees challenged the legislation and the agency shop clause in the union's collective bargaining agreement as violative of the First Amendment freedom of association. *Held*, the agency shop provision was valid, but plaintiffs were entitled to a remedy against use of their contributions to support causes they opposed.

(a) *Validity of union shop.* *Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112, *infra* §1318, and *International Assn. of Machinists v. Street* (1961) 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141, are controlling on one of the basic issues: Where union dues are not used to force ideological conformity or otherwise to impair the free expression of employees, the requirement of financial support of the collective-bargaining agency does not violate the *First Amendment*. (97 S.Ct. 1791, 52 L.Ed.2d 276.) A union-shop arrangement fairly distributes the cost of activities among those who benefit, and counteracts the incentive that employees might otherwise have to become "free riders." (97 S.Ct. 1792, 52 L.Ed.2d 277.)

(b) *Impact on First Amendment interests.* An employee might have ideological objections to a wide variety of union activities; e.g., to a medical benefits plan that does not square with his or her view on abortion, or to a limitation on the right to strike; and to be compelled to help finance the union might well be thought to interfere with the employee's freedom to associate for the advancement of his or her ideas or to refrain from doing so. But *Hanson* and *Street* determined that this interference "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." (97 S.Ct. 1793, 52 L.Ed.2d 276.) Michigan's legislation, modeled after federal law and involving similar governmental interests, is likewise valid. "Thus, insofar as the service charge is used to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment, these two decisions of this Court appear to require validation of the agency-shop agreement before us." (97 S.Ct. 1794, 52 L.Ed.2d 278.)

(c) *Similarity of public and private employment.* The fact that *Hanson* and *Street* dealt with private employment does not call for a different holding; i.e., the public employee does not have a weightier First Amendment interest than a

private employee. The public employee is free to express his or her views in opposition to union policy, and to participate in the full range of political activities open to other citizens. (97 S.Ct. 1796, 52 L.Ed.2d 280.) Although public employee unions may attempt to influence governmental policy making, the characterization of this activity as "political" does not raise the ideas and beliefs of public employees onto a higher plane than those of private employees. (97 S.Ct. 1797, 52 L.Ed.2d 281.) Thus, the differences between public and private sector collective bargaining "do not translate into differences in First Amendment rights." (97 S.Ct. 1798, 52 L.Ed.2d 282.)

(d) *Use of nonmembers' fees for purposes other than collective bargaining.* This issue was not decided in *Hanson* or *Street*, and plaintiffs' contention that they may prevent the union's spending of part of their fees for political purposes is sound. A state cannot compel an individual to affirm a religious belief or to associate with a political party as a condition of public employment. (97 S.Ct. 1799, 1800, 52 L.Ed.2d 283, citing *Torcaso v. Watkins* (1961) 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982, *infra*, §514; *Elrod v. Burns* (1976) 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547, *supra*, §384.) Similarly, plaintiffs cannot be required to contribute to support of an ideological cause as a condition of holding their jobs. (97 S.Ct. 1799, 1800, 52 L.Ed.2d 283.) The union may spend funds for this purpose, but the expenditures must be financed from charges paid by employees who do not object to advancing those ideas. (97 S.Ct. 1800, 52 L.Ed.2d 284.) The line between collective bargaining activities and ideological activities unrelated thereto will be difficult to draw, and cannot be drawn in the instant case which came up on the pleadings without a record. (97 S.Ct. 1800, 52 L.Ed.2d 285.) Because the union has an internal remedy for dissenters, further judicial proceedings should be deferred pending the voluntary utilization of that remedy as a means of settling the dispute. (97 S.Ct. 1802, 1803, 52 L.Ed.2d 287.) (See 91 Harv. L. Rev. 188; 5 Hastings Const. L. Q. 341; 66 Cal. L. Rev. 767 [right of ideological nonassociation; comment on *Elrod* and *Abood*].)

(2) *Chargeable Activities.* *Lehnert v. Ferris Faculty Assn.* (1991) 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572, summarizes the guidelines set forth in prior cases: "[C]hargeable activities must (1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." (111 S.Ct. 1959, 114 L.Ed.2d 589.)

Under these guidelines, a public sector local union may use dissenting members' fees for otherwise chargeable activities of the union's state and national affiliates--even if those activities are not performed for the direct benefit of the local bargaining unit--where there is some indication that the payment is for services that may ultimately inure to the benefit of members of the local union. (111 S.Ct. 1961, 114 L.Ed.2d 592.)

(3) *Procedural Safeguards.* The qualification stated in *Abood*, *supra*, upholding the constitutional right of nonunion employees to prevent the union's spending of part of their service fees for political purposes, was applied in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986) 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232. "[T]he constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (106 S.Ct. 1078, 89 L.Ed.2d 249.)

In *Jerabek v. Public Emp. Relations Bd.* (1991) 2 C.A.4th 1298, 4 C.R.2d 181, the court upheld provisions of the Ralph C. Dills Act (Govt.C. 3512 et seq., 3 Summary (10th), *Agency and Employment*, §604 et seq.) for escrow of agency fees in dispute. The opinion discusses *Abood*, *Hudson*, and related decisions, and concludes that the regulations at issue comport with those decisions. "Any funds collected under the concurrent notice provision ... are placed in an escrow account pending objection by nonmembers. At no time does the union have access to these funds to use them for political, ideological, or other nonrepresentational purposes. Consequently, the evil discussed in *Abood*, *Ellis*, and *Hudson*, the involuntary subsidization of ideological activity, is not implicated." (2 C.A.4th 1306.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Affirmative Authorization To Use Nonmembers' Dues for Political Purposes.* In *Davenport v. Washington Education Assn.* (2007) 551 U.S. 177, 127 S.Ct. 2372, 168 L.Ed.2d 71, the State of Washington and fee-paying

nonmembers of a public employees union claimed that the union violated a statute prohibiting labor organizations from using agency shop fees paid by nonmembers for election-related purposes, without the affirmative consent of those nonmembers. The Supreme Court of Washington held that the affirmative authorization requirement violated the First Amendment. *Held*, judgment vacated and case remanded. A state may require that public-sector unions receive affirmative authorization from nonmembers before spending their agency fees for election-related purposes. (127 S.Ct. 2383, 168 L.Ed.2d 83.) This holding is limited to public-sector unions because the collection of fees by private-sector unions is governed by private contractual arrangements that present a different constitutional question. (127 S.Ct. 2382, 168 L.Ed.2d 82.)

(a) There is no constitutional requirement that a nonmember must shoulder the burden of objecting before a union can use his or her agency fees for purposes impermissible under *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, text, p. 633. The First Amendment is not necessarily implicated every time governments place limitations on a union's entitlement to agency fees above and beyond what is required in *Abood* and *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986) 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232, text, p. 635. *Hudson* outlined a *minimum* set of procedures by which a public-sector union could meet its requirement under *Abood*. Here, the "mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny. The constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions." (127 S.Ct. 2379, 168 L.Ed.2d 79.)

(b) Given the unique context of public-sector agency-shop arrangements, which essentially give private entities the power to tax government employees, the content-based nature of the statute does not violate the *First Amendment*. (127 S.Ct. 2378, 2382, 168 L.Ed.2d 79, 82.) The statute is a reasonable viewpoint-neutral limitation on Washington's authorization allowing public-sector unions to collect and spend the money of government employees. (127 S.Ct. 2381, 168 L.Ed.2d 82.) Correction: Page 633, first line of second paragraph, "*Railway Employees' Dept.*" should read "*Railway Employes' Dept.*"



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CHAPTER X - Constitutional Law

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B. Scope of Protection.

2. Freedom of Association.

f. Politically Motivated Economic Boycott.

7 *Witkin Sum. Cal. Law Const Law* § 386

[§ 386] Politically Motivated Economic Boycott.

In *N.A.A.C.P. v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 102 S.Ct 3409, 73 L.Ed.2d 1215, black citizens of Port Gibson, Mississippi, and other areas of Claiborne County presented white elected officials with a list of demands for racial equality and integration. No satisfactory response was received, and at a local N.A.A.C.P. meeting several hundred black persons voted to place a boycott on white merchants in the area, and proceeded to do so. After the boycott had been in effect for over 3 years, several merchants filed suit in the state court against organizations and individuals to recover damages for losses sustained and to enjoin further boycott activity. The trial court gave judgment for the plaintiffs, and the Mississippi Supreme Court upheld the judgment on the ground that some of the defendants engaged in acts of violence and intimidation, making the entire boycott illegal; hence, defendants were liable for the tort of malicious interference with business. *Held*, reversed; imposition of liability was a violation of defendants' First Amendment rights.

(a) The boycott, supported by speeches and nonviolent picketing, was protected speech or conduct. "The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect." (102 S.Ct. 3423, 73 L.Ed.2d 1232.) The elements of speech, assembly, association, and petition are inseparable; and through exercise of these First Amendment rights defendants sought to bring about political, social, and economic change. (102 S.Ct. 3425, 73 L.Ed.2d 1235.)

(b) Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances; e.g., unfair trade practices and secondary boycotts by labor unions. (102 S.Ct. 3425, 73 L.Ed.2d 1235.) But "we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." (102 S.Ct. 3426, 73 L.Ed.2d 1236.) An intent to influence government action cannot be held unlawful even though defendants foresaw that some economic injury would result. "The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically-motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." (102 S.Ct. 3426, 73 L.Ed.2d 1236.)

(c) Tort liability can be imposed for business losses caused by violence and threats of violence. But "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damage liability

and on the persons who may be held accountable for those damages." (102 S.Ct. 3428, 73 L.Ed.2d 1238.) (1) The state may not award compensation for the consequences of nonviolent protected activity. Only losses proximately caused by unlawful conduct may be recovered. (2) The state may not impose liability on an individual solely because of his or her association with another. (102 S.Ct. 3429, 73 L.Ed.2d 1240.) "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." (102 S.Ct. 3430, 73 L.Ed.2d 1241.)

(d) The judgment against Charles Evers, Field Secretary of the N.A.A.C.P., was improperly based on his speeches supporting the boycott. "The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct." (102 S.Ct. 3434, 73 L.Ed.2d 1246.) But "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." (102 S.Ct. 3434, 73 L.Ed.2d 1246.)

(e) The judgment against the N.A.A.C.P. was improperly derived from the liability of Evers. "To impose liability without a finding that the NAACP authorized--either actually or apparently--or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment." (102 S.Ct. 3435, 73 L.Ed.2d 1248.)

(f) Although "the taint of violence colored the conduct of some of the petitioners," the burden of demonstrating that it colored the entire effect was not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. "A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." (102 S.Ct. 3437, 73 L.Ed.2d 1249.) (See *Environmental Planning & Information Council v. Superior Court* (1984) 36 C.3d 188, 197, 203 C.R. 127, 680 P.2d 1086, 5 Summary (10th), *Torts*, §761 [following *Claiborne*]; *Lam v. Ngo* (2001) 91 C.A.4th 832, 845, 111 C.R.2d 582 [following *Claiborne*; protest organizer could not be held liable for protesters' tortious acts in absence of evidence of his authorization, direction, or ratification of their activities]; 96 Harv. L. Rev. 171 [*Claiborne*]; 22 San Diego L. Rev. 555 [consumer boycotts and freedom of association].)

Claiborne Hardware was distinguished in *Federal Trade Com. v. Superior Court Trial Lawyers Assn.* (1990) 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851, 1 Summary (10th), *Contracts*, §566. The Court held that a boycott by a group of lawyers appointed to represent indigent defendants in criminal cases was an illegal restraint of trade. In rejecting the First Amendment defense, the Court pointed out the Blacks who joined the *Claiborne Hardware* boycott sought no special advantage for themselves, but only equal treatment to which they were constitutionally entitled; here, the immediate objective of the lawyers was to increase their compensation. (110 S.Ct. 777, 107 L.Ed.2d 868.)

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g. Restrictions on Prisoners' Rights.

7 Witkin Sum. Cal. Law Const Law § 387

[§ 387] Restrictions on Prisoners' Rights.

In *Jones v. North Carolina Prisoners' Labor Union* (1977) 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629, a "Prisoners' Labor Union" was incorporated in North Carolina, with the stated goal of forming unions at every prison and jail in the state, and to work towards improvement of correctional practices and policies. After it had gained 2,000 members in 40 prison units, the State Department of Corrections, though tolerating membership or belief in the union, prohibited inmate solicitation of other inmates, meetings between members, and bulk mailings from outside sources. *Held*, the regulations were constitutional.

(a) Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, including those derived from the *First Amendment*. (97 S.Ct. 2538, 2540, 53 L.Ed.2d 638, 639; see *infra*, §405.)

(b) The restrictions on solicitation and group meetings are rationally related to the reasonable objectives of prison administration. "It is clearly not irrational to conclude that individuals may believe what they want, but that concerted group activity, or solicitation therefor, would pose additional and unwarranted problems and frictions in the operation of the State's penal institutions." (97 S.Ct. 2540, 53 L.Ed.2d 640.)

(c) Because other avenues of outside informational flow by the union remain available, the prohibition of bulk mailings is reasonable. (97 S.Ct. 2541, 53 L.Ed.2d 642.)

(d) The contention that the prohibition of union meetings and bulk mail distribution denied equal protection because these rights had been extended to Jaycees, Alcoholics Anonymous, and the Boy Scouts is unsound. A prison is not a "public forum," and the prison administrators could reasonably conclude that the prisoners' union required different treatment from the other groups. (97 S.Ct. 2543, 53 L.Ed.2d 645.)

In *Thornburgh v. Abbott* (1989) 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459, the Court upheld as facially valid a regulation authorizing federal prison officials to reject incoming publications found to be detrimental to prison security. The test to be applied is whether a regulation is reasonably related to legitimate penological interests. (109 S.Ct. 1876, 104 L.Ed.2d 467.) "We deal here with incoming publications, material requested by an individual inmate but targeted to a general audience. Once in the prison, material of this kind reasonably may be expected to circulate among prisoners,

with the concomitant potential for coordinated disruptive conduct. Furthermore, prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly. ... In the volatile prison environment, it is essential that prison officials be given broad discretion to prevent such disorder." (109 S.Ct. 1881, 104 L.Ed.2d 472, 473.) (See 103 Harv. L. Rev. 239 [restrictions on prisoners' rights to receive publications]; 17 Pepperdine L. Rev. 1011 [Thornburgh].)

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h. Rights of Political Parties.

7 *Witkin Sum. Cal. Law Const Law* § 388

[§ 388] Rights of Political Parties.

(1) *In General.* "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." (*Cousins v. Wigoda* (1975) 419 U.S. 477, 95 S.Ct. 541, 547, 42 L.Ed.2d 595, 603, quoting *Kusper v. Pontikes* (1973) 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260, *supra*, §251.) In *Cousins*, the Court held that the Illinois Election Code could not be applied to determine a challenge of a group of delegates to the Democratic Party national convention. The interest of a state in protecting the integrity of its electoral process was considered insufficient to justify interference with the process of selecting candidates for *national office*. Hence, the convention itself was the proper forum to settle intra-party disputes as to which delegates should be seated. (95 S.Ct. 549, 42 L.Ed.2d 605.) (See *Democratic Party of the United States v. Wisconsin* (1981) 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 [state cannot compel party to honor primary results reached contrary to party rules]; *Tashjian v. Republican Party of Connecticut* (1986) 479 U.S. 208, 107 S.Ct. 544, 554, 93 L.Ed.2d 514, 530 [Connecticut statute requiring voters in party primary to be registered members of that party, violated freedom of association by forbidding party to permit independents to vote]; 95 *Harv. L. Rev.* 241 [*Wisconsin*].)

(2) *California Law.* California statutes that dictate the organization and composition of governing bodies of political parties and require geographical rotation of their chair violate the right of free association. (*Eu v. San Francisco County Democratic Cen. Committee* (1989) 489 U.S. 214, 109 S.Ct. 1013, 1024, 1025, 103 L.Ed.2d 271, 286, 288, *supra*, §267.)

In *California Democratic Party v. Jones* (2000) 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502, plaintiff political parties challenged the constitutionality of *Elec.C. 2001*. That statute, adopted as part of Proposition 198 in 1996, changed California's partisan primary from a closed primary to a blanket primary, permitting voters to choose among the candidates, regardless of party affiliation, with the candidate of each party winning the greatest number of votes becoming the nominee of that party. The purpose of the proposition was to favor nominees with "moderate" positions. *Held*, the statute is unconstitutional.

The processes by which political parties select their nominees are not wholly public affairs that states may regulate freely. (120 S.Ct. 2407, 147 L.Ed.2d 508.) Representative democracy "is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." (120 S.Ct. 2408, 147

L.Ed.2d 509.) A corollary of this right to associate is the right not to associate, and in no area is a "political association's right to exclude more important than in the process of selecting its nominee. ... [I]t is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." (120 S.Ct. 2408, 147 L.Ed.2d 510.)

One justice concurred and one justice dissented. (See 114 Harv. L. Rev. 269 [*California Democratic Party*]; 29 *Pepperdine L. Rev.* 319 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Clingman v. Beaver* (2005) 544 U.S. 581, 125 S.Ct. 2029, 2039, 161 L.Ed.2d 920, 935 [upholding Oklahoma's semi-closed primary system in which only members of political party and voters registered as Independents are permitted to vote in party's primary]; 119 *Stanf. L. Rev.* 268 [*Clingman*].

In *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. ___, 128 S.Ct. 1184, 170 L.Ed.2d 151, plaintiff political parties challenged an initiative changing Washington's primary election system. The initiative provided for a "blanket" primary in which candidates for office are identified on the ballot by self-designated "party preference"; voters may vote for any candidate, regardless of party designation, and the two highest vote-getters for each office, regardless of party preference, advance to the general election. A party may not prevent a candidate, who might not be affiliated with the party and whose beliefs might be repugnant to it, from designating that party on the ballot. Plaintiffs immediately challenged the law on its face as a burden on their associational rights, and they received an injunction against its implementation. The Court of Appeals affirmed. *Held*, reversed. The initiative does not impose a severe burden on plaintiffs' associational rights. (128 S.Ct. 1195, 170 L.Ed.2d 165.)

(a) In a facial challenge, the Court must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases. Here, the state has had no opportunity to implement the initiative, and its courts have had no opportunity "to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions." (128 S.Ct. 1190, 170 L.Ed.2d 160.)

(b) A similar system was struck down in *California Democratic Party v. Jones* (2000) 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502, text, p. 639, as an unconstitutional burden on the associational rights of political parties by forcing them to associate with voters who did not share their political beliefs. *Jones* suggested that a nonpartisan blanket primary would be constitutional, but the Court had no occasion to determine the issue here, which is "whether a primary system that indicates each candidate's party preference on the ballot, in effect, chooses the parties' nominees." (128 S.Ct. 1192, 170 L.Ed.2d 162.) Unlike the California primary, Washington's initiative does not, by its terms, choose the parties' nominees. "The law never refers to the candidates as nominees of any party, nor does it treat them as such. To the contrary, the election regulations specifically provide that the primary 'does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election.' ... Whether parties nominate their own candidates outside the state-run primary is simply irrelevant. In fact, parties may now nominate candidates by whatever mechanism they choose because" the initiative repealed prior regulations governing party nominations. (128 S.Ct. 1192, 170 L.Ed.2d 162.)

(c) Plaintiffs' associational rights are not burdened by the assumption that the candidates on the general election ballot are the nominees of their preferred parties. There is no basis to presume that voters will be confused or misinterpret a candidate's designation of party-preference to mean that the candidate is the party's chosen nominee or that the party associates with or approves the candidate. (128 S.Ct. 1193, 170 L.Ed.2d 163.) Further, the state ballot ultimately might include prominent disclaimers explaining that the self-designated party preference is not an official party endorsement, and the state might choose to educate the public regarding the new ballots through advertising and the distribution of explanatory materials. (128 S.Ct. 1194, 170 L.Ed.2d 164.)

Two justices concurred (128 S.Ct. 1196, 170 L.Ed.2d 166), and two justices joined in a strong dissent (128 S.Ct. 1197, 170 L.Ed.2d 168). (See 41 U.C. Davis L. Rev. 713 [*California Democratic Party and Washington State Republican Party*].)



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B. Scope of Protection.

2. Freedom of Association.

i. Exclusion of Women From Membership.

7 *Witkin Sum. Cal. Law Const Law* § 389

[§ 389] Exclusion of Women From Membership.

(1) *In General.* In *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, the Court held that the Minnesota Human Rights Act, prohibiting discrimination by a place of public accommodation on the basis of sex, was validly applied to compel the United States Jaycees to accept women as regular members. The Jaycees, founded in 1920 as the Junior Chamber of Commerce, is a national nonprofit membership corporation with 7,400 local chapters affiliated with 51 state organizations. Regular membership is limited to young men between 18 and 35, and others--principally women and older men--are given only associate membership with limited privileges. The Minnesota Department of Human Rights ordered the national organization to cease discrimination on the basis of sex, and the Minnesota Supreme Court, answering a certified question, ruled that the Jaycees organization was a "place of public accommodation" within the meaning of the state statute. The district court upheld the Department's order, the Court of Appeals reversed, but the Supreme Court held that the order did not violate the Jaycees' constitutional freedom of association.

(a) *Two types of freedom of association.* "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." (104 S.Ct. 3249, 82 L.Ed.2d 471.) "[T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case." (104 S.Ct. 3249, 82 L.Ed.2d 471.) The two aspects of the constitutional guarantee may be called (1) the freedom of "intimate association" and (2) the freedom of "expressive association." (104 S.Ct. 3250, 82 L.Ed.2d 471.)

(b) *No effect on freedom of intimate association.* The local chapters are large and basically unselective groups, and much of the activity of the association involves the participation of strangers. Hence, the chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women. (104 S.Ct.

3251, 82 L.Ed.2d 474.)

(c) *Justifiable abridgment of freedom of expressive association.* Infringement of this right may be justified by compelling state interests unrelated to the suppression of ideas, which cannot be achieved through means significantly less restrictive of associational freedoms. (104 S.Ct. 3252, 82 L.Ed.2d 475.) The Minnesota statute is an example of public accommodation laws adopted by some states a decade before their federal counterpart, the Civil Rights Act of 1875 (*infra*, §814). By prohibiting gender discrimination in places of public accommodation, it protects its citizens from a number of serious social and personal harms. (104 S.Ct. 3253, 82 L.Ed.2d 476.) And it imposes no serious burdens on the male members' freedom of expressive association. "The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members. ... Moreover, the Jaycees already invite women to share the group's views and philosophy and to participate in much of its training and community activities." (104 S.Ct. 3254, 82 L.Ed.2d 477.) Even if enforcement "causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." (104 S.Ct. 3255, 82 L.Ed.2d 478.) (See 98 Harv. L. Rev. 195 [Jaycees]; 28 U.S.F. L. Rev. 1009 [criticizing intimate association test as insufficient to remedy discrimination against women by private clubs].)

(2) *Effect of Violation of Unruh Civil Rights Act.* In *Warfield v. Peninsula Golf & Country Club* (1995) 10 C.4th 594, 42 C.R.2d 50, 896 P.2d 776, the court, after holding that the country club in question engaged in sufficient transactions with nonmembers to qualify as a business establishment (*infra*, §899), addressed the question whether application of the Unruh Civil Rights Act (C.C. 51) to require admission of women to an all-male club violated either the right of association or the right to privacy of the members. *Held*, it did not.

(a) Using the freedom of intimate association and the freedom of expressive association dichotomy developed in the *Jaycees* case, the court said: "To begin with, defendant country club does not contend that it was organized for, or regularly engages in, the type of expressive activities that fall within the protection of the First Amendment. Thus, application of section 51 to the club will have no appreciable effect on its members' freedom of expressive association." (10 C.4th 628, 629.)

(b) "Second, it is clear any claim that application of section 51 infringes upon club members' freedom of intimate association is untenable when the characteristics and the nature of the activities of defendant club are compared with the characteristics and activities of the organizations involved in the *Roberts*, *Rotary Club*, and *New York State Club Assn.* decisions. As an initial matter, the size of defendant's membership--700 members--is considerably larger than that of most of the local clubs involved in the *Rotary Club* case, and also falls well above the 400-member threshold established by the city ordinance at issue in the *New York State Club Assn.* case; indeed, because members' spouses and children under age 21 generally share the benefits of membership, the 700-member figure significantly understates the number of persons with unrestricted access to the club. Furthermore, as with the organizations involved in all three of the foregoing United States Supreme Court decisions, the premises and activities of defendant club are not narrowly restricted to club members (or their families). Instead, numerous nonmembers--invited guests, participants in sponsored events, and patrons of the golf and tennis pros--regularly are present at the club and, along with club members, make use of the club facilities. Finally, and perhaps most significantly, defendant club--like the organizations involved in the *Roberts* and *Rotary Club* cases--cannot persuasively claim that elimination of the men-only requirement for proprietary membership fundamentally will alter the nature of the club or its specific purposes. The club's golf, tennis, and other recreational and social facilities generally have been open to women, and women routinely have held nonproprietary classes of membership within the club." (10 C.4th 629; citing *Roberts v. United States Jaycees*, *supra*, *Board of Directors of Rotary Int. v. Rotary Club of Duarte* (1987) 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474, *infra*, §902, and *New York State Club Assn. v. New York* (1988) 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1, *infra*, §890.)

(c) Although the California constitutional right to privacy "provides protection that is distinct from, and in some respects greater than, that provided by the federal Constitution ... defendant has cited no authority that suggests the state constitutional provision properly should be interpreted to provide protection to the discriminatory membership policies

of a large private country club, such as defendant, greater than the protection afforded by the federal Constitution. ... Particularly in light of the size of the club's membership, the regular business transactions in which the club engages with nonmembers, and the absence of any conflict between the inclusion of women and the nature or purpose of the club, we hold that application of the nondiscrimination provisions of the Unruh Civil Rights Act does not violate the members' right of privacy embodied in Article I, section 1, of the California Constitution." (10 C.4th 630.) (See 26 Southwestern U. L. Rev. 167 [*Warfield*]; 30 U.C. Davis L. Rev. 909 [same]; on Unruh Civil Rights Act generally, see *infra*, §898 et seq.)

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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

2. Freedom of Association.

j. Exclusion of Group From Parade.

7 *Witkin Sum. Cal. Law Const Law* § 390

[§ 390] Exclusion of Group From Parade.

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487, the issue was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Held*, "such a mandate violates the First Amendment." (115 S.Ct. 2340, 2341, 132 L.Ed.2d 495.)

In *Hurley*, the South Boston Allied War Veterans Council, an unincorporated association of individuals, organized and conducted the annual St. Patrick's Day-Evacuation Day Parade in Boston. The council refused a place in the 1993 parade to GLIB, an organization of gay, lesbian, and bisexual descendants of Irish immigrants formed for the purpose of marching in the parade to express its members' pride in their identity, to show that there are such individuals in the community, and to support the like persons who sought to march in the New York St. Patrick's Day Parade. GLIB filed suit in state court, alleging that denial of its application to march violated the Massachusetts public accommodations law, which prohibits discrimination on account of sexual orientation. The state trial and appellate courts, finding that there was a lack of selectivity in choosing participants and that the parade lacked any expressive purpose, and thus that the parade did not involve First Amendment rights, held that exclusion of GLIB because of the sexual orientation of its members violated the state statute. The Supreme Court granted certiorari to address the First Amendment issue.

(a) A "parade" consists of marchers making some sort of collective point, not just to each other but to bystanders along the way, and thus is inherently expressive. Moreover, the protected expression in a parade is not limited to its banners and songs, but includes symbolic acts. (115 S.Ct. 2345, 132 L.Ed.2d 500.)

(b) The council is rather lenient in admitting participants. "But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor ... does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." (115 S.Ct. 2345, 132 L.Ed.2d 501.)

(c) GLIB's participation was equally expressive, since it was formed for the very purpose of marching in the parade to celebrate its members' sexual identities and for related purposes. (115 S.Ct. 2346, 132 L.Ed.2d 501.) "GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own." (115

S.Ct. 2346, 132 L.Ed.2d 502.)

(d) The Massachusetts law is well within a legislature's power to enact and does not, as a general matter, violate the *First or Fourteenth Amendments*. (115 S.Ct. 2346, 132 L.Ed.2d 502.) Here, however, the law has been applied in a peculiar manner. GLIB seeks admission as its own parade unit carrying its own banner. "Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." (115 S.Ct. 2347, 132 L.Ed.2d 503.)

(e) The effect is that the sponsors' speech itself is declared to be the public accommodation, and any group protected by the state law may join in and help shape that speech. "But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." (115 S.Ct. 2347, 132 L.Ed.2d 503.)

(f) "Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." (115 S.Ct. 2348, 132 L.Ed.2d 504.) (See 49 *Stanf. L. Rev.* 143 [Hurley].)

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B. Scope of Protection.

2. Freedom of Association.

k. Exclusion of Homosexual Scoutmaster.

7 *Witkin Sum. Cal. Law Const Law* § 391

[§ 391] Exclusion of Homosexual Scoutmaster.

In *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554, plaintiff scoutmaster's membership in defendant organization was revoked because of his avowed homosexuality. *Held*, the application of New Jersey's public accommodation law to membership in defendant organization violated the First Amendment.

(a) *Expressive activity required.* "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." (120 S.Ct. 2451, 147 L.Ed.2d 563.) Although the First Amendment's protection of expressive association is not reserved for advocacy groups, to come within its ambit, a group still must engage in some form of expression, whether public or private. (120 S.Ct. 2451, 147 L.Ed.2d 563.) Defendant is a private, nonprofit organization with the general mission "to instill values in young people." (120 S.Ct. 2452, 147 L.Ed.2d 563.) Scoutmasters help to inculcate youth members with defendant's values, both expressly and by example. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." (120 S.Ct. 2452, 147 L.Ed.2d 564.)

(b) *Content of message is contrary to mission.* Defendant's official position has long been that homosexuals do not provide a role model consistent with the organization's mission. (120 S.Ct. 2453, 147 L.Ed.2d 565.) Plaintiff is a gay rights activist whose presence in defendant organization "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." (120 S.Ct. 2454, 147 L.Ed.2d 566.) Just as in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487, *supra*, §390, where the presence of a gay rights group marching in Boston's St. Patrick's Day parade would have interfered with the parade organizer's choice not to propound a particular point of view, plaintiff's presence here would interfere with defendant's "choice not to propound a point of view contrary to its beliefs." (120 S.Ct. 2454, 147 L.Ed.2d 566.)

(c) *Public accommodation law is inapplicable.* New Jersey's interests, embodied in its public accommodation law, do not justify the significant burden plaintiff's retention as an assistant scoutmaster would have on defendant's right to freedom of expressive association. (120 S.Ct. 2457, 147 L.Ed.2d 569.)

Four justices joined in a lengthy dissent. (120 S.Ct. 2459, 147 L.Ed.2d 572.) Three of the dissenters joined in a further dissent (120 S.Ct. 2478, 147 L.Ed.2d 594) to clarify that their opinion is based on defendant's failure to make out an expressive association claim, not because of what it "may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message." (120 S.Ct. 2479, 147 L.Ed.2d 595.) (See 114 Harv. L. Rev. 259 [Boy Scouts]; 74 So. Cal. L. Rev. 119 [same]; 76 So. Cal. L. Rev. 521 [same]; 53 Stanf. L. Rev. 767 [same]; on applicability of Unruh Civil Rights Act to exclusion from Boy Scouts of gays, atheists, and agnostics, see *infra*, §904.)

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B. Scope of Protection.

2. Freedom of Association.

1. (New) Exclusion From Subsidized Program.

7 Witkin Sum. Cal. Law Const Law § 391A

[§ 391A] (New) Exclusion From Subsidized Program.

In *Evans v. Berkeley* (2006) 38 C.4th 1, 40 C.R.3d 205, 129 P.3d 394, defendant city excluded the Sea Scouts, a volunteer organization affiliated with the Boy Scouts of America, from a free berth program for nonprofit community service organizations. Defendant had adopted a resolution requiring that access to its marina facilities not be predicated on, among other things, a person's religion or sexual orientation. Although there was no evidence of past discrimination in the use of the berths by the Sea Scouts, defendant asked the group to provide a "local policy statement" of nondiscrimination because of concern that the Boy Scouts had a national policy of discrimination against homosexuals and atheists. Defendant deemed the group's written assurance to be insufficient, and discontinued the subsidy. Members of the group sued, claiming that defendant's action violated their rights to free speech, association, and equal protection. The trial court sustained defendant's demurrer. The Court of Appeal, concluding that the complaint established no constitutional violation, affirmed. *Held*, affirmed.

(a) Against First Amendment challenges, the Supreme Court has "approved programs of governmental financial assistance that limit the expressive activities for which the funds may be used" or that condition financial assistance on an advance agreement that an organization will not discriminate in government-assisted programs. (38 C.4th 11, 12.) For example, in *Rust v. Sullivan* (1991) 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233, text, §568, the Court rejected a challenge to federal regulations prohibiting abortion counseling in programs supported by federal family planning funds. (38 C.4th 11.) And in *Grove City College v. Bell* (1984) 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516, text, §853, the Court rejected a challenge to federal regulations conditioning receipt of federal education funds on a school's assurance that it will not discriminate on the basis of sex in any government-funded program. (38 C.4th 12.)

(b) There are two exceptions to the rule that "the government's refusal to subsidize exercise of a First Amendment right does not infringe that right": (1) where the purpose of the funding restriction is the suppression of a disfavored viewpoint (38 C.4th 13) and (2) where the restriction goes beyond the government-funded expressive activity of the recipient and attempts to limit other expressive activities (38 C.4th 14). Neither of these exceptions is applicable here. (38 C.4th 13.)

(c) Defendant's requirement that an organization receiving a subsidized berth agree in advance not to discriminate in the administration of its program does not infringe on plaintiffs' speech or associational rights. Plaintiffs were not

required to espouse or to denounce a particular viewpoint or to break an affiliation. Plaintiffs only had to assure defendant of their adherence to defendant's policies in connection with the use of defendant's facilities. (*38 C.4th 11.*)

(d) Plaintiffs were not being punished for being affiliated with the Boy Scouts. "To require a group operating as part of an organization with an official policy of discrimination that it agree in advance not to discriminate in the use" of defendant's free facilities is a reasonable and narrowly tailored step to implement defendant's diversity and nondiscrimination provisions. The fact that other groups that were not affiliated with the Boy Scouts "were not required to give local policy statements assuring nondiscrimination does not show unequal treatment." (*38 C.4th 18.*)

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B. Scope of Protection.

2. Freedom of Association.

m. (New) Exclusion of Group From Street Fair.

7 Witkin Sum. Cal. Law Const Law § 391B

[§ 391B] (New) Exclusion of Group From Street Fair.

In *U.S. Western Falun Dafa Assn. v. Chinese Chamber of Commerce (2008)* 163 C.A.4th 590, 77 C.R.3d 710, the court applied the holding in *Hurley v. Irish-Amer. Gay, Lesbian & Bisexual Group of Boston (1995)* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487, text, §390, to an action alleging violation of the Unruh Civil Rights Act based on the denial by defendant chamber of commerce of plaintiff's applications to participate in defendant's street and flower fairs held during Chinese New Year festivities. Even though there were commercial aspects to the fairs, defendant's purpose in holding them was to educate the public on Chinese history and culture. Hence, the festivities, which included a parade with lion dancers and fireworks, exhibitions of Chinese music, puppet shows, and martial arts displays, were expressive activities. Plaintiff's participation also would have been expressive in attempting to educate the public regarding its own beliefs, political views, and practices. (163 C.A.4th 602.) Although plaintiff had a right to attend the festivities and express its views verbally or through signs or pamphlets, it had no right to be a participant in defendant's expressive activity. (163 C.A.4th 606.)

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B. Scope of Protection.

3. Right of Peaceable Assembly.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 392

[§ 392] In General.

In *De Jonge v. Oregon* (1937) 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, a statute made it criminal to assist in conducting a meeting of an organization that teaches criminal syndicalism. Defendant spoke at a meeting called by the Communist Party to protest police actions during a maritime strike. The meeting was public, orderly, attended chiefly by nonparty members, and no criminal syndicalism was advocated. Defendant was convicted on the theory that the Communist Party as an organization advocated criminal syndicalism, and that one who assisted in its meeting violated the law, though the meeting itself was conducted without unlawful activity. *Held*, as so construed, the statute was an invasion of the rights of free speech and free assembly. The two rights are cognate and equally fundamental; hence "peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score." (57 S.Ct. 260, 81 L.Ed. 284.) (See *Herndon v. Lowry* (1937) 301 U.S. 242, 57 S.Ct. 732, 739, 81 L.Ed. 1066, 1075; *Thomas v. Collins* (1945) 323 U.S. 516, 65 S.Ct. 315, 324, 89 L.Ed. 430, 442, *infra*, §465; 65 So. Cal. L. Rev. 2599 [*Herndon*].)

In *Hague v. Committee for Industrial Organization* (1939) 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, the mayor and other local officials were enjoined from interfering with activities of plaintiffs, labor organizers, who sought to hold public meetings to disseminate information on labor unions. The majority justices split on the governing theory, some holding it a violation of privileges and immunities of U.S. citizens, and others holding it a denial of due process of law to *any persons*.

In *Carroll v. President & Commrs. of Princess Anne* (1968) 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325, petitioners, members of a "white supremacist organization," held a public assembly in the town of Princess Anne, Maryland. The speakers used inflammatory language toward Blacks and Jews, and announced another rally for the following night. Respondent officials then obtained an ex parte restraining order from the circuit court of the county restraining petitioners for 10 days from holding meetings that "will tend to disturb and endanger the citizens of the County." *Held*, reversed. Where a First Amendment freedom is involved, prior restraint by ex parte order can only be justified by a showing that it is impossible to serve or notify opposing parties and give them an opportunity to participate. (89 S.Ct. 351, 21 L.Ed.2d 331.) (See 4 Rotunda, §20.53 et seq.; 34 *San Diego L. Rev.* 921 ["Freedom of Assembly" and the Right to Passage in Modern English Legal History]; 45 So. Cal. L. Rev. 983 [collateral attack on

injunctions restraining First Amendment activity]; *16A Am.Jur.2d (1998 ed.)*, *Constitutional Law* §531; Uniform Public Assembly Act, 14 U.L.A. (Master Ed.), p. 207.)

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See 5 Rotunda 4th, §20.53 et seq.; Uniform Public Assembly Act, 14 U.L.A. (Master Ed.), p. 291.



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3. Right of Peaceable Assembly.

b. Public Forum.

1. United States Supreme Court Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 393

[§ 393] United States Supreme Court Decisions.

In *Kunz v. New York* (1951) 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280, a New York City ordinance prohibited street religious meetings without a permit, which was granted in the discretion of the police commissioner. Petitioner, a Baptist minister, had previously ridiculed and denounced other religions in offensive terms. He was denied a new permit, and arrested for holding a meeting without one. *Held*, reversed. The power to punish for breaches of the peace was not involved, for this was suppression and "we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." (71 S.Ct. 315, 95 L.Ed. 284.) (On requirement of license to speak as invalid prior restraint generally, see *supra*, §360.)

The condemnation was even stronger in *Niemotko v. Maryland* (1951) 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267, where there was no ordinance but merely a practice of authorizing park meetings by administrative officials. Defendants, members of Jehovah's Witnesses, were denied a permit solely because of their religious beliefs. The court observed that the "possibility of abuse" of a regulatory statute or ordinance lacking in standards had occurred here by a clearly unwarranted discrimination against a group. (See 65 *Harv. L. Rev.* 136.)

In *Edwards v. South Carolina* (1963) 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, petitioners, 187 Blacks, marched peaceably on to the South Carolina State House grounds carrying placards protesting against discrimination. A crowd gathered, but police protection was ample and no violence was threatened, nor was there any interference with traffic. The police ordered petitioners to disperse on pain of arrest, and they responded with a "religious harangue" and singing of patriotic and religious songs, accompanied by stamping of feet and clapping of hands. They were then arrested. *Held*, judgments of conviction of breach of the peace reversed. "The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form"; i.e., they peaceably assembled at the site of the state government to express their grievances. (83 S.Ct. 683, 9 L.Ed.2d 702.) "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." (83 S.Ct. 684, 9 L.Ed.2d 703.)

The *Edwards* case was followed in *Cox v. Louisiana* (1965) 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471. Defendant, a minister and field secretary of CORE, and adviser to a general protest demonstration by college students,

was convicted of three statutory crimes: (1) breach of the peace, (2) obstructing public passages, and (3) picketing a courthouse (see *infra*, §462). *Held*, reversed.

(a) As in *Edwards, and Terminiello v. Chicago* (1949) 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131, *infra*, §458, the breach of the peace statute was unconstitutionally broad, and the record revealed no conduct for which defendant could constitutionally be punished. The meeting was an orderly and peaceable expression of views. (85 S.Ct. 462, 463, 13 L.Ed.2d 482.)

(b) A properly drawn statute prohibiting wilful obstruction of the free use of a public sidewalk or street may validly vest discretion in local administrative officials if it is exercised without discrimination; i.e., there is no unlimited right to hold a peaceful public meeting at any public place and at any time. (85 S.Ct. 464, 13 L.Ed.2d 484.) But the Louisiana act was administered by allowing meetings only on prior application, granted or withheld in the uncontrolled discretion of the local authorities. This permitted them to censor ideas, and was invalid. (85 S.Ct. 466, 13 L.Ed.2d 486.)

In *Shuttlesworth v. Birmingham* (1965) 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176, petitioner was standing on the sidewalk with 10 or 12 companions in connection with black boycotting of stores in Birmingham. They were ordered by a policeman to clear the sidewalk. Petitioner and others remained, and he was convicted under an ordinance prohibiting refusal to comply with a lawful direction of a police officer. *Held*, reversed. This ordinance, taken at face value, was unconstitutional. The Alabama appellate court narrowly construed it to apply only to orders of traffic officers; but there was nothing in the record to show that the officer was directing traffic, or that petitioner was in or around a vehicle. Hence, the case was one of no evidence to support the conviction, a denial of due process. (86 S.Ct. 215, 15 L.Ed.2d 180.) (See *Shuttlesworth v. Birmingham* (1969) 394 U.S. 147, 89 S.Ct. 935, 942, 22 L.Ed.2d 162, 171 [obviously unconstitutional ordinance could not support conviction, despite efforts of state supreme court to construe it constitutionally]; *Gregory v. Chicago* (1969) 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 [police ordered peaceful demonstrators to disperse because onlookers became unruly; conviction reversed].)

In *United States v. Grace* (1983) 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736, a federal statute prohibited display of a flag, banner, or device adapted to bring into public notice any party organization or movement, "in the Supreme Court Building or grounds." *Held*, the statute was unconstitutional as applied to activity on the public sidewalks surrounding the court building. The Court took note of its prior decisions in *Adderley v. Florida* (1966) 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149, *infra*, §463, and *Greer v. Spock* (1976) 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505, *infra*, §1325, holding that publicly owned property does not become a "public forum" simply because members of the public are permitted to come and go at will, but distinguished *Greer* on the ground that the streets and sidewalks at issue there were located within an enclosed military reservation, while here they are like any other sidewalks in Washington, D.C. Hence, they are public forums for First Amendment purposes. (103 S.Ct. 1707, 1708, 75 L.Ed.2d 744, 745.) (See *Thomas v. Chicago Park Dist.* (2002) 534 U.S. 316, 122 S.Ct. 775, 780, 151 L.Ed.2d 783, 791 [content-neutral permit scheme regulating speech in public park did not need to adhere to procedural requirements of *Freedman v. Maryland* (1965) 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, *supra*, §371]; 80 *Harv. L. Rev.* 1773 [Regulation of Demonstrations]; 85 *Harv. L. Rev.* 1284 [Exercise of Emergency Powers]; 46 *Hastings L. J.* 335 [public forum doctrine in age of information superhighway]; 50 *Hastings L. J.* 309 [public forum doctrine]; 28 *Stanf. L. Rev.* 117 [minimum and equal access]; 35 *Stanf. L. Rev.* 121 [access to publicly owned property]; 34 *U.C.L.A. L. Rev.* 1713 [history and theory of public forum].)

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3. Right of Peaceable Assembly.

b. Public Forum.

2. California Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 394

[§ 394] California Decisions.

In *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 171 P.2d 885, the court, elaborately reviewing all of the important U.S. Supreme Court decisions on the subject, upheld the rights of free speech and assembly for political dissenters. The Civic Center Act (now *Educ.C. 38130 et seq.*) required that school boards allow the free use of school auditoriums, but prohibited their use by organizations seeking forcible overthrow of the government. Petitioners, affiliated with the American Civil Liberties Union, sought the use of a school auditorium for meetings to discuss the "Bill of Rights in Postwar America." Permission was denied when they refused to sign an affidavit of nonadvocacy and nonaffiliation with subversive organizations. *Held*, the statute was unconstitutional, and mandamus should issue to compel granting of use of the hall.

(a) No matter how objectionable the groups or doctrines may be, free speech and assembly cannot be prohibited unless they come within the rule of clear and present danger (*infra*, §407). "[D]octrines advocating the overthrow of the government by force do not of themselves constitute a substantial danger, and ... the state is therefore not justified in suppressing the freedom of speech of those who happen to be members of an organization committed to such doctrines." (28 C.2d 543.)

(b) The fact that "subversive elements" are allowed to meet anywhere but in a school building shows that the Legislature did not believe that these meetings would create a clear and present danger to the community, but merely believed that "the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate." (28 C.2d 545.)

(c) Although the state need not make school buildings available for public meetings, it cannot impose *unconstitutional conditions* on their use (*infra*, §813). (See 35 Cal. L. Rev. 120.)

The *Danskin* view was restated and followed in *American Civil Liberties Union of Southern Calif. v. Board of Education of Los Angeles* (1961) 55 C.2d 167, 171, 10 C.R. 647, 359 P.2d 45. Former *Educ.C. 16564* (now *Educ.C. 38135*) prohibited use of school buildings by an organization seeking overthrow of the government, etc., and former *Educ.C. 16565* (now *Educ.C. 38136*), the implementing section, required a statement of information from an applicant

that the organization does not advocate the government's overthrow, etc., and is not a Communist-front organization required to be listed with the Attorney General. Petitioners, seeking use of a school building to hold monthly public meetings on "The Bill of Rights in 1960," refused to furnish the statement. *Held*, mandamus issued to compel defendant Board to grant their application.

(a) *De Jonge v. Oregon* (1937) 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, supra, §392, and *Danskin* establish the rule that a subversive organization may nevertheless meet for lawful purposes. These statutes clash with the rule, for any prohibited organization is prevented from holding a peaceful public meeting to discuss lawful subjects because it cannot without perjury furnish the statement. "The present statute thus has the same vice which caused us to strike down its predecessor section in *Danskin*. It closes the doors to public meetings of the proscribed organizations, while leaving them open to all others, even though the particular meeting may be for an entirely lawful purpose. It thus, somewhat more indirectly, prevents assembly and free speech in school buildings by certain organizations because it disapproves of the organizations and not because of what those organizations may have intended to say or do therein. This is exactly the type of regulation held unconstitutional by us in *Danskin* and by the United States Supreme Court in *De Jonge*." (55 C.2d 175.)

(b) Even without the requirement of a statement, former Educ.C. 16564 is an unconstitutional prior restraint on free speech and assembly. The Legislature has provided that the school board, on a finding that its civic center will be used for overthrow, etc., can deny use of the center. "This amounts to a censorship in advance of the right of assembly and free speech upon the mere determination of a probability of its future misuse. Prior censorship upon such a prophetic finding can certainly only be justified, if at all, upon the clearest sort of showing that such misuse will with reasonable certainty occur. The state and the federal government can, as the federal government has done in the Smith Act, make the actual commission of such acts criminal. It seems obvious that attempts at censorship by prior restraint should be more closely scrutinized to detect constitutional infirmity than such *post hoc* methods of restraint by criminal sanction. The danger of censorship in advance is that, in attempting to prevent the commission of forbidden acts in advance, it will also prevent lawful assemblies and the lawful exercise of free speech upon an erroneous (even if plausible) finding in advance that the applicant intends to engage in lawful assembly and unlawful speech." (55 C.2d 179.)

In *American Civil Liberties Union of Southern Calif. v. Board of Education of Los Angeles* (1963) 59 C.2d 203, 28 C.R. 700, 379 P.2d 4, the Board, after the first decision, adopted a rule calling for no information but only for a statement that the property would not be knowingly used for the commission of any illegal act. *Held*, the rule was valid. It did not impose any censorship, for the matter to be presented at the meeting was not subject to disclosure; and it was not more objectionable than a requirement that an applicant for a permit to parade agree in advance to comply with existing regulatory ordinances. (59 C.2d 212.)

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c. Semipublic Forum.

7 *Witkin Sum. Cal. Law Const Law* § 395

[§ 395] Semipublic Forum.

In *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 C.A.3d 1157, 201 C.R. 837, the court, reviewing federal and state cases, approved the broad concept of a "semi-public forum," mainly on the basis of Cal. Const., Art. I, §2 (see *supra*, §312).

Lawrence Livermore Laboratory is owned by the federal government and run by the University of California under contract with the U.S. Department of Energy. It develops nuclear weapons and also does non-weapons-related research. Plaintiff Project is an unincorporated association that opposes the work of the Laboratory in the area of developing nuclear weapons and nuclear power. The Project requested permission to place literature and give periodic slideshows in the Visitors Center of the Laboratory, and use of the Laboratory's Auditorium for presentation of a program without the sponsorship of a Laboratory employee. On denial of these requests, the Project brought this action, and the superior court granted an injunction in accordance with the requests. *Held*, affirmed.

(a) The "public forum" concept "is a continuum, with public streets and parks at one end and government institutions like hospitals and prisons at the other." (154 C.A.3d 1164.) Streets and parks are "quintessential public forums"; use of other public property may be limited to activities "compatible with the intended purpose of the property." (154 C.A.3d 1165.)

(b) The primary purpose of the Center is to inform the public about the work of the Laboratory, and "it is difficult to see how dissemination of literature critical of the government's nuclear policy (and the Laboratory's role in that policy) could interfere with that purpose." (154 C.A.3d 1166.) "Visitors are allowed to roam freely around the Center, to pick up literature, study posters and other displays, and presumably to discuss all they are exposed to." (154 C.A.3d 1168.) Thus, the Project's right to access to the Center is protected by Cal. Const., Article I, §2, as a use compatible with the purpose and function of the Center. "Moreover, we consider it critically important for a government facility whose primary purpose is to describe and explain government activity or policy (which certainly includes the work of the Laboratory) to accommodate a meaningful exchange of views by the public." (154 C.A.3d 1169.)

(c) The Auditorium is neither a traditional public forum nor a "semi-public forum"; it is closer to the end of the continuum where prisons and hospitals would be placed. But the Laboratory allows outside groups to use the

Auditorium after normal working hours and on weekends for various purposes, so long as a Laboratory employee "sponsors" the outside group. This opened the forum; and even a content-neutral procedure regulating time, place, and manner of the activity must be fairly administered. Here, the condition of "sponsorship" is without standards or guidelines, and this unfettered discretion has the potential for becoming a means of suppressing a particular point of view. (154 C.A.3d 1172.)

(d) "A standardless policy like the employee-sponsorship requirement violates the free speech and assembly provisions of the state and federal Constitutions because it operates as a prior restraint on speech, since employees are free to decline sponsorship for any reason, including disagreement with the content (beliefs, political views, goals) of a group's proposed expressive activity. In addition, the policy has a significant 'chilling' effect on the exercise of free speech rights. It is probably inevitable that even an employee sympathetic to the views of an outside group critical of the employer would not feel free to ask that employer for permission for the group to present a program on the employer's property. And finally, the policy violates the equal protection provisions of the California and United States Constitutions because it allows the Laboratory to discriminate arbitrarily and capriciously against any given group seeking use of the auditorium even *with* employee sponsorship." (154 C.A.3d 1172.)

One justice, agreeing with the decision as to the Auditorium, dissented from the holding on the *Visitors Center*. (154 C.A.3d 1173.) (See 52 *Stanf. L. Rev.* 929 [limited public forum].)

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1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 396

[§ 396] In General.

In *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, Mosley picketed a Chicago high school carrying a sign charging discrimination against Blacks. The city then adopted an ordinance prohibiting all picketing within 150 feet of a school except "peaceful picketing of any school involved in a labor dispute." *Held*, the ordinance was a denial of equal protection. It described permissible picketing in terms of its subject matter; but picketing for nonlabor objectives cannot be subjected to this discriminatory treatment. "Some labor picketing is peaceful, some disorderly; the same is true for picketing on other themes. ... In seeking to restrict nonlabor picketing which is clearly more disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum." (92 S.Ct. 2293, 33 L.Ed.2d 220.) (See *Grayned v. Rockford* (1972) 408 U.S. 104, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227 [following *Mosley*; picketing of school by 200 persons to support black student demands]; 62 A.L.R.3d 227 [consumer picketing to protest products, prices, or services]; on politically motivated economic boycott, see *supra*, §386; on picketing at abortion clinics, see *infra*, §399 et seq.)

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2. By Labor Organizations.

7 *Witkin Sum. Cal. Law Const Law* § 397

[§ 397] By Labor Organizations.

(1) *Protected Against Injunction.* Peaceful picketing by labor organizations is regarded as an exercise of the rights of free speech and assembly. Hence, subject to certain restrictions on the object and means, it is protected against injunction by the First and Fourteenth Amendments. (See *Thornhill v. Alabama* (1940) 310 U.S. 88, 60 S.Ct. 736, 744, 84 L.Ed. 1093, 1102; *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza* (1968) 391 U.S. 308, 88 S.Ct. 1601, 1609, 20 L.Ed.2d 603, 614, 3 *Summary* (10th), *Agency and Employment*, §648 [shopping center]; *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1978) 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209, 3 *Summary* (10th), *Agency and Employment*, §650 [picketing on private property]; *In re Blaney* (1947) 30 C.2d 643, 650, 184 P.2d 892; 36 Cal. L. Rev. 1; *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31* (1964) 61 C.2d 766, 769, 40 C.R. 233, 394 P.2d 921, 3 *Summary* (10th), *Agency and Employment*, §648 [shopping center]; 6 *Hastings Const. L. Q.* 206 [*Sears, Roebuck & Co.*]; on picketing generally, see 3 *Summary* (10th), *Agency and Employment*, §643 et seq.; for restricted view of *Logan Valley* holding, see *supra*, §315.)

(2) *Invalid Temporary Restraining Order.* In *United Farm Workers v. Superior Court* (1975) 14 C.3d 902, 911, 122 C.R. 877, 537 P.2d 1237, B Co., operating fruit orchards, filed a complaint against the farmworkers union alleging mass picketing, trespass, and threats of violence to nonunion workers, endangering a \$ 500,000 apple crop. An ex parte temporary restraining order limiting picketing was obtained by B Co. without any attempt to give notice to the union or its counsel. *Held*, the order was a violation of the defendants' constitutional right of freedom of speech.

(a) *Procedural defects in issuance of ex parte orders.* As pointed out in *Carroll v. President & Commrs. of Princess Anne* (1968) 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325, *supra*, §392, ex parte proceedings (1) lack adequate factual and legal presentation of both sides, and (2) often result in overbroad orders framed with the assistance of only one party. (14 C.3d 908, 909.) Thus, in the instant case, the order prevented pickets from entering the company's property on which the farm labor camp was situated, and limited picketing on unproved allegations of violence. (14 C.3d 910.)

(b) *Unconstitutionality of orders.* An injunction may lie after a hearing on a showing of acts of violence or physical intimidation or other unlawful objects or activity. (14 C.3d 911, 912.) But short of a trial of the issues, picketing may be curtailed or prohibited only after notice and opportunity for hearing, or a reasonable and good faith effort to give it. The

possibility of "great or irreparable injury" is not enough to justify the brief delay required for notice and hearing. (14 C.3d 912.) The ex parte order is in violation not only of the federal Constitution's First and Fourteenth Amendments, but also of Cal. Const. Art. I, §2 (supra, §§311, 312). (14 C.3d 912.)

(c) *Effect on procedure to obtain injunctive relief.* This constitutional requirement must be read into the procedure prescribed by C.C.P. 527, for all cases involving First Amendment rights. (14 C.3d 913.) However, the prescribed procedure "remains adequate in all other instances, i.e., when a party seeks a temporary restraining order that is outside the area of First Amendment freedoms and does not substantially affect rights" defined in Cal. Const., "Art. I, §2. (14 C.3d 913, footnote 12.)

One justice briefly concurred only in the holding as to picketing in labor disputes, objecting to the "sweeping extension" to all free speech cases. (14 C.3d 914.) Two other justices joined in a concurrence and dissent that (1) argued against limiting the notice requirement to First Amendment freedom cases, and (2) disagreed with the majority's view on access to the farm labor camp. (14 C.3d 915, 919.) (See 64 Cal. L. Rev. 369.)

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3. Residential Picketing.

7 *Witkin Sum. Cal. Law Const Law* § 398

[§ 398] Residential Picketing.

(1) *In General.* In *Carey v. Brown* (1980) 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263, an Illinois statute prohibited picketing of residences or dwellings, but exempted "peaceful picketing of a place of employment involved in a labor dispute." *Held*, the statute, like the ordinance in *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, *supra*, §396, was a denial of equal protection. "On its face, the act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the Illinois statute is thus dependent solely on the nature of the message being conveyed." (100 S.Ct. 2290, 65 L.Ed.2d 269.) The court made it clear, however, that residential picketing was not beyond the reach of uniform and nondiscriminatory regulation. (100 S.Ct. 2295, 65 L.Ed.2d 265.)

A complete ban on residential picketing was upheld in *Frisby v. Schultz* (1988) 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420. The town board of Brookfield, Wisconsin, adopted an ordinance providing that "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town." Its primary purpose was "the protection and preservation of the home." Appellees, individuals strongly opposed to abortion, picketed the home of a doctor who performed abortions in clinics in neighboring towns, and brought an action in the federal district court under the federal Civil Rights Act (42 U.S.C., §1983) seeking declaratory and injunctive relief. The district court granted an injunction, and the Court of Appeals affirmed. *Held*, reversed; the ordinance was sufficiently narrow in scope to survive facial challenge.

(a) "To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ. ... Specifically, we have identified three types of fora: 'the traditional public forum, the public forum created by government designation, and the nonpublic forum.' " (108 S.Ct. 2499, 101 L.Ed.2d 428.)

(b) The public street is a traditional public forum, even though it runs through a residential neighborhood; hence, the antipicketing ordinance must be judged against the stringent standards established for restrictions on speech in that kind of forum. (108 S.Ct. 2500, 101 L.Ed.2d 429.) Accordingly, the questions are whether the ordinance is narrowly

tailored to serve a significant government interest, and whether it leaves open ample alternative channels of communication. Here, it is obvious that the narrow ban on focused picketing in front of a particular residence preserves ample alternative channels of communication. (108 S.Ct. 2501, 101 L.Ed.2d 431.)

(c) The ordinance also serves a significant government interest. "One important aspect of residential privacy is protection of the unwilling listener. ... [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." (108 S.Ct. 2502, 101 L.Ed.2d 431.)

(d) The ordinance is narrowly tailored to protect only unwilling recipients of the communications. "[T]he picketing is narrowly directed at the household, not the public. The type of picketers banned ... generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy." (108 S.Ct. 2503, 101 L.Ed.2d 433.)

Three justices dissented. (108 S.Ct. 2506, 2509, 101 L.Ed.2d 436, 439.) (See 102 Harv. L. Rev. 261; 113 A.L.R.5th 1 [validity and construction of statute or regulation forbidding or limiting peaceful residential picketing].)

(2) *Buffer Zone*. In *San Jose v. Superior Court (Thompson)* (1995) 32 C.A.4th 330, 38 C.R.2d 205, plaintiff picketers were charged with violating an ordinance of defendant city that prohibited picketing within 300 feet of a targeted residence. *Held*, the statute was constitutional.

(a) *Madsen v. Women's Health Center* (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, *infra*, §401, is not controlling. That case involved an *injunction*, instead of an *ordinance*, as was involved here. Ordinances represent a legislative choice regarding particular societal interests, while injunctions are remedies for violations, or threatened violations, of a legislative or judicial decree. While the former asks whether time, place, and manner regulations are narrowly tailored to fit a significant governmental interest, the latter applies the more stringent standard of inquiring whether there are alternative measures that would have less impact on protected speech. (32 C.A.4th 336, citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, *infra*, §464.)

(b) The ordinance in question is content-neutral in that it applies to all targeted picketing, no matter what the cause. Also, there were alternative forms of communication for plaintiffs to get their message across. The ordinance is valid, therefore, if it achieves a substantial governmental interest. The regulation does not have to be the least restrictive on speech of the alternatives available, but instead, has to be one that achieves a substantial governmental interest that could not be achieved as effectively without the regulation. (32 C.A.4th 337.)

(c) The substantial governmental interest that the ordinance furthers is the prohibition of targeted picketing within 300 feet of the home targeted. This type of picketing has been described by the U.S. Supreme Court as highly offensive conduct that disturbs the right of privacy and is not designed to reach the public at large. Hence, it is not entitled to the same level of First Amendment protection as speech designed to reach a wider audience. (32 C.A.4th 336, citing *Frisby*, *supra*.)

(d) The ordinance in question created a 300-foot buffer zone to protect residential privacy. This compares with buffer zones created by both California and out-of-state statutes and ordinances for various purposes, as well as with notice requirements in land use statutes, i.e., that notice be given to all houses within 300 feet of a home subject to a land use decision. These buffer zones vary from 200 to 1,000 feet, so 300 feet is not out of the ordinary. However, it is not the job of the courts to write the law. So long as the ordinance is not substantially broader than necessary to achieve the objective, it will be upheld. Put another way, an ordinance will not be invalidated just because there might be a less restrictive means. "[I]t is not the court's job to draw the line, and ... it is not a question of constitutional dimension whether the boundary line of the buffer zone could be somewhat tighter." (32 C.A.4th 338.)

(e) *Madsen's* distinction between reviewing an injunction and an ordinance is not arbitrary, but is a statesmanlike expression of the judiciary's role of review, considering the separation of powers. In other words, the judiciary does not

have plenary powers of review over the Legislature, but injunctions are written by trial courts and reviewed by the reviewing courts. Accordingly, a much broader review power may come into play when a court is reviewing an injunction, instead of an ordinance. (32 C.A.4th 342.)

(f) The present case involved a 300-foot buffer zone, while *Frisby* banned picketing "before or about" a residence. The more definite zone is preferable, because it informs both picketers and the police of what could be done. (32 C.A.4th 337.) (See *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 C.A.4th 290, 301, 57 C.R.2d 736 [injunction ordering protesters to stay at least 250 feet away from doctor's residence was not sufficiently precise where site of doctor's apartment in complex was not established and it could not be determined where measurement was to be taken from; restriction also denied protesters opportunity to deliver message to intended target and shifted burden of adverse consequences to doctor's neighbors].)

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e. Picketing of Abortion Clinics.

1. Earlier Cases.

7 *Witkin Sum. Cal. Law Const Law* § 399

[§ 399] Earlier Cases.

In *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 256 C.R. 194, plaintiff center operated an abortion clinic in the city of Chico. Defendants, Chico citizens, picketed the center on Saturdays, when abortions were performed, and made attempts to ascertain the identities of the clients. Plaintiff sought an injunction against this picketing on the ground that the identities were protected by the constitutional right of privacy. *Held*, assuming that the clients had a limited privacy interest on the public streets, an injunction against picketing in a "public forum" (the street) would be improper. *Frisby v. Schultz* (1988) 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420, *supra*, §398, states the principle that in a public forum a regulation must leave open ample alternative channels of communication, and an alternative channel does not exist if a speaker's target audience is altogether insulated from the speaker's message. (208 C.A.3d 244, 245, 246.) That is the case here. Plaintiff made no showing that defendants had any means of reaching their target audience if they were excluded from the vicinity on Saturdays. (208 C.A.3d 246.)

In *Feminist Women's Health Center v. Blythe* (1993) 17 C.A.4th 1543, 22 C.R.2d 184 (*Blythe I*), plaintiff clinic, located on the second floor of a medical building, provided abortions and other gynecological health care. Defendants engaged in repeated antiabortion demonstrations at the clinic; among other things, defendants blocked or impeded the entrance to the building and parking lot, making it difficult or impossible for patients to enter the clinic. Plaintiff obtained a permanent injunction prohibiting defendants (1) from any activity within a specified "speech free zone" in front of and on either side of the front door, (2) blocking ingress or egress to the building or parking lot, (3) making loud noise that interfered with clinic operations, or (4) harassing patients or staff in various specified ways. *Held*, affirmed.

(a) Defendants' exclusion from the parking lot is reasonable. The lot is private property, it is restricted to tenants and clients, and the building it serves is a small medical building, not a shopping mall or large retail establishment. (17 C.A.4th 1557, 1558.)

(b) The designation of a "speech free zone" is proper in light of the evidence. The exclusion from this zone is content-neutral and serves both the property rights of the clinic and the privacy rights of its patients. The presence of antiabortion activities directly in front of the clinic might force patients to go elsewhere or the clinic to discontinue its

services, thus compromising a woman's right to effectuate her abortion decision. (17 C.A.4th 1559.) Patients approaching the clinic must still pass areas where the defendants are permitted. Thus, the speech free zone is narrowly tailored to protect patients' privacy interests while leaving defendants ample alternatives for communication. (17 C.A.4th 1560.)

In *Real v. Feminist Women's Health Center* (1994) 512 U.S. 1249, 114 S.Ct. 2776, 129 L.Ed.2d 888, the U.S. Supreme Court granted certiorari, vacated the judgment, and remanded *Blythe* for consideration in light of *Madsen v. Women's Health Center* (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, *infra*, §401. In *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1652, 1653, 39 C.R.2d 189 (*Blythe II*), the court, concluding that *Madsen* did not alter the outcome, republished its prior opinion with modifications occasioned by *Madsen*. (See *infra*, §402; 101 Harv. L. Rev. 1856 [protesting outside medical facilities]; 29 U.C. Davis L. Rev. 471 [Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination]; on First Amendment rights at private medical clinics and other businesses generally, see *supra*, §315 et seq.)

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e. Picketing of Abortion Clinics.

2. Shasta-Diablo Case.

7 *Witkin Sum. Cal. Law Const Law* § 400

[§ 400] Shasta-Diablo Case.

In *Planned Parenthood Shasta-Diablo v. Williams* (1994) 7 C.4th 860, 30 C.R.2d 629, 873 P.2d 1224 (*Planned Parenthood I*), the court stated: "We are confronted in this matter with a collision between competing constitutional interests involving a subject of exceptional public concern. The precise question is whether, in granting and upholding a permanent injunction against anti-abortion protesters, the trial court and Court of Appeal properly balanced the free speech and assembly rights of the protesters, against the health and safety interests of women attempting to obtain medical services, including clinical abortions, in a private medical facility. We conclude that the injunction, as modified by the Court of Appeal, is constitutional and therefore shall affirm the judgment." (7 C.4th 864.)

Respondent clinic, located in a one-story building, operated a family planning clinic that provided a range of services, including abortions. Petitioners regularly gathered at the clinic to demonstrate against abortion; the number of demonstrators varied from 6 to as many as 100. They picketed on the sidewalk in front of the clinic as well as in the adjoining parking lot, delayed cars entering the lot, and pursued patients walking from their cars to the clinic or on the sidewalk. The picketers pressed antiabortion literature and plastic replicas of fetuses on patients attempting to enter the clinic, harassed clinic staff, photographed staff and patients, and recorded the license numbers of cars entering the lot. Plaintiff obtained a permanent injunction that, as modified by the Court of Appeal, enjoined petitioners from: (1) blocking entrances or exits to the clinic building; (2) recording the license numbers of cars; (3) photographing people entering or leaving the clinic; and (4) shouting at or touching physicians, staff, or patients, or making noise that could be heard inside the clinic. The injunction also restricted picketing to the public sidewalk across the street from the clinic building. The validity of the sidewalk exclusion was the sole issue on review. *Held*, the exclusion was valid.

(a) The public sidewalk directly in front of the clinic constitutes a public forum. Thus, the question is whether the restriction on picketing on that sidewalk is content-neutral, narrowly tailored to serve a significant governmental interest, and permits ample alternative channels of communication. (7 C.4th 869.)

(b) The place restriction here is content-neutral--it restricts all picketing to the sidewalk across the street and makes no reference whatsoever to content. (7 C.4th 869.) The injunction was impelled by petitioners' antiabortion protests and applies only to those activities, but that is because they were the only ones found to have harassed clinic patients and

staff. (7 C.4th 870.) The place restriction itself focuses exclusively on the *manner* and *location* of the expressive activities, insulating the clinic's patients and staff from close physical contact with petitioners--not from the content of their speech. A similar injunction might just as readily apply to pro-choice demonstrations or to other disruptive protests in close physical proximity to the clinic. (7 C.4th 871.)

(c) "The more difficult question is whether the interests served by the injunction are consonant with its scope. Is the place restriction narrowly tailored to advance significant governmental interests, and does it allow adequate alternative avenues of communication? On balance, we conclude that the place restriction serves a significant governmental interest in safeguarding the health and safety of the clinic's patients, and is narrowly tailored to further that interest. We also conclude that the restriction allows petitioners adequate alternative means of conveying their anti-abortion message." (7 C.4th 872.)

(d) The principle that permits regulation of disruptive expression outside of schools, courthouses, and individual residences applies equally to permit regulation of conduct incompatible with the health and safety of patients in a medical facility. (7 C.4th 872.) "This interest is particularly acute in the context of family planning clinics that perform the most intimate of medical services, including abortions. The constitutional right of privacy that guarantees a woman's freedom to choose an abortion ... defines an equally substantial governmental interest in assuring that they are performed in a safe and suitable environment." (7 C.4th 873.)

(e) The state's interest in protecting the health and safety of women seeking abortions extends beyond the clinic. Physical or emotional intimidation of patients outside the doctor's office poses serious health risks and may affect a patient's subsequent well-being. (7 C.4th 873, 874.) For that reason, "a considerable number of courts have upheld time, place and manner restrictions designed to temper the confrontational tactics of anti-abortion demonstrators and thereby alleviate the emotional distress and resulting health risks experienced by women entering and leaving family planning clinics." (7 C.4th 874.) And in the present case, "it was precisely the health and well-being of the clinic's patients that constituted the court's primary concern." (7 C.4th 875.) Therefore, "the place restriction serves a substantial governmental interest in protecting the patients' physical and emotional health and safety." (7 C.4th 876.)

(f) The state must choose a narrowly tailored means, but not necessarily the "least restrictive means," to achieve its interest. (7 C.4th 876.) Here, the threatening and intimidating behavior of the pickets was plainly inappropriate and not conducive to the health of the clinic's patients, and confining the demonstrations to an alternative site across the street responded most effectively to this threat by creating a "clear zone" for the patients. "Clear zones" have been sanctioned in a variety of demonstration contexts, including antiabortion protests. (7 C.4th 877.) Although they differ in their particular facts and geographic circumstances, these cases "all embrace, however, the principle that a 'clear zone' or 'free zone' around a health clinic that does not foreclose alternative, albeit less confrontational, means of communication present a narrowly tailored scheme for furthering the state's substantial interest in assuring the health and safety of women seeking abortions or other treatment." (7 C.4th 877, 878.)

(g) Finally, the place restriction allows adequate alternative avenues of communication. "The alternative site across the street from the clinic affords petitioners a vantage from which to picket and demonstrate that is reasonably close to the clinic and, judging from the photographic exhibits in the record, within plain view of their target audience, the clinic patients and staff. As noted above, petitioners do not contend that their signs cannot be seen or that their presence and views cannot readily be perceived by persons entering and leaving the clinic. Should anyone wish to be 'counseled' by or otherwise converse with petitioners, it is a short walk across the street." (7 C.4th 880, 881.)

One justice dissented, arguing that the majority's factual picture was "incomplete and misleading," and concluding that, while the decision to establish a buffer zone around the clinic was proper, the absolute prohibition of speech within that zone was not. (7 C.4th 883.) (See 22 *Pepperdine L. Rev.* 1190.)

In *Williams v. Planned Parenthood Shasta-Diablo* (1994) 513 U.S. 956, 115 S.Ct. 413, 130 L.Ed.2d 329, the U.S. Supreme Court granted certiorari, vacated the judgment, and remanded the case for consideration in light of *Madsen v.*

Women's Health Center (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, infra, §401. In Planned Parenthood Shasta-Diablo v. Williams (1995) 10 C.4th 1009, 43 C.R.2d 88, 898 P.2d 402 (Planned Parenthood II), the court reconsidered the matter and reaffirmed the judgment. (See infra, §402; 28 Southwestern U. L. Rev. 627 [Planned Parenthood; suffocation of free speech in California].)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

3. Right of Peaceable Assembly.

e. Picketing of Abortion Clinics.

3. Madsen Case.

7 *Witkin Sum. Cal. Law Const Law* § 401

[§ 401] Madsen Case.

In *Madsen v. Women's Health Center* (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, petitioners, who had been engaged in picketing a Florida abortion clinic operated by respondents, were enjoined from blocking or interfering with public access to the clinic and from physically abusing persons entering or leaving the clinic. Later, when respondents sought to broaden the injunction, the trial judge found that, despite the initial injunction, protesters continued to impede access to the clinic. In numbers ranging from a handful to 400, the demonstrators congregated on the street leading to the clinic and in the clinic's driveways, approached vehicles heading to the clinic, and made noise that could be heard in the clinic. They also picketed clinic employees' residences and gave their neighbors literature identifying the employees as baby killers. The trial judge found that the protests generally caused increased stress and anxiety among, and thus increased the health risks to, the patients, and that its original injunction had been insufficient to protect the health, safety, and rights of women seeking medical services. The court issued an amended injunction that (1) excluded demonstrators from a 36-foot buffer zone around the clinic entrances and driveway and on adjacent private property; (2) prohibited demonstrators from making noises within earshot of, or using images observable by, patients inside the clinic; (3) prohibited protesters within a 300-foot zone around the clinic from approaching patients who did not consent to talk; and (4) created a 300-foot buffer zone around the residences of clinic staff. *Held*, the restrictions are partially unconstitutional.

(a) The fact that the injunction restricts only the speech of antiabortion protesters does not make it content-based. An injunction, by its very nature, applies to and regulates the activities, and perhaps the speech, of a particular group. It does so, however, because of the group's past actions in the context of a specific dispute. Here, the court imposed restrictions on petitioners not because of their message, but because they repeatedly violated the court's original order. (114 S.Ct. 2523, 129 L.Ed.2d 606.) Hence, the injunction is not subject to the heightened scrutiny that applies to content-based restrictions. (114 S.Ct. 2524, 129 L.Ed.2d 607.)

(b) The differences between a generally applicable ordinance and an injunction—including the greater risk of censorship and discrimination posed by an injunction—require more stringent application of First Amendment principles to an injunction. (114 S.Ct. 2524, 129 L.Ed.2d 607.) Close attention to the fit between an injunction's objectives and its restrictions on speech is also consistent with the general rule that injunctive relief should be no more burdensome than

necessary. "Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (114 S.Ct. 2525, 129 L.Ed.2d 608.)

(c) The combination of governmental interests involved here--protecting a pregnant woman's freedom to seek lawful medical services, ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, protecting citizens' property rights, and assuring the medical privacy of clinic patients--is quite sufficient to justify an appropriately tailored injunction. (114 S.Ct. 2526, 129 L.Ed.2d 609, 610.)

(d) The 36-foot buffer zone around the clinic entrances and parking lot is valid. This zone requires petitioners to move to the other side of the street. However, given the narrow confines around the clinic and the failure of the first injunction to protect access, the impracticality of allowing petitioners to stand in the middle of the street, and the fact that petitioners were still no more than 10 to 12 feet from cars approaching and leaving the clinic and could still be seen and heard from the parking lots, the buffer zone, on balance, burdened no more speech than necessary to protect access to the clinic and promote an orderly flow of traffic. (114 S.Ct. 2526, 2527, 129 L.Ed.2d 610, 611.)

(e) The injunction included private property abutting the clinic in the 36-foot buffer zone. However, patients and staff do not have to cross the private property to reach the clinic, and there was no evidence that petitioners' activities on private property obstructed access or blocked vehicular traffic. Thus, this portion of the zone fails to serve significant government interests and is invalid. (114 S.Ct. 2528, 129 L.Ed.2d 611, 612.)

(f) The limited noise restrictions burden no more speech than necessary to ensure the health and well-being of the clinic's patients. Noise control is particularly important around medical facilities, and the First Amendment does not demand that patients undertake Herculean efforts to escape the cacophony of political protests. (114 S.Ct. 2528, 129 L.Ed.2d 612.)

(g) The blanket ban on all "images observable" is overbroad. Threats may be proscribed, but a prohibition on display of threatening signs would achieve this goal. And if a patient is bothered by an image, the clinic could pull its curtains. (114 S.Ct. 2529, 129 L.Ed.2d 612, 613.)

(h) The prohibition on uninvited approaches within 300 feet of the clinic burdens more speech than necessary to prevent intimidation and insure access. Lacking evidence that the protesters' speech is independently proscribable or is so infused with violence as to threaten physical harm, the provision cannot stand. (114 S.Ct. 2529, 129 L.Ed.2d 613.)

(i) The ban on picketing within 300 feet of the residences of clinic staff is too broad. The zone approved in *Frisby v. Schultz* (1988) 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420, supra, §398, was much smaller, and the prohibition there was limited to focused picketing in front of a particular residence. Here, a limitation on the time, duration, and number of pickets outside a smaller zone would appear to be sufficient. (114 S.Ct. 2529, 2530, 129 L.Ed.2d 613, 614.)

One justice, dissenting in part, expressed the view that injunctive relief should be judged by a more lenient standard than legislation. (114 S.Ct. 2531, 129 L.Ed.2d 615, 616.) Three justices, dissenting in part, believed that injunctive restrictions on speech should be subjected to strict scrutiny, and that the injunction was unconstitutional in its entirety. (114 S.Ct. 2534, 2538, 129 L.Ed.2d 620, 624.) (See 108 Harv. L. Rev. 271 [Madsen]; 25 Golden Gate L. Rev. 543 [same]; 29 McGeorge L. Rev. 94 [same]; 24 Pepperdine L. Rev. 203 [same]; 22 Western State L. Rev. 463 [same].)

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B. Scope of Protection.

3. Right of Peaceable Assembly.

e. Picketing of Abortion Clinics.

4. Subsequent Cases.

7 Witkin Sum. Cal. Law Const Law § 402

[§ 402] Subsequent Cases.

In *Real v. Feminist Women's Health Center* (1994) 512 U.S. 1249, 114 S.Ct. 2776, 129 L.Ed.2d 888, and *Williams v. Planned Parenthood Shasta-Diablo* (1994) 513 U.S. 956, 115 S.Ct. 413, 130 L.Ed.2d 329, the United States Supreme Court granted certiorari, vacated the judgments, and remanded *Feminist Women's Health Center v. Blythe* (1993) 17 C.A.4th 1543, 22 C.R.2d 184 (*Blythe I*), supra, §399, and *Planned Parenthood Shasta-Diablo v. Williams* (1994) 7 C.4th 860, 864, 30 C.R.2d 629, 873 P.2d 1224 (*Planned Parenthood I*), supra, §400, for consideration in light of *Madsen v. Women's Health Center* (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, supra, §401. In *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1652, 1653, 39 C.R.2d 189 (*Blythe II*), the court concluded that "application of the standard of review set forth in *Madsen* does not alter the outcome we reached in *Feminist Women's Health Center v. Blythe*," and republished its prior opinion with modifications occasioned by the holdings in *Madsen*.

In *Planned Parenthood Shasta-Diablo v. Williams* (1995) 10 C.4th 1009, 1012, 43 C.R.2d 88, 898 P.2d 402 (*Planned Parenthood II*), the court concluded that the injunction upheld in *Planned Parenthood I* "is equally valid under the new standard set forth in *Madsen*."

(a) On the threshold issue of content neutrality, the analysis in *Planned Parenthood I* is entirely consistent with that in *Madsen*. (10 C.4th 1019.) The target of the injunction was "petitioners' physical tactics, not their anti-abortion message." (10 C.4th 1020.)

(b) *Planned Parenthood I* and *Madsen* are also consistent on the nature and purpose of the place restrictions. The facts of the two cases are strikingly similar, although the buffer zone here was approximately 60 feet as compared to 36 feet in *Madsen*. (10 C.4th 1020.) "Thus, the 2 restrictions were essentially equivalent in size and function, the disparity between 36 and 60 feet--or approximately 8 yards--representing a relatively small difference in degree, attributable solely to the differing widths of the streets in question." (10 C.4th 1021.)

(c) *Madsen* thus supports the conclusion that the buffer zone here was justified by at least two significant governmental interests: (1) ensuring safety and order in the relatively restricted physical area surrounding the clinic, and (2) protecting unfettered access to and egress from the clinic. (10 C.4th 1021, 1022.)

(d) Finally, the buffer zone burdened no more speech than necessary to accomplish the state's interests, and thus satisfied the "somewhat more stringent" test articulated in *Madsen*. The physical layout of the clinic was such that one or two pickets could effectively block passage along the sidewalk and impede traffic. The preliminary injunction, which had allowed four picketers to remain on the sidewalk, had failed to protect the state's interests in protecting unimpeded access to the clinic and the well-being of patients. The buffer zone ameliorated the confrontational tactics of petitioners, but afforded them a reasonable vantage point from across the street to communicate their viewpoint. On balance, therefore, the buffer zone burdened no more speech than necessary to achieve the interests at stake. (10 C.4th 1023, 1024.) (See *San Jose v. Superior Court (Thompson)* (1995) 32 C.A.4th 330, 38 C.R.2d 205, supra, §398 [upholding ordinance limiting residential picketing, as applied to abortion picketers who were not allowed within 300 feet of abortion clinic staff members' homes]; *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 C.A.4th 290, 301, 57 C.R.2d 736 [15-foot buffer zone in front of clinic did not burden more speech than was necessary to prevent intimidation and permit access, but prohibition against approaching any clinic staff member, patient, or companion once that person has made it clear that she does not wish to be approached was unduly restrictive]; 51 *Hastings L. J.* 411 [The Freedom of Access to Clinic Entrances Act and *The Nuremberg Files* Web Site: Is the Site Properly Prohibited or Protected Speech?]; 23 *Pepperdine L. Rev.* 1026 [*Planned Parenthood II*]; 28 *Southwestern U. L. Rev.* 627 [*Planned Parenthood*]; 29 *U.C. Davis L. Rev.* 471 [Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination].)

In *Schenck v. Pro-Choice Network of Western New York* (1997) 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1, the Court applied *Madsen*. *Held*, a 15-foot buffer zone around abortion clinics' entrances, parking lots, and driveways did not burden more speech than necessary, but a 15-foot floating buffer zone around people entering and leaving the clinics was an unconstitutional burden on free speech. (117 S.Ct. 867, 868, 137 L.Ed.2d 21, 23.) A "cease and desist" exception for sidewalk counselors within a fixed buffer zone was a valid limitation based on previous harassment and intimidation of patients. (117 S.Ct. 870, 137 L.Ed.2d 26.) (See 111 *Harv. L. Rev.* 339 [*Schenck*]; 29 *McGeorge L. Rev.* 98 [same]; 50 *Stanf. L. Rev.* 179 [same].)

In *Hill v. Colorado* (2000) 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597, the Court applied *Madsen* and upheld Colorado's eight-foot buffer zone, distinguishing it from the floating buffer zone condemned in *Schenck*. The Colorado statute regulates speech-related conduct within 100 feet of the entrance to any health care facility. Within that zone, it is unlawful for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." (120 S.Ct. 2484, 147 L.Ed.2d 606.)

(a) *Content neutrality*. The statute is "content neutral." (1) It does not regulate speech; (2) it was not adopted because of any disagreement with the message it conveys; and (3) "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech." (120 S.Ct. 2491, 147 L.Ed.2d 613.)

(b) *Balancing of rights*. The right of every person "to be let alone" and the right of "passage without obstruction" must be balanced with other persons' freedom to communicate. Here, the statute only applies to communications that interfere with these rights rather than those involving willing listeners. (120 S.Ct. 2490, 147 L.Ed.2d 612.)

(c) *Statute is narrowly tailored to serve competing interests*. The 8-foot zone does not apply to demonstrators with signs who remain in place, and it should not affect the readers' ability to read the signs. Neither does it apply to speakers who remain in place. Unlike the 15-foot zone in *Schenck*, the 8-foot zone allows the speaker to communicate at a "normal conversational distance." (120 S.Ct. 2495, 147 L.Ed.2d 618, quoting *Schenck*.) Further, the statute places no limitations on the number, size, or content of the signs, nor on the number of speakers or the noise level. (120 S.Ct. 2495, 147 L.Ed.2d 618.)

Four justices concurred. (120 S.Ct. 2499, 147 L.Ed.2d 623.) Two justices joined in a lengthy dissent (120 S.Ct. 2503, 147 L.Ed.2d 627), reasoning that the statute is content-based, requiring application of the strict scrutiny test (120

S.Ct. 2505, 147 L.Ed.2d 630). (See 114 *Harv. L. Rev.* 289 [*Hill*]; 28 *Hastings Const. L. Q.* 187 [*Hill* and free speech balancing in U.S. and Canada]; 35 *U.C. Davis L. Rev.* 387 [*Hill*]; 36 *U.C. Davis L. Rev.* 787 [same].)

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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

B. Scope of Protection.

4. Right To Travel.

a. Interstate Travel.

7 *Witkin Sum. Cal. Law Const Law* § 403

[§ 403] Interstate Travel.

Early cases based the right of interstate travel on the Commerce Clause and the privileges and immunities of national citizenship. (See *Edwards v. California* (1941) 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119, *infra*, §§608, 1298.) Later cases invoked it in support of the right of indigents to relocate to obtain better welfare benefits, free from local legislative residence requirements (see *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600, 612, *infra*, §735), and to strike down local voting residence requirements (see *supra*, §245). (See 1 *Hastings Const. L. Q.* 153 [environmental rights and free travel rights]; 26 *Hastings L. J.* 849 [right to travel and exclusionary zoning]; 9 *Loyola L.A. L. Rev.* 192 [same]; 41 *Stanf. L. Rev.* 1557 [State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV]; 22 *U.C.L.A. L. Rev.* 1129 [strict scrutiny of right to travel]; 5 *U.S.F. L. Rev.* 330 [anti-hitchhiking laws].)

In *Jones v. Helms* (1981) 452 U.S. 412, 101 S.Ct. 2434, 69 L.Ed.2d 118, a Georgia statute made abandonment of a dependent child a misdemeanor, but raised the offense to a felony if a parent committed the offense within the state and then left the state. *Held*, the statute was valid. Unlike the situation in *Edwards v. California*, *supra*, the defendant parent had committed a crime in Georgia that qualified his right thereafter freely to travel interstate. "Thus, although a simple penalty for leaving a State is plainly impermissible, if departure aggravates the consequences of conduct that is otherwise punishable, the state may treat the entire sequence of events, from the initial offense to departure from the State, as more serious than its separate components." (101 S.Ct. 2441, 69 L.Ed.2d 127.) And the statute did not deny equal protection, for it applied equally to all parents residing in Georgia. (101 S.Ct. 2442, 69 L.Ed.2d 128.)

Attorney General of New York v. Soto-Lopez (1986) 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899, held that a New York State's civil service veterans' preference, granted only to those veterans who were residents of the state when they entered military service, was unconstitutional. The lead opinion of four justices attempts to clarify the constitutional foundation of the right to travel (or "migrate").

(a) "The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration, ... has been variously assigned to the Privileges and Immunities Clause of Art. IV, ... and to the Privileges and Immunities Clause of the Fourteenth Amendment. ... The right has also been inferred from the federal structure of government adopted by our Constitution. ... However, in light of the unquestioned historic acceptance of the principle of

free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitely in any particular constitutional provision." (106 S.Ct. 2320, 90 L.Ed.2d 905.)

(b) "A state law implicates the right to travel when it actually deters such travel, ... when impeding travel is its primary objective, ... or when it uses 'any classification which serves to penalize the exercise of that right.' ... Our right to migrate cases have principally involved the latter, indirect manner of burdening the right. More particularly, our recent cases have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents." (106 S.Ct. 2321, 90 L.Ed.2d 905, 906.)

(c) "Because the creation of different classes of residents raises equal protection concerns, we have also relied upon the Equal Protection Clause in these cases. ... Thus, in several cases, we asked expressly whether the distinction drawn by the State between older and newer residents burdens the right to migrate. Where we found such a burden, we required the State to come forward with a compelling justification." (106 S.Ct. 2321, 90 L.Ed.2d 906.)

(d) The New York limitation of civil service employment preference effectively penalizes otherwise qualified resident veterans, and the state "has not met its heavy burden of proving that it has selected a means of pursuing a compelling state interest which does not impinge unnecessarily on constitutionally protected interests." Hence, it violates the constitutionally protected rights to migrate and to equal protection of the law. (106 S.Ct. 2325, 90 L.Ed.2d 911.)

Three justices dissented. (106 S.Ct. 2328, 2329, 90 L.Ed.2d 914, 915.)

A number of cases have rejected right-to-travel claims (See *Tobe v. Santa Ana* (1995) 9 C.4th 1069, 1096, 1102, 1104, 40 C.R.2d 402, 892 P.2d 1145, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §62 [ordinance prohibiting camping and storage of personal property in public areas does not unconstitutionally restrict right of homeless to travel]; *Tolces v. Trask* (1999) 76 C.A.4th 285, 289, 90 C.R.2d 294 [suspending driver's license for nonpayment of child support under Welf.C. 11350.6 does not infringe on right to travel; suspension only limits mode of transportation]; *Niedle v. Work. Comp. App. Bd.* (2001) 87 C.A.4th 283, 288, 104 C.R.2d 534 [application of statute providing that employer is not liable for out-of-state vocational rehabilitation services unless they are more cost-effective than in-state services, to deny benefits to former resident for rehabilitation services that were more expensive in new home state than in California did not impede her right to travel; right does not obligate state to continue providing same benefits to former resident who has moved to another state]; 77 Cal. L. Rev. 595 [discussing intrastate travel as included in right to travel and arguing that "antihomeless" ordinances prohibiting sleeping in outdoor public areas are unconstitutional].)

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B. Scope of Protection.

4. Right To Travel.

b. International Travel.

7 *Witkin Sum. Cal. Law Const Law* § 404

[§ 404] International Travel.

(1) *In General*. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law of the Fifth Amendment." (*Kent v. Dulles* (1958) 357 U.S. 116, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204, 1210; see 95 Harv. L. Rev. 201; 20 Stanf. L. Rev. 839.) However, the foregoing case, dealing with the asserted discretion of the Secretary of State to deny passports to American Communists, found no clear congressional intent to confer this broad discretion and therefore did not reach the constitutional issue.

The right was more fully explored in later cases. In *Aptheker v. Secretary of State* (1964) 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992, the challenge was to a provision of the Subversive Activities Control Act of 1950, providing that when a Communist organization is registered, or ordered to register by final order of the board, it is unlawful for any member of the organization, with knowledge or notice of registration or the order, to apply for or use a passport. In October, 1961, the board made its order directing the Communist Party of the United States to register. Before issuance of the order, appellants, Elizabeth Flynn, Chairman of the Party, and Herbert Aptheker, editor of its organ "Political Affairs," both native-born citizens and residents, held valid passports. The Passport Office revoked them on advice of the State Department, and appellants sued for declaratory and injunctive relief in the district court. *Held*, the provision was unconstitutional.

(a) The right to travel is guaranteed by the *Due Process Clause*. (84 S.Ct. 1663, 12 L.Ed.2d 997.) And its unwarranted restriction cannot be justified on the theory that the restricted person may give up his or her membership in the organization, for freedom of association is itself a constitutional right. (84 S.Ct. 1664, 12 L.Ed.2d 998.)

(b) Although the Congressional purpose--protection of national security--is proper, restrictions that stifle personal liberties cannot be imposed where the purpose may be achieved by less drastic means. (84 S.Ct. 1665, 12 L.Ed.2d 999.)

(c) The restrictions imposed by §6 of the Act were too broad. They prohibited travel anywhere in the world outside the Western Hemisphere; they applied to a person regardless of lack of knowledge of the Communist nature of an organization and irrespective of his or her degree of activity and commitment to its aims; and they applied to a person regardless of the purpose of the travel. (84 S.Ct. 1666, 12 L.Ed.2d 1000.)

Hence, §6 was unconstitutional "on its face." "The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil,' ... yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms." (84 S.Ct. 1668, 12 L.Ed.2d 1002.)

Three justices dissented. (84 S.Ct. 1671, 12 L.Ed.2d 1006.) (See 78 Harv. L. Rev. 168, 195; 1 U.S.F. L. Rev. 212.)

(2) *Restrictions on Travel to Particular Country.* A different result was reached in *Zemel v. Rusk* (1965) 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179, which was decided before the 1978 addition to the Passport Act (22 U.S.C., §211a), expressly providing for travel restrictions under specified conditions. The Act provides that the Secretary of State may grant and issue passports under rules prescribed by the President. Before 1961, no passport was required for Western Hemisphere travel. When we broke diplomatic relations with Cuba, the Department of State prohibited travel there except under passports specifically endorsed as in the best interest of the United States. Here, appellant sought validation of his passport for the purpose of satisfying his curiosity about Cuban affairs, and brought this action for declaratory relief and injunction when refused. *Held*, the statute authorized this refusal, and is constitutional.

(a) *Kent v. Dulles*, *supra*, is distinguishable. It held that a passport could not be denied because of the political beliefs or associations of the applicant. Here, the denial was not because of anything connected with appellant but because of foreign policy considerations affecting all citizens. (85 S.Ct. 1279, 14 L.Ed.2d 188.)

(b) The State Department has concluded that a major Cuban goal is exportation of its Communist revolution to the rest of Latin America, and the United States and other OAS countries have taken measures to discourage travel, which is an important element in spreading of subversion. Also, the duty of the President to protect American citizens unlawfully arrested abroad must be considered; the conduct of Cuba justifies the fear of involving this nation in dangerous international incidents. (85 S.Ct. 1280, 14 L.Ed.2d 189.)

(c) The argument that the refusal infringes on the First Amendment by interfering with the flow of information is untenable. The Secretary's refusal is an inhibition of action, and cannot be distorted into an inhibition of information. "The right to speak and publish does not carry with it the unrestrained right to gather information." (85 S.Ct. 1281, 14 L.Ed.2d 190.)

Three dissenting justices in separate opinions respectively challenged the delegation of this legislative power to the executive, objected to the indiscriminate restrictions, and disputed the statutory authorization of the executive ruling. (85 S.Ct. 1282 et seq., 14 L.Ed.2d 192 et seq.) (See *United States v. Laub* (1967) 385 U.S. 475, 87 S.Ct. 574, 17 L.Ed.2d 526; *Regan v. Wald* (1984) 468 U.S. 222, 104 S.Ct. 3026, 3039, 82 L.Ed.2d 171, 187 [upholding treasury regulation prohibiting travel-related economic transactions with Cuba]; 79 Harv. L. Rev. 123 [Zemel]; 19 Stanf. L. Rev. 1369 [Laub]; 8 U.C. Davis L. Rev. 401 [Area Restrictions and the Right to Travel Abroad]; 13 U.C.L.A. L. Rev. 470 [Zemel].)

(3) *Restrictions on Collection of Benefits While Abroad.* *Califano v. Aznavorian* (1978) 439 U.S. 170, 99 S.Ct. 471, 58 L.Ed.2d 435, upheld the constitutionality of federal Supplementary Security Income legislation to aid the needy aged, blind, and disabled. The challenge was to a provision that benefits are not to be paid for any month that the recipient spends entirely outside the United States. *Held*: (a) Freedom of interstate travel is virtually unqualified; freedom to travel abroad, though recognized, is no more than an aspect of the "liberty" protected by the *Due Process Clause*. (99 S.Ct. 475, 58 L.Ed.2d 441.) Hence, unless the limitation imposed is wholly irrational, it is constitutional despite its incidental effect on international travel. (99 S.Ct. 475, 58 L.Ed.2d 442.) (b) Unlike the limitations in *Kent*, *Aptheker*, and *Zemel*, *supra*, the challenged legislation merely withdraws a governmental benefit during and shortly after an extended absence from this country. Congress may have decided to limit payments to those who need them in

the United States, or may have wanted to increase the likelihood that the money would be spent here. These objectives furnish a rational basis for the provision. (99 S.Ct. 475, 476, 58 L.Ed.2d 442, 443.)

(4) *National Security and Foreign Policy Considerations.* In *Haig v. Agee* (1981) 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640, Philip Agee, an American citizen formerly employed by the Central Intelligence Agency, began a campaign in European countries to expose CIA officers and agents and drive them out of the countries in which they were operating. He revealed identities of undercover agents and other classified information in violation of his express contract, prejudicing the ability of the United States to obtain intelligence. While he was residing in West Germany, the Secretary of State revoked his passport. *Held*, this action was within the statutory authority of the Secretary of State and was not violative of Agee's constitutional rights.

(a) "Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such it is subject to reasonable governmental regulation. The Court has made it plain that the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States." (101 S.Ct. 2781, 69 L.Ed.2d 661.)

(b) Agee's acts were not within the First Amendment protections. They jeopardized the national security and endangered the interests of other countries, creating serious problems for American foreign relations and foreign policy. Restricting his foreign travel was the only avenue open to the government to limit those activities. (101 S.Ct. 2782, 69 L.Ed.2d 663.) *Kent, supra*, involving denials of passports solely on the basis of political belief, is distinguishable. (101 S.Ct. 2780, 69 L.Ed.2d 660.) (See 10 *Hastings Const. L. Q.* 187 [*Haig*]; 56 *So. Cal. L. Rev.* 1321 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

1. General Principles and Tests.

a. Rights Are Not Absolute.

7 *Witkin Sum. Cal. Law Const Law* § 405

[§ 405] Rights Are Not Absolute.

The rights of free speech, press, and assembly are not absolute, and have been traditionally regulated in certain well defined fields. (See *infra*, §412 et seq.) As the court said in *Konigsberg v. State Bar* (1961) 366 U.S. 36, 81 S.Ct. 997, 1006, 6 L.Ed.2d 105, 116, 1 Cal. Proc. (4th), *Attorneys*, §391:

"At the outset we reject the view that freedom of speech and association ... as protected by the First and Fourteenth Amendments, are 'absolutes.' ... Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection. ... On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." (See 4 Rotunda, §20.7; 76 *Harv. L. Rev.* 755 [Supreme Court's balancing test]; 85 *Harv. L. Rev.* 1189, 1284 [security classifications and emergency powers]; 33 *Golden Gate L. Rev.* 1 [monetary damages for true threats by antiabortion activists]; 23 *Loyola L.A. L. Rev.* 763 [balancing process]; 70 *So. Cal. L. Rev.* 979 [Harm, Liberty, and Free Speech]; 52 *Southwestern U. L. Rev.* 231 [evaluating true threats under First Amendment]; 30 *U.C.L.A. L. Rev.* 405 [National Security Controls on the Dissemination of Privately Generated Scientific Information]; 32 *U.C.L.A. L. Rev.* 904 [acts of civil disobedience as protected expression].)

In considering the validity of a particular regulation, three important general principles have been applied:

(1) *Preferred position of freedoms.* In balancing competing public and private interests, First Amendment interests must be given preference. (See *infra*, §406.)

(2) *Clear and present danger test.* To justify a restriction of First Amendment rights, there must be a clear and present danger of serious public harm. (See *infra*, §407.)

(3) *Uncertainty and overbreadth.* Any restriction of First Amendment rights must be clear and confined to an area

of legitimate public concern. (See *infra*, §408.)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Rotunda 4th, §20.7; 118 Harv. L. Rev. 1709 [Speech Exceptions].

Konigsberg case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §375.



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C. Limitations on the Rights.

1. General Principles and Tests.

b. Preferred Position of Freedoms.

7 *Witkin Sum. Cal. Law Const Law* § 406

[§ 406] Preferred Position of Freedoms.

In balancing the various public and private interests involved, the freedoms of the First Amendment (as incorporated into the Fourteenth) must be given a preferred position. (See *Marsh v. Alabama* (1946) 326 U.S. 501, 66 S.Ct. 276, 280, 90 L.Ed. 265, 270, supra, §314; *Saia v. New York* (1948) 334 U.S. 558, 68 S.Ct. 1148, 1151, 92 L.Ed. 1574, 1578, infra, §464; *Kovacs v. Cooper* (1949) 336 U.S. 77, 69 S.Ct. 448, 454, 93 L.Ed. 513, 523, infra, §464; *New York Times Co. v. United States* (1971) 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, supra, §363; *Los Angeles Teachers Union, Local 1021, Amer. Federation of Teachers v. Los Angeles City Bd. of Education* (1969) 71 C.2d 551, 556, 78 C.R. 723, 455 P.2d 827; 4 Rotunda, §20.7; 2 Tribe, §11-1 et seq.) This means that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Shelton v. Tucker* (1960) 364 U.S. 479, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237, supra, §379.)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Rotunda 4th, §20.7.



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C. Limitations on the Rights. 1. General Principles and Tests. c. Clear and Present Danger Test.

7 *Witkin Sum. Cal. Law Const Law* § 407

[§ 407] Clear and Present Danger Test.

In *Schenck v. United States* (1919) 249 U.S. 47, 39 S.Ct. 247, 249, 63 L.Ed. 470, 473, an Espionage Act case, the court laid down the rule that, to justify deprivation of the constitutional right, it must appear that the utterances involve "a clear and present danger" of serious substantive evils. Although this view was not always followed at first, later cases have established it as a major test of statutory regulation in this field.

In *Bridges v. California* (1941) 314 U.S. 252, 62 S.Ct. 190, 194, 86 L.Ed. 192, 203, it was said that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

In *Thomas v. Collins* (1945) 323 U.S. 516, 65 S.Ct. 315, 322, 89 L.Ed. 430, 440, the court was even more emphatic, declaring that the restriction "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. ... Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

In *Pennekamp v. Florida* (1946) 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295, *infra*, §412, a contempt case, the Court conceded that as to what constitutes a clear and present danger to the fair administration of justice, "no definition could give an answer" (66 S.Ct. 1038, 90 L.Ed. 1304), and explained its application of the test as follows: "Whether the threat to the impartial and orderly administration of justice must be clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." (66 S.Ct. 1032, 90 L.Ed. 1298.)

In *Sun Co. of San Bernardino v. Superior Court* (1973) 29 C.A.3d 815, 105 C.R. 873, *infra*, §415, the court took note of criticisms of the test as giving either too much or too little protection to free speech, and approved the following statement of a commentator: "[T]he clear-and-present danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched." (29 C.A.3d 827.)

The clear and present danger test has been discussed in many other cases. (See *West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628, 1638, *infra*, §536; *Craig v. Harney* (1947) 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546, *infra*, §412; *Terminiello v. Chicago* (1949) 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131, *infra*, §458; *Dennis v. United States* (1951) 341 U.S. 494, 71 S.Ct. 857, 864, 95 L.Ed. 1137, 1151, *infra*, §471; *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 542, 171 P.2d 885, *supra*, §394; *Katzev v. Los Angeles* (1959) 52 C.2d 360, 366, 341 P.2d 310, *supra*, §367; *People v. American Auto Ins. Co.* (1955) 132 C.A.2d 317, 322, 282 P.2d 559, *infra*, §412.)

Commentary on the clear and present danger test has been extensive. (See 4 Rotunda, §20.12 *et seq.*; 2 Tribe, §12-9 *et seq.*; 70 *Cal. L. Rev.* 1159 [Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger]; 32 *McGeorge L. Rev.* 289 [free speech issues in connection with manuals and web sites providing detailed instruction on illegal activities]; 29 *Southwestern U. L. Rev.* 567 [Reckless Aiding and Abetting: Sealing the Cracks That Publishers of Instructional Materials Fall Through]; 16A *Am.Jur.2d* (1998 *ed.*), *Constitutional Law* §493 *et seq.*; on validity of emergency curfew regulations during periods of civil disturbance, see 2 *Cal. Crim. Law* (3d), *Crimes against Public Peace and Welfare*, §12.)

SUPPLEMENT: [This section is current through the latest supplement]

See 5 Rotunda 4th, §20.12 *et seq.*



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C. Limitations on the Rights. 1. General Principles and Tests. d. Uncertainty and Overbreadth. 1. In General.

7 Witkin Sum. Cal. Law Const Law § 408

[§ 408] In General.

(1) *Fair Notice and Improper Application of Statute.* The "void for vagueness" rule establishes a test of *certainty* in the statutory criteria of guilt under a criminal statute (see 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §40; supra, §134), which is particularly important in regulations affecting First Amendment freedoms. "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press." (*Winters v. New York* (1948) 333 U.S. 507, 68 S.Ct. 665, 667, 92 L.Ed. 840, 846; see *Papachristou v. Jacksonville* (1972) 405 U.S. 156, 92 S.Ct. 839, 843, 31 L.Ed.2d 110, 115 [vagrancy ordinance].)

The uncertainty challenge is usually coupled with the objection of *overbreadth*, i.e., that the statute punishes constitutionally protected conduct as well as acts that may validly be prohibited. A statute found to be *substantially* overbroad is subject to facial invalidation. (See *Houston v. Hill* (1987) 482 U.S. 451, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398, 408; 4 Rotunda, §§20.8, 20.9; 2 Tribe, §12-27 et seq.; on standing to raise overbreadth, see supra, §79.)

Thus, in *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, supra, §383, a Virginia statute making the solicitation of civil rights cases unlawful was held fatally uncertain. As construed by the state court it would have prohibited any arrangement by which prospective litigants were advised to seek other assistance of particular attorneys, so that a person who advised another that his or her legal rights had been infringed and referred that person to an attorney would be guilty of a crime. The mere existence of this kind of statute could eliminate all legal activity on behalf of civil rights. (83 S.Ct. 338, 340, 9 L.Ed.2d 417, 418.) Nor did it make any difference that the statute was challenged in an action for an injunction against its enforcement rather than a criminal prosecution for its violation. "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." (83 S.Ct. 338, 9 L.Ed.2d 418.)

(2) *Gang Activity.* Ordinances limiting the associational rights of gang members have been challenged on grounds

of overbreadth. (See *Chicago v. Morales* (1999) 527 U.S. 41, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67, 76 [declining to apply overbreadth doctrine to anti-loitering law because it did not have sufficiently substantial impact on conduct protected by First Amendment]; *People v. Acuna* (1997) 14 C.4th 1090, 1113, 60 C.R.2d 277, 929 P.2d 596, 13 Summary (10th), Equity, §73 [examining overbreadth and vagueness standards as applied to preliminary injunction prohibiting association by gang members in defined area]; *In re Englebrecht* (1998) 67 C.A.4th 486, 495, 498, 79 C.R.2d 89 [following *Acuna* on validity of nonassociation provision of preliminary injunction; however, restriction on gang members' possession of pagers and beepers in target area was overbroad]; *People v. Englebrecht* (2001) 88 C.A.4th 1236, 1261, 106 C.R.2d 738 [following *Acuna*; injunction limiting associational rights, dress, and hand signals of gang members in specific geographic area was not overly broad]; *Vo v. Garden Grove* (2004) 115 C.A.4th 425, 439, 444, 9 C.R.3d 257 [ordinance placing daytime curfew on minors' use of Internet at CyberCafes during school hours, requiring CyberCafes to have adult employee on premises at all times and uniformed security guard during certain hours, and requiring video surveillance, is content neutral time, manner, and place restriction narrowly tailored to serve significant government interest in curbing escalating violence and gang activity in and around CyberCafes]; 72 A.L.R.5th 1 [loitering statutes and ordinances].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Fair Notice and Improper Application of Statute*. See 5 Rotunda 4th, §§20.8, 20.9. (2) *Gang Activity*. See *People v. Colonia Chiques* (2007) 156 C.A.4th 31, 46, 67 C.R.3d 70 [curfew provision of gang injunction that prohibited "being outside" during curfew hours without defining "outside," and that provided exception for "legitimate meeting or entertainment activity" without defining those terms, was unconstitutionally vague]; 35 *Hastings Const. L. Q.* 287 [gang injunctions: selective enforcement as way to defeat discrimination].



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1. General Principles and Tests.

d. Uncertainty and Overbreadth.

2. Invalid Regulations.

7 Witkin Sum. Cal. Law Const Law § 409

[§ 409] Invalid Regulations.

In *Cramp v. Board of Public Instruction of Orange County, Florida* (1961) 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285, a Florida statute required every public employee to execute a written oath that he or she had never lent his or her "aid, support, advice, counsel or influence to the Communist Party." Failure to subscribe was subject to the penalty of immediate discharge. *Held*, the statute was void. The court, illustrating its "extraordinary ambiguity," observed that it could conceivably be applied to one who voted for a candidate endorsed by the party, to a lawyer who represented the party or its members, or to a journalist who defended their constitutional rights. (82 S.Ct. 280, 7 L.Ed.2d 291.)

The *Cramp* case was followed in *Baggett v. Bullitt* (1964) 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377, involving a Washington state oath for teachers. The teacher was required to swear that he was not a "subversive person" and did not advise or teach another to commit or aid in revolution, etc. Holding the requirement void for vagueness, the court said: "Persons required to swear they understand this oath may quite reasonably conclude that any person who aids the Communist Party or teaches or advises known members of the Party is a subversive person because such teaching or advice may now or at some future date aid the activities of the Party." (84 S.Ct. 1320, 12 L.Ed.2d 383.) The court found further uncertainty as to whether the statute covered support for Communist candidates for office, legal representation of a *Communist, etc.* (84 S.Ct. 1320, 12 L.Ed.2d 383.)

The dissenters thought that the oath was narrower than that condemned in the *Cramp* case, and that *Gerende v. Board of Supervisors of Elections of Baltimore City* (1951) 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745, *infra*, §484, was controlling. "It is unfortunate that *Gerende* is overruled so quickly." (84 S.Ct. 1328, 12 L.Ed.2d 391.) "Where does this leave the constitutionality of the Smith Act?" (84 S.Ct. 1329, 12 L.Ed.2d 392.)

In *Coates v. Cincinnati* (1971) 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214, a city ordinance made it a criminal offense for "three or more persons to assemble ... on any of the sidewalks ... and there conduct themselves in a manner annoying to persons passing by." *Held*, it was void on its face. (a) It was unconstitutionally vague, for it specified no standard of conduct and did not indicate what activities were regulated. (91 S.Ct. 1688, 29 L.Ed.2d 217.) (b) It was unconstitutionally broad in punishing protected conduct, i.e., free assembly and association; these cannot be prohibited merely because they may be annoying to some. (91 S.Ct. 1689, 29 L.Ed.2d 218.)

In *People v. Tisbert* (1992) 11 C.A.4th Supp. 1, 14 C.R.2d 128, a Los Angeles county ordinance regulated solicitation on county property. Defendant set up a table near the entrance to a courthouse to collect signatures for proposed ballot initiatives. He was charged with a misdemeanor, and appealed from his conviction. *Held*, reversed. The ordinance was not narrowly tailored to protect the county's interests, but instead authorized the county to determine which types of solicitation would be allowed, based on the specific content of the solicitation. (11 C.A.4th Supp. 4.) The court relied mainly on *People v. Fogelson* (1978) 21 C.3d 158, 145 C.R. 542, 577 P.2d 677, *supra*, §79, and *Cox v. Louisiana* (1965) 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487, *infra*, §462, and the opinion concludes with this observation: "[T]he most egregious portion of the ordinance is the provision which allows solicitation for 'other causes deemed meritorious by the board of supervisors.' ... The ordinance contains no specific limitations or standards to safeguard against the unfettered discretion the county could exercise in determining which causes are 'unmeritorious.' " (11 C.A.4th 7.)

Many other cases invoke one or both of the two tests in holding regulations invalid. (See *Gooding v. Wilson* (1972) 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408, *infra*, §458 ["opprobrious words or abusive language tending to cause a breach of peace"; overbroad]; *Hynes v. Mayor & Council of Borough of Oradell* (1976) 425 U.S. 610, 96 S.Ct. 1755, 1761, 48 L.Ed.2d 243, 253 [ordinance requiring advance notice to police department by any person desiring to engage in door to door solicitation for charitable cause or political campaign; vague]; *Board of Airport Commrs. of Los Angeles v. Jews for Jesus* (1987) 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 [airport board resolution banning "First Amendment activities" in central terminal area; overbroad]; *In re Porterfield* (1946) 28 C.2d 91, 110, 168 P.2d 706 [ordinance requiring license for solicitation of union memberships; definite standards lacking]; *Katzev v. Los Angeles* (1959) 52 C.2d 360, 341 P.2d 310, *supra*, §367 [ordinance prohibiting sale of "crime comic book" failed to define crime and standards of guilt with certainty]; *Van Nuys Publishing Co. v. Thousand Oaks* (1971) 5 C.3d 817, 97 C.R. 777, 489 P.2d 809, *supra*, §350 [ordinance prohibiting deposit of literature on property of another without prior consent; overbroad]; *Young v. Municipal Court* (1971) 16 C.A.3d 766, 769, 94 C.R. 331, *supra*, §324 [blanket prohibition of all peddling on public streets; overbroad]; *Ketchens v. Reiner* (1987) 194 C.A.3d 470, 475, 477, 239 C.R. 549 [Education Code provisions on insulting and abusing teacher; denial of preliminary injunction reversed on ground that plaintiffs would probably prevail in their challenge]; *Gatto v. Sonoma* (2002) 98 C.A.4th 744, 774, 120 C.R.2d 550 [dress code for entry into county fair that prohibited wearing apparel "intended to provoke, offend, or intimidate others ... including offensive slogans, insignia or 'gang colors' " is unconstitutionally vague and overbroad in failing to provide ascertainable standards and in failing to specify types of apparel that justify restriction].)

SUPPLEMENT: [This section is current through the latest supplement]

See *ARP Pharmacy Services v. Gallagher Bassett Services* (2006) 138 C.A.4th 1307, 1315, 1320, 42 C.R.3d 256 [C.C. 2527, which requires drug claim processors to obtain and transmit drug processing cost reports to their clients, is unconstitutional content-based regulation of compelled speech; statute did not satisfy strict scrutiny required for regulation of speech because it was not narrowly tailored to accomplish compelling state interest of encouraging insurers to pay pharmacists fair rate for drug-dispensing services, and it did not have least restrictive impact on processors' right to free speech].



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3. Valid Regulations.

7 Witkin Sum. Cal. Law Const Law § 410

[§ 410] Valid Regulations.

A statute will be upheld despite ambiguities if it has a "core" of proscribed conduct. (See *Bailey v. National City* (1991) 226 C.A.3d 1319, 1329, 277 C.R. 427; *People v. Antoine* (1996) 48 C.A.4th 489, 495, 56 C.R.2d 530, citing the text [overbreadth concept deals with statutes that punish both constitutionally protected conduct and acts that validly may be prohibited; carjacking statute (P.C. 215; see 2 Cal. Crim. Law (3d), *Crimes Against Property*, §§101, 102) is not overbroad].) And a statute will be upheld if its terms can be made reasonably certain by reference to other definable sources (*Costa Mesa v. Soffer* (1992) 11 C.A.4th 378, 387, 13 C.R.2d 735), or if its terms have a long-standing, judicially recognized meaning (*People v. Barrera* (1993) 14 C.A.4th 1555, 163, 18 C.R.2d 395 [P.C. 206, defining crime of torture, is constitutional]).

Other cases, sometimes by construction, find the statute valid. (See *Grayned v. Rockford* (1972) 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, *infra*, §492 [anti-noise ordinance prohibiting disruption of school activity; sufficiently clear]; *United States Civil Service Com. v. National Assn. of Letter Carriers, AFL-CIO* (1973) 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796, *supra*, §253 [reversing finding of overbreadth where administrative practice, incorporated by statute, provided adequate notice]; *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362, 372 [applying *Grayned* standards to ordinance prohibiting sale of drug paraphernalia, and holding it valid]; *In re Kay* (1970) 1 C.3d 930, 83 C.R. 686, 464 P.2d 142 [construing statute narrowly to avoid unconstitutional overbreadth]; *Welton v. Los Angeles* (1976) 18 C.3d 497, 505, 134 C.R. 668, 556 P.2d 1119, *supra*, §119 [construction]; *People v. Gudger* (1994) 29 C.A.4th 310, 320, 34 C.R.2d 510 [P.C. 76, prohibiting threat against life of state official, requires specific intent to make threat and apparent ability to carry it out; because statute punishes true threats, rather than mere hyperbole, it is not overbroad]; on constitutionality of ordinances targeting gang activity, see *supra*, §408.)

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e. Uneven Application.

7 *Witkin Sum. Cal. Law Const Law* § 411

[§ 411] Uneven Application.

People v. Stanistreet (2002) 29 C.4th 497, 127 C.R.2d 633, 58 P.3d 465, 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority, Supp.*, §28, held that P.C. 148.6, making it a misdemeanor to file an allegation of misconduct against a peace officer knowing it to be false, is constitutional on its face. The statute only proscribes unprotected speech, and the fact that it proscribes unprotected speech only against peace officers and not against other government employees does not make it unconstitutional. Allegations of misconduct against peace officers have substantial secondary effects, requiring agency investigation and retention of complaints and resulting reports for at least 5 years. (29 C.4th 506, 508, applying the content discrimination analysis of *R.A.V. v. St. Paul, Minnesota* (1992) 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305, *infra*, §459.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

2. Interference With Judicial Process.

a. Publications as Contempt.

7 *Witkin Sum. Cal. Law Const Law* § 412

[§ 412] Publications as Contempt.

The inherent power of courts to punish for indirect contempt (committed outside the court) is a familiar example of permitted limitations on free speech and press. (See 7 *Cal. Proc. (4th), Trial*, §182.) However, the exercise of this power was greatly limited by *Bridges v. California* (1941) 314 U.S. 252, 62 S.Ct. 190, 197, 86 L.Ed. 192, 207, which applied the "clear and present danger" test, and held that the publication cannot be punished unless it has a *substantial*, and not merely a *reasonable*, tendency to interfere with judicial functions or obstruct justice.

Later decisions were even more explicit. In *Pennekamp v. Florida* (1946) 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295, petitioners published newspaper editorials to the general effect that county judges were favoring criminals and hindering their prosecution by legal technicalities. Some of the illustrative cases mentioned were still pending in the legal sense (proceedings after verdict). *Held*, contempt judgment reversed. (a) Although public comment on a pending legal proceeding may not be as free as public comment after complete disposal of the litigation, the discussion after termination of the case "may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct." (66 S.Ct. 1037, 90 L.Ed. 1303.) (b) The publication here dealt with the *attitude* of judges toward those accused of crime; it did not comment on evidence of rulings during a jury trial. The effect on the administration of justice is not so grave and substantial as to justify the limitation of free discussion. (66 S.Ct. 1038, 90 L.Ed. 1304.)

In *Craig v. Harney* (1947) 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546, a newspaper editorial severely castigated a judge's directed verdict in a civil case, calling it a travesty of justice. Again the contempt judgment was reversed: "[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." (67 S.Ct. 1255, 91 L.Ed. 1552.) (See *In re Sawyer* (1959) 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473, 1 *Cal. Proc. (4th), Attorneys*, §561 [attorney's criticism of judge's rulings in pending case; disciplinary order reversed]; on media publications generally, see 7 *Cal. Proc. (4th), Trial*, §§221, 222.)

Another aspect of this topic was examined in *People v. American Auto. Ins. Co.* (1955) 132 C.A.2d 317, 282 P.2d 559, on unique facts. Defendant insurance companies placed advertisements in national magazines, stating in substance that excessive damage awards in negligence cases were resulting in higher insurance premiums to the injury of all policyholders, and urging that policyholders bear this in mind when serving as jurors. This proceeding in quo warranto

sought to restrain the future publication of the material as an interference with the judicial process. *Held*, the contempt cases were controlling and relief should be denied. "[H]owever intemperate the language, false the charges, or unfair the criticism, they do not admit of judicial restraint or punishment unless there is an immediate, clear and present danger imperiling the administration of justice." (132 C.A.2d 322.)

The restrictive influence of the *Bridges*, *Pennekamp*, and *Craig* cases was manifested again in *Wood v. Georgia* (1962) 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569. A county judge, in the middle of a political campaign, directed the grand jury to investigate what appeared to be corrupt black "bloc voting" and vote selling in the county. The charge was made in open court with the press present on request. Petitioner, the county sheriff, was campaigning for an elective office. He issued a press release criticizing the judge's action as political intimidation in the guise of law enforcement, and delivered an open letter to the grand jury, implying that the charge was false, and asserting that the local Democratic Executive Committee was the corrupting agent. *Held*, contempt adjudication reversed. Although the state court held that petitioner's conduct did present a clear and present danger to proceedings of the grand jury, the record contained no evidence or findings to show any kind of disturbance of its functioning--only the conclusion of the court below based on allegations in the contempt citation. Thus, the test was not met. (82 S.Ct. 1371, 1372, 8 L.Ed.2d 578, 579.) (See 76 Harv. L. Rev. 130.)

SUPPLEMENT: [This section is current through the latest supplement]

Indirect contempt:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §168.

In re Sawyer case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §501.

Media publications:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §§208, 209.



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

2. Interference With Judicial Process.

b. Court's Control Over Publicity.

1. Right of Media To Report Proceedings.

7 *Witkin Sum. Cal. Law Const Law* § 413

[§ 413] Right of Media To Report Proceedings.

(1) *In General.* The problem of balancing First Amendment rights with the requirements of orderly judicial process arises also in connection with publicity of court proceedings. Newspapers and radio and television broadcasters are free to attend and to report the proceedings of a public trial. (See 2 *Cal. Proc.* (4th), *Courts*, §39; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§351, 357; on exceptions to public trial requirement for marital, custody, adoption, and Juvenile Court proceedings, see 2 *Cal. Proc.* (4th), *Courts*, §38.)

In *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399, a West Virginia statute made it a misdemeanor for a newspaper to publish the name of a minor charged as a juvenile offender without written approval of the juvenile court. Defendant obtained the name of a juvenile offender from witnesses, police, and an assistant prosecuting attorney, and the name was broadcast over three radio stations. Defendant then included the minor's name in an article and was indicted. *Held*, the statute was unconstitutional.

(a) State action punishing the publication of truthful information "seldom can satisfy constitutional standards." (99 S.Ct. 2670, 61 L.Ed.2d 405, citing *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, *infra*, §430, *Oklahoma Publishing Co. v. District Court, Oklahoma County* (1977) 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355, *infra*, §414, and *Landmark Communications v. Virginia* (1978) 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1, 2 *Cal. Proc.* (4th), *Courts*, §66.) Although these cases involved situations where the government itself provided or made possible press access to the information, that factor is not controlling. "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." (99 S.Ct. 2671, 61 L.Ed.2d 405.)

(b) The interest advanced by the state is protection of the anonymity of the juvenile offender. But the state's policy may have to be subordinated to a constitutional right (such as the right of confrontation). (99 S.Ct. 2671, 61 L.Ed.2d 405, 406.) And, even assuming a state interest of the highest order, the statute involved here does not accomplish its purpose, for any other kind of publication, e.g., radio broadcasting, is allowed. (99 S.Ct. 2672, 61 L.Ed.2d 406.) (See *San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 C.A.3d 188, 206, 283 C.R. 332, *infra*, §422 [juvenile court may not restrict press's right to publish lawfully obtained information]; *KGTV Channel 10 v. Superior Court* (1994) 26 C.A.4th 1673, 1675, 1682, 32 C.R.2d 181, *infra*, §414 [same]; 7 *Hastings Const. L. Q.* 352 [

Smith].)

(2) *Scope of Right*. The media's right to attend and report on trial proceedings includes the following:

(a) A right of access to former jurors. (See *Contra Costa Newspapers v. Superior Court* (1998) 61 C.A.4th 862, 868, 72 C.R.2d 69 [trial court's blanket order forbidding press contact with former jurors was without jurisdiction and was impermissibly overbroad]; 17 *Pepperdine L. Rev.* 357 [right of access to juror's identity].)

(b) In some cases, the right to learn the amount of a settlement. (*Copley Press v. Superior Court* (1998) 63 C.A.4th 367, 376, 74 C.R.2d 69 [student's interest in sealing amount of settlement in action against school district, which arose out of brutal assault by other students, did not outweigh public right of access to court records and to know what transpires in public schools].)

(c) The right to report information about unlawful detainer actions. (See *U.D. Registry v. California* (1995) 34 C.A.4th 107, 110, 114, 40 C.R.2d 228, 4 *Summary* (10th), *Sales*, §299 [C.C. 1785.13(a)(3), making it unlawful for consumer credit reporting agency to report any unlawful detainer action unless lessor is prevailing party, is unconstitutional prohibition on truthful reporting of publicly available information]; 69 *So. Cal. L. Rev.* 1105 [reexamination of access doctrine]; 44 *U.C.L.A. L. Rev.* 1567 [propriety of restricting truthful reporting of public record information].)

(3) *Valid Limitations on Interviews With Prisoners*. Reporting the proceedings of a public trial must be distinguished from personal interviews with prisoners. The news media have no special right of access to a jail or prison to interview prisoners or make sound recordings or films for publication or broadcasting, and state and federal prison regulations prohibiting these interviews have been upheld against constitutional challenge. (See *Pell v. Procunier* (1974) 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495; *Saxbe v. Washington Post Co.* (1974) 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514; *Houchins v. KQED* (1978) 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553; 92 *Harv. L. Rev.* 174; 30 *McGeorge L. Rev.* 125 [need for First Amendment right of access to inmates].)

(4) *Disclosure of Grand Jury Testimony*. In *Butterworth v. Smith* (1990) 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572, a Florida criminal statute prohibited a grand jury witness from ever disclosing testimony that he gave before that body. S, a newspaper reporter, obtained information about improprieties in the Charlotte County State Attorney's Office and Sheriff's Department, and was called to testify before a special grand jury. After termination of the investigation, S decided to publish an article or book that would include his testimony, and sought an injunction against a threatened prosecution. *Held*, the statute was unconstitutional.

(a) The proper functioning of a grand jury system depends on the secrecy of grand jury proceedings; and the Court must balance the asserted First Amendment rights against the state's interest in preserving confidentiality. (110 S.Ct. 1380, 1381, 108 L.Ed.2d 580, 581.)

(b) "When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape--that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on the other. There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over. Similarly, the concern that some witnesses will be deterred from presenting testimony due to fears of retribution is, we think, not advanced by this prohibition; any witness is free *not* to divulge his own testimony, and that part of the Florida statute which prohibits the witness from disclosing the testimony of *another* witness remains enforceable under the ruling of the Court of Appeals." (110 S.Ct. 1381, 108 L.Ed.2d 582.)

(c) "Against the state interests ... must be placed the impact of Florida's prohibition on respondent's ability to make a truthful public statement. The effect is dramatic: before he is called to testify in front of the grand jury, respondent is possessed of information on matters of admitted public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information since it relates to the 'content, gist, or import' of his testimony. The ban extends not merely to the life of the grand jury but into the indefinite future.

The potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent." (110 S.Ct. 1383, 108 L.Ed.2d 583, 584.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Right to attend and report on public trial:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §33 et seq.

Exceptions:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §34. *Landmark Communications case:*

Cross-Reference: 2 Cal. Proc. (5th), Courts, §68.(4) *Disclosure of Grand Jury Testimony.* See *Alvarez v. Superior Court* (2007) 154 C.A.4th 642, 655, 64 C.R.3d 854, 4 Cal. Crim. Law (3d), *Pretrial Proceedings, Supp.*, §167 [in ruling on postindictment motion under P.C. 938.1 to keep grand jury transcripts sealed until completion of trial, trial court erred in applying First Amendment standard for denying public access of "substantial probability" of prejudice; trial court should have applied lesser "reasonable likelihood" standard of P.C. 938.1].



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C. Limitations on the Rights.

2. Interference With Judicial Process.

b. Court's Control Over Publicity.

2. Juvenile Delinquency Proceedings.

7 *Witkin Sum. Cal. Law Const Law* § 414

[§ 414] Juvenile Delinquency Proceedings.

In *Oklahoma Publishing Co. v. District Court, Oklahoma County* (1977) 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355, B, a juvenile, was charged with delinquency as a result of the murder of a railroad switchman. At the juvenile detention hearing, reporters and photographers were present, and the juvenile's name and picture were published in petitioner's newspapers and broadcast by radio and television stations. At a subsequent closed arraignment hearing, the judge entered a pretrial order enjoining the news media from publishing B's name or picture in connection with the proceeding. *Held*, the order was void. (a) Under *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, *infra*, §430, and *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, *infra*, §415, a state court cannot prohibit the publication of information obtained in court proceedings that were in fact open to the public. (b) These cases are controlling despite the fact that the state statute provides for closed juvenile hearings; members of the press were in fact present, with the full knowledge of the judge, prosecutor, and defense counsel, and no objection was made to their presence or to photographing the juvenile as he left the courthouse. Thus, his name and picture were "publicly revealed in connection with the prosecution of the crime," as was that of the rape victim in *Cox Broadcasting*. (97 S.Ct. 1047, 51 L.Ed.2d 358.)

The same approach was used, and the same result reached, in *KGTV Channel 10 v. Superior Court* (1994) 26 C.A.4th 1673, 32 C.R.2d 181, where the media published the full name of a 17-year-old minor charged with murder and showed footage of her being escorted into a building after her arrest. The juvenile court allowed the press to attend the subsequent detention hearing, but it issued a minute order prohibiting the media from disclosing the minor's name or publishing her likeness in connection with reports of the hearing. *Held*, the order was an unconstitutional prior restraint.

(a) The United States Supreme Court has consistently held that the press cannot be prohibited from publishing information lawfully obtained inside and outside the courtroom. (26 C.A.4th 1679, 1680, 1681), discussing *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399, *supra*, §413, and *Nebraska Press Assn. v. Stuart*, *Oklahoma Publishing*, and *Cox Broadcasting*, *supra*. California cases have reached similar conclusions. (26 C.A.4th 1681, discussing *San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 C.A.3d 188, 283 C.R. 332, *infra*, §422.) "Under *Smith* and *San Bernardino County Dept. of Public Social Services* then, the media has a right to investigate, gather information about the minor outside the courtroom and disseminate it without

interference by the court. The juvenile court in our case apparently recognized this principle." (26 C.A.4th 1682.)

(b) The juvenile court failed to appreciate that under Welf.C. 676 (10 Summary (10th), *Parent and Child*, §811), which requires public admission to juvenile hearings where the charge is murder, the media also had a right to attend the detention hearing and to report activities that occurred inside the courtroom. (26 C.A.4th 1682.)

(c) "Under *Nebraska Press, Cox Broadcasting* and *Oklahoma Publishing*, the court may not enjoin the press from reporting true information disclosed at a public hearing or in records without running afoul of the First and Fourteenth Amendments. In exactly the same way here, if reporters attend Niki's detention hearing, learn her name at the hearing and see she is the same juvenile arrested and pictured a few days earlier, the court cannot order their silence." (26 C.A.4th 1682.) (See 16 J. Juvenile Law 281.)

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3. Control To Insure Fair Trial.

7 *Witkin Sum. Cal. Law Const Law* § 415

[§ 415] Control To Insure Fair Trial.

(1) *In General.* If the exercise by the media of the right to attend and publicize a criminal trial is so abused as to prejudice the defendant's right to a fair trial, the court can and should impose appropriate restraints; and in the absence of these restraints, improper publicity may be a denial of due process and ground for reversal of a conviction. (See *Estes v. Texas* (1965) 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, 5 Cal. Crim. Law (3d), *Criminal Trial*, §362 [televised trial]; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, 5 Cal. Crim. Law (3d), *Criminal Trial*, §362 [massive publicity]; on criminal defendant's right to discover relevant evidence consisting of broadcaster's tapes and films, see *CBS v. Superior Court* (1978) 85 C.A.3d 241, 251, 252, 149 C.R. 421; on public broadcast of criminal trial, see *infra*, §417.)

(2) *Improper Prior Restraint.* Current studies and judicial pronouncements in this field were carefully reviewed in *Sun Co. of San Bernardino v. Superior Court* (1973) 29 C.A.3d 815, 105 C.R. 873, applying the clear and present danger test (*supra*, §407) to nullify a "gag order." Two convicts were charged with the murder of another convict, and the district attorney planned to call nine other inmates as witnesses. He asked for an order prohibiting newspaper publication of the true names or photographs of these witnesses, asserting and offering evidence to show that this publicity might subject them to reprisals from other prisoners, that in consequence they might refuse to testify, and that in view of their long sentences, contempt would be a useless sanction. The judge made the order, effective for a 6-month period or until further order, and petitioners, newspapers of general circulation, sought mandamus to compel its vacation. *Held*, writ granted.

(a) The Warren Commission and the Kaufman and Reardon Committees recommended restraints on pretrial publicity to protect the right of fair trial; but their proposals were for regulation of courtroom hearings and restriction on *participants* in the trial, i.e., prohibitions against lawyers and court personnel furnishing information to the press. No direct restraints on publication by the press were favored. (29 C.A.3d 823.)

(b) In reliance on the dictum in *Sheppard, supra*, gag orders have been imposed by some trial courts without judicial disapproval, but other courts, sometimes invoking the clear and present danger test, have held the orders void as unwarranted prior restraints. (29 C.A.3d 828.)

(c) In the instant case, the showing did not meet the test. (1) The possibility of refusal of the witnesses to testify was pure speculation, for none had declined to do so. (2) The publicity would not involve additional danger to their lives for their identities had already been disclosed in pretrial discovery proceedings, and their appearance as witnesses would again result in disclosure. Moreover, they were in protective custody. (29 C.A.3d 830.)

(d) A prior restraint on publication to insure a fair trial should rarely be employed. "(1) The historical background of the current fair trial-free press issue reflects that it arose in a relatively few 'sensational' jury cases which generated great public interest. On the other hand, the vast majority of criminal actions (such as the one under review) excite little, if any, public interest and receive minimum coverage. Ordinarily, it is only the most unusual criminal matter--the outrageous offense or one involving a prominent victim or an infamous defendant--that generates public attention; and (2) even in the infrequent notorious case, a prior restraint on publication should be considered only upon presentation of strong proof that the publication sought to be restrained meets the clear-and-present danger standard. In balancing the constitutional right to a fair trial against the rights of a free press, it should be emphasized that sufficient legal safeguards presently exist to assure the defendant of a fair trial--e.g., change of venue, *voir dire* examination and challenge of prospective jurors, jury sequestration, mistrial, new trial, appeal and habeas corpus. On the other hand, in only an insignificant number of cases does the publicity factor affect the prosecution's right to due process. In those instances, the vast financial resources and manpower available to the government for investigating and litigating criminal actions, as well as for counteracting any unfavorable publicity, should likewise be kept firmly in mind before the issuance of any order amounting to a direct prior restraint on publication." (29 C.A.3d 830.)

In *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, S was bound over for trial on a charge of murder. The Nebraska district court issued an order, to apply only until the jury was impaneled, prohibiting petitioners--press and broadcast associations, publishers, and reporters--from reporting such matters as confessions or admissions of the defendant and other implicating facts. The Nebraska Supreme Court upheld the order as modified. *Held*, reversed.

(a) Decisions on the Sixth Amendment guarantee of trial by an impartial jury (see 5 Cal. Crim. Law (3d), *Criminal Trial* §§361, 362) are instructive. (96 S.Ct. 2799, 49 L.Ed.2d 693.) They demonstrate that even pervasive, adverse pretrial publicity does not inevitably lead to an unfair trial. The measures a judge takes or fails to take to mitigate the effects of this publicity may well determine whether the defendant receives a trial consistent with due process. (96 S.Ct. 2800, 49 L.Ed.2d 695.)

(b) The First Amendment cases on prior restraints (see *supra*, §§359, 363) are also relevant. (96 S.Ct. 2801, 49 L.Ed.2d 695.) The thread running through all of them is that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." (96 S.Ct. 2802, 49 L.Ed.2d 697.) The extraordinary protections afforded by the First Amendment "carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly," to protect the rights of an accused to a fair trial by unbiased jurors. (96 S.Ct. 2803, 49 L.Ed.2d 698.)

(c) The authors of the Bill of Rights did not assign priorities between the First and Sixth Amendments, and it is unnecessary to do so. (96 S.Ct. 2803, 49 L.Ed.2d 699.)

(d) The instant case must be decided by examining the evidence before the trial judge to determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger." (96 S.Ct. 2804, 49 L.Ed.2d 699.) The record is insufficient to show that other measures would not have been effective (96 S.Ct. 2805, 49 L.Ed.2d 701), and it is not clear that the restraint on publication would have protected the defendant's rights (96 S.Ct. 2806, 49 L.Ed.2d 702). Moreover, the order improperly prohibited the reporting of evidence adduced at an open preliminary hearing; "once a public hearing had been held, what transpired there could not be subject to prior restraint." (96 S.Ct. 2807, 49 L.Ed.2d 703.)

(d) "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met." (96 S.Ct. 2908, 49 L.Ed.2d 704.)

A concurring opinion of three justices takes the strong position that prior restraints are constitutionally impermissible, and that the judges must use other devices for insuring a fair trial. (96 S.Ct. 2809, 2828, 49 L.Ed.2d 705, 724.) (See *KCST-TV Channel 39 v. Municipal Court* (1988) 201 C.A.3d 143, 145, 147, 246 C.R. 869 [under *Nebraska Press* and *Oklahoma Publishing Co. v. District Court, Oklahoma County* (1977) 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355, supra, §414, court could not make order temporarily prohibiting television station from exhibiting lawfully obtained drawing of criminal defendant]; *South Coast Newspapers v. Superior Court* (2000) 85 C.A.4th 866, 872, 102 C.R.2d 487 [following *Nebraska Press*; order prohibiting publication of legally obtained, "nontilted" pictures of defendants (pictures in which defendants' faces were not obscured) was illegal prior restraint where there was no evidence that publication would taint victims' in-court identification and adequate procedures were available to safeguard defendants' interests in avoiding tainted in-court identification]; on publication of confidential matters presented in judicial disciplinary proceeding, see *Landmark Communications v. Virginia* (1978) 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1, 2 Cal. Proc. (4th), Courts, §66 [criminal penalties cannot be imposed on third parties--nonparticipants in the proceeding]; on prior restraints generally, see supra, §359 et seq.)

(3) *No Prior Restraint*. In *Broadman v. Commission on Judicial Performance* (1998) 18 C.4th 1079, 77 C.R.2d 408, 959 P.2d 715, the court held that a judicial canon prohibiting a judge's public comment on a pending case was not an impermissible restriction on public speech. The burden the canon imposed on the general interest of judges in making public comments on court proceedings was outweighed by the benefits it achieved in furthering the state's interest in the soundness of judicial system. (18 C.4th 1103.) (See *San Jose Mercury News v. Criminal Grand Jury Santa Clara County* (2004) 122 C.A.4th 410, 417, 18 C.R.3d 645 [grand jury proceedings are typically secret and admonition to witnesses not to reveal information about investigation, questions asked, or responses given, to extent it prevented plaintiff newspaper from obtaining information from witnesses, was not prior restraint].)

(4) *Texts and Law Reviews*. Commentary on the issues involved in these cases has been extensive. (See 4 Rotunda, §20.18; 90 Harv. L. Rev. 159; 91 Harv. L. Rev. 1899 [trial secrecy and right of public access]; 68 Cal. L. Rev. 83 [First Amendment Standards for Subsequent Punishment for Dissemination of Confidential Government Information]; 6 Golden Gate L. Rev. 101 [Judicial Control of Pretrial and Trial Publicity]; 4 Hastings Const. L. Q. 187 [gag orders]; 22 Hastings Const. L. Q. 405 [rethinking jury's representative function in highly publicized cases]; 27 Hastings L. J. 1369 [Gag Orders on Criminal Defendants]; 45 So. Cal. L. Rev. 51 [gag orders]; 69 So. Cal. L. Rev. 827 [arguing that ban on cameras in federal criminal courtrooms is unconstitutional]; 29 Stanf. L. Rev. 383 [Symposium on *Nebraska Press* case]; 44 Stanf. L. Rev. 927 [Newsgathering, Press Access, and the First Amendment]; 10 U.S.F. L. Rev. 391 [protecting criminal defendant from adverse publicity]; 56 A.L.R.4th 1214 [order precluding publicity about pending civil case by counsel, parties, or witnesses].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Improper Prior Restraint*. See *Freedom Communications v. Superior Court* (2008) 167 C.A.4th 150, 154, 83 C.R.3d 861 [in action by newspaper carriers claiming wage and meal break violations, order enjoining defendant newspaper from reporting on trial testimony, to prevent witnesses from being influenced by testimony of others, was unconstitutional prior restraint under both U.S. and California Constitutions; gag order did not apply to other newspapers, and witnesses could have been admonished not to read press accounts of trial]. *Landmark Communications* case:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §68.

(4) *Texts and Law Reviews*. See 5 Rotunda 4th, §20.18.



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4. Unauthorized Photographs of Courtroom Proceedings.

7 *Witkin Sum. Cal. Law Const Law* § 416

[§ 416] Unauthorized Photographs of Courtroom Proceedings.

In *Marin Independent Journal v. Municipal Court* (1993) 12 C.A.4th 1712, 16 C.R.2d 550, the court upheld the application of C.R.C., Rule 980, prohibiting photography or electronic media coverage of courtroom proceedings unless authorized by written order. Petitioner's photographer, aware that she had no authorization to take photographs, entered a courtroom in which a suspect was being arraigned and snapped three still pictures of him. The judge ordered the bailiff to seize the film, and petitioner sought mandamus, challenging the confiscation as an unconstitutional prior restraint of speech. *Held*, writ denied.

(a) The media are entitled to attend and report on open judicial proceedings, but under C.R.C., Rule 980, electronic recording of the proceedings is subject to the court's discretion. (12 C.A.4th 1728.) Seizure of the film simply enforced the Rule by precluding publication of photographs that should never have been taken; the seizure is little different from a refusal of permission to photograph in the first instance. "[W]e seriously question whether confiscation of photographs which should never have been taken and which could have been, as they were in this case, totally disallowed, is a prior restraint of protected speech." (12 C.A.4th 1719.)

(b) Assuming, however, that the seizure was a prior restraint, it was justified because the photographs were obtained unlawfully in a deliberate violation of a rule of court. A review of decisions of the U.S. Supreme Court, including *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, *infra*, §430, *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, *supra*, §415, *Oklahoma Publishing Co. v. District Court, Oklahoma County* (1977) 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355, *supra*, §414, and *The Florida Star v. B.J.F.* (1989) 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443, *infra*, §430, makes it clear that news reporters may not violate the law and then hide behind the protective cloak of the *First Amendment*. (12 C.A.4th 1719 et seq.)

(c) "It cannot be seriously maintained that a reporter could break into a sealed court file and remove a confidential document, or surreptitiously open a sealed search warrant affidavit including the name of a confidential informant cooperating with police at risk of life and limb, and remove it from the courthouse without permission. Nor could a reporter break into the courthouse and remove a sealed document and then rely on First Amendment absolution. We think the law clearly permits the court to confiscate such stolen items and prevent their removal." (12 C.A.4th 1721.)

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5. Public Broadcast of Trial.

7 *Witkin Sum. Cal. Law Const Law* § 417

[§ 417] Public Broadcast of Trial.

In *Chandler v. Florida* (1981) 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740, the Court held that a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused. The case involved a trial conducted under Florida's experimental program permitting electronic media coverage of judicial proceedings, subject to strict controls and the judge's discretionary power to forbid coverage where it might have a deleterious effect on the defendant's right to a fair trial. The Court first analyzed the six opinions in *Estes v. Texas* (1965) 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, 5 Cal. Crim. Law (3d), *Criminal Trial*, §362, concluding that *Estes* did not announce a constitutional rule barring all media coverage; it then rejected the suggestion that it promulgate a per se rule.

(a) The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials; "so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. ... [T]he appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case--be it printed or broadcast--compromised the ability of the particular jury that heard the case to adjudicate fairly." (101 S.Ct. 810, 66 L.Ed.2d 752.) The contention that displaying the accused on television is itself a denial of due process cannot be accepted in the absence of empirical data. (101 S.Ct. 812, 66 L.Ed.2d 754.)

(b) Defendants have failed to show that their trial was compromised by the television coverage (as was the case in *Estes*). (101 S.Ct. 813, 66 L.Ed.2d 755.)

(c) Despite the dangers involved, the states must be free to experiment. "Absent a showing of prejudice of constitutional dimensions to these defendants, there is no reason for this Court either to endorse or to invalidate Florida's experiment." (101 S.Ct. 813, 66 L.Ed.2d 757.)

A concurring justice thought *Estes* was not successfully distinguished and should be overruled. (101 S.Ct. 814, 66 L.Ed.2d 759.) (On televising trials, see 37 *Santa Clara L. Rev.* 879; 69 *So. Cal. L. Rev.* 1519; 28 *West L.A. L. Rev.* 293.)

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6. Discovery Protective Order.

7 *Witkin Sum. Cal. Law Const Law* § 418

[§ 418] Discovery Protective Order.

A protective order preventing dissemination of information gained through discovery does not violate the First Amendment where that order (1) is entered on a showing of good cause; (2) is limited to the context of pretrial civil discovery; and (3) does not restrict the dissemination of the information if that information is gained from other sources. (*Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17, 29, 2 Cal. Evidence (4th), Discovery, §21 [protective order relating to information concerning membership in plaintiff's religious foundation and sources of foundation's financial support]; see *In re Marriage of Candiotti* (1995) 34 C.A.4th 718, 724, 40 C.R.2d 299 [following *Seattle Times*; protective order restricting ex-wife from disseminating information about ex-husband's new wife was proper as to information acquired by discovery; as to independently acquired information, it was undue prior restraint on speech]; *Hurvitz v. Hoefflin* (2000) 84 C.A.4th 1232, 1244, 101 C.R.2d 558 [following *Candiotti*; nonparty patients' right to privacy does not justify prior restraint, especially when information is already public]; *Maggi v. Superior Court* (2004) 119 C.A.4th 1218, 1225, 15 C.R.3d 161 [following *Hurvitz*; prohibiting plaintiffs and their counsel from contacting certain third party witnesses without court permission and from accepting representation of new plaintiffs in any actions against defendants, as remedy for alleged violation of protective order, constituted invalid restraint on speech].)

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See *Doe 1 v. Superior Court* (2005) 132 C.A.4th 1160, 1172, 34 C.R.3d 248, 1 Cal. Evidence (4th), Circumstantial Evidence, Supp., §153 [applying rule of *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17, text, p. 693, to "proffer protocols" compiled by church to provide information about notice issue without disclosing personnel files that were subject to objections; barring release of proffers did not act as prior restraint because they were used by parties as substitute for formal discovery and were creatures of court's processes].



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2. Interference With Judicial Process.

c. Public Access to Court Proceedings.

1. Criminal Pretrial Hearing.

7 *Witkin Sum. Cal. Law Const Law* § 419

[§ 419] Criminal Pretrial Hearing.

(1) *Preliminary Hearing*. The California Constitution's provisions on right to public trial (Cal. Const., Art. I, §15) and freedom of speech and the press (Cal. Const., Art. I, §2(a)) do not guarantee public access to preliminary hearings; hence, P.C. 868, allowing a defendant to obtain a closed hearing, is constitutional. (*San Jose Mercury-News v. Municipal Court* (1982) 30 C.3d 498, 507, 179 C.R. 772, 638 P.2d 655.)

However, when a defendant requests closure under P.C. 868 to protect his or her right to a fair trial, the hearing may be closed only if *specific findings* are made demonstrating that (a) "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent," and (b) "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." (*Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 106 S.Ct. 2735, 2743, 92 L.Ed.2d 1, 16; see *Eversole v. Superior Court* (1983) 148 C.A.3d 188, 195, 195 C.R. 816, 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §137 [magistrate erred under P.C. 868.7 in failing to consider alternatives to closure of hearing during examination of minor victim]; on exclusion of public and attendance at preliminary hearings generally, see 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §135 et seq.)

(2) *Suppression Hearing When Defendant Requests Closure*. In *Gannett Co. v. DePasquale* (1979) 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, counsel for the defendants in a New York murder trial moved to suppress evidence illegally obtained. At the pretrial hearing of the motion, they argued that continuous adverse publicity in petitioners' newspapers was making it difficult for the defendants to receive a fair trial, and accordingly requested that the public and press be excluded from the hearing. The motion was unopposed by the prosecution; and the judge, on a finding that an open hearing would be prejudicial, granted the motion. The New York Court of Appeals upheld the ruling. *Held*, affirmed.

(a) *Dangers of publicity concerning pretrial hearing*. Under *Sheppard v. Maxwell* (1966) 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, 5 Cal. Crim. Law (3d), *Criminal Trial*, §362, the trial judge has an affirmative duty to minimize the effects of pretrial publicity, and closure of pretrial proceedings is often one of the most effective methods of insuring against dissemination of inadmissible prejudicial information about a defendant. (99 S.Ct. 2904, 61 L.Ed.2d 620.)

(b) *Sixth Amendment does not give public right to attend.* The public trial guarantee of the Sixth Amendment, binding on the states under the Fourteenth, is for the benefit of the defendant. (99 S.Ct. 2907, 61 L.Ed.2d 622.) And the common law rule of open civil and criminal proceedings has not been elevated to the status of a constitutional right. (99 S.Ct. 2908, 61 L.Ed.2d 625.) However, if it could be assumed that the Sixth Amendment does embody the common-law right of the public to attend criminal *trials*, no such right was recognized as to *pretrial* proceedings, which involve the dangers mentioned above. Hence, "we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." (99 S.Ct. 2911, 61 L.Ed.2d 628.)

(c) *First Amendment does not give public right to attend.* Assuming that the First Amendment, binding on the states under the Fourteenth, may guarantee access to criminal trials in some situations (a question not decided), the trial judge's action gave appropriate deference to the right. (1) There was no objection from any member of the public when the motion was made. (2) The judge balanced the rights of the public against the defendants' right to a fair trial. (3) The denial of access was only temporary; when the danger of prejudice had dissipated, a transcript of the hearing was made available to press and public. Under these circumstances, "any First and Fourteenth Amendment right of the petitioner to attend criminal trial was not violated." (99 S.Ct. 2912, 61 L.Ed.2d 630.)

Three justices concurred separately and four dissented. (See 93 Harv. L. Rev. 62; 7 Hastings Const. L. Q. 339, 625; 7 Pepperdine L. Rev. 283; 59 So. Cal. L. Rev. 603.)

(3) *Suppression Hearing When Prosecution Requests Closure.* To close a suppression hearing over the defendant's objections, the prosecution must "advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (*Waller v. Georgia* (1984) 467 U.S. 39, 104 S.Ct. 2210, 2216, 81 L.Ed.2d 31, 39 [closure of entire suppression hearing was unjustified].)

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c. Public Access to Court Proceedings.

2. Criminal Trial.

7 *Witkin Sum. Cal. Law Const Law* § 420

[§ 420] Criminal Trial.

(1) *In General.* In *Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973, the Court held that in the absence of some overriding interest, the trial of a criminal case must be open to the public. Although only one justice dissented, there were six opinions expressing differing reasons for the decision. (See 94 *Harv. L. Rev.* 20, 149 [*Richmond Newspapers*]; 59 *So. Cal. L. Rev.* 603 [same]; 12 *Southwestern U. L. Rev.* 431 [same]; 14 *U.C. Davis L. Rev.* 1081 [same]; 36 *U.C.L.A. L. Rev.* 609 [same]; on right to broadcast executions, see 43 *Hastings L. J.* 1489.)

In *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248, a Massachusetts statute required exclusion of the press and public from the courtroom at trials for specified sexual offenses involving victims under 18, during the testimony of a victim. *Held*, the mandatory statute was unconstitutional.

(a) *Richmond Newspapers v. Virginia*, *supra*, "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." (102 S.Ct. 2618, 73 L.Ed.2d 255.) Two features of the criminal justice system explain why this right of access is afforded protection by the First Amendment: (1) The criminal trial historically has been open to the press and general public. (2) The right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole. It enhances the quality and safeguards the integrity of the factfinding process, fosters an appearance of fairness, and permits the public to participate in and serve as a check on the judicial process. (102 S.Ct. 2619, 2620, 73 L.Ed.2d 256, 257.) "In sum, the institutional value of the open criminal trial is recognized in both logic and experience." (102 S.Ct. 2620, 73 L.Ed.2d 257.)

(b) The right is not absolute; but where, as here, the state attempts to deny it, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. (102 S.Ct. 2620, 73 L.Ed.2d 257.)

(c) The interest in safeguarding the physical and psychological well-being of a minor is a compelling one, but it does not justify a mandatory closure rule. A trial court can determine on a case-by-case basis whether closure is necessary. Thus, in the instant case, the names of the minor victims were already in the public record, and they may

have been willing to testify despite the presence of the press. (102 S.Ct. 2621, 73 L.Ed.2d 258.)

(d) The interest in encouragement of minor victims of sex crimes to come forward and provide accurate testimony likewise does not support the statute. The claim that automatic closure will lead to an increase in the number of these witnesses is speculative and questionable. Thus, though barred from the courtroom, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Also, the same interest could be relied on to support an array of mandatory closure rules, for minor victims of sex crimes are not the only crime victims who, because of publicity, are reluctant to testify. "The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*." (102 S.Ct. 2622, 73 L.Ed.2d 259.)

Two dissenting justices deplored the "disturbing paradox" of *valid* closure rules to protect minors *charged* with crime and *invalid* closure rules protecting *minor victims* of sex crimes; they also contended that *Richmond Newspapers* did not support the result reached by the majority, and that the interests asserted by Massachusetts were sufficient to overcome the constitutional challenge. (102 S.Ct. 2623 et seq., 73 L.Ed.2d 260 et seq.) (See 11 *Hastings Const. L. Q.* 637; 23 *Santa Clara L. Rev.* 947.)

(2) *Public Access to Presented Evidence*. "[A]bsent a showing that providing access would create a significant risk of impairment of the integrity of the evidence, the court must make evidence previously presented to a jury in open court reasonably available to the public." (*KNSD Channels 7/39 v. Superior Court* (1998) 63 C.A.4th 1200, 1205, 74 C.R.2d 595 [access to audiotape played for jury in open court].) And even when the public is excluded from a preliminary hearing during the examination of a witness under P.C. 868.7 (see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §137), a transcript of the testimony of the witness must be made available to the public. (P.C. 868.7(b).)

(3) *Public Access to Probation Reports*. Probation reports are open to the public without restriction for 60 days after judgment. After that time, the general public, including reporters, can gain access only "by order of the court." (P.C. 1203.05.) In considering a petition for access, the court must do more than simply weigh the defendant's constitutional right of privacy against the public's common law right of access. First, the defendant must receive notice of the petition and be given an opportunity to be heard. Then, if the defendant requests a hearing, the court must balance the defendant's interest in keeping the information confidential against the potential benefit to be gained from disclosure. Personal information may be redacted from the report before it is released. (*People v. Connor* (2004) 115 C.A.4th 669, 696, 9 C.R.3d 521, 3 *Cal. Crim. Law* (3d), *Punishment, Supp.*, §528.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *People v. Jackson* (2005) 128 C.A.4th 1009, 1022, 27 C.R.3d 596, 2 *Cal. Proc.* (5th), *Courts*, §43 [applying *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 86 C.R.2d 778, 980 P.2d 337, text, §423; trial court properly balanced public's right of access to court proceedings with privacy interests of minors and unindicted coconspirators, and with defendant's right to fair trial, in sealing search warrant affidavit, motion to set aside indictment, and related documents in action charging famous musical performer with sexual molestation of minor; however, order sealing indictment would be reversed where names of unindicted coconspirators could be redacted].



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3. Jury Voir Dire.

7 Witkin Sum. Cal. Law Const Law § 421

[§ 421] Jury Voir Dire.

(1) *Voir Dire Examination*. The guarantee of open public proceedings in a criminal trial applies to a voir dire examination. (*Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629; see 16 A.L.R.5th 152 [exclusion of public and media from voir dire examination of prospective jurors in state criminal case]; 5 Cal. Crim. Law (3d), *Criminal Trial*, §354.)

(2) *Voir Dire Questionnaires*. In *Copley Press v. Superior Court* (1991) 228 C.A.3d 77, 278 C.R. 443, a trial for murder with special circumstances, the trial court, pursuant to C.C.P. 205 and local court rules, distributed a detailed questionnaire to 300 prospective jurors. Petitioner, publisher of the San Diego Union, was denied access to the questionnaires and petitioned for mandamus. The Court of Appeal, relying on *Press-Enterprise*, *supra*, granted the writ. Thereafter the Supreme Court directed that the opinion be vacated and the matter considered anew in light of *Lesher Communications v. Superior Court* (1990) 224 C.A.3d 774, 274 C.R. 154. The Court of Appeal, pursuant to the direction, issued its opinion as modified.

(a) *Lesher* held that the public or press does not have the right of access to jury questionnaires filled out by venirepersons who are *not called* to the jury box for oral voir dire; and that holding is accepted in modifying the earlier opinion. Petitioner and the superior court also contend that *Lesher* raises another distinction between the two cases as to whether questions dealing with juror qualification are confidential. "We disagree. It is apparent that the questionnaires involved in the two cases are different, with the questionnaire here containing 219 questions while the one in *Lesher* contained 120. Nothing in *Lesher* indicates the questions contained in that questionnaire included the type of confidential information that is essential for the determination of juror qualification and management of the jury system as was the case here. ... Accordingly, we stand by our original view ... , that certain information ... that is essential for the determination of juror qualification and management of the jury system, but is not properly part of the voir dire, should be kept confidential." (228 C.A.3d 80.)

(b) *Press-Enterprise* states that the right of access may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. (228 C.A.3d 84.) Here, respondent superior court asserts three overriding interests:

(1) *Administering an expeditious trial.* But "we cannot give much weight to such a goal when compared to a constitutional interest." (228 C.A.3d 84.)

(2) *Preserving the defendant's right to a fair and impartial jury trial.* This is the sort of compelling interest that can override the First Amendment right of access. However, none of the matters stressed by the trial court were essential to a fair trial; and the trial court failed to consider alternatives to closure. (228 C.A.3d 85.)

(3) *Protecting the juror's right to privacy.* This also is an interest of constitutional dimension, and it has the potential to be in conflict with the First Amendment right of access. (228 C.A.3d 86.)

(c) Nevertheless, *Press-Enterprise* teaches that an individualized rather than a blanket approach is appropriate. "When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of the juror withheld, to protect the person from embarrassment." (228 C.A.3d 86.)

(d) "[P]ursuant to the guidance of the United States Supreme Court, we believe that the proper approach is to have the superior court advise the venirepersons that they have the right to request in camera hearings on sensitive questions rather than writing their answers in the questionnaire. Counsel should be present and the session should be reported, with the trial court determining afterward on the record whether a legitimate privacy interest warrants protection. If it does, the trial court should then seal the transcript of the hearing. Henceforth, the superior court shall inform the venirepersons of their right to request in camera hearings to answer specific sensitive questions rather than filling out those answers on the questionnaire form. No explicit or implicit promise of confidentiality should be attached to the information contained in the questionnaires; rather the venirepersons shall be expressly informed the questionnaires are public records. Second, the superior court shall provide access to the questionnaires of individual jurors when the individual juror is called to the jury box for oral voir dire. Public access shall not be provided to questionnaires filled out by venirepersons who are not called to the jury box." (228 C.A.3d 87.)

(e) In this case the 300 prospective jurors were asked questions designed to determine juror qualification as well as to assist in the voir dire. "Thus, because of the hybrid nature of the questionnaire, certain information (e.g., telephone number, Social Security number, driver's license number) is included that is essential for the determination of juror qualification and management of the jury system but is not properly part of voir dire, and public access to it is not warranted. Information of this type should be segregated from the other questions and not released to the public." (228 C.A.3d 88.)

Copley Press and *Lesher Communications* were followed in *Bellas v. Superior Court* (2000) 85 C.A.4th 636, 102 C.R.2d 380. Here, the Public Defender was held in contempt for refusing to return defense copies of juror questionnaires to the clerk for sealing. *Held*, judgment of contempt annulled.

(a) The First Amendment right of "public access to judicial proceedings overwhelms any countervailing privacy interests of prospective jurors as to the content of questionnaires they complete. Where trial courts wish to protect their content from public observation, the constitutionally permitted procedure mandates that the judge advise members of the venire at the time the questionnaires are distributed that, upon completion, they will become public records accessible to anyone, and as an alternative to writing in sensitive personal data, jurors can answer those questions on the record in chambers with counsel present." (85 C.A.4th 638, 639.)

(b) "As to personal identifying information of trial jurors, the law provides limited privacy protection from the defendant, defense counsel, and the public by requiring the redaction of their personal juror identifying information (names, addresses, and telephone numbers) from the court's record, including questionnaires, unless good cause for access is shown on noticed motion. Members of the venire who were not sworn as trial jurors are entitled to have their

names kept confidential only upon a finding of a compelling interest against disclosure. Because defense counsel agreed to redact personal juror identifying information from defense copies of questionnaires, we likewise conclude the trial court erred in requiring the questionnaires returned in order to protect the disclosure of this data." (85 C.A.4th 639.)

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4. Juvenile Dependency Proceedings.

7 Witkin Sum. Cal. Law Const Law § 422

[§ 422] Juvenile Dependency Proceedings.

San Bernardino County Dept. of Public Social Services v. Superior Court (1991) 232 C.A.3d 188, 283 C.R. 332, was a juvenile dependency proceeding involving seven children and allegations that the children's parents had kept one child locked in a closet for almost 10 years. The juvenile court granted the Sun Newspaper permission to attend court proceedings on the condition that the Sun not publish the minors' names, likenesses, or photographs, and that it interview participants only under specified circumstances. The Department of Public Social Services petitioned for mandamus or prohibition. *Held*, mandamus issued directing the juvenile court to vacate its order.

(a) Prior decisions of the U.S. Supreme Court, as summarized in *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (*Press-Enterprise II*), have emphasized two considerations in determining the extent of the right of public access: (1) whether the particular proceeding has traditionally been open--the historical experience factor, and (2) whether public access plays a positive role in the proceeding--the logic factor. (232 C.A.3d 197.)

(b) Juvenile court hearings have historically been private, not public, and privacy may aid the rehabilitative process in dependency proceedings. (232 C.A.3d 198, 200.) However, the juvenile justice system has had many problems, and public access might play a positive role in improving juvenile court practice, checking judicial abuse, and educating the public. (232 C.A.3d 202, 203.) Thus, the two prongs of the Supreme Court's test point to different conclusions. (232 C.A.3d 203.)

(c) In criticizing the admitted failings of the juvenile court system, the Supreme Court has never indicated that lack of open proceedings is one of the reasons. Finding a constitutional right of public access would mean that a proceeding could not be closed unless the test for closure of *Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (*Press-Enterprise I*), supra, §421, was met. "With the welfare of minors at stake, we are reluctant to impose the strict standard for closure required for a First Amendment right unless compelled to do so by the United States Supreme Court." (232 C.A.3d 204.)

(d) Here, the juvenile court granted access primarily because it thought it could control publicity by doing so.

However, the court's restrictions on the press's right to investigate and publish information that it has lawfully obtained were invalid. (232 C.A.3d 206.)

(e) Because the conditions cannot stand, the juvenile court must be allowed to re-exercise its discretion in deciding whether to grant access. In doing so, the court must first determine what is in the best interests of the minors, while at the same time considering the important social values that are fostered by public access. The court may decide to allow access to some portions of the proceedings but not others. (232 C.A.3d 207, 208.) After considering the various circumstances, "the court should allow press access unless there is a reasonable likelihood that such access will be harmful to the child's or children's best interest in this case." (232 C.A.3d 208.)

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5. Civil Trial.

7 *Witkin Sum. Cal. Law Const Law* § 423

[§ 423] Civil Trial.

In *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 1190, 86 C.R.2d 778, 980 P.2d 337, a civil action involving celebrities, the trial judge closed all proceedings held outside the jury's presence. To further ensure that the press and public would only see what the jury could see, the judge sealed, until the case was closed, that part of the transcript that was not before the jury. Petitioner, a television station, claimed that the closure order violated the First Amendment. The Court of Appeal issued a writ of mandamus directing the trial court to vacate its closure order and make transcripts available to the public and press. The Supreme Court granted review to address "whether there is a constitutional right of public access to civil trials" and whether the trial court's exclusion order violated *C.C.P. 124*. *Held*, judgment of Court of Appeal issuing writ of mandamus affirmed.

(a) *C.C.P. 124* states: "Except as provided in *Section 214 of the Family Code* or any other provision of law, the sittings of every court shall be public." (20 C.4th 1191.) It is not clear from the statute's language or the few cases interpreting it whether it should be construed to preclude public access to portions of a civil trial "when, as here, the court reasonably believes there is a strong likelihood that such proceedings will be widely publicized and might come to the attention of the jurors and jeopardize the litigant's right to a fair trial." (20 C.4th 1196.) However, statutory provisions should be interpreted to avoid serious constitutional questions. (20 C.4th 1197.)

(b) The First Amendment right of access applies to civil as well as to criminal proceedings. (20 C.4th 1211.) Accordingly, *C.C.P. 124* must be interpreted in a manner compatible with constitutional standards. (20 C.4th 1212.) Substantive proceedings held in chambers are part of the trial and are subject to the First Amendment right of access. (20 C.4th 1216.)

(c) Prior to the 1980's, closure and sealing "may have been permissible under circumstances that would fail to meet the minimum constitutional standards set out in more recent United States Supreme Court decisions." However, today substantive courtroom proceedings in ordinary civil cases are "presumptively open" and *C.C.P. 124* "must be interpreted to preclude closure of proceedings that satisfy the high court's historical tradition/utility considerations--unless two things occur." (20 C.4th 1216, 1217.)

(1) "First, a trial court must provide notice to the public of the contemplated closure. ... [W]hen a motion to close a proceeding is made in open court (or, for example, at a closed bench conference held during open court proceedings), adequate notice of the contemplated closure is provided if the trial judge thereafter announces in open court that he or she plans to hold (or to consider holding) that proceeding in closed session. When a motion seeking closure is made in a written finding, adequate notice is provided by publicly docketing the motion reasonably in advance of a determination thereon. In either circumstance, the notice requirement should not impose an onerous or undue burden on trial courts." (20 C.4th 1217.)

(2) "Second, *before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (20 C.4th 1217, 1218.)

(d) Here, the trial court's closure and sealing order failed to meet the minimum requirements imposed by C.C.P. 124 as interpreted in light of First Amendment requirements. (20 C.4th 1225.) For example, "the trial court's stated justification--protection of the underlying civil litigant's right to a fair trial--is, in the abstract, an overriding interest, and ... the First Amendment (and hence section 124) do, in an appropriate case, permit closure to protect that interest. The trial court, however, made no finding supporting the proposition that prejudice to that interest was *substantially probable* absent closure and temporary sealing." (20 C.4th 1222.) Also, "there were less restrictive means, short of closure, of achieving the overriding interest in a fair trial." (20 C.4th 1223.) "The trial court did not make, nor would the record support, a finding that the traditional means of countering inadmissible, prejudicial information--regular and specific cautionary jury admonitions and instructions--did not constitute an adequate and less intrusive means of accomplishing the goal of ensuring a fair trial." (20 C.4th 1225.) (See 39 A.L.R.5th 103 [propriety of excluding press or other media from civil trial].)

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Burkle* (2006) 135 C.A.4th 1045, 1052, 37 C.R.3d 805, 11 Summary (10th), Husband and Wife, Supp., §82 [applying *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 86 C.R.2d 778, 980 P.2d 337, text, p. 702; statute permitting sealing of financial documents in divorce cases was overly broad; same First Amendment right of access applicable in ordinary civil cases applies in divorce proceedings].

In *NBC Subsidiary (KNBC-TV)*, the court stated that there is a First Amendment right of access to documents in civil litigation that are "filed in court as a basis for litigation," but that there is no similar right of access "to discovery materials that are neither used at trial nor submitted as a basis for adjudication." (20 C.4th 1208, footnote 25.) To effectuate these principles, the Judicial Council adopted the sealed records rules, C.R.C., Rules 2.550 and 2.551. (See 2 Cal. Proc. (5th), Courts, §42.) In *Mercury Interactive Corp. v. Klein* (2007) 158 C.A.4th 60, 70 C.R.3d 88, 2 Cal. Proc. (5th), Courts, Supp., §42, the court interpreted the phrase "as a basis for adjudication" in the context of attempting to obtain public access to discovery documents designated confidential pursuant to a protective order and later attached as sealed exhibits to the complaint filed with the court, which was not used at trial or submitted as a basis for adjudication. *Held*, order unsealing the exhibits reversed. There is no presumptive First Amendment right of access to discovery documents. (158 C.A.4th 105.) Discovery is not automatically submitted "as a basis for adjudication," and hence does not perforce become accessible to the public, simply by becoming part of the court file. (158 C.A.4th 90.) Although the subject matter here was newsworthy, that was "not a substitute for a showing of specific utility of public access to the information." (158 C.A.4th 105.)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY C. Limitations on the Rights. 3. Fraud.

7 *Witkin Sum. Cal. Law Const Law* § 424

[§ 424] Fraud.

(1) *Tort or Crime*. Statutes making certain kinds of fraudulent and damaging statements tortious or criminal are common. (See 5 *Summary* (10th), *Torts*, §767 et seq.; 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §§42 et seq., 177 et seq.; 78 *Harv. L. Rev.* 1191 [commercial expression].)

The principle underlying these regulations also supports an injunction against picketing that, though peaceful, is accompanied by false charges. (See *Magill Bros. v. Building Service Employees' Int. Union* (1942) 20 *C.2d* 506, 508, 127 *P.2d* 542, 3 *Summary* (10th), *Agency and Employment*, §646.)

(2) *Post Office Censorship of Fraudulent Matter*. Federal statutes provide that fraudulent mail may be returned to the sender or detained under a temporary injunction pending an administrative hearing. (See 39 *U.S.C.*, §§3005, 3007.) In *Donaldson v. Read Magazine* (1948) 333 *U.S.* 178, 68 *S.Ct.* 591, 92 *L.Ed.* 628, the Postmaster General, after a hearing, found that respondents' puzzle contest was a fraudulent scheme and directed that mail addressed to them be returned marked "Fraudulent." *Held*, the statute was valid. This regulation, and many others, "manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud." (68 *S.Ct.* 598, 92 *L.Ed.* 641.) (For a different conclusion where the fraud charged involved religious belief, see *United States v. Ballard* (1944) 322 *U.S.* 78, 64 *S.Ct.* 882, 88 *L.Ed.* 1148, *infra*, §514.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Limitations on the Rights.

4. Libel.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 425

[§ 425] In General.

Defamatory publications have been recognized as outside the protection of the free speech and press guarantee, and are generally made actionable torts and crimes. (See *Beauharnais v. Illinois* (1952) 343 U.S. 250, 72 S.Ct. 725, 729, 96 L.Ed. 919, 927; 5 *Summary* (10th), *Torts*, §529 et seq.; 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §107; 4 *Rotunda*, §20.32 et seq.; 112 *Harv. L. Rev.* 1575 [defamation in cyberspace].)

Beauharnais extends the criminal libel theory to *libel against a group*. An Illinois statute made it unlawful to publish or exhibit matter that portrayed depravity, criminality, unchastity, or lack of virtue of "a class of citizens, of any race, color, creed or religion," that exposed these citizens "to contempt, derision, or obloquy," or that was productive of a breach of the peace. Petitioner published a leaflet containing a petition to city officials to "halt the further encroachment, harassment and invasion of white people" by Blacks and attacking black "rapes, robberies, knives, guns and marijuana." *Held*, the statute was valid and a conviction thereunder was proper. "[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State." (72 S.Ct. 731, 96 L.Ed. 928.) And, in view of the history of race riots in Illinois, due process does not prevent the state from experimenting with this debatable means of control. The Legislature "may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as it does on his own merits." (72 S.Ct. 734, 96 L.Ed. 930.)

West's Key Number Digest, Constitutional Law k.90.1(5)

SUPPLEMENT: [This section is current through the latest supplement]

See 5 *Rotunda* 4th, §20.32 et seq.; 34 *Southwestern U. L. Rev.* 247 [what constitutes creation or development of content under Communications Decency Act]; 53 *U.C.L.A. L. Rev.* 1107 [deception and the First Amendment].



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C. Limitations on the Rights.

4. Libel.

b. New York Times Rule.

1. Public Officials.

7 Witkin Sum. Cal. Law Const Law § 426

[§ 426] Public Officials.

In *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, the Court established the defense of qualified privilege in defamation as an element of constitutional due process.

The "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" sent, through an advertising agency, a full-page advertisement that was published in the New York Times. It set forth a number of charges of terrorism and suppression of black rights in the South, including reference to intimidation, violence, and other illegal activity by the "police" of Montgomery, Alabama. Some of the statements of alleged fact were inaccurate in their descriptions of details of the events. The Times followed its established practice of accepting the advertisement from a responsible source with no knowledge of any false statements. Sullivan, one of three elected Commissioners of Montgomery, in charge of police and several other departments, brought a civil libel action in the Montgomery court against some individuals whose names appeared in the advertisement, and against the New York Times, a New York corporation. His theory was that the reference to "police" would be read as accusing the Montgomery police, and himself as Commissioner, of illegal acts set forth; and he and some Montgomery witnesses testified that they read some of the statements as so referring to him in that capacity. The trial judge instructed the jury that the statements were libelous per se, that general damages were presumed, and that punitive damages could be awarded without finding the amount of actual damages. He refused to instruct that actual malice was required. Sullivan offered no proof of actual pecuniary loss. The jury awarded the full amount demanded, \$ 500,000, against all defendants, and the Alabama Supreme Court affirmed. *Held*, reversed; the rule of law applied by the Alabama court violated the First and Fourteenth Amendments, and the evidence was constitutionally insufficient to support the judgment.

(a) The contention that there was no constitutional protection to this "commercial" advertisement was rejected. The advertisement communicated information, expressed opinion, and sought support for a movement on objectives of high public interest and concern. The fact that the Times was paid for it was no more material than the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying "editorial advertisements," shutting off an important outlet for information and ideas by persons who do not have access to publishing facilities to exercise their freedom of the press. So, if otherwise constitutionally protected, the statements "do not forfeit that protection because they were published in the form of a paid advertisement." (84 S.Ct. 718, 719, 11 L.Ed.2d 698.)

(b) The general statements of the Court in prior free speech cases, that the Constitution does not protect libelous publications, did not refer to libel laws imposing sanctions on criticism of official conduct; and no precedent or policy requires giving more weight to the epithet "libel" than to other "mere labels" of state law. "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (84 S.Ct. 720, 11 L.Ed.2d 700.)

(c) Alabama law, which restricts the privilege of fair comment to truthful statements, must be considered against a background of "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (84 S.Ct. 721, 11 L.Ed.2d 701.) Because error is inevitable in free debate, the protection is not forfeited by falsity of some of the statements. (84 S.Ct. 721, 11 L.Ed.2d 701.) Nor does the injury to official reputation forfeit the protection any more than in criminal contempt charges for criticism of a judge or his or her decision. (84 S.Ct. 722, 11 L.Ed.2d 702.) What a state could not constitutionally do by a criminal statute restricting free speech it cannot do by allowing a civil action for libel. Here, e.g., without proof of actual pecuniary loss, the judgment was 1,000 times greater than the maximum fine provided by the state criminal libel statute. And there is no double jeopardy limitation in civil suits; e.g., the Times has been subjected to other suits based on this advertisement, by the Alabama Governor and others, with another \$ 500,000 verdict already rendered and a total of \$ 2,000,000 sought. (84 S.Ct. 724, 725, 11 L.Ed.2d 705.)

(d) A defense for erroneous statements honestly made is as essential as the requirement of proof of guilty knowledge in obscenity cases; a rule compelling a critic of official conduct to guarantee the truth of his or her factual assertions on pain of libel judgments virtually unlimited in amounts leads to "self-censorship," because of doubts as to ability to find the truth or prove it. (84 S.Ct. 725, 11 L.Ed.2d 706.) Hence: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (84 S.Ct. 726, 11 L.Ed.2d 706.)

(e) This privilege "is appropriately analogous to the protection accorded a public official" sued for libel by a private citizen. He or she is protected under all the state immunity rules unless actual malice is proved, because otherwise fearless administration of governmental policy would be inhibited. "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. ... It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." (84 S.Ct. 727, 11 L.Ed.2d 707.)

(f) Because on reversal the plaintiff may seek a new trial, "we deem that conditions of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." This is such a case because it involves the regulation of constitutional free speech. (84 S.Ct. 728, 11 L.Ed.2d 709.)

(g) Applying these standards, the proof to show *actual malice* lacks the clarity that constitutional standards demand. There was no evidence of defendant's knowledge of falsity or recklessness; at most there was negligence in failing to discover misstatements from its own news files; but reliance on the good reputation of the sponsors was reasonable. (84 S.Ct. 729, 730, 11 L.Ed.2d 710.)

(h) The evidence was also constitutionally insufficient to support the jury's finding that the statements were made "of and concerning" plaintiff. There was no direct reference to him by name or official position. As to the theory of the Alabama Supreme Court that it is "common knowledge" that the average person would take praise or criticism of "police" or others as attached to the official in control, the Court said:

"This proposition has disquieting implications for criticism of governmental conduct. For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.' The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, 'reflects not only on me but on the other commissioners and the community.' Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." (84 S.Ct. 732, 11 L.Ed.2d 713.)

The *New York Times* case inspired a considerable amount of law review comment, and its holding has been applied in a number of subsequent decisions. (See *Garrison v. Louisiana* (1964) 379 U.S. 64, 85 S.Ct. 209, 212, 13 L.Ed.2d 125, 129 [applying the *New York Times* doctrine to criminal libel]; *Eberle v. Municipal Court* (1976) 55 C.A.3d 423, 429, 432, 127 C.R. 594 [holding P.C. 250 and 251 unconstitutional under *Garrison* test]; *Nadel v. Regents of Univ. of Calif.* (1994) 28 C.A.4th 1251, 1267, 1268, 34 C.R.2d 188, 5 Summary (10th), *Torts*, §607 [*New York Times* standard of constitutional malice applies to government defendants]; 78 *Harv. L. Rev.* 201 [*New York Times*]; 79 *Harv. L. Rev.* 157 [*Garrison*]; 95 *Harv. L. Rev.* 1876 [Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants]; 56 *Cal. L. Rev.* 935 [comparing *New York Times* and *Time v. Hill*]; 17 *Hastings L. J.* 347 [*New York Times*]; 21 *Hastings L. J.* 1048 [*New York Times* and public health issues]; 38 *So. Cal. L. Rev.* 349; 47 *So. Cal. L. Rev.* 902 [distinguishing media and nonmedia defendants]; 63 *So. Cal. L. Rev.* 433 [*New York Times*]; 12 *U.C.L.A. L. Rev.* 1420 [same]; 14 *U.C.L.A. L. Rev.* 631 [same]; 25 *U.C.L.A. L. Rev.* 915 [Defamatory Non-Media Speech and First Amendment Methodology]; 39 *U.C.L.A. L. Rev.* 979 [Slapp Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation]; 95 *A.L.R.2d* 1450.)

Some aspects of the *New York Times* rule are discussed in subsequent sections. (On public figures, see *infra*, §427; on inapplicability of rule to private individuals, see *infra*, §428.) Other aspects are covered in the *Torts* Chapter. (See 5 Summary (10th), *Torts*, §601 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Limitations on the Rights.

4. Libel.

b. New York Times Rule.

2. Public Figures.

7 *Witkin Sum. Cal. Law Const Law* § 427

[§ 427] Public Figures.

The question whether the *Times* rule (supra, §426) applies to public figures who are not public officials was raised in two cases decided together: *Curtis Publishing Co. v. Butts and Associated Press v. Walker* (1967) 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094. Although the main opinion had only four signatures, a majority favored a slightly modified *Times* rule.

In the *Butts* case, the Saturday Evening Post published an article accusing Butts, Athletic Director of the University of Georgia, of conspiring to fix a football game with Alabama. The article was based on an allegedly overheard phone conversation of Butts with the Alabama coach, and the reaction of Georgia players to Alabama's victory. A federal district court jury returned a verdict for \$ 60,000 general and \$ 3,000,000 punitive damages, reduced to a \$ 460,000 total by the judge. *Held*, affirmed.

In the *Walker* case, a news dispatch accused retired General Walker of encouraging rioters at the scene of enrollment of James Meredith, a Black, at the University of Mississippi. In an action in Texas, a verdict of \$ 500,000 general and \$ 300,000 punitive damages was revised by the trial judge to strike the punitive damages. *Held*, reversed.

(a) Although the plaintiffs were not public officials, they were public figures, and libel actions by these persons cannot be left entirely to state law. "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." (87 S.Ct. 1991, 18 L.Ed.2d 1111.)

(b) Applying this rule to the *Butts* action, it appeared that the Post, changing to a policy of "sophisticated muckraking," disregarded elementary precautions in accepting the affidavit of the phone call by a criminal on probation, with no checking of the story, no expert handling of it, and no urgency in writing it. Thus, the evidence was ample to support a finding of this highly unreasonable conduct. (87 S.Ct. 1993, 18 L.Ed.2d 1113.)

(c) Applying this rule to the *Walker* action, it appeared that there was news requiring immediate dissemination; the

report was from a correspondent on the scene who was apparently trustworthy; and the dispatches contained nothing unreasonable in light of the circumstances. Hence, there was no severe departure from accepted publishing standards. (87 S.Ct. 1993, 18 L.Ed.2d 1113.)

(d) The additional contention of Curtis Publishing Co. that imposition of punitive damages called for a showing of a higher degree of misconduct was rejected. If a publisher's departure is severe enough to strip it of constitutional protection, the state law can give both compensatory and punitive damages. (87 S.Ct. 1994, 18 L.Ed.2d 1114.) (See 81 Harv. L. Rev. 160; *Belli v. Curtis Publishing Co.* (1972) 25 C.A.3d 384, 388, 102 C.R. 122 [article about attorney for Jack Ruby, killer of Oswald; plaintiff acknowledged that he was public figure and that trial was matter of public interest].)

In *Greenbelt Cooperative Publishing Assn. v. Bresler* (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6, B was a real estate developer and builder in Greenbelt, Maryland, and a member of the Maryland Legislature from another district. He was engaged in negotiations with the city council to obtain zoning variances, and in a controversy with the city over the value of a tract owned by him which the city was attempting to condemn. Feelings were high at city council meetings, and some people characterized B's negotiating position as "blackmail." The local paper reported the meetings fully and accurately, mentioning this word. B sued for libel, and a jury verdict and judgment for compensatory and punitive damages were sustained by the Maryland Court of Appeals. *Held*, reversed. (a) B was a "public figure," and it was unnecessary to determine whether, as a state legislator from another county, he was also a "public officer." (90 S.Ct. 1540, 26 L.Ed.2d 12.) (b) The paper was performing a legitimate function in publishing reports, and it did not charge B with the crime of blackmail. "On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." (90 S.Ct. 1542, 26 L.Ed.2d 15.)

In *Monitor Patriot Co. v. Roy* (1971) 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35, R was running for the U.S. Senate in the 1960 New Hampshire Democratic primary. The Concord Monitor, a daily newspaper, published a syndicated column that spoke of the political maneuvering and criminal records of several candidates, characterizing R as a "former small-time bootlegger." R was not elected, and he sued the Monitor and American Newspaper Alliance for libel, recovering a judgment that was affirmed by the New Hampshire Supreme Court. *Held*, reversed; the jury was improperly permitted to determine that the charge of criminal activity was not relevant. (a) The "public official" rule and the "public figure" rule apply to publications concerning a candidate for public office. (91 S.Ct. 625, 28 L.Ed.2d 41.) (b) The candidate "who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." (91 S.Ct. 626, 28 L.Ed.2d 42.) (c) The test is not a standard of care, but a standard of relevance--relevance of the past incident to the candidate's fitness for office. (91 S.Ct. 627, 28 L.Ed.2d 43.) A "charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*." (91 S.Ct. 628, 28 L.Ed.2d 44.) (See *Noonan v. Rousselot* (1966) 239 C.A.2d 447, 452, 48 C.R. 817 [charges against candidate for Congress made by incumbent Congressman opponent].)

In *Ocala Star-Banner Co. v. Damron* (1971) 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57, Leonard Damron was mayor of a small Florida town and a candidate for county tax assessor. The Star Banner, a local newspaper, published a story that Leonard Damron, identified only as a "local garage owner," had been charged with perjury in a federal civil rights suit, and that his case had been held over until the following term of court. The story was false, as a result of inadvertent substitution of Leonard's name for that of his brother James. *Held*, judgment for plaintiff reversed. The attempted distinction of *Times*, that nothing in the article referred to his official conduct and was therefore a purely "private" libel, was unsound. As pointed out in *Monitor Patriot Co. v. Roy*, a charge of criminal conduct against an official or candidate is always relevant for purposes of the *Times* rule. (91 S.Ct. 632, 28 L.Ed.2d 62.)

In *Time v. Pape* (1971) 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45, the United States Commission on Civil Rights issued a report entitled "Justice" that was concerned with police brutality. It gave a detailed account of a raid by

Chicago police, headed by Deputy Chief of Detectives Pape, on the home of Mr. and Mrs. Monroe, who were Blacks. Vicious attacks on the couple and their children, destruction of their personal property, and holding of Mr. Monroe for illegal interrogation without charges, were set forth. Time magazine, reporting the publication, also gave a detailed description of the incident. Pape sued for libel, and he and the other policemen testified that no such events occurred. The Time writers testified that the article had been based largely on the Commission Report, and the researcher asserted belief in its truth. The case for the plaintiff, however, was based on the fact that the report and Time article gave the impression that the events were findings of the Commission as to what occurred, whereas they were founded on allegations in the civil rights complaint by the Monroes in a suit against Pape, and the Time writer admitted that the word "alleged" had been deliberately omitted. *Held*, judgment against Time reversed.

The Court, recognizing the difficulties of reporting events in the press on the basis of what others have said, nevertheless strongly condemned the Commission Report as "anything but straightforward," and as "extravagantly ambiguous," and concluded: "[W]e cannot agree that, when Time failed to state that the Commission in reporting the Monroe incident had technically confined itself to the allegations of a complaint, Time engaged in a 'falsification' sufficient in itself to sustain a jury finding of 'actual malice.' " (91 S.Ct. 639, 28 L.Ed.2d 53.) (See 52 So. Cal. L. Rev. 1783 [arguing that summary judgment should be liberally granted to media defendants to avoid intimidation into self-censorship by high litigation costs]; for discussion of types of public figures, see 5 *Summary* (10th), *Torts*, §§604, 605.)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

4. Libel.

b. New York Times Rule.

3. Private Individuals.

7 *Witkin Sum. Cal. Law Const Law* § 428

[§ 428] Private Individuals.

In *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296, the *Times* rule was extended to libel actions by a private individual involved in an event of public interest. Plaintiff, a magazine distributor, was arrested and tried for possession of obscene books, but was acquitted at the trial. He then sued defendant radio station for libel in reporting the event on its newscasts, and recovered a substantial judgment. *Held*, reversed. The Court was divided in its reasons, but the main opinion took a strong position on the issue:

"If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." (91 S.Ct. 1819, 29 L.Ed.2d 311.) (See 85 *Harv. L. Rev.* 222; 47 *So. Cal. L. Rev.* 917; 18 *U.C.L.A. L. Rev.* 371.)

The *Rosenbloom* statement was repudiated in *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, 5 *Summary* (10th), *Torts*, §613, and *Wolston v. Reader's Digest Assn.* (1979) 443 U.S. 157, 99 S.Ct. 2701, 2708, 61 L.Ed.2d 450, 460, 5 *Summary* (10th), *Torts*, §605.

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C. Limitations on the Rights.
5. Invasion of Privacy.
a. New York Times Rule Applies.

7 *Witkin Sum. Cal. Law Const Law* § 429

[§ 429] New York Times Rule Applies.

In *Time v. Hill* (1967) 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, the *Times* rule (supra, §426) was applied to actions for invasion of privacy. In September, 1952, Hill, his wife and five children were held hostage by three escaped convicts for 19 hours, and released unharmed. In newspaper interviews, Hill stressed the fact of their courteous treatment. Shortly afterwards, Hill moved his family to another state and discouraged any publicity. In the spring of 1953, Hayes published a novel, "The Desperate Hours," which was made into a play of the same name and produced on Broadway. In the Hayes works, the convicts are violent and the family is abused. In February, 1955, Life magazine published an article entitled "True Crime Inspires Tense Play," which included pictures of violent scenes from the play, "inspired by the family's experience." Hill sued under New York's privacy statute, was awarded \$ 30,000 compensatory damages, and the judgment was affirmed in New York. *Held*, reversed.

(a) *Requirement of knowledge of falsity or reckless disregard of truth.* "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (87 S.Ct. 542, 17 L.Ed.2d 467.) A negligence test would place an intolerable burden on the press of guessing how a jury might assess reasonableness of steps taken to verify accuracy of every reference to a name, picture, or portrait. (87 S.Ct. 543, 17 L.Ed.2d 467.)

(b) *Application of the test.* From the evidence, the jury might have concluded that Life's editor (1) negligently believed that the play accurately portrayed the incident, or (2) knew that the play was to some extent fiction, so that the statement in the article about "the story reenacted" was made with knowledge of falsity or reckless disregard of the truth. (87 S.Ct. 544, 545, 17 L.Ed.2d 469.) The trial judge failed to instruct that liability could be based only on a finding of knowing or reckless falsity; hence judgment was reversed for this error. (87 S.Ct. 545, 546, 547, 17 L.Ed.2d 470, 471, 472.) (See *Cantrell v. Forest City Publishing Co.* (1974) 419 U.S. 245, 95 S.Ct. 465, 469, 42 L.Ed.2d 419, 427, 5 Summary (10th), Torts, §674 [applying *Time v. Hill* standard, and holding evidence of knowledge or recklessness sufficient to support judgment for plaintiff]; *Nicholson v. McClatchy Newspapers* (1986) 177 C.A.3d 509, 517, 223 C.R. 58 [publication of State Bar's evaluation of plaintiff who was being considered for appointment to judicial office was privileged; plaintiff was public figure, evaluation was matter of substantial public interest]; 83 *Harv. L. Rev.* 1722 [privacy of hospital inmates]; 3 *Hastings Const. L. Q.* 543 [development of tort remedy in light of expansion of

constitutional privilege]; on *Time v. Hill*, see 81 *Harv. L. Rev.* 160; 56 *Cal. L. Rev.* 935; 41 *So. Cal. L. Rev.* 902.)

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b. Publication of Name of Rape Victim.

7 *Witkin Sum. Cal. Law Const Law* § 430

[§ 430] Publication of Name of Rape Victim.

(1) *Information Obtained From Public Record of Criminal Proceeding.* *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, involved the constitutionality of a Georgia statute making it a misdemeanor to publish or broadcast the name or identity of a rape victim. C was raped and died. Six youths were indicted for the crime. Defendant W, a reporter for defendant Broadcasting Corp., discovered C's name in an examination of the indictments, which were public records, and broadcast the name in a news report. Plaintiff, father of the victim, sued for damages for invasion of privacy, and prevailed in the Georgia courts. *Held*, judgment reversed; the statute was unconstitutional.

(a) *Narrow issue.* The tort of invasion of privacy is widely recognized (95 S.Ct. 1042, 43 L.Ed.2d 345), but the broad question whether truthful publication of private matters could be constitutionally prohibited was expressly left open in *Time v. Hill* (1967) 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, *supra*, §429. (95 S.Ct. 1044, 43 L.Ed.2d 347.) The decision here is limited to the issue presented, whether the state may impose sanctions on the truthful publication of the name of a rape victim obtained from public records open to public inspection. (95 S.Ct. 1044, 43 L.Ed.2d 347.)

(b) *Constitutional right to publish matters of public record.* The law of tort has recognized the privilege of the press to report the events of judicial proceedings. (95 S.Ct. 1045, 43 L.Ed.2d 348.) And the same conclusion as to any matters of public record is compelled by the First and Fourteenth Amendments. "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform their readers about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be put into print and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." (95 S.Ct. 1046, 43 L.Ed.2d 350.)

(2) *Information Obtained From Police Report.* In *The Florida Star v. B.J.F.* (1989) 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443, the Court held unconstitutional a Florida statute making it unlawful to publish the name of the victim of a sexual assault. The county sheriff's department prepared a report of the incident, which identified the victim, B.J.F., by her full name, and placed the report in the department's press room, available to the public. A Florida Star's reporter-trainee copied the police report, including the victim's name, and the newspaper published a one-paragraph article derived from the report, in a "Police Reports" section, one of 54 police blotter stories in that day's edition. B.J.F. filed a civil suit and received a substantial award of compensatory and punitive damages, which was upheld in the Florida Court of Appeal. *Held*, reversed.

(a) "The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject we have addressed several times in recent years. Our decisions in cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy, have not, however, exhaustively considered this conflict. On the contrary, although our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context." (109 S.Ct. 2607, 105 L.Ed.2d 453.) "The somewhat uncharted state of the law in this area thus contrasts markedly with the well-mapped area of defamatory falsehoods, where a long line of decisions has produced relatively detailed legal standards governing the multifarious situations in which the individuals aggrieved by the dissemination of damaging untruths seek redress." (109 S.Ct. 2607, 105 L.Ed.2d 453, footnote 5.)

(b) *Cox Broadcasting, supra*, is not controlling. There the name of the rape victim was obtained from courthouse records open to public inspection, and the opinion stressed the important role of the press in subjecting trials to public scrutiny. "That role is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified." (109 S.Ct. 2608, 105 L.Ed.2d 454.)

(c) The issue is governed by a limited principle articulated in *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399, *supra*, §413. "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." (109 S.Ct. 2609, 105 L.Ed.2d 455.) Applied to the present case, the *Daily Mail* principle requires reversal. The article was accurate, the newspaper lawfully obtained the name, and the state's interest could have been protected by more limited means than punishing truthful speech. (109 S.Ct. 2610, 105 L.Ed.2d 457, 458.)

(d) "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." (109 S.Ct. 2613, 105 L.Ed.2d 460.)

Three justices dissented. (See 103 Harv. L. Rev. 259; 18 Hastings Const. L. Q. 391; 64 So. Cal. L. Rev. 1020; 40 A.L.R.5th 787 [propriety of publishing identity of sexual assault victim].)

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5. Invasion of Privacy.

c. Information Initially Obtained Illegally.

7 *Witkin Sum. Cal. Law Const Law* § 431

[§ 431] Information Initially Obtained Illegally.

In *Bartnicki v. Vopper* (2001) 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787, a tape of an illegally intercepted cellular telephone conversation concerning a matter of public interest was played on defendant's radio show, rebroadcast by another station, and its contents published in local newspapers. Defendant radio commentator obtained the tape legally from another defendant, although they both had reason to know that the tape was initially obtained illegally. Plaintiffs sought damages under the Electronic Communications Privacy Act, 18 U.S.C., §2510 et seq., and similar Pennsylvania wiretapping statutes. The Court of Appeals concluded that the statutes were invalid because they deterred significantly more speech than necessary to protect the privacy interests at stake. *Held*, affirmed.

(a) The question here is whether the government may punish the publisher of information that was obtained in a lawful manner but from a source who obtained it unlawfully. One of the principal governmental interests the statutes serve is in removing an incentive for persons to intercept private conversations. (121 S.Ct. 1762, 149 L.Ed.2d 802.) Imposing an appropriate punishment is the normal method of deterring unlawful conduct by the person who engages in it. "But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." (121 S.Ct. 1762, 149 L.Ed.2d 803.)

(b) The wiretapping statutes also seek to minimize harm to persons whose conversations have been illegally intercepted. (121 S.Ct. 1762, 149 L.Ed.2d 802.) Privacy of communication is an important governmental interest, and "the fear of public disclosure of private conversations might well have a chilling effect on private speech." (121 S.Ct. 1764, 149 L.Ed.2d 804.) However, "privacy concerns give way when balanced against the interest in publishing matters of public importance. ... One of the costs associated with participation in public affairs is an attendant loss of privacy." (121 S.Ct. 1765, 149 L.Ed.2d 805.)

Two justices joined in the majority opinion and filed a separate concurrence (121 S.Ct. 1766, 149 L.Ed.2d 806), and three justices dissented (121 S.Ct. 1769, 149 L.Ed.2d 810). The dissent stressed the need for personal conversations to be frank and uninhibited without fear of "clandestine surveillance and purposeful disclosure." (121 S.Ct. 1769, 149 L.Ed.2d 811.) Being content neutral, the laws here should have been upheld "if they further a substantial governmental interest unrelated to the suppression of free speech, and they do." (121 S.Ct. 1772, 149 L.Ed.2d 815.) (See 115 *Harv. L. Rev.* 406 [*Bartnicki*]; 30 *Pepperdine L. Rev.* 367 [same].)

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d. Infliction of Emotional Distress.

7 *Witkin Sum. Cal. Law Const Law* § 432

[§ 432] Infliction of Emotional Distress.

Hustler Magazine v. Falwell (1988) 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41, presented a novel question involving First Amendment limitations on "a State's authority to protect its citizens from the intentional infliction of emotional distress." The question was "whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do." (108 S.Ct. 879, 99 L.Ed.2d 48.)

Plaintiff Falwell, a nationally known minister and commentator on politics and public affairs, was the subject of a "parody" advertisement in defendant's magazine. The parody contained an alleged interview with plaintiff in which he described "a drunken incestuous rendezvous with his mother in an outhouse," but in small print set forth a disclaimer: "ad parody--not to be taken seriously." Plaintiff sued defendant in the federal court on theories of libel, invasion of privacy, and intentional infliction of emotional distress. The trial judge directed a verdict against plaintiff on the invasion of privacy claim, and the jury found against him on the libel claim; but the jury found for him on the emotional distress claim and judgment was entered in his favor. The Court of Appeals affirmed, holding that the *New York Times* standard was satisfied by the state-law requirement and the jury's finding, that defendants had acted intentionally or recklessly. *Held*, reversed.

(a) "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' " (108 S.Ct. 879, 99 L.Ed.2d 49.) This criticism will not always be reasoned or moderate, and these persons will be subject to vehement, caustic, and sometimes unpleasantly sharp attacks. (108 S.Ct. 880, 99 L.Ed.2d 49.)

(b) Plaintiff's argument that a different standard should be applied to an action based on intentional infliction of emotional distress is unacceptable. A bad motive may be deemed controlling for purposes of tort liability, but "we think the First Amendment prohibits such a result in the area of public debate about public figures." (108 S.Ct. 881, 99

L.Ed.2d 50.) To hold otherwise would subject political cartoonists and satirists to damage awards without any showing that their work falsely defamed its subject. (*108 S.Ct. 881, 99 L.Ed.2d 51*, listing a number of "famous examples of this type of intentionally injurious speech by Thomas Nast.")

(c) Plaintiff contended that the caricature of him was so "outrageous" as to distinguish it from more traditional political cartoons. But "outrageousness" in the area of political and social discourse is inherently subjective, and an "outrageousness" standard "runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." (*108 S.Ct. 882, 99 L.Ed.2d 52.*)

(d) "We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a 'blind application' of the *New York Times* standard ... ; it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." (*108 S.Ct. 882, 99 L.Ed.2d 52.*) (See *103 Harv. L. Rev. 601*; *25 Loyola L.A. L. Rev. 1409*; *16 Pepperdine L. Rev. 97*; *18 Southwestern U. L. Rev. 441*; for application of *Hustler Magazine* reasoning to tort of intentional interference with prospective economic advantage, see *Hofmann Co. v. E.I. Du Pont de Nemours & Co. (1988) 202 C.A.3d 390, 403, 248 C.R. 384, 5 Summary (10th), Torts, §765.*)

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e. Distinction: Right of Publicity.

7 *Witkin Sum. Cal. Law Const Law* § 433

[§ 433] Distinction: Right of Publicity.

In *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, petitioner Z was an entertainer who performed a "human cannonball" act in which he was shot from a cannon into a net some 200 feet away. He gave a performance at an Ohio county fair. Respondent's reporter, without Z's consent, filmed the act, and it was shown in full on respondent's news program that night, with favorable commentary. Petitioner sought damages for infringement of his "right of publicity," i.e., for unlawful appropriation of his professional property. The Ohio court upheld the defense of First Amendment privilege to report matters of legitimate public interest. *Held*, reversed.

(a) *Time v. Hill* (1967) 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, *supra*, §429, deals with the distinguishable tort of invasion of privacy; the present action seeks only to protect petitioner's proprietary interest in his act. And respondent was not merely engaged in the reporting of an event, as in *Time v. Hill* and similar cases. (97 S.Ct. 2856, 53 L.Ed.2d 975.)

(b) The state may by its own law create a privilege to do what respondent did here (97 S.Ct. 2859, 53 L.Ed.2d 978), but the First Amendment does not require it to do so. "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner ... ; or to film and broadcast a prize fight ... ; or a baseball game ... , where the promoters or the participants had other plans for publicizing the event." (97 S.Ct. 2857, 53 L.Ed.2d 975.)

Four justices dissented, three on the theory that the film clip was treated as news, without any attempt at commercial exploitation, and the broadcast was therefore privileged. (97 S.Ct. 2860, 53 L.Ed.2d 978.) (See 91 *Harv. L. Rev.* 208; 96 *Harv. L. Rev.* 1703 [commercial exploitation requirement]; 30 *Stanf. L. Rev.* 1185.)

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C. Limitations on the Rights.

6. Obscenity.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 434

[§ 434] In General.

(1) *Constitutionality of Prohibition.* Statutes punishing the publication or circulation of obscene matter have long been considered safe from constitutional attack. In *Roth v. United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, the numerous prior dicta were approved, and state and federal statutes making publication or distribution of obscene matter criminal were upheld. The Court said: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." (77 S.Ct. 1309, 1 L.Ed.2d 1507.) (See *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419, 430, *infra*, §437 ["This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment"]; *Fort Wayne Books v. Indiana* (1989) 489 U.S. 46, 109 S.Ct. 916, 924, 925, 103 L.Ed.2d 34, 48, 49 [misdemeanor obscenity violations may be used as predicate offenses for felony violation of state Racketeering Influenced and Corrupt Organizations (RICO) statute; if obscenity law is not vague, then neither is RICO statute, and fact that greater punishment is imposed for RICO violation is not constitutionally significant]; *National Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 118 S.Ct. 2168, 2173, 2180, 141 L.Ed.2d 500, 509, 518 [statute mandating that NEA consider "general standards of decency and respect for diverse beliefs and value" in awarding grants "merely adds some imprecise considerations to an already subjective selection process," and does not, on its face, violate First or Fifth Amendment rights]; 27 *Pepperdine L. Rev.* 345 [Finley]; 33 *U.C. Davis L. Rev.* 249 [same]; on summary seizure and injunction, see *infra*, §681; on regulation of theaters exhibiting obscene films or plays, see *infra*, §442 et seq.)

(2) *Effect of Words Alone.* Although most obscenity cases involve pictorial pornography (e.g., films, pictures, or illustrations in books), words alone can be legally obscene. "A book seems to have a different and preferred place in our hierarchy of values, and so it should be. But this generalization, like so many, is qualified by the book's content. As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution." (*Kaplan v. California* (1973) 413 U.S. 115, 93 S.Ct. 2680, 2684, 37 L.Ed.2d 492, 497, *infra*, §451; 107 *Harv. L. Rev.* 2111 [book review of MacKinnon, *Dirty Words*]; 21 *Southwestern U. L. Rev.* 155 [*Dirty Words, Dirty Thoughts and Censorship: Obscenity Law and Non-Pictorial Works*].)

(3) *Texts and Law Reviews*. The constitutionality of obscenity laws has been the subject of extensive commentary. (See 4 Rotunda, §20.56 et seq.; 98 *Harv. L. Rev.* 460 [Anti-Pornography Laws and First Amendment Values]; 106 *Harv. L. Rev.* 1075 [Pornography, Equality and a Discrimination-Free Workplace]; 112 *Harv. L. Rev.* [sexually explicit speech in cyberspace]; 76 *Cal. L. Rev.* 297 [Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment]; 84 *Cal. L. Rev.* 1499 [hate speech, pornography, and problem for artistic expression]; 26 *Golden Gate L. Rev.* 599 [legislation directed at obscenity and indecency on Internet]; 14 *Hastings Const. L. Q.* 561 [impact of pornography on nation's ability to adhere to constitutional principles]; 28 *Hastings L. J.* 1275 et seq. [several articles on obscenity]; 14 *Pepperdine L. Rev.* 421 [rock lyric censorship]; 17 *San Diego L. Rev.* 757 [The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making]; 29 *San Diego L. Rev.* 13 [Obscenity's Meaning, Smut-fighters, and Contraception: 1872-1936]; 34 *San Diego L. Rev.* 1111 [vagueness and overbreadth of Communications Decency Act]; 65 *So. Cal. L. Rev.* 1887 [bigotry, pornography, and First Amendment]; 39 *Stanf. L. Rev.* 607 [antipornography movement]; 47 *Stanf. L. Rev.* 661 [social utility of pornography]; 34 *U.C.L.A. L. Rev.* 1265 [analysis and critique of proposed anti-pornography ordinances]; 50 *Am.Jur.2d* (1995 ed.), *Lewdness, Indecency, and Obscenity* §3 et seq.; 13 *A.L.R.5th* 567 [statutory exemption based on dissemination to persons having scientific, educational, or similar justification for possession of obscene materials].)

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(3) *Texts and Law Reviews*. See 5 Rotunda 4th, §20.56 et seq.; 39 *Loyola L.A. L. Rev.* 1299 [case for First Amendment zoning of Internet pornography]; 42 *San Diego L. Rev.* 129 [media proliferation and right to reject]; 34 *Southwestern U. L. Rev.* 427 [Vulgarians at the Gate: Privacy, Pornography and the End of Obscenity Law As We Know It]; 50 *Am.Jur.2d* (2006 ed.), *Lewdness, Indecency, and Obscenity* §4 et seq.



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C. Limitations on the Rights.

6. Obscenity.

b. Requirement of Knowledge.

7 *Witkin Sum. Cal. Law Const Law* § 435

[§ 435] Requirement of Knowledge.

(1) *In General.* In *Smith v. California* (1959) 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, the Court held that an ordinance imposing liability on a bookseller for sale of an obscene book with no requirement of proving knowledge was unconstitutional. "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally-protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." (80 S.Ct. 218, 4 L.Ed.2d 211.)

(2) *Effect of Circumstances of Publication.* In *Ginzburg v. United States* (1966) 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, defendant was convicted in the federal district court of violation of the federal obscenity statute (18 U.S.C., §1461) by mailing obscene publications and advertising material telling how to get them. *Held*, affirmed.

(a) In cases since *Roth v. United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, *supra*, §434, the materials themselves were examined. Here, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity. The Court proceeded on the tacit assumption that, standing alone, the publications might not be obscene, and agreed that "the setting in which the publications were presented" could be considered as an aid to determining the question of obscenity. (86 S.Ct. 944, 945, 16 L.Ed.2d 35.)

(b) The publications were the magazine "Eros," the newsletter "Liaison," and the "Housewife's Handbook on Selective Promiscuity." The evidence showed that these were part of the business of pandering, i.e., purveying matter openly advertised to appeal to the erotic interest of customers. Thus, the postal service of "Middlesex" in New Jersey was chosen after those of the Pennsylvania hamlets of "Blue Ball" and "Intercourse" had been denied. The "leer of the sensualist" permeated the advertising. (86 S.Ct. 945, 946, 16 L.Ed.2d 36, 37.)

(c) This evidence was relevant in determining the issue. "Where the purveyor's sole emphasis is on the sexually

provocative aspects of his publications, that fact may be decisive." (86 S.Ct. 947, 16 L.Ed.2d 38.) Nor is there any threat to First Amendment guarantees in holding that in close cases evidence of pandering may be probative and satisfy the *Roth* test. A conviction for mailing obscene matter does not necessarily suppress the materials or inhibit the enterprise of others seeking to advance human knowledge. "All that will have been determined is that questionable publications are obscene in a context which brands them as obscene." (86 S.Ct. 949, 950, 16 L.Ed.2d 40.)

Four dissenting justices found this reasoning wholly unsupportable. (a) Defendant was sentenced to 5 years in prison for distributing matter that neither he nor anyone else could have known to be criminal. (86 S.Ct. 950, 16 L.Ed.2d 41.) (b) The material was not hard core pornography, and the objective test of *Roth* is now supplemented by another that goes to the mailer's aim and motives, allowing punishment just because the judge or jury does not find his or her business agreeable. (86 S.Ct. 953, 16 L.Ed.2d 51.) (c) Defendant was not charged with pandering or commercial exploitation, nor are these criminal offenses. (86 S.Ct. 956, 16 L.Ed.2d 55.) (d) The First Amendment protects the discussion of any subject, including sex. (86 S.Ct. 969, 16 L.Ed.2d 55.)

In *Mishkin v. New York* (1966) 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56, the conviction was under a New York statute. Defendant, using paid authors, produced many paper-covered books, mostly on sexual deviations and illustrated with erotic pictures. The chief defense was that treatment of homosexuality and other deviations disgusted rather than stimulated the "average" person. The Court held, however, that where material is designed for a deviant sexual group, the *Roth* test is satisfied if the dominant theme as a whole appeals to the prurient interest in sex of the members of that group. (86 S.Ct. 963, 16 L.Ed.2d 62.) And scienter was shown by the nature of the materials and testimony about defendant's instructions to his artists and writers. (86 S.Ct. 965, 16 L.Ed.2d 63.) Three justices dissented, in much the same vein as in their *Ginzburg* dissents.

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

6. Obscenity.

c. Determination of Obscenity.

1. Roth Test.

7 *Witkin Sum. Cal. Law Const Law* § 436

[§ 436] Roth Test.

The principal problem in sustaining and applying obscenity laws has been the uncertain meaning of the words "obscene," "lewd," "lascivious," and "indecent," as used in the statutes; and the principal practical difficulty has been to avoid prohibition of permissible treatment of sex in art, literature, and scientific works. (See 21 *U.C.L.A. L. Rev.* 181.)

In *Roth v. United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, the Court dealt with these issues as follows: (a) As to uncertainty, the Constitution requires no impossible standards, and this language, properly applied, does not fail to give adequate notice of what is prohibited. (77 S.Ct. 1312, 1 L.Ed.2d 1511.) (b) As to the standard, the early rule allowing material to be judged by the effect of isolated excerpts on particularly susceptible persons (e.g., children) is rejected. The proper test is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (77 S.Ct. 1311, 1 L.Ed.2d 1509.)

In *Jacobellis v. Ohio* (1964) 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793, appellant was convicted for showing a movie with an "explicit love scene." The Court, after viewing the film and noting its high praise by critics, concluded that it was not obscene. The Court declared that it must make an independent determination of the fact question whether the material is constitutionally protected; that the proper standard is that laid down in *Roth*; that the "contemporary community standards" of *Roth* do not mean varying local standards but those of "society at large," i.e., the determination must be on the basis of a national standard. (84 S.Ct. 1680, 12 L.Ed.2d 800.) The dissenters argued that there is no provable national standard, that local community standards should govern, and that the state court's finding of obscenity was not unreasonable and should not be disturbed. (84 S.Ct. 1685, 1686, 12 L.Ed.2d 805, 806.) (See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Commonwealth of Massachusetts* (1966) 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 [judgment declaring book obscene reversed for failure to apply modified *Roth* test]; *infra*, §437.)

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c. Determination of Obscenity.

2. Miller Test.

7 *Witkin Sum. Cal. Law Const Law* § 437

[§ 437] Miller Test.

In *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, defendant conducted a mass mailing campaign in California advertising the sale of illustrated "adult" books. The brochures contained pictures and drawings explicitly depicting a variety of sexual activities, with genitals prominently displayed. He was convicted of violating P.C. 311.2(a), and after affirmance of the conviction by the Appellate Department of the Superior Court, the U.S. Supreme Court took the case over for a reexamination of the obscenity standards laid down in the earlier cases (see *supra*, §436).

(a) *Memoirs* formulation rejected. The original *Roth* test (*supra*, §436) was modified by the plurality opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Commonwealth of Massachusetts* (1966) 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1:

"While *Roth* presumed 'obscenity' to be 'utterly without redeeming social value,' *Memoirs* required that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming social value.' Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative ... a burden virtually impossible to discharge under our criminal standards of proof." (93 S.Ct. 2613, 37 L.Ed.2d 429.)

"Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power." (93 S.Ct. 2614, 37 L.Ed.2d 429.) And, although this case was tried below on the theory that P.C. 311 approximately incorporated the three-stage *Memoirs* test, no member of the Supreme Court today supports its formulation. (93 S.Ct. 2614, 37 L.Ed.2d 430.)

(b) *The new test*. Because of the dangers of regulating any form of expression, statutes must be carefully limited. "[W]e now confine the permissible scope of such regulation to works which *depict or describe sexual conduct*. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual

conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." (93 S.Ct. 2614, 37 L.Ed.2d 430.)

(c) *Content of a valid statute.* Permissible regulations could cover: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (93 S.Ct. 2615, 37 L.Ed.2d 431.) "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection." (93 S.Ct. 2616, 37 L.Ed.2d 431.)

(d) *National standards rejected.* There are no fixed, uniform national standards to determine what appeals to the "prurient interest" or is "patently offensive." "These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." (93 S.Ct. 2618, 37 L.Ed.2d 434.) Thus there was no error in the state's failure to offer evidence of national standards or the trial judge's instruction that the jury consider state community standards. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (93 S.Ct. 2619, 37 L.Ed.2d 435.)

(e) *No repression or regimentation will result.* The alarm of the four dissenters is unjustified. "These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. ... One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive 'hard core' materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine." (93 S.Ct. 2621, 37 L.Ed.2d 438.) (See 87 Harv. L. Rev. 160; 88 Harv. L. Rev. 1838 [Community Standards, Class Actions, and Obscenity under *Miller v. California*]; 26 Golden Gate L. Rev. 599 [legislation directed at obscenity and indecency on Internet]; 23 Hastings Const. L. Q. 671 [difficulty of applying community standards test to material disseminated on computer networks]; 7 Loyola L.A. L. Rev. 207; 3 Pepperdine L. Rev. 1 [The Judicial Politics of Obscenity]; 11 San Diego L. Rev. 906 [1973 obscenity-pornography decisions]; 36 Santa Clara L. Rev. 185 [community standards test as unworkable for regulating obscenity on Internet]; 2 Western State L. Rev. 193 [*Miller* test].)

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c. Determination of Obscenity.

3. Subsequent Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 438

[§ 438] Subsequent Decisions.

In *Jenkins v. Georgia* (1974) 418 U.S. 153, 94 S.Ct. 2750, 2753, 41 L.Ed.2d 642, 648, the Court declared that under *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, supra, §437, juries may be instructed to apply the standards of "a hypothetical statewide community," but this approval "did not mandate their use." *Miller* simply makes clear that juries need not be instructed to apply "national standards," and that they may "rely on the understanding of the community from which they came as to contemporary community standards."

"The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." (*Hamling v. United States* (1974) 418 U.S. 87, 94 S.Ct. 2887, 2901, 41 L.Ed.2d 590, 613.)

As held in *Hamling*, contemporary community standards must be applied by juries in accordance with their own understanding; a state law regulating distribution of obscene materials cannot define these standards. (*Smith v. United States* (1977) 431 U.S. 291, 97 S.Ct. 1756, 1764, 52 L.Ed.2d 324, 337.) (See 66 Cal. L. Rev. 1277 [community standards]; 5 *Hastings Const. L. Q.* 216 [Smith]; 55 So. Cal. L. Rev. 693 [Community Standards and Federal Obscenity Prosecutions].)

The California statutes meet the *Miller* test. (*People v. Enskat* (1973) 33 C.A.3d 900, 109 C.R. 433, infra, §450; *Bloom v. Municipal Court* (1976) 16 C.3d 71, 79, 81, 127 C.R. 317, 545 P.2d 229, infra, §450; see *Ward v. Illinois* (1977) 431 U.S. 767, 97 S.Ct. 2085, 52 L.Ed.2d 738 [Illinois statute upheld under *Miller* test, and conviction for selling sadomasochistic materials affirmed]; *Pinkus v. United States* (1978) 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 [prosecution for mailing obscene materials; children are not to be included in "community" by whose standards obscenity is to be judged]; 5 *Hastings Const. L. Q.* 262 [Ward].)

In *Pope v. Illinois* (1987) 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439, the issue involved the third prong of the *Miller* test: "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The trial judge rejected defendants' contention that the value question must be determined solely on an objective basis, and

instructed the jury to judge how the material would be viewed by "ordinary adults in the whole State of Illinois." *Held*, the instruction was unconstitutional. "Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community, based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." (107 S.Ct. 1921, 95 L.Ed.2d 445.) (See 59 A.L.R.5th 749 [Admissibility of Evidence of Public-Opinion Polls or Surveys in Obscenity Prosecutions on Issue Whether Materials in Question Are Obscene].)

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6. Obscenity.

d. Protection of Minors.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 439

[§ 439] In General.

In *Ginsberg v. New York* (1968) 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, a statute prohibited the sale of obscene matter to minors under 17. Defendant was convicted of selling "girlie" magazines to a 16-year-old boy. Under controlling decisions, the magazines were not obscene for adults, and defendant contended that it was an unconstitutional deprivation of the protected liberty of the minor to make this classification. *Held*, giving these minors a more restricted right to judge what sex material they may read or see does not invade their constitutional rights.

(a) Two state interests are involved: (1) The parental authority to direct the rearing of children, with support of laws, and (2) the interest of the state in the well-being of youth. (88 S.Ct. 1280, 20 L.Ed.2d 203.)

(b) The "clear and present danger" test does not apply, for obscenity is not a protected expression. To sustain state power requires only the conclusion that it "was not irrational" for the Legislature to find that exposure of the material condemned is harmful to minors. (88 S.Ct. 1281, 20 L.Ed.2d 205.) (See *Berry v. Santa Barbara* (1995) 40 C.A.4th 1075, 47 C.R.2d 661 [upholding ordinance requiring that publications that publicly display material harmful to minors be placed in blinder racks]; 82 Harv. L. Rev. 124 [Ginsberg]; 39 So. Cal. L. Rev. 345 [proposed statutory protection]; 49 Stanf. L. Rev. 637 [Indecent Proposals: How Each Branch of the Federal Government Overstepped Its Institutional Authority in the Development of Internet Obscenity Law]; on prohibition of nonobscene child pornography, see *infra*, §441; on defendant's knowledge that material depicts minors engaged in sexual conduct as factor to be considered in determining obscenity under California statute, see *infra*, §449; on P.C. 313, 313.1, prohibiting distribution or exhibition of harmful matter to minors, see 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §104 et seq.)

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2. Internet Transmissions.

7 *Witkin Sum. Cal. Law Const Law* § 440

[§ 440] Internet Transmissions.

In *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874, numerous corporations and public interest groups filed two suits against the Attorney General of the United States and the Department of Justice challenging the constitutionality of two provisions of the Communications Decency Act of 1996 (CDA), which make it unlawful to transmit certain types of speech to minors on the Internet. The first provision, 47 U.S.C., §223(a), prohibits the knowing transmission of obscene or indecent messages to a recipient under the age of 18; the second, 47 U.S.C., §223(d), prohibits the knowing transmission of patently offensive messages to a specific person under 18 or display of patently offensive messages in a manner available to a person under 18. The two cases were consolidated before a three-judge federal district court, which entered a preliminary injunction against enforcement of 47 U.S.C., §223(a), insofar as it relates to "indecent" communications, and against enforcement of all the provisions of 47 U.S.C., §223(d). The court, however, expressly preserved the Government's right to prosecute the obscenity or child pornography activities prohibited by 47 U.S.C., §223(a). The Government appealed to the U.S. Supreme Court under the Act's special review provisions. *Held*, affirmed.

(a) *The constitutionality of CDA is not supported by prior decisions.*

(1) *Ginsberg v. New York* (1968) 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, *supra*, §439, upheld a New York statute prohibiting the sale of material to minors under the age of 17 if obscene as to them, even if not obscene to adults. Although there a distinction could be made between adults and minors as to their constitutional freedom to see sexual material, in four important respects the New York statute was narrower than the CDA: (a) the prohibition against sales to minors did not bar parents from purchasing relevant material for their children, whereas, under the CDA, parental consent is of no consequence; (b) unlike the CDA, the statute applied only to commercial transactions; (c) the statute required that the prohibited material be "utterly without redeeming social importance for minors," whereas the CDA fails to define "indecent" and omits any requirement that "patently offensive" material lack serious literary, artistic, political, or scientific value; and (d) the statute applied only to those under the age of 17 rather than 18. (117 S.Ct. 2341, 138 L.Ed.2d 893.)

(2) In *Federal Communications Com. v. Pacifica Foundation* (1978) 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073,

the Court upheld an order of the Federal Communications Commission providing that the radio broadcast of recorded material deemed indecent, during a time when children were in the audience, could be subject to administrative sanctions. (117 S.Ct. 2341, 138 L.Ed.2d 893.) However, there are significant differences between that order and the CDA: (a) the order targeted a specific broadcast, which was not in character with traditional program content, in order to designate *when*--not *whether*--it could be played on the radio, whereas the CDA's broad categorical prohibitions are not limited to particular times; (b) unlike the CDA, the order was not punitive; and (c) the order applied to a medium that had, as a matter of history, "received the most limited First Amendment protection," while the Internet has no comparable history. (117 S.Ct. 2342, 138 L.Ed.2d 894.)

(3) In *Renton v. Playtime Theatres* (1986) 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, the Court upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. However, the ordinance was not aimed at the content of the films shown but rather at the "secondary effects" that the theatres fostered. By contrast, the CDA is a content-based blanket restriction on speech that cannot be properly analyzed as a form of time, place, and manner regulation. (117 S.Ct. 2342, 138 L.Ed.2d 895.)

(b) *The factors justifying regulation of broadcast media are not relevant to the Internet.* The history of extensive government regulation of the broadcast media and the invasive nature of radio and television have justified special regulation of those media. However, the Internet has not been subject to the type of government supervision and regulation that has attended the broadcast industry, and Internet communications do not invade an individual's home or appear on a computer screen unbidden. Users seldom encounter content on the Internet by accident. Further, whereas Congress first authorized regulation of the broadcast spectrum because it was deemed a scarce expressive commodity, the same cannot be said for the Internet. It provides a vast array of communications services and its content is "as diverse as human thought." (117 S.Ct. 2343, 138 L.Ed.2d 895.)

(c) *The CDA is unconstitutionally vague.*

(1) The two parts of the CDA use different linguistic forms. 47 U.S.C., §223(a) uses the word "indecent," while 47 U.S.C., §223(d) speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Because neither term is defined, the difference in language will provoke uncertainty among speakers as to how the two standards relate to each other and just what they mean. The CDA's vagueness is of special concern because it is a content-based regulation, the vagueness of which has an obvious chilling effect on free speech, and it is a criminal statute. (117 S.Ct. 2344, 138 L.Ed.2d 897.)

(2) The CDA does not meet the three-pronged obscenity test established by *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, *supra*, §437: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (117 S.Ct. 2345, 138 L.Ed.2d 898.)

(3) Even if the CDA's "patently offensive" and "indecent" standards are considered analogous to the second *Miller* prong, the CDA does not contain the critical requirement that the proscribed material be "specifically defined by the applicable state law." Further, the *Miller* definition is limited to "sexual conduct," whereas the CDA includes "excretory activities" and "organs" of both a sexual and excretory nature. Finally, the CDA addresses only one of the three prongs of the *Miller* test. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague. The two additional prongs critically limit the uncertain sweep of the obscenity definition. (117 S.Ct. 2345, 138 L.Ed.2d 898.) "In contrast to *Miller* and our previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute's scope." (117 S.Ct. 2345, 138 L.Ed.2d 899.)

(d) *The CDA is overbroad.*

(1) To deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and communicate to one another. The governmental interest in protecting children from harmful materials does not justify unnecessarily broad suppression of speech addressed to adults. The Government's premise that prohibiting a transmission, whenever it is known that one of its recipients is a minor, would not interfere with adult-to-adult communications is untenable. (117 S.Ct. 2346, 138 L.Ed.2d 899.)

(2) The district court found that, at the time of trial, existing technology did not include an effective method for a *sender* to prevent minors from obtaining access to its Internet communications without also denying access to adults. By contrast, the court found that currently available *user-based* software suggests that technology to allow parents to prevent children from accessing undesirable material may soon be widely available. (117 S.Ct. 2346, 138 L.Ed.2d 900.)

(3) The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in other cases, the CDA's scope is not limited to commercial speech or commercial entities. Its open-ended prohibitions apply to all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The strength of the Government's interest in protecting minors is not equally strong throughout the coverage of the broad statute. The government has not met its especially heavy burden to explain why a less restrictive provision would not be as effective as the CDA. (117 S.Ct. 2347, 138 L.Ed.2d 901.)

(4) The constitutionality of the CDA, which effectively censors discourse on many of the Internet's modalities, such as chat groups, newsgroups, and mail exploders, is not saved by the fact that persons might still engage in the restricted speech on the World Wide Web. The feasibility of using the Web for that purpose is immaterial, because the CDA regulates speech on the basis of its content and, thus, a "time, place, and manner" analysis is inapplicable. The Government's position to the contrary "is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." (117 S.Ct. 2347, 138 L.Ed.2d 902.)

(5) The "knowledge" requirement in both of the challenged statutory provisions, even when coupled with the "specific child" element in 47 U.S.C., §223(d), does not save the CDA from overbreadth. Persons cannot avoid violating the law by merely refraining from disseminating prohibited materials to persons they know to be under 18, because most Internet services—including chat groups, newsgroups, and mail exploders, and the Web—are open to all comers. (117 S.Ct. 2347, 138 L.Ed.2d 903.)

(e) *The CDA's defenses are inadequate.* It is a defense to prosecution under the CDA if a person has "taken good faith, reasonable, effective, and appropriate actions" to restrict or prevent minors' access to prohibited materials. (47 U.S.C., §223(e)(5)(A).) The Government suggests that this defense can be met by "tagging" materials to indicate their content and allow them to be blocked with appropriate software. It is also a defense if a person requires the use of a verified credit card, debit account, or adult identification to restrict access. (47 U.S.C., §223(e)(5)(B).) However, both defenses are either technologically or economically infeasible. (117 S.Ct. 2349, 138 L.Ed.2d 903.)

(f) *Restriction of "obscene" material is constitutional.* To the extent that 47 U.S.C., §223(a) applies to obscene, as opposed to indecent, messages, it is constitutional, since obscene speech enjoys no First Amendment protection. Thus, the term "or indecent" will be severed from that provision, leaving the rest standing. However, no more of the CDA can be similarly saved, nor is the statute subject to being narrowly construed so as to permit its application to other persons or circumstances that might be constitutionally permissible. (117 S.Ct. 2350, 138 L.Ed.2d 904.)

Two justices concurred in part and dissented in part. (117 S.Ct. 2351, 138 L.Ed.2d 906.) (See *Hatch v. Superior Court* (2000) 80 C.A.4th 170, 200, 202, 94 C.R.2d 453 [distinguishing *Reno*; P.C. 288.2(b), prohibiting sending defined harmful matters to minors for purposes of seducing them, is directed more at conduct than communication and is not overbroad]; *People v. Hsu* (2000) 82 C.A.4th 976, 988, 994, 99 C.R.2d 184 [distinguishing *Reno* and disagreeing with *Hatch* court's reasoning that P.C. 288.2(b) is content neutral because it was designed to prevent specific conduct; statute regulates speech and is subject to strict scrutiny, but is not overly broad or vague]; 26 *Golden Gate L. Rev.* 599 [legislation directed at obscenity and indecency on Internet]; 111 *Harv. L. Rev.* 329 [*Reno*]; 112 *Harv. L. Rev.* [sexually

explicit speech in cyberspace]; 20 J. Juvenile Law 195 [*Reno*]; 23 J. Juvenile Law 15 [regulating minors' access to Internet]; 30 *Pepperdine L. Rev.* 1 [Conflicting Images of Children in First Amendment Jurisprudence]; 98 *A.L.R.5th* 167 [validity of state statutes and regulations regulating internet communications under First Amendment].)

The Child Online Protection Act (COPA), 47 U.S.C., §231, added in 1998, prohibits the use of the World Wide Web to "knowingly and with knowledge of the character of the material, in interstate or foreign commerce," make any communication for commercial purposes that is available to minors and that includes any material that is harmful to them. The Act relies on community standards to identify "material that is harmful to minors." This reliance "does not by itself render the statute substantially overbroad for purposes of the First Amendment." (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 122 S.Ct. 1700, 1713, 152 L.Ed.2d 771, 788 [declining to express views on whether Act is overly broad for other reasons, or whether it is unconstitutionally vague]; see 40 *Santa Clara L. Rev.* 221 [COPA: Congress's latest attempt to regulate speech on Internet].) However, on appeal after remand, the Court held that the trial court did not abuse its discretion in granting a preliminary injunction against the enforcement of COPA because the government failed to show that the less restrictive alternatives proposed by plaintiffs, like blocking and filtering software, should be disregarded. (*Ashcroft v. American Civil Liberties Union* (2004) 542 U.S. 656, 124 S.Ct. 2783, 2791, 159 L.Ed.2d 690, 701.) (See *Am.Jur.2d*, *New Topic Service*, *Computers and the Internet* §§6, 7, 86.)

In *United States v. American Library Assn.* (2003) 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221, the Court upheld the validity of the Children's Internet Protection Act (CIPA) (20 U.S.C., §9154(f), 47 U.S.C., §254(h)), which bans the payment of federal funds to public libraries to provide Internet access unless they install pornography blocking software.

(a) "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum." (123 S.Ct. 2304, 156 L.Ed.2d 232.) A library does not provide Internet access "to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak." It provides Internet access "to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." (123 S.Ct. 2305, 156 L.Ed.2d 233.)

(b) Public libraries must identify suitable and worthwhile material in making collection decisions. They are no less entitled to play that role when collecting material from the *Internet*. (123 S.Ct. 2306, 156 L.Ed.2d 234.)

(c) Although filtering software has a tendency to "overblock," when encountering a blocked site, a library patron may ask to have the site unblocked. Further, libraries can permanently unblock an erroneously blocked site. (123 S.Ct. 2306, 156 L.Ed.2d 234.)

(d) "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision to not subsidize their doing so." (123 S.Ct. 2308, 156 L.Ed.2d 236.)

Two justices concurred in separate opinions (123 S.Ct. 2309, 2310, 156 L.Ed.2d 238), and three justices dissented in two opinions (123 S.Ct. 2312, 2318, 156 L.Ed.2d 242, 248). (See *Am.Jur.2d*, *New Topic Service*, *Computers and the Internet* §3.)

SUPPLEMENT: [This section is current through the latest supplement]

See 118 *Harv. L. Rev.* 353 [*Ashcroft v. American Civil Liberties Union*]; 26 J. Juvenile Law 39 [Children's Access to the Internet in Public Libraries]; 38 *U.C. Davis L. Rev.* 1345 [*United States v. American Library Assn.*]; 7 *A.L.R. Fed* 2d 1 [federal statutes proscribing obscenity and child pornography on Internet].



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CHAPTER X - Constitutional Law

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

6. Obscenity.

d. Protection of Minors.

3. Child Pornography.

7 *Witkin Sum. Cal. Law Const Law* § 441

[§ 441] Child Pornography.

In *New York v. Ferber* (1982) 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113, the Court held that a state can prohibit the dissemination of child pornography--material showing children engaged in sexual conduct--regardless of whether the material is obscene.

(a) "Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." But the states "are entitled to greater leeway" in the regulation of pornographic depictions of children (102 S.Ct. 3354, 73 L.Ed.2d 1122), for the following reasons:

(1) The state's interest in safeguarding the physical and psychological well-being of a minor is compelling. The legislative judgment of nearly all the states and the federal Government, that the use of children as subjects of pornographic materials is harmful to the child, must be accepted. (102 S.Ct. 3355, 73 L.Ed.2d 1122.)

(2) The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children. (102 S.Ct. 3355, 73 L.Ed.2d 1124.) And the test for obscenity in *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, *supra*, §437--whether the work taken as a whole appeals to the prurient interest of the average person--bears no connection to the issue of whether a child has been harmed in the production of the work. It is likewise irrelevant that the work contains serious literary, artistic, political, or scientific value. (102 S.Ct. 3356, 73 L.Ed.2d 1125.)

(3) Advertising and selling of child pornography provides an economic motive for the illegal production of these materials. (102 S.Ct. 3357, 73 L.Ed.2d 1125.)

(4) The value of permitting live performances and photographic reproduction of children engaged in lewd sexual conduct is minimal. (102 S.Ct. 3357, 73 L.Ed.2d 1126.)

(5) "Recognizing and classifying child pornography as a category of material outside the protection of the First

Amendment is not incompatible with our earlier decisions. ... When a definable class of material ... bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." (102 S.Ct. 3358, 73 L.Ed.2d 1126.)

(b) "The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." (102 S.Ct. 3358, 73 L.Ed.2d 1127.)

(c) The New York statute is not unconstitutionally overbroad; it meets the test of *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830--that where conduct and not merely speech is involved the overbreadth must not only be real, but substantial as well. (102 S.Ct. 3361, 3362, 73 L.Ed.2d 1131, 1132.) "We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." (102 S.Ct. 3363, 73 L.Ed.2d 1133.)

Four justices, in three concurring opinions, agreed with the result but not with all of the reasoning. (102 S.Ct. 3364, 3365, 73 L.Ed.2d 1134, 1135, 1136.) (See 96 Harv. L. Rev. 141; 23 Santa Clara L. Rev. 675; 5 Pepperdine L. Rev. 809 [Exploitation of Children in Pornography and Prostitution].)

New York v. Ferber was followed in *Osborne v. Ohio* (1990) 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98. The Court upheld a statute prohibiting possession of nude photographs of minors, with exceptions for artistic or other proper uses. The Court distinguished *Stanley v. Georgia* (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, *infra*, §§445, 446: "The difference here is obvious: the State does not rely on a paternalistic interest in regulating Osborne's mind." The statute was enacted "to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." (110 S.Ct. 1696, 109 L.Ed.2d 109.) (See 104 Harv. L. Rev. 237 [Osborne]; on P.C. 311.1, 311.2, prohibiting distribution of obscene matter depicting minors, see 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §89 et seq.)

In *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403, the Court considered whether the Child Pornography Prevention Act (CPPA), 18 U.S.C., §2251 et seq., abridges freedom of speech. The CPPA "extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using real children." (122 S.Ct. 1396, 152 L.Ed.2d 414.) It covers both depictions of adults who look like children and computer-generated images. *Held*, the statute is overbroad and unconstitutional.

(a) Because the CPPA's penalties are severe, "few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law." (122 S.Ct. 1398, 152 L.Ed.2d 417.) The statute extends to images that appear to depict children engaging in sexual activity without regard to the obscenity test set forth in *Miller*. (122 S.Ct. 1399, 152 L.Ed.2d 418.) Any depiction of sexually explicit activity is proscribed, no matter how it is presented. The depiction need not appeal to prurient interest. And the statute prohibits speech "despite its serious literary, artistic, political, or scientific value." (122 S.Ct. 1400, 152 L.Ed. 2d 418.) *Miller* requires that redeeming value be considered by judging a work as a whole, but the CPPA condemns a single graphic depiction. (122 S.Ct. 1400, 1401, 152 L.Ed.2d 420.)

(b) *Ferber* "upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were 'intrinsically related' to the sexual abuse of children." (122 S.Ct. 1401, 152 L.Ed.2d 420.) *Osborne* held that protecting the victims of child pornography "justified a ban on the possession of pornography produced by using children." (122 S.Ct. 1401, 152 L.Ed.2d 421.) But the CPPA prohibits speech that "records no crime

and creates no victims." (122 S.Ct. 1402, 152 L.Ed.2d 421.) The causal link between the prohibited depictions and actual harm to minors is contingent and indirect, depending on "some unqualified potential for subsequent criminal acts" by pedophiles, rather than following from the speech. (122 S.Ct. 1402, 152 L.Ed.2d 421.)

(c) The fact that computer imaging might make it very difficult to prosecute child pornographers because of the difficulty in distinguishing real from "fake" children does not permit the Government to prohibit both kinds of images. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." (122 S.Ct.1404, 152 L.Ed.2d 424.)

(d) The CPPA provision banning the advertising, promotion, presentation, or distribution of sexually explicit material in a manner that *conveys the impression* that it includes a visual depiction of minors engaging in prohibited conduct, is also overly broad and unconstitutional. A violation of this provision "turns on how the speech is presented, not on what is depicted." (122 S.Ct. 1405, 152 L.Ed.2d 425.)

Three justices concurred and dissented in part (22 S.Ct. 1407, 152 L.Ed.2d 427), and one justice wrote a separate dissent, with another justice joining in part, stating that the CPPA could be saved by a limiting instruction (22 S.Ct. 1411, 152 L.Ed.2d 432). (See 116 Harv. L. Rev. 262 [Free Speech Coalition]; 40 Cal. Western L. Rev. 231 [child-modeling websites as quasi-child pornography]; 31 Pepperdine L. Rev. 825 [same].)

West's Key Number Digest, Constitutional Law k.90.4(6)

SUPPLEMENT: [This section is current through the latest supplement]

In *United States v. Williams* (2008) 553 U.S. ___, 128 S.Ct. 1830, 170 L.Ed.2d 650, the Court considered whether the new pandering and solicitation provision of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, 18 U.S.C., §2552A(a)(3), was overbroad under the First Amendment or impermissibly vague under the Due Process Clause of the Fifth Amendment. Defendant was arrested for pandering under the statute based on messages posted in a public Internet chat room. He pleaded guilty, reserving the right to challenge the constitutionality of the statute. The District Court rejected the challenge, but the Court of Appeals reversed the conviction, holding that the pandering statute was overbroad and impermissibly vague. *Held*, reversed.

(a) *Statutory Provision.* 18 U.S.C., §2552A(a)(3) makes it a crime to knowingly advertise, promote, distribute, or solicit through the mail or in interstate or foreign commerce, including by computer, "material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains ... an obscene visual depiction of a minor engaging in sexually explicit conduct," or "a visual depiction of an actual minor engaging in sexually explicit conduct." (128 S.Ct. 1836, 1837, 170 L.Ed.2d 660.)

(b) *Statutory Interpretation.* The statute prohibits offers to provide and requests to obtain child pornography; it does not require the actual existence of child pornography. "Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute." (128 S.Ct. 1838, 170 L.Ed.2d 662.)

(c) *Consistency With Precedent.* The definition in the statute of the material or purported material that may not be pandered or solicited precisely tracks that held constitutionally proscribable in *New York v. Ferber* (1982) 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113, text, p. 734, and *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, text, p. 735: "obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." (128 S.Ct. 1839, 170 L.Ed.2d 663.)

(d) *No Strict Scrutiny.* The Court of Appeals erred in applying strict scrutiny in this case because offers to engage in illegal transactions are categorically excluded from the protections of the First Amendment. This "is based not on the

less privileged First Amendment status of commercial speech, ... but on the principle that offers to give or receive what is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection." (128 S.Ct. 1841, 170 L.Ed.2d 665.) Further, there is a distinction between proposing to engage in illegal activity and the abstract advocacy of illegality. The statute does not prohibit the advocacy of child pornography. (128 S.Ct. 1842, 170 L.Ed.2d 666.)

(e) *Mistaken Belief in Nature of Material*. In performing its strict scrutiny review, the Court of Appeals particularly objected to the fact that the "reflects the belief" prong of the statute could ensnare someone for mistakenly believing that the material offered or requested is child pornography. (128 S.Ct. 1842, 170 L.Ed.2d 667.) But offers to engage in illegal activity are not protected by the First Amendment when the offeror is mistaken about the factual predicate of the offer. For example, the impossibility of completing a crime because the facts were not as the defendant believed is not a defense to conspiracy or attempted crimes. Further, besides a defendant's belief that a picture contains proscribed material, the material in fact must meet the statutory definition. (128 S.Ct. 1843, 170 L.Ed.2d 667.)

(f) *Virtual and Simulated Child Pornography*. An offer to provide or a request to receive virtual child pornography is not prohibited by the statute. "A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children." Simulated child pornography is still available as long as it is offered and sought *as such*. (128 S.Ct. 1844, 170 L.Ed.2d 669.)

(g) *Statute Is Not Impermissibly Vague*. A statute is rendered vague not by the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved, but by the indeterminacy of precisely what that fact is. For instance, statutes have been struck down where criminal culpability is based on "annoying" or "indecent" conduct, which calls for "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." (128 S.Ct. 1846, 170 L.Ed.2d 670.) That is not the case here. This statute requires defendant to hold, and to "make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe. Those are clear questions of fact." (128 S.Ct. 1846, 170 L.Ed.2d 671.)

Two justices joined in a concurring opinion (128 S.Ct. 1846, 170 L.Ed.2d 671), and two justices joined in a dissent (128 S.Ct. 1847, 170 L.Ed.2d 673).

See 7 A.L.R. Fed 2d 1 [federal statutes proscribing obscenity and child pornography on Internet].



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CHAPTER X - Constitutional Law

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

6. Obscenity.

e. Theaters, Movies, and Plays.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 442

[§ 442] In General.

Many First Amendment challenges to motion picture censorship have involved claims that state and local regulations requiring presubmission to permit or censorship boards constitute unconstitutional prior restraints. (See *supra*, §371.) To withstand a constitutional challenge, these laws must provide adequate procedural safeguards, and the burden of proving that the film is objectionable must be on the censor. (See *Freedman v. Maryland* (1965) 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, *supra*, §371.)

In *Erznoznik v. Jacksonville* (1975) 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, an ordinance of the city of Jacksonville, Florida, made it a misdemeanor to exhibit films in a drive-in movie theater with a screen visible from a public street or place if the film exhibited male or female bare buttocks, breasts, or pubic areas. *Held*, it was unconstitutional. (a) The limited privacy interest of persons on the public streets could not justify this censorship of otherwise protected speech on the basis of content. (95 S.Ct. 2274, 45 L.Ed.2d 132.) (b) The power to protect children could not support this overbroad proscription, which might prohibit newsreel shots of an art exhibit, or other legitimate displays of nudity. (95 S.Ct. 2275, 45 L.Ed.2d 133.) (c) It was not a valid traffic regulation; it was not intended as such, and there is no basis for distinguishing movies containing nudity from others in a regulation designed to protect traffic. (95 S.Ct. 2275, 2276, 45 L.Ed.2d 134.) (See 89 *Harv. L. Rev.* 123; 10 *U.S.F. L. Rev.* 232 [restricting public display of offensive materials].)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

6. Obscenity.

e. Theaters, Movies, and Plays.

2. Zoning of Adult Theaters.

7 *Witkin Sum. Cal. Law Const Law* § 443

[§ 443] Zoning of Adult Theaters.

(1) *In General.* In *Young v. American Mini Theatres* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, the city of Detroit adopted ordinances regulating "adult" theaters, i.e., those presenting "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.'" Under the ordinances, an adult theater cannot be located within 1,000 feet of two other regulated uses or within 500 feet of a residential area. *Held*, the ordinances were valid.

(a) The city's interest in planning and regulating commercial property uses supports the restrictions and disposes of the First Amendment challenge; i.e., the exhibitors were not denied access to the market and the viewing public was not denied the right to see the product. (96 S.Ct. 2448, 49 L.Ed.2d 321.)

(b) The Equal Protection challenge is equally unavailing, despite the broad language of *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, *supra*, §396. (96 S.Ct. 2450, 49 L.Ed.2d 323.) "Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." (96 S.Ct. 2452, 49 L.Ed.2d 326.) (See 90 Harv. L. Rev. 196; 4 Hastings Const. L. Q. 321.)

Young has been discussed and applied in several subsequent cases. (See *Schad v. Borough of Mount Ephraim* (1981) 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 [invalid total prohibition]; *Castner v. Oakland* (1982) 129 C.A.3d 94, 97, 180 C.R. 682 [applying *Young* to uphold ordinance banning adult entertainment activity within 1,000 feet of residential zone, against challenge by owner of adult bookstore with motion picture machines]; *Strand Property Corp. v. Municipal Court* (1983) 148 C.A.3d 882, 886, 200 C.R. 47 [following *Young*]; *Whittier v. Walnut Properties* (1983) 149 C.A.3d 633, 641, 197 C.R. 127 [same]; *Vallejo v. Adult Books* (1985) 167 C.A.3d 1169, 1178, 1180, 213 C.R. 143 [upholding ordinance confining adult bookstores and theaters to three zoning districts, and prohibiting those establishments from locating within 500 feet of residential zone, park, playground, library, or school, or within 1,000 feet of another such establishment]; 28 Hastings L. J. 1293 [potential impact of *Young*]; 95 Harv. L. Rev. 231 [Schad]; 15 Loyola L.A. L. Rev. 321 [same].)

Renton v. Playtime Theatres (1986) 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, follows *Young*. (106 S.Ct. 928, 929, 89 L.Ed.2d 37.) The Court declared that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" (106 S.Ct. 929, 89 L.Ed.2d 38.) (See 79 Cal. L. Rev. 119 [reassessment of *Renton*]; 100 Harv. L. Rev. 190 [*Renton*]; 102 Harv. L. Rev. 1904 [same]; 22 U.S.F. L. Rev. 161 [*Young* and *Renton*]; 8 A.L.R.4th 130 [requirement of operating license for sex-oriented business]; 10 A.L.R.5th 538 [zoning sex-oriented business].)

In *Los Angeles v. Alameda Books* (2002) 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670, a four to four opinion in which one justice concurred only in the judgment, the plurality opinion applied *Renton* to reverse a summary judgment against defendant city. Plaintiffs challenged a zoning ordinance prohibiting more than one adult entertainment business in the same building. "Adult entertainment business" is defined as an adult arcade, bookstore, cabaret, motel, theater, massage parlor, or place for sexual encounters. Each of these enterprises constitutes "a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." (122 S.Ct. 1732, 152 L.Ed. 2d 678.) Defendant's use of a 1977 study showing a correlation between a concentration of adult businesses and increased crime in the surrounding neighborhoods was sufficient to satisfy the *Renton* requirement that "a municipality may rely on evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." (122 S.Ct. 1736, 152 L.Ed2d 683.)

(2) *Regular and Substantial Course of Conduct Standard*. In *People v. Superior Court (Lucero)* (1989) 49 C.3d 14, 259 C.R. 740, 774 P.2d 769, the court, dealing with an adult entertainment zoning ordinance, rejected both the single use standard and the requirement of a use of over 50%. "[W]e adopt a constitutional standard similar to that recently approved by the United States Supreme Court and several state courts: cities may zone the location of theaters that show, on a regular basis, films characterized by an emphasis on the 'specified sexual activities' or 'specified anatomical areas' identified in the ordinance, where such films constitute a substantial portion of the films shown or account for a substantial part of the revenues derived from the exhibition of films." (49 C.3d 19, citing *Renton* and *Young*.)

(3) *Need for Alternative Avenues of Communication*. In *National City v. Wiener* (1992) 3 C.4th 832, 12 C.R.2d 701, 838 P.2d 223, the issue was "whether a zoning ordinance that combines both distance regulations and an exception for location of adult businesses in certain shopping malls conforms with First Amendment principles" under *Renton*. (3 C.4th 835.) The trial court found that the ordinance was a reasonable time, place, and manner regulation designed to serve a substantial government interest, and that it provided reasonable alternative avenues of communication. (3 C.4th 838.) The Court of Appeal reversed, on the ground that the ordinance as applied failed to provide reasonable alternative avenues of communication. (3 C.4th 839.) The Supreme Court, on a review of the leading cases (*Young*, *Renton*, and *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, *infra*, §464) reversed the judgment of the Court of Appeal (3 C.4th 839), and remanded with instructions to reinstate the trial court's judgment (3 C.4th 839, 849).

The court concluded that a substantial government interest was shown (3 C.4th 845), and that reasonable alternative avenues of communication were provided in the ordinance (3 C.4th 847). On the latter issue, the court answered an argument made by defendants as follows: "It is also inaccurate to characterize the ordinance as forcing respondents to build their own shopping mall at prohibitive cost. The city has demonstrated that there are three shopping centers, and a partially developed 4.5-acre area, where an adult business may seek to rent an existing location. Moreover, certain malls may be modified in conformance with the ordinance to accommodate adult business. It is respondents, not the city, who define construction of a new shopping center as their only alternative under the ordinance." (3 C.4th 849.) (See 21 Pepperdine L. Rev. 299 [Wiener].)

(4) *No Retroactive Application of Ordinance*. *Gammoh v. Anaheim* (1999) 73 C.A.4th 186, 86 C.R.2d 194, held that "a city cannot use redevelopment as a rationale to retroactively exclude adult businesses from areas which are otherwise suitable for them. Otherwise, cities could engage in shellgames to make it virtually impossible for an adult business to operate." (73 C.A.4th 199.) Further, under *Renton*, no "secondary effects" would be caused by locating the business within 400 feet of an odd, practically undevelopable parcel of vacant land that had been zoned residential in an

industrial zone. (73 C.A.4th 191, 197.) And a prohibition against locating an adult business within 100 feet of a freeway was unconstitutional because there were less intrusive means of controlling visual blight, e.g., by regulating signage. (73 C.A.4th 191, 199.)

West's Key Number Digest, Constitutional Law k.90.4(5)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. The following annotations discuss the validity of statutes and ordinances regulating the operation of sexually oriented businesses; they supersede 8 A.L.R.4th 130, cited in the text, p. 739; 20 A.L.R.6th 161 [legal issues and principles]; 21 A.L.R.6th 425 [types of businesses regulated]; 23 A.L.R.6th 573 [nature of regulation].



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3. Consenting Adults.

7 *Witkin Sum. Cal. Law Const Law* § 444

[§ 444] Consenting Adults.

In *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 93 S.Ct. 2628, 2633, 37 L.Ed.2d 446, 455, the Court said: "We categorically disapprove the theory ... , that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." (93 S.Ct. 2635, 37 L.Ed.2d 456.) The case involved the exhibition in a Georgia "Adult Theatre" of two films depicting sexual conduct characterized by the Georgia Supreme Court as "hard core pornography." *Held*, the exhibition could be enjoined.

(a) The states may regulate the use of obscene material in local commerce and in all places of public accommodation. The legitimate state interests "include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." (93 S.Ct. 2635, 37 L.Ed.2d 457.) "The sum of experience ... affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex." (93 S.Ct. 2638, 37 L.Ed.2d 460.)

(b) The right of privacy, protecting personal intimacies of the home, does not include the right to watch obscene exhibitions in a public place. (93 S.Ct. 2640, 37 L.Ed.2d 462.)

(c) No control of minds or thoughts is involved. "Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, ... is distinct from a control of reason and the intellect." (93 S.Ct. 2640, 37 L.Ed.2d 463.) (See 87 Harv. L. Rev. 160; 4 Hastings Const. L. Q. 637 [Consent, Not Morality, as the Proper Limitation on Sexual Privacy].)

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f. Private Possession or Distribution.

1. Private Possession Protected.

7 *Witkin Sum. Cal. Law Const Law* § 445

[§ 445] Private Possession Protected.

In *Stanley v. Georgia* (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, officers entered defendant's home with a search warrant to look for evidence of bookmaking. In his bedroom, they found three reels of film which they viewed and thought obscene. Appellant was found guilty of possession of obscene matter under the Georgia statute. *Held*, reversed; mere knowing private possession cannot constitutionally be made a crime.

(a) *Prior dicta explained.* Many cases contain unqualified declarations that obscenity is not protected by the First Amendment. (See *supra*, §434.) But these all dealt with mailing or possession for sale or something more than mere private possession. This question has never been fully considered. (89 S.Ct. 1245, 22 L.Ed.2d 546.)

(b) *The rights involved.* The Constitution protects the right to receive information and ideas, and the right to be free from unwanted intrusions into privacy. These are the rights asserted here by defendant: to read or observe what he pleases, to satisfy his intellectual and emotional needs in the privacy of his own home, to be free from state inquiry into the contents of his library. The state's assertion of the right to protect his mind--to control the moral content of his thoughts--is inconsistent with the *First Amendment*. (89 S.Ct. 1248, 22 L.Ed.2d 549.)

(c) *Other contentions.* The Court briefly disposed of two contentions advanced by the state:

First, that exposure to obscenity may lead to deviant sexual behavior or sex crime. The proper remedy is education and punishment for violations of law. "Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." (89 S.Ct. 1249, 22 L.Ed.2d 551.)

Second, that prohibition of possession is a necessary incident of statutory schemes prohibiting distribution. Even if difficulties in these schemes exist, they would not justify infringement of an individual's right to read or observe what he or she pleases; i.e., the right is so fundamental that the restriction cannot be justified by the need to ease administration of the criminal laws. (89 S.Ct. 1249, 22 L.Ed.2d 551.) (See 57 Cal. L. Rev. 1257; 83 Harv. L. Rev. 147; 7 San Diego L. Rev. 111; 10 Santa Clara Lawyer 288; 11 Santa Clara Lawyer 1 [discussing possible extension of holding

to private distribution]; on limitation of case to its facts, see *infra*, §446.)

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f. Private Possession or Distribution.

2. Private Distribution Not Protected.

7 *Witkin Sum. Cal. Law Const Law* § 446

[§ 446] Private Distribution Not Protected.

Stanley v. Georgia (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, supra, §445, has been limited to its precise facts: private possession and the use of obscene matter in the home. Mailing, importation, and transportation of obscene matter, whether for commercial or private use, may be prohibited.

(1) *Mailing Obscene Matter*. In *United States v. Reidel* (1971) 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813, defendant mailed an obscene booklet ("The True Facts About Imported Pornography") to a postal inspector who had ordered it. *Held*, the federal statute prohibiting the mailing (18 U.S.C., §1461) was constitutional. *Stanley* held that a person may read or observe what he or she pleases in the privacy of his or her home; it did not "recognize a constitutional right ... to distribute or sell obscene materials." (91 S.Ct. 1412, 28 L.Ed.2d 817.) (See 85 Harv. L. Rev. 229; 6 U.S.F. L. Rev. 399.)

(2) *Importation for Commercial Use*. In *United States v. Thirty-Seven Photographs* (1971) 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, L, returning from Europe, brought 37 obscene photographs with him for incorporation into a book to be published. The material was seized by customs officials under the authority of 19 U.S.C., §1305(a). Distinguishing *Stanley*, and following *Reidel*, the court declared that "a port of entry is not a traveler's home," and that the right of the private possessor "does not extend to one who is seeking ... to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution." (91 S.Ct. 1408, 28 L.Ed.2d 834.) (See 82 Harv. L. Rev. 229; 6 U.S.F. L. Rev. 399.)

(3) *Importation for Private Use*. In *United States v. 12 200-Foot Reels of Super 8mm. Film* (1973) 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500, P brought in from Mexico obscene films, color slides, photographs, and other printed and graphic material. They were seized by customs officials. *Held*, this was not a violation of P's constitutional rights. *Stanley* does not permit importation of obscene materials simply because they are intended for private use. (93 S.Ct. 2669, 37 L.Ed.2d 505.)

(4) *Interstate Transportation*. In *United States v. Orito* (1973) 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513, defendant was charged with violation of 18 U.S.C., §1462, by knowingly transporting a large quantity of obscene films

in interstate commerce by common carrier. *Held*, the statute was constitutionally applied to his act. "[W]e cannot say that the Constitution forbids comprehensive regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because material is intended for the private use of the transporter. ... Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent." (93 S.Ct. 2678, 37 L.Ed.2d 518.)

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g. Commercial Telephone Communications.

7 *Witkin Sum. Cal. Law Const Law* § 447

[§ 447] Commercial Telephone Communications.

In *Sable Communications of Calif. v. Federal Communications Com.* (1989) 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93, the Court considered challenges to the provisions of the federal Communications Act (47 U.S.C., §223(b)) that imposed a ban on indecent as well as obscene state commercial telephone messages. Sable furnished sexually oriented prerecorded messages ("dial-a-porn") through special telephone lines for special fees. *Held*:

(a) The prohibition of obscene telephone messages is constitutional. Under *United States v. Reidel* (1971) 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813, *supra*, §446, Congress can prohibit use of the mails for commercial distribution of obscene materials, and it has the same power to prohibit interstate transmission of obscene telephone recordings. (109 S.Ct. 2835, 106 L.Ed.2d 104.)

(b) The prohibition of matter indecent but not obscene is unconstitutional. Although the Government has a legitimate interest in protecting children from exposure to the indecent messages, the statute was not narrowly drawn to serve that purpose. "Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny." (109 S.Ct. 2839, 106 L.Ed.2d 108.) (See 30 Cal. Western L. Rev. 297 [discussing constitutionality of bond requirement for dial-a-porn providers].)

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h. Nudity: Public Indecency Statutes.

7 *Witkin Sum. Cal. Law Const Law* § 448

[§ 448] Nudity: Public Indecency Statutes.

In *Barnes v. Glen Theatre* (1991) 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504, the Court upheld an Indiana statute prohibiting public nudity, rejecting a challenge by nightclub owners who wished to present "totally nude dancing" in an adult bookstore. The lead opinion of three justices applied the four-part test set forth in *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, *infra*, §473, as follows:

(a) "Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity." (111 S.Ct. 2461, 115 L.Ed.2d 512.) The public indecency statutes were designed to protect morals and public order, and the traditional police power of the states is defined as the authority to provide for "the public health, safety, and morals." (111 S.Ct. 2462, 115 L.Ed.2d 513.)

(b) The club owners contended that prohibiting the performance of nude dancing is related to expression because the state seeks to prevent its erotic message. But "[t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the state still seeks to prevent it." (111 S.Ct. 2463, 115 L.Ed.2d 514.)

(c) The *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to further the governmental interest. Here the statute is "narrowly tailored." "Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose." (111 S.Ct. 2463, 115 L.Ed.2d 515.) (See *Tily B. v. Newport Beach* (1998) 69 C.A.4th 1, 18, 25, 81 C.R.2d 6 [nude dancing ordinance directed at owners and managers of adult-oriented businesses satisfied *Barnes*; fact that city manager "may" revoke permit for specified reasons did not make ordinance unconstitutional by granting city manager too much discretion, because lax enforcement would result in more freedom of expression]; 105 *Harv. L. Rev.* 287 [*Barnes*]; 20 *Hastings Const. L. Q.* 467 [same]; 25 *Loyola L.A. L. Rev.* 595 [same]; 19 *Pepperdine L. Rev.* 1337 [same].)

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See *Krontz v. San Diego* (2006) 136 C.A.4th 1126, 1133, 1139, 39 C.R.3d 535 [suspension of license as punishment for continued violations of city regulation establishing "6-foot" and "no-touch" rules regarding nude dancing was not illegal prior restraint; regulation was aimed at terminating illegal conduct, not expressive activity, and city was not limited to

imposing fine as punishment].



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6. Obscenity.

i. California Law.

1. Statutory Development.

7 *Witkin Sum. Cal. Law Const Law* § 449

[§ 449] Statutory Development.

The Penal Code provisions on obscenity were modernized in 1961 by the repeal of former provisions and the enactment of P.C. 311 et seq. The new definition of obscenity followed the approach of *Roth v. United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, supra, §436, and the requirement of knowledge in *Smith v. California* (1959) 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, supra, §435, was incorporated. (See 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §83.)

In 1969, further revisions were made to incorporate the standards of scienter set forth in *Ginzburg v. United States* (1966) 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, supra, §435, and *Mishkin v. New York* (1966) 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56, supra, §435. (See 24 *Hastings L. J.* 1303; 1 *Pacific L. J.* 364, 373.) And in 1970, P.C. 311 was amended to cover live conduct. (See 2 *Pacific L. J.* 365.) (See 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §114.)

P.C. 311 was amended in 1986 to eliminate from the definition of "obscene matter" the phrase "is utterly without redeeming social importance." The statute now defines "obscene matter" as "matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." (P.C. 311(a); on similar definition of "obscene live conduct," see P.C. 311(g); on similar *Miller* test, see supra, §437.)

For purposes of determining whether matter or live conduct "as a whole lacks serious literary, artistic, political, or scientific value in description or representation," the defendant's knowledge that the matter or live conduct "depicts persons under the age of 16 years engaged in sexual conduct" is a factor to be considered. (P.C. 311(a)(3), (g)(3).)

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i. California Law.

2. Validity of Statute.

7 *Witkin Sum. Cal. Law Const Law* § 450

[§ 450] Validity of Statute.

In *People v. Enskat* (1973) 33 C.A.3d 900, 109 C.R. 433, an appeal from a conviction for exhibition of an allegedly obscene motion picture, it was argued that California's former statute was based on pre-*Miller* decisions (supra, §436) and that *Miller* (supra, §437) had invalidated it. The court, in a careful analysis of the statutory language in light of *Miller* and other decisions, rejected the contention. "[W]e hold (1) that section 311 as heretofore construed, defines obscene matter as required by *Miller*, except as to *Miller's* tolerance of an obscenity finding as to matter which is not utterly without redeeming social importance; (2) that while the work in question here meets the *Miller* test of lacking serious literary, artistic and other values, we cannot apply that yardstick to it, but instead must measure it against the concept of being 'utterly without redeeming social importance'; (3) that such measurement is still permissible; and (4) that so measured, the film which appellant was convicted of exhibiting is obscene." (33 C.A.3d 912.) (For the holding on expert testimony, see infra, §452.) (On 1986 amendment of P.C. 311 eliminating phrase "utterly without redeeming social importance," see supra, §449.)

Bloom v. Municipal Court (1976) 16 C.3d 71, 81, 127 C.R. 317, 545 P.2d 229, approved *Enskat*, and held that P.C. 311, as limited to patently offensive representations or descriptions of specific "hard core" sexual conduct, is not unconstitutionally vague. Two justices joined in a lengthy dissent, arguing that the statute is not only unconstitutionally vague but also an intrusion on the individual's right to receive information and ideas. (16 C.3d 86.) (See *Splawn v. California* (1977) 431 U.S. 595, 97 S.Ct. 1987, 1990, 52 L.Ed.2d 606, 613 [P.C. 311(a), authorizing jury consideration of circumstances of commercial exploitation of material, is valid]; *Gould v. People* (1976) 56 C.A.3d 909, 918, 128 C.R. 743 [rejecting constitutional challenges]; *People v. Kuhns* (1976) 61 C.A.3d 735, 748 et seq., 132 C.R. 725 [same]; 5 *Hastings Const. L. Q.* 181 [*Splawn*]; 17 *Santa Clara L. Rev.* 236 [*Bloom*].)

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i. California Law.

3. Books.

7 *Witkin Sum. Cal. Law Const Law* § 451

[§ 451] Books.

Zeitlin v. Arnebergh (1963) 59 C.2d 901, 31 C.R. 800, 373 P.2d 152, makes it clear that only "hard-core pornography" is prohibited by P.C. 311. Plaintiffs, a bookseller and a prospective purchaser of Henry Miller's "Tropic of Cancer," brought an action against the City Attorney of Los Angeles for a declaratory judgment that the book was not illegally "obscene." The complaint attached a copy of the book and some reviews. *Held*, judgment of dismissal reversed.

(a) The remedy was appropriate. (1) The *bookseller* faced threatened criminal action, and without declaratory relief would be forced to the alternatives of risking criminal prosecution or discontinuing the book, thus making the city attorney an indirect censor. (59 C.2d 906.) (2) The *purchaser*, unless able to find a bookseller to handle the book, would be deprived of his or her constitutional right to read. (59 C.2d 907.) (3) Diverse misdemeanor prosecutions would probably lead to conflicting decisions. (59 C.2d 907.)

(b) The question of obscenity is for the court, not the jury--a mixed question of law and fact. This is the view of the Model Penal Code, and California patterned its new obscenity law on that Code and its standards as approved in *Roth v. United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, *supra*, §436. (59 C.2d 910, 911.)

(c) The California statute, adding the phrase "utterly without redeeming social importance" in the definition of obscenity, made it an element of the offense. (59 C.2d 919.) And "by employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography." (59 C.2d 920.)

(d) The book in question is not hard-core pornography. It is "a semi-autobiographical novel written in the style of a surrealistic stream of consciousness"; although sexual experiences are presented, "there is absent from the book the sadism, masochism and treatment of sex in a morbid or shameful manner which frequently mark pornography." (59 C.2d 921.) "In sum, the book in narrating Miller's stream of consciousness necessarily expresses the writer's thoughts in their most primitive aspect, often violent and repulsive, and constantly in four-letter words. The book embraces the emotional, the sexual, the intellectual, and every other kind of stimulus that intrudes upon the writer's consciousness. Thus the book is a kind of grotesque, unorthodox art-form. But indeed, such art-forms are not confined to literature;

they appear and reappear in all phases of artistic expression." (59 C.2d 922.) (On amendment of P.C. 311 to eliminate phrase "utterly without redeeming social importance" from definition of "obscene matter," see supra, §449.)

Under the *Miller* test, however (see supra, §437), a book may be obscene by reason of its words alone, without any pictorial content. (*Kaplan v. California* (1973) 413 U.S. 115, 93 S.Ct. 2680, 2684, 37 L.Ed.2d 492, 496 ["Suite 69" in plain cover with no pictures, but describing almost every kind of sexual contact in explicit terms, and with "only the most tenuous 'plot' ".])

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i. California Law.

4. Films.

7 *Witkin Sum. Cal. Law Const Law* § 452

[§ 452] Films.

In re Klor (1966) 64 C.2d 816, 51 C.R. 903, 415 P.2d 791, involved an attack on a conviction for producing and distributing "girlie" films in violation of P.C. 311.2. The trial judge instructed that defendant could be found guilty if he either (a) possessed obscene material with intent to distribute, or (b) prepared the material. *Held*, this was improper. The court, construing the statute to avoid unconstitutionality, declared that its purpose was to punish dissemination, not mere preparation. "[N]o constitutionally punishable conduct appears in the case of an individual who prepares material for his own use or for such personal satisfaction as its creation affords him." (64 C.2d 821; see *supra*, §445.)

Landau v. Fording (1966) 245 C.A.2d 820, 54 C.R. 177, affirmed a conviction for showing a celebrated picture, "Un Chant D'Amour," to selected audiences. The setting of the half-hour film is a prison cell, the characters are a guard and prisoners, and the film is a vivid and intensified portrayal of masturbation, oral copulation, sodomy, voyeurism, sadism, and masochism. In this action for declaratory relief against defendant Chief of Police of Berkeley, the trial judge viewed the film and found it obscene. *Held*, affirmed, after viewing by appellate justices.

(a) Applying the national community standard (then approved in *Jacobellis v. Ohio* (1964) 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793, *supra*, §436), the trial judge properly allowed experts (literary critic, film program director, psychiatrist, etc.) to testify to contemporary community standards, and as to the artistic merit and social importance of the film. (245 C.A.2d 824.)

(b) A film on homosexuality and sadism in prisons could be produced without obscene matter, or a film obscene under community standards would not be improper for an audience of specialists. But the detailed descriptions of unorthodox sexual practices made this film obscene for "its intended and probable recipient group"; i.e., "the predominant appeal of the film taken as a whole is to the prurient interest." (245 C.A.2d 826.)

(c) The absence of text or dialogue left it without a distinct theme or artistic quality; and unlike a documentary of prison life or a scientific study of prison psychology, it had no redeeming social importance. (245 C.A.2d 828.)

(d) Although the audience was more limited than is usual in movie houses, the film was commercially exploited

and is subject to *Ginzburg v. United States* (1966) 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, supra, §435. (245 C.A.2d 830.)

In *People v. Enskat* (1973) 33 C.A.3d 900, 109 C.R. 433, supra, §450, the trial judge instructed the jury, in effect, that it could disregard expert testimony of community standards if it found that the conduct was so patently offensive as to violate any conceivable community standard. *Held*, the instruction was proper. The requirement of expert testimony on this issue, introduced by *In re Giannini* (1968) 69 C.2d 563, 72 C.R. 655, 446 P.2d 535, infra, §453, was nullified by the enactment of P.C. 312.1 in 1969 (infra, §453). Hence, the defendant may introduce expert testimony, but the jurors may disregard it if they find it unreasonable. (33 C.A.3d 915.) (See *People v. Freeman* (1988) 46 C.3d 419, 425, 426, 250 C.R. 598, 758 P.2d 1128, 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §75 [application of pandering statute (P.C. 266i) to payment of actors and actresses to perform in nonobscene "adult" film in which they engaged in sexually explicit acts would impinge unconstitutionally on First Amendment values; hence, statute was construed as inapplicable].)

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i. California Law.

5. Live Entertainment.

7 *Witkin Sum. Cal. Law Const Law* § 453

[§ 453] Live Entertainment.

(1) *Obscenity Statute. In re Giannini* (1968) 69 C.2d 563, 72 C.R. 655, 466 P.2d 535, established dancing as a protected First Amendment freedom (*supra*, §323). Petitioners, a "topless" nightclub dancer and the club manager, were found guilty of violating P.C. 314(1), wilful and lewd exposure (2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §109 et seq.), and P.C. 647(a), lewd or dissolute conduct (2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §§46, 47). The prosecution evidence consisted solely of photographs of the dancer and testimony describing the performance with her breasts exposed. The defense introduced evidence that topless nightclubs, and this kind of dancing, were common in many areas of the state. *Held*, the convictions were void.

(a) The test of obscenity is that of contemporary community standards, and this applies both to the element of predominant appeal to prurient interest and the element of substantially beyond customary limits of candor. (69 C.2d 573; see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §§80, 83.)

(b) The prosecution has the burden of proving these standards. (69 C.2d 574; see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §86.)

(c) The relevant community is the State of California, not the local city or county. (69 C.2d 580.)

The court also, with two justices dissenting, declared that the standard must be established by expert testimony. (69 C.2d 574.) The 1969 Legislature nullified this requirement. (P.C. 312.1; see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §87.)

(2) *State Liquor Regulations. California v. LaRue* (1972) 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, upheld the validity of regulations of the California Department of Alcoholic Beverage Control prohibiting sexual live entertainment and films in bars. The court pointed out that the Twenty-First Amendment gives a state something more than the normal police power in the area of liquor control (see *infra*, §1311), and declared that the Department could rationally conclude that "the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place simultaneously in bars and cocktail lounges for which it has licensing responsibility." (93 S.Ct. 395, 34 L.Ed.2d

350.) (See *New York State Liquor Authority v. Bellanca* (1981) 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 [applying *LaRue* to topless dancing]; *Locker v. Kirby* (1973) 31 C.A.3d 520, 522, 107 C.R. 446 [following *LaRue*]; *Department of Alcoholic Bev. Control v. Alcoholic Bev. Control App. Bd. (Vicary)* (2002) 99 C.A.4th 880, 887, 121 C.R.2d 729 [following *LaRue* in upholding restrictions on erotic entertainment in establishments that sell alcoholic beverages as minimal infringement on expressive conduct]; 1 *Pepperdine L. Rev.* 129 [*LaRue*]; 21 *U.C.L.A. L. Rev.* 31 [verbal and nonverbal expression].)

The Supreme Court disavowed *LaRue*'s reliance on the Twenty-First Amendment in a case dealing with state power to prohibit the advertisement of liquor prices. "Entirely apart from the Twenty-First Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate places." (44 *Liquormart v. Rhode Island* (1996) 517 U.S. 484, 116 S.Ct. 1495, 1514, 134 L.Ed.2d 711, 736.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

6. Obscenity.

i. California Law.

6. Validity of Local Ordinances.

7 *Witkin Sum. Cal. Law Const Law § 454*

[§ 454] Validity of Local Ordinances.

(1) *Crownover Case*. Following the decision in *In re Giannini* (1968) 69 C.2d 563, 72 C.R. 655, 466 P.2d 535, supra, §453, P.C. 318.5 and 318.6 were adopted, authorizing the regulation of topless waitresses and entertainers, and live nude exhibitions, by local ordinance. With state preemption of the field overcome, several cities and counties adopted prohibitory ordinances, which were upheld in *Crownover v. Musick* (1973) 9 C.3d 405, 107 C.R. 681, 509 P.2d 497. The court applied the balancing test of *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, infra, §473, for the power to regulate activity involving symbolic conduct, after making clear at the outset that the service of food and beverages is a commercial activity that does not become communicative merely because the waitress is unclothed (9 C.3d 423); and that entertainment was not prohibited but merely subjected to a regulation requiring clothing (9 C.3d 425).

The governmental interest in promoting public morals is aimed at separately identifiable conduct, not speech; and any incidental restriction that may be imposed on free speech and expression is no greater than is essential to the furtherance of the substantial governmental interest; i.e., the regulations do not prohibit speech or expression or entertainment, but merely direct that the entertainer cannot appear with genitals or breasts exposed. (9 C.3d 427.) *In re Giannini*, to the extent inconsistent, is overruled. (9 C.3d 431.)

Two justices dissented, arguing that *O'Brien* is completely distinguishable on its facts, and that its principles were improperly applied. (9 C.3d 431.)

(2) *Crownover Overruled*. In *Morris v. Municipal Court* (1982) 32 C.3d 553, 186 C.R. 494, 652 P.2d 51, the County of Santa Clara, pursuant to the authority of P.C. 318.5, adopted an ordinance prohibiting nude entertainment in any public place other than a concert hall, theater, or similar establishment primarily devoted to theatrical performances. Petitioner, employed as a dancer in a bar, was arrested for exposing her buttocks during a performance, and sought prohibition to bar her prosecution for violation of the ordinance. *Held*, writ granted; the ordinance was overbroad and infringed on First Amendment freedom.

(a) *Crownover no longer controlling*. Significant decisions in the years following *Crownover* show that the

majority in that case failed to anticipate future development in the law. *Crownover's* discussion of *California v. LaRue* (1972) 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, supra, §453, "and its failure to recognize the constitutional significance of *LaRue's* distinction between places that serve alcohol and those that do not, have proven to be plainly erroneous. Both *Crownover's* alternative holdings that nudity in dance is conduct and, as such, beyond the scope of First Amendment protection, or that public opposition to nude entertainment generates a substantial state interest in its suppression, also crumble under the force of later decisions." (32 C.3d 560; see 32 C.3d 561 et seq., discussing *New York State Liquor Authority v. Bellanca* (1981) 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357, and other state and federal decisions.)

(b) *Nonobscene nude dancing constitutionally protected.* "(1) A ban on nude dancing cannot be sustained on the theory that it regulates only conduct and does not impinge upon protected speech. Nonobscene nude dancing cannot be barred without, in some cases, infringing upon constitutionally protected expression. (2) An enactment prohibiting nonobscene nude dancing which extends beyond establishments serving alcohol is presumptively overbroad." (32 C.3d 564, adding that *Crownover* is overruled.)

(c) *Nature of permissible infringement.* The county's interest in the promotion of public morals does not support a direct infringement on protected activities. (32 C.3d 566.) It is immaterial that an activity that enjoys First Amendment protection is carried on for profit. (32 C.3d 568.) However, under *Young v. American Mini Theatres* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, supra, §443, the control of "near-obscenity" by zoning was given "a constitutional green light"; and "if local authorities wish to regulate otherwise protectible entertainment through the medium of *Young* type zoning, they should not feel discouraged by anything they read in this opinion." (32 C.3d 568.)

One justice, concurring, would have rested the conclusion solely on Cal. Const., Art. I, §2(a) (see supra, §312). (32 C.3d 569.) Two justices joined in a strong dissent, arguing that the *Crownover* analysis was sound, that the majority improperly relied on decisions of lower federal courts and inconclusive dicta of the Supreme Court, and that the social harm resulting from sexual exploitation and degradation of women for profit was a compelling societal interest supporting the regulation. (32 C.3d 570.) (See 22 *Santa Clara L. Rev.* 211 [discussing conflict of federal/state law after *Crownover* but before *Morris*].)

(3) *Picture Arcades With Closed Booths.* In *DeMott v. Board of Police Commrs.* (1981) 122 C.A.3d 296, 175 C.R. 879, an ordinance requiring unenclosed booths in public picture arcades was held applicable to a private association that any member of the public could join by identifying himself or herself, signing a statement of general philosophy, and paying \$ 1. The court termed the association "a thinly veiled device to escape regulation of an otherwise valid ordinance." (122 C.A.3d 306.) (See *Sacramento v. Superior Court* (1982) 137 C.A.3d 448, 454, 187 C.R. 154 [prohibition of enclosed booths is constitutional]; *Deluxe Theater & Bookstore v. San Diego* (1985) 175 C.A.3d 980, 983, 985, 221 C.R. 100 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

C. Limitations on the Rights.

6. Obscenity.

j. Civil Proceedings Against Obscene Matter.

7 *Witkin Sum. Cal. Law Const Law* § 455

[§ 455] *Civil Proceedings Against Obscene Matter.*

"The Alabama Law on Obscenity takes a form that is gaining increasing favor among the States. It permits a test of the issue of obscenity in a civil action prior to any exposure to a criminal penalty. This Court has acknowledged the value of this approach to the solution of the vexing problem of reconciling state efforts to suppress sexually oriented expression with the prohibitions of the First Amendment, as applied to the States through the Fourteenth Amendment." (*McKinney v. Alabama* (1976) 424 U.S. 669, 96 S.Ct. 1189, 1195, 47 L.Ed.2d 387, 395, concurring opinion.)

(1) *Action To Adjudicate Obscenity of Particular Matter.* In *McKinney v. Alabama*, *supra*, the statute authorized an "in rem" action in equity by the district attorney to adjudicate the obscenity of mailable matter. The action was brought with four magazines as respondents, and resulted in a decree that they were obscene. Petitioner, operator of a bookstore, received written notice of the decree, and was thereafter charged with violation of a statute prohibiting the sale of "mailable matter known ... to have been judicially found to be obscene." At the trial, the jury was instructed that the only issue before them was whether he had sold the material; i.e., he was not permitted to have his defense--that the material was not obscene--submitted to the jury. The verdict was guilty. *Held*, judgment reversed.

(a) Petitioner received no notice of the equity proceeding; hence, he had no opportunity to be heard or any other means for initiating a challenge to the decree. Thus, it had the same effect as an ex parte determination of a state censorship authority which unilaterally found material obscene. (96 S.Ct. 1193, 47 L.Ed.2d 393.)

(b) The state's contention that the "in rem" action was an "adversary judicial proceeding" that safeguarded First Amendment rights is unsound. Although an individual and corporate respondent were named along with the magazines, there was no indication that they were in privity with petitioner. Exhibitors and distributors may, for various reasons, be unwilling to oppose a state claim of obscenity; and those who are afforded an opportunity to be heard are properly bound by the outcome. But nonparties must be given the chance to litigate the issues if they choose to do so. (96 S.Ct. 1193, 1194, 47 L.Ed.2d 393, 394.)

(c) The state contended that the use of civil proceedings to determine obscenity is preferable to case-by-case criminal prosecutions. However, this is not an answer where a person is convicted in a criminal proceeding, with the issue of obscenity concluded against him or her by a decree in a civil proceeding to which the person was not a party

and of which he or she had no notice. (96 S.Ct. 1194, 47 L.Ed.2d 394.)

(2) *Action To Enjoin Exhibition or Abate Public Nuisance.* In *People v. Projection Room Theater* (1976) 17 C.3d 42, 130 C.R. 328, 550 P.2d 600, plaintiffs, law enforcement officers of both the City and County of Los Angeles, brought actions to enjoin the exhibition of obscene books and films as public nuisances. Defendants were operators of stores and motion picture theaters. The complaint contained allegations and exhibits, good against a general demurrer, supporting the charge of obscenity under the law. The relief was sought under the general public nuisance statutes (C.C. 3479, 3480; P.C. 370, 371) and the Red Light Abatement Law (P.C. 11225 et seq.). *Held*, the complaint stated a cause of action under the public nuisance statutes (see 13 *Summary* (10th), *Equity*, §144), but not under the Red Light Abatement Law (see 13 *Summary* (10th), *Equity*, §146 et seq.).

(a) The Penal Code and Civil Code definitions of public nuisance are substantially identical, and they refute the argument that only those activities offensive to the five senses are covered. The statutes also apply to anything that is "indecent." (17 C.3d 49.)

(b) Prior decisions in California and elsewhere have held indecent exposure and other obscene exhibitions to come within the definition. (17 C.3d 49 et seq.) The argument that obscene exhibitions are free from regulation because they take place behind closed doors and are viewed only by those who choose to view them was rejected in *People v. Luros* (1971) 4 C.3d 84, 92 C.R. 833, 480 P.2d 633, *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, 430, and *Harmer v. Tonylyn Productions* (1972) 23 C.A.3d 941, 100 C.R. 576. (17 C.3d 51, 55.)

(c) The statutory language ("indecent, or offensive to the senses") is not impermissibly vague; similar language in obscenity statutes has been construed and held not subject to constitutional challenge. (17 C.3d 56.)

(d) Although the exhibition and sale of specific obscene materials may be enjoined after a fair and full adversary hearing, a judgment closing down the premises is an unconstitutional prior restraint. (17 C.3d 58.) "We are aware of no reported cases authorizing the closing of a bookstore or theatre, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene." (17 C.3d 59.)

(e) The Red Light Abatement Law, which authorizes injunctions and closing the premises, does not apply. Its reference to "lewdness" has been held to cover live lewd entertainment (*People v. Sarong Gals* (1972) 27 C.A.3d 46, 103 C.R. 414), but not the exhibition of obscene magazines or films (*Harmer v. Tonylyn Productions, supra*). (17 C.3d 61.)

Two justices joined in a strong dissent, attacking the opinion's approval of the discretion of a city attorney, challenging the asserted similarity of the Penal Code and Civil Code definitions, and concluding that the public nuisance statutes were not intended to embrace the private indecency involved here; also that the statutes as interpreted contravene the *First Amendment*. (17 C.3d 63.) (See 65 Cal. L. Rev. 330; 4 *Hastings Const. L. Q.* 385; 28 *Hastings L. J.* 1329.)

(3) *Preliminary Injunction.* In *re Ward* (1978) 82 C.A.3d 981, 147 C.R. 476, held that a preliminary injunction may be issued and enforced by contempt proceedings pending a prompt judicial decision at a full hearing. (82 C.A.3d 989.) The court found no constitutional defect in the judge's issuance of the preliminary injunction on a police officer's affidavit without viewing the film or taking expert testimony. (82 C.A.3d 989.) (See *People v. Mitchell Bros. Santa Ana Theater* (1980) 101 C.A.3d 296, 304, 161 C.R. 562 [following *Ward*].)

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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY C. Limitations on the Rights. 7. Street Meetings and Parades.

7 *Witkin Sum. Cal. Law Const Law* § 456

[§ 456] Street Meetings and Parades.

The legislative authority, under the police power, may regulate traffic on streets and highways by measures that incidentally limit free speech and assembly. In *Cox v. New Hampshire* (1941) 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, a statute prohibited a parade or procession on a public street without a license. The conviction of a group of members of Jehovah's Witnesses for parading without a license was upheld. The Court pointed out that public parades call for an investigation to determine the amount and extent of policing and traffic control, and that the license fee was neither large nor arbitrary, but graduated according to the expense of the supervision. (See 80 A.L.R.5th 255 [state or local enactments regulating parades].)

But where the purpose or operation of the licensing requirement is not regulation of traffic, the attempted suppression of free speech and assembly will not be upheld. (See *supra*, §360.) In *People v. Duffy* (1947) 79 C.A.2d Supp. 875, 179 P.2d 876, an ordinance prohibited any procession or parade without a permit from the Board of Police Commissioners. The court reversed a conviction for conducting a parade without the required permit. Conceding the legislative power to impose valid regulations, the opinion nevertheless states that "the holding of parades is a public right, subject to proper regulation and not suppression," and that the ordinances "must allow parades, when and where traffic conditions permit." The vice of the provision was in vesting arbitrary control in the police. "To be valid the ordinance may not leave it within the power of any administrative board to issue or withhold a permit, dependent upon the board's approval or disapproval of the purpose of those who seek it." (79 C.A.2d Supp. 890.) (See *Cox v. Louisiana* (1965) 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471, *supra*, §393; *Cox v. Louisiana* (1965) 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487, *infra*, §462; 80 Harv. L. Rev. 1772 [regulation of demonstrations].)

In *re Bodkin* (1948) 86 C.A.2d 208, 194 P.2d 588, though decided on a narrow issue of fact, appears to follow the approach of the older cases. A city ordinance made it a misdemeanor for persons to refuse to move on, at the direction of a police officer, "whenever the free passage of any street or sidewalk ... shall be obstructed by a crowd." Petitioner stood in a small, lightly-traveled street in the industrial part of the city addressing between 100 and 150 workers on the subject of the Taft-Hartley Act (legislation then pending before Congress). He refused to move on when ordered and was arrested and convicted. *Held*, the conviction was proper because the court below found that there had been an "obstruction." "It was established in this case that the passage of some members of the public along the street was in fact obstructed. If nobody had desired to use this street at the time another question would be presented. Whether the obstruction merely impaired the progress of one member of the general public, or a thousand, does not alter the case."

(86 C.A.2d 211.) (See *People v. Amdur* (1954) 123 C.A.2d Supp. 951, 962, 267 P.2d 445 [ordinance against sidewalk obstruction valid but applied in unconstitutionally discriminatory manner]; *Poulos v. New Hampshire* (1953) 345 U.S. 395, 73 S.Ct. 760, 768, 97 L.Ed. 1105, 1116 [same; failure to pursue state remedy].)

Dillon v. Municipal Court (1971) 4 C.3d 860, 94 C.R. 777, 484 P.2d 945, invalidating a parade-permit ordinance wholly lacking in standards, followed the modern approach of *Cox v. Louisiana*, *supra*, and approved the holding in *People v. Duffy*, *supra*. "In determining whether a statute regulating speech violates the First Amendment, we must weigh the state's interest in maintaining peace and order in the streets and other public places against the individual's right to freedom of speech and assembly. When this balance is struck, statutes requiring licenses for parades and demonstrations will not offend the Constitution if they regulate only the time, place, manner and duration of the marches and if they are fairly administered by officials within the range of narrowly limited discretion. On the other hand, any procedure which allows licensing officials wide or unbounded discretion in granting or denying permits is constitutionally infirm because it permits them to base their determination on the content of the ideas sought to be expressed." (4 C.3d 869.)

In *People v. Dury* (1983) 152 C.A.3d Supp. 23, 199 C.R. 577, after police officers had been injured at demonstrations by persons using two-inch wooden sign poles to resist arrest, an ordinance was adopted prohibiting demonstrators from carrying lengths of wood thicker than specified limits. *Held*, applying the test in *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, *infra*, §473, the ordinance was a valid regulation of the time, place, and manner of use of the streets. (152 C.A.3d Supp. 27.)

In *Forsyth, Georgia v. Nationalist Movement* (1992) 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101, the issue was whether the free speech guarantee was violated by "an assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order." (112 S.Ct. 2398, 120 L.Ed.2d 107.) *Held*, the ordinance was facially invalid.

(a) In regulating competing uses of public forums, the government "may impose a permit requirement on those wishing to hold a march, parade, or rally. ... Such a scheme, however, must meet certain constitutional requirements." (112 S.Ct. 2401, 120 L.Ed.2d 111.) Here, there are no narrowly drawn standards. "The decision how much to charge for police protection or administrative time--or even whether to charge at all--is left to the whim of the administrator" whose decision is not reviewable. "Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees." (112 S.Ct. 2403, 120 L.Ed.2d 113.)

(b) The ordinance as construed by the county often requires that the fee be based on the content of the speech. In assessing a fee to cover the cost of necessary protection of participants and observers, the administrator must estimate the response of others to that content, and judge the number of police necessary to meet that response. "The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content." (112 S.Ct. 2403, 120 L.Ed.2d 113.)

(c) The ordinance provided a \$ 1,000 cap on the allowable fee, and the lower courts expressed the view that a "nominal" fee would be constitutional; but no limit on the fee can cure the constitutional violations. "Neither the \$ 1,000 cap on the fee charged, nor even some lower nominal cap, could save the ordinance because in this context, the level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax." (112 S.Ct. 2405, 120 L.Ed.2d 115.)

Four justices joined in a dissent. (112 S.Ct. 2405, 120 L.Ed.2d 116.) (See *Long Beach Lesbian & Gay Pride v. Long Beach* (1993) 14 C.A.4th 312, 325, 17 C.R.2d 861 [discussing and following *Forsyth*]; *Sanctity of Human Life Network v. California Highway Patrol* (2003) 105 C.A.4th 858, 868, 129 C.R.2d 708 [statute authorizing CHP to "direct traffic as conditions may require" was sufficient authorization for CHP to terminate political protests occurring on freeway overpasses when those activities caused freeway congestion; CHP's actions were not based on content of speech, and many other forums were available to plaintiffs to communicate their message]; on application of state public

accommodations law to privately sponsored parade as violation of sponsors' First Amendment rights, see *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487, supra, §390.)

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CHAPTER X - Constitutional Law

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C. Limitations on the Rights.

8. Violence and Incitement to Violence.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 457

[§ 457] In General.

(1) *Statutes Directed Against Riots and Unlawful Assemblies.* Statutes directed against riots or other unlawful assemblies, such as P.C. 407 et seq., 416, 726, are obviously valid. (*People v. Sklar* (1930) 111 C.A. Supp. 776, 779, 292 P. 1068; *People v. Anderson* (1931) 117 C.A. Supp. 763, 767, 1 P.2d 64; *Chambers v. Municipal Court* (1977) 65 C.A.3d 904, 909, 135 C.R. 695 [P.C. 416, making it misdemeanor for persons disturbing public peace or committing unlawful act to fail to disperse on command by public officer, is constitutional when construed to prevent overbreadth]; see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §10 et seq.)

(2) *Statutes Directed at Words.* Difficulty is encountered in determining the validity of regulations directed against words that are an incitement to violence. In *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, the statute prohibited the use of an "offensive, derisive or annoying word" in a public place. Defendant was convicted of calling the city marshal a "God damned racketeer" and "Fascist." Upholding the conviction, the Court said that certain classes of speech have always been deemed punishable: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflicted injury or tend to incite an immediate breach of the peace." (62 S.Ct. 769, 86 L.Ed. 1035.)

In *Feiner v. New York* (1951) 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295, petitioner addressed a street audience from a box on the sidewalk, condemning various political figures. The audience showed signs of disorder and obstructed the sidewalk, and after he had ignored several requests by police to desist, petitioner was arrested. His conviction for breach of the peace was upheld. The Court thought the facts, as found below, showed no attempted suppression of unpopular speech. And the exercise of authority to preserve order, when the speech constituted an incitement to riot and produced a dangerous reaction, justified the conviction. (See 65 *Harv. L. Rev.* 135; 2 *Hastings L. J.* 64.)

In *People v. Rubin* (1979) 96 C.A.3d 968, 158 C.R. 488, defendant, a national director of the Jewish Defense League, held a press conference in California to protest a planned demonstration by the American Nazi Party to take place in Illinois in 5 weeks. In the course of his remarks, he said: "We are offering five hundred dollars ... to any member of the community ... who kills, maims, or seriously injures a member of the American Nazi Party. ... This is not said in jest, we are deadly serious." *Held*, an information charging solicitation of murder under P.C. 653f was properly filed. The court, on an extended examination of the case law dealing with the distinction between abstract advocacy and

concrete solicitation of specific acts, followed the analysis in *Brandenburg v. Ohio* (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, *infra*, §470:

(a) *Proximity*: incitement to imminent lawless action. The event--a demonstration that had attracted national attention, was proximate and imminent. (96 C.A.3d 978.)

(b) *Degree*: likelihood of producing action. The solicitation was not made in jest nor was it the outcome of an improvised piece of braggadocio; its words and circumstances suggested the possibility that it might produce the violence sought. (96 C.A.3d 979.)

"[W]e conclude there was sufficient likelihood of his solicitation being interpreted as a call to arms, ... as a systematic promotion of future bloodshed in the streets, rather than as a communication of ideas through reasoned public discussion, to remove it from the category of protected speech and require Rubin to answer the charges against him." (96 C.A.3d 980.) (See *Long v. Valentino* (1989) 216 C.A.3d 1287, 1295, 265 C.R. 96, *infra*, §905 ["mere incitement of another to commit a nonviolent civil rights violation may not be punished"]; *People v. Gudger* (1994) 29 C.A.4th 310, 320, 34 C.R.2d 510 [P.C. 76, prohibiting threat against life of state official, requires specific intent to make threat and apparent ability to carry it out; because statute punishes true threats, rather than mere hyperbole, it is not overbroad].)

(3) *Statutes Providing Civil and Criminal Remedy*. On a finding that advocacy of unlawful acts likely to cause imminent serious bodily injury or death is not constitutionally protected (see P.C. 11410), the 1982 Legislature enacted C.C.P. 527.7, making it unlawful for two or more persons to advocate these acts and *to take substantial action* in furtherance thereof. (C.C.P. 527.7(a).) If it appears likely that an assemblage has engaged in this kind of advocacy in the past and will continue to do so in the future, an aggrieved individual may bring a civil action in superior court to enjoin the advocacy at any future meeting. (C.C.P. 527.7(b).) (See 14 *Pacific L. J.* 491.)

The California Freedom of Access to Clinic and Church Entrances Act, P.C. 423 et seq., criminalizes certain acts, including violence or threat of force, that interfere with a person's access to reproductive health facilities or places of worship. (See 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare, Supp.*, §409.) The statute also provides a civil action for injunctive relief and compensatory and punitive damages, and includes a right to recover costs and reasonable attorney and expert witness fees. In lieu of actual damages, the plaintiff may elect to recover statutory damages. (P.C. 423.4(a).) In addition, the Attorney General or a district or city attorney may bring an action to enjoin violation of P.C. 423.2, for compensatory damages, and for the assessment of a civil penalty. (P.C. 423.4(b).) However, if a person has been found liable under the federal Freedom of Access to Clinic Entrances Act (18 U.S.C., §248), the person may not be found liable under the California Act based on identical conduct on the same occasion. (P.C. 423.4(c).)

(4) *Texts and Law Reviews*. Hate speech and incitement to violence has been the subject of extensive commentary. (See 4 *Rotunda*, §20.37 et seq.; *Tribe*, §§12-9, 12-10; 82 *Cal. L. Rev.* 847 [essays on hate speech]; 84 *Cal. L. Rev.* 1499 [hate speech, pornography, and problem for artistic expression]; 33 *Golden Gate L. Rev.* 1 [money damages for true threats by antiabortion activists]; 25 *Hastings Const. L. Q.* 605 [liability of publishers for inciting of violence]; 51 *Hastings L. J.* 411 [The Freedom of Access to Clinic Entrances Act and *The Nuremberg Files* Web Site: Is the Site Properly Prohibited or Protected Speech?]; 38 *San Diego L. Rev.* 817 [regulating hate speech on Internet]; 36 *Santa Clara L. Rev.* 73 [liability of publishers for publications that incite, solicit, or instruct on acts of violence]; 40 *Santa Clara L. Rev.* 729 [historical perspective on power of hate speech]; 60 *So. Cal. L. Rev.* 215 [Heckling: A Protected Right or Disorderly Conduct?]; 65 *So. Cal. L. Rev.* 1887 [Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech]; 52 *Southwestern U. L. Rev.* 231 [evaluating true threats under First Amendment]; 39 *U.C.L.A. L. Rev.* 333 [ethnic intimidation laws]; 40 *U.C.L.A. L. Rev.* 103 [Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression]; 47 *U.C.L.A. L. Rev.* 1253 [hate speech and hate crimes]; 106 *A.L.R.5th* 337 [First Amendment Protection Afforded to Commercial and Home Video Games].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Texts and Law Reviews*. See 5 Rotunda 4th, §20.37 et seq.; 58 *Stanf. L. Rev.* 1337 [Threats and Meanings: How the Facts Govern First Amendment Doctrine]; 39 *U.S.F. L. Rev.* 353 [potential for Internet-specific standard restricting speech that performs teaching function].



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C. Limitations on the Rights.

8. Violence and Incitement to Violence.

b. Statements Not "Fighting Words."

7 *Witkin Sum. Cal. Law Const Law* § 458

[§ 458] Statements Not "Fighting Words."

In *Terminiello v. Chicago* (1949) 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131, an ordinance made it a misdemeanor to assist "in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace." Petitioner addressed a meeting of over 800 persons. About 1,000 opponents of his views were gathered outside in protest, with police unable to maintain order. Petitioner, who condemned the outside crowd and attacked various political and racial groups, was convicted of violation of the ordinance. *Held*, reversed. (a) The issue argued before the Court was whether the use of "fighting words" tending to incite an immediate breach of the peace was constitutionally punishable under *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, *supra*, §457. The majority did not decide this issue. Instead, the court held that a trial judge's instruction was a binding judicial construction of the ordinance, and that constitutionality must be determined in light of that instruction. (b) The instruction defined "breach of the peace" to include speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." This speech, the court held, cannot be constitutionally prohibited, for a function of free speech under our governmental system is to invite dispute. "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." (69 S.Ct. 896, 93 L.Ed. 1134.) Dissenting opinions argued that the instruction was immaterial to the main issue presented and left undecided by the majority. (69 S.Ct. 897 *et seq.*, 93 L.Ed. 1136 *et seq.*) (See 23 *So. Cal. L. Rev.* 356.)

In *Ashton v. Kentucky* (1966) 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469, defendant went to a Kentucky town during a labor dispute, and circulated pamphlets attacking the local police chief, sheriff, and editor of the paper for anti-union activities and various kinds of corruption. He was convicted of "criminal libel," the crime being defined by the trial judge as a writing "calculated to create disturbances of the peace," etc. *Held*, reversed. *Terminiello* and similar decisions "recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*. This kind of criminal libel 'makes a man a criminal simply because his neighbors have no self control and cannot refrain from violence.'" (86 S.Ct. 1410, 16 L.Ed.2d 472.) (See *People v. Huss* (1966) 241 C.A.2d 361, 366, 51 C.R. 56 [American Nazi Party members convicted of conspiracy to disturb public peace; reversed for error in instruction contrary to *Terminiello* rule].)

In *Gooding v. Wilson* (1972) 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408, a Georgia statute made it a misdemeanor

for a person without provocation to use "opprobrious words or abusive language, tending to cause a breach of the peace." *Held*, the statute was invalid. The proscribed act "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not susceptible of application to protected expression" (92 S.Ct. 1106, 31 L.Ed.2d 414), and this one was not. (92 S.Ct. 1109, 31 L.Ed.2d 417.) (See *Hess v. Indiana* (1973) 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 [defendant, in antiwar demonstration, loudly declared, "We'll take the fucking street later"; held, at worst, advocacy of future illegal action, not incitement to imminent disorder]; *Lewis v. New Orleans* (1974) 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 [prohibition of "obscene or opprobrious language" toward police; *Gooding v. Wilson* followed and conviction reversed]; *Department of Corrections v. State Personnel Bd.* (1997) 59 C.A.4th 131, 145, 69 C.R.2d 34 [brief verbal assault that was not critical of plaintiff personally, but of department's preferential treatment of women and minorities, and that did not threaten to erupt in violence, was not subject to "fighting words" exception].)

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8. Violence and Incitement to Violence.

c. Cross Burning.

1. General Prohibition.

7 *Witkin Sum. Cal. Law Const Law* § 459

[§ 459] General Prohibition.

R.A.V. v. St. Paul, Minnesota (1992) 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305, held unconstitutional the following ordinance of the city of St. Paul: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

Petitioner and several other teenagers allegedly assembled a cross and burned it inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under a number of other laws, one of the two provisions under which respondent city chose to charge petitioner was the ordinance. Petitioner moved to dismiss this count; the trial court granted the motion; but the Minnesota Supreme Court construed the ordinance as reaching only those expressions that constitute "fighting words" within the meaning of *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, *supra*, §457, and reversed the order of dismissal. *Held*, judgment of Minnesota Supreme Court reversed.

(a) Content-based regulations are presumptively invalid, but have been permitted in a few limited areas, such as defamation and obscenity. (112 S.Ct. 2542, 2543, 120 L.Ed.2d 316, 317.) It has sometimes been said that these categories of expression are "not within the area of constitutionally protected speech," but these statements must be taken in context. "What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)--not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." (112 S.Ct. 2543, 120 L.Ed.2d 318.)

(b) "The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace, and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because

of the action it entails, but not because of the ideas it expresses--so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. ... Similarly, we have upheld reasonable 'time, place or manner' restrictions, but only if they are 'justified without reference to the content of the regulated speech.' ... And just as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element, so also, the power to proscribe it on the basis of *one* content element (e.g., obscenity) does not entail the power to proscribe it on the basis of *other* content elements." (112 S.Ct. 2544, 120 L.Ed.2d 319.)

(c) "In other words, the exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication. Fighting words are thus analogous to a noisy sound truck: Each is ... a 'mode of speech,' ... ; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility--or favoritism--towards the underlying message expressed." (112 S.Ct. 2545, 120 L.Ed.2d 319.)

(d) "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience--i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages." (112 S.Ct. 2545, 120 L.Ed.2d 320.)

(e) "Another valid basis for according differential treatment to even a content-based subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the ... speech.' ... A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. ... Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." (112 S.Ct. 2546, 120 L.Ed.2d 321.)

(f) Applying these principles to the ordinance, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional.

(1) "[T]he ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics." (112 S.Ct. 2547, 120 L.Ed.2d 323.)

(2) "In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words--odious racial epithets, for example--would be prohibited to proponents of all views. But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender--aspersions upon a person's mother, for example--would seemingly be usable ad libitum in the placards on those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." (112 S.Ct. 2547, 120 L.Ed.2d 323.)

(3) "The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific

exceptions to the First Amendment prohibition we discussed earlier, nor within a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. ... St. Paul has not singled out an especially offensive mode of expression--it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty." (112 S.Ct. 2548, 120 L.Ed.2d 324, 325.)

(4) St. Paul and its amici finally contend that the discrimination is justified because it is narrowly tailored to serve compelling state interests. They assert that it helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination. The dispositive question, however, is whether content discrimination is reasonably necessary to achieve these compelling interests, and "it plainly is not." An ordinance not limited to the favored topics would have precisely the same beneficial effect; and the only interest distinctively served is that of displaying the city council's special hostility toward the particular biases thus singled out. "The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree." (112 S.Ct. 2550, 120 L.Ed.2d 326.)

Three separate opinions were filed. (See 112 S.Ct. 2550, 120 L.Ed.2d 327 [four justices concurring in the judgment]; 112 S.Ct. 2560, 120 L.Ed.2d 339 [one justice concurring in the judgment]; 112 S.Ct. 2561, 120 L.Ed.2d 339 [three justices concurring in the judgment].) (See 106 Harv. L. Rev. 124; 107 Harv. L. Rev. 1729; 108 Harv. L. Rev. 757; 106 Harv. L. Rev. 1139 [demise of *Chaplinsky* fighting words doctrine]; 21 Hastings Const. L. Q. 1117; 65 So. Cal. L. Rev. 1887 [Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech].)

In *Virginia v. Black* (2003) 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535, the justices agreed in several opinions that a state may, without infringing the First Amendment, ban cross burning with intent to intimidate a person or group. However, the Virginia statute involved here was held unconstitutional. In the plurality opinion, four justices agreed that the part of the statute that treats any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional on its face. (123 S.Ct 1550, 155 L.Ed.2d 554.) Three other justices concluded that severance of the prima facie evidence provision would "not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct." (123 S.Ct 1562, 155 L.Ed.2d 569.) (See 117 Harv. L. Rev. 339 [*Virginia v. Black*].)

SUPPLEMENT: [This section is current through the latest supplement]
See 59 Hastings L. J. 407 [*R.A.V.* and *Virginia v. Black*].



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c. Cross Burning.

2. Specific Prohibition on Property of Another.

7 *Witkin Sum. Cal. Law Const Law* § 460

[§ 460] Specific Prohibition on Property of Another.

In re Steven S. (1994) 25 C.A.4th 598, 31 C.R.2d 644, involved a juvenile who, with several other people, burned a cross in the yard of a neighboring interracial couple. The juvenile court found that the minor had violated P.C. 11411(c), which prohibits burning or desecrating a cross or other religious symbol on the private property of another, if done for the purpose, or in reckless disregard, of terrorizing another. (See 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §§17, 18.) *Held*, the statute "is neither overbroad nor vague, is not an impermissible content-based prohibition on speech, and does not violate equal protection." (25 C.A.4th 604.)

(a) Cross burning conveys a message, and hence it implicates free speech guarantees. (25 C.A.4th 606.) However, an *unauthorized* cross burning *on another person's property* (malicious cross burning), as distinguished from a ritual cross burning at a Klan gathering, also inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm. Hence, a malicious cross burning implicates the "true threat" and "fighting words" doctrines, under which certain speech and expressive conduct may be punished. (25 C.A.4th 607.)

(b) The true threat doctrine does not require an intent to terrorize. Rather, an objective standard applies. It is enough that a reasonable person would foresee that a victim would construe a malicious cross burning as a serious expression of intent to do harm; the only required intent is that the offender intentionally or knowingly burned the cross. (25 C.A.4th 608.)

(c) Malicious cross burning also falls within the scope of the fighting words doctrine. A cross burning at a Klan rally is constitutionally protected because it is not directed at any individual. A malicious cross burning on another's property is directed at individuals and causes terror in specific victims, thus bringing it within the scope of the fighting words doctrine. (25 C.A.4th 609.)

(d) Because the statute is restricted to true threats and fighting words, it is not overbroad. (25 C.A.4th 609.)

(e) In *R.A.V. v. St. Paul, Minnesota* (1992) 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305, *supra*, §459, the Court stated that, while certain categories of speech and expressive conduct may be regulated, regulation may not discriminate

within a category on the basis of content. (25 C.A.4th 610.) However, *R.A.V.* also prescribed three exceptions to this rule. Content-based discrimination is valid if (1) the basis of the discrimination consists entirely of the very reason the entire class of speech is proscribable; (2) the subclass involved is associated with particular secondary effects of the speech that are not content-related; or (3) the nature of the discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (25 C.A.4th 611.)

(f) The ordinance in *R.A.V.* applied to *any* cross burning, while the statute here applies only to an unauthorized cross burning on another person's private property. That distinction invokes all three of the *R.A.V.* exceptions. (1) The basis of the statute's content discrimination--protection of specific victims from fear, intimidation, and the threat of physical harm--is the very reason that fighting words and true threats are proscribable. (25 C.A.4th 611.) (2) The statute targets secondary effects of malicious cross burning--infliction of fear, intimidation, and threat of harm--not the racist message conveyed. (25 C.A.4th 612.) (3) There is no realistic possibility that official suppression of ideas is afoot. At its core, an unauthorized cross burning on another person's property is an act of terrorism that inflicts pain on its victim, and its expressive element is incidental at best. (25 C.A.4th 612.)

(g) Thus, although the statute discriminates against malicious cross burning on the basis of content, *R.A.V.* permits the discrimination. This conclusion also applies to the statute's prohibition against unauthorized desecration of other religious symbols on the property of another, since that desecration can have the same effects. (25 C.A.4th 613.)

(h) The statute's punishment of those who desecrate religious symbols but not those who desecrate nonreligious symbols does not deny equal protection. Malicious cross burning and desecration of other religious symbols is uniquely threatening, fearsome, and provocative, while desecration of nonreligious symbols is not. (25 C.A.4th 615.)

(i) P.C. 11411(c) "is not unconstitutional as to either its specific prohibition against cross burning or its general prohibition against desecration of religious symbols. The statute targets only acts of terrorism on the private property of another person, not the expression of ideas. It is neither overbroad nor vague, is not an impermissible content-based prohibition on speech, and does not deny equal protection." (25 C.A.4th 615, 616.)

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d. Acts Motivated by Bigoted Racial Beliefs.

7 *Witkin Sum. Cal. Law Const Law* § 461

[§ 461] Acts Motivated by Bigoted Racial Beliefs.

In *Wisconsin v. Mitchell* (1993) 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436, defendant led a group of Blacks who accosted a young white boy and beat him severely. Defendant was convicted of aggravated battery, with a sentence enhancement under a Wisconsin statute, because he intentionally selected his victim on account of the victim's race. The Supreme Court noted that there was a conflict of authority in state high courts on the constitutionality of such statutes (113 S.Ct. 2198, 124 L.Ed.2d 443), but rejected the constitutional challenges, holding that the statute did not violate defendant's free speech rights by punishing his biased beliefs (113 S.Ct. 2200, 124 L.Ed.2d 446). (See 107 Harv. L. Rev. 234; on sentence enhancement for hate crimes generally, see 3 Cal. Crim. Law (3d), Punishment, §305.)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Picketing Court or Legislature.

7 *Witkin Sum. Cal. Law Const Law* § 462

[§ 462] Picketing Court or Legislature.

(1) *Picketing Courthouse.* The second *Cox* case, *Cox v. Louisiana* (1965) 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487, raised a far more troublesome issue than the first (see *supra*, §456), and left the Court in sharp disagreement. A 1950 Louisiana criminal statute applies to a person who, with the intent of interfering with the administration of justice or of influencing a judge, juror, witness, or court officer, "pickets or parades in or near a building housing a court." The statute, like those of Massachusetts and Pennsylvania, was modeled after a 1949 federal act. Defendant was charged with its violation when the student mass meeting with which he was associated demonstrated at the courthouse in protest against the arrest of black college students who were jailed there. *Held*, the statute was valid but the conviction was not.

(a) *Validity of the statute.* (1) The state's interest in the object--protecting the judicial system--is unquestioned; a statutory safeguard against either hostile or friendly mobs is necessary and appropriate. (85 S.Ct. 480, 13 L.Ed.2d 491.) (2) The statute was narrowly drawn, and regulated conduct, not speech, even though speech was intermingled with the conduct. (85 S.Ct. 480, 13 L.Ed.2d 491.) (3) The clear and present danger test was inapplicable; the state may prohibit demonstrations before a courthouse "based on experience that such conduct inherently threatens the judicial process." (85 S.Ct. 481, 13 L.Ed.2d 493.) (4) The fact that defendant and the other demonstrators were seeking justice (good motives) did not make their conviction a violation of due process. The purpose of the demonstration was to condemn the arrest and trial, and even without that admitted purpose, intent could be inferred from the circumstantial evidence. A demonstration before a courthouse where a criminal charge is pending may be presumed to be intended to influence the judges, jurors, witnesses, or court officials. (85 S.Ct. 482, 13 L.Ed.2d 494.)

(b) *Reliance on police directions.* The thin ground of reversal was that the statute does not define the term "near," and that the police actually gave permission for the demonstration to take place where it did--across the street, about 125 feet away from the courthouse. Thus, in effect, defendant was advised that the place chosen would not be "near" the courthouse, and a conviction obtained after reliance on this assurance would deny due process. (85 S.Ct. 484, 13 L.Ed.2d 496.)

The dissenting opinions (four justices) found no substance in the theory that the chief of police either did or could by an "administrative determination" authorize a clear violation of the law, and challenged the assumption of fact that

defendant relied on this consent by pointing out that the demonstration had already occurred when the alleged consent was given. (85 S.Ct. 470, 472, 13 L.Ed.2d 503, 505.)

In *Cohen v. California* (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284, a conviction for violation of P.C. 415 (disturbing the peace) was based on defendant's peaceful picketing in a courthouse corridor, wearing a jacket containing the words "Fuck the Draft." *Held*, reversed. The Court said: "[A]bsent a more particularized and compelling reason for its actions, the State may not, ... make the simple public display here involved of this single four-letter expletive a criminal offense." (91 S.Ct. 1789, 29 L.Ed.2d 294.) (See 9 Cal. Western L. Rev. 171; 34 U.C.L.A. L. Rev. 1595; for further discussion of *Cohen*, see 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §3.)

(2) *Picketing Legislature*. Former P.C. 171f(3) made it a misdemeanor to "Picket within the State Capitol," the latter term being defined as the building intended primarily for use by the legislative department. (See P.C. 171f(2), proscribing "any conduct" within the State Capitol that "disrupts the orderly conduct of official business.") In *Simpson v. Municipal Court* (1971) 14 C.A.3d 591, 92 C.R. 417, the statute was held constitutional, and peaceful nonobstructive picketing inside the building was therefore properly banned. The prohibition was narrowly directed at a single communicative technique at a single location, leaving the picket free to operate on the rest of the capitol grounds. And the legislative assumptions were reasonable: that picketing in the corridors (a) "creates an oppressive atmosphere which discourages and repels citizen-visitors" and (b) "debases the quality" of the Legislature's deliberative processes. (14 C.A.3d 597.)

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f. Sit-in or Stand-in.

7 *Witkin Sum. Cal. Law Const Law* § 463

[§ 463] Sit-in or Stand-in.

In *Brown v. Louisiana* (1966) 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637, five Blacks staged a peaceful sit-in at the branch library in a Louisiana town. They had been served without discrimination at the library, but were protesting the use of segregated library cards and bookmobiles. *Held*, there was no evidence to support a conviction for breach of the peace. Thus, the opinion suggests that the defendants had a right to engage in a peaceful demonstration in the library. Four justices denounced this as "a completely new constitutional doctrine" with destructive implications: If one group can take over libraries for one cause, others can do it for other causes, and the next step will be to paralyze the schools. (86 S.Ct. 735, 736, 15 L.Ed.2d 658.)

In *Adderley v. Florida* (1966) 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149, the majority took a different view of a stand-in at a jail. University students went to the county jail to demonstrate their protest of arrests of other students who had attempted to integrate public theaters, and also to protest generally against racial segregation. They were ordered by the sheriff to leave the jail grounds, were warned that they would be arrested if they did not, and were then arrested, charged, and convicted of the statutory crime of "trespass with a malicious and mischievous intent" on the jail premises. *Held*, convictions affirmed. *Edwards v. South Carolina* (1963) 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, *supra*, §393, is distinguishable. The trespass there was on capitol grounds open to the public; here, it was on jail premises built for security purposes and not open to the public. South Carolina's breach of the peace statute was too indefinite and all-embracing; here, a narrow statute was aimed at one limited kind of conduct. (87 S.Ct. 244, 17 L.Ed.2d 152.)

The argument that petitioners had a right to make a peaceful demonstration on this public property was rejected as based on "the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (87 S.Ct. 247, 17 L.Ed.2d 156.)

Four justices dissented, contending that a jailhouse is one of the seats of government and an obvious center for protest; that the obstruction of traffic was nominal and correctable by ordering petitioners to move out of the way; and that this was a legitimate petition for redress of grievances, which could not be turned into a trespass by fiat of the sheriff. (87 S.Ct. 248, 17 L.Ed.2d 157.) (For restaurant sit-in cases, see *infra*, §760.)

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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY C. Limitations on the Rights. 9. Antinoise Regulations.

7 Witkin Sum. Cal. Law Const Law § 464

[§ 464] Antinoise Regulations.

Municipal ordinances regulating the use of sound amplifying devices on vehicles and elsewhere call for careful drafting to meet constitutional limitations. (See 122 A.L.R.5th 593 [Validity of State or Local Enactment Regulating Sound Amplification in Public Area].)

(1) *Loudspeakers*. In *Saia v. New York* (1948) 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574, an ordinance prohibited the use of a sound truck except by permission of the chief of police. *Held*, the ordinance was unconstitutional on its face because it placed in the hands of the chief of police an uncontrolled discretion, and thereby established a previous restraint on the right of free speech. Loudspeakers are "indispensable instruments of effective public speech." The sound truck "has become an accepted method of political campaigning." And the ordinance "would be a dangerous weapon if it were allowed to get a hold of our public life." Abuses that loudspeakers "create can be controlled by narrowly drawn statutes." (68 S.Ct. 1150, 92 L.Ed. 1578.)

In *Kovacs v. Cooper* (1949) 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513, an ordinance made it unlawful to use a sound truck or similar instrument that "emits therefrom loud and raucous noises." This was held valid. Three justices took the position that the city had acted reasonably in attempting to control the nuisance of "disturbing noises." "Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. ... We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance." (69 S.Ct. 454, 93 L.Ed. 522.) Two concurring justices saw no merit in this attempted distinction of the *Saia* case; they felt that a municipality could constitutionally prohibit the use of sound trucks. (69 S.Ct. 454, 459, 93 L.Ed. 523, 528.)

Saia and *Kovacs* indicate that sound trucks may not be absolutely prohibited, nor subjected to arbitrary regulation in the uncontrolled discretion of local officers, but that reasonable regulations of their use may be made. As a practical matter, however, it is difficult to see how the operator of a loudspeaker can avoid "loud and raucous" noises, and accordingly it would seem that much of the substance of the *Saia* opinion has been repudiated.

California took the *Kovacs* approach in *Haggerty v. Associated Farmers of Calif.* (1955) 44 C.2d 60, 279 P.2d 734. A Fresno County Anti-Noise Ordinance made it unlawful to emit "any loud and raucous noise" on the public highway,

including the human voice amplified to the extent that it carries onto private property or is heard by others using the highway. Petitioner, suing on behalf of a labor union, sought an injunction to prevent enforcement against union members using automobile horns and loud speakers to induce farm workers to quit work in a strike for union wage demands. *Held*, the ordinance was valid. It did not prevent use of all loudspeaking devices (e.g., broadcasting music or unamplified human voice), nor did it prohibit them in all places (it was still possible to use devices on private property, public parks, etc., normal places of public assembly), and the regulation of this noise on the highway was a legitimate police measure to preserve safety and tranquility. (44 C.2d 69.) (See 2 U.C.L.A. L. Rev. 561.)

In *Wollam v. Palm Springs* (1963) 59 C.2d 276, 29 C.R. 1, 379 P.2d 481, defendant city adopted a lengthy sound truck ordinance totally forbidding their use on Sundays and holidays, restricting their hours to 4 per day, limiting volume to a point of inaudibility at more than 200 feet away, and requiring movement at 10 miles or more per hour. Plaintiff sought relief on behalf of himself and members of his union, who were in a dispute with their employers over working conditions. *Held*, the ordinance was unconstitutional. Reviewing and reconciling *Saia* and *Kovacs*, and distinguishing *Haggerty*, the court held that the constitutional guarantee applies to the *means* as well as the content of the communication; that in some instances a sound truck may be the only practical means for communication of an opinion; and that in the instant case, the prohibition against the use of parked trucks deprived the union members of the right to communicate their grievances at the jobsite. (59 C.2d 284.)

"In summary, the vice of the present ordinance lies in its practical prohibition of the conveyance of a message to the public. The ordinance prevents any continuous statement, argument, or sustained presentation of a point of view that cannot be transmitted during the truck's fleeting, momentary passage. Yet the purposes of the ordinance could have been achieved without such an incursion into the field of free speech. An ordinance narrowly drawn may properly reach to the evils which it seeks to avoid. Instead, here, the ordinance sweeps within its broad ambit the constitutional right to tell a whole story by means of this method of communication." (59 C.2d 288.) (See *United Farm Workers Organizing Committee, AFL-CIO v. Superior Court* (1967) 254 C.A.2d 768, 772, 62 C.R. 567 [injunction prohibiting strikers from using mechanical device to amplify human voice in their picketing was unconstitutional attempt to prevent use of bullhorns in communications to workers]; *Chavez v. Municipal Court of Visalia Judicial Dist.* (1967) 256 C.A.2d 149, 156, 64 C.R. 76 [county ordinance prohibiting use of loudspeaker mounted on vehicle without permit was unconstitutional]; 10 Southwestern L. Rev. 267 [Authority of Municipal Corporations To Abate Unwanted Sounds].)

(2) *Other Regulations.* In *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, New York City adopted a regulation and a use guideline requiring Bandshell performers in Central Park to use sound-amplification equipment and a sound technician provided by the city. The purpose of the regulation was to decrease the volume of amplified music, which had brought complaints from park users and residents of adjacent areas. *Held*, the regulation was valid.

"The city's sound amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the Bandshell concert ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression." (109 S.Ct. 2760, 105 L.Ed.2d 683.) (See 25 *Loyola L.A. L. Rev.* 453 [*Ward*]; 25 *U.S.F. L. Rev.* 627 [same]; *Veh.C.* 27007 [driver of vehicle on highway is prohibited from operating "sound amplification system" intended to make sound audible from 50 feet or more away, unless to request assistance or warn of hazardous situation; excepting vehicles operated in parades, etc.].)

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C. Limitations on the Rights.

10. Registration and Identification.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 465

[§ 465] In General.

Statutes and ordinances requiring specified classes of persons or organizations to register and provide information to public authorities are common. Their effect, however, may be to expose these persons or organizations to unwarranted adverse publicity and to violate First Amendment freedoms or the Fifth Amendment privilege against self-incrimination. Hence, they are tested by considering the legislative motive, the public interest asserted, and the impact on those affected.

(1) *Valid Regulations.* In *People v. Zimmerman* (1928) 278 U.S. 63, 49 S.Ct. 61, 65, 73 L.Ed. 184, a statute required registration and filing of membership rosters of organizations that condition membership on execution of an oath. It was held valid as applied to the Ku Klux Klan, which had a history of unlawful activities.

Applicants for a business or professional license may be required to give fingerprints. (See *People v. Stuller* (1970) 10 C.A.3d 582, 595, 89 C.R. 158 [listing statutes on collection agents, private detectives, insurance agents, and others, and upholding ordinance requiring registration and fingerprinting of bartenders]; 41 A.L.R.3d 732.) And other legitimate public interests may support registration or identification statutes or ordinances. (On aliens, see *infra*, §475; on subversive political organizations, see *infra*, §477; on election campaign contributions, see *supra*, §257; on election campaign literature, see *infra*, §468; on gamblers, see 9 *Summary* (10th), *Taxation*, §107; on convicted narcotic and sex offenders, see 3 *Cal. Crim. Law* (3d), *Punishment*, §§180, 183.)

(2) *Invalid Regulations.* In *Thomas v. Collins* (1945) 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, a Texas statute required any paid labor union organizer to register with and give information to the Secretary of State, and to obtain an organizer's card, before soliciting members. The issue of validity of this identification and registration statute as applied to solicitation and collection of funds was raised but not decided. The Court held that the organizer had not solicited members, and that the statute could not validly be applied to a *public address* by an organizer. (See *In re Porterfield* (1946) 28 C.2d 91, 100, 105, 168 P.2d 706 [critical analysis of *Thomas* and power to regulate, but license ordinance held void for uncertainty].)

In *Lambert v. California* (1957) 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228, a Los Angeles municipal ordinance required a formerly convicted felon to register and furnish information to the chief of police if he remained in the city

for more than 5 days. The Court held it unconstitutional on the ground that it applied even though the defendant had no knowledge of the requirement (due process denied). (See *Albertson v. Subversive Activities Control Bd.* (1965) 382 U.S. 70, 86 S.Ct. 194, 198, 15 L.Ed.2d 165, 171, 2 Cal. Evidence (4th), Witnesses, §375 [violation of self-incrimination privilege]; *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488, 1499, supra, §379 [exposure of persons acting lawfully to adverse public political pressure].)

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10. Registration and Identification.

b. Handbill Distributor.

7 *Witkin Sum. Cal. Law Const Law* § 466

[§ 466] Handbill Distributor.

In *Talley v. California* (1960) 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559, a Los Angeles municipal ordinance provided that no person should distribute any handbill unless the name and address of the author and of the person causing distribution to be made were given. Talley passed out handbills headed "National Consumers Mobilization," urging a boycott against those denying equal employment opportunities to Blacks, Mexicans, and Asians. The California Appellate Department of the Superior Court (with a strong dissent) upheld the ordinance and affirmed a conviction. *Held*, reversed; the ordinance was void on its face.

The main opinion relied on *Lovell v. Griffin* (1938) 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, *supra*, §360, and *Schneider v. New Jersey* (1939) 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, *supra*, §350, which preclude any censorship of handbills, and distinguished valid identification regulations on the ground that this ordinance did not seek to reach those responsible for fraud or libel, but required identification in all circumstances. Thus it violated the "freedom of anonymity" that has played an important role in the history of social criticism, and that was protected in *Bates v. Little Rock* (1960) 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480, *supra*, §379, and *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488, 1499, *supra*, §379. "The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity." (80 S.Ct. 539, 4 L.Ed.2d 563.)

The dissenters pointed to the lack of any claim that defendant will suffer injury by identifying the bill with his name; denied the asserted constitutional guarantee of "freedom of anonymous speech"; listed a number of statutory requirements of identification that have been sustained (e.g., newspapers using second-class mail, regulations of lobbying and corrupt political practices); and concluded that the ordinance merely requires that "one who exercises his right of free speech through writing or distributing handbills identify himself just as does one who speaks from the platform. The ordinance makes for the responsibility in writing that is present in public utterance." (80 S.Ct. 542, 4 L.Ed.2d 566.)

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C. Limitations on the Rights.

10. Registration and Identification.

c. Anonymous Recorded Phone Messages.

7 *Witkin Sum. Cal. Law Const Law* § 467

[§ 467] Anonymous Recorded Phone Messages.

Talley v. California (1960) 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559, supra, §466, protects anonymity in any form of expression. In *Huntley v. Public Util. Com.* (1968) 69 C.2d 67, 69 C.R. 605, 442 P.2d 685, the Federal Communications Commission, in response to complaints about anonymous recorded telephone messages, requested A. T. & T. to make the sponsor's name and address available, and P. T. & T. and other state companies adopted regulations to that effect in 46 states. California's regulation, approved by the Public Utilities Commission, required subscribers to include their names and addresses in the recorded announcement, on penalty of termination of the service. *Held*, the regulation was void.

(a) Anonymity may be an indispensable prerequisite to speech, where its content may lead to harassment or reprisal, fear or apprehension. The *Talley* case makes it clear that First Amendment freedom of speech includes the right to remain anonymous; and this right encompasses all forms of expression, whether they be writings or, as here, a recorded message published over the telephone. (69 C.2d 74.)

(b) The right may be constitutionally impaired only where there is a compelling state interest. Thus, in *Canon v. Justice Court for Lake Valley Judicial Dist. of El Dorado* (1964) 61 C.2d 446, 39 C.R. 228, 393 P.2d 428, *infra*, §468, infringement was minimal and justified by a sufficient state interest. (69 C.2d 75.)

(c) No compelling interest justified this regulation. There was no showing of fear of defamation, and a person defamed can easily ascertain the identity of the defamer from P. T. & T. records. Also, the identification of "irresponsible messages" involves a test of degree of popular acceptance, which is not a criterion for determining the boundaries of speech. (69 C.2d 76.)

(d) The theory that *Talley* deals only with "primary actors," and not an "intervening neutral" like the telephone company, is unsound. P. T. & T. is a public utility whose regulations are made effective only by state action. (69 C.2d 76.)

(e) The F.C.C. identification requirement for broadcasters is distinguishable. A broadcast, under federal licensing laws and in an area greatly affecting the public interest, is quite different from a recorded telephone message actively

sought by the caller. (69 C.2d 78.)

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10. Registration and Identification.

d. Author of Attack on Candidate.

7 *Witkin Sum. Cal. Law Const Law* § 468

[§ 468] Author of Attack on Candidate.

Former Elec.C. 12047, as it read prior to 1965, made it a misdemeanor to distribute a writing attacking a candidate for public office unless it contained the name and address of the printer, and either two officers of the issuing organization or "some voter of this State, who is responsible for it." In *Canon v. Justice Court for Lake Valley Judicial Dist. of El Dorado* (1964) 61 C.2d 446, 39 C.R. 228, 393 P.2d 428, the statute, except for one defect, was held constitutional.

(a) The purpose--identification to allow the electorate to evaluate campaign material and candidates to refute charges--is legitimate. The Legislature found that scurrilous smear attacks are common and contrary to the public interest; 36 other state legislatures and Congress found similar legislation necessary. (61 C.2d 452, 453.)

(b) Since the decision in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, supra, §426, protecting the critic of public officers or candidates from defamation suits, the need for anonymity is less and the need for protection from scurrilous attacks is greater. This justifies the limited impairment of freedom of expression involved. Identification permits confrontation and makes refutation easier. (61 C.2d 458.)

(c) "We concluded, therefore, that the public interest in more complete information and clean, free elections, along with the incidental benefit of maintaining an environment more hospitable to candidates for public office, exceeds the interest in the marginal decrease in freedom of expression resulting from loss of anonymity in the instances in which the statute is applicable." (61 C.2d 459.)

(d) The statute, however, calls for disclosure by "some voter ... responsible for it," meaning that a person issuing campaign literature can comply only if he or she is a California voter or by obtaining the consent of some voter to place his or her name on it. Not only does this defeat the purpose of identification of the real issuer, it discriminates against individuals who are not California voters, and is therefore an invalid restraint on freedom of expression. Elec.C. 12049 (later repealed), requiring disclosure in writings dealing with ballot issues, merely calls for identification of "any individual responsible." (61 C.2d 460.) Elec.C. 12047 was amended to conform to the decision, and subsequently repealed. (See 4 A.L.R.4th 741 [validity and construction of state statutes prohibiting anonymous political advertising].)

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e. Author of Campaign Materials.

7 *Witkin Sum. Cal. Law Const Law* § 469

[§ 469] Author of Campaign Materials.

Elec.C. 29410 required disclosure of the name and address of the person or campaign committee responsible for any campaign materials, thus prohibiting all anonymous literature that sets forth arguments, information, or ideas in support of or in opposition to candidates or ballot measures. In *Schuster v. Municipal Court* (1980) 109 C.A.3d 887, 167 C.R. 447, the statute was held to be an unconstitutionally overbroad restraint of freedom of speech, violative of the First Amendment and Cal. Const., Art. I, §2. The opinion relies on *Talley v. California* (1960) 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559, supra, §466, and *Huntley v. Public Util. Com.* (1968) 69 C.2d 67, 69 C.R. 605, 442 P.2d 685, supra, §467 (109 C.A.3d 894, 895), rejects as insufficient the legislative findings of compelling state interest in the integrity of the electoral process (109 C.A.3d 896, 897), and notes that other jurisdictions have reached the same conclusion as to similar legislation (109 C.A.3d 899). The court adds:

"Concerning the governmental interests in assisting the electorate in distinguishing between truth and falsity, facilitating redress for libel, and discouraging through criminal punishment campaign falsity, former section 12047 and the *Talley* and *Canon* decisions have taught us that such state interests can be furthered through more narrowly constructed statutes without the criminalization of anonymously uttering the truth. The failure of section 29410 to distinguish between protected and unprotected speech constitutes its crowning blow of unconstitutionality." (109 C.A.3d 897.)

The constitutionally objectionable provisions were deleted in 1983. The statute was subsequently repealed and has been replaced by *Elec.C. 16*, which requires that a copy of the statute on mass mailings, *Govt.C. 84305* (supra, §277), be provided to each candidate and to proponents of local initiatives or referenda. (See *Griset v. Fair Political Practices Com.* (1994) 8 C.4th 851, 864, 865, 35 C.R.2d 659, 884 P.2d 116, supra, §277 [upholding constitutionality of *Govt.C. 84305*, requiring candidates and their committees to identify themselves on mass mailings to voters, and rejecting claim, based on *Schuster*, that failure to distinguish between protected and unprotected speech renders statute unconstitutional]; on campaign disclosures generally, see supra, §275 et seq.)

In *McIntyre v. Ohio Elections Com.* (1995) 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426, the Court struck down an Ohio statute that prohibited the distribution of anonymous campaign literature. The state's asserted interest in providing the electorate with relevant information was "plainly insufficient," because "the identity of the speaker is no

different from other components of the document's content that the author is free to include or exclude." (115 S.Ct. 1519, 1520, 131 L.Ed.2d 440, 441.) The state's interest in preventing fraudulent and libelous statements during election campaigns, while important, is vindicated by means of other, more direct prohibitions, and does not justify the extremely broad reach of the statute, which encompasses all documents without regard to whether they are arguably false or misleading. (115 S.Ct. 1520, 1521, 131 L.Ed.2d 441, 442.) (See 109 Harv. L. Rev. 180.)

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C. Limitations on the Rights.

11. Loyalty Regulations.

a. Antisubversive Criminal Legislation.

1. Earlier Statutes.

7 *Witkin Sum. Cal. Law Const Law* § 470

[§ 470] Earlier Statutes.

The cases dealing with the World War I federal Espionage Act and peacetime Criminal Syndicalism Laws took a broad view of the legislative power to prohibit speech that is dangerous to the public welfare in its advocacy of sabotage or violence in accomplishing political or economic changes. (On the federal statute, see *Abrams v. United States* (1919) 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173; *Hartzel v. United States* (1944) 322 U.S. 680, 64 S.Ct. 1233, 88 L.Ed. 1534 [conviction of pro-German author of pamphlets sent to prominent persons including military personnel was reversed for insufficiency of proof of criminal intent]; on state criminal syndicalism laws, see *Gitlow v. New York* (1925) 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138; *People v. Steelik* (1921) 187 C. 361, 374, 375, 203 P. 78; *People v. Chambers* (1937) 22 C.A.2d 687, 699, 72 P.2d 746; and see 56 Cal. L. Rev. 702 [Black Power Advocacy]; 37 Stanf. L. Rev. 661, 767, 795 [seditious libel and freedom of the press]; 70 Am.Jur.2d (1987 ed.), *Sedition, Subversive Activities, and Treason* §4 et seq.)

Statutes and ordinances prohibiting the display of a flag or other device as a symbol of opposition to the government or as an aid to seditious propaganda received varied treatment. (See *In re Hartman* (1920) 182 C. 447, 449, 188 P. 548 [ordinance was unconstitutional as covering advocacy of peaceful changes]; *Stromberg v. California* (1931) 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 [statute was void in part for uncertainty].)

Whitney v. California (1927) 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095, was overruled, and the Ohio Criminal Syndicalism Act was held unconstitutional, in *Brandenburg v. Ohio* (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430. The court declared that decisions subsequent to *Whitney* have fashioned "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (89 S.Ct. 1829, 23 L.Ed.2d 434.) (See *In re Harris* (1971) 20 C.A.3d 632, 634, 97 C.R. 844 [habeas corpus granted to release defendant charged with violation of California Criminal Syndicalism Act; *Brandenburg* applied, and Act held unconstitutional]; 22 Stanf. L. Rev. 1163 [*Whitney* and *Brandenburg*].)

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C. Limitations on the Rights.

11. Loyalty Regulations.

a. Antisubversive Criminal Legislation.

2. Smith Act.

7 *Witkin Sum. Cal. Law Const Law* § 471

[§ 471] Smith Act.

The Smith Act (18 U.S.C., §2385) makes it unlawful to (1) knowingly or willingly advocate or teach, etc., the overthrow of our government by force or violence; (2) publish or distribute this matter with the intent to cause the overthrow of the government; (3) organize or knowingly become a member of a group with these purposes; or (4) conspire to commit any of these acts. In *Dennis v. United States* (1951) 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, petitioners, Communist Party organizers and leaders, were convicted of violation of the conspiracy section. On certiorari, the binding facts found below were that petitioners, controlling the political apparatus of the party, established the party policy and objective of overthrow of the government by a violent revolution whenever the propitious occasion appeared. *Held*, the statute was constitutional and the convictions were properly affirmed.

(a) There is no "right" to rebel by violence against a government that provides the means of peaceful change, and the government has the power to protect itself. "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy." (71 S.Ct. 863, 95 L.Ed. 1148.)

(b) The statute does not punish peaceful study and discussion of the philosophical theories of Communism; it is directed at advocacy, not discussion. (71 S.Ct. 863, 95 L.Ed. 1148.)

(c) Where the statute, as here, punishes speech (teaching and advocacy), the clear and present danger test governs (see *supra*, §407), but it is not a rigid rule and its application depends on the circumstances of each case. Where, e.g., the *interest* to be protected is deemed too insubstantial to warrant restriction of speech, the regulation will fail; but "overthrow of the government by force and violence is certainly a substantial enough interest for the Government to limit speech." (71 S.Ct. 867, 95 L.Ed. 1152.) That the rebellion is not imminent or likely to succeed is immaterial; an *attempt* to overthrow the government, by a highly organized *conspiracy*, is, in present world conditions, a sufficient danger. (See 70 Am.Jur.2d (1987 ed.), *Sedition, Subversive Activities, and Treason* §63 et seq.)

The implication that *Dennis* obliterated the dividing line between legal advocacy of abstract doctrine and illegal advocacy of action was dispelled in *Yates v. United States* (1957) 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356,

reversing a conviction of Communist Party officials for improper instructions. "We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effect to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not." (77 S.Ct. 1076, 1 L.Ed.2d 1374.)

A conviction for membership in the Communist Party with knowledge of its purposes was affirmed in *Scales v. United States* (1961) 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782. "Dennis and Yates have definitely laid at rest any doubt but that present advocacy of *future* action for violent overthrow satisfies statutory and constitutional requirements equally with advocacy of *immediate* action to that end." (81 S.Ct. 1497, 6 L.Ed.2d 814.) (See 28 *San Diego L. Rev.* 1 [Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era].)

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11. Loyalty Regulations.

a. Antisubversive Criminal Legislation.

3. Federal Preemption.

7 *Witkin Sum. Cal. Law Const Law* § 472

[§ 472] Federal Preemption.

A state may enact sedition and anti-sabotage laws (see *supra*, §470), but only where the federal government has not occupied the field. In *Pennsylvania v. Nelson* (1956) 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640, a conviction of a Communist Party member for violation of the Pennsylvania Sedition Act was reversed on the ground of supersession.

(a) The aggregate of federal statutes, including the Smith Act (18 U.S.C., §2385), the Internal Security Act of 1950 (former 50 U.S.C., §781 et seq.), and the Communist Control Act of 1954 (50 U.S.C., §841), makes clear the congressional intention to occupy the field of sedition, and a state statute is superseded though it purports only to supplement the federal law ("coincidence is as ineffective as opposition"). (76 S.Ct. 481, 100 L.Ed. 653.)

(b) The subject is one in which the federal interest is so dominant as to preclude enforcement of state laws on the same subject; it is a matter of vital national concern and in no sense a local enforcement problem. (76 S.Ct. 481, 482, 100 L.Ed. 653.)

(c) Enforcement of state acts presents a serious danger of conflict with the administration of the federal program, which has been emphasized by requests of federal officials to state officers to turn over information on subversive activities and allow the Department of Justice to take charge of the matter. (76 S.Ct. 482, 483, 100 L.Ed. 654.)

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11. Loyalty Regulations.

a. Antisubversive Criminal Legislation.

4. Burning Draft Card.

7 *Witkin Sum. Cal. Law Const Law* § 473

[§ 473] Burning Draft Card.

The Military Selective Service Act (50 U.S.C. Appx., §462(b)) makes it a crime to knowingly destroy or mutilate a Selective Service Registration Certificate (draft card). In *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, defendant publicly burned his certificate for the avowed purpose of influencing others to adopt his anti-war beliefs. *Held*, conviction affirmed; the statute is constitutional.

(a) The statute, prohibiting an act, does not abridge free speech on its face, any more than a law prohibiting destruction of a driver's license or tax records. (88 S.Ct. 1678, 20 L.Ed.2d 679.)

(b) The contention that the act was "symbolic speech," and that the Constitution protects all modes of communication by conduct, is unsound. When speech and nonspeech elements are combined in conduct, a sufficiently important governmental interest can justify incidental limitations. (88 S.Ct. 1678, 20 L.Ed.2d 679.)

(c) The statute meets this test. (1) The power of Congress to raise and support armies is broad and sweeping, and supports compulsory military service. (2) The draft certificate aids in the administration of the system. (3) Destruction of the certificate was a wilful frustration of this governmental interest. (88 S.Ct. 1679, 20 L.Ed.2d 680.) (See 81 Harv. L. Rev. 1347 [criticizing Court of Appeals decision]; 6 San Diego L. Rev. 81.)

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a. Antisubversive Criminal Legislation.

5. Desecrating Flag.

7 *Witkin Sum. Cal. Law Const Law* § 474

[§ 474] Desecrating Flag.

In *Smith v. Goguen* (1974) 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605, defendant appeared on a public street in a Massachusetts town with a four- by six-inch American flag sewed to the left rear of his blue jeans. He was not charged with physical desecration, but with violation of the portion of the Massachusetts flag misuse statute punishing a person who "treats contemptuously the flag of the United States." *Held*, the statute was void for vagueness, and it was unnecessary to consider the challenge of overbreadth or other First Amendment grounds.

(a) Casual treatment of the flag "has become a wide-spread contemporary phenomenon," and the legislative intent could not have been to make criminal every informal use of it. Due process requires reasonably clear notice of what the statute forbids, and the notice standards were not satisfied here. (94 S.Ct. 1247, 2148, 39 L.Ed.2d 612.)

(b) The additional and most meaningful aspect of the vagueness doctrine is the requirement that a Legislature establish minimal guidelines to govern law enforcement. Where, as here, inherently vague statutory language permits selective enforcement, due process is denied. (94 S.Ct. 1248, 39 L.Ed.2d 613.)

(c) There are areas of human conduct where the Legislatures cannot establish precise standards; e.g., disorderly conduct, requiring an on-the-spot assessment of the need to keep order. But there is no reason to commit such broad discretion to law enforcement officers in the area of flag contempt. Display of the flag is so common, and takes so many forms, that the legislature should define "with substantial specificity" what constitutes forbidden treatment. (94 S.Ct. 1251, 39 L.Ed.2d 616.)

Three justices dissented. (94 S.Ct. 1255, 1256, 39 L.Ed.2d 621, 622.) (See *Street v. New York* (1969) 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 [conviction based on mere words under statute making it criminal to publicly deface the flag "either by words or act" would be unconstitutional]; 41 A.L.R.3d 502 [what constitutes violation of flag desecration statutes]; on crime of defacing, trampling, etc., U.S. or California flag, see *Mil. & Vet.C. 614*, 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §261.)

In *Spence v. Washington* (1974) 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842, defendant, a college student, hung a

three- by five-foot flag out of the window of his apartment in Seattle, Washington. It was upside down, and had attached to it by removable tape the peace symbol (circle enclosing a trident). He was convicted under a statute that prohibited various kinds of improper use of the flag. *Held*, conviction reversed.

(a) The flag was privately owned, displayed on private property, and involved no breach of the peace. (94 S.Ct. 2729, 41 L.Ed.2d 846.)

(b) A flag may be used, as other symbols have been used, as a means of communication of protected expression. Here, defendant sought to protest the recent invasion of Cambodia and the Kent State University killings, and to stress the objective of peace. "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." (94 S.Ct. 2730, 41 L.Ed.2d 847.)

(c) The state asserted the interest in preserving the national flag as an unalloyed symbol of our country. Assuming the validity of this interest, the statute was unconstitutionally applied to defendant's activity. "[H]is message was direct, likely to be understood, and within the contours of the First Amendment." (94 S.Ct. 2732, 41 L.Ed.2d 849.)

Three justices dissented. (94 S.Ct. 2733, 41 L.Ed.2d 850.) (See 88 Harv. L. Rev. 1482 [roles of categorization and balancing in flag desecration cases]; 8 Loyola L.A. L. Rev. 689 [Spence and other flag cases]; 22 U.C.L.A. L. Rev. 974 [same].)

In *Texas v. Johnson* (1989) 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342, defendant was convicted of desecrating a flag in violation of Texas law after publicly burning an American flag as a means of political protest. The Texas Court of Criminal Appeals reversed defendant's conviction, and the Supreme Court, on certiorari, affirmed the decision.

(a) The act of burning the flag was expressive conduct protected by the *First Amendment*. (109 S.Ct. 2538, 2539, 105 L.Ed.2d 352, 353, citing *Spence* and other cases.) "The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." (109 S.Ct. 2540, 105 L.Ed.2d 354.)

(b) Where speech and nonspeech elements are combined in the same course of conduct, the test of *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, *supra*, §473, is applied: whether a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. (109 S.Ct. 2540, 105 L.Ed.2d 355.)

(c) The asserted state interest in preventing breaches of the peace cannot be sustained. It amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace. (109 S.Ct. 2541, 105 L.Ed.2d 356.) And the conduct does not fall within the small class of "fighting words." No reasonable onlooker would have regarded defendant's generalized expression of dissatisfaction with the government's policies as a direct personal insult. (109 S.Ct. 2542, 105 L.Ed.2d 357.)

(d) The state's interest in preserving the flag as a symbol of nationhood and national unity does not justify the conviction. Under the principles announced in *Boos v. Barry* (1988) 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333, *supra*, §342, defendant's political expression was restricted because of the content of the message he conveyed, and the state's interest must be subjected to "the most exacting scrutiny." (109 S.Ct. 2543, 105 L.Ed.2d 359.) The Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable; and no exception to this principle has been recognized even where the state's flag was involved. (109 S.Ct. 2544, 2546, 105 L.Ed.2d 360, 362, citing *Spence* and *Street v. New York*, *supra*.) "We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by--as one witness here did--according it remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." (109 S.Ct. 2547, 105 L.Ed.2d 364.)

Four justices dissented in two opinions. (109 S.Ct. 2549, 2556, 105 L.Ed.2d 365, 374.) (See 103 Harv. L. Rev. 249; 17 Hastings Const. L. Q. 369; 23 Loyola L.A. L. Rev. 535; 17 Pepperdine L. Rev. 757; 37 U.C.L.A. L. Rev. 925.)

After the decision in *Johnson*, Congress passed the Flag Protection Act of 1989. (See 17 Hastings Const. L. Q. 353.) In *United States v. Eichman* (1990) 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287, the Court, with four justices dissenting, held the statute unconstitutional.

(a) The Government argued that, unlike the statute involved in *Johnson*, the present Act did not target expressive conduct on the basis of the content of its message; it proscribed conduct that damages or mistreats a flag, without regard to the actor's motive, his or her intended message, or the likely effects of his or her conduct on onlookers. (110 S.Ct. 2408, 110 L.Ed.2d 294.) "But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. ... Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated 'only when a person's treatment of the flag communicates [a] message' to others that is inconsistent with those ideals." (110 S.Ct. 2408, 110 L.Ed.2d 294, 295.)

(b) "We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, ... vulgar repudiations of the draft, ... and scurrilous caricatures. ... Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering." (110 S.Ct. 2410, 110 L.Ed.2d 296.) (See 42 Stanf. L. Rev. 1337 [Saving Old Glory: On Constitutional Iconography].)

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11. Loyalty Regulations.

b. Regulation of Aliens.

1. Exclusion and Registration.

7 *Witkin Sum. Cal. Law Const Law* § 475

[§ 475] Exclusion and Registration.

(1) *Exclusion.* The comprehensive regulation of immigration, under the Immigration and Nationality Act, has already been mentioned. (See *supra*, §183 et seq.) Among those subject to exclusion are persons who advocate opposition to all organized government, or the violent overthrow of the United States Government. (8 U.S.C., §1182(a); see 15 *San Diego L. Rev.* 79 [avenues of relief for the alien]; 3*B Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §1690 et seq; on exclusion hearings, see *Landon v. Plasencia* (1982) 459 U.S. 21, 103 S.Ct. 321, 74 L.Ed.2d 21; 34 *Hastings L. J.* 911; on right to judicial review of exclusion order under the Administrative Procedure Act, as in deportation cases (*infra*, §476), see *Brownell v. We Shung* (1956) 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225.)

Exercise of the power to exclude subversive aliens is not affected by the desire of residents to hear their views. (*Kleindienst v. Mandel* (1972) 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 [rejecting claim of First Amendment right to hear].)

(2) *Registration.* The Immigration and Nationality Act requires that aliens register, be fingerprinted, report any change of address, and carry a registration card. (8 U.S.C., §1301 et seq.; see 3*C Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §2594 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Exclusion.* See 23 *A.L.R. Fed 2d* 171 [validity and construction of federal statute providing for inadmissibility of persons engaged in terrorist activity].



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11. Loyalty Regulations.

b. Regulation of Aliens.

2. Deportation.

7 *Witkin Sum. Cal. Law Const Law* § 476

[§ 476] Deportation.

(1) *Power of Congress.* Congress has relatively unlimited power to prescribe grounds for the deportation of undesirable aliens. (See *Galvan v. Press* (1954) 347 U.S. 522, 74 S.Ct. 737, 742, 98 L.Ed. 911, 921 [upholding provision of Internal Security Act of 1950, authorizing deportation for membership in Communist Party without necessity of proving its subversive character]; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 [deportation of alien witness before defense counsel has opportunity to interview him does not violate Fifth and Sixth Amendments unless defendant makes some plausible explanation of assistance he would have received from deported witness' testimony]; 6 *Golden Gate L. Rev.* 23 [Aliens, Deportation and the Equal Protection Clause]; 3B *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §1807 et seq.)

(2) *Principal Statutory Grounds.* The Immigration and Nationality Act authorizes the deportation of aliens who advocate the violent overthrow of the U.S. Government or who have been convicted of violating certain acts or offenses relating to national security, including selective service, espionage, sabotage, treason, terrorism, and trading-with-the-enemy. (8 U.S.C., §1227(a)(2), (4); see 3B *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §1868 et seq.) It also provides for the deportation of those convicted of specified crimes involving moral turpitude after entry. (8 U.S.C., §1227(a)(2); see *Reid v. Immigration & Naturalization Service* (1975) 420 U.S. 619, 95 S.Ct. 1164, 1168, 43 L.Ed.2d 501, 507 [false assertion of citizenship held equivalent to excludable ground of entry without inspection]; 22 *Hastings Const. L. Q.* 491 [deportation of alien parents of citizen child as unconstitutional de facto deportation of child]; 2 *Pepperdine L. Rev.* 52 [criminal convictions]; 13 *San Diego L. Rev.* 454 [deportation for marijuana conviction]; 23 *U.S.F. L. Rev.* 415 [standards for denaturalization and deportation of persons accused of crimes prior to entry]; 3B *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §1824 et seq.)

A former version of the moral turpitude provision was given a highly technical construction in favor of the alien in *Costello v. Immigration & Naturalization Service* (1964) 376 U.S. 120, 84 S.Ct. 580, 11 L.Ed.2d 559. C, born in Italy, became a naturalized citizen in 1925. He was convicted of two income tax offenses in 1954, and his citizenship was revoked for fraud in 1959. Hence, under the section making revocation relate back to the date of naturalization, he was an alien in 1954 when convicted of the two crimes. *Held*, however, he was not subject to deportation. The provision establishing the ground applies only to a person who was an alien at the time of the convictions; the relation back

section, based on a fiction and involving a forfeiture, should not be applied without a clear congressional intent. (84 S.Ct. 586, 11 L.Ed.2d 565.)

The dissenting justices offered a caustic comment: "Today's holding has an anomalous result. The alien who has not become a citizen is deportable for the commission of two crimes. But not so the alien who has committed two crimes and has also been denaturalized for fraud practiced in procuring his citizenship. His fraud becomes his ready and effective shield, a result which I cannot believe Congress intended to enact into law." (84 S.Ct. 589, 11 L.Ed.2d 568.)

(3) *Procedure*. Although an *alien entrant* may be excluded or expelled by administrative order, deportation of a *resident alien without a hearing* is beyond the legislative and executive authority. "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law. Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard. For example, he is entitled to a fair chance to prove mistaken identity." (*Kwong Hai Chew v. Colding* (1953) 344 U.S. 590, 73 S.Ct. 472, 477, 97 L.Ed. 576, 583.)

The statute contains a detailed procedure involving investigation, arrest, hearing, and administrative appeal. (See *Marcello v. Bonds* (1955) 349 U.S. 302, 75 S.Ct. 757, 761, 99 L.Ed. 1107, 1115; *Jay v. Boyd* (1956) 351 U.S. 345, 76 S.Ct. 919, 100 L.Ed. 1242; 8 *Hastings Const. L. Q.* 397 [Due Process and Deportation]; 14 *San Diego L. Rev.* 111, 130, 151; 15 *San Diego L. Rev.* 79 [avenues of relief for alien]; 8 *U.C. Davis L. Rev.* 289 [right to assigned counsel in deportations]; 3B *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §§1879 et seq., 1917 et seq.; on procedure of arrest under administrative warrant, and validity of search thereunder, see *Abel v. United States* (1960) 362 U.S. 217, 80 S.Ct. 683, 694, 4 L.Ed.2d 668, 681.)

(4) *Judicial Review*. Judicial review of a deportation order is generally available under the provisions governing review of orders of federal agencies (see 28 U.S.C., §2341 et seq.). (8 U.S.C., §1252(a); see 8 U.S.C., §1225(b)(1) [habeas corpus review of order regarding inspection of aliens for admission]; *Stone v. Immigration & Naturalization Service* (1995) 514 U.S. 386, 115 S.Ct. 1537, 1543, 1544, 131 L.Ed.2d 465, 474 [motion for reconsideration of final deportation order does not toll statutory period for filing petition for judicial review of order]; 3B *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §2025 et seq.) (On standard of proof in deportation cases, see *Woodby v. Immigration & Naturalization Service* (1966) 385 U.S. 276, 87 S.Ct. 483, 488, 17 L.Ed.2d 362, 369 [same standard as in denaturalization and expatriation cases: clear and convincing evidence required to support deportation order]; on de novo judicial determination of claim to United States citizenship, see *Agosto v. Immigration & Naturalization Service* (1978) 436 U.S. 748, 98 S.Ct. 2081, 2085, 56 L.Ed.2d 677, 684.)

(5) *Suspension of Deportation*. The statute authorizes the Attorney General to suspend deportation in cases of extreme hardship. (8 U.S.C., §1229b(b)(1); see 8 U.S.C., §§1182(a)(6), 1229b(b)(2) [alien subjected to extreme cruelty or battering by U.S. citizen spouse, parent, or family member]; *Jay v. Boyd* (1956) 351 U.S. 345, 76 S.Ct. 919, 923, 100 L.Ed. 1242, 1250; *Foti v. Immigration & Naturalization Service* (1963) 375 U.S. 217, 84 S.Ct. 306, 309, 11 L.Ed.2d 281, 285 [review of denial]; *Immigration & Naturalization Service v. Rios-Pineda* (1985) 471 U.S. 444, 105 S.Ct. 2098, 85 L.Ed.2d 452 [Attorney General's discretion]; 18 *San Diego L. Rev.* 663; 8 *U.C. Davis L. Rev.* 323 [relief from deportation]; 3B *Am.Jur.2d* (1998 ed.), *Aliens and Citizens* §1962 et seq.; on Attorney General's discretion to deny motion to reopen deportation proceedings, see *Immigration & Naturalization Service v. Doherty* (1992) 502 U.S. 314, 112 S.Ct. 719, 116 L.Ed.2d 823.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Principal Statutory Grounds*. See 27 A.L.R. *Fed 2d* 227 [what constitutes "aggravated felony" for which alien can be deported or removed--murder, rape, or sexual abuse]; 32 A.L.R. *Fed 2d* 509 [expedited removal of aliens convicted of committing aggravated felonies].



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c. Registration of Subversive Organizations.

7 *Witkin Sum. Cal. Law Const Law* § 477

[§ 477] Registration of Subversive Organizations.

(1) *In General.* Registration requirements for subversive organizations have been upheld, but they cannot be applied in a manner infringing on constitutional rights. Thus, in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817, a suit for declaratory and injunctive relief was brought to review the Attorney General's inclusion of plaintiff organizations in a list of subversive organizations furnished by him to the federal Loyalty Review Board and Civil Service Commission, pursuant to the President's Executive Order. The several opinions of the Court generally hold that due process requires notice and hearing before such a listing can be made.

The former Internal Security Act of 1950 (also known as the Subversive Activities Control Act), regulating "Communist-action" organizations, required that they register as such with the Attorney General. If the Attorney General had reason to believe that an unregistered organization came within the Act, a proceeding before the Subversive Activities Control Board to determine the fact would be initiated. (Former 50 U.S.C., §781 et seq.; see 70 *Am.Jur.2d* (1987 ed.), *Sedition, Subversive Activities, and Treason* §74 et seq.) In upholding the former Act, the Court in *Communist Party of the United States v. Subversive Activities Control Bd.* (1961) 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625, answered the familiar argument that if the Communist Party may be required to register and give identifying information, so may any group with unpopular political objectives or ideology: The Act applies only to *foreign-dominated* organizations that "work primarily to advance the objectives of a world movement controlled by the government of a foreign country. ... This is the full purported reach of the statute and its fullest effect. There is no attempt here to impose stifling obligations upon the proponents of a particular political creed as such, or even to check the importation of particular political ideas from abroad for propagation here." (81 S.Ct. 1414, 6 L.Ed.2d 694.)

The Communist Control Act of 1954 outlaws the Communist Party. (50 U.S.C., §841.) As a subversive organization rather than a political party, it is not entitled to the rights, privileges, or immunities of other legal bodies. (50 U.S.C., §842.)

(2) *Distinction: Individual Members.* In a subsequent decision, the Court held that the requirement of registration of individual members of these organizations violated the Fifth Amendment privilege against self-incrimination. (*Albertson v. Subversive Activities Control Bd.* (1965) 382 U.S. 70, 86 S.Ct. 194, 198, 15 L.Ed.2d 165, 171, 2 *Cal. Evidence* (4th), Witnesses, §375; see *People v. McCormick* (1951) 102 C.A.2d Supp. 954, 962, 228 P.2d 349 [local

ordinance requiring members to register was violative of privilege]; 34 *U.C.L.A. L. Rev.* 467 [self-reporting schemes and Fifth Amendment since *Albertson*].)

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d. Investigation of Subversive Activities.

7 *Witkin Sum. Cal. Law Const Law* § 478

[§ 478] Investigation of Subversive Activities.

The power of congressional committees to investigate subversive activities is established. (See *supra*, §164.) However, because admission of this conduct involves the possibility of criminal prosecution, a witness questioned on Communist membership or affiliations may make a timely and proper claim of the privilege against self-incrimination (Fifth Amendment). (See *Blau v. United States* (1950) 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170; 2 *Cal. Evidence* (4th), *Witnesses*, §502.)

Where no claim is made of the Fifth Amendment privilege, and the witness simply claims the right, under the First Amendment, to privacy of personal political beliefs and associations (see *supra*, §378 et seq.); the governmental interest has been upheld. In *Barenblatt v. United States* (1959) 360 U.S. 109, 79 S.Ct. 1081, 1094, 3 L.Ed.2d 1115, 1130, petitioner, a teacher, was questioned by the Subcommittee of the House Committee on Un-American Activities as to present and past membership in the Communist Party, and was convicted of contempt for failure to answer. In affirming the conviction, the court pointed out that the situation called for a balancing of the competing private and public interests in the particular circumstances; that the Communist Party was not an ordinary political party and the power to investigate Communist activity is well established; and that the fact that the field of education was involved was not a reason for denial of inquiry into revolutionary Communist activities. (See *supra*, §164.)

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e. Loyalty Tests for Employees.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 479

[§ 479] In General.

The federal security program, by statute and executive orders, has resulted in widespread investigation of subversive activity and the imposition of loyalty tests in determining eligibility for federal employment or "security clearance." The decisions of the U.S. Supreme Court have been mainly concerned with statutory interpretation and procedure rather than with constitutionality. (See *Peters v. Hobby* (1955) 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129; *Cole v. Young* (1956) 351 U.S. 536, 76 S.Ct. 861, 100 L.Ed. 1396; *Greene v. McElroy* (1959) 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377, 1 *Cal. Evidence* (4th), *Introduction*, §84 [right of confrontation and cross-examination].)

United States v. Robel (1967) 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508, emphasizes the constitutional protection of innocent or passive membership in a subversive organization. The Subversive Activities Control Act of 1950 (former 50 U.S.C., §781 et seq.) provides that, when a Communist-action organization is under a final order to register, it is unlawful for a member of it to engage in employment in any defense facility. The Communist Party is under this order. Defendant, a member, was employed as a machinist in a Seattle shipyard designated by the Secretary of Defense as a "defense facility." He was indicted for engaging in this employment with knowledge of these facts. The district court read into the statute a requirement of active membership in the Party and specific intent to further its aims; the Government opposed this limited construction. *Held*, the statute was an unconstitutional abridgment of the First Amendment right of association; the district court's attempt to save it was not permissible in view of *Aptheker v. Secretary of State* (1964) 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992, *supra*, §404, holding a similar provision void for overbreadth and lack of certainty. "It is precisely because that statute [i.e., the one here involved] sweeps indiscriminately across all types of associations with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment." (88 S.Ct. 423, 19 L.Ed.2d 513.)

The war power "cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." (88 S.Ct. 423, 19 L.Ed.2d 514.) Thus, Congress can prescribe criminal penalties for espionage and sabotage, deny access to secrets, declare sensitive positions off limits, etc.; but it must realize its objectives by means less drastic than this invasion of First Amendment freedoms. (88 S.Ct. 425, 19 L.Ed.2d 515.) (See 82 *Harv. L. Rev.* 143 [*Robel*]; 85 *Harv. L. Rev.* 1160 et seq. [extended review of problem].)

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2. Disclosure of Communist Membership.

7 *Witkin Sum. Cal. Law Const Law* § 480

[§ 480] Disclosure of Communist Membership.

(1) *Past Membership in Subversive Organization.* In *Garner v. Board of Public Works of Los Angeles* (1951) 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, *infra*, §482, a Los Angeles municipal ordinance required a city employee to file an affidavit stating whether he is or ever was a member of the Communist Party. *Held*, this was a valid inquiry into matters that might be relevant to fitness for public service. "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." (71 S.Ct. 912, 95 L.Ed. 1322.)

(2) *Present Membership.* In *Adler v. Board of Education of New York* (1952) 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, a New York statute provided that membership in certain listed subversive organizations (the list compiled after hearings) was *prima facie* evidence of unfitness for school employment. *Held*, the statute was valid; the rebuttable presumption was reasonably related to the fact of membership in a subversive organization. And the power of the state to impose reasonable conditions on public employment was restated: "In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." (72 S.Ct. 385, 96 L.Ed. 524.) (See *Steinmetz v. California State Bd. of Education* (1955) 44 C.2d 816, 285 P.2d 617, *infra*, §481 [following *Garner* and *Adler*]; 85 Harv. L. Rev. 1160 et seq. [extended review of problem]; 27 A.L.R.2d 487 [Dismissal or Rejection of Public School Teacher Because of Disloyalty].)

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7 *Witkin Sum. Cal. Law Const Law* § 481

[§ 481] Cooperation With Investigating Agencies.

Many states have enacted statutes that require public employees to appear before investigating committees or other bodies and to answer questions concerning subversive activities. (See, e.g., *Govt.C. 1028.1*.) Early cases, mainly dealing with police officers involved in criminal investigations by a grand jury, had established the right to discharge an employee for claiming the privilege against self-incrimination. (See *Christal v. Police Com. of San Francisco* (1939) 33 C.A.2d 564, 567, 92 P.2d 416; 44 A.L.R.2d 789 [Assertion of Immunity as Ground for Removing or Discharging Public Officer or Employee]; 2 *Cal. Evidence* (4th), *Witnesses* §362.) Other cases made similar holdings with respect to teachers claiming the privilege before legislative committees or governing boards of schools. (See *Pockman v. Leonard* (1952) 39 C.2d 676, 687, 249 P.2d 267, *infra*, §482.) But later decisions indicate that not every refusal to answer questions is a ground for discharge.

In *Steinmetz v. California State Bd. of Education* (1955) 44 C.2d 816, 285 P.2d 617, the court construed and upheld *Govt.C. 1028.1*. Petitioner, an associate professor at a state college, was questioned by the president of the state Board of Education. He refused to answer such questions as "Are you knowingly a member of the Communist Party?" and "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" *Held*, the questions were relative to his fitness for public employment, and he was properly dismissed for failure to answer. (44 C.2d 823.) (See *Board of Education of Los Angeles v. Wilkinson* (1954) 125 C.A.2d 100, 105, 270 P.2d 82 [local Board of Education rule requiring employee to answer such questions, upheld]; *Board of Education of Los Angeles v. Eisenberg* (1954) 129 C.A.2d 732, 736, 277 P.2d 943 [similar, following *Wilkinson*]; *Laguna Beach Unified School Dist. of Orange County v. Lewis* (1956) 146 C.A.2d 463, 470, 304 P.2d 59 [Education Code requirement]; 8 *Hastings L. J.* 203.)

On the other hand, in *Slochower v. Board of Higher Education of New York* (1956) 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, appellant invoked the Fifth Amendment privilege before a Senate investigating committee. He was thereupon summarily dismissed from his position as a New York City schoolteacher, pursuant to a charter provision authorizing dismissal for claim of the privilege. *Held*, the provision violated the Due Process Clause by authorizing an arbitrary discharge on a conclusive presumption of guilt for any invocation of the constitutional privilege, regardless of the circumstances. "It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously

given, whether wisely or unwisely." (76 S.Ct. 641, 100 L.Ed. 700.)

The charter provision involved in *Slochower* was distinguished in *Board of Education of San Francisco v. Mass* (1956) 47 C.2d 494, 498, 304 P.2d 1015, upholding former Educ.C. 7004 (repealed in 1981). The court construed the dismissal language to mean that "before an employee may be found guilty of insubordination or dismissed for refusing to answer under the claim of privilege against self-incrimination, there must be a full hearing and a determination that his reasons for invoking the privilege are not sufficient." (47 C.2d 499.)

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1. Earlier Cases.

7 *Witkin Sum. Cal. Law Const Law* § 482

[§ 482] Earlier Cases.

(1) *General Principles.* In *Garner v. Board of Public Works of Los Angeles* (1950) 98 C.A.2d 493, 498, 220 P.2d 958, a Los Angeles city ordinance, pursuant to its charter, provided that every city employee must take an oath that he or she had not been for the preceding 5 years and was not now a member of an organization advocating forcible overthrow of the government, and did not advocate these beliefs. Petitioner refused, was discharged, and his discharge was upheld.

This judgment was affirmed in *Garner v. Board of Public Works* (1951) 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317. The court declared that the provisions were "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. ... While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons who thereafter engaged in the activity proscribed." (71 S.Ct. 913, 95 L.Ed. 1323.) (See 18 A.L.R.2d 268 [Validity of Governmental Requirement of Oath of Allegiance or Loyalty].)

The court in the *Garner* case emphasized its interpretation of the ordinance as requiring *knowledge* by the employee of the *character* of the organization. (71 S.Ct. 914, 95 L.Ed. 1324.) In *Wieman v. Updegraff* (1952) 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, an Oklahoma statute was held unconstitutional for lack of this requirement. The question was "whether the due process clause permits a state in attempting to bar disloyal individuals from its employ to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged." (73 S.Ct. 218, 97 L.Ed. 221.) The answer was that "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." (73 S.Ct. 219, 97 L.Ed. 222.)

(2) *California: State-Imposed Oath.* A local ordinance, requiring an oath from civil service employees, and construed to require knowledge of the character of the organizations involved, was sustained in *Hirschman v. Los Angeles* (1952) 39 C.2d 698, 702, 249 P.2d 287. Subsequently, however, the state Levering Act (Govt.C. 3100 et seq.) was held to have fully occupied the field, and locally imposed oaths are no longer permissible. (39 C.2d 702, footnote; see *Tolman v. Underhill* (1952) 39 C.2d 708, 711, 249 P.2d 280, footnote.)

The principal controversy in California arose over the Cal. Const., Art. XX, §3, specifying an oath for public officers and stating that no other oath or test shall be required as a qualification for any office or public trust. In *Pockman v. Leonard* (1952) 39 C.2d 676, 686, 249 P.2d 267, petitioner was dismissed from his position as a state college teacher for refusal to execute the Levering Act oath. *Held*, the statute was valid. The constitutional provision was intended to prohibit the "test" oath regarding matters of religious or political beliefs. There is nothing in the Levering oath that calls for such a declaration, and its requirements of declaration of present and future loyalty, and disclosure of information as to past loyalty, are consistent with the Constitution and with the controlling decisions of the U.S. Supreme Court (*Garner*, *supra*, and *Adler v. Board of Education of New York* (1952) 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, *supra*, §480). (See *Orange Coast Junior College Dist. of Orange County v. St. John* (1956) 146 C.A.2d 455, 458, 303 P.2d 1056 [upholding Education Code oath, following *Pockman*, *supra*, and *Steinmetz v. California State Bd. of Education* (1955) 44 C.2d 816, 285 P.2d 617, *supra*, §481]; on overruling of *Pockman*, see *infra*, §483.)

In *Wilson v. Los Angeles Bd. of Civil Service Commrs.* (1960) 54 C.2d 61, 4 C.R. 489, 351 P.2d 761, petitioner W was employed in 1948 by the County of Los Angeles. She objected to the county loyalty oath which then required disavowing membership in particular organizations, was discharged, and her discharge was upheld in *Hirschman*, *supra*. In 1958 and 1959, she again sought employment, and after written and oral examinations appeared qualified. But she was refused county employment under a local Civil Service Commission rule disqualifying a person previously discharged from any position in public or private employment. *Held*, mandamus granted to require the Commission to redetermine her qualifications.

(a) Under *Wieman*, "the right to public employment providing that such employment is available and that she meets all reasonable requirements--is entitled to protection, at least against deprivation thereof by arbitrary means." (54 C.2d 63.) Petitioner was willing to take the oath, disavowed membership in the Communist Party, and the record contained no competent evidence on present loyalty. Hence, prior disqualification had no more bearing on present qualification than would her failure to meet abandoned educational requirements. "We cannot assume, without arbitrarily doing so, that one who might have been disqualified for reasons of prior associations reflecting on loyalty, will forever after remain disqualified for that reason." (54 C.2d 65.)

(b) "From the foregoing it is manifest that the relevancy of the petitioner's refusal to subscribe, for reasons of conscience, to a different oath eleven years earlier, and her discharge from public office at that time, is too remote to deprive her of consideration at this time in view of her present willingness to take the required oath and her denial of, at any time, being a member of the Communist party. Under the cases, both federal and state, herein cited, to disqualify the petitioner upon the ground relied on by the commission must be regarded as arbitrary and therefore unwarranted." (54 C.2d 66.) (See *Wirin v. Ostly* (1961) 191 C.A.2d 710, 713, 13 C.R. 31 [constitutional oath validly applied to notary public; following *Pockman*]; *Cramp v. Board of Public Instruction of Orange County, Florida* (1961) 368 U.S. 278, 82 S.Ct. 275, 279, 7 L.Ed.2d 285, 291, *supra*, §409; *Baggett v. Bullitt* (1964) 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377, *supra*, §409.)

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2. Later Cases.

7 *Witkin Sum. Cal. Law Const Law* § 483

[§ 483] Later Cases.

Elfbrandt v. Russell (1966) 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321, involved an Arizona loyalty oath for state employees. The statute provided for prosecution for perjury and discharge from office of one who took the oath and thereafter knowingly became a member of the Communist Party or its subordinate organizations or any other having for "one of its purposes" overthrow of the government. *Held*, the statute was invalid. A group may have both legal and illegal aims, and proscription of mere knowing membership, without a showing of specific intent to further the unlawful aims, is unconstitutional. That was the defect in this statute. It applied to a knowing member of an organization that had illegal purposes even though he or she did not subscribe to them; in effect the statute created a conclusive presumption that the member shared the unlawful aims.

Four justices dissented, pointing to the long line of cases upholding the state's power to condition public employment on employees abstaining from knowing membership in the Communist Party and other organizations advocating violent overthrow of the government. They contended that if the state may condition employment on absence of knowing membership, it may make it a crime for an employee to falsify his or her qualifications, or to join this kind of an organization, knowingly, while a public employee. (86 S.Ct. 1242, 16 L.Ed.2d 326.)

In *Keyishian v. Board of Regents of University of State of New York* (1967) 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629, the court reexamined the New York Feinberg Law requiring a non-Communist oath from teachers. The Act had previously been upheld, but the challenge made here, on vagueness, "overbreadth," and defective administrative implementation, resulted in a declaration of unconstitutionality. (87 S.Ct. 684, 687, 17 L.Ed.2d 638, 641.)

Four justices dissented with stinging criticism of the main opinion. (87 S.Ct. 693, 17 L.Ed.2d 651.) The court has repeatedly, for 15 years, "approved procedures either identical or at the least similar to the ones the Court condemns today." (87 S.Ct. 694, 17 L.Ed.2d 652.)

In *Whitehill v. Elkins* (1967) 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228, the Maryland oath statute was held not precise enough to meet the requirements of *Gerende v. Board of Supervisors of Elections of Baltimore City* (1951) 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745, *infra*, §484. The three dissenters observed: "The only thing that does shine through

the opinion of the majority is that its members do not like loyalty oaths." (88 S.Ct. 189, 19 L.Ed.2d 235.)

The California Supreme Court followed this trend in *Vogel v. Los Angeles* (1968) 68 C.2d 18, 64 C.R. 409, 434 P.2d 961, overruling *Pockman v. Leonard* (1952) 39 C.2d 676, 686, 249 P.2d 267, supra, §482, and holding the second paragraph of the California constitutional oath (Cal. Const., Art. XX, §3) invalid. The court pointed out that quasi-political parties or other groups may embrace both legal and illegal aims; that one may join an association in sympathy with only the legal ones; that this person poses no threat as a citizen or public employee; and that a law that applies to membership, without the specific intent to further the illegal aims, rests on guilt by association and infringes protected freedoms. (68 C.2d 22.) (See *Chilton v. Contra Costa Community College Dist.* (1976) 55 C.A.3d 544, 551, 552, 127 C.R. 659 [suggesting that in light of *Vogel*, Govt.C. 3109 might well be repealed]; 3 *Summary* (10th), *Agency and Employment*, §278 et seq.; cf. *Cole v. Richardson* (1972) 405 U.S. 676, 92 S.Ct. 1332, 1337, 31 L.Ed.2d 593, 599 [Massachusetts oath to "uphold and defend" constitutions and also to "oppose the overthrow" of either government "by force, violence or by any illegal or unconstitutional method," upheld, 5-4].)

In *San Francisco Police Officers Assn. v. San Francisco* (1977) 69 C.A.3d 1019, 1023, 138 C.R. 755, citing the text, defendant city's charter (a) prohibited any strike or picketing by uniformed members of the police and fire departments, with a penalty of dismissal for violation; and (b) required a declaration under oath from these members that they will comply with the charter provision. *Held*, the oath requirement was invalid; Cal. Const., Art. XX, §3, prescribing the form of oath and prohibiting any other oath or test (see supra, §482), applies:

"To secure the faithful performance of duties of office or employment, the constitution authorizes an oath in that language. The city's argument that it is a dereliction of duty for an employee of the police or fire department to withdraw his services by way of a strike defeats itself, because it demonstrates that the required oath goes to the performance of duties of employment which is covered by the second aspect of the constitutional oath. As to this aspect, the import of the constitutional prohibition of additional oaths is unambiguous; no other oath may be required by sovereignty." (69 C.A.3d 1025.) (For authorization of oaths of government officers and employees generally, see Govt.C. 1369 [officers], Govt.C. 3103 [disaster service workers], Govt.C. 18150 [employees].)

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7 *Witkin Sum. Cal. Law Const Law* § 484

[§ 484] Loyalty Tests for Others.

(1) *Union Officers*. In *American Communications Assn., C.I.O. v. Douds* (1950) 339 U.S. 382, 70 S.Ct. 674, 678, 94 L.Ed. 925, 938, the court sustained the constitutionality of a federal statute providing that the N.L.R.B. should not entertain a complaint by a union unless its officers filed affidavits negating membership or affiliation with subversive organizations. The measure was viewed as a reasonable regulation of interstate commerce (federal "police power," *infra*, §1317) to protect against political strikes. (See *N.L.R.B. v. Highland Park Mfg. Co.* (1951) 341 U.S. 322, 71 S.Ct. 758, 95 L.Ed. 969; *Killian v. United States* (1961) 368 U.S. 231, 82 S.Ct. 302, 310, 7 L.Ed.2d 256, 266.)

The theory of *Douds* was repudiated in *United States v. Brown* (1965) 381 U.S. 437, 85 S.Ct. 1707, 1710, 1715, 14 L.Ed.2d 484, 487, 492, involving the successor statute, §504 of the Labor Management Relations Act, making it a crime for a member of the Communist Party to serve as an officer of a union. The court held the statute unconstitutional on the novel ground that it was a bill of attainder. (See *supra*, §206.)

(2) *Candidates for Elective Office*. In *Gerende v. Board of Supervisors of Elections of Electronics of Baltimore City* (1951) 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745, a Maryland statute requiring a candidate for local election to swear that he or she was not engaged in an attempt to overthrow the Government by force and violence and was not knowingly a member of an organization so engaged was upheld. (See 18 A.L.R.2d 268 [Validity of Governmental Requirement of Oath of Allegiance or Loyalty].)

(3) *Political Parties*. In *Communist Party of Indiana v. Whitcomb* (1974) 414 U.S. 441, 94 S.Ct. 656, 38 L.Ed.2d 635, the court held unconstitutional an Indiana statute requiring an affidavit from officers of every political party that it does not advocate overthrow of the Government by force or violence. The statutory oath embraced advocacy of abstract doctrine as well as action, and fell within the principles declared in *Brandenburg v. Ohio* (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, *supra*, §470, and other decisions. The court declared that "burdening access to the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office," not because the Party urges others to *do* something, now or in the future, but merely to *believe* in something, "is to infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law." (94 S.Ct. 662, 38 L.Ed.2d 643.) (See *Coe v. Davidson* (1974) 43 C.A.3d 170, 181, 117 C.R. 630 [following *Whitcomb*; holding invalid similar oath required of candidate for county central committee of Peace and Freedom Party].)

(4) *Legislators*. In *Bond v. Floyd* (1966) 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235, Bond, a black man, was elected to the Georgia House of Representatives. He fulfilled all constitutional qualifications and asserted his loyalty and willingness to take the oath. However, he was denied his seat on charges of support of the Student Nonviolent Coordinating Committee, and attacks on American policy in Viet Nam, wars in general, and the draft. The federal district court concluded that his pronouncements were a call to Blacks to oppose the draft law, and sustained the legislative action. *Held*, exclusion violated Bond's First Amendment right of free expression. He never advocated illegal acts, and could not have been subjected to criminal prosecution. The state's position, that it could exact a higher standard of loyalty from legislators than from others, was unsound; it cannot limit a legislator's capacity to discuss local or national policy. (87 S.Ct. 349, 17 L.Ed.2d 247.)

(5) *Applicants for Admission to Bar*. Loyalty oaths and tests for attorneys are valid so long as they respect constitutional freedoms. (See *Law Students Civil Rights Research Council v. Wadmond* (1971) 401 U.S. 154, 91 S.Ct. 720, 728, 27 L.Ed.2d 749, 760; 1 Cal. Proc. (4th), Attorneys, §§391, 392.)

(6) *Tenants of Housing Project*. Several state courts have held that a loyalty oath requirement for tenants of federally aided housing projects is an unwarranted restriction of freedom of speech. It was thought that possible membership in an organization on the Attorney General's list bore no relation to the purposes of the housing act, namely, slum clearance and housing for persons of low income. (See *Housing Authority of Los Angeles v. Cordova* (1955) 130 C.A.2d Supp. 883, 887, 279 P.2d 215 [decided partly on statutory interpretation and partly on constitutional grounds; following Illinois case].)

(7) *Applicants for Tax Exemption*. The most significant test of the extent of governmental power in this field occurred in the tax exemption cases: *First Unitarian Church of Los Angeles v. Los Angeles* (1957) 48 C.2d 419, 311 P.2d 508, *Prince v. San Francisco* (1957) 48 C.2d 472, 311 P.2d 544, and *Speiser v. Randall* (1958) 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460. A 1952 amendment of former Cal. Const., Art. XX, §19 (now Cal. Const., Art. VII, §9), provided that no person or organization advocating overthrow of the Government by force or violence or other unlawful means, or advocating support of a foreign government against the United States in the event of hostilities, should receive any tax exemption from the state or any subdivision or agency. This self-executing provision also authorized legislation to enforce it, and Rev.C. 32, enacted in 1953, required a loyalty declaration in the constitutional language as a condition for a claim of exemption.

In *First Unitarian Church*, *supra*, the constitutional provision and statute were challenged by a claimant of the church property exemption (9 Summary (10th), *Taxation*, §186), and in *Prince* by a claimant of the veterans' exemption (9 Summary (10th), *Taxation*, §198 et seq.). The California court, pointing out that a tax exemption is a bounty that may be granted with or without conditions, and that the constitutional provision limited action (advocacy) rather than mere belief, found no merit in the free speech and due process arguments.

However, in *Speiser v. Randall*, *supra*, the U.S. Supreme Court reversed both decisions. The court *assumed*, without deciding, that the state could deny tax exemptions to persons who engaged in *criminally punishable speech* within the standards of *Dennis v. United States* (1951) 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, *supra*, §471. (78 S.Ct. 1339, 2 L.Ed.2d 1469.) Thus, the validity of former Cal. Const., Art. XX, §19 was "conceded *arguendo*." (78 S.Ct. 1344, 2 L.Ed.2d 1474.) But Rev.C. 32, under the interpretation given by the California court, was held to have established an unfair method of determining whether the taxpayer claimant was a member of the proscribed class: He had the affirmative burden of proof, in court as well as before the assessor, to show that he was not a member of the class. This, the court thought, was a denial of due process, for what might be a reasonable shifting of the burden in ordinary tax assessment procedures cannot be justified when the effect is to penalize speech. (78 S.Ct. 1341, 2 L.Ed.2d 1471.) The court distinguished *Garner v. Board of Public Works* (1951) 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, *supra*, §§480, 482, *Gerende*, and *Douds*:

"Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize

political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public." (78 S.Ct. 1343, 2 L.Ed.2d 1473.) The instant case is different: "[W]hen the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." (78 S.Ct. 1343, 2 L.Ed.2d 1474.)

SUPPLEMENT: [This section is current through the latest supplement]
(5) *Applications for Admission to Bar.*

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §§375, 376.



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D. Regulation of Educational Institutions.

1. Professors and Schoolteachers.

a. Protected Rights.

7 *Witkin Sum. Cal. Law Const Law* § 485

[§ 485] Protected Rights.

(1) *Freedom To Communicate and Circulate.* In *Los Angeles Teachers Union, Local 1021, Amer. Federation of Teachers v. Los Angeles City Bd. of Education* (1969) 71 C.2d 551, 78 C.R. 723, 455 P.2d 827, the teachers union local prepared a brief unobjectionable petition to the Governor, the State Superintendent of Public Instruction, and the Los Angeles City Board of Education opposing cutbacks in funds for higher education and urging increased funds for public education at all levels. Defendant Board ruled that it could not be circulated on school premises even during duty-free periods. The union sought mandamus which the trial court denied. *Held*, reversed.

(a) The interest of plaintiffs in communicating their views to fellow teachers could only be effectively asserted during the hours teachers are gathered together and free to converse. (71 C.2d 560.)

(b) The interest of defendant--in harmony and avoidance of distraction of teachers engaged in planning work during duty-free periods--is insufficient to justify the ruling. Disturbances would be minimal, and disharmony resulting from expression of controversial ideas is not a proper reason for restriction of communication. Moreover, the views of students and teachers on school policies are of peculiar concern in the present turmoil over education. "When controversies arising from or contributing to this turbulence are brought before the courts, it is imperative that the courts carefully differentiate in treatment those who are violent and heedless of the rights of others as they assert their cause and those whose concerns are no less burning but who seek to express themselves through peaceful, orderly means. In order to discourage persons from engaging in the former type of activity, the courts must take pains to assure that the channels of peaceful communication remain open and that peaceful activity is fully protected." (71 C.2d 565.) (See *Adcock v. Board of Education* (1973) 10 C.3d 60, 65, 109 C.R. 676, 513 P.2d 900, 3 Summary (10th), *Agency and Employment*, §278 [criticism of school policies]; 81 *Harv. L. Rev.* 1065 [extended treatment of "Academic Freedom"]; 86 *Harv. L. Rev.* 1341 [right to mild "political" expression in classroom]; 102 *Harv. L. Rev.* 1595 [sexual orientation; faculty members' rights]; 56 *Cal. L. Rev.* 253 [university as sanctuary for dissenter]; 58 *Cal. L. Rev.* 168 [*Los Angeles Teachers Union*]; 91 *Cal. L. Rev.* 1061 [analyzing academic freedom rights within state's managerial realm]; 39 *San Diego L. Rev.* 1311 [right of public school teachers to criticize Darwinism]; 42 *So. Cal. L. Rev.* 375 [constitutional limits on overseeing governmental research grants]; 66 *So. Cal. L. Rev.* 2533 [Controversial Teacher Speech]; 53 *Stanf. L. Rev.* 915 [academic freedom]; 16 *U.C. Davis L. Rev.* 831 [Symposium on Academic Freedom]; 50 *U.C.L.A. L. Rev.* 959 [courts' imprudent treatment of controversial teaching in public schools].)

The First Amendment protection is not limited to public expression of views; it extends to a public employee who arranges to communicate privately with his or her employer rather than to spread his or her views before the public. Hence, discharge of a junior high school teacher after a series of private encounters with her principal was wrongful. (*Givhan v. Western Line Consol. School Dist.* (1979) 439 U.S. 410, 99 S.Ct. 693, 696, 58 L.Ed.2d 619, 624.)

(2) *Protection Against Unwarranted Discharge.* The right of teachers to prevent wrongful discharge for exercising constitutional freedoms has been fully considered in another Chapter. (See 3 *Summary* (10th), *Agency and Employment*, §278 et seq.; *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548; *Bekiaris v. Board of Education* (1972) 6 C.3d 575, 585, 100 C.R. 16, 493 P.2d 480; 81 *Harv. L. Rev.* 1065 [academic freedom].) (On demotion or transfer as equivalent to discharge, see *Adcock v. Board of Education*, *supra*, 10 C.3d 66; on due process in dismissal, see *infra*, §691.)

West's Key Number Digest, Constitutional Law k.90.1(1.4)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Freedom To Communicate and Circulate.* See 32 *Western State L. Rev.* 105 [teacher's right to speak].(3) (*New Protecting Students' Rights to Free Speech and Press.* An employee may not be "dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect" a student engaged in conduct authorized by *Educ.C.* 48907 (see text, §498), *Educ.C.* 48950 (see text, §502), or *Educ.C.* 66301 (see text, §502), or in refusing to infringe on conduct protected by those statutes, the First Amendment to the U.S. Constitution, or Cal. Const., Art. I, §2. (*Educ.C.* 48907(g), 48950(g), 66301(f), added in 2008.)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

D. Regulation of Educational Institutions.

1. Professors and Schoolteachers.

b. Valid Regulations.

7 *Witkin Sum. Cal. Law Const Law* § 486

[§ 486] Valid Regulations.

(1) *Exclusion of Faculty From Personnel Review.* In *Garnel v. Bunzel* (1977) 68 C.A.3d 999, 137 C.R. 627, the president of San Jose State University determined after an investigation and a hearing that the economics department was unable to conduct its self-governance functions. The president then placed the department "in receivership," indefinitely suspending its participation in personnel and policy activities, and turning these over to an executive committee of other senior faculty members. Plaintiffs, members of the economics faculty, brought this action for mandamus, and injunctive and declaratory relief, contending that they had been deprived of "liberty" and "property" without due process of law. *Held*, judgment for defendants on demurrer affirmed.

(a) There was no evidence to show that the disenfranchisement of the department had caused any loss of reputation or interference with the teaching and writing activities of individual faculty members. (68 C.A.3d 1004.)

(b) The interest of a tenured professor in consultation on appointment and promotion of faculty members is recognized by regulations, policies, and practices of the university, and is entitled to due process protection. But the proceedings leading to the suspension of the department involved full notice and hearing, and therefore met the requirements of procedural due process. (68 C.A.3d 1008.)

(2) *Unlawful Activities of Professor.* In *Franklin v. Leland Stanford Junior University* (1985) 172 C.A.3d 322, 218 C.R. 228, plaintiff, a tenured professor at defendant university, was charged by its president with violations of university standards by activities that constituted a "substantial and manifest neglect of duty and a substantial impairment of his performance of his appropriate functions." A faculty advisory board, after extensive hearings, recommended plaintiff's dismissal, and the president and board of trustees accepted the recommendation. In plaintiff's action, the trial judge found no abuse of discretion, and the Court of Appeal, on an independent review of the record, affirmed the judgment for defendants.

The activities consisted of antiwar demonstrations on the campus in 1971, and the opinion reviews the record and case law, applying the analysis in *Pickering v. Board of Education of Township High School Dist. 205, Will County, Illinois* (1968) 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 3 Summary (10th), *Agency and Employment*, §283, and a number of U.S. Court of Appeals decisions on teacher protests. The court points out that constitutional freedom of

speech does not license a teacher to substantially disrupt the normal operations of the school. (172 C.A.3d 341.) Particular incidents of plaintiff's conduct were described as follows:

(a) Occupation of university building by demonstrators: "Plaintiff perceived a potential for violence in the ensuing face-off between the police and the protestors. His loud, emotional disagreement with the police dispersal order, particularly in light of his acknowledged leadership role in protest activities, could only serve to prolong the existing state of campus disorder." (172 C.A.3d 342.)

(b) Speech at plaza: "Plaintiff, a leader in the antiwar protest movement, called for a strike to shut down some of the University's activities, specifically the Computation Center." (172 C.A.3d 343.)

A concurring justice suggested that this was a time to look at first principles in determining what is constitutionally protected speech. "A university is a marketplace of ideas or it is nothing. It is a home for sober reflection, for critical inquiry and analysis, for vigorous advocacy, for dialogue, all in pursuit of the truth. The imposition of one's cause or point of view by coercion upon those of different persuasion is totally inconsistent with a university's process and function." (172 C.A.3d 349.) (See 66 So. Cal. L. Rev. 2533 [*Pickering*].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

D. Regulation of Educational Institutions.

2. College and University Students.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 487

[§ 487] In General.

(1) *Right to Protection.* The early view that attendance in a state university is a privilege (see *Hamilton v. Regents of Univ. of Calif.* (1934) 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343) has been abandoned. Federal and state court decisions have developed the modern theory that it is a benefit analogous to public employment, and therefore entitled to constitutional protection. (See *Healy v. James* (1972) 408 U.S. 169, 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266, 279, *infra*, §488 ["state colleges and universities are not enclaves immune from the sweep of the First Amendment"].)

Regulations unduly restricting freedom of expression are consequently invalid, but reasonable rules of student conduct that are appropriate and necessary to the maintenance of order and furtherance of the educational goals are valid. (*Goldberg v. Regents of Univ. of Calif.* (1967) 248 C.A.2d 867, 875, 879, 57 C.R. 463, *infra*, §488.) *Goldberg* recognized that the uniqueness of the academic community, together with its historical freedom from outside interference, call for a distinct approach to disciplinary problems: "To compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the educational institutions, nor the ultimate advantages that society derives therefrom. Thus, in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in a large measure, be left to the educational institution itself." (248 C.A.2d 880.) (See 28 A.L.R.4th 463 [misconduct of student off campus as grounds for disciplinary action]; on statutory declaration of speech and other communication rights of postsecondary students, see *infra*, §§501, 502.)

In *Shuffer v. Board of Trustees* (1977) 67 C.A.3d 208, 136 C.R. 527, plaintiff, a graduate student at California State University, alleged that he was subjected to discriminatory and arbitrary treatment in connection with completion of necessary requirements for his degree. *Held*, a cause of action was stated. The court took note of the "so-called rule of judicial non-intervention in scholastic affairs" (67 C.A.3d 219), and acknowledged that schools may properly fashion special requirements for an applicant for an advanced degree. However, unreasonable or punitive action toward a student may amount to a denial of constitutional rights. (67 C.A.3d 219, 220.) (See 11 A.L.R.4th 1182 [student's right to compel school officials to issue degree or diploma].)

(2) *Texts and Law Reviews.* The First Amendment rights of university students have been the subject of extensive commentary. (See 81 *Harv. L. Rev.* 1143 [academic freedom]; 102 *Harv. L. Rev.* 1584 [sexual orientation]; 54 *Cal. L.*

Rev. 1 [Symposium: Student Rights and Campus Rules]; 79 *Cal. L. Rev.* 825 [A Libertarian Critique of University Restrictions of Offensive Speech]; 15 *Pacific L. J.* 1203 [athletic participation]; 7 *San Diego L. Rev.* 244 [legal relationship between students and private colleges]; 4 *U.S.F. L. Rev.* 49 [Fourteenth Amendment rights in college dormitories]; 78 *A.L.R.3d* 1109 [regulation denying or restricting right of student to receive visitors in dormitory]; 39 *A.L.R.4th* 1137 [university regulation of political or voter registration activity in student housing facilities]; on hate speech on campus, see 79 *Cal. L. Rev.* 919 [campus anti-slur regulations]; 83 *Cal. L. Rev.* 693 [campus hate speech codes]; 20 *Southwestern U. L. Rev.* 145 [hate speech in law schools]; on "political correctness" on college campuses, see 21 *Hastings Const. L. Q.* 1 [trends in regulating student and faculty verbal conduct as part of controversy on political correctness and its possible conflicts with neutral principles of academic freedom and freedom of speech]; 45 *Stanf. L. Rev.* 1457 [review of Berman collection of essays].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Law Reviews.* See 33 *Hastings Const. L. Q.* 1 [traditional public forum status of open areas on public university campuses]; 80 *So. Cal. L. Rev.* 641 [application of *Hazelwood School Dist. v. Kuhlmeier* to colleges]; 54 *U.C.L.A. L. Rev.* 1497 [universities as First Amendment institutions].



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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

D. Regulation of Educational Institutions.

2. College and University Students.

b. Freedom of Speech and Association.

7 *Witkin Sum. Cal. Law Const Law* § 488

[§ 488] Freedom of Speech and Association.

(1) *Freedom of Association.* In *Healy v. James* (1972) 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266, petitioners, students at Central Connecticut State College, organized a local chapter of Students for a Democratic Society (SDS), and sought campus recognition. The Student Affairs Committee gave a favorable recommendation; the president rejected it, relying on independently acquired information about the national organization and its philosophy. The federal district court held that petitioners had not sustained the burden of proving their independence from SDS. *Held*, reversed.

(a) Freedom of association is a constitutionally protected right (see *supra*, §378), and it is substantially impaired by denial of the use of campus facilities for meetings, and denial of the use of the campus bulletin boards, the school newspaper, and other means of communicating with faculty and students. (92 S.Ct. 2346, 33 L.Ed.2d 279.)

(b) The burden of proof was improperly placed on petitioners. The effect of denial of recognition was a prior restraint on the exercise of their constitutional rights, and the burden was on the administration to justify its decision. (92 S.Ct. 2347, 33 L.Ed.2d 281.)

(c) The president's reliance on his knowledge of the national organization as a ground for denial was an improper finding of guilt by association. Recognition could only be denied if a showing were made that petitioners intended to refuse to abide by reasonable campus rules of conduct. (92 S.Ct. 2352, 33 L.Ed.2d 286.)

(2) *Freedom of Speech and Press.* In *Papish v. Board of Curators of University of Missouri* (1973) 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618, petitioner, a graduate student in the University of Missouri School of Journalism, distributed an issue of the *Free Press Underground*. The paper had a front cover cartoon showing policemen raping the Statue of Liberty and the Goddess of Justice, and an article entitled "M____ f____ Acquitted," discussing an assault trial. Petitioner was expelled, and the federal district court denied relief. *Held*, reversed. "We think *Healy* makes it clear that the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency.' Other precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labelled as constitutionally obscene or otherwise unprotected." (93 S.Ct. 1199, 35 L.Ed.2d 622.)

In *Dunbar v. Governing Bd. of Grossmont Junior College Dist.* (1969) 275 C.A.2d 14, 79 C.R. 662, defendant junior college board created an open forum to promote discussion of issues, and the forum scheduled a debate on the Vietnam War between a John Birch Society member and a Communist Party member. The Board refused to permit the Communist to speak. *Held*, denial of the right because of membership in an organization was a violation of the *First Amendment*. (275 C.A.2d 19.)

In *DiBona v. Matthews* (1990) 220 C.A.3d 1329, 269 C.R. 882, plaintiff community college teacher selected "Split Second," a play with a racial theme that contains profanity and racial slurs, for production by students in his drama class. Church leaders complained to defendant college administrators about the play, and defendants decided that it was unacceptable because of the community opposition. Plaintiff declined to choose another play, and defendants cancelled the class. Plaintiff teacher and one of his students then brought this action seeking the declaratory and injunctive relief. *Held*, summary judgment for defendants reversed.

(a) The Government may not regulate the content of speech merely because of undifferentiated fear or concern that it may provoke dissension or disturbance. (220 C.A.3d 1342, 1343.) This case presents a "classic illustration" of restriction based on undifferentiated fear. The class was cancelled because of "community" opposition and with no showing of "a 'clear and present danger' of any evil, let alone a 'serious substantive' one." (220 C.A.3d 1343.) Neither the desire to avoid antagonizing the religious community nor the politically sensitive nature of the play's subject matter was a proper basis for censorship. (220 C.A.3d 1344.)

(b) Nor can cancellation of the class be upheld on the ground that the language was inappropriate for a school play. School administrators have broad discretion in making curriculum decisions, and the appropriateness of language is traditionally one of the factors that they may consider. However, nearly all the prior cases involve minors rather than adult college students. (220 C.A.3d 1345.) First Amendment protections apply on college campuses with the same force as in the community at large, and dissemination of ideas on a university campus may not be curtailed in the name of decency. (220 C.A.3d 1346, citing *Healy* and *Papish*.)

(c) The government interest in regulating school-sponsored activities does not justify the decision to cancel the drama class and play. It is questionable whether the rationale underlying this interest applies to educational settings involving adults. Assuming that it does, it is not reasonably arguable that the use of profanity and racial slurs in "Split Second" would be construed as advocacy or sponsorship of that language. (220 C.A.3d 1346, 1347.)

(d) "Our conclusions do not leave college administrators powerless to control college curriculum. Although the 'legitimate pedagogical concerns' at the college and university level may be more limited than in elementary and secondary schools, they are not nonexistent. Certainly college officials may limit the drama curriculum to works of an acceptable literary quality and they undoubtedly are entitled to broad deference where such determinations are made in advance rather than, as here, sometime after the class had already begun to meet." However, at least where adults are concerned, "literary quality cannot be measured simply by counting the number of 'indecent' words in a book or play." (220 C.A.3d 1347, 1348.)

One justice dissented, arguing that the majority opinion removed decisions on curriculum content from administrators and placed them in the hands of faculty and students. (220 C.A.3d 1348.) (See 22 *Pacific L. J.* 973; on statutory declaration of speech and other communication rights of postsecondary students, see *infra*, §§501, 502.)

(3) *Demonstrations*. In *Goldberg v. Regents of Univ. of Calif.* (1967) 248 C.A.2d 867, 57 C.R. 463, petitioners, students at U.C. Berkeley, participated in various demonstrations on the campus. They were arrested on charges of violation of the obscenity statutes and disturbing the peace. While the criminal charges were pending, the duly constituted university authorities held a hearing at which petitioners were invited to be present with counsel. Counsel appeared at various times, and after extended hearings disciplinary measures were imposed, consisting of dismissal of G and suspension of the others. Petitioners sought administrative mandamus in the superior court, and judgment went for defendants on demurrer. *Held*, affirmed. The university has an administrative responsibility to regulate student behavior

that tends to obstruct its educational goals. Petitioners' conduct, in loudly and publicly using indecent language, violated the minimum standard of propriety of both the academic and the social community; hence the disciplinary action was a proper exercise of the university's inherent powers. (248 C.A.2d 880.) (See *In re Bacon* (1966) 240 C.A.2d 34, 55, 49 C.R. 322 [unlawful assembly and trespass]; *People v. Uptgraft* (1970) 8 C.A.3d Supp. 1, 8, 87 C.R. 459 [unlawful assembly]; 32 A.L.R.3d 864 [expulsion for student demonstrations].)

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

D. Regulation of Educational Institutions.

2. College and University Students.

c. Mandatory Fees To Fund Student Activities.

7 *Witkin Sum. Cal. Law Const Law* § 489

[§ 489] Mandatory Fees To Fund Student Activities.

In *Smith v. Regents of Univ. of Calif.* (1993) 4 C.4th 843, 16 C.R.2d 181, 844 P.2d 500, the issue was whether plaintiff students at U.C. Berkeley, were required to pay an activities fee used in part by the Associated Students (ASUC) organization "to support student groups that pursue political and ideological causes." (4 C.4th 847.) Plaintiffs "object both to the imposition of the fee and to the manner in which it is used." (4 C.4th 847.)

The court held that the authority to levy the fee was within the broad powers of the University Regents under the California Constitution, but added that the Regents' freedom to govern the University was not the only freedom at stake here. "It goes without saying that all students are free to organize, to promote their ideas, and to seek by all legal means to persuade others that their views are correct. Moreover, the Regents may continue to fund student political activities through the fees of students who do not object. However, the constitutional guaranties of free speech and association do not permit the state to make speech a matter of compulsion and coercion. As the present system of funding student activities has that effect, it cannot be continued without affording dissenting students an appropriate remedy." (4 C.4th 848.)

(a) *Collection of mandatory fee.* Plaintiffs contend that the Regents lack authority to collect a mandatory student activities fee; but the constitutional and statutory provisions invoked only declare, in essence, that the university must be kept free of political and sectarian influence. While these authorities might support an argument against some of the uses to which the fee has been put, they do not affect the Regents' power to collect a fee, assuming its use is proper. (4 C.4th 851.)

(b) *ASUC support of political and ideological groups.*

(1) This case involves two important principles: The first is that the government may not compel a person to contribute money to support political or ideological causes. (4 C.4th 852.) The second is that the Regents must have considerable discretion to determine how best to carry out the university's educational mission. (4 C.4th 852.) These principles conflict in the case before us. "Plaintiffs, invoking their constitutional right not to be compelled to speak, argue that the use of mandatory fees to subsidize student political groups impermissibly burdens that right. The Regents, relying on their authority to define the University's educational mission, acknowledge the burden on plaintiffs' rights but

argue that student political activity offers educational benefits that justify the burdens." (4 C.4th 853.)

(2) In the cases dealing with agency-shop agreements, the high court held that a state may compel employees who obtain the benefits of a union's collective bargaining efforts to pay service fees to the union, even though the employees may choose not to join. However, when the state does compel nonmembers to support a union financially, the nonmembers may prevent the union from using their contributions to fund the expression of political and ideological view unrelated to collective bargaining. (4 C.4th 853, citing *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 and *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986) 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232, supra, §385.)

(3) The principle underlying the agency-shop decisions took sharper focus in *Keller v. State Bar* (1990) 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1, 1 Cal. Proc. (4th), Attorneys, §373. The U.S. Supreme Court made it clear that the use of mandatory contributions must be "germane," not simply to any purpose the organization chooses to declare for itself, but to the purpose for which compelled association was justified as a matter of constitutional law. (4 C.4th 854.) *Keller* and *Abood* "teach that the state may compel a person to support an organization if there is a sufficiently compelling reason to do so, and that the organization's use of mandatory contributions must be germane to the purposes that justified the requirement of support." (4 C.4th 854.) But it does not follow, as the Regents argue, that everything "germane" is automatically permissible without the need for further inquiry. The burdens on speech and associational rights in *Keller* and *Abood* were much lighter than those at issue here. The university's educational function is extremely broad, potentially encompassing all of life; and by recognizing that student political activity can be germane to education, "we run the risk of sanctioning a much greater burden on speech and associational rights than the high court necessarily contemplated when it used that term." (4 C.4th 855.)

(4) "The solution to this problem is to set a rational limit on the use of mandatory fees. We can do this by recognizing what is obviously true, namely, that a group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf. To fund such a group through mandatory fees will usually constitute more of a burden on dissenting students' speech and associational rights than is necessary to achieve any significant educational goal. The University can teach civics in other ways that involve a lesser burden on those rights, or no burden at all." (4 C.4th 855.)

(5) This approach was followed in two later federal Court of Appeals cases: *Carroll v. Blinken*, 2d Circuit, and *Galda v. Rutgers*, 3d Circuit. (4 C.4th 855, discussing both cases.) "The principles that we derive from *Carroll* and *Galda*, as well as *Keller* and *Abood*, are these: A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. ... At some point, however, the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests. ... To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights. Phrased in terms of the tests that courts have applied, a regulation that permits the mandatory funding of such groups is not 'narrowly drawn to avoid unnecessary intrusion on freedom of expression.' " (4 C.4th 860.)

(6) "We find no reason to doubt that the burden on dissenting students' speech and associational rights in this case is real and substantial. For example, students who favor abortion rights must pay to support the political activities of Berkeley Right to Life, a group opposed to abortion, and students opposed to abortion must subsidize groups such as Campus N.O.W. and Campus Abortion Rights Action League, which favor abortion rights." (4 C.4th 860.)

(7) "So long as the present system of funding student activity groups continues, the only practical way to protect the rights of dissenting students is to implement the procedures outlined in *Hudson* ... and *Keller*. ... These procedures will require the Regents to identify any groups that are ineligible for mandatory funding under the constitutional standards set out above, and offer students the option of deducting a corresponding amount from the mandatory fee. The State Bar of California adopted a similar procedure to comply with the high court's decision in *Keller*. ... Students who disagree with the Regents' calculation of the deduction will be entitled to the procedural safeguards articulated in *Keller*: 'an

adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.' " (4 C.4th 863.) Also, the Regents are free to adopt a voluntary system that avoids the constitutional defects identified in this opinion. (4 C.4th 863.)

(c) *ASUC-funded lobbying.*

(1) *Lehnert v. Ferris Faculty Assn.* (1991) 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572, supra, §385, held that a public employees' union may not use mandatory contributions to support lobbying on all union-related matters. Thus, while the *Lehnert* plaintiffs, who were state college professors, could be compelled to subsidize a union's collective bargaining efforts, they could not be compelled to subsidize lobbying on matters other than collective bargaining, "even matters as closely related to the union's interests as taxes for the support of public education." (4 C.4th 865.)

(2) Under *Lehnert*, even if the state has a sufficiently compelling interest to require persons to support an organization financially, the state may not compel support for lobbying efforts except on those matters that are strictly necessary to further the interest that justified the requirement of support. "Applying this principle to the case before us compels us to reverse the judgment. Even if the Regents had appointed the ASUC to negotiate with governmental bodies on students' behalf, and even if the state had a compelling reason to do so, under *Lehnert* the state still could not force unwilling students to subsidize lobbying beyond the narrow subject matter that justified the requirement of support." (4 C.4th 866.)

(d) *The ASUC Senate's political activities.*

(1) The Senate has debated, adopted, and publicized resolutions on many current political issues; and it also supports voter registration, draft counselling, and renters' assistance programs that occasionally became channels for political activity. (4 C.4th 866.) The Court of Appeal reasoned that these activities contribute to the educational mission of the university, and that if plaintiffs did not approve of positions taken they could seek Senate office and make their own voices heard. This resolution of the issue cannot withstand scrutiny. (4 C.4th 867.)

(2) "If further evidentiary proceedings show that mandatory fees have been spent on political activities by the ASUC Senate, then the Regents shall have the burden of demonstrating that the resulting burden on dissenting students' speech and associational rights is germane to, and justified by, such activities' educational value in accordance with the principles discussed above. If the Regents do not satisfy that burden, then plaintiffs will be entitled to relief under the procedures set out in *Keller ...* and *Hudson. ...* We shall remand these issues for further proceedings in accordance with the views expressed herein." (4 C.4th 868.)

Two justices joined in an elaborate dissent. (4 C.4th 869.) "Contrary to the majority, I would hold that the funding of student groups engaged in on-campus speech--regardless of political or ideological content--is germane to the University's educational mission and serves compelling national interests. As long as the funds are distributed in a neutral fashion and are not used to promote partisan political purposes, to finance off-campus activities or to interfere with the free speech rights of others, such funding is well encompassed within the constitutional mandate of the University." (4 C.4th 869.) (See 21 *Pepperdine L. Rev.* 287; 29 *U.S.F. L. Rev.* 541; *infra*, §497; on decision of Court of Appeal after remand, see *Smith v. Regents of Univ. of Calif.* (1997) 56 C.A.4th 979, 987, 65 C.R.2d 813 [burden on dissenting students' rights is justified].)

In *Board of Regents of University of Wisconsin System v. Southworth* (2000) 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193, university students challenged a mandatory student activity fee used in part to support student organizations engaging in political or ideological speech. Both the District Court and the Court of Appeals invalidated the student fee program based on Supreme Court precedents protecting union and bar association members from being required to pay fees used for speech the members find objectionable. *Held*, reversed and remanded.

(a) *Viewpoint neutrality.* The student activity fee is exacted for the sole purpose of facilitating the free and open

exchange of ideas among students. While objecting students may insist on certain safeguards with respect to the expressive ideas they are required to support, the university's viewpoint neutrality requirement for allocating funds to student groups is sufficient to protect the rights of objecting students. (120 S.Ct. 1354, 146 L.Ed.2d 206.)

(b) *Germane speech standard is inapplicable.* *Abood* and *Keller*, *supra*, are distinguishable. The "germane speech" standard applied in those cases is unworkable as applied to speech at a university. It gives "insufficient protection both to the objecting students and to the University program itself." (120 S.Ct. 1355, 146 L.Ed.2d 207.) "It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning." (120 S.Ct. 1355, 146 L.Ed.2d 207.)

(c) *Remand on referendum issue.* However, the referendum aspect of the University's program, under which a student organization may be funded or defunded by a student body vote, does not appear to have viewpoint neutrality protection, and remand is necessary to resolve this point. (120 S.Ct. 1357, 146 L.Ed.2d 209.) (See 114 Harv. L. Rev. 279 [Southworth]; 20 Cal. Western L. Rev. 279 [constitutionality of university's use of mandatory student fees to finance political or ideological activities].)

SUPPLEMENT: [This section is current through the latest supplement]

Keller case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §355.



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D. Regulation of Educational Institutions.

2. College and University Students.

d. Registration and Identification.

7 *Witkin Sum. Cal. Law Const Law* § 490

[§ 490] Registration and Identification.

In *Eisen v. Regents of Univ. of Calif.* (1969) 269 C.A.2d 696, 75 C.R. 45, plaintiff, a student at U.C. Berkeley, was an officer of a student organization advocating dissident ideas. The organization was "registered," and consequently entitled to such privileges as use of university facilities for meetings, fund raising, and campus meetings addressed by nonuniversity speakers. A condition of registration was submission of a statement of purpose and names of officers, and plaintiff's name was submitted. A, an outsider, sued the university to compel disclosure of names and purposes of all student organizations. The university agreed to permit examination by members of the public. Plaintiff then sued to enjoin this public disclosure. *Held*, judgment for defendant on demurrer affirmed.

Plaintiff argued for a "right of anonymity," incidental to the rights of free speech and association (see *supra*, §379). But the people have a right to know who are the responsible officers of student organizations using publicly financed and owned campus facilities. Disclosure will not unduly deter freedom of expression; rather the policy appears well designed to promote it by insuring orderly enjoyment of facilities. (269 C.A.2d 704.) Thus, a compelling state interest outweighed any minimal infringement of plaintiff's First Amendment rights. (269 C.A.2d 706.) (See 37 A.L.R.3d 1311 [student organization registration statement as open to public].)

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VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

D. Regulation of Educational Institutions.

2. College and University Students.

e. (New) Military Recruiters on Campus.

7 *Witkin Sum. Cal. Law Const Law* § 490A

[§ 490A] (New) Military Recruiters on Campus.

In *Rumsfeld v. Forum for Academic & Institutional Rights* (2006) 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156, the Court interpreted the Solomon Amendment (10 U.S.C., §983), which denies certain federal funds to institutions of higher learning if any school in that institution denies military recruiters access to students equal to that of other recruiters. Plaintiff association of law schools and law faculties objected to military recruitment on their campuses because of the policy of Congress to bar homosexuals from serving in the military. The trial court rejected plaintiff's constitutional claims under a former version of the statute. The Court of Appeals reversed on the ground that, even after amendment, the statute violates the unconstitutional conditions doctrine because it forces a law school to choose between surrendering its First Amendment rights and losing federal funding for its university. *Held*, reversed.

(a) For a law school and its university to receive federal funding under the statute, plaintiff and the government agree that "the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access." (126 S.Ct. 1304, 164 L.Ed.2d 169.) A school may not satisfy the statute, as certain amici argue, by denying access to the military and to other employers that violate its nondiscrimination policy. The statute requires the Secretary of Defense to compare the military's access to that provided to *any other employer*. (126 S.Ct. 1305, 164 L.Ed.2d 169.)

(b) Congress' power to provide for the defense of the nation is broad and sweeping, "and there is no dispute in this case that it includes the authority to require campus access for military recruiters ... unless Congress exceeds constitutional limitations on its power in enacting" the legislation. (126 S.Ct. 1306, 164 L.Ed.2d 170.) The fact that Congress chose to secure campus access indirectly, through its Spending Clause power, "does not reduce the deference given to Congress in the area of military affairs." Although Congress is free to attach reasonable conditions to the receipt of federal funds, which universities are free to decline, the government may not condition those benefits on a basis that infringes freedom of speech. (126 S.Ct. 1306, 1307, 164 L.Ed.2d 171.) "Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students." (126 S.Ct. 1307, 164 L.Ed.2d 171.) Here, the First Amendment does not prevent Congress from directly imposing the access requirement; hence, "the statute does not place an unconstitutional condition on the receipt of funds." (126 S.Ct. 1307, 164 L.Ed.2d 171.)

(c) The statute puts no restrictions on the expression of speech or views on the military's employment policies. (126 S.Ct. 1307, 164 L.Ed.2d 172.) Any recruiting assistance provided by the law schools in sending e-mails or posting notices on behalf of the military also would be provided to other recruiters, and is plainly incidental to the regulation of conduct under the statute. (126 S.Ct. 1308, 164 L.Ed.2d 173.) Further, "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions." (126 S.Ct. 1309, 164 L.Ed.2d 174.) Nothing in the military's recruiting "suggests that the law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." (126 S.Ct. 1310, 164 L.Ed.2d 175.)

(d) "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do--afford equal access to military recruiters--not what they may or may not say." (126 S.Ct. 1307, 164 L.Ed.2d 172.) The First Amendment only protects conduct that is inherently expressive, like flag burning. (126 S.Ct. 1310, 164 L.Ed.2d 175.) The expressive conduct of the law schools in barring military recruiters from their campuses is not created by the conduct itself, but by the speech that accompanies it. The fact that this "explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection" under *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, text, §473. (126 S.Ct. 1311, 164 L.Ed.2d 176.)

(e) The Solomon Amendment does not violate a law school's freedom of expressive association. Under the statute, a law school must associate "with military recruiters in the sense that they interact with them. But recruiters are not part of the law school." They are "outsiders who come onto campus for the limited purpose of trying to hire students--not to become members of the school's expressive association. This distinction is critical." Unlike the public accommodations law in *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554, text, §391, the statute here does not force a school to accept members it does not desire. (126 S.Ct. 1312, 164 L.Ed.2d 177.) (See 54 U.C.L.A. L. Rev. 1767 [Rumsfeld].)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY D. Regulation of Educational Institutions. 3. Elementary and Secondary School Students. a. First Amendment Rights. 1. In General.

7 Witkin Sum. Cal. Law Const Law § 491

[§ 491] In General.

(1) *Students' Rights*. "[S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. ... In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." (*Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 739, 21 L.Ed.2d 731, 740, *infra*, §492.)

This right, *Tinker* points out, is not confined to the classroom. "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school. It is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so '[without] materially and substantially interfering with ... appropriate discipline in the operation of the school' and without colliding with the rights of others." (89 S.Ct. 740, 21 L.Ed.2d 741.) (See *Lopez v. Tulare Joint Union High School Dist.* (1995) 34 C.A.4th 1302, 1309, 40 C.R.2d 762 [reviewing historical development of student free speech rights]; 24 *Hastings L. J.* 1263 [*Tinker*]; on procedural due process, see *infra*, §688; on right to hear and receive ideas from persons other than teachers and fellow students, see *Mandel v. Municipal Court* (1969) 276 C.A.2d 649, 81 C.R. 173, 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §52 [defendant adult distributed antiwar leaflets to students on high school grounds; conviction of loitering reversed]; on statutory declaration of speech and other communication rights of secondary students, see *infra*, §§501, 502.)

(2) *Restrictions on Students' Rights*. Restrictions necessary for the control of children in an educational institution are valid. "[A] student may be subject to far more stringent regulations than an adult outside a school environment due to his immaturity and status as a student in a school environment where disciplinary and health problems and considerations relating to safety of minors take on special significance. ... The courts have universally recognized this difference, including those situations where First Amendment rights admittedly are involved." (*Montalvo v. Madera*

Unified School Dist. Bd. Of Education (1971) 21 C.A.3d 323, 330, 98 C.R. 593, *infra*, §493; see *Bethel School Dist. No 403 v. Fraser* (1986) 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549, *infra*, §495; *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592, *infra*, §496; *Akin v. Board of Education of Riverside Unified School Dist.* (1968) 262 C.A.2d 161, 166, 68 C.R. 557, *infra*, §493.)

(3) *Military Recruitment*. High school districts that provide on-campus access to employers may not prohibit access to military recruiters. (See *Educ.C.* 49603.) The enacting legislation (Stat. 1991, Chap. 666, §1) states that "this access is in furtherance of the First Amendment to the United States Constitution, which guarantees not only the right to speak freely, but also the right to receive information." (See 24 *Loyola L.A. L. Rev.* 1333 [arguing that allowing military to participate in career placement programs violates Unruh Act because military bars gays and lesbians from service].)

(4) *Texts and Law Reviews*. Commentary on the First Amendment rights of elementary and secondary students has been extensive. (See 81 *Harv. L. Rev.* 1128 [extended treatment of students' rights]; 102 *Harv. L. Rev.* 1584 [sexual orientation]; 79 *Cal. L. Rev.* 1269 [Valuing Student Speech: The Work of the Schools as Conceptual Development]; 11 *Hastings Const. L. Q.* 247 [students' rights and high school theatrical productions]; 19 *Hastings Const. L. Q.* 123 [Freedom of Speech in Public Schools: Using Communications Analysis to Eliminate the Role of Educational Ideology]; 8 *Santa Clara Lawyer* 146 [substantive validity of disciplinary regulations]; 42 *So. Cal. L. Rev.* 126 [restrictions on student association, expressions, and appearance]; 64 *So. Cal. L. Rev.* 105 [prohibition of racist speech on campus as constitutional if patterned after Title VII of Civil Rights Act]; 68 *So. Cal. L. Rev.* 1391 [same]; 28 *U.S.F. L. Rev.* 517 [mandatory community service program for high school students as violation of First Amendment]; 11 *A.L.R.3d* 996 [marriage or pregnancy of public school student as ground for expulsion, exclusion, or restriction of activities]; 37 *A.L.R.3d* 1311 [student organization registration statement as open to public].)

West's Key Number Digest, Constitutional Law k.90.1(1.4)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Restrictions on Students' Rights*. See *Morse v. Frederick* (2007) 551 U.S. 393, 127 S.Ct. 2618, 2625, 168 L.Ed.2d 290, 300 [distinguishing *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, text, p. 814; school officials did not violate First Amendment by confiscating pro-drug banner displayed at school-sponsored event and suspending student who refused to remove it; schools may properly restrict student expression that they reasonably regard as promoting illegal drug use]; *Robbins v. Regents of Univ. of Calif.* (2005) 127 C.A.4th 653, 663, 25 C.R.3d 851 [temporary suspension of 4-H club members, who participated in making violent video, while director investigated whether they posed threat to others did not violate members' First Amendment rights; club here was functional equivalent of school, suspension was for short period, members were reinstated after they were determined not to pose safety threat, and director's purpose was to protect other members of club rather than to discipline those involved in project]; 121 *Harv. L. Rev.* 295 [*Morse v. Frederick*]; 35 *Hastings Const. L. Q.* 835 [*Morse v. Frederick* and regulation of student cyberspeech].

(4) *Texts and Law Reviews*. See 25 *J. Juvenile Law* 37 [Is Student Evangelism Protected Speech?]; 32 *Pepperdine L. Rev.* 647 [Inculcation, Bias, and Viewpoint Discrimination in Public Schools].



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D. Regulation of Educational Institutions.

3. Elementary and Secondary School Students.

a. First Amendment Rights.

2. Demonstrations and Symbolic Acts.

7 *Witkin Sum. Cal. Law Const Law* § 492

[§ 492] Demonstrations and Symbolic Acts.

(1) *Invalid Regulations.* In *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, *supra*, §491, petitioners, high school students, decided to demonstrate their objections to the war in Vietnam by wearing black armbands during the Christmas holiday season. School officials, aware of the plan, adopted a policy of suspension of any student who wore the band after being asked to remove it. Petitioners were suspended, and brought this action against the school authorities to enjoin the discipline. The district court upheld the regulation as reasonable. *Held*, reversed.

(a) *Symbolic acts as speech.* Wearing armbands, without actual or potentially disruptive conduct, is closely akin to "pure speech," and entitled to comprehensive protection. (89 S.Ct. 736, 21 L.Ed.2d 737.)

(b) *Limits of control of conduct by school authorities.* The problem here is not regulation of clothing, hair style, or deportment, and it is not control of disruptive action or group demonstrations. This was a silent, passive expression of opinion, by only a few of the many students. The district court's theory that the regulation was reasonable because of the fear of disturbance was unsound. To limit expression something more must be shown than the mere desire to avoid unpleasantness that accompanies an unpopular viewpoint. (89 S.Ct. 737, 21 L.Ed.2d 739.) The record showed no facts to reasonably lead school authorities to forecast material interferences with school activities, and none occurred. The prohibition therefore was a denial of the right of free expression. (89 S.Ct. 740, 21 L.Ed.2d 742.)

Two justices dissented; one disagreed with the "uncritical assumption" that First Amendment rights of children "are co-extensive" with those of adults. (89 S.Ct. 741 *et seq.*, 21 L.Ed.2d 742 *et seq.*) (See 24 *Hastings L. J.* 1263; 1 West L.A. L. Rev. 107; 32 *A.L.R.3d* 864 [participation of student in demonstration on or near campus as warranting expulsion or suspension].)

(2) *Valid Regulations.* *Tinker* was distinguished in *Grayned v. Rockford* (1972) 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, 223: "[W]e nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes." Peaceful picketing and handbilling on public grounds near a school to publicize significant grievances to pedestrians, school visitors,

deliverymen, teachers, administrators and students do not disturb the normal functioning of the school. But "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." (92 S.Ct. 2305, 33 L.Ed.2d 234.)

In *Grayned*, an ordinance prohibited the wilful "making of any noise or diversion which disturbs or tends to disturb the peace or good order" of "school sessions or classes." A group of demonstrators (about 200) picketed a school protesting alleged exclusion of black students from school activities, and made sufficient noise to disrupt classes and distract hundreds of students who went to the windows to watch. Appellant, one of the demonstrators, was convicted of violation of the ordinance. *Held*, affirmed; the ordinance was not vague or overbroad.

(a) *No vagueness*. The ordinance was designed for the protection of schools, and forbids deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities; and it forbids this wilful activity at fixed times--when the school is in session, and at a fixed place--adjacent to the school. (92 S.Ct. 2300, 33 L.Ed.2d 229.)

(b) *No overbreadth*. The ordinance "is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning." (98 S.Ct. 2305, 33 L.Ed.2d 234.) "Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools." (92 S.Ct. 2306, 33 L.Ed.2d 235.) (See 24 *Hastings L. J.* 1263.)

In *Lipkis v. Caveney* (1971) 19 C.A.3d 383, 96 C.R. 779, plaintiff high school student petitioned for mandamus to compel defendant principal and the Board of Education to permit noon rallies in the "quad." Defendant principal, on the basis of his knowledge of prior activity of plaintiff's group (the "Radical Student Union," not a recognized campus organization), and particularly of their use of a battery-powered bull horn in the area where students eat lunch, had denied their request, and offered instead the opportunity to express their views at regular campus meetings (Noon Forum, Discussion Group, Forum Club). *Held*, judgment denying writ affirmed.

"[A]ppellant had adequate and concededly *readily available* fora in which to exercise his right of free speech and to ventilate views he entertained relative to any problems of his school, his country or the world. Puerile, abrasive and contemptuous behavior cannot be whitewashed by constitutional incantations, which, if we understand them, give appellate the right to espouse in nonobscene language even the most unpopular views but which do not require Van Nuys High School or the school system to guarantee to him on the school grounds a captive audience at the specific times he elects to address them." (19 C.A.3d 387.)

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D. Regulation of Educational Institutions.

3. Elementary and Secondary School Students.

a. First Amendment Rights.

3. Clothes and Personal Appearance.

7 *Witkin Sum. Cal. Law Const Law* § 493

[§ 493] Clothes and Personal Appearance.

(1) *Personal Appearance.* In *Akin v. Board of Education of Riverside Unified School Dist.* (1968) 262 C.A.2d 161, 68 C.R. 557, petitioner, a 16-year-old minor, was suspended from defendant's high school because he wore a beard in violation of defendant board's "Good Grooming Policy." He offered evidence that in a private school he attended for a year, his beard caused no problems. The board offered evidence of serious disruption of the educational process by students with mustaches, which led to the adoption of the requirement that boys be clean-shaven. *Held*, judgment denying mandamus to compel admission affirmed.

An adult teacher with a well-trimmed and well-kept beard cannot be disciplined; this is an unconstitutional interference with his personal liberty. (262 C.A.2d 165, citing *Finot v. Pasadena City Bd. of Education* (1967) 250 C.A.2d 189, 58 C.R. 520, 3 *Summary* (10th), *Agency and Employment*, §281.) Although a student may have a similar constitutional right, the extent of reasonable restrictions is greater than in the case of adults. (262 C.A.2d 166; see *supra*, §491.) The evidence showed that a bearded student would disrupt the educational process. Thus, the benefit from the regulation was great, and there was no other way to preserve the proper climate of order and decorum. Hence, there was no unreasonable infringement of constitutional rights. (262 C.A.2d 169.) Petitioner advanced the additional contention that because a beard (unlike clothes) cannot be doffed and donned, the regulation extended to the home and invaded the right of privacy. The court declared that privacy must give way to a regulation reasonably calculated to maintain school discipline. (262 C.A.2d 169.)

In *Montalvo v. Madera Unified School Dist. Bd. of Education* (1971) 21 C.A.3d 323, 98 C.R. 593, the regulation required a boy's hair to be "neat and trimmed above eyes, ears, and collars," and "tapered up from the neck." *Held*, it was valid. Hair style is not per se an expression of protected speech, and the burden was therefore on plaintiff to demonstrate unreasonableness of the regulation. This he failed to do; the school proved that long male hair was a safety hazard in the science laboratory and in shop classes; that it would be extremely difficult to require boys to wear hair nets and caps; that long hair is a health factor; and that it would result in friction between long and short haired students. (21 C.A.3d 336.) The contention that boys were denied equal protection because girls may wear long hair is without substance. (21 C.A.3d 337.) (See *Meyers v. Arcata Union High School Dist.* (1969) 269 C.A.2d 549, 559, 75 C.R. 68 [mandamus was properly granted to compel reinstatement of student suspended for wearing long hair; regulation

against "extremes of hair styles" lacked specificity and was unconstitutionally vague]; 84 *Harv. L. Rev.* 1702 [prohibition of long hair]; 8 Santa Clara Lawyer 146 [due process in school administration]; 58 *A.L.R.5th* 1 [regulation of pupils' personal appearance by public school authorities].)

(2) *Clothes*. School districts may adopt school dress code policies and prohibit wearing "gang-related apparel." (See *Educ.C.* 35183; 26 *Pacific L. J.* 513.) The statute includes legislative findings that "gang-related apparel" is hazardous to the health and safety of the school environment, that students often conceal weapons by wearing particular clothing, that adoption of a schoolwide uniform policy is a reasonable way to protect students from being associated with gangs, that public schools need the authorization to implement uniform clothing requirements to maintain an effective learning environment, and that schools with school uniforms experience better behavior in and out of the classroom. (*Educ.C.* 35183(a).)

The governing board of a school district "may adopt or rescind a reasonable dress code policy that requires pupils to wear a schoolwide uniform or prohibits pupils from wearing 'gang-related apparel' " if the board approves a plan "initiated by an individual school's principal, staff, and parents and determines that the policy is necessary for the health and safety of the school environment." An individual school may include the dress code policy as part of its school safety plan pursuant to *Educ.C.* 32281. (*Educ.C.* 35183(b); see *Educ.C.* 35294.2(a)(2)(F) [safety plan may include schoolwide dress code that prohibits "gang-related apparel," if definition of term is limited to apparel that "reasonably could be determined to threaten the health and safety of the school environment"].) Adoption and enforcement of a reasonable dress code policy does not violate *Educ.C.* 48950 (infra, §502). (*Educ.C.* 35183(c).) (See *Educ.C.* 35183(d) [notice to parents of uniform plan; financial assistance to economically disadvantaged students]; *Educ.C.* 35183(e) [opportunity to option-out of plan]; 16 *J. Juvenile Law* 13 [discussing whether uniforms in public schools violate child's First Amendment rights]; 28 *Loyola L.A. L. Rev.* 1415 [same]; 64 *So. Cal. L. Rev.* 1321 [anti-gang clothing restrictions]; 58 *A.L.R.5th* 1 [regulation of pupils' clothes by public school authorities].)

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3. Elementary and Secondary School Students.

a. First Amendment Rights.

4. Removal of Library Books.

7 *Witkin Sum. Cal. Law Const Law* § 494

[§ 494] Removal of Library Books.

In *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico* (1982) 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435, a local school board ordered nine books removed from high school and junior high school libraries, characterizing them as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." (See 102 S.Ct. 2803, 73 L.Ed.2d 440, footnote 3, listing the books, and 102 S.Ct. 2823, 73 L.Ed.2d 466, Appendix containing excerpts.) In a plurality opinion of three justices, the court held that students could challenge the action as a violation of their First Amendment rights.

(a) The issue involved was not prescribed textbooks but only library books for optional reading; and the students were not seeking to compel acquisition of books but only to prevent removal of books previously acquired. (102 S.Ct. 2805, 73 L.Ed.2d 444.)

(b) School boards have broad discretion in the management of school affairs, but it must be exercised in a manner that comports with the imperatives of the *First Amendment*. (102 S.Ct. 2806, 2807, 73 L.Ed.2d 444, 445, discussing *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, *supra*, §§491, 492.)

(c) The right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his or her own rights of speech, press, and political freedom. Just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, this "access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." (102 S.Ct. 2809, 73 L.Ed.2d 447.) And "the special characteristics of the school library makes that environment especially appropriate for the recognition of First Amendment rights of students." (102 S.Ct. 2809, 73 L.Ed.2d 447.) "Petitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." (102 S.Ct. 2809, 73 L.Ed.2d 448.)

(d) Motivation is the determinative factor in testing the discretion to determine the content of school libraries. "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." (102 S.Ct. 2810, 73 L.Ed.2d 449.)

Two justices concurred in the judgment; four dissented in lengthy opinions attacking the decision and reasoning; e.g., "a lavish expansion going beyond any prior holding" (102 S.Ct. 2817, 73 L.Ed.2d 458); "[i]f the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it" (102 S.Ct. 2835, 73 L.Ed.2d 481). (See 96 Harv. L. Rev. 151; 17 Loyola L.A. L. Rev. 1057; 35 Stanf. L. Rev. 497.)

In *McCarthy v. Fletcher* (1989) 207 C.A.3d 130, 254 C.R. 714, defendant superintendent/principal of a high school district, acting on behalf of the school board, deleted two books from the curriculum without a statement of reasons. Plaintiffs, a teacher, a student, and a parent, sought an injunction against the restrictions on use of the books, and the trial judge granted summary judgment for defendants. *Held*, reversed.

(a) *Pico* and other federal cases, while recognizing the power of local boards to make educational decisions, also hold that First Amendment rights must be respected. "[T]here exists an inherent tension between two essential functions of a school board, exposing young minds to the clash of ideas in the free marketplace and the need to provide our youth with a solid foundation of basic, moral values. ... Thus, to insure that the school board's discretion is being exercised in a constitutionally permissible manner, it is necessary to examine the intent of the board members." (207 C.A.3d 140.)

(b) "Two rational but conflicting interpretations as to motivation may be drawn from the opinions that Grendel and One Hundred Years of Solitude were anti-God, antireligious and anti-Catholic in the light of all of the circumstances in the record: (1) the administrators were merely trying to maintain a neutral classroom environment concerning religious orthodoxy by deleting books which criticize the religious views of the community--an arguably legitimate educational purpose, or (2) the administrators were acting to protect and advance the Christian ideology on behalf of the Wasco religious community--a patently illegitimate educational purpose." (207 C.A.3d 141.)

(c) "What is critical to the present state is that a school board does not have the power to advance or inhibit a particular religious orthodoxy as a 'community value' no matter how prevalent or unpopular the orthodox view might be in the community." (207 C.A.3d 144.)

(d) In *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592, *infra*, §496, the Court referred to a wide variety of "curriculum decisions," and the standard applied in that case should also be applied here. "[R]espondents' decision ... will survive a First Amendment challenge so long as that decision is reasonably related to legitimate educational concerns. However, even under this broad standard, the school authorities' discretion is not unfettered. ... [S]uch a decision cannot be motivated by an intent to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. ...' In other words, school authorities cannot substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make educational choices." (207 C.A.3d 146.) (See 17 J. Juvenile Law 45 [First Amendment protection relating to selection of books in public schools]; 52 Stanf. L. Rev. 509 [Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment].)

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Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY D. Regulation of Educational Institutions. 3. Elementary and Secondary School Students. a. First Amendment Rights. 5. Obscene Speech.

7 *Witkin Sum. Cal. Law Const Law* § 495

[§ 495] Obscene Speech.

In *Bethel School Dist. v. Fraser* (1986) 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549, F, a high school pupil, delivered a speech nominating a fellow student for a student government office. The speech "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor." After a hearing, F was disciplined by 3 days' suspension and removal of his name from the list of candidates for graduation speaker. *Held*, the sanctions did not violate F's First Amendment rights.

(a) The court in *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, *supra*, §§491, 492, was careful to note that the case did not concern speech or action "that intrudes upon the work of the schools or the rights of other students." (106 S.Ct. 3163, 92 L.Ed.2d 557.) Thus, the freedom to advocate unpopular and controversial views must be balanced against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior." (106 S.Ct. 3164, 92 L.Ed.2d 557.) The process of educating youth for citizenship "is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." (106 S.Ct. 3165, 92 L.Ed.2d 558.)

(b) The "pervasive sexual innuendo" in F's speech "was plainly offensive to both teachers and students--indeed to any mature person." (106 S.Ct. 3165, 92 L.Ed.2d 558.) Hence, the school district "acted entirely within its permissible authority in imposing sanctions" on F "in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." (106 S.Ct. 3166, 92 L.Ed.2d 560.)

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D. Regulation of Educational Institutions.

3. Elementary and Secondary School Students.

a. First Amendment Rights.

6. Newspaper Produced by Journalism Class.

7 *Witkin Sum. Cal. Law Const Law* § 496

[§ 496] Newspaper Produced by Journalism Class.

In *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592, Spectrum, a newspaper, was written and edited by the journalism class at Hazelwood High School in St. Louis, Missouri. The major funding was supplied by the school district, and the practice of the journalism teacher was to submit page proofs to the principal for review prior to publication. On this occasion the principal objected to one story describing students' experiences with pregnancy, and to another discussing the impact of divorce on students. Because of the time limitations on publication, he concluded that corrections could not be made, and ordered deletion of the two pages on which the stories appeared. Three student staff members of the paper brought an action against the school authorities; the district court concluded that the principal's action was justified, the Court of Appeals came to the opposite conclusion, and the Supreme Court reversed the decision of the Court of Appeals.

(a) The newspaper was not a public forum. School facilities may be deemed public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or some segment of it. (108 S.Ct. 568, 98 L.Ed.2d 602.) Here, the authorities reserved the forum for its intended purpose as a supervised learning experience for journalism students; hence, they were entitled to regulate the contents of the newspaper in any reasonable manner. (108 S.Ct. 569, 98 L.Ed.2d 605.)

(b) "The question whether the First Amendment requires a school to tolerate particular student speech--the question that we addressed in *Tinker*--is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." (108 S.Ct. 570, 98 L.Ed.2d 604, referring to *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, supra, §§491, 492.)

(c) "Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." (108 S.Ct. 570, 98 L.Ed.2d 605.) Accordingly, the *Tinker* standard does not apply. "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." (108 S.Ct. 571, 98 L.Ed.2d 606.) "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." (108 S.Ct. 571, 98 L.Ed.2d 606.)

The majority opinion concluded that the principal acted reasonably under the circumstances, and that no violation of First Amendment rights occurred. (108 S.Ct. 572, 98 L.Ed.2d 607.) Three justices dissented, arguing that *Tinker* was controlling. (108 S.Ct. 573, 98 L.Ed.2d 609.) (See 102 Harv. L. Rev. 271 [*Hazelwood*]; 105 Harv. L. Rev. 597 [Ninth Circuit case on school district's exclusion of advertisement from school newspapers].)

SUPPLEMENT: [This section is current through the latest supplement]
See 35 *Hastings Const. L. Q.* 345 [*Hazelwood School Dist.*].



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7 Witkin Sum. Cal. Law Const Law § 497

[§ 497] Fees for Extracurricular Activity.

(1) *Invalid Fees.* The Legislature must "provide for a system of common schools by which a *free school* shall be kept up and supported in each district." (Cal. Const., Art. IX, §5.)

In *Hartzell v. Connell* (1984) 35 C.3d 899, 201 C.R. 601, 679 P.2d 35, the court held that extracurricular activities come within the guarantee, and therefore that fees imposed for participation in extracurricular music and sports activities are unconstitutional. (35 C.3d 911.) One justice dissented, contending that a school district may properly charge a fee for optional participation by students in extracurricular activities that bear no credit, where participation is not barred by any student's inability to pay. (35 C.3d 928, 937.) (See *California Assn. for Safety Education v. Brown* (1994) 30 C.A.4th 1264, 1276, 36 C.R.2d 404 [school district's driver training fee violated free school guarantee; citing *Hartzell*].)

(2) *Valid Fees.* In *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 C.4th 251, 5 C.R.2d 545, 825 P.2d 438, the issue was whether *Educ.C. 39807.5* (former version), which authorizes school districts to charge fees for pupil transportation, violates either the free school guaranty (Cal. Const., Art. IX, §5) or the *Equal Protection Clause* (Cal. Const., Art. I, §7) of the California Constitution. (2 C.4th 255.) *Held*, neither is violated.

(a) In *Hartzell*, the court determined that extracurricular activities constitute an integral component of public education, and are a fundamental ingredient of the educational process. (2 C.4th 262.) This is not true of school bus transportation. "Students are not required to use the same means of transportation as their classmates in order to get to school to receive an education; individual students may choose different modes of transportation to suit their own circumstances. Unlike textbooks or teachers' salaries, transportation is not an expense peculiar to education. Without doubt, school-provided transportation may enhance or be useful to school activity, but it is not a necessary element which each student must utilize or be denied the opportunity to receive an education." (2 C.4th 263.)

(b) The contention that the transportation fees discriminate against the poor might have merit if the children were prevented from attending school because they could not afford to pay the fees. However, *Educ.C. 39807.5* specifically provides that indigent children must be exempted from paying fees; and if the statute is properly administered, no child

will be denied transportation to school because of poverty. (2 C.4th 266.) (See *Salazar v. Eastin* (1995) 9 C.4th 836, 849, 39 C.R.2d 21, 890 P.2d 43 [injunction finding that *Educ.C.* 39807.5 was unconstitutional was properly vacated on basis of *Arcadia*, and refusal to modify injunction to have local districts address statute's application was correct, where no district was ever found to be misapplying statute]; 20 *Pepperdine L. Rev.* 806 [*Arcadia*].)

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3. Elementary and Secondary School Students.

b. California Constitution and Statutes.

2. Censorship of Unofficial Newspaper.

7 *Witkin Sum. Cal. Law Const Law* § 498

[§ 498] Censorship of Unofficial Newspaper.

(1) *In General.* In *Bright v. Los Angeles Unified School Dist.* (1976) 18 C.3d 450, 134 C.R. 639, 556 P.2d 1090, defendant school district's regulations on the circulation of student underground newspapers included two that were challenged by plaintiff: (1) approval of the proposed publication by the principal before its distribution on school premises; and (2) prohibition against *sale* as distinguished from distribution without charge. *Held*, the regulations were violative of the rights established by former Educ.C. 10611 (now *Educ.C. 48907*), and were consequently invalid.

(a) *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, *supra*, §§491, 492, "introduced a significant change in the control of students by school authorities and in a real sense gave voice to a different theory of education." (18 C.3d 456.) The decision recognized the right of personal intercommunication among students, and the right to express unpopular views. Student criticism of government, society, and the school system finds expression in a variety of ways, including the "underground newspaper," produced without the authorization of school officials, and often couched in strident or earthy language. (18 C.3d 456, 457.)

(b) Federal decisions have not been consistent on the extent of permissible regulation of these publications, but none has actually upheld a system of prior restraint. (18 C.3d 463.)

(c) In light of these decisions and the legislative history, the statute was intended to establish a system for prohibition against specific categories of objectionable material, and for discipline of those responsible for distributing it. But it does not authorize prevention of distribution through prior administrative censorship. (18 C.3d 464.)

(d) The federal cases have uniformly invalidated regulations flatly banning the sale of underground newspapers as overbroad restrictions on freedom of speech. (18 C.3d 466, 467.) In light of these decisions, the statute must be construed as not authorizing the ban on sale of printed materials that are otherwise entitled to be distributed. (18 C.3d 466.) (See 22 U.C.L.A. L. Rev. 141 [Regulation of Underground Newspapers on Public School Campuses].)

(2) *Statutory Provision.* *Educ.C. 48907* provides as follows:

(a) Students of public schools have the right to exercise freedom of speech and of the press, including "the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities." Excepted are (1) obscene, libelous or slanderous matter; (2) matter which so incites students as to create a clear and present danger of unlawful acts on school premises, violation of lawful school regulations, or substantial disruption of its orderly operation.

(b) The governing board of a school district and the county board of education must adopt a written publications code.

(c) Student editors of official school publications are responsible for the content of publications, but a journalism adviser within each school must "supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section." "Official school publications" are materials produced by students in the journalism, newspaper, yearbook, or writing classes, and distributed to the student body either free or for a fee.

(d) "There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section."

(e) "Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school." (See *Lopez v. Tulare Joint Union High School Dist.* (1995) 34 C.A.4th 1302, 1317, 1322, 1327, 40 C.R.2d 762 [under *Educ.C. 48907*, school board, in interest of maintaining professional standards of English and journalism, could require that profanity be deleted from film produced by students in film arts class; rejecting claims of improper prior restraint under First Amendment and California Constitution]; 20 *Loyola L.A. L. Rev.* 1055 [constitutionality of *Educ.C. 48907*]; on interpretation and scope of statute, see *infra*, §499.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Provision.* *Educ.C. 48907* "mandates that a school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption. Schools may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance." (*Smith v. Novato Unified School Dist.* (2007) 150 C.A.4th 1439, 1457, 1460, 59 C.R.3d 508 [although student editorial on immigration was disrespectful to immigrants, it did not incite disruption; defendant school did not infringe plaintiff's free speech rights by providing forum to parents and students objecting to plaintiff's editorial, but it did violate *Educ.C. 48907* by announcing that editorial was not protected speech and retracting remaining copies of paper].)

Educ.C. 48907 was amended in 2008 to substitute "pupil" for "student" throughout the statute, and to substitute "the" for "such" in the quoted material in paragraph (a). Paragraph (e) now reads: "This section does not prohibit or prevent the governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by pupils upon the premises of each school."



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b. California Constitution and Statutes.

3. Censorship of Official Newspaper.

7 *Witkin Sum. Cal. Law Const Law* § 499

[§ 499] Censorship of Official Newspaper.

In *Leeb v. DeLong* (1988) 198 C.A.3d 47, 243 C.R. 494, plaintiff, student editor of a newspaper of Rancho High School, prepared its traditional April Fool's Day spoof. One article was headlined "Nude Photos; Girls of Rancho," and stated that Playboy magazine would carry nude photographs of Rancho girl students. It was accompanied by a photograph of five clothed girls standing in line to apply for the posing session. A disclaimer on a different page stated that all stories and announcements "are fabrications of the mind." The edition was submitted to defendant principal too late for deletion of the offending article, and he prohibited distribution of the newspaper. Plaintiff sued for an injunction, contending that *Educ.C. 48907* (see *supra*, §498) violates the free press provision of the California Constitution (Cal. Const., Art. I, §2, *supra*, §312). *Held*, summary judgment for defendants affirmed.

(a) "Is a statute which accords broad free press rights to public high school students nonetheless repugnant to the Constitution of California because it also allows school officials a very limited right to censor *official* high school publications?" (198 C.A.3d 53.) If *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592, *supra*, §496, were applicable in California, the answer would be clear, but it is not. *Educ.C. 48907* "and California decisional authority confer editorial control of official student publications on the student editors alone, with very limited exceptions. The broad power to censor expression in school sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is not available to this state's educators." (198 C.A.3d 54.)

(b) *Bailey v. Loggins* (1982) 32 C.3d 907, 187 C.R. 575, 654 P.2d. 758, *supra*, §365, is apparently based on both the federal and state Constitutions. The Court rejected the contention that the state as publisher enjoys the same total control over the content of a newspaper as a private publisher; and the holding was that the state, having established an activity that has the elements of free expression, must take into account First Amendment considerations in restricting that expression. The dissent in *Bailey* took essentially the same position as the U.S. Supreme Court in *Kuhlmeier*. (198 C.A.3d 55.) "Nonetheless, we are compelled to follow the views of the majority in *Bailey*." (198 C.A.3d 56.)

(c) "At least by statute a school newspaper is a limited forum in this state, but to what extent may the government publisher exercise its restricted right to control the content of the publication? In terms of the present case, was it constitutionally permissible to impose the limited prior restraint the Legislature authorized in *Education Code section*

48907 or was discipline after the fact the only lawful response?" (198 C.A.3d 57.) *Bright v. Los Angeles Unified School Dist.* (1976) 18 C.3d 450, 134 C.R. 639, 556 P.2d 1090, supra, §498, concluded that, while prior restraints might be possible, the statute did not authorize them; *Educ.C. 48907*, the Legislature's response to *Bright*, does expressly provide for a limited form of censorship in school sponsored publications. (198 C.A.3d 57.)

(d) Sound precedent and practical considerations support the school administration's right to censor actionable defamatory material from official student publications.

(1) Student editors have little incentive to suppress defamatory material; few would be able to respond in damages, and suspension or expulsion of offenders would not do much to restore the reputations of defamed parties. "Where, as here, the prospective victims of the defamation are themselves students, it is nonsensical to contend the Constitution of California requires the school district to publish a libelous treatment of one pupil by another. Surely a school district owes as great a duty to the prospective student victim of a defamation as it does to the student editor-tortfeasor." (198 C.A.3d 58.)

(2) A school district shorn of the power to ban defamation would be vulnerable to a defamation action, and a severe diminution of opportunities for student expression would be the trade-off. (198 C.A.3d 58.)

(3) The practicalities consequently suggest the need for and reasonableness of *Educ.C. 48907*, "specifically the power to censor defamatory material from official student publications." (198 C.A.3d 58.) Thus, construed in light of *Bailey*, the statute does not offend the California Constitution. It is understood in terms of the potential tort liability test: "A school district in this state may censor expression from official school publications which it reasonably believes to contain an actionable defamation, but not as a matter of taste or pedagogy. ... Grading or postpublication discipline, if warranted, is adequate to achieve the latter ends." (198 C.A.3d 60.)

(e) The tort liability test also assists in resolving plaintiff's charges of vagueness and overbreadth. Read literally, the statute provides a power to censor material that, by reason of privilege, would not support an action for damages against a private newspaper. (198 C.A.3d 60.) And neither the statute nor the district's implementing regulation defines the words "libelous" and "slanderous," and neither describes a method for evaluating questioned material. But by confining the scope of the section's defamation exception to matters involving a clear risk of a recovery in tort, the parties are placed in the same situation with respect to allegedly defamatory material as private litigants in a court of law. (198 C.A.3d 62.)

(f) The court summarizes its conclusion as follows:

(1) A "decision to impose a prior restraint in the case of a possible defamation must, at a minimum, be based on a good faith and objectively rational determination of the probable effect of the challenged speech, i.e., that it contains a false statement (or one that cannot be proved to be true) likely to harm the reputation of another or hold that person up to shame, ridicule, or humiliation. It is not enough that a lawsuit is threatened. Freedom of speech may not be allowed to hinge on the subjective pique of an offended prospective plaintiff in a frivolous or doubtful lawsuit. Prior restraint, although not other disciplinary action necessarily, must yield unless it also appears that an offended plaintiff would have a clear chance of prevailing in a tort action against the school district." (198 C.A.3d 62.)

(2) "Defamatory material that is not actionable because it is privileged or deals with a public figure without malice may not be censored." (198 C.A.3d 62.)

(3) The district's regulation "should also require that any decision to delete an item thought to be defamatory should, insofar as it is possible, be limited to the offending material itself." (198 C.A.3d 62.)

(4) The regulation "should also provide that no prior restraint may be imposed without affording a speedy opportunity to be heard and a swift procedure for administrative review." (198 C.A.3d 63.)

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b. California Constitution and Statutes.

4. School Placement.

7 *Witkin Sum. Cal. Law Const Law* § 500

[§ 500] School Placement.

In *Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 C.A.4th 1793, 57 C.R.2d 605, plaintiffs were students who had enrolled late. Due to lack of space, they were denied immediate entry into their schools of residence but were offered placement in alternate schools and placed on waiting lists for their schools of residence. Plaintiffs, claiming that their placement violated their right under Cal. Const., Art. IX, §5 (see *supra*, §497), to a free public education, sought mandamus, which was denied. *Held*, affirmed.

(a) Plaintiffs were not denied access to district schools; rather, they were late enrollees who were denied immediate entry into the school of their choice. The obligation to provide free education does not include a duty to provide schools that are geographically convenient. (49 C.A.4th 1799, 1800.)

(b) There are benefits to attending a school close to home. However, "[t]he convenience of late-registering students must be balanced against the education of an established number of students deemed the maximum appropriate size for its age group. To accommodate these competing interests, the district must be permitted some flexibility in configuring attendance zones and maintaining the schools therein to accommodate the demands upon its educational resources." (49 C.A.4th 1801, 1802.)

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D. Regulation of Educational Institutions.

4. Statutory Declaration of Rights.

a. Legislative Findings and Intent.

7 *Witkin Sum. Cal. Law Const Law § 501*

[§ 501] Legislative Findings and Intent.

(1) *In General.* The rights of secondary and postsecondary students to engage in constitutionally protected speech or other communication have been codified. (See *Educ.C. 48950* [secondary schools]; *Educ.C. 66301* [public colleges and universities]; *Educ.C. 94367* [private postsecondary institutions]; *24 Pacific L. J. 839*.) The legislative intent of these enactments was "that a student shall have the same right to exercise his or her right to free speech on campus as he or she enjoys when off campus." (Stats. 1992, Chap. 1363, §4(b).)

(2) *Rights of Free Speech.* On a student's free speech rights, the legislative findings include a quotation from *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, supra, §§491, 492, that a student may exercise these rights so long as the student's conduct does not materially disrupt school operations. (Stats. 1992, Chap. 1363, §4(a)(2).) However, the Legislature also found that "[f]ree speech rights, both on and off campus, are subject to reasonable time, place, and manner regulations." (Stats. 1992, Chap. 1363, §4(a)(1).)

(3) *Fighting Words Are Not Protected.* "Fighting words" or epithets are not constitutionally protected "where (A) the speech, considered objectively, is abusive and insulting rather than a communication of ideas and (B) it is actually used in an abusive manner in a situation that presents an actual danger that it will cause a breach of the peace." (Stats. 1992, Chap. 1363, §4(a)(3).)

(4) *Hate Violence Is Not Protected.* Several findings were made on equal educational opportunity and the effect of hate violence on this opportunity: (a) "All students have the right to participate fully in the educational process free from discrimination and hate violence." (Stats. 1992, Chap. 1363, §4(a)(4).) (b) "Institutions of higher education have an obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity as guaranteed by the state and federal Constitutions." (Stats. 1992, Chap. 1363, §4(a)(5).) (c) "Hate violence on campus creates a hostile environment and jeopardizes" this constitutionally guaranteed equal educational opportunity. (Stats. 1992, Chap. 1363, §4(a)(6).)

The findings define hate violence as any act or threat "of physical intimidation or physical harassment, physical force or physical violence ... directed against any person or group of persons, or the property" of that person or group, "because of the ethnicity, race, national origin, religion, sex, sexual orientation, disability, or political or religious

beliefs of that person or group." (Stats. 1992, Chap. 1363, §4(a)(7).) Acts may not be considered hate violence "based on speech alone, except upon a showing that the speech itself threatens violence against a specific person or group of persons," that the threatened person or group "reasonably fears that the violence will be committed because of the speech, and that the person threatening violence had the apparent ability to carry out the threat." (Stats. 1992, Chap. 1363, §4(a)(8).)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

D. Regulation of Educational Institutions.

4. Statutory Declaration of Rights.

b. Protected Speech Is Not Subject to Discipline.

7 *Witkin Sum. Cal. Law Const Law* § 502

[§ 502] Protected Speech Is Not Subject to Discipline.

(1) *Secondary Schools.* School districts operating one or more high schools, as well as private secondary schools, are prohibited from making or enforcing "any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication" that, if engaged in off campus, is protected from governmental restriction by the First Amendment or by Cal. Const., Art. I, §2. (*Educ.C. 48950(a)*.) However, nothing in the statute prohibits "imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected." (*Educ.C. 48950(d)*.) And "free speech rights are subject to reasonable time, place, and manner regulations." (*Educ.C. 48950(f)*); see *Educ.C. 35294.2* [wearing "gang-related apparel" in violation of schoolwide dress code is not protected form of speech under *Educ.C. 48950*]; *supra*, §493.) Nothing in *Educ.C. 48950* may be construed to supersede, limit, or modify the provisions of *Educ.C. 48907* (*supra*, §498). (*Educ.C. 48950(e)*.)

(2) *Postsecondary Schools.* Postsecondary schools are prohibited from making or enforcing "any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication" that, if engaged in off campus, is protected from governmental restriction by the First Amendment or by Cal. Const., Art. I, §2. (*Educ.C. 66301(a)*) [University of California, California State University, and community college districts]; *Educ.C. 94367(a)* [private postsecondary institutions].)

However, nothing in the statutes prohibits "imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected." (*Educ.C. 66301(d)*, *94367(e)*.) And nothing in the statutes prohibits an institution from adopting rules and regulations "designed to prevent violence ... from being directed at students in a manner that denies them their full participation in the educational process," provided these rules and regulations conform to constitutional standards for citizens generally. (*Educ.C. 66301(e)*, *94367(f)*.) The statutes may not be construed to authorize any prior restraint of student speech. (*Educ.C. 66301(c)*, *94367(d)*.)

(3) *Exception for Religious Institutions.* Neither *Educ.C. 48950* nor *Educ.C. 94367* applies to a private secondary or postsecondary school "that is controlled by a religious organization, to the extent" that application of the statute "would not be consistent with the religious tenets of the organization." (*Educ.C. 48950(c)*, *94367(c)*.)

(4) *Remedy.* The remedy is the same regardless of whether a secondary or postsecondary school is involved. A

student enrolled in a covered institution that has made or enforced any rule in violation of the statute may bring a civil action for "appropriate injunctive and declaratory relief as determined by the court." On motion, attorneys' fees may be awarded to a prevailing plaintiff. (*Educ.C. 48950(b), 66301(b), 94367(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Secondary Schools*. The portion of *Educ.C. 48950(a)* quoted in the text was amended in 2008 to substitute "a" for "any" both times it appears. (2) *Postsecondary Schools*. The portions of *Educ.C. 66301(a)* and *94367(a)* quoted in the text were amended in 2008 to substitute "a" for "any" both times it appears. *Educ.C. 66301(e)* and *94367(f)* both allow institutions to adopt rules and regulations designed to prevent "hate" violence (see text, §501).

(4) *Remedy*. See *Antebi v. Occidental College (2006) 141 C.A.4th 1542, 1547, 47 C.R.3d 277* [plaintiff who was no longer student at college lacked standing to pursue remedy under *Educ.C. 94367(b)*].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY E. Regulation of Government Employees. 1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 503

[§ 503] In General.

(1) *No Issue of Public Concern.* In *Connick v. Myers* (1983) 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708, plaintiff, an assistant district attorney in New Orleans competently performing her duties, was notified by defendant district attorney that she was being transferred to a different section of the criminal court. She objected, but was unable to change defendant's decision. Plaintiff then prepared a questionnaire which she distributed to fellow staff members, asking questions dealing with office transfer policy, morale, the need for a grievance committee, the level of confidence in superiors, and whether employees felt pressured to work in political campaigns. Defendant then told her that she was being terminated because of refusal to accept the transfer, and also that distribution of the questionnaire was considered an act of insubordination. She filed a civil rights action under 42 U.S.C., §1983 (see *infra*, §816), and the district court ordered her reinstated with back pay, damages, and attorneys' fees. *Held*, reversed.

(a) Early decisions followed the unchallenged dogma that a public employee had no right to object to conditions placed on the terms of employment, including those that restricted the exercise of constitutional rights. But later cases, culminating in *Pickering v. Board of Education of Township High School Dist. 205, Will, Illinois* (1968) 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 3 *Summary* (10th), *Agency and Employment*, §283, invalidated statutes and actions that sought to suppress the rights of public employees to participate in public affairs. (103 S.Ct. 1688, 1689, 75 L.Ed.2d 718, 719.) Other cases following *Pickering* make it clear that the test is whether the speech deals with a matter of public concern. (103 S.Ct. 1689, 75 L.Ed.2d 719.)

(b) Government officials should have wide latitude in managing their offices. A dismissal may not be fair, but ordinary dismissals from government service that violate no fixed tenure or applicable statute or regulation are not subject to judicial review. (103 S.Ct. 1690, 75 L.Ed.2d 719.) "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." (103 S.Ct. 1690, 75 L.Ed.2d 720.)

(c) Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of the statement. With one exception, the questions posed by *Myers* did not meet the test: They were mere extensions of her dispute over the transfer; they were designed to gather ammunition for another round of controversy with her superiors, and were "an attempt to turn that displeasure into a cause celebre." (103 S.Ct. 1691, 75 L.Ed.2d 720.)

While public officials should be receptive to constructive criticism offered by their employees, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." (103 S.Ct. 1691, 75 L.Ed.2d 721.) The exception was the question regarding pressure to work in political campaigns. (103 S.Ct. 1691, 75 L.Ed.2d 721.)

(d) Plaintiff's questionnaire therefore touched on matters of public concern in only a most limited sense; and the limited First Amendment interest involved here does not require defendant to tolerate action that "he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." (103 S.Ct. 1694, 75 L.Ed.2d 724.)

Four justices dissented. (See 97 Harv. L. Rev. 164; 72 Cal. L. Rev. 962 [prepublication review of government employees' speech]; 76 Cal. L. Rev. 1109 [public concern requirement]; 25 Hastings Const. L. Q. 529 [permissible content discrimination]; 25 Pepperdine L. Rev. 723 [employees' free speech rights vs. duty of loyalty to employer].)

(2) *Protected Issue of Public Concern.* In *Chico Public Officers' Assn. v. Chico* (1991) 232 C.A.3d 635, 283 C.R. 610, defendant city's police department took disciplinary action against police officer M, for writing an article in the employees' association newsletter (The Centurion). The article castigated the management, and stated that The Centurion was "the only watch dog available to monitor the chief and his lackeys." The trial judge granted the petition of M and the association for mandamus, and ordered the disciplinary action vacated. *Held*, affirmed; the statement was protected speech involving a matter of public concern.

(a) The speech did not become unprotected simply because it included a complaint that was personal to M. M's "use of the term 'lackeys' was substantially intertwined with both comments on employer-employee relations and allegations of mismanagement." Thus, taken in context, M's speech "addressed issues of public concern." (232 C.A.3d 648.)

(b) The city's interests in efficiency as an employer did not outweigh M's speech interest. "[A]ppellants offered no evidence of any disruptive effect occasioned by Moore's speech, other than the chief's conclusionary opinion that he perceived it as interfering with close working relationships within the department as a direct attempt to undermine his authority and that of the officers to whom Moore referred. ... [I]t is equally probable that any disruption to efficiency and discipline in the department was the result of a widely held perception of mismanagement which was merely reflected in 'The Centurion' edition rather than precipitated by Moore's speech." (232 C.A.3d 651.)

(3) *Reasonableness Requirement.* In *Waters v. Churchill* (1994) 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686, C, a public hospital nurse, was fired because of disruptive statements she allegedly made during a conversation with another nurse. C denied the statements and claimed that her comments were limited to criticisms of a policy that threatened patient care. She filed an action under 42 U.S.C., §1983, but the district court granted summary judgment to petitioners. The Court of Appeals reversed, holding that the test set forth in *Connick* should be applied to C's actual speech, as determined by a jury, not to what the employer thought she said. *Held*, judgment vacated.

The plurality opinion of four justices concluded that the *Connick* test should be applied to what the government employer *reasonably* thought the employee said, not to what the trier of fact ultimately determines the employee actually said. (114 S.Ct. 1884, 128 L.Ed.2d 694.) The decisionmaker must reach its decision in good faith, rather than as a pretext. But good faith alone is not sufficient; the conclusion as to what was said must also be reasonable. (114 S.Ct. 1889, 128 L.Ed.2d 700.)

Three justices, concurring in the judgment, disagreed with imposition of a reasonableness requirement and concluded that a public employer's discipline of an employee violates the First Amendment only if it is in retaliation for the employee's speech on a matter of public concern. (114 S.Ct. 1893, 128 L.Ed.2d 706.)

Two justices dissented, arguing that the proper inquiry is not what the government employer reasonably thought was said, but rather what the trier of fact ultimately determines actually was said. (114 S.Ct. 1899, 128 L.Ed.2d 713.) (See 108 Harv. L. Rev. 280.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *No Issue of Public Concern.* See *San Diego v. Roe* (2004) 543 U.S. 77, 125 S.Ct. 521, 526, 160 L.Ed.2d 410, 417 [following *Connick v. Myers* (1983) 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708, text, p. 833; police officer who produced, marketed, and sold sexually explicit videos of himself, and who marketed and sold official police uniforms, was not informing public about aspects of employer's operation that were subjects of legitimate news interest, and officer's termination did not violate First Amendment]; 40 U.C. Davis L. Rev. 85 [public employee rights to noninterference in private affairs].(1a) *(New) Statements Pursuant to Official Duties.* "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 126 S.Ct. 1951, 1960, 164 L.Ed.2d 689, 701 [deputy district attorney's disposition memorandum recommending dismissal of case because of inaccuracies in search warrant affidavit was made as part of deputy's official duties and was not protected speech].)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law VI. FREEDOM OF SPEECH, PRESS, AND ASSEMBLY E. Regulation of Government Employees. 2. Balancing of Interests.

7 Witkin Sum. Cal. Law Const Law § 504

[§ 504] Balancing of Interests.

(1) *In General.* In *Gray v. Tulare* (1995) 32 C.A.4th 1079, 38 C.R.2d 317, plaintiff, a captain in the sheriff's department, was fired for suggesting in newspaper articles that defendant sheriff was abusing his power by punishing his political enemies. The statements were the result of a disruptive situation. Plaintiff was one of four captains (there were five altogether) who had supported the losing candidate in an election. When defendant took over, he investigated plaintiff about his predecessor's spying on him and transferred plaintiff from investigations to administration, after removing the administrative captain's most important job, that of budgeting. Defendant relied on the newly appointed undersheriff and often excluded the captains when setting policy. Plaintiff's statements included negative comments about the choice of the new undersheriff, the transfer of a sergeant from narcotics to road patrol, and several internal investigations that defendant had launched. After exhausting his administrative remedies, which resulted in the upholding of his dismissal, plaintiff filed a petition for mandamus. The trial judge found that plaintiff's First Amendment's rights had been violated and issued the writ. *Held*, reversed; the trial judge failed to consider the issue of political retaliation.

(a) *General principles.* It is well established that the First Amendment protects speech by public employees about matters of public concern. (32 C.A.4th 1089, citing *Waters v. Churchill* (1994) 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686, *supra*, §503.) However, the government, as employer, has far broader powers to regulate the speech of its employees than the government, as sovereign, has to regulate the speech of its citizens in general. Hence, the standard is to inquire whether the speech involves a matter of public interest and, if so, to then ask whether the interests of the employee, as a citizen, outweigh the interests of the state, as an employer, in promoting efficiency of public service.

(b) *Matters of public concern.* Two of plaintiff's statements were not limited purely to grievances, but related generally to claims that defendant was misusing the resources and prerogatives of his job. This is a matter of public concern, as is the ethical operation of the department in accordance with applicable rules and regulations. (32 C.A.4th 1090.) Plaintiff's assertions that defendant was paranoid and possibly psychotic were closely tied to his allegations of political retaliation and did not cause his remarks to lose their First Amendment protection. (32 C.A.4th 1091.)

(c) *State's interests outweighed plaintiff's interests.*

(1) On paper, the captains occupy the positions directly beneath the undersheriff. They are major executives

responsible for keeping the sheriff informed and carrying out his policy. As such, they must have the sheriff's trust and confidence and vice versa. In other words, law enforcement agencies are essentially paramilitary organizations in which discipline and loyalty are of paramount importance. (32 C.A.4th 1092.)

(2) Plaintiff argued that, in reality, his relationship with defendant had already deteriorated to the point that the newspaper articles did not make it worse. The cases are in disagreement over whether the speech must cause the problem, or merely reflect the existing situation. However, it is not necessary to resolve this issue, because, irrespective of any ill will between the two men, their positions required that they continue to be able to work closely together. Moreover, the evidence shows that plaintiff's statements contributed significantly to a public debate that created dissension within the department and impaired defendant's ability to manage. (32 C.A.4th 1093.)

(3) Plaintiff's comments were made at a time when one captain had been dismissed and a sergeant was suing over a transfer. Given the nature of plaintiff's remarks and the manner in which they were made (prepared remarks to a reporter, instead of off-the-cuff statements), it was understandable that they would get the widest possible distribution. (32 C.A.4th 1094.)

(4) When an employee's speech about an office policy arises from an employment dispute concerning the application of that policy to the speaker, the view that the employee had threatened the authority of the employer to run the office is entitled to additional weight. Here, the policy of firing those who speak out against the department was the same policy that was applied against plaintiff, who was allegedly a victim of a witch hunt against political enemies. This factor did not diminish his right to speak out, but it was relevant in determining whether his statements were protected. (32 C.A.4th 1095.)

(5) Plaintiff's remarks suggested that he had access to inside information that, given the nature of the internal investigations, defendant was unable to refute. In fact, defendant was quoted in related articles as refusing to respond to plaintiff's comments because of possible breach of confidence. (32 C.A.4th 1095.)

(6) Finally, plaintiff's statements violated written provisions of both the county's and the department's policy manual. Plaintiff argued that defendant had abrogated these policies by promising an open administration during the election campaign, by saying that critics of his appointment of the undersheriff had a constitutional right to voice their opinion, and by refusing to discipline or warn plaintiff when he publicly attacked that appointment. This contention is without merit. Defendant's campaign promises and silence can hardly be equated with his inviting public attacks on his administration. Nor can they be treated as repealing established departmental policy, much less county policy, over which defendant had no control. And defendant's statement that employees have a right to voice their criticism of his appointments does not suggest that employees also have a right to make statements that go beyond the *First Amendment*. (32 C.A.4th 1096.)

(7) "Thus, in view of the entire record before us, we reject Gray's contentions Coley invited his critical statements and failed to give him adequate notice the statements would subject him to disciplinary action. We conclude Gray's statements to the Visalia Times-Delta, although related to matters of public concern, substantially disrupted the efficient operation of the Department. For all the reasons we have set out above, his interest in making the statements was outweighed by the sheriff's interest in maintaining order and discipline. Accordingly, Gray's statements were not protected by the First Amendment and Coley was justified in dismissing him for having made them." (32 C.A.4th 1096.) (See *Southern Calif. Rapid Transit Dist. v. Superior Court* (1994) 30 C.A.4th 713, 726, 36 C.R.2d 665 [First Amendment rights of transportation district's at-will employee were violated by retaliatory firing for conducting investigation that revealed forged signature and misclassification of company as "Disadvantaged Business Enterprise"]; *Kirchmann v. Lake Elsinore Unified School Dist.* (1997) 57 C.A.4th 595, 613, 67 C.R.2d 268 [degree of sanction levied against employee is not relevant to question whether free speech rights were violated]; on discharge of public employees as violation of their constitutional or statutory rights generally, see 3 *Summary* (10th), *Agency and Employment*, §278 et seq.)

(2) *Independent Contractors*. The First Amendment protects independent contractors, as well as employees, from termination of an employment contract in retaliation for the exercise of free speech. The balancing test under *Pickering v. Board of Education of Township High School Dist. 205, Will, Illinois* (1968) 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 3 Summary (10th), *Agency and Employment*, §283, determines the extent of protection. (*Board of County Commrs., Wabaunsee, Kansas v. Umbehr* (1996) 518 U.S. 668, 116 S.Ct. 2342, 2346, 2349, 135 L.Ed.2d 843, 851, 854; *O'Hare Truck Service v. Northlake* (1996) 518 U.S. 712, 116 S.Ct. 2353, 2361, 135 L.Ed.2d 874, 886; see *Associated Builders & Contractors, Golden Gate Chapter v. San Francisco Airports Com.* (1999) 21 C.4th 352, 380, 87 C.R.2d 654, 981 P.2d 499 [project stabilization agreement between city airport commission and union relating to long-term airport expansion project did not prevent nonunion contractors from "expressing their 'merit shop philosophy' and opposition to unions, nor [did] it coerce 'pro-union' expressions or associations"; distinguishing *O'Hare Truck Service*]; 110 Harv. L. Rev. 226 [*Board of County Commrs.*].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

VII. FREEDOM OF RELIGION

A. In General.

1. Nature of Constitutional Provisions.

7 *Witkin Sum. Cal. Law Const Law* § 505

[§ 505] Nature of Constitutional Provisions.

Both the federal and California Constitutions guarantee religious freedom. The First Amendment to the federal Constitution declares that Congress "shall make no law respecting an *establishment of religion*, or prohibiting the *free exercise* thereof." (On Free Exercise Clause, see *infra*, §514 et seq.; on Establishment Clause, see *infra*, §507 et seq.) (See 5 Rotunda, §21.1 et seq.; 2 Tribe, §14-1 et seq.)

The California provision is broader: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the state. The Legislature shall make no law respecting an establishment of religion." The section adds: "A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs." (Cal. Const., Art. I, §4.)

The California Constitution further provides that the state and its subdivisions may not appropriate funds or pay for anything in aid of a religious sect, church, creed, or institution (Cal. Const., Art. XVI, §5), and that no public money may be appropriated "for the support of any sectarian or denominational school" (Cal. Const., Art. IX, §8).

In *Everson v. Board of Education of Ewing Township* (1947) 330 U.S. 1, 67 S.Ct. 504, 511, 91 L.Ed. 711, 723, *infra*, §539, the Court stated that the First Amendment "establishment of religion" clause "means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "

In *McCullum v. Board of Education of School Dist. No. 71 Champaign County, Illinois* (1948) 333 U.S. 203, 68 S.Ct. 461, 465, 92 L.Ed. 649, 659, *infra*, §529, the Court added that the First Amendment rests on "the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective

sphere."

In *Torcaso v. Watkins* (1961) 367 U.S. 488, 81 S.Ct. 1680, 1683, 6 L.Ed.2d 982, *infra*, §514, the Court repeated and reaffirmed "that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (See *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 2964, 37 L.Ed.2d 948, 962, *infra*, §544 [grants to parochial schools].)

West's Key Number Digest, Constitutional Law k.84 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Rotunda 4th, §21.1 et seq.



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VII. FREEDOM OF RELIGION
A. In General.
2. Texts and Commentary.

7 *Witkin Sum. Cal. Law Const Law* § 506

[§ 506] Texts and Commentary.

Textwriters and other commentators have produced a huge volume of published material on this subject.

(1) *Texts and Practice Works*. See 5 Rotunda, §21.1 et seq.; 2 Tribe, §14-1 et seq.; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §415 et seq.; 41 *A.L.R.3d* 519 [validity of blasphemy statutes or ordinances]; 107 *A.L.R.5th* 623 [employer's reasonable accommodation of employee's religious preference under state law]; 123 *A.L.R.5th* 385 [church autonomy doctrine]; Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §5:1 et seq. [text and forms].

(2) *Law Reviews*. See 97 *Harv. L. Rev.* 547 [legislative responses to religious vandalism]; 97 *Harv. L. Rev.* 1468 [reinterpreting religion clauses]; 100 *Harv. L. Rev.* 1607 [Developments in the Law--Religion and the State]; 103 *Harv. L. Rev.* 1410 [origins and historical understanding of free exercise]; 106 *Harv. L. Rev.* 1639 [flag desecration laws and Establishment Clause]; 115 *Harv. L. Rev.* 2205 [minors' free exercise rights and psychology of religious development]; 116 *Harv. L. Rev.* 946 [Wagering on Religious Liberty]; 116 *Harv. L. Rev.* 1353 [public accountability and faith-based organizations]; 116 *Harv. L. Rev.* 1397 [new religion and Constitution]; 117 *Harv. L. Rev.* 1810 [role of local government in doctrine and discourse of religious liberty]; 88 *Cal. L. Rev.* 1709 [century of religious freedom]; 19 *Cal. Western L. Rev.* 507 [constitutional analysis of clergy malpractice concept]; 9 *Hastings Const. L. Q.* 691 [supervision of religious corporations under *Corp.C.* 9230]; 30 *Hastings Const. L. Q.* 1 [Religious Discrimination, Public Funding, and Constitutional Values]; 30 *Hastings Const. L. Q.* 131 [President Bush's faith-based charitable choice plan]; 44 *Hastings L. J.* 843 [other side of religion]; 44 *Hastings L. J.* 865 [The Public Square and the Jew as Religious Other]; 8 *Loyola L.A. L. Rev.* 396 [problems of faith healing]; 11 *Loyola L.A. L. Rev.* 807 [deprogramming religious cultists]; 32 *Loyola L.A. L. Rev.* 9, 27 [should Religion Clauses of Constitution be amended?]; 7 *Pepperdine L. Rev.* 313 ["Religion" and "Religious Institutions" Under the First Amendment]; 7 *Pepperdine L. Rev.* 355 [government's role in "purification" of religious organizations]; 7 *Pepperdine L. Rev.* 613 [government entanglement with religion]; 7 *Pepperdine L. Rev.* 655 [Piercing the Religious Veil of the So-Called Cults]; 21 *Pepperdine L. Rev.* 478 [Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools?]; 16 *San Diego L. Rev.* 325 [teaching transcendental meditation in public schools]; 30 *San Diego L. Rev.* 643 [symposium on role of religion in public debate in liberal society]; 51 *So. Cal. L. Rev.* 1 [Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment]; 53 *So. Cal. L. Rev.* 1277 [Government Protection of Church Assets From Fiscal Abuse]; 56 *So. Cal. L. Rev.* 1277 [Of Robots, Persons, and the Protection of Religious Beliefs]; 59 *So. Cal. L. Rev.* 495 [Supreme Court and establishment]; 60 *So. Cal. L. Rev.* 1579 [religion and law in modern America]; 75 *So. Cal. L. Rev.* 559 [Faith and Funding: Toward an

Expressivist Model of the Establishment Clause]; 41 *Stanf. L. Rev.* 233 [Religion or Ideology: A Needed Clarification of the Religion Clauses]; 48 *Stanf. L. Rev.* 903 [Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics]; 49 *Stanf. L. Rev.* 773 [19th century Christianization policy in 20th century Native American free exercise cases]; 26 Thomas Jefferson *L. Rev.* 125 [domestic partnership law and faith-based organizations]; 26 Thomas Jefferson *L. Rev.* 333 [Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise]; 20 *U.C. Davis L. Rev.* 705 [religion and the Constitution]; 23 *U.C.L.A. L. Rev.* 763 [religious rights of public school teachers]; 27 *U.C.L.A. L. Rev.* 1195 [entanglement test of religion clauses]; 51 *U.C.L.A. L. Rev.* 1645 [Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine]; 20 *U.S.F. L. Rev.* 775 [nonprofit religious institutions]; 24 *U.S.F. L. Rev.* 505 [Free Exercise in the 1980's: A Rollback of Protection]; 31 Western State *L. Rev.* 185 [effect of denominational preferences of military chaplaincy].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Texts and Practice Works.* See 6 Rotunda 4th, §21.1 et seq.

(2) *Law Reviews.* See 118 *Harv. L. Rev.* 155 [theology scholarships, Pledge of Allegiance, and religious liberty]; 56 *Hastings L. J.* 699 [Free Exercise and the Problem of Symmetry]; 57 *Hastings L. J.* 1 [The Political Marketplace of Religion]; 33 *Hastings Const. L. Q.* 337 [The Constitution's Article VI Religious Test Prohibition and the Judiciary's Religious Motive Analysis]; 35 *Hastings Const. L. Q.* [government-sponsored chaplain programs and disaster response]; 25 *J. Juvenile Law* 37 [Is Student Evangelism Protected Speech?]; 31 *Lincoln L. Rev.* 51 [First Amendment Right and Sunday Closing Laws]; 38 *Loyola L.A. L. Rev.* 2185 [Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage]; 35 *Pepperdine L. Rev.* 1029 [restitutionary recoupment of federal funds as remedy when taxpayers allege that expired statute violated Establishment Clause]; 78 *So. Cal. L. Rev.* 795 [constitutionality of faith-based rehabilitation programs]; 36 *Southwestern U. L. Rev.* 85 [mixing morality with medicine]; 39 *U.C. Davis L. Rev.* 1621 [Coercion and Choice Under the Establishment Clause]; 52 *U.C.L.A. L. Rev.* 1061 [property rights approach to Indians' right to use tribal sacred sites].



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CHAPTER X - Constitutional Law

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VII. FREEDOM OF RELIGION

B. Establishment Clause.

1. Under Federal Constitution.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 507

[§ 507] In General.

(1) *Scope of Protection.* "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects--or even intolerance among 'religions'--to encompass intolerance of the disbeliever and the uncertain." (*Wallace v. Jaffree* (1985) 472 U.S. 38, 105 S.Ct. 2479, 2488, 86 L.Ed.2d 29, 40, *infra*, §532; see 5 Rotunda, §21.3 et seq.; 105 *Harv. L. Rev.* 1700 [Rethinking the Incorporation of the Establishment Clause: A Federalist View]; 80 *Cal. L. Rev.* 981 [argument that Christian holiday celebration in public elementary schools is establishment of religion]; 81 *Cal. L. Rev.* 293 [Establishment Clause, civil religion, and public church]; 90 *Cal. L. Rev.* 673 [transformation of Establishment Clause]; 10 *Hastings Const. L. Q.* 145 [The Establishment Clause and Religion-Based Categories: Taking Entanglement Seriously]; 15 *Hastings Const. L. Q.* 533 [Establishment Clause]; 19 *Hastings Const. L. Q.* 343 [First Amendment considerations in government regulation of religiously based social services]; 19 *Hastings Const. L. Q.* 567 [Establishment Clause in the Rehnquist Court]; 33 *Southwestern U. L. Rev.* 119 [note on 9th circuit case holding that reciting Pledge of Allegiance violates of Establishment Clause].)

(2) *Tests for Violation.* In *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *infra*, §543, the Court established a 3-prong test to be applied in determining whether a statute satisfies the Establishment Clause. "First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statute must not foster 'an excessive government entanglement with religion.'" (91 S.Ct. 2111, 29 L.Ed.2d 755.) To determine whether there is excessive entanglement, the court "must examine the character

and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." (91 S.Ct. 2112, 29 L.Ed.2d 757.) (See *Lucas Valley Homeowners Assn. v. Marin* (1991) 233 C.A.3d 130, 150, 152, 284 C.R. 427 [granting conditional use permit for synagogue in residential area, on conditions that weekly attendance log be kept, that only six children at a time be allowed outside, and that facility be used for religious events and functions for benefit of members, did not constitute excessive entanglement under *Lemon*]; *Singh v. Singh* (2004) 114 C.A.4th 1264, 1289, 9 C.R.3d 4 [applying *Lemon*; court's monitoring of temple according to temple's bylaws regarding membership and election of members to its Supreme Council did not constitute monitoring for religious content and did not constitute excessive entanglement]; 80 Cal. L. Rev. 1595 [alternative to existing judicial tests]; 22 *Hastings Const. L. Q.* 29 [suggesting adoption of endorsement test as Establishment Clause test]; on modification of *Lemon* test, see *Agostini v. Felton* (1997) 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391, *infra*, §545, and *Mitchell v. Helms* (2000) 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660, *infra*, §540; for application of *Lemon* test to exemptions of churches from landmark preservation laws, see *infra*, §511.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Protection.* See 6 Rotunda 4th, §21.3 et seq.; 93 Cal. L. Rev. 367 [history as ideology]; 15 A.L.R. Fed 2d 573 [U.S. Supreme Court cases on construction and application of Establishment Clause]. (2) *Tests for Violation.* See 42 San Diego L. Rev. 349 [*Lemon* test should be replaced by modified coercion test].



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VII. FREEDOM OF RELIGION

B. Establishment Clause.

1. Under Federal Constitution.

b. Prayer.

7 *Witkin Sum. Cal. Law Const Law* § 508

[§ 508] Prayer.

(1) *Valid Prayer in Legislative Session.* In *Marsh v. Chambers* (1983) 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019, the Court held that the Nebraska practice of opening each legislative day with a prayer did not violate the Establishment Clause. "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." (103 S.Ct. 3336, 77 L.Ed.2d 1028.)

The Court briefly discussed three features of the Nebraska practice that did not call for a different conclusion: (a) Only a Presbyterian clergyman had been selected for 16 years; (b) he is paid at public expense; and (c) the prayers are in "the Judeo-Christian tradition." (103 S.Ct. 3336, 77 L.Ed.2d 1028.)

Three justices dissented. (103 S.Ct. 3338, 3352, 77 L.Ed.2d 1030, 1047.) (See 97 Harv. L. Rev. 143.)

(2) *Sectarian Prayer Invalid.* Invoking the name of Jesus Christ in a prayer in a city council meeting violates the Establishment Clause. (*Rubin v. Burbank* (2002) 101 C.A.4th 1194, 1203, 124 C.R.2d 867 [applying rule of *Marsh* that permits only nonsectarian prayer].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Valid Prayer in Legislative Session.* See 48 *Santa Clara L. Rev.* 569 [why First Amendment permits sectarian legislative prayer and demands "practiced focused" analysis]; 30 *A.L.R.6th* 459 [Constitutionality of Legislative Prayer Practices].



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VII. FREEDOM OF RELIGION

B. Establishment Clause.

1. Under Federal Constitution.

c. Religious Speech.

7 *Witkin Sum. Cal. Law Const Law* § 509

[§ 509] Religious Speech.

In *Widmar v. Vincent* (1981) 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440, the University of Missouri allowed over 100 student groups to use its facilities for meetings, but denied the right to a religious group on the ground that this access would violate the Establishment Clause. *Held*, the regulation was invalid; a religious organization's enjoyment of merely incidental benefits does not violate the prohibition against the "primary advancement" of religion. (102 S.Ct. 276, 70 L.Ed.2d 451.) The opinion emphasizes the narrow basis for the decision: "Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards." (102 S.Ct. 278, 70 L.Ed.2d 452.) (See 5 Rotunda, §21.5(e); 15 *Loyola L.A. L. Rev.* 103, 149 [student religious meetings on campus]; 16 *Pepperdine L. Rev.* 229 [Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools]; on religious meetings in public secondary schools, see *infra*, §531.)

In *Capitol Square Review & Advisory Bd. v. Pinette* (1995) 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650, the Ku Klux Klan's application to place an unattended cross on Capitol Square during the Christmas season was denied on Establishment Clause grounds by the Capitol Square Review and Advisory Board, the agency responsible for regulating access to the square. Under Ohio law, the square was a public forum, with access granted on the basis of speech-neutral criteria. The district court entered an injunction requiring issuance of the requested permit, and the Court of Appeals affirmed. Certiorari was granted to determine "whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." (115 S.Ct. 2444, 132 L.Ed.2d 658.) *Held*, purely private religious expression that occurs in a public forum does not violate the *Establishment Clause*. (115 S.Ct. 2450, 132 L.Ed.2d 666.)

(a) Private religious speech, including the Klan's display, is as fully protected under the Free Speech Clause as secular private expression. Because Capitol Square is a traditional public forum, the state may impose reasonable, content neutral time, place, and manner restrictions, but it may regulate *expressive* content only if the restriction is necessary, and narrowly drawn, to serve a compelling state interest. (115 S.Ct. 2446, 132 L.Ed.2d 660.)

(b) The board concedes--indeed it is the essence of its case--that it rejected the display precisely because its content

was religious, and advances the state's interest in avoiding official endorsement of Christianity as justification. (115 S.Ct. 2446, 132 L.Ed.2d 660.) Compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. (115 S.Ct. 2446, 132 L.Ed.2d 661.)

(c) However, two previous cases--*Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352, supra, §341, and *Widmar v. Vincent*, supra--have involved the combination of private religious expression, a public forum, content-based regulation, and a state's interest in complying with the Establishment Clause, and in both cases the restriction on religious content was struck down. (115 S.Ct. 2446, 132 L.Ed.2d 661.) The factors that were determinative in those cases exist here as well. "The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." (115 S.Ct. 2447, 132 L.Ed.2d 661.) (See *Rosenberger v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, supra, §341 [reimbursement for printing costs of religious newspaper]; *DiLoreto v. Board of Education of Downey Unified School Dist.* (1999) 74 C.A.4th 267, 276, 87 C.R.2d 791 [applying test of *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, supra, §507; posting Ten Commandments on baseball field fence in sight of students and public as part of paid advertisement solicited by school booster club would violate Establishment Clause because it would advance religious rather than secular interest]; 109 Harv. L. Rev. 170 [*Capitol Square*].)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Rotunda 4th, §21.5.



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VII. FREEDOM OF RELIGION

B. Establishment Clause.

1. Under Federal Constitution.

d. Tax Exemption.

7 *Witkin Sum. Cal. Law Const Law* § 510

[§ 510] Tax Exemption.

In *Texas Monthly v. Bullock* (1989) 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1, a Texas statute exempted from its sales tax "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." The Court said: "The question presented is whether this exemption violates the Establishment Clause or the Free Press Clause of the First Amendment when the State denies a like exemption for other publications. We hold that, when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause; accordingly, we need not reach the question whether it contravenes the Free Press Clause as well." (109 S.Ct. 891, 103 L.Ed.2d 7; and see 109 S.Ct. 899, 103 L.Ed.2d 13.)

The opinion disapproves dicta in *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, and *Follett v. McCormick, South Carolina* (1944) 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, inconsistent with the decision. (109 S.Ct. 903, 904, 103 L.Ed.2d 17.) (See 25 U.S.F. L. Rev. 605 [*Texas Monthly*]; on validity of exemption of religious property from taxation by state, see *Walz v. Tax Com. of City of New York* (1970) 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697, 703, 9 Summary (10th), *Taxation*, §186.)

SUPPLEMENT: [This section is current through the latest supplement]



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VII. FREEDOM OF RELIGION

B. Establishment Clause.

1. Under Federal Constitution.

e. Exemption from Landmark Preservation Laws.

7 Witkin Sum. Cal. Law Const Law § 511

[§ 511] Exemption from Landmark Preservation Laws.

In *East Bay Asian Local Dev. Corp. v. California* (2000) 24 C.4th 693, 102 C.R.2d 280, 13 P.3d 1122, a city, a secular community economic development organization, and several nonprofit organizations interested in the preservation of historic landmarks challenged the constitutionality of Govt.C. 25373 and 37361 under both the U.S. and California Constitutions. These statutes prohibit the application of local landmark preservation laws to noncommercial property owned by religious entities. To use the exemption, the owner must determine in a public forum that it will suffer substantial hardship likely to deprive it of (1) economic return on the property, (2) the reasonable use of the property, or (3) the appropriate use of the property in the furtherance of its religious mission. *Held*, the statutes are constitutional.

(a) *Applicable test.* The analytical framework for examining a statute challenged under the Establishment Clause of the U.S. Constitution was enumerated in *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *supra*, §507. (24 C.4th 705.) To be constitutional (1) the statute must have a secular purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive government entanglement with religion. Although this test "is ill-suited to evaluating an establishment clause challenge to a law that creates an exemption for religious bodies from a neutral law of general application, the high court has not yet modified the test to accommodate such exemptions." (24 C.4th 706.) Hence, "we will apply it here." (24 C.4th 708.)

(b) *Application of Lemon test.*

(1) *Secular purpose.* It is sufficient that the exemption "seeks only to relieve religious entities of a *potential* burden on free exercise." (24 C.4th 710.) An *actual* burden on an entity's free exercise of religion is not necessary. (24 C.4th 711.) Because "the Legislature could reasonably believe that landmark designation may result in denying the owner the economic benefit and appropriate use of the property necessary to fulfill the owner's religious mission, the exemption ... meets the secular purpose test." (24 C.4th 713.)

(2) *Law must not advance or inhibit religion.* "[P]ermitting a religious organization to continue using its property in the manner it would have done but for landmark designation is not an impermissible endorsement of religion and the use of the property cannot be attributed to the state. ... No burden is shifted from the religious entity that owns the property to owners of other landmark properties. The second prong of the *Lemon* test is satisfied." (24 C.4th 715.)

(3) *Excessive government entanglement with religion.* Although religious institutions benefit from this exemption, "the state provides no aid other than leaving noncommercial properties owned by religious entities alone if the owner seeks exemption. The exemption process does not create any relationship between those entities and the state." (24 C.4th 716.) "The third prong of the *Lemon* test is also satisfied." (24 C.4th 717.)

(c) *California Constitution.*

(1) *Establishment and No-Preference Clauses.* Although the California Constitution "is a document of independent force," its protection against the establishment of religion does not create broader protections than those of the *First Amendment*. (24 C.4th 718.) Thus, decisions of the U.S. Supreme Court are the guide for construction of Cal. Const., Art. I, §4. In the absence of a violation of the First Amendment, the statutes do not violate California's Establishment Clause, and, having satisfied the *Lemon* test, the exemption does not violate the no-preference provision of the *California Constitution*. (24 C.4th 719.)

(2) *No aid to religion.* The exemption does not violate the ban on aid to religion in Cal. Const., Art. XVI, §5. "[P]ermitting a religious entity to exempt its noncommercial property from landmark designation status simply leaves the property in the status it otherwise occupied. While there may be a benefit as compared to properties that are subjected to landmark designation, neither the state nor the local governmental entity expends funds, or provides any monetary support, for the exempted property or its owner." (24 C.4th 721.)

Three justices filed two strong dissents. (24 C.4th 722, 727.) One justice wrote that the exemption "cannot be reconciled with the strict neutrality required" by the California Constitution, and that he strongly disagrees "that the federal Constitution dictates either the analysis or the result in this case." (24 C.4th 722.) The other two justices agreed that the exemption "cannot be justified as an impartial grant of nonreligious assistance" because "no comparable relief is provided to nonprofit secular organizations whose noncommercial activities may be similarly affected by the same regulations." (24 C.4th 728.) (See 37 *Santa Clara L. Rev.* 213 [Holy War: In the Name of Religious Freedom, California Exempts Churches from Historic Preservation].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Establishment Clause.

1. Under Federal Constitution.

f. Other Applications.

7 *Witkin Sum. Cal. Law Const Law* § 512

[§ 512] Other Applications.

(1) *Invalid Delegation of Governmental Power to Church.* In *Larkin v. Grendel's Den* (1982) 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297, a Massachusetts statute gave churches and schools the power to veto applications for liquor licenses within a 500-foot radius of the church or school. *Held*, this was not valid zoning (see *infra*, §1005 et seq.), but a delegation of governmental power to religious institutions and therefore clearly a violation of the *Establishment Clause*. (103 S.Ct. 511, 512, 74 L.Ed.2d 306, 307.) (See 97 *Harv. L. Rev.* 143; 36 *Hastings L. J.* 917 [city of Rajneeshpuram and Establishment Clause]; 38 *Stanf. L. Rev.* 1363 [church-controlled municipalities].)

(2) *Invalid Discrimination Against Religious Organizations.* In *Larson v. Valente* (1982) 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33, 49, a state statute imposing registration and reporting requirements on only those religious organizations that solicit more than 50% of their funds from nonmembers was held violative of the Establishment Clause. (See 5 *Rotunda*, §21.16.)

(3) *Valid Exemption of Religious Organization From Ban on Employment Discrimination.* The Civil Rights Act of 1964 (42 U.S.C., §2000e-1) exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion (see *infra*, §876). In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos* (1987) 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273, the court held that this statutory exemption did not violate the Establishment Clause.

(a) The government may accommodate religious practices, and there is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (107 S.Ct. 2867, 97 L.Ed.2d 282, quoting *Hobbie v. Unemployment App. Com. of Florida* (1987) 480 U.S. 136, 107 S.Ct. 1046, 1048, 94 L.Ed.2d 190, 197.)

(b) The fact that the exemption was not limited to religious activities of church employers does not invalidate it. "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." (107

S.Ct. 2868, 97 L.Ed.2d 283.) (See *Schmoll v. Chapman University* (1999) 70 C.A.4th 1434, 1440, 83 C.R.2d 426, *infra*, §918 [FEHA].)

(4) *Federal Grant Program in Which Religious Institutions Participate*. In *Bowen v. Kendrick* (1988) 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520, the Adolescent Family Life Act (42 U.S.C., §300z et seq.), providing funding for services related to adolescent sexuality and pregnancy, was upheld against a facial challenge, despite the fact that it allows religious institutions to participate as recipients of funds. The Court, after lengthy discussion of various grounds on which the district court found the Act invalid, "concluded that the statute has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state." (108 S.Ct. 2578, 101 L.Ed.2d 546.) However, the district court was directed on remand to consider whether particular grants have had the primary effect of advancing religion; and, if it should conclude that current practices of the Secretary of Health and Human Services does allow these grants, it should devise a remedy to insure that grants comply with the Constitution and the statute. (108 S.Ct. 2850, 101 L.Ed.2d 549.) (See *Zobrest v. Catalina Foothills School Dist.* (1993) 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1, *infra*, §549; 102 Harv. L. Rev. 211 [Bowen]; 16 Hastings Const. L. Q. 513 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Invalid Discrimination Against Religious Organizations*. See 6 Rotunda 4th, §21.16.(5) (*New Religious Land Use and Institutionalized Persons Act*). The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) provides that the government may not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless it shows that the burden furthers "a compelling governmental interest" and does so by the "least restrictive means." (42 U.S.C., §2000cc-1(a).) In *Cutter v. Wilkinson* (2005) 544 U.S. 709, 125 S.Ct. 2113, 161 L.Ed.2d 1020, the Court held that this provision, on its face, does not violate the Establishment Clause. It does not "exceed the limits of permissible government accommodation of religious practices." (125 S.Ct. 2117, 161 L.Ed.2d 1029.) RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." (125 S.Ct. 2122, 161 L.Ed.2d 1034.) Further, it does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." (125 S.Ct. 2122, 161 L.Ed.2d 1035.) (See 119 Harv. L. Rev. 238 [Religious Land Use and Institutionalized Persons Act]; 53 U.C.L.A. L. Rev. 485 [same].)

RLUIPA also prohibits government imposition or implementation of land use regulations "in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" unless the burden satisfies strict scrutiny. (See 42 U.S.C., §2000cc(a)(1).) The use or conversion of real property for the purpose of religious exercise is considered to be the religious exercise of the person or entity that uses the property for that purpose. (See 42 U.S.C., §2000cc-5(7)(B).)

In *Scottish Rite Cathedral Assn. of Los Angeles v. Los Angeles* (2007) 156 C.A.4th 108, 67 C.R.3d 207, the court held that defendant city's revocation of the certificate of occupancy of a Masonic Cathedral did not violate RLUIPA. The cathedral was owned by plaintiff nonprofit Masonic association and operated under a lease by plaintiff for-profit limited liability company. The limited liability company rented the cathedral to non-Masonic organizations that held, mostly, commercial events. No Masonic functions had been conducted at the cathedral since 1993. Although freemasonry is not a religion, members must profess a belief in God, and its teachings include morality, justice, and religious freedom. RLUIPA does not require that the exercise of religion be central to a system of religious beliefs. (See 42 U.S.C., §2000cc-5(7)(A).) However, not all activities and facilities sponsored by a religious institution to obtain funds to further its religious activities automatically make those activities and facilities religious exercises under RLUIPA. (156 C.A.4th 119.)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
VII. FREEDOM OF RELIGION
B. Establishment Clause.
2. Under California Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 513

[§ 513] Under California Constitution.

A unique situation gave rise to an opinion construing and applying both the federal and the California Establishment Clauses.

In *Feminist Women's Health Center v. Philibosian* (1984) 157 C.A.3d 1076, 203 C.R. 918, the owner of a defunct pathology laboratory abandoned a container of human fetuses received from physicians, clinics, and hospitals for disposal in accordance with state law (interment or incineration). The district attorney initially placed a hold on the fetuses to determine whether they constituted evidence of criminal abortions. Later, public officials and organizations became involved in a controversy over their disposal, and the district attorney received a request from the Catholic League--a right to life organization--to release them for burial in a private cemetery (Valhalla) with a religious service and a memorial plaque. Plaintiff sought to enjoin the district attorney from this disposal. The lower court gave judgment for defendants on the ground that the contract for the religious burial was made without state participation. *Held*, reversed.

(a) Although most of the federal cases involving the Establishment Clause deal with statutes, executive action by the district attorney pursuant to legislation conferring prosecutorial discretion can be prohibited by the clause. (157 C.A.3d 1086.)

(b) The act of burial in the religious cemetery would violate the clause.

(1) "[T]he Catholic League is a religious organization which regards a fetus as a human being and abortion as murder. While this specific belief may well cross sectarian lines, it is a belief not universally held. Consequently, any state action showing a preference for this belief will be strictly scrutinized and must be invalidated unless it is justified by a compelling governmental interest with which 'it is closely fitted to further [that] interest.' " (157 C.A.3d 1088.)

(2) "The Catholic League has a constitutionally protected right to express their view that the fetuses are murdered humans and to publicly mourn them. They do not have the right, however, to have the state's imprimatur on that expression." (157 C.A.3d 1090.) "Either the public act of disposing of the fetuses with no government display of religiosity, or the private expression of protected ideas would be proper. The impropriety comes from proceeding with the public act when the private group's intent to use that public act to frame and support the private expression is widely

known." (157 C.A.3d 1090.)

(3) The proposed religious burial causes political entanglement with religion. "The abortion issue is one of the most emotionally explosive issues in today's political firmament. The appearance of support by the state, of one side of this controversy over the other, is improper political entanglement. The act of indirectly turning the fetuses over to Valhalla for religious burial as murdered humans would vitiate the studied neutrality which is the state's constitutional course." (157 C.A.3d 1091.)

(c) The "no preference of religion clause" of the California Constitution (Art. I, §4, supra, §505) furnishes additional grounds for a finding of unconstitutionality. Under the holding in *Fox v. Los Angeles* (1978) 22 C.3d 792, 150 C.R. 867, 587 P.2d 663, infra, §555, preference is forbidden even when there is no discrimination; and here, "[w]hatever the district attorney's motive, a preference will be objectively demonstrated if the fetuses are delivered to Valhalla in these circumstances." (157 C.A.3d 1092.)

(d) A final basis for holding the proposed act unconstitutional is the provision in the California Constitution forbidding official aid to any "religious sect, church, creed, or sectarian purpose" (Cal. Const., Art. XVI, §5). The prohibited aid under this section includes aid "in the intangible form of prestige and power." (157 C.A.3d 1093, quoting *Fox v. Los Angeles*, supra.)

In *Duffy v. State Personnel Bd.* (1991) 232 C.A.3d 1, 283 C.R. 622, the issue was whether the Department of Corrections can limit publicly paid chaplaincy positions to persons ordained, accredited by, and in good standing with the Roman Catholic Church. Plaintiff, suspended by that church, joined another denomination and applied for the position of Catholic Chaplain at the Susanville prison facility. He was accepted; but the department then learned that the Roman Catholic Diocese of Sacramento would not issue a letter of authorization, and he was rejected. He sought mandamus, contending that by funding a prison chaplaincy position limited to Roman Catholic priests in good standing with their diocese, the state violated the Establishment Clauses of both Constitutions. *Held*, the department's act was valid.

(a) "The challenge posed here is how to define the proper establishment clause limits on voluntary government efforts to facilitate the free exercise of religion when such exercise is burdened by government itself, here the incarceration of state inmates." (232 C.A.3d 11.) *Wallace v. Jaffree* (1985) 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29, infra, §532, and *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos* (1987) 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273, supra, §512, provide a fitting analytical approach to application of the test under *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, supra, §507. (232 C.A.3d 10, 11, 12.) Under this approach, the department's decision "does not convey a message of endorsement as perceived by an objective observer, acquainted with the test, history, and implementation of the government act at issue." (232 C.A.3d 12.)

(b) "By necessity government has deprived members of the armed forces and inmates of the opportunity to practice their faith at places of their choice. To accommodate the fundamental and constitutionally recognized need of these persons to exercise their religious beliefs, government has long relied on the practical substitute of providing for chaplains representative of the religious creeds of those deprived of their freedom and placed in their care." (232 C.A.3d 15.)

(c) The department's practice of letting the Roman Catholic Church decide which priests are theologically and ecclesiastically qualified to serve as Catholic chaplains does not constitute excessive entanglement of government with religion; it is a safeguard against doctrinal entanglement in religious issues, and protects rather than subverts First Amendment values. (232 C.A.3d 17.) The First Amendment prohibits civil courts from resolving issues on the basis of religious doctrine or practice, and just as clearly would prohibit the department from making these determinations regarding the threshold qualifications of priests seeking to serve as Catholic prison chaplains. (232 C.A.3d 18.)

(d) "[T]he only means by which Roman Catholic inmates can exercise fundamental aspects of their religious life such as instruction, mass, receipt of sacraments, and other religious rites, is by having access to a priest ordained, accredited by and in good standing with the Roman Catholic Church. The state's current requirements for Catholic chaplaincy positions assure such access for Roman Catholic inmates and we find that they do not violate the establishment clause or article I, section 4 in doing so." (232 C.A.3d 19.)

In *Silo v. CHW Med. Foundation* (2002) 27 C.4th 1097, 119 C.R.2d 698, 45 P.3d 1162, a religiously affiliated employer, exempt under the FEHA (see *infra*, §916), discharged an employee for objectionable religious speech. *Held*, the employer was not subject to tort liability under Cal. Const., Art. I, §8, for violating a fundamental public policy against religious discrimination. "[T]he public policy against religious discrimination in employment must be qualified by the public policy of permitting religious employers considerable discretion to choose employees who will not interfere with their religious mission or message." (27 C.4th 1108.)

Additional decisions involve the California Constitution. (See *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.* (1990) 218 C.A.3d 79, 93, 95, 266 C.R. 767 [community college district's 75-year lease of surplus real property to religious organization did not constitute impermissible advancement of, or entanglement with, religion]; *East Bay Asian Local Dev. Corp. v. California* (2000) 24 C.4th 693, 719, 102 C.R.2d 280, 13 P.3d 1122, *supra*, §511 [exempting noncommercial religious organizations from landmark preservation laws does not violate establishment clause or no-preference provisions of Cal. Const., Art. I, §4, or ban on aid to religion in Cal. Const., Art. XVI, §5].)

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VII. FREEDOM OF RELIGION

C. Free Exercise Clause.

1. Invalid Direct Restraints.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 514

[§ 514] In General.

Direct interference with religion is rare, but *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* (1952) 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120, is an illustration. Plaintiff, head of the North American Russian Orthodox Church which had seceded from control by Russian church authorities, sued to establish the right to use St. Nicholas cathedral in New York. He relied on a New York statute providing for autonomy of the American church, to prevent its political use by the Soviet government. *Held*, the statute was unconstitutional. This was not a valid attempt to punish subversive action by a layman or cleric, but a transfer of control over churches, interfering with the free exercise of religion. (73 S.Ct. 151, 97 L.Ed. 133.) "Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls." (73 S.Ct. 157, 97 L.Ed. 139.)

In *United States v. Ballard* (1944) 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148, the Court reversed a criminal conviction for using the mails to defraud, which had been based on proof of false representation of religious experiences. This was in effect a *heresy* trial, and no one can be put to proof of his or her religious beliefs. (64 S.Ct. 886, 88 L.Ed. 1154.) (See 5 Rotunda, §21.6 et seq.; 102 *Harv. L. Rev.* 933, 1258 [burdens on free exercise]; 9 *Hastings Const. L. Q.* 153 ["Other People's Faiths"; The Scientology Litigation and the Justiciability of Religious Fraud]; 27 *Santa Clara L. Rev.* 377 [resolving conflicts between federal and California standards]; 63 *Proof of Facts* 3d 195 [interference with free exercise]; on Free Exercise Clause covering religious belief against participation in production of armaments, see *Thomas v. Review Bd. of Indiana Emp. Sec. Div.* (1981) 450 U.S. 707, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624, 632, 3 *Summary* (10th), *Agency and Employment*, §496; 22 *Santa Clara L. Rev.* 235.)

The Maryland Constitution contained a self-executing provision requiring "a declaration of belief in the existence of God" as a condition to holding "any office of profit or trust." In *Torcaso v. Watkins* (1961) 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982, appellant was appointed a notary public but was refused a commission when he declined to make this declaration. *Held*, this was a religious test for public office and an unconstitutional invasion of his freedom of belief and religion. The court found no substance in the Maryland court's assertion that there was no unconstitutional compulsion to believe because he was not compelled to hold any office; this fact "cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." (81 S.Ct. 1684, 6 L.Ed.2d 987.)

In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969) 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658, petitioner, the general church, became involved in a dispute with local churches in Georgia. The local members did not seek resolution in the church tribunals, but filed suits to enjoin the general church from interfering with title to the local churches. Under Georgia law, the implied trust of local church property for the benefit of the general church was on condition that the general church adhere to the tenets of faith and practice existing at the time of affiliation. This issue was presented to the jury under instructions stating the "departure-from-doctrine" standard, and the jury verdict was for the local churches. The trial judge then declared the implied trust terminated and enjoined the general church from interfering with the use of the property. The Georgia Supreme Court affirmed. *Held*, reversed. The Georgia courts, applying the departure-from-doctrine element of the implied trust theory, engaged in the process of interpreting and weighing church doctrine, in violation of the *Kederoff* principle. (89 S.Ct. 607, 21 L.Ed.2d 665.) (See *Wilson v. Hinkle* (1977) 67 C.A.3d 506, 510, 136 C.R. 731 [following *Presbyterian Church*]; on concept of separation of church and state as partial justification for rule against review of church controversies, see 3 Cal. Proc. (4th), Actions, §89 et seq.)

In *McDaniel v. Paty* (1978) 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593, a Tennessee statute barring ministers or priests of any denomination from serving as delegates to the state's limited constitutional convention was held a violation of the First Amendment. The Court declared that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions." (98 S.Ct. 1327, 55 L.Ed.2d 600.) (See 6 Hastings Const. L. Q. 75.)

SUPPLEMENT: [This section is current through the latest supplement]

See 6 Rotunda 4th, §21.6 et seq. *Rule against review of church controversies:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §39 et seq.



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VII. FREEDOM OF RELIGION

C. Free Exercise Clause.

1. Invalid Direct Restraints.

b. Prohibition of Ritual Slaughter of Animals.

7 *Witkin Sum. Cal. Law Const Law* § 515

[§ 515] Prohibition of Ritual Slaughter of Animals.

In *Church of the Lukumi Babalu Aye v. Hialeah* (1993) 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472, Florida city ordinances prohibited the Santeria religious practice of animal sacrifice at such occasions as birth, marriage, and death. *Held*, the ordinances were void.

(a) *Neutrality requirement*. "The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killing of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral." (113 S.Ct. 2231, 124 L.Ed.2d 496.)

(b) *Requirement of general applicability*. Laws burdening religious practice must be of general applicability. (113 S.Ct. 2232, 124 L.Ed.2d 498.)

(c) *Conclusion*. "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void." (113 S.Ct. 2234, 124 L.Ed.2d 499.) (See 107 *Harv. L. Rev.* 118 [The Resurrection of Religious Freedom]; 26 *Southwestern U. L. Rev.* 201 [*Lukumi*].)

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VII. FREEDOM OF RELIGION

C. Free Exercise Clause.

1. Invalid Direct Restraints.

c. Religious Freedom Restoration Act.

7 *Witkin Sum. Cal. Law Const Law* § 516

[§ 516] Religious Freedom Restoration Act.

In *Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624, the Court discussed whether Congress had the power to adopt the Religious Freedom Restoration Act. The Act was adopted in direct response to *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, *infra*, §523, which held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." (117 S.Ct. 2161, 138 L.Ed.2d 635.) The Act prohibited both the states and the federal Government from substantially burdening the exercise of religion even if the burden resulted from a rule of general applicability, unless the government demonstrated that (1) it was in furtherance of a compelling governmental interest, and (2) it was the least restrictive means of furthering that compelling interest. *Held*, Congress lacked the power to adopt the Act.

(a) Congress may enact legislation under U.S. Const., Art. XIV, §5, enforcing the constitutional right to the free exercise of religion. (117 S.Ct. 2163, 138 L.Ed.2d 638.) However, Congress's power extends only to enforcing the provisions of the Fourteenth Amendment. This power is remedial. Legislation that "alters the meaning of the Free Exercise Clause cannot be said to be enforcing the clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." (117 S.Ct. 2164, 138 L.Ed.2d 638.)

(b) "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." (117 S.Ct. 2169, 138 L.Ed.2d 645.) The Act "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." (117 S.Ct. 2170, 138 L.Ed.2d 646.) The Act's coverage is sweeping, ensuring intrusion at every level of government. Its restrictions apply to every agency and official of the federal, state, and local governments. It applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. "Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion." (117 S.Ct. 2170, 138 L.Ed.2d 647.)

(c) "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means

of achieving that interest is the most demanding test known to constitutional law. ... Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. ... This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." (117 S.Ct. 2171, 138 L.Ed.2d 648.)

Two justices concurred. (117 S.Ct. 2172, 138 L.Ed.2d 649, 650.) Three justices dissented in three separate opinions, voicing concern whether *Smith* was correctly decided. (117 S.Ct. 2176, 2185, 2186, 138 L.Ed.2d 654, 667, 668.) (See 111 Harv. L. Rev. 153 [Boerne]; 111 Harv. L. Rev. 1542 [same]; 88 Cal. L. Rev. 1281 [Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection]; 26 Hastings Const. L. Q. 789 [Boerne]; 33 Loyola L.A. L. Rev. 1183 [attacking constitutionality of state religious freedom legislation]; 53 Stanf. L. Rev. 1127 [Boerne]; 21 Thomas Jefferson L. Rev. 23 [same]; 32 U.C. Davis L. Rev. 513 [Symposium: Restoring Religious Freedom in the States]; 46 U.C.L.A. L. Rev. 1465 [A Common-Law Model for Religious Exemptions]; 116 A.L.R.5th 233 [state religious freedom restoration acts].)

SUPPLEMENT: [This section is current through the latest supplement]

See 135 A.L.R. Fed 121 [validity of Religious Freedom Restoration Act]; for case applying Religious Freedom Restoration Act to actions of federal Government, see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017, Supp., infra, §523.



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VII. FREEDOM OF RELIGION

C. Free Exercise Clause.

2. Indirect Restraints.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 517

[§ 517] In General.

General regulations having an otherwise valid object are not necessarily rendered invalid by reason of some incidental effect on religious beliefs or observances; a balancing test is employed. (See *United States v. Lee* (1982) 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127, 132; 5 Rotunda, §21.6 et seq.; 2 Tribe, §14-8 et seq.; 102 Harv. L. Rev. 933, 1258 [burdens on free exercise]; 21 *Hastings Const. L. Q.* 275 [application of employment discrimination laws to religious employers]; 27 *Santa Clara L. Rev.* 377 [resolving conflicts between federal and California standards]; 63 Proof of Facts 3d 195 [interference with free exercise].) Examples of this approach include regulations in the following areas:

(1) *Child Support*. (See *Pencovic v. Pencovic* (1955) 45 C.2d 97, 103, 287 P.2d 501 [duty of religious leader to support child despite rule of religious conduct prohibiting gainful employment].)

(2) *Civic and Military Duties*. (See *Hamilton v. Regents of Univ. of Calif.* (1934) 293 U.S. 245, 55 S.Ct. 197, 204, 79 L.Ed. 343, 353 [compulsory military training as part of state university curriculum upheld]; 8 *So. Cal. L. Rev.* 302 [Hamilton]; for repudiation of "privilege" theory of *Hamilton*, see *supra*, §487; on conscientious objection to military service, see *infra*, §1336; on conscientious objection to jury service, see 77 Harv. L. Rev. 550.)

(3) *Health*. (See *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25 S.Ct. 358, 363, 49 L.Ed. 643, 649 [compulsory vaccination upheld]; *Board of Med. Quality Assur. v. Andrews* (1989) 211 C.A.3d 1346, 1353, 1354, 260 C.R. 113 [state may prohibit dangerous medical treatment despite its religious content]; on objection to blood transfusion, see 79 Harv. L. Rev. 675; 1 *Lincoln L. Rev.* 81; on objection to water fluoridation, see 32 *So. Cal. L. Rev.* 158; 8 *Santa Clara Lawyer* 37; 43 *A.L.R.2d* 453; on compulsory medical treatment, see 10 *U.S.F. L. Rev.* 1; 21 *A.L.R.5th* 248.)

(4) *Marriage*. (See *Davis v. Beason* (1890) 133 U.S. 333, 10 S.Ct. 299, 301, 33 L.Ed. 637, 640 [polygamy is not protected by First Amendment].)

(5) *Military Dress Regulations*. In *Goldman v. Weinberger* (1986) 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478, the Court, in a 5-4 opinion with strong dissents, held that an Air Force regulation prohibiting wearing headgear while indoors was validly applied to an officer, an Orthodox Jew and ordained rabbi who wore his yarmulke (skullcap) on the base.

(a) The review of military regulations challenged on First Amendment grounds "is far more deferential than constitutional review of similar laws or regulations designed for civilian society." (106 S.Ct. 1313, 89 L.Ed.2d 484.)

(b) "The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission." (106 S.Ct. 1313, 89 L.Ed.2d 484.) Petitioner's contention that the Air Force failed to prove that an exception for his practice would threaten discipline, and that expert opinion supports this exception, is beside the point. "The desirability of dress regulations in the military is decided by the appropriate military officials. ... The Air Force has drawn the line essentially between religious apparel which is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and even-handedly regulate dress in the interest of the military's perceived need for uniformity." (106 S.Ct. 1314, 89 L.Ed.2d 485.) (See 100 Harv. L. Rev. 5, 33, 163.)

(6) *Racial Discrimination: Denial of Tax-Exempt Status. Bob Jones University v. United States* (1983) 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157, held that the Internal Revenue Service did not violate petitioner's First Amendment free exercise of religion rights in denying tax-exempt status because petitioner prescribed and enforced racially discriminatory admissions standards on the basis of religious doctrine. The compelling governmental interest in eradicating racial discrimination in education outweighed the burden of denial of tax benefits. (102 S.Ct. 2034, 2035, 76 L.Ed.2d 180, 181.) (See 97 Harv. L. Rev. 261 [Bob Jones]; 33 U.C. Davis L. Rev. 389 [same].)

(7) *Retirement Benefits. In Martin v. Industrial Acc. Com.* (1956) 147 C.A.2d 137, 141, 304 P.2d 828, the court upheld the denial of workers' compensation benefits for refusal to consent to a blood transfusion. The case was disapproved in *Montgomery v. Board of Retirement* (1973) 33 C.A.3d 447, 453, 109 C.R. 181. Plaintiff, a woman clerk employed by the County of Kern, developed a uterine tumor, which caused permanent incapacity. She applied to defendant board for nonservice-connected disability retirement benefits. The Board denied the application on the ground that her condition was correctable by surgery with a short period of convalescence, and that she refused to undergo surgery because it was contrary to the teachings of her religion (Church of God, Evening Light Saints). *Held*, she was entitled to the benefits. (a) *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, *infra*, §550, is controlling. The denial of retirement benefits places the same kind of burden on plaintiff's free exercise of religion as the denial of unemployment compensation in *Sherbert*. (33 C.A.3d 451.) (b) Although the state and county have an interest in preserving the life and health of citizens, neither courts nor other governmental agencies may compel a sane, conscious adult to undergo medical treatment against his or her wishes. And when religious beliefs are involved, "the state interest in preserving health pales into insignificance." (33 C.A.3d 452.) (c) In view of *Sherbert*, *People v. Woody* (1964) 61 C.2d 716, 40 C.R. 69, 394 P.2d 813, *infra*, §523, and *Syrek v. Unemp. Ins. App. Bd.* (1960) 54 C.2d 519, 7 C.R. 97, 354 P.2d 625, 3 *Summary* (10th), *Agency and Employment*, §523, *Martin* no longer states the law. (33 C.A.3d 453.)

(8) *Sales Tax on Religious Materials.* (See *Jimmy Swaggart Ministries v. Board of Equalization of Calif.* (1990) 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 [imposition of sales and use tax on religious organization's retail sale of religious materials does not violate religion clauses].)

(9) *Scholarships.* (See *Locke v. Davey* (2004) 540 U.S. 712, 124 S.Ct. 1307, 1314, 158 L.Ed.2d 1, 11 [distinguishing *Church of the Lukumi Babalu Aye v. Hialeah* (1993) 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472, *supra*, §515; state scholarship program that excluded funding of devotional theological degrees did not violate Free Exercise Clause; nothing in scholarship program suggested animus toward religion, and state constitution prohibited state funding of devotional degrees].)

(10) *Sex Crimes.* (See *People v. Baldwin* (1974) 37 C.A.3d 385, 388, 389, 112 C.R. 290 [P.C. 288a, proscribing oral copulation, does not violate nonestablishment of religion prohibition of First Amendment to federal Constitution or guarantee of religious freedom in Cal. Const., Art. I, §4].)

(11) *Sex Education in Schools.* In *Citizens for Parental Rights v. San Mateo County Bd. of Education* (1975) 51

C.A.3d 1, 124 C.R. 68, former statutes providing for sex education programs in schools of various grades were upheld against a variety of constitutional attacks. The elaborate opinion rejected challenges based on the *Free Exercise Clause* (51 *C.A.3d 12*), the *Establishment of Religion Clause* (51 *C.A.3d 20*), and the *Right of Privacy* (51 *C.A.3d 29*). The court pointed out (a) that the courses were conducted by specially trained teachers under directions to call attention to the wide variety of beliefs and practices in connection with the sensitive subjects of abortion, birth control, divorce, and masturbation; and (b) that a system of excuses from participation made the program noncompulsory, and allowed parents to exclude their children from any of the classes that they thought were in conflict with their religious beliefs. (51 *C.A.3d 5, 7*.) (See *Educ.C. 51930* et seq. [providing for comprehensive sexual health education, including HIV/AIDS prevention education]; *Educ.C. 51240* [providing that students may be excused from part of health instruction that conflicts with parents' or guardians' religious training and beliefs]; 82 *A.L.R.3d 579* [validity of sex education programs in public schools].)

(12) *Street Vending*. (See *People v. Foote* (2001) 91 *C.A.4th Supp. 7, 18, 110 C.R.2d 260* [defendant church member was not exempt from ordinance requiring vendor's permit where his sale of incense on street had no religious connotations because incense is not, in itself, communicative, and defendant failed to show or tell prospective purchasers how incense was used in Church, or how it related to Church doctrine].)

(13) *Timber Harvesting in Sacred Indian Land*. In *Lyng v. Northwest Indian Cemetery Protective Assn.* (1988) 485 *U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534*, the Court, following *Bowen v. Roy* (1986) 476 *U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735*, *infra*, §518, held that the Free Exercise Clause did not prevent the government from permitting timber harvesting or road-building in a portion of a National Forest traditionally used for religious purposes by three Indian tribes. "A broad range of government activities--from social welfare programs to foreign aid to conservation projects--will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions." (108 *S.Ct. 1327, 99 L.Ed.2d 548*.) (See 102 *Harv. L. Rev. 232* [*Lyng*]; 16 *Hastings Const. L. Q. 483* [same]; 18 *Southwestern U. L. Rev. 603* [same]; 41 *Santa Clara L. Rev. 757* [same]; 23 *U.S.F. L. Rev. 97* [same].)

(14) *University Student Registration Fees*. In *Erzinger v. Regents of Univ. of Calif.* (1982) 137 *C.A.3d 389, 187 C.R. 164*, plaintiff students alleged that the University of California collects a registration fee that is used partly to pay for health services which includes abortion counseling, abortion referral, and abortion; and that the collection of the part of the fee used for those purposes would force them to violate their religious beliefs as a condition for attending the university. They demanded a pro rata exemption. *Held*, judgment for defendants affirmed; plaintiffs made no showing that the university's collecting and using the fees prevented them from holding or expressing their views against abortion, or forced them to use the abortion-related services. (137 *C.A.3d 392*.) (See 20 *San Diego L. Rev. 837*.)

SUPPLEMENT: [This section is current through the latest supplement]

See 6 *Rotunda 4th*, §21.6 et seq.(5a) (*New*) *Photograph on Driver's License*. (See *Valov v. Department of Motor Vehicles* (2005) 132 *C.A.4th 1113, 1124, 1131, 34 C.R.3d 174* [state has compelling reasons to require that driver's license bear photograph of licensee, and fact that plaintiff and others of his faith had formerly received exemption from that requirement did not mean that revocation of exemption targeted plaintiff's religious beliefs].)(15) (*New*) *Unruh Civil Rights Act*. (See *North Coast Women's Care Med. Group v. Superior Court* (2008) 44 *C.4th 1145, 1156, 81 C.R.3d 708, 189 P.3d 959, Supp., infra*, §908B [right of religious freedom did not exempt physicians from complying with prohibition against sexual orientation discrimination in Unruh Civil Rights Act].)



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2. Indirect Restraints.

b. Social Security and Social Security Numbers.

7 *Witkin Sum. Cal. Law Const Law* § 518

[§ 518] Social Security and Social Security Numbers.

(1) *In General.* The use and disclosure of social security numbers have been challenged on free exercise grounds. However, the government has a compelling interest in identifying taxpayers. (See *Freis v. Soboroff* (2000) 81 C.A.4th 1102, 1105, 97 C.R.2d 429; 93 A.L.R.5th 1 [Free Exercise of Religion as Applied to Individual's Objection to Obtaining or Discussing Social Security Number].) Further, the required payment of Social Security taxes is valid despite the objection that it violates religious belief. (*United States v. Lee* (1982) 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127, 132).

(2) *Use in Welfare Benefit Programs.* In *Bowen v. Roy* (1986) 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735, the question presented was "whether the Free Exercise Clause of the First Amendment compels the government to accommodate a religiously-based objection to the statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the States use these numbers in administering the benefit programs." (106 S.Ct. 2149, 90 L.Ed.2d 741.) The objection was raised by a Native American Indian, who refused to obtain a Social Security number for his 2-year-old daughter, asserting a tribal belief that identification and other uses of the number would "rob the spirit" of the child. The Court rejected the challenge.

(a) "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. ... Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter." (106 S.Ct. 2152, 90 L.Ed.2d 744.)

(b) "[G]overnmental regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard. A governmental burden on religious liberty is not insulated from review simply because it is indirect, ... but the nature of the burden is relevant to the standard the Government must meet to justify the burden." (106 S.Ct. 2155, 90 L.Ed.2d 749.) (See *Mullaney v.*

Woods (1979) 97 C.A.3d 710, 727, 158 C.R. 902.)

(3) *Use by Department of Motor Vehicles.* Following *Bowen v. Roy*, *Brunson v. Department of Motor Vehicles* (1999) 72 C.A.4th 1251, 85 C.R.2d 710, held that the trial court erred in applying the compelling interest test, rather than the rational basis test, to a religious group's objection to disclosing Social Security numbers before obtaining or renewing a driver's license. The test is the same under both the federal and *California Free Exercise Clauses*. (72 C.A.4th 1255, 1256.)

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2. Indirect Restraints.

c. Children.

7 *Witkin Sum. Cal. Law Const Law* § 519

[§ 519] Children.

(1) *Child Custody*. In *Cory v. Cory* (1945) 70 C.A.2d 563, 576, 161 P.2d 385, it was held an abuse of discretion to refuse to award custody of young children to their mother solely because of her membership in Jehovah's Witnesses and her belief in the teachings of the sect. The trial judge "lost sight of the constitutional provisions which guarantee religious freedom to all, and, in depriving their mother of the custody of her children because of her religious convictions, has deprived her of a constitutional right which she may not be compelled to exercise only conditionally." (70 C.A.2d 576; 15 J. Juvenile Law 57 [restricting visitation rights on religious grounds].)

(2) *Child Abuse and Neglect*. The application of P.C. 11166, requiring child care custodians to report child abuse, to clergy acting as child care custodians at a church school does not violate the First Amendment. (*People v. Hodges* (1992) 10 C.A.4th Supp. 20, 30, 13 C.R.2d 412; *Conley v. Roman Catholic Archbishop of San Francisco* (2000) 85 C.A.4th 1126, 1132, 102 C.R.2d 679 [following *Hodges* and distinguishing *Schmoll v. Chapman University* (1999) 70 C.A.4th 1434, 83 C.R.2d 426, *infra*, §918; requirement does not violate Free Exercise Clause or constitute excessive government entanglement with religion; church's retaliation against clergyman for complying with statutory reporting duties was "outrageous act" sufficient to support action against church for intentional infliction of emotional distress]; see 25 *Loyola L.A. L. Rev.* 1 [legislation mandating clergy to report child abuse].)

(3) *Health Care*. Criminal liability may be imposed for child endangerment where medical treatment is withheld for religious reasons. (See 10 *Summary* (10th), *Parent and Child*, §291; 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §161; on providing medical care to children over parental religious objections, see 21 *A.L.R.5th* 248 [where child's life is not endangered]; 82 *Cal. L. Rev.* 1371 [debunking doctrine of parents' rights]; 94 *A.L.R.5th* 613 [power of court or agency to order vaccination over parental religious objection]; 21 *Hastings Const. L. Q.* 725 [Religion Clauses and parental decision-making regarding health care for children]; 16 J. Juvenile Law 37 [child's right to medical care]; 19 J. Juvenile Law 123 [denying child nonemergency medical treatment].)

(4) *Adoption*. In *Scott v. Family Ministries* (1976) 65 C.A.3d 492, 506, 135 C.R. 430, religious requirements imposed on prospective adoptive parents by licensed adoption agencies were held invalid. (See 7 *Stanf. L. Rev.* 394; 10 *Summary* (10th), *Parent and Child*, §113.)

(5) *Compulsory School Attendance*. In *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary* (1925) 268 U.S. 510, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 1077, a statute requiring compulsory attendance solely at a public school was held unconstitutional as applied to a parent who sent a child to a church-operated school.

The *Pierce* doctrine was reaffirmed and extended in *Wisconsin v. Yoder* (1972) 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. The state law required school attendance until age 16. Respondents, members of the Old Order Amish religion, refused to send their children past the 8th grade. They contended that education beyond that age interfered with the children's vocational training and exposed them to an environment hostile to their religious beliefs during the formative period. *Held*, the law as applied to respondents violated the right to free exercise of their religion.

(a) "[O]nly state interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." (92 S.Ct. 1533, 32 L.Ed.2d 25.)

(b) The record established, and the state conceded, that the compulsory attendance law required acts by respondents at odds with the fundamental tenets of their religious beliefs. (92 S.Ct. 1534, 32 L.Ed.2d 26.)

(c) The state has not shown that its interest must override these established religious practices. (1) The proposition that some degree of education is necessary to prepare individuals to participate in society and in our political system is accepted; but the evidence showed that the additional 1 or 2 years of formal high school for Amish children would do little to serve those interests. (92 S.Ct. 1536, 32 L.Ed.2d 29.) (2) The duty of the state to protect children from "ignorance" is also conceded, but the record shows that the Amish community develops productive and law-abiding members of society, and that their system of learning-by-doing cannot be condemned because it differs from the conventional formal education. (92 S.Ct. 1537, 1538, 32 L.Ed.2d 30.) (3) The objective of the child labor laws--keeping children out of the labor market--is likewise an insufficient interest, for there is no evidence that the Amish employment of children in family farms causes them any harm or displaces adult workers. (92 S.Ct. 1540, 32 L.Ed.2d 32.)

(d) No issue of protecting the interests of the child against his or her parent's wishes is involved, for the record shows no desire of children for the compulsory education required by the state. (92 S.Ct. 1541, 32 L.Ed.2d 33.) (See 62 Cal. L. Rev. 1506 [Education of the Amish Child]; 26 Stanf. L. Rev. 1383, 1402 [*Wisconsin v. Yoder*]; 8 A.L.R.5th 875 [validity of law requiring private school to report attendance or similar information to government].)

(6) *Child Labor*. State child labor laws apply to children selling religious publications. (See *Prince v. Massachusetts* (1944) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, *infra*, §552.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Health Care*. See 58 *Hastings L. J.* 643 [role of religion in refusing medical treatment for minors]. *Correction:* Page 863, line 4, reference to 10 *Summary* (10th), *Parent and Child*, §113 should be to 10 *Summary* (10th), *Parent and Child*, §115.



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d. Prisoners.

7 *Witkin Sum. Cal. Law Const Law* § 520

[§ 520] Prisoners.

Two cases involving the Black Muslims (a group asserting supremacy of the dark-skinned races and opposing integration) raised the question whether the constitutional guarantee protects incarcerated prisoners. *In re Ferguson* (1961) 55 C.2d 663, 670, 671, 12 C.R. 753, 361 P.2d 417, inadvertently relying on a previously repealed provision of the California Constitution, held that its guarantee was subject to the authority to provide for prison government, and further held that the federal Constitution's guarantee was not fully available to state prisoners. But *In re Jones* (1962) 57 C.2d 860, 862, 22 C.R. 478, 372 P.2d 310, corrected both mistakes, and pointed out that the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to "persons," including convicted felons. "A person is not deprived of all of his constitutional rights by reason of his incarceration for a felony." (See 75 *Harv. L. Rev.* 837 [*Ferguson*]; 35 *So. Cal. L. Rev.* 162 [same]; 9 *U.C.L.A. L. Rev.* 501 [same]; 51 *U.C.L.A. L. Rev.* 1151 [A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause]; 12 *A.L.R.3d* 1276 [Provision of Religious Facilities for Prisoners].)

The right of prisoners is also recognized by statutes. (See P.C. 5009 [state prisoners; "all prisoners shall be afforded reasonable opportunities to exercise religious freedom"]; P.C. 4027 [local prisoners]; Welf.C. 1705 [Youth Authority].)

In *O'Lone v. Estate of Shabazz* (1987) 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282, state prison regulations effectively preventing Muslim inmates from attending a weekly congregational service were upheld. The regulations were justified by concerns of institutional order, security, and rehabilitation; the prisoners retained the ability to participate in other religious observances of their faith; and accommodation of the prisoners' asserted right would, in the judgment of prison officials, have adverse effects on other prisoners, on prison personnel, and on allocation of prison resources generally. (107 S.Ct. 2405, 2406, 96 L.Ed.2d 291, 292.) The court also declared that prison officials did not have the burden of proving that no reasonable alternative method existed by which the inmates' religious rights could be accommodated without creating bona fide security problems. (107 S.Ct. 2405, 96 L.Ed.2d 290.)

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On Religious Land Use and Institutionalized Persons Act of 2000, see Supp., supra, §512.



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e. Religious Solicitation.

7 *Witkin Sum. Cal. Law Const Law* § 521

[§ 521] Religious Solicitation.

Members of the religious sect known as Jehovah's Witnesses practice missionary evangelism by means of "colporteurs" or "ministers" who preach or sell religious literature on the streets or door to door. Attempts by municipalities to apply the usual business license tax to these activities were held invalid, as an imposition on the religious activity itself, equivalent to a tax on the privilege of delivering a sermon. (*Jones v. Opelika* (1943) 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290; *Follett v. McCormick*, *South Carolina* (1944) 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938; see *Cantwell v. Connecticut* (1940) 310 U.S. 296, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 1218 [requirement of license as prerequisite to solicitation of money constituted undue censorship of religious activities when applied to members of Jehovah's Witnesses].)

In *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, the Court made it clear that the objection was to a *license tax on the activity*, and that ordinary property or income taxes were to be distinguished. (63 S.Ct. 874, 87 L.Ed. 1298.) Accordingly, a general ad valorem personal property tax may validly be applied to religious pamphlets and books stored in bulk in a building. (*Watchtower Bible & Tract Soc. v. Los Angeles* (1947) 30 C.2d 426, 430, 182 P.2d 178 ["It has never been supposed that the property used in the exercise of the rights of freedom of press or religion is not subject to a uniform tax for revenue imposed upon all alike"]; see *Texas Monthly v. Bullock* (1989) 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1, *supra*, §510 [disapproving dicta in *Murdock* and *Follett*].)

In *Martin v. Struthers* (1943) 319 U.S. 141, 63 S.Ct. 862, 863, 87 L.Ed. 1313, 1317, an ordinance prohibiting distributors of literature from ringing door bells or otherwise summoning a resident to the door was likewise held void as applied to religious colporteurs, despite the contention that it was designed to protect night and swing shift workers in war plants from disturbance of sleep, and also to guard against burglars posing as canvassers. The Court suggested that a narrowly drawn ordinance might validly furnish the desired protection, but did not indicate the legitimate boundaries thereof. (See *Douglas v. Jeannette* (1943) 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324; *Watchtower Bible & Tract Soc. of New York v. Village of Stratton* (2002) 536 U.S. 150, 122 S.Ct. 2080, 2089, 153 L.Ed.2d 205, 218 [ordinance making it misdemeanor to engage in door-to-door solicitation or advocacy without first registering with mayor and obtaining permit was overly broad and violated First Amendment; ordinance required speakers to forego anonymity and spontaneity, and was not tailored to village's stated interest in preventing fraud and crime and protecting residents' privacy]; 116 *Harv. L. Rev.* 282 [*Village of Stratton*]; 3 *A.L.R.2d* 1431 [right of owner of housing development or

apartment house to restrict canvassing, solicitation, etc.]; 35 A.L.R.2d 355 [validity of ordinance prohibiting door-to-door solicitation, etc., without invitation]; cf. *People v. Vaughan* (1944) 65 C.A.2d Supp. 844, 851, 150 P.2d 964 [manager could exclude Jehovah's Witnesses from hotel, and their noisy resistance justified conviction for disturbing the peace].)

Reasonable restrictions were upheld in *Heffron v. International Soc. for Krishna Consciousness* (1981) 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298. A Minnesota public corporation, operating a state fair on state property, promulgated a "booth rule," providing that sale or distribution of merchandise or printed material or fund solicitation was restricted to a booth in a fixed location. Booths were available to nonprofit, charitable, and commercial enterprises on a first-come, first-served basis, without discrimination. ISKCON (respondent religious society) contended that the rule unconstitutionally suppressed its practice of Sankirtan--a religious ritual that orders its members to go into public places to distribute or sell literature and solicit donations. *Held*, the rule was valid.

(a) The activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. (1) The restriction may not be based on either the content or subject matter of the speech, and here it is not. (101 S.Ct. 2564, 69 L.Ed.2d 307.) (2) The regulation must also serve a significant governmental interest, and here the interest is the orderly movement of the crowd in light of the large number of exhibitors and persons attending the fair. (101 S.Ct. 2565, 69 L.Ed.2d 307.)

(b) ISKCON and its ritual of Sankirtan have no special claims to First Amendment protection. "None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature." (101 S.Ct. 2566, 69 L.Ed.2d 309.)

(c) The validity of a place and manner restriction also depends on the existence of an alternative forum for the expression of protected speech; and here there is a forum. ISKCON may practice Sankirtan anywhere outside the fairgrounds, and it may conduct any desired activity within the grounds. Its members may mingle with the crowd and orally propagate their views, and it may distribute or sell literature and solicit funds from a booth. Considering the functions of the fair and the area in which it operates--a limited public forum for many exhibitors temporarily to present their products or views to a large number of people in an efficient fashion--the rule provides organizations with an adequate means to sell and solicit on the fairgrounds. (101 S.Ct. 2567, 69 L.Ed.2d 310.)

One justice concurred and dissented in part, and three justices dissented. (101 S.Ct. 2568, 2572, 69 L.Ed.2d 311, 316.) (See 71 Cal. L. Rev. 1012.)

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2. Indirect Restraints.

f. Meetings in Public Place.

7 *Witkin Sum. Cal. Law Const Law* § 522

[§ 522] Meetings in Public Place.

In *Fowler v. Rhode Island* (1953) 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828, a local ordinance made it unlawful to "address any political or religious meeting in any public park," and petitioner, a minister of Jehovah's Witnesses, was convicted of its violation. *Held*, the ordinance was void. It allowed any kind of church services that did not involve an "address," and therefore was a plain discrimination against this particular sect, as much so as in *Niemotko v. Maryland* (1951) 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267, *supra*, §393. "To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another." (73 S.Ct. 527, 97 L.Ed. 831.)

Arbitrary licensing regulations that operate to prevent religious meetings or circulation of religious literature have also been condemned on the distinct ground of interference with the rights of free speech and assembly. (See *supra*, §360; on invalidity of flag salute, see *infra*, §536.)

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2. Indirect Restraints.

g. Use of Drugs.

7 *Witkin Sum. Cal. Law Const Law* § 523

[§ 523] Use of Drugs.

(1) *In General.* It has been contended that the use of certain drugs to attain a religious experience is constitutionally protected. (See 56 *Cal. L. Rev.* 74, 86 [LSD]; 56 *Cal. L. Rev.* 100 [marijuana]; 28 *Hastings L. J.* 1509 [Native Americans and the Free Exercise Clause]; 1 *U.S.F. L. Rev.* 131 [LSD].) This view was accepted in limited form in *People v. Woody* (1964) 61 *C.2d* 716, 718, 40 *C.R.* 69, 394 *P.2d* 813, in which a statute prohibiting use of peyote was held invalid as applied to Navajo Indians whose religion involved group use of the drug as a basic experience in worship. (See 17 *Stanf. L. Rev.* 494.) But in *People v. Collins* (1969) 273 *C.A.2d* 486, 78 *C.R.* 151, the *Woody* holding was limited to the peculiar situation where the drug itself is an essential element of the worship. Marijuana is not so sanctified, and criminal sanctions against its possession and use are constitutional. (273 *C.A.2d* 487.)

(2) *First Smith Case.* In *Employment Div. Dept. of Human Resources of State of Oregon v. Smith* (1988) 485 *U.S.* 660, 108 *S.Ct.* 1444, 99 *L.Ed.2d* 753, the Court discussed the issue but did not decide it. Smith and other drug and alcohol abuse rehabilitation counselors in Oregon were discharged after they ingested peyote in a religious ceremony. They were denied unemployment compensation by the state Employment Division, and the Oregon Supreme Court held that this was a violation of the First Amendment, despite the fact that possession of peyote is a felony under Oregon law. The U.S. Supreme Court first pointed out that on three occasions it had held that an employee required to choose between fidelity to religious belief and cessation of work may not be denied unemployment compensation because the employee is faithful to the tenets of his or her church. (108 *S.Ct.* 1450, 99 *L.Ed.2d* 763, citing *Sherbert v. Verner* (1963) 374 *U.S.* 398, 83 *S.Ct.* 1790, 10 *L.Ed.2d* 965, *infra*, §550, *Hobbie v. Unemployment App. Com. of Florida* (1987) 480 *U.S.* 136, 107 *S.Ct.* 1046, 1048, 94 *L.Ed.2d* 190, 197, and *Thomas v. Review Bd. Indiana of Emp. Sec. Div.* (1981) 450 *U.S.* 707, 101 *S.Ct.* 1425, 67 *L.Ed.2d* 624.)

(a) "The results we reached in *Sherbert*, *Thomas*, and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct. ... If the bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a marriage counselor who was discharged because he or she entered into a bigamous relationship. The protection that the First Amendment provides to 'legitimate claims to the free exercise of religion,' ... does not extend to conduct that a State has validly proscribed." (108 *S.Ct.* 1451, 99 *L.Ed.2d* 764.)

(b) "Neither the Oregon Supreme Court nor this Court has confronted the question whether the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the reach of a State's criminal laws." (108 S.Ct. 1451, 99 L.Ed.2d 764.) And it is inappropriate for this Court to do so without first receiving further guidance concerning the status of the practice as a matter of Oregon law. "Thus, paradoxical as it may first appear, a necessary predicate to a correct evaluation of respondents' federal claim is an understanding of the legality of their conduct as a matter of state law." (108 S.Ct. 1451, 99 L.Ed.2d 765.)

(3) *Second Smith Case*. In *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, the Oregon Supreme Court, on remand after the first *Smith* case, stated that religiously inspired use of peyote fell within the prohibition of the Oregon statute, which made no exception for sacramental use of the drug; and the Oregon Court reaffirmed its previous ruling that the state could not deny unemployment benefits to employees for having engaged in that practice. The U.S. Supreme Court again granted certiorari and reversed.

(a) Respondents (Smith and the other discharged employees) argue for an enlarged meaning of "prohibiting the free exercise of religion." "They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons." (110 S.Ct. 1599, 108 L.Ed.2d 885.) However, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." (110 S.Ct. 1600, 108 L.Ed.2d 885.)

(b) "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, ... or the right of parents. ... Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion. ... And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." (110 S.Ct. 1601, 108 L.Ed.2d 887.)

(c) "The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now." (110 S.Ct. 1602, 108 L.Ed.2d 888.)

(d) "Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*." However, "[e]ven if we were inclined to breathe into *Sherbert v. Verner* ... some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." (110 S.Ct. 1602, 1603, 108 L.Ed.2d 888, 889.) "The rule respondents favor would open the prospect of constitutionally required exemptions from civil obligations of almost every conceivable kind." (110 S.Ct. 1605, 108 L.Ed.2d 892.)

(e) "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception in their drug laws for sacramental peyote use. ... But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in

which judges weigh the social importance of all laws against the centrality of all religious beliefs." (110 S.Ct. 1606, 108 L.Ed.2d 893.)

A concurring opinion of four justices supported the judgment in part (110 S.Ct. 1608, 108 L.Ed.2d 893), and three justices joined in a dissenting opinion (110 S.Ct. 1615, 108 L.Ed.2d 904). (See *People v. Trippet* (1997) 56 C.A.4th 1532, 1542, 66 C.R.2d 559 [evidence failed to show strongly held personal religious belief to trigger consideration of free exercise clause; discussing *Smith*]; 104 Harv. L. Rev. 198 [*Smith*]; 26 Southwestern U. L. Rev. 201 [same]; 26 U.S.F. L. Rev. 149 [same]; 163 A.L.R. Fed 493 [what constitutes "hybrid rights" claim under *Smith*]; 167 A.L.R. Fed 663 [what laws are neutral and of general applicability within meaning of *Smith*]; on invalidity of Religious Freedom Restoration Act adopted in response to *Smith*, see supra, §516.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) (*New*) *Test Under Religious Freedom Restoration Act.* In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017, a religious sect sued to enjoin enforcement of the Controlled Substances Act (21 U.S.C., §801 et seq.) in a manner that interfered with the use of a controlled substance in tea taken as a religious rite. Although the government conceded that the practice is a sincere exercise of religion, it argued that all use of the substance, a hallucinogen, is prohibited by the federal statute, which should prevail. The federal district court granted a preliminary injunction, and its order was affirmed by the circuit court. *Held*, affirmed.

(a) The Religious Freedom Restoration Act (RFRA; 42 U.S.C., §2000bb et seq.) was enacted in response to *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, text, p. 869, which held that states may prohibit the use of peyote in a religious sacrament. (126 S.Ct. 1216, 163 L.Ed.2d 1027.) The RFRA prohibits the federal Government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability. There is a single exception for cases where the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. (126 S.Ct. 1217, 163 L.Ed.2d 1027.) This is a strict scrutiny test. (126 S.Ct. 1220, 163 L.Ed.2d 1031.)

(b) The test was not satisfied in this case. The government's "mere invocation of the general characteristics" of the regulated substances "cannot carry the day." 21 U.S.C., §822(d) itself contemplates that exempting certain people from its requirements would be consistent with public health and safety. (126 S.Ct. 1221, 163 L.Ed.2d 1032, 1033.) A regulatory exception for the use of peyote in religious ceremonies by Indian tribes has been in place for 35 years. (126 S.Ct. 1222, 163 L.Ed.2d 1033.)

(c) The exception for peyote "fatally undermines" the government's broader argument that the Controlled Substances Act establishes a closed regulatory system permitting no exceptions. (126 S.Ct. 1222, 163 L.Ed.2d 1034.) The government's argument for uniformity "rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." But the RFRA operates by mandating, under the compelling interest test, the consideration of exceptions to these laws. (126 S.Ct. 1223, 163 L.Ed.2d 1035.)

(d) The Court also rejected a government claim that its position was compelled by the federal Government's adherence to an international convention prohibiting the use of psychotropic substances. (126 S.Ct. 1224, 163 L.Ed.2d 1036.) (See 135 A.L.R. Fed 121 [Validity, Construction, and Application of Religious Freedom Restoration Act]; for case holding that RFRA is not applicable to states, see *Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624, text, §516.)



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2. Indirect Restraints.

h. Defamation Action Against Church.

7 *Witkin Sum. Cal. Law Const Law* § 524

[§ 524] Defamation Action Against Church.

In *McNair v. Worldwide Church of God* (1987) 197 C.A.3d 363, 242 C.R. 823, a case of first impression, the court was asked whether the Free Exercise Clause of the First Amendment of the U.S. Constitution "bars a defamation suit brought against a church and two of its ministers for statements made during the course of a theological controversy." (197 C.A.3d 366.) *Held*, the action was not barred, but was subject to the *New York Times* rule of malice.

(a) Protection of a person's good name is a sufficiently important state interest to justify a defamation action against the Church and its evangelist ministers. (197 C.A.3d 374.) But the reputational interest of the citizen must be balanced against the *First Amendment's Free Exercise Clause*. (197 C.A.3d 375.)

(b) "To resolve the issues raised by this balancing we look not to common law theories of defamation" but turn to the theory of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, *supra*, §426. (197 C.A.3d 375.) The *New York Times* rule was developed to protect the constitutional guarantees of free speech and free press. "We hold that the right to free exercise of religion is a constitutional guarantee of equal significance." (197 C.A.3d 377.)

(c) "Our accommodation of the competing interests of our society--one protecting reputation, the other, the free exercise of religion--requires that we hold that in order for a plaintiff to recover damages for defamatory remarks made during the course of a doctrinal explanation by a duly authorized minister, he/she must show, by clear and convincing evidence, that the defamation was made with constitutional malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not. Whether a plaintiff is a 'public figure' or the method of publication is via a 'newspaper' is irrelevant under this holding." (197 C.A.3d 377.)

(d) The jury instructions on malice did not state the *New York Times* requirement. The verdict and judgment awarding compensatory and punitive damages to plaintiff must therefore be reversed, for the record does not show that plaintiff presented evidence that "crossed this 'constitutional threshold.'" (197 C.A.3d 278.)

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i. Intentional Infliction of Emotional Distress.

7 *Witkin Sum. Cal. Law Const Law* § 525

[§ 525] Intentional Infliction of Emotional Distress.

In *Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 252 C.R. 122, 762 P.2d 46, the court held that the free exercise clauses of the federal and California Constitutions did not bar a cause of action for intentional infliction of emotional distress arising out of deceptive recruitment practices of defendant church.

(a) Religious belief is absolutely protected, but religiously motivated conduct is not. This conduct is subject to regulation for the protection of society, under a balancing test, in which the importance of a state's interest is weighed against the severity of the burden imposed. (46 C.3d 1112.)

(b) Tort liability for fraudulent recruitment does impair the Church's ability to recruit members; but the burden is not substantial. "Being subject to liability for fraud does not in any way or degree prevent or inhibit Church members from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading Reverend Moon's message among the population. ... At most, it potentially closes one questionable avenue for bringing new members into the Church." (46 C.3d 1117.) (See 25 *Loyola L.A. L. Rev.* 499 [Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interests-Based Approach]; for full discussion of *Molko*, see 5 *Summary* (10th), *Torts*, §770.)

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j. Religious Discrimination Against Advertisers.

7 *Witkin Sum. Cal. Law Const Law* § 526

[§ 526] Religious Discrimination Against Advertisers.

In *Pines v. Tomson* (1984) 160 C.A.3d 370, 206 C.R. 866, defendants owned and operated a business telephone directory called the "Christian Yellow Pages" (CYP), which accepts advertisements only by persons who affirm orally and in writing that they have accepted Jesus Christ as their personal savior and are "born-again" Christians. Plaintiffs, Jewish businessmen and a Jewish civic organization, sought injunctive and monetary relief for violation of California statutes prohibiting religious discrimination (C.C. 51, 51.5, *infra*, §§898, 906). The trial court granted the requested relief by an order that prohibited defendants from requiring an oath or affirmation of a particular religious belief as a precondition to placing of an advertisement. *Held*, this injunction did not violate defendants' right to free exercise of religion.

(a) Nothing in the injunction prevents CYP or their advertisers from declaring "their position in Christ" or from identifying themselves as members of the Christian community; it simply enjoins them from refusing an advertisement on the ground that the person attempting to place it will not affirm that he or she is a "born-again" *Christian*. (160 C.A.3d 388.)

(b) Defendants also contended that compelling them to accept advertisements from non-Christians would force them to subscribe to non-Christian beliefs in violation of *West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, *infra*, §536. This is unsound. The injunction does not require defendants to endorse these beliefs; it merely compels them to act in a nondiscriminatory manner, and they are free to publish disclaimers to assure that their compliance with the court order is not to be confused with endorsement. (160 C.A.3d 389.)

(c) The injunction does infringe on defendants' freedom of religious association by requiring them to do business with non-Christians despite their preference to the contrary. But the infringement is justified by the compelling state interest in eradicating invidious discrimination. (160 C.A.3d 390, 392, discussing *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed. 462, *supra*, §389, and using the same approach.)

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k. Fair Employment and Housing Act.

7 *Witkin Sum. Cal. Law Const Law* § 527

[§ 527] Fair Employment and Housing Act.

In *Smith v. Fair Emp. & Housing Com.* (1996) 12 C.4th 1143, 51 C.R.2d 700, 913 P.2d 909, a landlord refused to rent an apartment to an unmarried couple because she believed that renting to people who would engage in nonmarital sex on her property would be sinful. The couple filed complaints against the landlord with the Fair Employment and Housing Commission, which determined that the landlord had violated the Fair Employment and Housing Act (FEHA) (*Govt.C. 12900* et seq.) by discriminating against the couple on the basis of their marital status. The Commission awarded damages and ordered the landlord to cease discriminating. The Court of Appeal reversed, holding that the state could not prevent the landlord from discriminating against unmarried couples, in view of the free exercise of religion clauses of the federal and state Constitutions (U.S. Const., First Amendment; Cal. Const., Art. I, §4) and the Religious Freedom Restoration Act of 1993 (RFRA). *Held*, reversed.

(a) *Applicability of FEHA.* *Govt.C. 12955(a)* prohibits housing discrimination on the basis of "marital status," and this ban extends to unmarried couples who cohabit. (12 C.4th 1155, 1157; see *infra*, §947.)

(b) *No First Amendment Exemption.* The First Amendment does not require that the state exempt the landlord from FEHA to avoid burdening her exercise of religious freedom. The statutory prohibition against discrimination on the basis of marital status is both generally applicable and neutral towards religion. It is generally applicable because it prohibits all discrimination without reference to motivation. It is neutral because its object is to prohibit discrimination irrespective of reason. Consequently, *Govt.C. 12955(a)* does not violate the *First Amendment's Free Exercise Clause*. (12 C.4th 1161, 1162, citing *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, *supra*, §523.)

(c) *No Exemption Under RFRA.* The Religious Freedom Restoration Act (since held unconstitutional in *Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624, *supra*, §516) does not exempt the landlord from the statutory prohibition against discrimination on the basis of marital status. Because *Govt.C. 12955(a)* does not substantially burden the landlord's religious exercise, there is no need to determine whether applying the statute to her furthers a compelling state interest and is the least restrictive means of doing so. (12 C.4th 1176.)

(d) *No Exemption Under California Constitution.* Because the landlord's claim to an exemption fails under the

"compelling interest" test codified in RFRA, it necessarily fails under Cal. Const., Art. I, §4; no California court has articulated a test more protective of religious exercise than the "compelling interest" test. (12 C.4th 1179.)

Three justices joined in the lead opinion, and a fourth concurred fully in the disposition of the case. (12 C.4th 1180.) (See 108 Harv. L. Rev. 763 [note on Alaska case holding that housing anti-discrimination laws protecting unmarried couples do not violate free exercise rights of religious landlord]; 47 Hastings L. J. 1669 [conflict between free exercise rights and housing discrimination laws]; 41 Stanf. L. Rev. 1201 [The Collision of Religious Exercise and Governmental Nondiscrimination Policies]; on use of religion clauses to exempt religious employer under FEHA, see *Schmoll v. Chapman University* (1999) 70 C.A.4th 1434, 1442, 83 C.R.2d 426, *infra*, §918; 21 Hastings Const. L. Q. 275 [application of employment discrimination laws to religious employers].)

SUPPLEMENT: [This section is current through the latest supplement]

See 10 A.L.R.6th 513 [landlord's refusal to rent to unmarried couple as protected by landlord's religious beliefs].



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k. Fair Employment and Housing Act.

7 *Witkin Sum. Cal. Law Const Law* § 528

[§ 528] (l) Prescription Contraceptive Coverage.

The Women's Contraceptive Equity Act (WCEA), *Health & Saf.C. 1367.25* and *Ins.C. 10123.196*, requires certain health and disability insurance contracts to cover prescription contraceptives. In *Catholic Charities of Sacramento v. Superior Court* (2004) 32 C.4th 527, 10 C.R.3d 283, 85 P.3d 67, plaintiff employer, which opposes contraceptives on religious grounds, claimed that the statute violates the Establishment and Free Exercise Clauses of the federal and California Constitutions. *Held*, the Act is constitutional.

(a) Although the WCEA provides an exemption for "religious" employers, plaintiff does not meet the statutory requirements for the exemption. Plaintiff's corporate purpose is not the direct "inculcation of religious values." It does not primarily employ, nor does it primarily serve, persons who share its religious tenets. And it is not a nonprofit organization as specified in the *Internal Revenue Code*. (32 C.4th 539.)

(b) The WCEA does not interfere with matters of internal church governance. Instead, "it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church. Only those who join a church impliedly consent to its religious governance on matters of faith and discipline." (32 C.4th 542.)

(c) The WCEA meets the test of *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, *supra*, §523, that "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." The Act "addresses a matter the state is free to regulate;" it regulates insurance coverage for the purpose of eliminating gender discrimination in the provision of certain health benefits. It only incidentally conflicts with plaintiff's religious beliefs "because those beliefs happen to make prescription contraceptives sinful." Thus, plaintiff must demonstrate an exception to the rule, which would require the application of strict scrutiny. (32 C.4th 549.)

(d) Strict scrutiny is not required by the fact that the WCEA exemption for religious employers contains religious terms; this does not mean that it lacks neutrality or general application. (32 C.4th 550.) Neither is strict scrutiny required by the fact that the exemption is not sufficiently broad to cover all organizations affiliated with the Catholic Church; this does not mean that the exemption discriminates against it. (32 C.4th 553.) And the fact that plaintiff must comply

with a law regulating health care benefits is not a regulation of speech that, as a "hybrid" right, might trigger strict scrutiny; plaintiff is free to express its disapproval of contraceptives and to discourage its employees in their use. (32 *C.4th* 558.)

(e) Although whether strict scrutiny is required by Cal. Const., Art. I, §4, the California Free Exercise Clause, is not determined, the WCEA passes the strict scrutiny test. "Under that standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored." A law substantially burdens a religious belief if it conditions receipt of an important benefit on conduct proscribed by a religious faith, or denies a benefit because of conduct mandated by a religious belief, which puts substantial pressure on an adherent to modify his or her behavior or violate his or her beliefs. Here, plaintiff was not forced to offer any prescription drug coverage. (32 *C.4th* 562.) Plaintiff's claim that its religious beliefs also require it to offer its employees prescription drug coverage raises the question whether plaintiff's "beliefs about the requirements of 'justice and charity' are necessarily equivalent to *religious* beliefs." (32 *C.4th* 563.) However, even assuming that the Act substantially burdens a religious belief or practice, it nevertheless serves the compelling state interest of eliminating gender discrimination in the cost of health care, and is narrowly tailored to achieve that interest. (32 *C.4th* 564.) There are no less restrictive means readily available to achieve that interest. A broader exemption would increase the number of women affected by discrimination in the provision of health care benefits. (32 *C.4th* 565.)

One justice dissented. (32 *C.4th* 571.)

SUPPLEMENT: [This section is current through the latest supplement]

See 42 Cal. Western L. Rev. 121 [Can a Pharmacist Refuse to Fill Birth Control Prescriptions on Moral or Religious Grounds?]; 34 *Hastings Const. L. Q.* 111 [constitutionality of pharmacist conscience cases]; 28 J. Juvenile Law 100 [pharmacists and morning-after pill]; 36 Southwestern U. L. Rev. 85 [mixing morality with medicine]; 35 *A.L.R.6th* 593 [constitutionality of requiring employers that provide group insurance for prescription drugs to include prescription contraceptives].



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D. Religious Activity in Public Schools.
1. Religious Instruction.

7 Witkin Sum. Cal. Law Const Law § 529

[§ 529] Religious Instruction.

(1) *Religious Instruction in School.* In *McCullum v. Board of Education of School Dist. No. 71, Champaign County, Illinois* (1948) 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, a county board of education in Illinois instituted a plan of "released-time" religious education in its public schools, with instructors of various faiths being furnished without charge to the school authorities. Instruction was given each week for 30- and 45-minute periods, in the classrooms and during regular school hours, to children whose parents signed printed requests. Attendance of these children at the classes was required and reports of absences were made in the usual manner. Students who did not choose to take the religious instruction were required to leave their classrooms and go elsewhere in the school building for secular studies. *Held*, the program violated the First Amendment. The general doctrine set forth in *Everson v. Board of Education of Ewing Township* (1947) 330 U.S. 1, 67 S.Ct. 504, 511, 91 L.Ed. 711, 723, *supra*, §505, was restated but the Court reached a different result (see *infra*, §539). "Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and state." (68 S.Ct. 465, 92 L.Ed. 659.) (See 5 Rotunda, §21.5(b); 6 *Pepperdine L. Rev.* 105 [moral values education for child]; 61 *So. Cal. L. Rev.* 863 [Religious Children, Secular Schools]; 28 *U.C.L.A. L. Rev.* 1000 [accommodation of religion in public schools]; 2 *A.L.R.2d* 1371 [release of pupils during school hours to attend religious education classes]; 79 *A.L.R.2d* 1148 [use of schools for religious purposes during nonschool time]; 68 *Am.Jur.2d* (1993 ed.), *Schools* §336 et seq.)

(2) *Religious Instruction Outside School.* Prior to *McCullum*, the Los Angeles "released-time" program, established under the authority of a former state statute, was upheld in *Gordon v. Board of Education of Los Angeles* (1947) 78 *C.A.2d* 464, 178 *P.2d* 488. The only important difference between this and the Illinois plan was that the children were transported to places outside the school building for their religious instruction. The opinion relied heavily on the reasoning of *Everson* (*infra*, §539) and was of doubtful value as a precedent while *McCullum* stood unchallenged.

But the *McCullum* view was all but obliterated by a refined distinction in *Zorach v. Clauson* (1952) 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, involving New York's "released-time" program. On a parent's request, a child is released during the school day to go to an outside building in a religious center for instruction or devotional exercise. If the child leaves school but fails to attend the religious center, the church reports him or her to the school. *Held*, the statute was valid, for there was no religious instruction in the school and no expenditure of public funds for that instruction. The

Court thought that releasing the child on voluntary application for systematic religious instruction was not essentially different from releasing him or her on religious holidays. (72 S.Ct. 684, 96 L.Ed. 962.) Three justices dissented in three opinions. (72 S.Ct. 685, 687, 689, 96 L.Ed. 963, 965, 967.) One of the dissenting opinions argues that the plan is coercive in that if a child fails to go to the church, the truant officer "dogs him back to the public schoolroom," and that school instruction is more or less suspended during the released time so that other pupils will not forge ahead of the absentees. (72 S.Ct. 689, 96 L.Ed. 967.) (See 5 Rotunda, §21.5(b); 2 A.L.R.2d 1371 [release of pupils during school hours to attend religious education classes].)

West's Key Number Digest, Constitutional Law k.84.5(3) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Religious Instruction in School*. See 6 Rotunda 4th, §21.5.(2) *Religious Instruction Outside School*. See 6 Rotunda 4th, §21.5.



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2. Prayers and Bible Reading.
a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 530

[§ 530] In General.

In *Engel v. Vitale* (1962) 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, the New York State Board of Regents was a governmental agency created by the state Constitution to which the Legislature granted supervisory powers over the public school system. The board composed a prayer for use in the schools, and respondent Board of Education of a school district directed the principal to have it said aloud daily by each class in the presence of a teacher. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." In this action by objecting parents, the procedure was held unconstitutional.

(a) The prayer was concededly a religious activity. It was part of a governmental program to further religious belief, and the constitutional prohibition at least means that the government may not compose official prayers for any group to recite as part of a governmentally sponsored religious program. (82 S.Ct. 1264, 1266, 8 L.Ed.2d 604.)

(b) It was immaterial that objecting pupils could remain silent or be excused from the room. The Establishment Clause, unlike the Free Exercise Clause, may be violated without any compulsion operating on individuals; its object is to keep government and religion separate, and thereby to avoid repetition of the historical experience of established religions leading to religious persecution. (82 S.Ct. 1267, 8 L.Ed.2d 607.)

(c) It was immaterial that the prayer was nondenominational and did not amount to a total establishment of a particular religion, or that it was so brief and general that it did not threaten religious freedom. As Madison put it, a slight encroachment may lead to ultimately complete enforced conformity. (82 S.Ct. 1269, 1270, 8 L.Ed.2d 610.)

(d) To apply the Constitutional prohibition is not to indicate hostility toward religion or prayer. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." (82 S.Ct. 1269, 8 L.Ed.2d 609.)

A dissenting justice observed that the New York school procedure was indistinguishable from the practice of the Court and both Houses of Congress, which open sessions with an invocation; and that the National Anthem, the Pledge of Allegiance, and the inscription on our coins, all follow a long tradition of recognition of and reliance on a *Divine*

Being. (82 S.Ct. 1274, 8 L.Ed.2d 616.) (See 76 Harv. L. Rev. 25, 1111; 77 Harv. L. Rev. 62; 36 So. Cal. L. Rev. 240; 110 A.L.R. Fed. 211.)

In *School Dist. of Abington Township, Pennsylvania v. Schempp* (1963) 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, Pennsylvania and Maryland statutes required that verses from the Bible be read without comment at the opening of school exercises each day. On request of a parent or guardian, pupils who did not desire to attend were excused. *Held*, the statutes were unconstitutional. The court's opinions were more elaborate than those in *Engel*.

(a) Religion is closely identified with our history and government; e.g., in the oath of office, the opening of Congress with a chaplain's prayer, and chaplains in military forces. Statistics show that 64% of our people are church members. But religious freedom is just as strongly imbedded, and authorities list 83 separate religious bodies with memberships over 50,000, and innumerable smaller groups. (83 S.Ct. 1566, 1567, 10 L.Ed.2d 853.)

(b) Both the Establishment and Free Exercise Clauses are parts of a constitutional doctrine of neutrality, based on the recognition that powerful groups might bring about a fusion of governmental and religious functions, or a concert of them. But the Free Exercise Clause is predicated on coercion, which the *Establishment Clause* is not. (83 S.Ct. 1571, 1572, 10 L.Ed.2d 858.)

(c) Neutrality does not establish a "religion of secularism," nor does this decision mean that study of the Bible or of religion presented objectively as part of a secular program of education is prohibited. (83 S.Ct. 1573, 10 L.Ed.2d 860.)

(d) "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purposes or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality." (83 S.Ct. 1574, 10 L.Ed.2d 860.)

An exhaustive concurring opinion covers all aspects of the problem, and particularly answers the contention of school officials that the decision makes unconstitutional every vestige of cooperation or accommodation between religion and government. (83 S.Ct. 1575, 10 L.Ed.2d 861.) (See *Stone v. Graham* (1980) 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 [statute requiring posting of copy of Ten Commandments on wall of classrooms violated Establishment Clause]; *Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290, 120 S.Ct. 2266, 2275, 2281, 147 L.Ed.2d 295, 310, 319 [school district policy permitting yearly student election to determine whether to have student-led prayer at school football games violates Establishment Clause; policy is invalid on its face because it established improper majoritarian election on religion; following *Lee v. Weisman* (1992) 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467, *infra*, §534]; 5 Rotunda, §21.5(c); 77 Harv. L. Rev. 62 [*Schempp*]; 28 Pepperdine L. Rev. 681 [*Santa Fe*]; on purchase of Bible for school library, see *Evans v. Selma Union High School Dist. of Fresno County* (1924) 193 C. 54, 58, 222 P. 801 [held proper on ground that it is not a sectarian work].)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Rotunda 4th, §21.5(c).



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
VII. FREEDOM OF RELIGION
D. Religious Activity in Public Schools.
2. Prayers and Bible Reading.
b. Student Bible Study Club.

7 *Witkin Sum. Cal. Law Const Law* § 531

[§ 531] Student Bible Study Club.

(1) *Johnson Case*. In *Johnson v. Huntington Beach Union High School Dist.* (1977) 68 C.A.3d 1, 137 C.R. 43, defendant high school district, pursuant to statutory authority, provided for recognition of student clubs and prescribed regulations for their operation and their use of school facilities. Plaintiffs, members of a high school group, applied for recognition of a club whose express purpose was "to enable those participating to know God better ... by prayerfully studying the Bible." *Held*, defendant's denial of the application was proper; the administrative action sought would be state action that could not meet the three-part test of validity set forth in *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 *infra*, §546.

(a) The purpose, in the abstract, might be secular in nature, but its primary effect was not. The club would be entitled to use classroom space rent free, would receive heat and light, would be monitored by a paid faculty sponsor, and would have its finances audited by defendant at defendant's expense. This financial subsidy might alone condemn the action. (68 C.A.3d 12.)

(b) The consequence of the action would be to place the state's imprimatur on the religious activity. The club would become an entity sponsored by the school, entitled to use the school name, to have free use of school property, to have access to the school newspaper and posting facilities, and to solicit contributions on campus during the school day. (68 C.A.3d 13.)

(c) The action would involve excessive governmental entanglement with religion by the school furnishing a faculty sponsor, auditing the accounts, and reviewing membership procedures. (68 C.A.3d 14.)

(d) An additional factor is the potential for divisiveness. Students who are members of less orthodox religions would be unable to organize a club, and might be subjected to pressures to conform to beliefs of a recognized club. (68 C.A.3d 14.)

(e) For all of the above reasons, the state action in question also violates the Establishment Clause of the California Constitution (Cal. Const., Art. I, §4; see *supra*, §505). It also violates Cal. Const., Art. XVI, §5, prohibiting appropriation of funds for a sectarian purpose (see *supra*, §505). (68 C.A.3d 15.)

(f) Refusal to permit the club to operate on campus is not a violation of plaintiffs' First Amendment rights. "This is not a case where plaintiffs are denied access to all public forums for religious expression; they are merely being denied use of school property during the school day for religious purposes. This deprivation in no way infringes upon their religious rights when practiced outside the confines of the school. Plaintiffs are only being denied religious expression in a manner involving state participation. Each club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off campus outside of school hours. There is no infringement of plaintiffs' free exercise rights except to the limited extent made necessary by the establishment clause of the state and federal Constitutions." (68 C.A.3d 17.)

A lengthy dissent challenges the reasoning and conclusions reached by the majority, and argues that under the accommodation concept of *Zorach v. Clauson* (1952) 343 U.S. 306, 72 S.Ct. 679, 684, 96 L.Ed. 954, 962, supra, §529, a rule should emerge making it plain that "locally formulated curricula recognizing and implementing the need for moral and ethical training of school pupils not only are permissible but are to be encouraged." (68 C.A.3d 35.) (See 28 U.C.L.A. L. Rev. 1000, 1025.)

(2) *Perumal Case*. In *Perumal v. Saddleback Valley Unified School Dist.* (1988) 198 C.A.3d 64, 243 C.R. 545, the question before the court was stated as follows: "Must a tax supported high school district board, which has adopted a closed forum policy, allow a student club to distribute religious flyers on the school campus during school hours or to place religious advertisements in a high school yearbook?" (198 C.A.3d 68.) The district, pursuant to *Educ.C. 48907* (supra, §498), enacted a board policy prohibiting off-campus groups from functioning or advertising on campus. (198 C.A.3d 69, footnote 4.) *Held*, under the *Johnson* analysis, the regulation was permissible. "Its enactment is secular, promoting the general well-being of the campus; because religious groups are not singled out for better or worse treatment, its principal or primary effect neither advances nor inhibits religion. No entanglement with religion exists." (198 C.A.3d 75.)

A lengthy dissent discusses state and federal cases, and concludes that "the suppression of purely private student religious expression cannot be reconciled with any of the clauses of the First Amendment." (198 C.A.3d 75, 94.)

(3) *Equal Access Act*. In 1984, Congress enacted the Equal Access Act (20 U.S.C., §4071-4074) which provides in part that it is "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." (20 U.S.C., §4071(a); see 20 U.S.C., §4071(b) ["limited open forum" defined]; 20 U.S.C., §4071(c) ["fair opportunity" criteria]; 12 *Hastings Const. L. Q.* 529 [unconstitutionality of equal access policies and legislation allowing organized student-initiated religious activities in public high schools]; 15 *Loyola L.A. L. Rev.* 103 [Religious Meetings on Public School Property]; 16 *Pepperdine L. Rev.* 229 [Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools]; 20 *U.C. Davis L. Rev.* 313 [Religious Meetings in the Public High School: Freedom of Speech or Establishment of Religion]; 174 *A.L.R. Fed* 407 [validity, construction, and application of Act].)

In *Board of Education of Westside Community Schools (Dist. 66) v. Mergens* (1990) 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191, the issue was whether the Act "prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment." (110 S.Ct. 2362, 110 L.Ed.2d 203.) The Court concluded that the Act did not on its face contravene the Establishment Clause; that the school board, in denying permission, violated the Act; and that it was therefore unnecessary to consider the students' claims under the *Free Speech and Free Exercise Clauses*. (110 S.Ct. 2373, 110 L.Ed.2d 218.) (See *Van Schoick v. Saddleback Valley Unified School Dist.* (2001) 87 C.A.4th 522, 527, 104 C.R.2d 562 [following *Mergens*; trial court erred in granting summary judgment to defendant school board on claim that it violated FEAA by refusing to grant Christian athletic club rights enjoyed by other student clubs where there was triable issue whether school had created limited open forum by recognizing two service clubs; court's conclusion that those clubs were curriculum-related because participation in them satisfied

community service requirement for graduation was not dispositive].)

SUPPLEMENT: [This section is current through the latest supplement]



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VII. FREEDOM OF RELIGION

D. Religious Activity in Public Schools.

2. Prayers and Bible Reading.

c. School Period of Silence.

7 *Witkin Sum. Cal. Law Const Law* § 532

[§ 532] School Period of Silence.

The constitutionality of state statutes authorizing "moments of silence" in public schools has been widely debated. (See 96 *Harv. L. Rev.* 1874; 14 *Hastings Const. L. Q.* 763; 5 *Rotunda*, §21.5(c).)

In *Wallace v. Jaffree* (1985) 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29, the court held that an Alabama statute authorizing a period of silence for "meditation or voluntary prayer" violated the Establishment Clause. The validity of another simple "moment of silence" statute was apparently conceded (105 S.Ct. 2481, 2482, 2491, 2493, 2496, 86 L.Ed.2d 33, 34, 45, 47, 50), but the record showed that the legislative intent in the statute under review was "to return voluntary prayer" to the public schools, and that the statute had no secular purpose (105 S.Ct. 2490, 86 L.Ed.2d 43). "[W]henver the State itself speaks on a religious subject, one of the questions that we must ask is 'whether the Government intends to convey a message of endorsement or disapproval of religion.' ... Keeping in mind, as we must, 'both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,' " the statute violates the *First Amendment*. (105 S.Ct. 2492, 86 L.Ed.2d 46.)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 *Rotunda* 4th, §21.5(c).



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VII. FREEDOM OF RELIGION

D. Religious Activity in Public Schools.

2. Prayers and Bible Reading.

d. Invocation at School Graduation.

1. California Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 533

[§ 533] California Decisions.

In *Bennett v. Livermore Unified School Dist.* (1987) 193 C.A.3d 1012, 238 C.R. 819, defendant school district established guidelines for the traditional religious invocation at school graduation ceremonies, although it did not provide for its content and did not require that it be given. In this action by a high school senior, the trial judge determined that inclusion of the invocation in the ceremony was unconstitutional, and enjoined the district from including it in scheduled and future ceremonies. *Held*, affirmed.

(a) An invocation is a form of prayer invoking God's presence, and it does not comport with the beliefs of many persons. (193 C.A.3d 1015.) "We therefore align ourselves with those cases holding *impermissible* the inclusion of an invocation at a public school graduation ceremony, finding that it violates both the United States and the California Constitutions." (193 C.A.3d 1016.)

(b) The U.S. Supreme Court has rejected any form of prayer, however inoffensive or nonsectarian, in the public schools. (193 C.A.3d 1018.)

(c) The religious invocation violates all three prongs of the test stated in *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *supra*, §507: (1) Its primary purpose is religious. (2) The practice of including it in a graduation ceremony conveys a message of endorsement of the particular creed represented and of religion in general. (3) If it were allowed, it would be necessary to oversee the students' choice of ceremony--the kind of entanglement condemned by *Lemon*. (193 C.A.3d 1020.) *Marsh v. Chambers* (1983) 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019, *supra*, §508, upholding the practice of opening legislative sessions with prayer, rests on the history and tradition from colonial times to the present. (193 C.A.3d 1022.)

In *Sands v. Morongo Unified School Dist.* (1991) 53 C.3d 863, 281 C.R. 34, 809 P.2d 809, district officials approved the selection of speakers who delivered prayers at graduation ceremonies at four high schools in the district. With one exception, every invocation or benediction was delivered by either a Protestant minister or a Catholic priest. Plaintiff taxpayers residing in the district brought an action for declaratory and injunctive relief to prohibit the religious invocations at public school ceremonies. While the action was pending, *Bennett, supra*, held that religious invocations

at high school graduation ceremonies violated both the state and federal Constitutions. The trial court then granted summary judgment for plaintiffs. On appeal, the Court of Appeal disagreed with *Bennett* and reversed the trial court's judgment. *Held*, judgment of Court of Appeal reversed.

(a) *Establishment Clause and Lemon tests.* *Lemon v. Kurtzman* stated a three-pronged test to be applied in *Establishment Clause* cases. (53 C.3d 871.) This test has been controlling law for 20 years, and is applied in this case. (53 C.3d 872.)

(b) *The "primary effect" test.* Under this test, the inquiry is whether, irrespective of the government's actual objective, the practice conveys a message of endorsement or disapproval. (53 C.3d 872.)

(1) The religious invocations challenged here are, in whole or major part, prayers; and when a school district opens or closes the graduation ceremony with a prayer, "it sends a powerful message that it approves of the prayer's religious content." (53 C.3d 874.) "Through the practices challenged in this case, the government appears to prefer religion over nonreligion; appears to prefer religions that acknowledge the practice of petitionary prayer over religions that do not recognize such prayer; appears to prefer the religious belief that prayer should be public over the belief that prayer should be private; and implicitly endorses religions that address a single, anthropomorphic, and male deity over those that do not." (53 C.3d 874.)

(2) "The assertedly 'nonsectarian' nature of the prayers at issue here does not render their government sponsorship constitutionally acceptable." (53 C.3d 876.) And the argument that no state coercive authority is present does not justify the practice: coercion is not an element of the Establishment Clause violation. (53 C.3d 877.)

(3) The singing of traditional patriotic songs (e.g., "God Bless America") is not prohibited by this holding; these songs no longer convey significant religious meaning. (53 C.3d 873, footnote 4.)

(c) *The "excessive entanglement" test.* "The practice of including prayers at public high school graduation ceremonies impermissibly entangles government in religious matters in two ways: It involves governmental selection or approval of religious speakers and governmental approval of the content of public prayer." (53 C.3d 879.)

(d) *Marsh case distinguished.* *Marsh v. Chambers*, *supra*, upheld the practice of opening legislative sessions with prayer on the ground of its "unique history." In *Edwards v. Aguillard* (1987) 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510, *infra*, §535, the Court made it clear that *Marsh* should not be applied to determine the constitutionality of public school practices. (53 C.3d 881.)

(e) *Religion Clauses of California Constitution.* Cal. Const., Art. I, §4, is virtually identical to the First Amendment's Establishment Clause, and the practice of government endorsement of graduation prayers violates this correspondent clause of the *California Constitution*. (53 C.3d 883.)

(f) *Conclusion.* "Ours is a religiously diverse nation. Within the vast array of Christian denominations and sects, there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religion or to no religion. Respect for the different religious choices of the people of this country requires that government neither place its stamp of approval on any particular religious practice, nor appear to take a stand on any religious question. In a world frequently torn by religious factionalism and the violence tragically associated with political division along religious lines, our nation's position of governmental neutrality on religious matters stands as an illuminating example of the true meaning of freedom and tolerance." (53 C.3d 883.)

Three concurring opinions were filed. The first reluctantly concurs in the judgment (53 C.3d 884), but notes that the law is in a state of flux (53 C.3d 885); discusses the "benign" recognition of religion as a part of American culture (e.g., legislative chaplains, Memorial Day of prayer, the motto "In God We Trust") (53 C.3d 890); and argues that the state constitutional provisions should not have been considered at this time (53 C.3d 902). The second opinion of two justices argues that federal cases are merely illustrative, and that our state constitutional provisions control and are validated by

the district's religious invocations. (53 C.3d 905.) The third concurring opinion (53 C.3d 914) concurs in the judgment, but "reluctantly," "with the hope and expectation that the high court will soon endorse another view." (53 C.3d 918.) (For U.S. Supreme Court decision, see *infra*, §534.)

Two justices dissented separately. (53 C.3d 918, 939.) (See 23 *Pacific L. J.* 1449; 19 *Pepperdine L. Rev.* 749; 40 *U.C.L.A. L. Rev.* 253.)

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VII. FREEDOM OF RELIGION

D. Religious Activity in Public Schools.

2. Prayers and Bible Reading.

d. Invocation at School Graduation.

2. United States Supreme Court Decision.

7 *Witkin Sum. Cal. Law Const Law* § 534

[§ 534] United States Supreme Court Decision.

Lee v. Weisman (1992) 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467, involved a practice of the Superintendent of Schools of the city of Providence, Rhode Island, permitting school principals in middle schools and high schools to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies. Weisman, acting for himself and his daughter, a 14-year-old middle school student, objected to any prayers at her graduation. Despite the objection, the school principal invited a rabbi who delivered an invocation and a benediction, in conformity with the principal's directive that it should be nonsectarian. The graduation ceremony was held on school premises.

In a proceeding in the federal district court the practice was held violative of the Establishment Clause; the Court of Appeals affirmed, and the Supreme Court affirmed the judgment of the Court of Appeals. The following excerpts from the lead opinion make clear the issue and the nature and scope of the holding:

(a) "These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma." (112 S.Ct. 2655, 120 L.Ed.2d 480.)

(b) "We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. ... The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school." (112 S.Ct. 2655, 120 L.Ed.2d 480.)

(c) The school argued that its directions for the content of the prayers were a good faith attempt to remove sectarianism from the ceremony. However: "The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to

attend." (112 S.Ct. 2656, 120 L.Ed.2d 481, 482.)

(d) "We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. ... If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcends human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself." (112 S.Ct. 2656, 120 L.Ed.2d 482.) These concerns have particular application in the case of school officials. "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." (112 S.Ct. 2657, 120 L.Ed.2d 483.)

(e) "The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. ... The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. ... The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." (112 S.Ct. 2658, 120 L.Ed.2d 483.)

(f) "The injury caused by the government's action ... is that the State, in a school setting, in effect required participation in a religious exercise. ... Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." (112 S.Ct. 2659, 120 L.Ed.2d 485.)

(g) "Inherent differences between the public school system and a session of a State Legislature distinguish this case from *Marsh v. Chambers*. ... The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend." (112 S.Ct. 2660, 120 L.Ed.2d 487, referring to *Marsh v. Chambers* (1983) 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019, supra, §508.)

(h) "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause." (112 S.Ct. 2661, 120 L.Ed.2d 487.)

Three justices concurred in a separate opinion (112 S.Ct. 2661, 120 L.Ed.2d 488); three also concurred in another separate opinion (112 S.Ct. 2667, 120 L.Ed.2d 495); and four justices joined in a dissenting opinion (112 S.Ct. 2678, 120 L.Ed.2d 509). (See 106 Harv. L. Rev. 259; 21 Hastings Const. L. Q. 441; 21 Pepperdine L. Rev. 207; 5 Rotunda, §21.5(c).)

SUPPLEMENT: [This section is current through the latest supplement]

See 6 Rotunda 4th, §21.5(c).



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VII. FREEDOM OF RELIGION

D. Religious Activity in Public Schools.

3. Instruction on Evolution.

7 *Witkin Sum. Cal. Law Const Law* § 535

[§ 535] Instruction on Evolution.

The Arkansas "anti-evolution" statute of 1928, similar to the Tennessee "monkey law" of the famous *Scopes* case, made it unlawful for a teacher in a state-supported school or university to teach the theory that mankind ascended or descended from a lower order of animals. In *Epperson v. Arkansas* (1968) 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228, the statute was held void. The state's undoubted right to prescribe curriculum does not carry with it the right to prohibit teaching of a scientific theory where sectarian conviction is the reason for the law. (89 S.Ct. 272, 21 L.Ed.2d 236.) (See 5 Rotunda, §21.5(d); 2 Tribe, §14-9.)

In *Edwards v. Aguillard* (1987) 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510, Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act was held unconstitutional. The statute forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school was required to teach evolution or creation science, but if either subject was taught, the other also had to be taught. Louisiana officials defended on the ground that the legislative purpose was to protect the secular interest of academic freedom. The Supreme Court rejected the defense and held that the Establishment Clause was violated.

(a) "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary." (107 S.Ct. 2577, 96 L.Ed.2d 519.)

(b) No clear secular purpose has been identified. Although its stated purpose is to protect academic freedom, and the Legislature may have had in mind the basic concept of fairness, the Act does not further this purpose. "The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science." (107 S.Ct. 2579, 96 L.Ed.2d 521.)

(c) The legislative history shows that the purpose of the Act's sponsor was to narrow the science curriculum. If the purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act, teachers who were

once free to teach any and all facets of this subject are now unable to do so; and the Court of Appeals correctly concluded that the purpose was to discredit evolution by counterbalancing its teaching with the teaching of creation science. (107 S.Ct. 2580, 96 L.Ed.2d 522.) "The legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety." (107 S.Ct. 2582, 96 L.Ed.2d 524.)

(d) "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. ... [T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." (107 S.Ct. 2582, 96 L.Ed.2d 525.)

Two justices joined in a strong dissent. (107 S.Ct. 2591, 96 L.Ed.2d 536.) (See 101 Harv. L. Rev. 189 [Edwards]; 25 San Diego L. Rev. 829 [same]; 49 Stanf. L. Rev. 439 [constitutionality of teaching "intelligent design" in public schools].)

SUPPLEMENT: [This section is current through the latest supplement]

See 6 Rotunda 4th, §21.5(d); 37 Southwestern U. L. Rev. 1 [entanglement of religion and origin of life in public schools].



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VII. FREEDOM OF RELIGION

D. Religious Activity in Public Schools.

4. Flag Salute.

7 *Witkin Sum. Cal. Law Const Law* § 536

[§ 536] Flag Salute.

A challenging problem in this field arose in connection with the requirement by school boards of a ceremony involving a pledge and salute to the national flag by school children. Members of the sect of Jehovah's Witnesses objected that this violated their religious convictions, based on a literal interpretation of the scriptural prohibition against worship of "any graven image."

In *Minersville School Dist. v. Gobitis* (1940) 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375, the Court held the requirement valid, expressing the view that the conflicting interest of freedom and national unity must be reconciled, and that training children in patriotism was a matter of educational policy, within the legislative authority. But in *West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, *Gobitis* was overruled and the principle declared that the object of national unity does not justify compulsory acceptance of a belief, symbolized by the pledge and salute.

The court did not rest its opinion on freedom of religion; it held invalid the attempt to secure national unity by compelling any kind of belief. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (63 S.Ct. 1187, 87 L.Ed. 1639.) (See 5 Rotunda, §21.7.)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Rotunda 4th, §21.7.



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D. Religious Activity in Public Schools.

5. Creation of Public School District for Religious Community.

7 Witkin Sum. Cal. Law Const Law § 537

[§ 537] Creation of Public School District for Religious Community.

Board of Education of Kiryas Joel Village School Dist. v. Grumet (1994) 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546, involved the village of Kiryas Joel, a religious enclave of Satmar Hasidim who practiced a strict form of Judaism. The village's boundaries had been drawn under New York's general incorporation law to include only the area inhabited by the Satmars. The village's children were educated in private religious schools, but those schools did not offer any distinctive services to handicapped children, and village residents were dissatisfied with the special education services offered in public schools outside the village. The New York Legislature, in 1989, passed a special law creating a separate school district following village lines, and the village school district then established a special education program for handicapped children. Various parties brought an action challenging the statute, and the state trial and appellate courts held that the statute was an unconstitutional establishment of religion. *Held*, "[b]ecause this unusual act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, we hold that it violates the prohibition against establishment." (114 S.Ct. 2484, 129 L.Ed.2d 552.)

(a) The case-specific nature of the legislature's action in creating this district for a religious community leaves the court with no way to review the action for the purpose of insuring that government does not prefer one religion to another, or religion to irreligion. Kiryas Joel did not receive its new governmental authority as one of many communities eligible for equal treatment under a general law, and there is no assurance that the next similarly situated group will also receive a school district. (114 S.Ct. 2491, 129 L.Ed.2d 560, 561.)

(b) The Constitution permits the state to accommodate religious needs by alleviating special burdens. However, accommodation has limits, and the adjustment made here is one the cases do not permit. (114 S.Ct. 2492, 129 L.Ed.2d 562.) "Petitioners' proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, ... it is clear that neutrality as among religions must be honored." (114 S.Ct. 2493, 129 L.Ed.2d 563.)

(c) "[W]e are clearly constrained to conclude that the statute before us fails the test of neutrality. It delegates a power this Court has said 'ranks at the very apex of the function of a State,' ... to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism. It therefore crosses the line from permissible accommodation to impermissible establishment." (114 S.Ct. 2494, 129 L.Ed.2d 565.)

Three justices dissented, arguing that the statute should be presumed valid, and that if it was intended to create a special arrangement because of the villagers' religion, it was a permissible accommodation. (*114 S.Ct. 2505, 129 L.Ed.2d 579.*) (See *108 Harv. L. Rev. 250*; 16 *J. Juvenile Law* 248; 22 *Pepperdine L. Rev. 1599*; 22 *Western State L. Rev. 409.*)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Aid to Private Schools or Private School Students.
1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 538

[§ 538] In General.

The concept of separation of church and state (*supra*, §505) has been tested and applied in a number of important cases dealing with aid to private schools. (See *Wilson v. State Bd. of Education* (1999) 75 C.A.4th 1125, 1142, 89 C.R.2d 745 [operation of charter schools by religious sects does not violate constitutional prohibitions against public appropriations in aid of sectarian purposes or institutions (Cal. Const., Art. XVI, §5 and Cal. Const., Art. IX, §8, *supra*, §505) because Charter Schools Act requires that schools themselves be nonsectarian, and provides for revocation of charter if school becomes sectarian]; on furnishing transportation, see *infra*, §539; on lending textbooks, see *infra*, §§540, 541; on financial assistance, see *infra*, §542 et seq.)

Commentary on this subject has been extensive. (See 5 Rotunda, §21.4; 2 Tribe, §§14-10, 14-11; 75 *Cal. L. Rev.* 5 [The Establishment Clause and Aid to Parochial Schools--An Update]; 3 *Pepperdine L. Rev.* 279 [development of guideline for assessing acceptable church-state relationships]; 23 *Santa Clara L. Rev.* 587 [Aid to Parochial Schools: A Free Exercise Perspective]; 28 *San Diego L. Rev.* 263 [Parochial School Aid Revisited: the Lemon Test, the Endorsement Test and Religious Liberty]; 9 *Southwestern L. Rev.* 1211 [State Aid to Parochial Schools]; 37 *Stanf. L. Rev.* 219 [Supreme Court and aid to parochial education]; 43 *A.L.R.4th* 776 [validity of local or state denial of public school courses or activities to private or parochial school students]; 78 *A.L.R.5th* 133 [school choice programs after *Lemon v. Kurtzman*].)

West's Key Number Digest, Constitutional Law k.84.5(5)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Rotunda 4th, §21.4.



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E. Aid to Private Schools or Private School Students.
2. Furnishing Transportation.

7 *Witkin Sum. Cal. Law Const Law* § 539

[§ 539] Furnishing Transportation.

In *Everson v. Board of Education of Ewing Township* (1947) 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, a New Jersey statute allowed local school districts to provide for transportation of children to and from schools, including nonprofit private schools. Pursuant to the statute, defendant board authorized reimbursement to parents of money paid for fares on buses operated by the local transportation system. Plaintiff taxpayer challenged the constitutionality of these payments to parents of children attending Catholic parochial schools. *Held*, the expenditure was valid.

(a) It was not a prohibited use of tax money for a private purpose (see 9 *Summary* (10th), *Taxation*, §16). (67 S.Ct. 510, 91 L.Ed. 718.)

(b) It did not "breach the wall" of separation between church and state because parochial schools were accredited under the state's compulsory education laws, and protection of the children attending them from the hazards of traffic was justifiable under the same considerations that support police and fire protection and other governmental services. (67 S.Ct. 516, 91 L.Ed. 724.) (See *Bowker v. Baker* (1946) 73 C.A.2d 653, 666, 167 P.2d 256 [decided prior to *Everson*, sustaining statute allowing private school pupils to ride on regular public school buses, where seats are available]; 5 Rotunda, §21.4(a); 41 A.L.R.3d 344 [Constitutionality, Under State Constitutional Provision Forbidding Financial Aid to Religious Sects, of Public Provision of Schoolbus Service for Private School Pupils].)

West's Key Number Digest, Constitutional Law k.84.5(5)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Rotunda 4th, §21.4(a).



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E. Aid to Private Schools or Private School Students.

3. Lending Textbooks and Equipment.

a. United States Supreme Court Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 540

[§ 540] United States Supreme Court Decisions.

Board of Education of Cen. School Dist. No. 1 v. Allen (1968) 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060, upheld a New York statute authorizing the lending of textbooks to public and private school students. The test, said the Court, is the purpose and primary effect of the law.

(a) Its stated purpose is furtherance of educational opportunities of the young. Its effect is to give financial benefits to parents and children, not to schools. Perhaps the law makes it more likely that some children will choose to attend parochial school, but the same was true of paid bus fares in *Everson v. Board of Education of Ewing Township* (1947) 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, supra, §539. (88 S.Ct. 1926, 20 L.Ed.2d 1065.)

(b) As to the contention that books are part of the teaching process, so that the law aids in teaching religion: Secular teaching in a private school can be distinct from religious education, and parochial schools perform the task of secular education. (88 S.Ct. 1928, 20 L.Ed.2d 1066.)

Two dissenting justices saw nothing but trouble ahead: (1) The law is a "flat, flagrant, open violation" of the Constitution, totally unsupported by any case. Bus or streetcar fares of all children, lunches, police protection, etc., are distinct from books, the essential tool of education. Tax funds cannot be used to buy books, erect buildings, or pay teachers of private schools. (88 S.Ct. 1931, 20 L.Ed.2d 1069.) (2) The inevitable result is that parochial school heads will seek books on economics, history, embryology, etc., slanted to religious ideas. (88 S.Ct. 1933, 20 L.Ed.2d 1072.) (3) "[D]espite transparent camouflage that the books are furnished to students, the reality is that they are selected and their use is prescribed by the sectarian authorities." The program is "hand-tailored to satisfy the specific needs of sectarian schools." (88 S.Ct. 1941, 20 L.Ed.2d 1081.) (See *Meek v. Pittenger* (1975) 421 U.S. 349, 95 S.Ct. 1753, 1760, 44 L.Ed.2d 217, 230 [following *Allen*]; *Wolman v. Walter* (1977) 433 U.S. 229, 97 S.Ct. 2593, 2600, 53 L.Ed.2d 714, 726 [following *Allen* and *Meek*]; 5 Rotunda, §21.4(a); 2 Tribe, §14-10; 82 Harv. L. Rev. 172; 5 Pepperdine L. Rev. 573; cf. *Norwood v. Harrison* (1973) 413 U.S. 455, 93 S.Ct. 2804, 2813, 37 L.Ed.2d 723, 735 [Mississippi plan for loan of state-purchased books to private schools was valid only with certification procedure ensuring against racial and religious discrimination].)

In *Mitchell v. Helms* (2000) 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660, the receipt of "Chapter 2" federal aid

by parochial schools was challenged as a violation of the Establishment Clause. Under Chapter 2 (20 U.S.C., §7301 et seq.), the federal Government distributes funds to state and local governmental agencies, which then lend educational materials and equipment to public and private schools based on the enrollment of each participating school. *Held*, Chapter 2 is not an establishment of religion.

(a) *Conflict in case law*. Conflict in the case law requires clarification. In *Meek v. Pittenger* and *Wolman v. Walter*, supra, the Court held that providing the same sorts of materials involved here was unconstitutional, although it did uphold providing textbooks. (120 S.Ct. 2538, 147 L.Ed.2d 672.) On the other hand, providing a sign language interpreter to a deaf student at a Catholic school was upheld in *Zobrest v. Catalina Foothills School Dist.* (1993) 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1, infra, §549. (120 S.Ct. 2538, 147 L.Ed.2d 672.) Providing public employees to teach remedial classes at private schools, including religious schools, was upheld in *Agostini v. Felton* (1997) 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391, infra, §545. (120 S.Ct. 2539, 147 L.Ed.2d 673.) "Meek and Wolman are anomalies in our case law. We therefore conclude that they are no longer good law." (120 S.Ct. 2540, 147 L.Ed.2d 675.)

(b) *Principle of neutrality*. "[T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." (120 S.Ct. 2541, 147 L.Ed.2d 675.) In determining whether there is any state indoctrination, "we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." (120 S.Ct. 2541, 147 L.Ed.2d 675.) Thus, "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, ... then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients." (120 S.Ct. 2541, 147 L.Ed.2d 676.)

(c) *Private choices of individuals*. It is important whether "any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private actions of individuals.'" (120 S.Ct. 2541, 147 L.Ed.2d 676, quoting *Agostini*.) "For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, ... and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones." (120 S.Ct. 2541, 147 L.Ed.2d 676.)

(d) *No incentive to undertake religious indoctrination*. "[S]imply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini's* second criterion, an 'incentive' for parents to choose such an education for their children. For any aid will have some such effect." (120 S.Ct. 2543, 147 L.Ed.2d 679.)

(e) *Diversion of aid to religious use*. The fact that Chapter 2 aid may be divertible to a religious use is not determinative. (120 S.Ct. 2547, 147 L.Ed.2d 682.) The issue is "whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist if aid is actually diverted to religious uses." (120 S.Ct. 2548, 147 L.Ed.2d 684.)

Two justices concurred, questioning the plurality's (1) treatment of neutrality as coming close to singular importance in future adjudications on challenges to school aid, and (2) approval of actual diversion of governmental aid to religious indoctrination, which was unnecessary to decide here. (120 S.Ct. 2556, 147 L.Ed.2d 693.) Three justices joined in a lengthy dissent (120 S.Ct. 2572, 147 L.Ed.2d 713), objecting to the plurality's espousing "a new conception of neutrality as a practically sufficient test of constitutionality that would ... eliminate enquiry into a law's effects." (120 S.Ct. 2573, 147 L.Ed.2d 714.) (See 114 Harv. L. Rev. 239 [*Mitchell v. Helms*]; 22 J. Juvenile Law 180 [same]; 28

Pepperdine L. Rev. 681 [State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression].)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Rotunda 4th, §21.4(a).



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E. Aid to Private Schools or Private School Students.

3. Lending Textbooks and Equipment.

b. California Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 541

[§ 541] California Decisions.

Former Educ.C. 60315 authorized the Superintendent of Public Instruction to lend textbooks used in the public schools to students attending nonprofit, nonpublic schools. In *California Teachers Assn. v. Riles* (1981) 29 C.3d 794, 176 C.R. 300, 632 P.2d 953, the court reviewed the U.S. Supreme Court decisions at length (29 C.3d 801 et seq.) and found them irreconcilable (29 C.3d 807 et seq.). The two prior California cases dealing with our own Constitution (*Bowker v. Baker* (1946) 73 C.A.2d 653, 167 P.2d 256, and *California Educational Facilities Authority v. Priest* (1974) 12 C.3d 593, 116 C.R. 361, 526 P.2d 513, *infra*, §548) were examined (29 C.3d 804, 813, footnote 16), and the statute was held violative of Cal. Const., Art. IX, §8 (prohibiting appropriation of public money for support of sectarian schools) and Cal. Const., Art. XVI, §5 (prohibiting appropriation in aid of sectarian purpose).

"By providing textbooks at public expense, the loan program appropriates money to advance the education function of the school. ... In this respect the program is distinguishable from 'generalized services government might provide to schools in common with others', ... such as fire and police protection, the maintenance of roads and sidewalks, and similar public services. These services, unlike education, have no doctrinal content, and they do not advance the essential objective of the sectarian school, which is the education of the child." (29 C.3d 811.) And the California constitutional provisions "do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction." (29 C.3d 812.) (See 70 Cal. L. Rev. 959 [Riles]; 10 Hastings Const. L. Q. 433 [same].)

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E. Aid to Private Schools or Private School Students.

4. Financial Assistance.

a. Development of Law.

7 *Witkin Sum. Cal. Law Const Law* § 542

[§ 542] Development of Law.

The approval of aid in the form of furnishing transportation and lending textbooks (see *supra*, §539 et seq.) inspired legislative efforts to offer more direct forms of financial assistance to private schools. (See 77 *Harv. L. Rev.* 1353; 81 *Harv. L. Rev.* 513, 1465; 82 *Harv. L. Rev.* 168; 56 *Cal. L. Rev.* 260; 24 *Santa Clara L. Rev.* 947 [constitutionality of former statute authorizing private school pupils to enroll in public vocational shop and science classes].) In a series of decisions of the U.S. Supreme Court, most of these efforts initially were held invalid. (See *Meek v. Pittenger* (1975) 421 U.S. 349, 95 S.Ct. 1753, 1764, 44 L.Ed.2d 217, 232 [Pennsylvania statute providing for loan of instructional material and equipment; invalid]; *Wolman v. Walter* (1977) 433 U.S. 229, 97 S.Ct. 2593, 2607, 2608, 53 L.Ed.2d 714, 734, 735 [following *Meek*; instructional materials and equipment, field trips; invalid].) However, more recently the Court approved providing a sign language interpreter to a deaf student at a Catholic school (see *Zobrest v. Catalina Foothills School Dist.* (1993) 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1, *infra*, §549) and providing public employees to teach remedial classes at private, including religious, schools (see *Agostini v. Felton* (1997) 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391, *infra*, §545). And *Meek v. Pittenger* and *Wolman v. Walter*, *supra*, were overruled. (*Mitchell v. Helms* (2000) 530 U.S. 793, 120 S.Ct. 2530, 2540, 147 L.Ed.2d 660, 675, *supra*, §540 [upholding receipt of Chapter 2 federal aid by parochial schools].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Financial Assistance.

b. Money for Salaries and Books.

7 *Witkin Sum. Cal. Law Const Law* § 543

[§ 543] Money for Salaries and Books.

In *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, Rhode Island and Pennsylvania adopted programs for furnishing money to secondary and elementary schools for teachers' salaries, textbooks, and instructional materials. Under both statutes, the aid was given to church-related schools, though only for "secular" instruction. *Held*, the statutes were unconstitutional. Teachers in parochial schools cannot in practice remain neutral in respect of teaching religious doctrine. (91 S.Ct. 2114, 2117, 29 L.Ed.2d 761, 673.) (See 85 *Harv. L. Rev.* 167 [*Lemon*]; 23 *Hastings L. J.* 966 [same]; 24 *Stanf. L. Rev.* 687 [same]; for *Lemon* three-part test to determine validity of statutes giving public aid to sectarian educational institutions, see *supra*, §507.)

Former Educ.C. 69790 et seq., authorizing annual payments of \$ 12,000 to private colleges and universities maintaining medical schools for each student enrolled in the program, was held unconstitutional in *Board of Trustees v. Cory* (1978) 79 C.A.3d 661, 145 C.R. 136. The statute was found to be in direct conflict with Cal. Const., Art. IX, §8 (79 C.A.3d 664, 666); and *California Educational Facilities Authority v. Priest* (1974) 12 C.3d 593, 116 C.R. 361, 526 P.2d 513, *infra*, §548, was distinguished on the ground that a subsidy to the school cannot be characterized as an "incidental" benefit (79 C.A.3d 667).

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4. Financial Assistance.

c. Grants for Special Purposes.

7 *Witkin Sum. Cal. Law Const Law* § 544

[§ 544] Grants for Special Purposes.

(1) *Grants for Maintenance and Repair.* The New York statute considered in *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948, *infra*, §546, provided funds to private elementary and secondary schools for "maintenance and repair" of school facilities and equipment. *Held*, the statute was unconstitutional. Pointing out that virtually all of the schools involved were parochial, and that it was impossible to restrict payments to upkeep of facilities used exclusively for secular purposes (93 S.Ct. 2966, 37 L.Ed.2d 963), the Court concluded that the inevitable effect of the program was "to subsidize and advance the religious mission of sectarian schools." (93 S.Ct. 2969, 37 L.Ed.2d 967.)

(2) *Grant for Testing and Record Keeping.* In *Levitt v. Committee for Public Education & Religious Liberty* (1973) 413 U.S. 472, 93 S.Ct. 2814, 37 L.Ed.2d 736, a New York statute provided funds to private schools for expenses of tests and examinations of pupils, and maintenance of records of pupil enrollment, health, and personnel qualifications and characteristics. *Held*, the statute was subject to the same constitutional objections as in *Nyquist*. Despite the integral role of testing in the teaching process, "no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instructions." (93 S.Ct. 2819, 37 L.Ed.2d 742.) (Cf. *Committee for Public Education & Religious Liberty v. Regan* (1980) 444 U.S. 646, 100 S.Ct. 840, 848, 63 L.Ed.2d 94, 107 [upholding New York statute authorizing use of public funds to reimburse private schools for performing state-mandated testing and reporting services].)

(3) *Noncategorical Grants.* In *Roemer v. Board of Public Works of Maryland* (1976) 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179, 192, a plurality opinion upheld a state statute providing for annual noncategorical grants to private colleges, including religiously affiliated institutions, subject to the restriction that the funds not be used for "sectarian purposes." (See 90 *Harv. L. Rev.* 133.)

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4. Financial Assistance.

d. Shared Time of Public School Teacher.

7 *Witkin Sum. Cal. Law Const Law* § 545

[§ 545] Shared Time of Public School Teacher.

(1) *Earlier Cases.* *School Dist. of Grand Rapids v. Ball* (1985) 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267, held that the Community Education and Shared Time programs of a Michigan school district violated the Establishment Clause. Each program provided classes for nonpublic school students financed by the public school system, taught by teachers hired by the public school system, and conducted in leased classrooms in the nonpublic schools, most of which were sectarian religious schools. The secular purpose of the instruction was not challenged. But the religious school students spend their school day moving between "religious-school" and "public-school" classes, both conducted in the same religious-school building and largely composed of students who are adherents of the same denomination.

"[T]he challenged programs have the effect of promoting religion in three ways. The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." (105 S.Ct. 3230, 87 L.Ed.2d 286.)

Two justices dissented (105 S.Ct. 3231, 87 L.Ed.2d 288), and two others concurred in part and dissented in part (105 S.Ct. 3230, 87 L.Ed.2d 287). (See companion case of *Aguilar v. Felton* (1985) 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290; 99 Harv. L. Rev. 173.)

(2) *Prior Cases Overruled.* In *Agostini v. Felton* (1997) 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391, the Court overruled its prior holding in *Aguilar, supra*, which barred sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. Plaintiffs (the Board of Education and a new group of parents of parochial school students), bound by the injunction in *Aguilar*, sought relief based on inconsistent, intervening Establishment Clause jurisprudence. The Court also overruled that portion of its holding in *Grand Rapids*, addressing its shared time program. (117 S.Ct. 2016, 138 L.Ed.2d 422.)

(a) *Change in criteria used.* "Our more recent cases have undermined the assumptions on which *Grand Rapids* and

Aguilar relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. ... What has changed ... is our understanding of the criteria used to assess whether aid to religion has an impermissible effect." (117 S.Ct. 2010, 138 L.Ed.2d 414.) First, the Court has abandoned the presumption "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." (117 S.Ct. 2010, 138 L.Ed.2d 414, discussing *Zobrest v. Catalina Foothills School Dist.* (1993) 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1, *infra*, §549.) Second, the Court has "departed from the rule relied on in *Grand Rapids* that all government aid that directly aids the educational function of religious schools is invalid." (117 S.Ct. 2010, 138 L.Ed.2d 415, discussing *Witters v. Washington Dept. of Services for the Blind* (1986) 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, *infra*, §549.)

(b) *No impermissible financing of religion.* A program placing full-time public employees on parochial campuses to provide federally mandated remedial instruction does not impermissibly finance religious indoctrination. The program makes aid available only to eligible students, which aid is supplemental to the regular curricula, and does not relieve "sectarian schools of costs they otherwise would have borne in educating their students." (117 S.Ct. 2013, 138 L.Ed.2d 417, quoting *Zobrest*.)

(c) *No incentive to modify religious beliefs.* Neither *Grand Rapids* nor *Aguilar* gave weight to the neutral, secular criteria, that neither favor nor disfavor religion, under which aid is allocated, i.e., aid is available to both religious and secular beneficiaries on a nondiscriminatory basis. Therefore, the program does not give aid recipients any incentive to modify their religious beliefs or practices to obtain the program's services. (117 S.Ct. 2014, 138 L.Ed.2d 419, 420.)

(d) *No excessive entanglement between Church and State.* The Court's finding of "excessive" entanglement in *Aguilar* rested on three grounds: (a) the program would require "pervasive monitoring by public authorities" to ensure that employees did not inculcate religion; (b) it required "administrative cooperation" between the Board and parochial schools; and (c) it might increase the dangers of "political divisiveness." The last two considerations are insufficient by themselves to create an "excessive" entanglement; they are present no matter where the services are offered, and no court has held that they cannot be offered off campus. The assumption underlying the first consideration has been undermined. "In *Aguilar*, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk pervasive monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. ... There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees." (117 S.Ct. 2015, 2016, 138 L.Ed.2d 421.)

Four justices dissented in two separate opinions. (117 S.Ct. 2019, 2026, 138 L.Ed.2d 425, 434.) (See 111 Harv. L. Rev. 279 [Agostini]; 26 Pepperdine L. Rev. 407 [same]; 46 U.C.L.A. L. Rev. 343 [same]; 20 J. Juvenile Law 60 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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VII. FREEDOM OF RELIGION

E. Aid to Private Schools or Private School Students.

4. Financial Assistance.

e. Tuition Reimbursement.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 546

[§ 546] In General.

The New York statute considered in *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948, established a partial tuition reimbursement plan for low-income parents of children attending private elementary or secondary schools. This was held unconstitutional. "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid--to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools--are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." (93 S.Ct. 2971, 37 L.Ed.2d 969.) The form of the grant--reimbursement for tuition paid with no condition attached to use of the funds, rather than a direct subsidy in advance for the special purpose--is immaterial; i.e., the absence of any element of coercion to send children to sectarian schools does not avoid the constitutional ban. "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same." (93 S.Ct. 2972, 37 L.Ed.2d 970.)

In *Sloan v. Lemon* (1973) 413 U.S. 825, 93 S.Ct. 2982, 2986, 37 L.Ed.2d 939, 944, the Court followed *Nyquist* in invalidating a similar tuition reimbursement program established by Pennsylvania law.

However, in *Zelman v. Simmons-Harris* (2002) 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604, the Court upheld an Ohio tuition aid program providing two forms of aid to poor students in a city with a failing public school system. Tuition aid is based on financial need, with the poorest students being given priority and allotted the most aid. Parents choose where to spend the aid, be it in public or private, or secular or sectarian schools. Tutorial aid is provided to children who remain in public schools. The aid is part of a larger program to improve the city's schools, which includes community schools run by their own school boards and public magnet schools that emphasize particular subjects. Per pupil funding for these schools is roughly twice the amount allotted to schools participating in the tuition aid program. *Held*, the program does not have the "effect" of advancing religion in violation of the Establishment Clause.

(a) Past cases have made it "clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." (122 S.Ct. 2467, 153 L.Ed.2d 616.) The program here is neutral towards religion. It is part of a state program to aid all children in a failed school district. The program is open to *all* schools located within the district. Even adjacent schools may participate. Benefits are available "on neutral terms with no reference to religion." The only preference in the program is for low-income families, who are given priority for admission and greater financial assistance. (122 S.Ct. 2467, 2468, 153 L.Ed.2d 617.)

(b) The fact that 96% of the scholarship recipients here enrolled in religious schools is irrelevant. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." (122 S.Ct. 2470, 153 L.Ed.2d 620.) Further, this 96% figure does not include the nearly 15,000 children enrolled in alternative community and magnet schools. (122 S.Ct. 2470, 153 L.Ed.2d 621.)

(c) *Nyquist* "does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." (122 S.Ct. 2472, 153 L.Ed.2d 623.)

Two justices concurred in separate opinions (122 S.Ct. 2473, 2480, 153 L.Ed.2d 623, 632), and four justices dissented in three opinions (122 S.Ct. 2484, 2485, 2502, 153 L.Ed.2d 637, 638, 658.) (See 116 Harv. L. Rev. 163 [Zelman]; 117 Harv. L. Rev. 919 [same]; 31 Cal. Western L. Rev. 193 [The Establishment Clause and School Vouchers; Private Choice and Proposition 174]; 34 Golden Gate L. Rev. 217 [Zelman]; 11 Pacific L. J. 1061 [educational vouchers]; 27 Pepperdine L. Rev. 107 [The Milwaukee Parental Choice Program: A Constitutional Victory for School Choice]; 29 Pepperdine L. Rev. 343 [Cleveland school voucher plan]; 31 Pepperdine L. Rev. 979 [rise of neutrality principle and private choice]; 44 Santa Clara L. Rev. 529 [Zelman]; 44 Santa Clara L. Rev. 699 [review of cases]; 76 So. Cal. L. Rev. 1105 [Zelman].)

SUPPLEMENT: [This section is current through the latest supplement]
See 54 U.C.L.A. L. Rev. 547 [rise and fall of school vouchers].



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VII. FREEDOM OF RELIGION

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4. Financial Assistance.

e. Tuition Reimbursement.

2. State Income Tax Deduction.

7 Witkin Sum. Cal. Law Const Law § 547

[§ 547] State Income Tax Deduction.

Another part of the New York statutory program considered in *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948, supra, §546, gave tax relief to parents who could not qualify for tuition reimbursement. They were permitted to deduct a stipulated sum from adjusted gross income for each child attending a private school; the amount of the deduction was based on taxable income, and not related to the amount of tuition actually paid. This was held unconstitutional, for its purpose and effect were the same as those of the tuition reimbursement plan. The historically approved *tax exemption* for church property is distinguishable. Exemption of church property confers an indirect benefit, but not for the purpose of supporting or subsidizing churches; its object was rather "to minimize involvement and entanglement between Church and State," and its elimination would involve the government in tax valuation of church property, tax liens, tax foreclosures, and other conflicts. (93 S.Ct. 2976, 37 L.Ed.2d 974, quoting *Walz v. Tax Com. of New York* (1970) 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697.) Granting tax benefits, on the other hand, "would tend to increase rather than limit the involvement between Church and State." (93 S.Ct. 2976, 37 L.Ed.2d 975.)

In *Mueller v. Allen* (1983) 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721, the court, distinguishing *Nyquist*, upheld a Minnesota tax deduction to parents for the education of children, in either public or private schools.

(a) The lines of demarcation in this area are difficult to discern. The issue is whether Minnesota's tax deduction "bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down." (103 S.Ct. 3066, 77 L.Ed.2d 727.)

(b) The statute clearly has a secular purpose--to defray the cost of educational expenses incurred by parents regardless of the type of schools their children attend. (103 S.Ct. 3066, 77 L.Ed.2d 728.)

(c) The primary effect of the statute is not to advance the sectarian aims of private schools. The deduction is only one of many in the tax law; it is available to all parents including those whose children attend public schools or nonsectarian private schools; by channeling the assistance through individual parents, the state has reduced the Establishment Clause objections; and parochial schools provide an educational alternative for millions of pupils,

relieving some states of substantial tax burdens incident to operation of public schools. (103 S.Ct. 3067, 77 L.Ed.2d 328.)

(d) The statute does not "excessively tangle" the state in religion. Although state officials must determine whether particular textbooks qualify for a deduction, similar types of decisions have been approved (see *supra*, §§540, 541). (103 S.Ct. 3071, 77 L.Ed.2d 733.)

Four justices dissented, finding no basis for distinguishing *Nyquist*. (103 S.Ct. 3072, 77 L.Ed.2d 734.) (See 97 Harv. L. Rev. 148 [Mueller]; 18 U.S.F. L. Rev. 785 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Financial Assistance.

f. Construction Aid to Colleges

7 *Witkin Sum. Cal. Law Const Law* § 548

[§ 548] Construction Aid to Colleges

In *Tilton v. Richardson* (1971) 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790, the Court upheld the validity of former 20 U.S.C., §701 et seq., which provided construction grants to church related colleges and universities for buildings used exclusively for *secular* educational purposes. The plurality opinion relied on the cases upholding aid for bus transportation, textbook lending, and exemption from church property taxes. (91 S.Ct. 2096, 29 L.Ed.2d 800.) *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, supra, §543, was distinguished on the basis of the significant differences between the two kinds of institutions. The affirmative policy of the precollege church school is to advance faith; college students are less impressionable, and the colleges seek to provide a secular education, without restrictions on faith for admission or faculty opinion, and with no requirement of religious activity. (91 S.Ct. 2099, 29 L.Ed.2d 802.)

A similar result was reached in *Hunt v. McNair* (1973) 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923. A South Carolina statute established an Educational Facilities Authority with power to issue tax-free revenue bonds (not state obligations) to finance construction by colleges of facilities for *purely secular purposes*. The Authority takes title to the property, leases it to the institution, and conveys title when the bonds are discharged; it also has power to make regulations for the use of the facilities and to set rents and fees. *Held*, applying the three tests of *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948, supra, §546 (purpose, effect, and entanglement), the statute was valid.

(a) The *purpose* is manifestly secular; benefits are available to all institutions of higher learning, regardless of religious affiliation. (93 S.Ct. 2873, 37 L.Ed.2d 930.)

(b) The *primary effect*, considered (as in *Tilton*) with respect to the particular institution involved (a Baptist-controlled college with only 60% Baptist student enrollment), will not be to advance or inhibit religion. The Establishment Clause does not prohibit every program that in any manner aids an institution with a religious affiliation, even though aid in one aspect frees it to spend its other resources for religious purposes. The objectionable primary effect of aid occurs "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." (93 S.Ct. 2874, 37 L.Ed.2d 931.) The "state aid" involved here is merely a "governmental

service." There is no expenditure of public funds, and no extending or committing of a state's credit; the only aid consists of creation of an instrumentality through which educational institutions may borrow on their own credit and the security of their own property on more favorable interest terms than otherwise would be available. (93 S.Ct. 2875, 37 L.Ed.2d 932, footnote 7.)

(c) There is no excessive *entanglement*. The issue is closer than in *Tilton* because of the power of the Authority to regulate and fix charges. "[W]ere there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant." (93 S.Ct. 2876, 37 L.Ed.2d 933.) But this case involves a test of constitutionality of the statute as applied to a proposed issue of bonds, and the state Supreme Court has narrowly interpreted it to confine the scope of assistance "to the secular aspects of this liberal arts college." Thus, no excessive entanglement is foreshadowed. (93 S.Ct. 2877, 37 L.Ed.2d 934.)

In *California Educational Facilities Authority v. Priest* (1974) 12 C.3d 593, 116 C.R. 361, 526 P.2d 513, the court upheld the validity of former Educ.C. 30301 et seq. (now Educ.C. 94100 et seq.), which creates an Authority with the power to issue revenue bonds to provide higher educational institutions with the means to establish and expand facilities. The statute enables private colleges to obtain financing at a lower rate of interest because the Authority may issue tax-exempt bonds. (a) *Hunt v. McNair* is controlling. (12 C.3d 600.) (b) No challenge can be based on the California Constitution: e.g., Cal. Const., Art. I, §4, on free exercise of religion, is not violated by this religiously neutral statute; Cal. Const., Art. IX, §8, and former Cal. Const., Art. XII, §24, prohibiting appropriation of money for, or help to, a sectarian school, are not violated by a statute that does not require an appropriation, and that is secular in purpose despite some incidental benefit to sectarian schools. (12 C.3d 603, 605.) (See 95 A.L.R.3d 1000 [state constitutional objections to issuance of revenue bonds to finance construction at private religious-affiliated colleges].)

SUPPLEMENT: [This section is current through the latest supplement]

In *California Statewide Communities Dev. Authority v. All Persons Interested in the Matter of the Validity of a Purchase Agreement* (2007) 40 C.4th 788, 55 C.R.3d 487, 152 P.3d 1070, the court considered the constitutionality of bond financing agreements between a public authority and three religiously affiliated schools that, for purposes of this litigation, the parties assumed to be pervasively religious. The trial court held that the agreements violated Cal. Const., Art. XVI, §5, and the Court of Appeal affirmed. *Held*, reversed and remanded.

(a) The following test, distilled from *California Educational Facilities Authority v. Priest* (1974) 12 C.3d 593, 116 C.R. 361, 526 P.2d 513, text, p. 905, applies in determining whether the issuance of government bonds benefiting religiously affiliated schools violates Cal. Const., Art. XVI, §5: (1) The bond program must serve the public interest and provide no more than an incidental benefit to religion; (2) it must be available to both secular and sectarian institutions on an equal basis; (3) it must prohibit use of bond proceeds for religious projects; and (4) it must not impose a financial burden on the government. (40 C.4th 801.)

(b) The last three requirements were easily satisfied here, but the court remanded the case to the trial court to determine whether the program served the public interest without providing more than an incidental benefit to religion. Because it was assumed that the schools to be benefited here were "pervasively sectarian," the trial court will need to examine the substance of the education that each of the schools offers. (40 C.4th 803, 806.) Each school must provide a broad curriculum in secular subjects, and "the information and coursework used to teach secular subjects must be neutral with respect to religion." (40 C.4th 803, 804.) Further, the schools must not use the facilities built or improved with the bond proceeds for theological or divinity programs or as a place of worship. (40 C.4th 806.)

(c) If the conditions to be met under the California Constitution are satisfied, then the bond program does not violate the *Establishment Clause of the United States Constitution*. (40 C.4th 810.) The test to be applied was set out in *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, text, §507, and refined in *Agostini v. Felton* (1997) 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391, text, §545:

(1) *The government program must have a secular purpose.* Here, once the California constitutional conditions are

satisfied, "the program serves the primary secular purpose of increasing secular educational opportunities for Californians in general." (40 C.4th 811.)

(2) *The government program must not have the impermissible effect of advancing religion.* The issuance of bonds to finance campus improvements does not result in government indoctrination. The schools cannot qualify for bond funding unless they offer a broad curriculum in secular subjects, the content of which is similar to that taught in nonreligious schools. The bond program does not define its recipients by reference to religion. And the government program does not create an excessive entanglement between the state and the schools in question. (40 C.4th 811.) As part of the program, the schools have agreed not to use the funds for religious purposes, and the program provides for the appointment of an independent trustee to monitor their compliance. (40 C.4th 811, 812.)

Three justices joined in a lengthy dissent based on the pervasiveness of religion at the schools in question. (40 C.4th 812.)



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E. Aid to Private Schools or Private School Students.

5. Aid to Disabled Students in Private Schools.

7 *Witkin Sum. Cal. Law Const Law* § 549

[§ 549] Aid to Disabled Students in Private Schools.

(1) *Rehabilitation Assistance.* In *Witters v. Washington Dept. of Services for the Blind* (1986) 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, a Washington statute provided state vocational rehabilitation assistance to the blind. Petitioner, attending a private Christian college to equip himself for a career as a pastor, missionary, or youth director, applied for benefits. The Washington Supreme Court decided that furnishing aid to petitioner would violate the Establishment Clause. *Held*, reversed.

(a) "It is well-settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well-settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in-kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State. ... Aid may have that effect even though it takes the form of aid to students or parents." (106 S.Ct. 751, 88 L.Ed.2d 854.)

(b) Under the Washington program, the money is paid directly to the student, and any aid that ultimately flows to religious institutions does so only as a result of private choices of aid recipients. Thus, the program creates no financial incentive for students to undertake sectarian education, and there was no evidence indicating that any other person had ever sought to finance religious education pursuant to the program. (106 S.Ct. 752, 88 L.Ed.2d 854.) "Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." (106 S.Ct. 753, 88 L.Ed.2d 855.)

(2) *Providing Interpreter.* In *Zobrest v. Catalina Foothills School Dist.* (1993) 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1, petitioner, who had been deaf since birth, asked respondent school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school, pursuant to the Individuals with Disabilities Education Act (IDEA, *infra*, §881). *Held*, the Establishment Clause does not bar the school district from providing an interpreter.

(a) The Supreme Court has never said that religious institutions are disabled from participating in publicly sponsored social welfare programs; if the Establishment Clause did bar religious groups from receiving general

government benefits, a church could not be protected by the police and fire departments or have its public sidewalk kept in repair. "Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit. Nowhere have we stated this principle more clearly than in *Mueller v. Allen* ... , and *Witters v. Washington Dept. of Services for the Blind* ... , two cases dealing specifically with government programs offering general educational assistance." (113 S.Ct. 2466, 125 L.Ed.2d 10.) (For discussion of *Mueller v. Allen* (1983) 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721, see *supra*, §547.)

(b) The reasoning of *Mueller* and *Witters* applies here. "By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision-making. ... Indeed, this is an even easier case than *Mueller* and *Witters* in the sense that, under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers." (113 S.Ct. 2467, 125 L.Ed.2d 11.)

Four justices dissented in two opinions. (113 S.Ct. 2469, 2475, 125 L.Ed.2d 14, 20). (See 107 Harv. L. Rev. 215.)

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F. Other Activities.

1. Work on Religious Holiday.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 550

[§ 550] In General.

(1) *Denial of Unemployment Compensation. Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, held that a state, administering its unemployment compensation law, could not deny benefits to a Seventh-Day Adventist for refusal to accept work on Saturday. The state's ruling "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." (83 S.Ct. 1794, 10 L.Ed.2d 970.) No compelling state interest justifies this infringement. (83 S.Ct. 1795, 10 L.Ed.2d 972.) (See *Hobbie v. Unemployment App. Com. of Florida* (1987) 480 U.S. 136, 107 S.Ct. 1046, 1048, 94 L.Ed.2d 190, 197 [denial of unemployment benefits was invalid where worker was discharged for refusing to work certain hours because of religious convictions adopted after beginning employment]; *Frazee v. Illinois Dept. of Emp. Sec.* (1989) 489 U.S. 829, 109 S.Ct. 1514, 1517, 1518, 103 L.Ed.2d 914, 919, 920 [prior cases invalidating denial of benefits rested on claimants' sincere religious beliefs, not on membership in particular religious sect; hence, benefits may not be denied merely because applicant is not member of established sect or church]; 82 Harv. L. Rev. 327 [*Sherbert*]; 11 U.C.L.A. L. Rev. 423 [same]; 24 U.S.F. L. Rev. 505 [abandoning *Sherbert*].)

(2) *No Right To Choose Sabbath.* In *Estate of Thornton v. Caldor* (1985) 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557, a Connecticut statute provided: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such a day." *Held*, the statute violated the Establishment Clause. It imposed an absolute duty on employers and employees to conform their business practices to the particular religious practices of the employee, taking no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. "This unyielding weighting in favor of Sabbath observers over all other interests" has a primary effect that impermissibly advances a particular religious practice. (105 S.Ct. 2918, 86 L.Ed.2d 563.) (See 36 *Hastings L. J.* 121 [*Thornton*]; 15 *Hastings Const. L. Q.* 513 [same].)

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1. Work on Religious Holiday.

b. Broader Protection Under California Constitution.

7 *Witkin Sum. Cal. Law Const Law* § 551

[§ 551] Broader Protection Under California Constitution.

In *Stimpel v. State Personnel Bd.* (1970) 6 C.A.3d 206, 85 C.R. 797, S was employed by the state as a construction inspector, and his duties often required inspection of work done by a contractor on Saturday. As a Seventh-Day Adventist, he refused to work on Saturday. For some time he was able to find substitutes, but eventually was discharged for being absent without leave. *Held*, the discharge was proper. *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, *supra*, §550, was not controlling because unemployment benefits are available only from the state, while employment as a construction inspector is available in many places. In view of the proliferation of religions and the burden on the employer to accommodate each employee's faith, "if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." (6 C.A.3d 209.) (See *Hildebrand v. Unemp. Ins. App. Bd.* (1977) 19 C.3d 765, 770, 140 C.R. 151, 566 P.2d 1297, 3 *Summary* (10th), *Agency and Employment*, §497 [denial of unemployment benefits upheld where employee voluntarily accepted conflict; *Sherbert v. Verner* distinguished].)

In *Rankins v. Commission on Professional Competence of Ducor Union School Dist.* (1979) 24 C.3d 167, 154 C.R. 907, 593 P.2d 852, B, a member of the Worldwide Church of God, was required to refrain from work on certain holy days. He was employed for some years by the school district as an elementary classroom teacher, and his ability was unquestioned. However, despite denial of requested permission and warnings of dismissal, he was absent in several consecutive years for periods of 8, 5, 8, and 10 days. He was dismissed for persistent refusal to obey the school laws and regulations. A commission on professional competence found that his absences did not have a substantially detrimental effect on the educational program because adequate substitutes took care of his classes, and that dismissal interfered with his free exercise of religion. In the district's mandamus proceeding, the trial judge disagreed, upheld the dismissal, and issued the writ. *Held*, reversed.

(a) Cal. Const., Art. I, §8, provides that a person may not be disqualified from employment because of "creed." Though the district's rules were neutral on their face, their effect was to exclude B from his employment because of his adherence to the precepts of his church. Unless that adherence created an inability to perform the tasks required by the particular occupation, reliance on it for dismissal amounted to disqualification because of religion. (24 C.3d 172.)

(b) The constitutional provision has not been construed, but to implement §703(a)(1) of the federal Civil Rights Act of 1964 (42 U.S.C., §2000e(a)(1)), the Equal Employment Opportunities Commission in 1967 issued guidelines requiring employers "to make reasonable accommodations to employees' religious needs," where this is possible without undue hardship. (24 C.3d 173.) These guidelines, later incorporated into the Act, were applied in a number of cases. "We think that duty also is implied by California's constitutional prohibition of religious disqualification from employment." (24 C.3d 174.)

(c) The record shows that the district failed to make this reasonable accommodation. By statute each teacher is allowed at least 10 days of paid leave for illness or "personal necessity"; the unpaid leave required for B's religious observances would not be unreasonably burdensome. (24 C.3d 175.)

(d) *Hildebrand v. Unemp. Ins. App. Bd.*, *supra*, is distinguishable. B did not voluntarily accept working conditions conflicting with his religion, and the *Hildebrand* opinion did not consider Cal. Const., Art. I, §8. (24 C.3d 176.) *Stimpel v. State Personnel Bd.*, *supra*, predates the adoption of Cal. Const., Art. I, §8, and its categorical rejection of any employer's duty to accommodate an employee's religious practice conflicts with the constitutional provision. (24 C.3d 177.)

(e) To require accommodation of an employee's religious observances does not contravene the Establishment Clause (*supra*, §507); it promotes equal employment opportunities for members of all religious faiths. "[T]he effect of the accommodation is simply to lessen the discrepancy between the conditions imposed on [B's] religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations of regular school calendars. Article I, section 8 does not require full equality of treatment of all employees' religious practices under all circumstances. It does require whatever reduction of inequality of treatment is possible through reasonable steps that do not impose undue hardship on employers." (24 C.3d 178.)

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VII. FREEDOM OF RELIGION

F. Other Activities.

2. Labor Regulations.

7 *Witkin Sum. Cal. Law Const Law* § 552

[§ 552] Labor Regulations.

(1) *Child Labor*. In *Prince v. Massachusetts* (1944) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, the guardian of a child of 9 permitted her to sell religious publications on the street. A conviction for violation of the state child labor law was upheld. Pointing out that the religious freedom of adults in this connection was fully established by prior cases, the Court declared that the power of the state to control the conduct of children so as to safeguard their health and welfare was greater and justified the application of the statute to this activity. (64 S.Ct. 444, 88 L.Ed.2d 654.) (For regulations affecting children and their care giver's free exercise of religion generally, see *supra*, §519.)

(2) *Workers Employed by Religious Organization*. In *Tony & Susan Alamo Foundation v. Secretary of Labor* (1985) 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278, the minimum wage, overtime, and recordkeeping requirements of the federal Fair Labor Standards Act (see 3 *Summary* (10th), *Agency and Employment*, §540) were held applicable to "associates" of petitioner who were engaged in ordinary commercial activities. Petitioner was a religious organization maintaining an evangelistic church, but its income was derived largely from the operation of a number of commercial businesses; and the "associates," though receiving no cash salaries, were provided with food, clothing, shelter, and other benefits. *Held*: (a) Under the "economic reality" test of employment, the "associates" were employees. (105 S.Ct. 1961, 1962, 85 L.Ed.2d 287, 288.) (b) The claim that receipt of "wages" would violate the religious convictions of the "associates" was unconvincing. Even if the Foundation were to pay wages in cash, the "associates" could voluntarily return the money; hence, application of the Act would not interfere with their free exercise of religious beliefs. (105 S.Ct. 1963, 85 L.Ed.2d 289, 290.) (On enforcement of FEHA against religious employer, see *infra*, §918.)

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F. Other Activities.

3. Sunday Closing Laws.

7 *Witkin Sum. Cal. Law Const Law* § 553

[§ 553] Sunday Closing Laws.

In a series of cases, the U.S. Supreme Court upheld the validity of compulsory Sunday Closing Laws, sometimes known as "Blue Laws," against the objection that they violated the guarantee of religious freedom. (See 24 *A.L.R.2d* 813 [Sunday sports]; 10 *A.L.R.4th* 246 [Sunday closing laws]; 27 *A.L.R.4th* 1155 [prohibiting sale of liquor on specific religious holidays].)

McGowan v. Maryland (1961) 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393, involved Maryland statutes prohibiting most types of labor, business, and other commercial activities on Sunday, but containing numerous exceptions, differing in territorial location and kind of activity, and in particular allowing business activities connected with recreational activities at various places. Defendants, employees of a department store, were convicted for the Sunday sale of sundry items. Although they lacked standing to challenge the laws as a prohibition of the free exercise of religion because they alleged only economic injury and did not disclose their religious beliefs, under *Everson v. Board of Education of Ewing Township* (1947) 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, supra, §539, they could raise the "establishment" or "separation of church and state" argument. (81 S.Ct. 1107, 6 L.Ed.2d 401.) But their argument was rejected and the conviction affirmed. The court, on an elaborate review of the history of Sunday closing laws, found that their original religious purpose had given way to a present-day secular objective of a day of rest:

(a) "Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, weekend diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." (81 S.Ct. 1115, 6 L.Ed.2d 410.)

(b) This finding of purpose, however, is crucial. "We do not hold that Sunday legislation may not be a violation of

the 'Establishment' Clause if it can be demonstrated that its purpose--evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect--is to use the State's coercive power to aid religion." (81 S.Ct. 1119, 6 L.Ed.2d 414.) (See *Two Guys From Harrison-Allentown v. McGinley* (1961) 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551, 561 [Pennsylvania law; following *McGowan*]; 75 Harv. L. Rev. 147 [*McGowan*].)

In *Braunfeld v. Brown* (1961) 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563, the Pennsylvania law was challenged by Philadelphia merchants selling clothes and home furnishings. Each was an Orthodox Jew who had to close on Saturday for religious reasons, and thus was unable to do business from Friday night until Monday. The court recognized that many states provide exemptions for members of religious groups who observe a different day of rest, but held that this was not a constitutional requisite. Legislation making a religious practice unlawful would be unconstitutional, but not legislation making it merely more expensive. Thus, the case came within the settled constitutional authority to impose valid indirect restraints.

(a) "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless." (81 S.Ct. 1147, 6 L.Ed.2d 568.)

(b) "Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." (81 S.Ct. 1148, 6 L.Ed.2d 568.) (See *Gallagher v. Crown Kosher Super Market of Massachusetts* (1961) 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536, 544 [Massachusetts law; following *Braunfeld*]; 75 Harv. L. Rev. 149 [*Braunfeld*]; on equal protection attack, see *infra*, §711.)

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VII. FREEDOM OF RELIGION

F. Other Activities.

4. Government-Sponsored Christmas Displays.

a. United States Supreme Court Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 554

[§ 554] United States Supreme Court Decisions.

In *Lynch v. Donnelly* (1984) 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604, the city of Pawtucket, Rhode Island, following a practice of 40 years, included a creche (Nativity scene) in its annual Christmas display. *Held*, this did not violate the Establishment Clause.

(a) The metaphor of the "wall" between church and state (see *supra*, §505) "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." (104 S.Ct. 1359, 79 L.Ed.2d 610.) "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." (104 S.Ct. 1360, 79 L.Ed.2d 611.) Thus, Christmas and Thanksgiving have been proclaimed national holidays in religious terms; our currency contains the national motto "In God We Trust," and the pledge of allegiance refers to "One nation under God"; art galleries supported by public revenues display religious paintings, and the Supreme Court chamber in which oral arguments are heard is decorated with a symbol of religion--Moses with the Ten Commandments; and there are "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." (104 S.Ct. 1360, 1361, 79 L.Ed.2d 611, 612.)

(b) This history helps explain why the Court has declined to take "a rigid, absolutist view" of the Clause; in each case, "the inquiry calls for line drawing; no fixed, *per se* rule can be framed." (104 S.Ct. 1361, 79 L.Ed.2d 613.)

(c) "The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes." (104 S.Ct. 1362, 79 L.Ed.2d 615.) The creche is identified with one religious faith. "It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so 'taint' the City's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol--the creche--at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings." (104 S.Ct. 1365, 79 L.Ed.2d 618.) (See 98 *Harv. L. Rev.* 174; 37 *Hastings L. J.* 499; 19 *Loyola L.A. L. Rev.* 133.)

In *Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* (1989) 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472, involving a holiday display of a creche and a menorah on public property, the Court held that the creche display violated the Establishment Clause but the menorah did not. The lead opinion discussed the analysis set forth in *Lynch* in great detail (109 S.Ct. 3101, 106 L.Ed.2d 495), and explained its conclusion as to the creche as follows:

"In sum, *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause." (109 S.Ct. 3105, 106 L.Ed.2d 500.)

Five justices concurred in the holding and reasoning of the lead opinion; an additional concurrence of three justices was filed (109 S.Ct. 3117, 106 L.Ed.2d 514); and three additional opinions, concurring and dissenting in part, were filed (109 S.Ct. 3124, 3129, 3134, 106 L.Ed.2d 523, 529, 533). (See 103 *Harv. L. Rev.* 228, 229 [observing that "fractured Court provided little guidance for settling disputes in this area"]; 22 *Hastings Const. L. Q.* 29 [suggesting adoption of endorsement test as Establishment Clause test].)

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4. Government-Sponsored Christmas Displays.

b. California Cases.

7 *Witkin Sum. Cal. Law Const Law* § 555

[§ 555] California Cases.

In *Los Angeles v. Hollinger* (1963) 221 C.A.2d 154, 34 C.R. 387, a corporation sought to restore the original significance of Christmas by presenting a religious parade based on biblical scenes. It contracted with Los Angeles County to produce and distribute a film of the parade for \$ 3,500, payable to it from the County Exploitation Fund. *Held*, the contract was invalid. *Govt.C. 26100* authorizes use of tax money by the Board of Supervisors to advertise the county, etc., for the purpose of inducing immigration and increasing trade. But the Constitution (former Cal. Const., Art. IV, §30, now Cal. Const., Art. XVI, §5, *supra*, §505) prohibits the payment of public money in aid of any sectarian purpose. Because the purpose of the parade is clearly sectarian, the contrary determination of the Board can be disregarded. (221 C.A.2d 160.)

In *Fox v. Los Angeles* (1978) 22 C.3d 792, 150 C.R. 867, 587 P.2d 663, Los Angeles city officials for many years had authorized the illumination of a large cross on the city hall on Christmas holidays and Easter Sundays. In a taxpayer's suit, the trial court issued an injunction against the display. *Held*, affirmed, on California constitutional grounds. (a) Several state and federal courts have approved similar displays, some relying on state constitutional provisions different from those of *California*. (22 C.3d 795.) (b) Cal. Const., Art. I, §4 states that free exercise and enjoyment of religion "without discrimination or preference" are guaranteed. Preference thus is forbidden even when there is no discrimination; and there is preference when only the Latin cross is displayed. (22 C.3d 797.)

Two justices concurred (22 C.3d 799), and two justices dissented (22 C.3d 813, 822). (See 68 Cal. L. Rev. 666; 11 Southwestern L. Rev. 713; 107 A.L.R.5th 1 [display of religious symbols on public property].)

In *Okrand v. Los Angeles* (1989) 207 C.A.3d 566, 254 C.R. 913, the court, following *Lynch v. Donnelly* (1984) 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604, *supra*, §554, held that an unlit menorah located near a decorated Christmas tree in the rotunda of city hall did not violate the *Establishment Clause*. (207 C.A.3d 568, 572.)

(a) "What clearly is suggested is that the city has illustrated its diversity, as well as its international and cultural eminence, by the variety of rotunda displays it permits. ... Indeed, it appears to us that the inclusion of the Katowitz Menorah during the winter holiday period promotes an image of a local government that is impartial toward religions. No one suggests, for example, that the inclusion of the African icons as ornaments during a prior holiday season

constituted an endorsement of African religious faiths. The winter holiday season is important not only to the Christian citizens of Los Angeles who celebrate Christmas but to the Jewish citizens who coincidentally celebrate Chanukah." (207 C.A.3d 574.)

(b) *Fox v. Los Angeles* is distinguishable. In the present case the city did not exhibit a preference for a religion, there was comparable recognition of other religious symbols, the menorah stood unlit in a corner occupied by a decorated Christmas tree, and the candelabra does not focus attention on a religious doctrine in the manner of a cross. (207 C.A.3d 579, 580.)

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F. Other Activities.

4A. (New) Other Government-Sponsored Religious Displays.

7 *Witkin Sum. Cal. Law Const Law* § 555A

[§ 555A] (New) Other Government-Sponsored Religious Displays.

In *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005) 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729, two Kentucky counties installed framed copies of the Ten Commandments, including citations to the Book of Exodus, in highly visible areas of their respective courthouses. After plaintiff received injunctive relief ordering the removal of the displays for violating the Establishment Clause, the counties installed new displays, which added eight other religiously themed documents in smaller frames. These displays also were ordered removed, with the direction that no similar displays be erected. The counties each then installed a third display which included framed copies of the Ten Commandments along with framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection was entitled "The Foundations of American Law and Government Display," and each document came with a statement about its historical and legal significance. *Held*, preliminary injunction affirmed. The counties' purpose in installing the displays is a sound basis for ruling on the Establishment Clause complaints, and the evolution of the displays should be considered in determining the counties' claim of a secular purpose. (125 S.Ct. 2728, 162 L.Ed.2d 740.)

(a) As stated in *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, text, §507, one of the factors to be considered in evaluating an Establishment Clause claim is whether the government action has a "secular legislative purpose." (125 S.Ct. 2732, 162 L.Ed.2d 746.) The primary consideration in this analysis is government neutrality. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." (125 S.Ct. 2733, 162 L.Ed.2d 746.)

(b) Although the courts will generally defer to a legislature's stated purpose, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." (125 S.Ct. 2735, 162 L.Ed.2d 749.) Here, the original display was unmistakably a religious statement. (125 S.Ct. 2739, 162 L.Ed.2d 752.) At the ceremony posting the framed Commandments in one of the counties, the county executive was accompanied by his pastor, who spoke on the existence of *God*. (125 S.Ct. 2738, 162 L.Ed.2d 752.) The second display still focused on religious passages, showing that the counties posted the Commandments "precisely because of their sectarian content." In trying to lift the preliminary injunction after posting the third display, the counties cited one of their purposes as trying to educate the citizenry on documents playing a significant role in our law and government. (125 S.Ct. 2739, 162 L.Ed.2d 753.) But

this statement was "presented only as a litigating position," without further authorizing action by the counties' governing board. "And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second display passed just months earlier were not repealed or otherwise repudiated." Further, there was enhanced religious expression in the use of purely religious language in the version of the Commandments used in the third display. And the selection of the other posted material did not "suggest a clear theme that might prevail over evidence of the continuing religious object." (125 S.Ct. 2740, 162 L.Ed.2d 754.)

(c) "In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context." (125 S.Ct. 2741, 162 L.Ed.2d 755.)

(d) "Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. ... [O]ur own courtroom frieze was deliberately designed ... to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion." (125 S.Ct. 2741, 162 L.Ed.2d 755.)

Three justices joined in a lengthy dissent, and one justice joined in part of that dissent. (125 S.Ct. 2748, 162 L.Ed.2d 762.) (See 119 Harv. L. Rev. 258 [McCreary County, Kentucky].)

A monument displaying the Ten Commandments on the grounds of the Texas State Capitol was held, by a divided court, not to violate the Establishment Clause in *Van Orden v. Perry* (2005) 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607. The monument was presented to Texas by a fraternal order in 1961, and stands among 16 other monuments and 21 historical markers commemorating the people and ideals of Texas. In the lead opinion, four justices declined to follow the *Lemon* test in this fact situation. The Court compared the monument to other acceptable displays in government buildings, like the depiction of Moses holding tablets revealing portions of the Ten Commandments in the United States Supreme Court and the statue of Moses holding the Ten Com- mandments in the rotunda of the *Library of Congress' Jefferson Building*. (125 S.Ct. 2862, 162 L.Ed.2d 618.) "Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning" in addition to religious significance. "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." (125 S.Ct. 2863, 162 L.Ed.2d 619.)

One justice concurred in the judgment (125 S.Ct. 2868, 162 L.Ed.2d 624), and four justices dissented in three opinions (125 S.Ct. 2873, 2891, 2892, 162 L.Ed.2d 631, 651). (See 94 Cal. L. Rev. 1243 [Ten Commandments cases]; 119 Harv. L. Rev. 248 [Van Orden].)

See *Paulson v. Abdelnour* (2006) 145 C.A.4th 400, 423, 51 C.R.3d 575 [discussing *McCreary* and *Van Orden*, and applying *Lemon* test; proposition providing for transfer of hilltop war memorial, which included large cross, from city to federal Government, that was necessitated by federal decision holding that cross was unconstitutional preference of religion, did not violate federal or state Establishment Clause; although memorial would continue to be maintained by veterans' group, there was no agreement that cross would be retained, there was no evidence that transfer was sham designed to retain cross, and 76% of voters approved transfer]; 26 A.L.R.6th 145 [State Constitutional Challenges to the Display of Religious Symbols on Public Property].

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F. Other Activities.
5. State Religious Holiday.

7 *Witkin Sum. Cal. Law Const Law* § 556

[§ 556] State Religious Holiday.

Govt.C. 6700 designates certain days as "holidays in this state," and other statutes require closing public offices on those days (see *Govt.C. 6703, 11020*). *Govt.C. 6700(n)* specifies "Good Friday from 12 noon until 3 p.m.," and *Govt.C. 6700(o)* specifies "[e]very day appointed by the President or Governor for a ... holiday." *Govt.C. 19853* provides that state employees are entitled to time off on certain designated holidays with pay. Pursuant to the power vested by these statutes, state Governors for some time issued executive orders for closing state offices on Good Friday between 12 noon and 3 p.m., with paid time off for state employees.

In *Mandel v. Hodges* (1976) 54 C.A.3d 596, 127 C.R. 244, plaintiff sought declaratory and injunctive relief, challenging the constitutionality of the legislation and the executive action. The complaint charged that designating Good Friday as a holiday without a similar designation of non-Christian holidays such as Yom Kippur violated the establishment provisions of the federal and state Constitutions. *Held*, judgment granting injunction affirmed.

(a) *Federal Constitution*. Under the three-part test of *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948, supra, §544, the Governor's executive action was unconstitutional. (1) It could not be justified on the theory of the Sunday Closing Law cases as a provision for a period of relaxation and rest (see supra, §553); Good Friday is a wholly religious day that has not become secularized, and the order therefore wholly lacked a secular purpose. (54 C.A.3d 612.) (2) The primary effect of the order was to advance religion by affording opportunity for and encouraging acts of worship. (54 C.A.3d 614.) (3) The order was an "excessive entanglement with religion." Thousands of state employees were given time off from work and many members of the public were denied access to state offices during the period. (54 C.A.3d 615.)

(b) *California Constitution*. The California Constitution has independent force (see supra, §178), and the order violates the provisions of Cal. Const., Art. I, §4 (supra, §505), guaranteeing free exercise of religion "without discrimination or preference." Appointment of an exclusively Christian holy day as a paid holiday "amounts to 'discrimination' against all non-Christian religions and 'preference' of those which are Christian." (54 C.A.3d 617.)

(c) *Unconstitutionality of legislation*. Although the principal challenge was to the executive order, the underlying legislation is also unconstitutional. On their face, the statutes providing for time off on designated holidays merely authorized the declaration of holidays; but "they have been unconstitutionally *applied* by the Governor with respect to

Good Friday because of the constitutional proscriptions applicable to that day as a 'wholly religious day.' " (54 C.A.3d 618.) And the Good Friday statute, although without operative effect until the Governor acts under it, is unconstitutional on its face in designating a religious holiday as a state holiday. (54 C.A.3d 618.) (See 90 A.L.R.3d 752 [validity of provision making day of religious observance a legal holiday].)

Mandel v. Hodges was distinguished in *California School Employees Assn. v. Sequoia Union High School Dist.* (1977) 67 C.A.3d 157, 136 C.R. 594. An agreement negotiated by plaintiff school employees' union with defendant school district designated March 28, 1975 (Good Friday) as a paid holiday. *Held*, the agreement was valid and enforceable.

(a) State statutes authorize union representatives to engage in these negotiations and vest authority in the trustees to approve the holidays chosen. But neither statute encourages the choice of Good Friday over any other holiday; the discretionary authority to request such days rested primarily with a nongovernmental entity. Thus, the constitutional infirmity in *Mandel* (governmental action by chief executive of the state) is absent. (67 C.A.3d 160.)

(b) In *Mandel*, the closing was from 12 noon to 3 p.m. for purely religious purposes. Here, the entire day was made a holiday, and secular considerations may have entered into its choice by the union representatives; e.g., giving classified employees a longer spring vacation. (67 C.A.3d 161.)

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CHAPTER X - Constitutional Law

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VII. FREEDOM OF RELIGION

F. Other Activities.

6. Patriotic Message on License Plates.

7 *Witkin Sum. Cal. Law Const Law* § 557

[§ 557] Patriotic Message on License Plates.

In *Wooley v. Maynard* (1977) 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752, members of Jehovah's Witnesses challenged a New Hampshire statute that (1) requires noncommercial vehicles to bear license plates embossed with the state motto, "Live Free or Die"; and (2) as construed by the state court, makes it a misdemeanor to cover up the motto. The challenger's affidavit stated: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent." *Held*, the statute was invalid.

(a) It required the automobile owner to use his private property as a "mobile billboard" for constant display of the state's ideological message. This brings it within the principle declared in the flag salute case, *West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, *supra*, §536. (97 S.Ct. 1435, 51 L.Ed.2d 762.)

(b) The state's countervailing interests in facilitating identification of passenger vehicles (commercial vehicles are not required to display the motto) and in promoting appreciation of history, individualism, and state pride, are not sufficiently compelling to outweigh the individual's First Amendment right to avoid becoming courier for the message. (97 S.Ct. 1436, 51 L.Ed.2d 764.)

Two justices took a different view, arguing that there is no required affirmation of belief in being compelled to carry a certain kind of license plate; and they added: "The fact that an atheist carries and uses U.S. currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God We Trust.' " (97 S.Ct. 1439, 51 L.Ed.2d 767.) (See 5 *Hastings Const. L. Q.* 392; 15 *San Diego L. Rev.* 815.)

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VIII. PRIVACY

A. Rights Under Federal Constitution.

1. Theory of Peripheral Rights Doctrine.

7 *Witkin Sum. Cal. Law Const Law* § 558

[§ 558] Theory of Peripheral Rights Doctrine.

The "forgotten Ninth Amendment" states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, a majority of the Court revived this declaration to support the creation of "peripheral rights" not expressly mentioned in the Bill of Rights. A Connecticut statute made it a crime to use a device to prevent conception, and punished as an accessory, one who assisted in the offense. G and B, officers of the Planned Parenthood League, gave medical advice on contraceptive devices to married persons, and were convicted. *Held*, reversed; the statute was an unconstitutional invasion of the right of marital privacy. The several opinions, however, differ in their reasoning and conclusions:

(a) *The first opinion* (four justices). "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." (85 S.Ct. 1681, 14 L.Ed.2d 514.) Thus, the right of freedom of speech includes not only utterance and printing, but the right to distribute, receive, and read, and freedom of inquiry, thought, and teaching. (85 S.Ct. 1680, 14 L.Ed.2d 514.) Various guarantees "create zones of privacy," protected from governmental intrusion; one of these is the private marital relationship. "We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." (85 S.Ct. 1682, 14 L.Ed.2d 516.)

(b) *The second opinion* (three of the four on the main opinion). Although the Ninth Amendment has seldom been mentioned in the cases and is not an independent source of rights, it shows a belief of the framers that the first eight Amendments did not exhaust the list. Thus, the Amendment supports the right declared here. "[T]he right of privacy in the marital relation is fundamental and basic--a personal right 'retained by the people' within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States." (85 S.Ct. 1690, 14 L.Ed.2d 524.)

(c) *The third opinion* (one justice concurring in the judgment alone). The approach that seeks to discover a fundamental right protected by the Fourteenth Amendment either in the Bill of Rights or its "penumbra" (the

"incorporation doctrine") is unsound and improperly restricts the reach of Fourteenth Amendment due process. The proper inquiry is whether the challenged statute violates basic values implicit in the concept of ordered liberty (the *Palko* test, supra, §218). (85 S.Ct. 1690, 14 L.Ed.2d 524.) (See also the *fourth opinion*, one justice, similarly concurring.)

Two dissenters argued that the law was silly and offensive but not unconstitutional; that neither the Fourteenth nor the Ninth Amendment supports the ambiguous concept of a right of privacy. (85 S.Ct. 1696 et seq., 14 L.Ed.2d 531 et seq.) (See 79 Harv. L. Rev. 162; 38 Hastings L. J. 305; 7 Hastings Const. L. Q. 777; 15 Hastings Const. L. Q. 81; 1 Lincoln L. Rev. 28 [birth control and right of privacy]; 1 Lincoln L. Rev. 149 [birth control and due process]; 31 Loyola L.A. L. Rev. 907 [privacy and due process rights of de facto competent minors]; 20 Southwestern U. L. Rev. 349 [Sleeping Giant: The Ninth Amendment and Criminal Law].)

The "penumbra" theory of *Griswold v. Connecticut* was invoked in a number of later cases dealing with various aspects of the newly recognized "right of privacy." (See *Eisenstadt v. Baird* (1972) 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349, infra, §560; *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, infra, §561; *People v. Belous* (1969) 71 C.2d 954, 963, 80 C.R. 354, 458 P.2d 194, infra, §561; *Carmel-By-The-Sea v. Young* (1970) 2 C.3d 259, 266, 85 C.R. 1, 466 P.2d 225, 1 Summary (10th), Contracts, §650 [statute requiring public officers and candidates to file statement of investments over \$ 10,000]; *American G.I. Forum v. Miller* (1990) 218 C.A.3d 859, 864, 267 C.R. 371 [right of privacy under Federal Constitution does not extend to immigration status or dissemination of arrest information]; *Los Altos v. Barnes* (1992) 3 C.A.4th 1193, 1201, 5 C.R.2d 77, infra, §1033 [zoning ordinance permitting home occupations in residential zones but prohibiting employment of assistants and requiring that use be carried on only by occupants does not violate right of privacy].) (On privacy and presidential papers, see *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 97 S.Ct. 2777, 2796, 53 L.Ed.2d 867, 899; cf. *Public Util. Com. of Dist of Columbia v. Pollak* (1952) 343 U.S. 451, 72 S.Ct. 813, 821, 96 L.Ed. 1068, 1078 [no due process protection against District of Columbia Commission's authorization of radios in streetcars and buses]; on constitutional right of privacy of homeowner, and picketing of home by domestic employees, see *Annenberg v. Southern Calif. Dist. Council of Laborers* (1974) 38 C.A.3d 637, 645, 113 C.R. 519.)

West's Key Number Digest, Constitutional Law k.82(7)

SUPPLEMENT: [This section is current through the latest supplement]
See 60 Stanf. L. Rev. 895, 937 [textual-historical theory of Ninth Amendment].



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VIII. PRIVACY

A. Rights Under Federal Constitution.

2. Texts and Law Reviews.

7 *Witkin Sum. Cal. Law Const Law* § 559

[§ 559] Texts and Law Reviews.

(1) *Texts*. See 3 Rotunda, §18.26 et seq.; 2 Tribe, §15-1 et seq.; 16*B Am.Jur.2d* (1998 ed.), *Constitutional Law* §603 et seq.

(2) *Law Reviews*. Law reviews on privacy rights fall into several different categories:

Adoption: See 4 San Fernando Valley L. Rev. 65 [rights of adoptee and natural parent]; 28 Southwestern U. L. Rev. 133 [need to restore parents' privacy rights in adoption process].

Families: See 93 *Harv. L. Rev.* 1156 [Constitution and family]; 41 *U.C.L.A. L. Rev.* 1 [Faiths, Flags, and Family Values: The Constitution of the Theater State]; 48 *U.C.L.A. L. Rev.* 1125 [family privacy].

Health and medical issues: See 99 *Harv. L. Rev.* 1274 [rights of AIDS carriers]; 19 *Hastings Const. L. Q.* 1163 [HIV Testing and Insurance Applicants: Exploring Constitutional Alternatives to Statutory Protections]; 20 *Hastings Const. L. Q.* 267 [health care and Constitution]; 53 *Hastings L. J.* 987 [Symposium on legal debate surrounding human cloning].

Information privacy: See 112 *Harv. L. Rev.* 1575 [right to speak in cyberspace]; 88 *Cal. L. Rev.* 1507 [licensing of personal information as solution to Internet privacy concerns]; 27 *Hastings Const. L. Q.* 563 [Electronic Filing and Informational Privacy]; 35 *Hastings L. J.* 991 [national identification systems, computer matching, and privacy]; 34 *San Diego L. Rev.* 1153 [informational privacy in age of Internet]; 50 *Stanf. L. Rev.* 1193 [Information Privacy in Cyberspace Transactions]; 53 *Stanf. L. Rev.* 1393 [computers and information privacy]; 56 *Stanf. L. Ref.* 191 [Data Retention: Privacy, Anonymity, and Accountability Online].

Labor and employment: See 13 *Hastings Const. L. Q.* 761 [California Workfair Legislation and the Right of Privacy]; 19 *Hastings Const. L. Q.* 1107 [privacy rights in private workplace under federal and California Constitutions].

Minors: See 21 *J. Juvenile Law* 40 [minors and privacy right of sexual autonomy]; 21 *Santa Clara L. Rev.* 499 [minor's right to privacy].

Pregnancy and reproduction: See 104 *Harv. L. Rev.* 1419 [Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy]; 18 *Hastings Const. L. Q.* 487 [constitutional issues in restricting surrogacy to married couples]; 19 *Hastings Const. L. Q.* 197 [Legislation Punishing Drug Use During Pregnancy]; 19 *Loyola L.A. L. Rev.* 267 [Frozen Embryos: The Constitution on Ice]; 33 *McGeorge L. Rev.* 155 [testing students for pregnancy]; 22 *Santa Clara L. Rev.* 291 [Surrogate Gestation Protection of Choice]; 25 *U.C. Davis L. Rev.* 775 [ethics of selectively reducing multiple pregnancy]; 45 *U.C.L.A. L. Rev.* 1077 [Reconceiving Privacy: Relationships and Reproductive Technology]; 25 *U.S.F. L. Rev.* 401 [morning-after Pill: abortion or birth control]; 28 *U.S.F. L. Rev.* 183 [Unwanted, Anonymous, Biological Descendants: Mandatory Donation Laws Violate Constitutional Right to Privacy].

Sexual devices: See 29 *Hastings Const. L. Q.* 89 [anti-vibrator legislation]; 94 *A.L.R.5th* 497 [Constitutionality of State Statutes Banning Distribution of Sexual Devices].

Other topics: See 102 *Harv. L. Rev.* 737 [new approach to privacy analysis]; 90 *Cal. L. Rev.* 1087 [Conceptualizing Privacy]; 30 *Hastings Const. L. Q.* 237 [forced disclosure of sexual orientation]; 53 *Hastings L. J.* 549 [satellite tracking]; 33 *McGeorge L. Rev.* 129 [Supreme Court's failure to protect privacy of personal diaries]; 70 *So. Cal. L. Rev.* 1805 [normative and social bases for according sexual relations "fundamental right" status]; 33 *Southwestern U. L. Rev.* 477 [how federal educational rights and Privacy Act may help colleges and universities keep hazing a secret]; 52 *Stanf. L. Rev.* 1461 [The Death of Privacy?]; 48 *U.C.L.A. L. Rev.* 85 [Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights].

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Texts.* See 4 *Rotunda* (4th), §18.26 et seq.; C.E.B., *Privacy Compliance and Litigation*, Chap. 1 et seq.

(2) *Law Reviews.*

Health and medical issues: See 41 *Cal. Western L. Rev.* 507 [recent developments in reproductive health law and constitutional rights of women]; 42 *San Diego L. Rev.* 735 [role and significance of counsel in right to refuse treatment cases].

Information privacy: See 44 *San Diego L. Rev.* 695 [Symposium on information privacy: philosophical and legal implications]; 81 *So. Cal. L. Rev.* 781 [Protecting Privacy Expectations and Personal Documents in SEC Investigations]; 52 *U.C.L.A. L. Rev.* 1149 [data privacy and First Amendment]. *Labor and employment:* See 37 *McGeorge L. Rev.* 449 [California's constitutional right of privacy as limitation on private employers' regulation of employees' off-duty intimate associations]; 95 *McGeorge L. Rev.* 1115 [would adopting English privacy standards better balance employee privacy and productivity?]; 40 *U.C. Davis L. Rev.* 85 [public employee rights to noninterference in private affairs].

Pregnancy and reproduction: See 121 *Harv. L. Rev.* 1578 [Regulating Eugenics]; 60 *Stanf. L. Rev.* 1135 [Constitution and right not to procreate].

Other topics: See 80 *So. Cal. L. Rev.* 1383 [how Ninth Amendment and Privileges and Immunities Clause protect unenumerated constitutional rights]; 42 *U.S.F. L. Rev.* 715 [how right to privacy protects popular practices from democratic failures].



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CHAPTER X - Constitutional Law

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VIII. PRIVACY

A. Rights Under Federal Constitution.

3. Contraceptives.

7 *Witkin Sum. Cal. Law Const Law* § 560

[§ 560] Contraceptives.

In *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, the case introducing the "peripheral rights" theory (see *supra*, §558), the Court held that a statute prohibiting distribution of contraceptives to *married persons* was an unconstitutional invasion of the right of marital privacy. (85 S.Ct. 1680, 14 L.Ed.2d 515.) (See 21 *Hastings Const. L. Q.* 827 [constitutionality of paying poor women to be implanted with contraceptive]; 40 *U.C.L.A. L. Rev.* 1 [court-ordered birth control as condition of probation].)

In *Eisenstadt v. Baird* (1972) 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349, a statute prohibiting distribution of contraceptives to *unmarried persons* was likewise held unconstitutional. (See *supra*, §84; *infra*, §785.) (See *Carey v. Population Services, Int.* (1977) 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 [New York law prohibiting distribution of contraceptives to anyone under 16, prohibiting distribution to others by anyone other than licensed pharmacist, and prohibiting advertising and display of contraceptives, was held unconstitutional, with three concurring opinions and two dissenting opinions]; 3 *Rotunda*, §18.27; 86 *Harv. L. Rev.* 116 [*Eisenstadt*]; 91 *Harv. L. Rev.* 146 [*Carey*]; 93 *Harv. L. Rev.* 1307 [same]; 7 *Hastings Const. L. Q.* 777 [*Eisenstadt*]; on minor's right to contraceptives, see 88 *Harv. L. Rev.* 1001; 3 *Ecology L. Q.* 843; 23 *Hastings L. J.* 1486; 7 *U.C. Davis L. Rev.* 270.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 4 *Rotunda* (4th), §18.27.



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VIII. PRIVACY

A. Rights Under Federal Constitution.

4. Abortion.

a. Woman's Right To Have Abortion.

1. In General: *Roe v. Wade*.

7 *Witkin Sum. Cal. Law Const Law* § 561

[§ 561] In General: *Roe v. Wade*.

(1) *U.S. Supreme Court Decisions*. In *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, the constitutional challenge was directed at the Texas criminal abortion law, which permitted abortion only to save the mother's life. Jane Roe (a pseudonym), alleging that she was unmarried and pregnant, sued for declaratory relief. *Held*, the statute was invalid.

(a) *Background of problem*. In both ancient and modern times, the propriety of abortion has been a source of deep dispute among medical personnel and people generally. Anti-abortion statutes had no common law origin but were enacted mainly in the latter half of the 19th century. (93 S.Ct. 715 et seq., 35 L.Ed.2d 164 et seq.)

(b) *Woman's right of privacy*. This right (see *supra*, §558) extends to the decision of a woman to terminate her pregnancy. The detriment of denying that choice is apparent: medically diagnosable harm, psychological harm from additional unwanted offspring, and the stigma of unwed motherhood. (93 S.Ct. 727, 35 L.Ed.2d 177.)

(c) *Interest of state*. The fetus is not a person, and the Fourteenth Amendment protection does not extend to the unborn; but at some point in pregnancy, the state does have an interest in protecting health and prenatal life, sufficiently compelling to sustain regulation. (93 S.Ct. 728, 729, 345 L.Ed.2d 177.) In other words, the pregnant woman's right of privacy is not absolute or sole, for she carries an embryo that becomes a fetus. "The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce* and *Meyer* were respectively concerned." (93 S.Ct. 730, 35 L.Ed.2d 180.)

(d) *Time when state's interest controls*. The state has dual interests in protecting the health of the woman and the potentiality of human life grow in substantiality as the woman approaches term. The interest in the mother's health reaches the compelling point at the end of the first trimester, and at this point, the state may regulate such matters as the qualifications of the doctor and the conditions of the operation. But prior to that time, the doctor and patient are free to decide on an abortion without interference by the state. (93 S.Ct. 731, 732, 35 L.Ed.2d 182.) The interest in potential life arises at the point of viability; and at that point, the state may prohibit abortion except when necessary to preserve the

life or health of the mother. (93 S.Ct. 732, 35 L.Ed.2d 183.)

(e) *Holding*. The holding was summarized in the following constitutional guidelines:

(1) "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."

(2) "For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."

(3) "For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (93 S.Ct. 732, 35 L.Ed.2d 183.)

Doe v. Bolton (1973) 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, a companion case, involved Georgia's therapeutic abortion statute. The challenger was a young married woman with three living children, two in foster homes, the other placed for adoption. Her poverty made it impossible to support the children, and she had been advised that an abortion would involve less danger to her health than childbirth. *Held*, adopting the basic principles of *Roe v. Wade* as a foundation, the statutory requirement of accreditation by the Joint Committee on Accreditation of Hospitals is invalid because the state has not shown that only accredited hospitals meet the needs of protecting the patient; and a hospital requirement applicable to the first trimester is invalid. (93 S.Ct. 750, 35 L.Ed.2d 215.) "[T]he interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician." (93 S.Ct. 750, 35 L.Ed.2d 216.)

Two dissenting justices denounced the reasoning and result in *Roe* and *Doe*: "The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court." (93 S.Ct. 763, 35 L.Ed.2d 195.) (See 87 Harv. L. Rev. 75 [*Roe* and *Doe*]; 61 Cal. L. Rev. 345 [same]; 10 San Diego L. Rev. 844 [same].)

(2) *California Cases*. A similar result had previously been reached in *People v. Belous* (1969) 71 C.2d 954, 80 C.R. 354, 458 P.2d 194, applying the underlying theories of *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, supra, §558, and of *Perez v. Sharp* (1948) 32 C.2d 711, 714, 198 P.2d 17, infra, §747. The court held the California abortion statute fatally uncertain. The rights involved, said the court, were "the woman's rights to life and to choose whether to bear children." The right to life was involved "because childbirth involves risks of death." And "[t]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right." (71 C.2d 963.) (On Therapeutic Abortion Act, see 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §127 et seq.; on partial unconstitutionality of Act, see *People v. Barksdale* (1972) 8 C.3d 320, 327, 338, 105 C.R. 1, 503 P.2d 257, 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §131.)

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A. Rights Under Federal Constitution.

4. Abortion.

a. Woman's Right To Have Abortion.

2. Texts and Law Reviews.

7 *Witkin Sum. Cal. Law Const Law* § 562

[§ 562] Texts and Law Reviews.

A woman's right to an abortion and the Supreme Court's abortion decisions have been the subject of extensive commentary. (See 3 Rotunda, §18.29; 2 Tribe, §15-10; 93 *Harv. L. Rev.* 1303 [abortion]; 101 *Harv. L. Rev.* 994 [Maternal Rights and Fetal Wrongs]; 103 *Harv. L. Rev.* 1325 [Rethinking Motherhood: Feminist Theory and State Regulation of Pregnancy]; 115 *Harv. L. Rev.* 2010 [fetal pain legislation]; 63 *Cal. L. Rev.* 1250 [Abortion and the Constitution]; 77 *Cal. L. Rev.* 521 [Moral Argument and Liberal Toleration: Abortion and Homosexuality]; 77 *Cal. L. Rev.* 1011 [Feminism, Theology and Abortion: Toward Love, Compassion, and Wisdom]; 26 *Hastings Const. L. Q.* 21 [The Author of *Roe*]; 3 *Ecology L.Q.* 311 [*Roe v. Wade*]; 4 *Pacific L. J.* 821 [Abortion Decisions and Legislative Response]; 28 *Pepperdine L. Rev.* 819 [Declaration of Independence recognizes and guarantees unborn's right to life]; 30 *Pepperdine L. Rev.* 161 [fetal pain legislation]; 15 Santa Clara Lawyer 591 [Moral Sentiment in Judicial Opinions on Abortion]; 13 Santa Clara Lawyer 698 [population control and abortion]; 58 *So. Cal. L. Rev.* 1061 [Brain Birth: A Proposal for Defining When a Fetus is Entitled to Human Life Status]; 63 *So. Cal. L. Rev.* 1113 [I Want a New Drug: RU-486 and the Right to Choose]; 66 *So. Cal. L. Rev.* 1237 [Abortion as Murder: Why Should Women Get Off? Using Scare Tactics To Preserve Choice]; 27 *Southwestern U. L. Rev.* 325 [Does a Nonviable Fetus's Right To Bring a Wrongful Death Action Endanger a Woman's Right To Choose?]; 26 *Stanf. L. Rev.* 1161 [*Roe* and *Paris Adult Theatre*]; 26 *Stanf. L. Rev.* 1191 [Fetal Experimentation]; 43 *Stanf. L. Rev.* 599 [On the Legal Status of the Proposition that "Life Begins at Conception"]; 44 *Stanf. L. Rev.* 179 [review of Tribe, "Abortion: The Clash of Absolutes"]; 44 *Stanf. L. Rev.* 261 [Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection]; 23 *Thomas Jefferson L. Rev.* 291 [Abortion Revived: Is the Fetus a Person?]; 7 *U.C. Davis L. Rev.* 432 [effect of *Roe* and *Doe*]; 23 *U.C.L.A. L. Rev.* 689 [Abortion, the Public Morals, and the Police Power]; 27 *U.C.L.A. L. Rev.* 1340 [Fetal Viability and Individual Autonomy; Resolving Medical and Legal Standards for Abortion]; 29 *U.C.L.A. L. Rev.* 1194 [Technological Advances and *Roe v. Wade*: The Need To Rethink Abortion Law]; 38 *U.C.L.A. L. Rev.* 1597 [Involuntary Servitude: A property-based notion of Abortion-Choice]; 8 *U.S.F. L. Rev.* 472 [future problem: potential father's right to restrain abortion]; 12 *U.S.F. L. Rev.* 111 [*Roe v. Wade* and *In re Quinlan*]; 25 *U.S.F. L. Rev.* 401 [morning-after pill: abortion or birth control]; 32 *U.S.F. L. Rev.* 261 [moment of conception in religion, science, and law]; 34 *U.S.F. L. Rev.* 49 [Supreme Court abortion doctrine and popular will]; 31 *Western State L. Rev.* 163 [protecting right to intimate sexual relations, right to abortion, and Justice Scalia's implausible dissent in *Lawrence v.*

Texas].)

SUPPLEMENT: [This section is current through the latest supplement]

See 4 Rotunda (4th), §18.29; 94 *Cal. L. Rev.* 215 [judicial bypass procedure for adolescent's abortion]; 41 *Cal. Western L. Rev.* 507 [recent developments in reproductive health law and constitutional rights of women]; 58 *Hastings L. J.* 869 [minors' petitions to bypass parental consent for abortion in age of increasing number of judicial recusals]; 38 *McGeorge L. Rev.* 775 [Empiricizing the Equal Protection Approach to Abortion]; 34 *Southwestern U. L. Rev.* 511 [proliferation of targeted regulation of abortion providers]; 28 *A.L.R.6th* 485 [Constitutional Right of Prisoners to Abortion Services and Facilities].



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A. Rights Under Federal Constitution.

4. Abortion.

a. Woman's Right To Have Abortion.

3. Development of Law.

7 *Witkin Sum. Cal. Law Const Law* § 563

[§ 563] Development of Law.

(1) *Planned Parenthood Case*. In *Planned Parenthood of Cen. Missouri v. Danforth* (1976) 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, the Court considered a challenge directed at a Missouri statute comprehensively regulating abortions, and decided issues reserved in *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, *supra*, §561, and *Doe v. Bolton* (1973) 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, *supra*, §561.

(a) *Definition of viability: Valid*. The Act defines "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *Held*, this definition is consistent with the holding in *Roe*; the statute need not specify the number of weeks in pregnancy as the point of viability. (96 S.Ct. 2838, 49 L.Ed.2d 802.)

(b) *The woman's consent: Valid*. The Act requires a woman's written consent, informed and freely given, prior to submitting to an abortion during the first 12 weeks of pregnancy. *Held*, a requirement of prior written consent for some types of surgery, including abortion, is not unconstitutional. (96 S.Ct. 2840, 49 L.Ed.2d 803.)

(c) *The husband's consent: Invalid*. The Act requires the prior written consent of the husband if the abortion is sought during the first 12 weeks of pregnancy unless a physician certifies that it is necessary to preserve the mother's life. *Held*, this requirement is unconstitutional, under *Roe* and *Doe*. "Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." (96 S.Ct. 2841, 49 L.Ed.2d 805.) The husband's interest is a strong one, and the decision may have profound effects on the marriage; but, when the two partners disagree, the woman who physically bears the child and is more directly and immediately affected by the pregnancy has the greater interest. (96 S.Ct. 2841, 2842, 49 L.Ed.2d 805, 806.)

(d) *Parental consent for minor's abortion: Invalid*. Where the woman is under 18, the Act requires the prior written consent of a parent or person in loco parentis if the abortion is sought during the first 12 weeks of pregnancy unless a physician certifies that it is necessary to preserve the mother's life. *Held*, the requirement is unconstitutional. "Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a

third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." (96 S.Ct. 2843, 49 L.Ed.2d 808.) While minors have constitutional rights, the state has somewhat broader authority to regulate the activities of children than of adults (see *Prince v. Massachusetts* (1944) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, supra, §552), and a significant state interest may justify a particular regulation. The present holding "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." However, the interests of the parent are not of sufficient weight to overcome the right of privacy of a "competent minor mature enough to have become pregnant." (96 S.Ct. 2844, 49 L.Ed.2d 808.)

(e) *Prohibition of saline amniocentesis: Invalid.* The Act prohibits the abortion technique of saline amniocentesis, or withdrawing of the amniotic fluid, after the first 12 weeks of pregnancy. *Held*, this provision is unconstitutional. It would prohibit the use of a method shown to be the one most commonly used nationally by physicians after the first trimester, and would force a woman and her physician to use methods more dangerous to her health. Hence, it cannot be upheld as a regulation reasonably related to maternal health, despite the legislative finding to that effect; instead, it is "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." (96 S.Ct. 2845, 49 L.Ed.2d 810.)

(f) *Recordkeeping: Valid.* The Act requires recordkeeping by health facilities and physicians for all abortions, with the declared purpose of obtaining statistical information to aid in preservation of maternal health and life, and with adequate safeguards of confidentiality. *Held*, the provisions, "while perhaps approaching permissible limits, are not constitutionally offensive in themselves." It may be assumed that they will not be enforced in a way that would indirectly accomplish the restrictions on abortions herein held unconstitutional. (96 S.Ct. 2846, 2847, 49 L.Ed.2d 811, 812.)

(g) *Standard of care: Invalid.* The Act provides that a person who performs or induces an abortion must exercise the same degree of professional care "to preserve the life and health of the fetus" that he would be required to exercise to preserve the health of a fetus intended to be born; and civil and criminal penalties are imposed for violation. *Held*, this provision is unconstitutional. "It does not specify that such care need be taken only after the stage of viability has been reached . . . [I]t impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy." (96 S.Ct. 2847, 49 L.Ed.2d 813.)

Two justices filed a concurring opinion (96 S.Ct. 2850, 49 L.Ed.2d 816), three joined in an opinion concurring and dissenting (96 S.Ct. 2851, 49 L.Ed.2d 818), and one filed a separate opinion concurring and dissenting (96 S.Ct. 2856, 49 L.Ed.2d 823). (See 10 Southwestern L. Rev. 177.)

(2) *Later Decisions.* In *Bellotti v. Baird* (1979) 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797, following *Planned Parenthood*, a Massachusetts statute requiring parental consent was held unconstitutional. (See 72 So. Cal. L. Rev. 1725; on notification to parents, see *infra*, §567; on minor's right to abortion under California Constitution, see *infra*, §579; on minors' statutory right of abortion without parental consent, see 1 *Summary* (10th), *Contracts*, §39; 5 *Summary* (10th), *Torts*, §391.)

In *Akron v. Akron Center for Reproductive Health* (1983) 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687, the Court, invalidating several provisions of a city ordinance, reaffirmed *Roe v. Wade*. (103 S.Ct. 2487, 76 L.Ed.2d 696.) In a detailed analysis of the provisions and their effects, the following requirements were held unconstitutional: (a) A requirement that an abortion after the end of the first trimester must be performed in a hospital. (103 S.Ct. 2493 et seq., 76 L.Ed.2d 705 et seq.) (b) A requirement that an abortion on a minor under 15 have the informed written consent of a parent or guardian, or an order of court. (103 S.Ct. 2497 et seq., 76 L.Ed.2d 708 et seq.) (c) A requirement of the informed written consent of the woman after detailed oral information by her attending physician of all aspects of the pregnancy and the risks of abortion. (103 S.Ct. 2499 et seq., 76 L.Ed.2d 710 et seq.) (d) A requirement that the attending physician must inform the woman of the particular risks, the abortion techniques, subsequent care, etc. (103 S.Ct. 2501 et seq., 76 L.Ed.2d 713 et seq.) (e) A prohibition against performance of an abortion until 24 hours after the woman

signs a consent form. (103 S.Ct. 2503, 76 L.Ed.2d 715.) (f) A requirement that physicians performing abortions insure that the remains of the unborn child are disposed of in "a humane and sanitary manner." (103 S.Ct. 2503, 2504, 76 L.Ed.2d 716, 717.) (See *Planned Parenthood v. Ashcroft* (1983) 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 [Missouri statute: hospital requirement is unconstitutional under *Akron*, but requirements of pathology report for all abortions, second physician for abortion of viable fetus, and parental or Juvenile Court consent for abortion sought by minor, were upheld]; *Simopoulos v. Virginia* (1983) 462 U.S. 506, 103 S.Ct. 2352, 76 L.Ed.2d 755 [upholding requirement that second-trimester abortions be performed in licensed clinics]; 97 Harv. L. Rev. 78 [*Akron* and *Ashcroft*].)

Thornburgh v. American College of Obstetricians & Gynecologists (1986) 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779, held unconstitutional the following provisions of a Pennsylvania abortion control statute: (a) an informed-consent requirement, calling for specified information to a woman seeking an abortion; (b) abortion reporting requirements with records available to the public; (c) a particular standard of care required when aborting a viable fetus; and (d) a requirement that a second physician be present during an abortion. "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. ... Close analysis of those provisions ... shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make." (106 S.Ct. 2178, 90 L.Ed.2d 792.) (See 100 Harv. L. Rev. 200.)

The provisions relating to informed consent that were held unconstitutional in *Akron* and *Thornburgh* were upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, *infra*, §565.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

VIII. PRIVACY

A. Rights Under Federal Constitution.

4. Abortion.

a. Woman's Right To Have Abortion.

4. Webster Case.

7 *Witkin Sum. Cal. Law Const Law* § 564

[§ 564] Webster Case.

In *Webster v. Reproductive Health Services* (1989) 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410, a Missouri statute amended existing state law concerning unborn children and abortion. In this class action challenging the constitutionality of certain provisions, the Court considered four sections of the Act: (1) the preamble, stating the rights of unborn children; (2) the prohibition of the use of public facilities or employees to perform abortions; (3) the prohibition on public funding of abortion counseling; and (4) the requirement that physicians conduct viability tests prior to performing abortions. *Held*, in a plurality opinion, the challenged provisions were valid.

(a) *Preamble*. This states that the life of each human being begins at conception, that unborn children have protectable interests in life, health, and well-being, and that state laws are to be interpreted to provide them with all the rights, privileges, and immunities available to other persons. (109 S.Ct. 3049, 106 L.Ed.2d 426.) This provision does not restrict the activities of plaintiffs in any concrete manner, and until applied, the Court need not pass on its constitutionality. (109 S.Ct. 3050, 106 L.Ed.2d 428.)

(b) *Prohibition on Use of Public Facilities or Employees To Perform Abortions*. "Nothing in the Constitution requires States to enter or remain in the business of performing abortions." (109 S.Ct. 3052, 106 L.Ed.2d 430.) *Maier v. Roe* (1977) 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484, *infra*, §568, supports the view that the state need not commit any resources to facilitating abortion. Hence, the Act's restrictions are valid. (109 S.Ct. 3052, 353, 106 L.Ed.2d 431.)

(c) *Prohibition on Public Funding of Abortion Counseling*. Plaintiffs no longer seek a declaratory judgment on this issue, and the controversy is therefore moot. (109 S.Ct. 3053, 106 L.Ed.2d 432.)

(d) *Requirement That Physicians Conduct Viability Tests Prior to Performing Abortions*. This section "creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion." (109 S.Ct. 3055, 106 L.Ed.2d 434.) "The State here has chosen viability as the point at which its interest in potential human life must be safeguarded. ... It is true that the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the viability of the fetus. Since the tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for

what were in fact second-trimester abortions. But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life." (109 S.Ct. 3057, 106 L.Ed.2d 437.)

The opinion rejects the suggestion that the Court overrule *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, supra, §561, pointing out that the facts of the present case differ from those at issue in *Roe*. "Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In *Roe*, on the other hand, the Texas statute criminalized the performance of all abortions, except when the mother's life was at stake. ... This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause ... , and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases." (109 S.Ct. 3058, 106 L.Ed.2d 438.)

Four additional opinions were filed, two concurring in part, and two concurring and dissenting in part. (109 S.Ct. 3059, 3064, 3067, 3079, 106 L.Ed.2d 438, 445, 448, 463.) (See 77 Cal. L. Rev. 1181 [discussing question left open in *Webster* whether "prohibition on abortion counseling and referral in public funded family planning clinics violates the First Amendment"]; 18 Pepperdine L. Rev. 955 [*Webster*]; for discussion of "viability" vs. "trimester" rules, see *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, infra, §565.)

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CHAPTER X - Constitutional Law

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VIII. PRIVACY

A. Rights Under Federal Constitution.

4. Abortion.

a. Woman's Right To Have Abortion.

5. Casey Case.

7 *Witkin Sum. Cal. Law Const Law* § 565

[§ 565] Casey Case.

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, involved the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982. (1) A woman seeking an abortion must give her informed consent and be provided with certain information at least 24 hours before the abortion is performed. (2) For a minor to obtain an abortion the Act requires the informed consent of her parents, but offers a judicial bypass option if the minor does not wish to or cannot obtain such consent. (3) Unless certain exceptions apply, a married woman must sign a statement indicating that she has notified her husband of her intended abortion. (4) The Act exempts compliance with these three requirements in the event of a "medical emergency." (5) The Act imposes certain reporting requirements on facilities that provide abortion services. The lead opinion, reaffirming the essential holding of *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, supra, §561, held that all the provisions were valid except that requiring spousal notification.

(a) *Reaffirmation of Roe v. Wade.*

(1) *Roe's* essential holding has three parts: "First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each." (112 S.Ct. 2804, 120 L.Ed.2d 694.)

(2) In some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, supra, §560, *Eisenstadt v. Baird* (1972) 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349, supra, §560, and *Carey v. Population Services, Int.* (1977) 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675, afford constitutional protection. "We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal

decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant." (112 S.Ct. 2807, 120 L.Ed.2d 699.)

(3) "It was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person. *Roe* was, of course, an extension of those cases and, as the decision itself indicated, the separate States could act in some degree to further their own legitimate interests in protecting pre-natal life. The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate both in *Roe* itself and in decisions following it." (112 S.Ct. 2808, 120 L.Ed.2d 699.)

(b) *Stare decisis as a reason for reaffirming Roe.*

(1) The rule of *stare decisis* is not an "inexorable command." "Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability ... ; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation ... ; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine ... ; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." (112 S.Ct. 2808, 120 L.Ed.2d 700.) (See 9 Cal. Proc. (4th), *Appeal*, §§917 et seq., 949 et seq.)

(2) *Roe* "has in no sense proven 'unworkable,' ... representing as it does a simple limitation beyond which a state law is unenforceable." (112 S.Ct. 2809, 120 L.Ed.2d 700.)

(3) "We have seen how time has overtaken some of *Roe's* factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973 ... , and advances in neonatal care have advanced viability to a point somewhat earlier ... But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe's* central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." (112 S.Ct. 2811, 120 L.Ed.2d 703.)

(4) "Because neither the factual underpinnings of *Roe's* central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown) the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." (112 S.Ct. 2813, 120 L.Ed.2d 706.)

(c) *In overruling, the Court must render legally principled decisions.*

(1) "The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." (112 S.Ct. 2814, 120 L.Ed.2d 707.) "[O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later

decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance." (112 S.Ct. 2815, 120 L.Ed.2d 708.)

(2) To give real substance to the woman's liberty to determine whether to carry her pregnancy to full term calls for a line that is clear; and the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. (112 S.Ct. 2816, 120 L.Ed.2d 710.) "A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*." (112 S.Ct. 2818, 120 L.Ed.2d 712.)

(3) Not all burdens on the right to decide whether to terminate a pregnancy will be undue; and the "undue burden" standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." (112 S.Ct. 2820, 120 L.Ed.2d 714.) "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." (112 S.Ct. 2821, 120 L.Ed.2d 715.) The state may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. (112 S.Ct. 2821, 120 L.Ed.2d 716.) The state may also enact regulations to further the health or safety of a woman seeking an abortion. (112 S.Ct. 2821, 120 L.Ed.2d 716.) And, subsequent to viability, the state may regulate and even proscribe abortion except where it is necessary for the preservation of the life or health of the mother. (112 S.Ct. 2821, 120 L.Ed.2d 716.)

(d) *Validity of challenged provisions of Pennsylvania statute.*

(1) The statute's definition of medical emergency, as construed by the Court of Appeals, imposes no undue burden on a woman's abortion right. (112 S.Ct. 2822, 120 L.Ed.2d 716.)

(2) The informed consent requirement is not an undue burden. "[W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion." (112 S.Ct. 2824, 120 L.Ed.2d 719, citing *Akron v. Akron Center for Reproductive Health* (1983) 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687, *supra*, §563, and *Thornburgh v. American College of Obstetricians & Gynecologists* (1986) 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779, *supra*, §563.)

(3) The requirement of a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion is an undue burden, and therefore *invalid*. (112 S.Ct. 2830, 120 L.Ed.2d 726.) *Planned Parenthood of Cen. Missouri v. Danforth* (1976) 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, *supra*, §563, held that the state cannot require a married woman to obtain her husband's consent. "The principles that guided the Court in *Danforth* should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*." (112 S.Ct. 2831, 120 L.Ed.2d 728.)

(4) The one-parent consent provision for an unemancipated young woman under 18, with its judicial bypass procedure, is valid under *Ohio v. Akron Center for Reproductive Health* (1990) 497 U.S. 502, 110 S.Ct. 2972, 111

L.Ed.2d 405 (Akron II), and *Hodgson v. Minnesota* (1990) 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344, *infra*, §567. (112 S.Ct. 2832, 120 L.Ed.2d 729.)

(5) The recordkeeping and reporting provisions reasonably directed to the preservation of maternity health and properly respecting a patient's confidentiality and privacy are valid under *Danforth*. (112 S.Ct. 2832, 120 L.Ed.2d 729.) But the provision requiring reporting of a woman's reason for failure to provide notice to her husband is *not*. "This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason." (112 S.Ct. 2833, 120 L.Ed.2d 730.)

Four additional opinions were filed, two of which were by four justices, all concurring and dissenting in part. (112 S.Ct. 2838, 2943, 2855, 2873, 120 L.Ed.2d 738, 744, 758, 781.) (See 106 Harv. L. Rev. 201; 23 Hastings Const. L. Q. 825 [problems in applying *Casey* undue burdens standard]; 28 Loyola L.A. L. Rev. 971 [survey of *Casey* in state and federal courts]; 119 A.L.R.5th 315 [validity of state "informed consent" statutes].)

SUPPLEMENT: [This section is current through the latest supplement]

See 31 Hastings Const. L. Q. 611 [existentialist philosophy in *Casey* decision and its effect on right to privacy]. *Stare decisis*:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §§481 et seq., 513 et seq.



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VIII. PRIVACY

A. Rights Under Federal Constitution.

4. Abortion.

a. Woman's Right To Have Abortion.

6. Partial Birth Abortion.

7 *Witkin Sum. Cal. Law Const Law* § 566

[§ 566] Partial Birth Abortion.

In *Stenberg v. Carhart* (2000) 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743, the Court applied *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, *supra*, §565, to a Nebraska statute banning "partial birth abortion" except to save the mother's life. The statutory definition of "partial birth abortion" includes partially delivering vaginally "a living unborn child before killing the unborn child and completing the delivery." Partially delivering a child in this manner means "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof" for the purpose of killing the unborn child. *Held*, the statute is unconstitutional.

(a) *Abortion methods in second trimester.* A partial birth abortion, as described above, is also known as a D & X or an intact D & E abortion. D & E generally refers to a transcervical procedure used after 13 weeks of gestation in which the cervix is dilated, instruments are used to remove fetal and placental tissue, and the walls of the uterus are then scraped with a curette to ensure that no tissue remains. Often the fetus is not removed intact. After 15 weeks, dismemberment or other destructive procedures are frequently necessary because the fetus is larger and bones are more rigid. "When instrumental disarticulation incident to D & E is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal." (120 S.Ct. 2606, 147 L.Ed.2d 756.)

(b) *Risks of D & E abortion.* "The D & E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. ... Nonetheless studies show that the risks of mortality and complication that accompany the D & E procedure between the 12th and 20th weeks of gestation are significantly lower than those accompanying induced labor procedures (the next safest midsecond trimester procedures)." (120 S.Ct. 2607, 147 L.Ed.2d 756.)

(c) *Advantages of D & X (partial birth) abortion.* The D & X procedure involves less risk of uterine perforation or cervical laceration than a D & E involving dismemberment because it requires "fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and cervix. There is also considerable evidence that D & X reduces the risk of retained fetal tissue, a serious abortion complication that can cause

maternal death, and that D & X reduces the incidence of a 'free floating' fetal head that can be difficult for a physician to grasp and remove and can thus cause maternal injury." (120 S.Ct. 2612, 147 L.Ed.2d 762, quoting *amici* brief for American College of Obstetricians and Gynecologists.) D & X also usually takes less time, with less blood loss and trauma. (120 S.Ct. 2612, 147 L.Ed.2d 763.)

(d) *Lack of exception for health of mother.* "[A] State may promote but not endanger a woman's health when it regulates the methods of abortion." (120 S.Ct. 2609, 147 L.Ed.2d 759.) This principle is not limited to situations where the pregnancy itself creates a threat to health. (120 S.Ct. 2609, 147 L.Ed.2d 759.) Thus, a state cannot force women to use methods of abortion that pose significant health risks. (120 S.Ct. 2609, 147 L.Ed.2d 760.) Here, because substantial medical authority supports the proposition that banning D & X could endanger women's health, *Casey* requires the statute to include an exception when it is necessary for the preservation of the mother's life or health. (120 S.Ct. 2613, 147 L.Ed.2d 764.)

(e) *Statute bans D & X and D & E procedures.* The plain language of the statute bans both procedures because they both "can involve the introduction of a 'substantial portion' of a still living fetus, through the cervix, into the vagina." (120 S.Ct. 2614, 147 L.Ed.2d 765.) The statute "thereby places an 'undue burden' upon a woman's right to terminate her pregnancy before viability." (120 S.Ct. 2613, 147 L.Ed.2d 764.)

Seven additional opinions were filed, three concurring (120 S.Ct. 2617, 2620, 147 L.Ed.2d 768, 769, 772), and four dissenting (120 S.Ct. 2620, 2621, 2623, 2635, 147 L.Ed.2d 772, 773, 775, 789). The dissenters assert that the majority's decision is an unprecedented expansion of prior cases and one not mandated by *Casey*'s "undue burden" test. (120 S.Ct. 2621, 2651, 147 L.Ed.2d 774, 808.) (See 114 Harv. L. Rev. 219 [Stenberg]; 48 U.C.L.A. L. Rev. 1125 [Stenberg and family privacy].)

SUPPLEMENT: [This section is current through the latest supplement]

In *Gonzales v. Carhart* (2007) 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480, the Court upheld the validity of the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C., §1531. The Act punishes any physician who "knowingly performs a partial-birth abortion," as defined, except "to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." (127 S.Ct. 1624, 167 L.Ed.2d 499.)

(a) *Act is not void for vagueness.* The Act defines a partial birth abortion in explicit terms, including that the physician performing the abortion must vaginally deliver "a living fetus." Hence, the Act does not apply to delivery of an expired fetus or to abortions that do not involve vaginal delivery. Further, the Act's definition requires that the entire fetal head be outside the mother's body, or, in the case of a breech presentation, that a part of the fetal trunk past the navel be outside the mother's body. The physician must perform an "overt act," separate from delivery, that "kills the partially delivered living fetus." All the actions involved in the prohibited abortion contain scienter requirements; no crime is committed absent the requisite state of mind. (127 S.Ct. 1627, 167 L.Ed.2d 503.)

(b) *Act is not invalid on its face.* The Act sets forth an anatomical landmark that provides doctors of ordinary intelligence with guidelines concerning prohibited conduct, and objective criteria to judge whether a prohibited procedure has been performed. The scienter requirement protects a physician who performs a D & E procedure on a fetus that is delivered beyond the prohibited point by mistake. (127 S.Ct. 1628, 167 L.Ed.2d 504.)

(c) *Act does not impose undue burden.* The Act's restrictions on second trimester abortions are not overly broad. Although the intact D & E procedure is prohibited, the Act does not prohibit the D & E procedure in which a fetus is removed in parts. (127 S.Ct. 1629, 167 L.Ed.2d 505.) To meet the objections made to the Nebraska partial birth abortion statute in *Stenberg v. Carhart* (2000) 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743, text, p. 935, Congress eliminated any reference to delivering a "substantial portion" of the fetus, and instead, identified specific anatomical landmarks to which the fetus must be partially delivered. (127 S.Ct. 1630, 167 L.Ed.2d 506.) Further, Congress required that the fatal overt act after delivery must be something other than completion of delivery. (127 S.Ct. 1631, 167 L.Ed.2d 507.)

(d) *Act does not impose substantial obstacle to previability abortions.* "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." (127 S.Ct 1633, 167 L.Ed.2d 509, 510.) The partial birth abortion ban furthers the state's objectives. Congress could conclude that the banned procedure "requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." Congress determined that the banned procedure had a "disturbing similarity to the killing of a newborn infant." Further, the future emotional repercussions that the lack of information a mother has about how her fetus will be killed is of legitimate concern to the state. (127 S.Ct 1633, 1634, 167 L.Ed.2d 510.) Although the standard D & E procedure may be as brutal as an intact D & E, the intact procedure is different because it occurs when the fetus is partially outside of the mother's body. (127 S.Ct 1634, 167 L.Ed.2d 511.) Hence, it was reasonable for Congress to believe that the intact procedure "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." (127 S.Ct 1635, 167 L.Ed.2d 511.)

(e) *Act does not require health exception.* The lack of an exception for the health of the mother does not have the effect of imposing an unconstitutional burden on the abortion right. (127 S.Ct 1637, 167 L.Ed.2d 513.) Whether the Act creates significant health risks for women is a contested factual question in the medical community. (127 S.Ct 1635, 167 L.Ed.2d 511, 512.) This medical uncertainty "provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." (127 S.Ct 1637, 167 L.Ed.2d 513.) Further, alternatives to the prohibited procedure are available. For example, because the Act requires delivery of a living fetus, an injection that kills the fetus could be used if the intact procedure was truly necessary. (127 S.Ct 1637, 167 L.Ed.2d 514.)

(f) *Act is open to proper as-applied challenge.* A facial attack was not the proper method to challenge the constitutionality of the Act. The nature of the medical risk to women could be better quantified and balanced in an as-applied challenge. (127 S.Ct 1638, 167 L.Ed.2d 515.) The Act is still "open to a proper as-applied challenge in a discrete case." (127 S.Ct 1639, 167 L.Ed.2d 504.)

Two justices joined in a concurring opinion, reiterating their view that the Court's abortion jurisprudence has no basis in the *Constitution*. (127 S.Ct 1639, 167 L.Ed.2d 516.) Four justices dissented, partly on the ground that the Court's disposition retreats from prior rulings, like *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, text, §565, and *Stenberg, supra*, requiring that abortion restrictions include an exception safeguarding the health of the mother. (127 S.Ct 1640, 167 L.Ed.2d 517.) (See 121 Harv. L. Rev. 265 [Gonzales v. Carhart]; 81 So. Cal. L. Rev. 877 [same]; 42 U.S.F. L. Rev. 227 [dismantling Roe--unconstitutional purpose behind federal Partial Birth Abortion Act of 2003].)



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CHAPTER X - Constitutional Law

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VIII. PRIVACY

A. Rights Under Federal Constitution.

4. Abortion.

b. Notification of Parents.

7 *Witkin Sum. Cal. Law Const Law* § 567

[§ 567] Notification of Parents.

In *H.L. v. Matheson* (1981) 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388, a Utah statute requiring a physician to notify the parent of a minor seeking an abortion was upheld; it gave neither parents nor judges a veto power over the minor's abortion decision. (See 95 *Harv. L. Rev.* 142; 19 *Cal. Western L. Rev.* 74; 77 *A.L.R.5th* 1 [parental notification and consent statutes].)

In *Hodgson v. Minnesota* (1990) 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344, the Court, in a number of differing opinions, considered the constitutionality of the Minnesota parental notice statute. Subdivision 2 of the statute provides that no abortion shall be performed on a woman under 18 until at least 48 hours after both of her parents have been notified, unless (1) the attending physician certifies that an immediate abortion is necessary, (2) both parents have consented in writing, or (3) the woman declares that she is a victim of parental abuse or neglect. Subdivision 6 of the statute provides that if a court enjoins the enforcement of subdivision 2, the same notice requirement is effective unless a court order permits the abortion to proceed. The lead opinion states:

"For reasons that follow, we now conclude that the requirement of notice to both of the pregnant minor's parents is not reasonably related to legitimate state interests and that subdivision 2 is unconstitutional. A different majority of the Court, for reasons stated in separate opinions, concludes that subdivision 6 is constitutional." (110 S.Ct. 2930, 111 L.Ed.2d 353.)

The lead opinion's reasoning on subdivision 2 appears in the following excerpts:

(a) "A woman's decision to conceive or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution." And "the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women." (110 S.Ct. 2936, 2937, 111 L.Ed.2d 360.)

(b) "In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, ... or deny

prisoners the right to marry. ... But the regulation of constitutionally protected decisions such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. ... In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. ... A State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing obstacles--absolute or otherwise--in the pregnant woman's path to an abortion." (110 S.Ct. 2937, 111 L.Ed.2d 361.)

(c) "Three separate but related interests--the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit--are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement." (110 S.Ct. 2941, 111 L.Ed.2d 366.)

(1) It is "clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. ... To the extent that subdivision 2 ... requires notification of only one parent, it does just that. The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future." (110 S.Ct. 2944, 111 L.Ed.2d 369.) The 48-hour delay "imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy." (110 S.Ct. 2944, 111 L.Ed.2d 369.)

(2) "It is equally clear that the requirement that *both* parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest. The usual justification for a parental consent or notification provision is that it supports the authority of a parent who is presumed to act in the minor's best interest and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate. To the extent that such an interest is legitimate, it would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision. In the ideal family setting, of course, notice to either parent would normally constitute notice to both. A statute requiring two-parent notification would not further any state interest in those instances. In many families, however, the parent notified by the child would not notify the other parent. In those cases the State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child." (110 S.Ct. 2945, 111 L.Ed.2d 370.)

(3) "Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disservices the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. ... In some cases, the parents were divorced and the second parent did not have custody or otherwise participate in the child's upbringing. ... In these circumstances, the privacy of the parent and child was violated, even when they suffered no physical or psychological harm. In other instances, however, the second parent had either deserted or abused the child, ... had died under tragic circumstances, ... or was not notified because of the considered judgment that notification would inflict unnecessary stress on a parent who was ill. ... In these circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive. The focus on notifying the second parent distracted both the parent and minor from the minor's imminent abortion decision." (110 S.Ct. 2945, 111 L.Ed.2d 371.)

(4) "Nor can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court." Under *Planned Parenthood of Cen. Missouri v. Danforth* (1976) 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, supra, §563, "the combined force of the

separate interests of one parent and the minor's privacy interest must outweigh the separate interest of the second parent." (110 S.Ct. 2946, 111 L.Ed.2d 372.) (See 104 Harv. L. Rev. 247 [Hodgson]; on "judicial bypass" procedure of minor's petition to juvenile court to authorize abortion without parental notification or consent, see *Ohio v. Akron Center for Reproductive Health* (1990) 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 [divided Court's consideration of constitutional issues involved in challenge of Ohio statute]; *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, supra, §565 [one parent consent requirement with judicial bypass provision; valid]; *Lambert v. Wicklund* (1997) 520 U.S. 292, 117 S.Ct. 1169, 1172, 137 L.Ed.2d 464, 469 [judicial bypass procedure when parental notification is not in minor's best interest is valid; following *Akron*]; on validity of parental consent statute under California Constitution, see *infra*, §579.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ayotte v. Planned Parenthood of Northern New England* (2006) 546 U.S. 320, 126 S.Ct. 961, 969, 163 L.Ed.2d 812, 822 [lack of exception permitting abortion without parental notification in emergency situations did not call for wholesale repudiation of parental notification statute; case was remanded for consideration whether issuance of declaratory judgment or injunction prohibiting unconstitutional application of statute would be consistent with legislative intent]; 119 Harv. L. Rev. 2552 [Ayotte]; 11 U.C. Davis J. Juvenile Law & Policy 311 [rejecting "maturity" standard in judicial bypass proceedings].



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VIII. PRIVACY

A. Rights Under Federal Constitution.

4. Abortion.

c. Public Funding of Abortion.

7 *Witkin Sum. Cal. Law Const Law* § 568

[§ 568] Public Funding of Abortion.

(1) *In General.* There is no federal constitutional requirement of Medicaid funding of abortion for an indigent woman. Title XIX of the Social Security Act (42 U.S.C., §1396 et seq.) does not require a state participating in the Medical Assistance Program to fund the cost of nontherapeutic abortions. (*Beal v. Doe* (1977) 432 U.S. 438, 97 S.Ct. 2366, 2370, 53 L.Ed.2d 464, 471.) The Equal Protection Clause likewise does not require a state to pay the expenses incident to nontherapeutic abortions for indigent women merely because it pays expenses of childbirth. (*Maher v. Roe* (1977) 432 U.S. 464, 97 S.Ct. 2376, 2380, 53 L.Ed.2d 484, 492.)

The Court in *Maher* made it clear that the decision does not proscribe government funding of nontherapeutic abortions; that Congress may require these benefits as a condition of state participation in the Medicaid program; and that a state is free to provide the benefits. "We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues." (97 S.Ct. 2386, 53 L.Ed.2d 498.) (See *Harris v. McRae* (1980) 448 U.S. 297, 100 S.Ct. 2671, 2683, 65 L.Ed.2d 784, 801 [5-4 decision upholding statutory exclusion of therapeutic abortions from Medicaid coverage]; 91 Harv. L. Rev. 138 [*Maher*]; 99 Harv. L. Rev. 330 [abortion funding]; 104 Harv. L. Rev. 989 [The Selective Funding Problem: Abortions and Religious Schools]; 28 *Hastings L. J.* 931 [discussion of law prior to *Beal* and *Maher*]; 7 *Hastings Const. L. Q.* 165 [*Maher*]; 8 *Hastings Const. L. Q.* 313 [same]; 94 Harv. L. Rev. 96 [*Harris v. McRae*]; 8 *Hastings Const. L. Q.* 313 [same]; 8 *Pepperdine L. Rev.* 861 [same]; 118 A.L.R.5th 463 [state restrictions and limitations on public funding for abortions sought by indigent women].)

A different result was reached in California under the California constitutional right of privacy (Cal. Const., Art. I, §1). (See *Committee To Defend Reproductive Rights v. Myers* (1981) 29 C.3d 252, 172 C.R. 866, 625 P.2d 779, *infra*, §578.)

(2) *Abortion Counseling.* In *Rust v. Sullivan* (1991) 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233, the Court rejected a facial challenge to regulations of the Secretary of the Department of Health and Human Services that limited the ability of Title X fund recipients to engage in abortion-related activities. The regulations specified that a Title X project "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." Petitioners--Title X grantees and doctors supervising Title X funds--contended that the regulations violated the First Amendment because they prohibited "all discussion about

abortion as a lawful option--including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy--while compelling the clinic or counsel to provide information that promotes continuing a pregnancy to term." (111 S.Ct. 1771, 114 L.Ed.2d 254.) *Held*, the regulations were based on a permissible construction of the statute and did not violate the First Amendment.

(a) "Here the Government is exercising the authority it possesses under *Maher* and *McRae* to subsidize family planning services which will lead to conception and childbirth, and declining to promote or encourage abortion. ... The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way." (111 S.Ct. 1772, 114 L.Ed.2d 255.)

(b) The regulations do not impermissibly burden a woman's Fifth Amendment rights. "The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical services relating to childbirth but not to those relating to abortion." (111 S.Ct. 1776, 114 L.Ed.2d 260, citing *Maher*, *McRae*, and *Webster v. Reproductive Health Services* (1989) 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410, *supra*, §564.)

The majority opinion was signed by five justices; three separate dissenting opinions were filed. (111 S.Ct. 1778, 1786, 1788, 114 L.Ed.2d 262, 273, 275.) (See 105 *Harv. L. Rev.* 389 [*Rust*]; 117 *Harv. L. Rev.* 2411 [relationship between compelled speech and government speech doctrines]; 77 *Cal. L. Rev.* 1181 [The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics]; 17 *Hastings Const. L. Q.* 421 [prohibition of public funding for abortion counseling: violation of women's right of privacy]; 19 *Pepperdine L. Rev.* 637 [*Rust*]; 45 *Stanf. L. Rev.* 185 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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VIII. PRIVACY

A. Rights Under Federal Constitution.

5. Right To Marry.

7 *Witkin Sum. Cal. Law Const Law* § 569

[§ 569] Right To Marry.

(1) *In General.* In *Zablocki v. Redhail* (1978) 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618, a Wisconsin statute provided that a Wisconsin resident subject to a court order for support of a minor child not in that resident's custody could marry only with court permission on proof of compliance with the support obligation and a demonstration that the child was not then or was not likely thereafter to become a public charge. *Held*, the statute violated the Equal Protection Clause.

(a) *Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010, *infra*, §747, and subsequent cases established the right to marry as part of the fundamental right of privacy implicit in the *Fourteenth Amendment Due Process Clause*. (98 S.Ct. 679, 680, 54 L.Ed.2d 629, 630; see *supra*, §558.)

(b) The statutory classification directly and substantially interferes with that right. Some members of the class will never be able to obtain the necessary court order because they lack financial means to meet their support obligations or cannot prove that the children will not become public charges; others who can meet the requirements will be sufficiently burdened by having to do so that they will be coerced into foregoing their right. (98 S.Ct. 680, 54 L.Ed.2d 631.)

(c) The state offered evidence that the statute was intended merely to establish a mechanism for counselling persons with support obligations to children of prior marriages, and that court permission was to be automatically granted after counselling. But the statute does not contain this limitation on the power to withhold court permission. (98 S.Ct. 682, 54 L.Ed.2d 632.) And the "collection device" rationale (incentive to the applicant for a marriage license to make support payments to his or her children) cannot justify the broad infringement of the constitutional right; the state has other means of enforcement (wage assignments, civil contempt proceedings, criminal penalties). (98 S.Ct. 682, 683, 54 L.Ed.2d 632, 633.) Also, preventing a marriage may only result in children being born out of wedlock, as in the instant case. (98 S.Ct. 683, 54 L.Ed.2d 633.)

One justice dissented. (98 S.Ct. 692, 54 L.Ed.2d 644.) (See 3 Rotunda, §18.28; 93 *Harv. L. Rev.* 1248; 6 *Hastings Const. L. Q.* 91, 155; 12 *U.C. Davis L. Rev.* 165; for argument in favor of minor's constitutional right to remain married, despite parent or guardian's statutory authority to seek annulment, see 22 *Santa Clara L. Rev.* 447.)

The right to marry is not unconstitutionally infringed by a statutory provision for termination of allowances to the

surviving spouse of a retired judge on the spouse's remarriage. (*McCourtney v. Cory* (1981) 123 C.A.3d 431, 438, 176 C.R. 639 [following *Califano v. Jobst* (1977) 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed.2d 228, on remarriage provision of Social Security Act].)

(2) *Right of Prisoner*. The right of an incarcerated prisoner to marry is not only part of the constitutionally guaranteed right but is declared by statute in California. (See P.C. 2601(e); *infra*, §897.) *In re Carrafa* (1978) 77 C.A.3d 788, 143 C.R. 848, makes it clear that denial of the right can be justified only by the most compelling showing of the necessity for security of the institution and protection of the public. Petitioner was confined in Folsom prison. His fiancée's visitation rights were suspended on the basis of substantial information that she was involved in smuggling a firearm and narcotics into the prison. The authorities then denied the application to marry, subject to its renewal on restoration of her visitation rights. *Held*, on habeas corpus, Department of Corrections ordered to permit the marriage under circumstances that will respect prison security. The court pointed out that petitioner's fiancée was willing to submit to a body search and noncontact visits (thus eliminating the smuggling danger), and that the Department could exclude the marriage partner from visitation if it believed that there was a legitimate security risk. (77 C.A.3d 792.) "Thus, we draw a clear distinction, not recognized by the department in this case, between the right to marry and the right of visitation. The right to marry may not be impinged or delayed unless security is endangered at the time and place of the marriage." (77 C.3d 793.) (See 12 U.S.F. L. Rev. 465 [Standard of Review in Prisoners' Rights Litigation and the Constitutional Right To Marry].)

In *Turner v. Safley* (1987) 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64, a regulation promulgated by the Missouri Division of Corrections permitted an inmate to marry only with the permission of the prison superintendent, which could be given only for "compelling reasons." The term "compelling" was not defined, but prison officials testified that generally only a pregnancy or a birth of an illegitimate child would be considered a compelling reason. *Held*, the regulation was unconstitutional. "It is undisputed that Missouri prison officials may regulate the time and circumstances under which the marriage ceremony itself takes place. ... On this record, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives." (107 S.Ct. 2267, 96 L.Ed.2d 85.)

West's Key Number Digest, Constitutional Law k.82(10)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 4 Rotunda (4th), §18.28; 38 *Loyola L.A. L. Rev.* 2185 [Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage]; on marriage between persons of same-sex, see Supp., *supra*, §226A.



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VIII. PRIVACY

A. Rights Under Federal Constitution.

6. Sterilization of Incompetent Conservatee.

7 *Witkin Sum. Cal. Law Const Law* § 570

[§ 570] Sterilization of Incompetent Conservatee.

In *Conservatorship of Valerie N.* (1985) 40 C.3d 143, 219 C.R. 387, 707 P.2d 760, the coconservators of the person of Valerie, their adult developmentally disabled daughter, petitioned the probate court for authority to have a tubal ligation performed on her. The probate judge, relying on *Prob.C. 2356(d)* as it then read (prohibiting sterilization of a ward or conservatee), denied the petition, and the coconservators appealed. *Held*, the existing statutory scheme was unconstitutional.

(a) Appellants argued that the statute deprived Valerie of the right of procreative choice, while appointed counsel for Valerie contended that the statute furthers that right by protecting her against sterilization forced on her by the will of others. "The sad but irrefragable truth, however, is that Valerie is not now nor will she ever be competent to choose between bearing or not bearing children, or among methods of contraception. The question is whether she has a constitutional right to have these decisions made for her, in this case by her parents as conservators, in order to protect her interests in living the fullest and most rewarding life of which she is capable. At present, her conservators may, on Valerie's behalf, elect that she not bear or rear children. As means of avoiding the severe psychological harm which assertedly would result from pregnancy, they may choose abortion should she become pregnant; they may arrange for any child Valerie might bear to be removed from her custody; and they may impose on her other methods of contraception, including isolation from members of the opposite sex. They are precluded from making, and Valerie from obtaining the advantage of, the one choice that may be best for her, and which is available to all women competent to choose--contraception through sterilization. We conclude that the present legislative scheme, which absolutely precludes the sterilization option, impermissibly deprives the developmentally disabled persons of privacy and liberty interests protected by the Fourteenth Amendment to the United States Constitution, and article I, section 1 of the California Constitution." (40 C.3d 160.)

(b) "The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests So too, is the right of a woman to choose not to bear children, and to implement that choice by use of contraceptive devices or medication, and, subject to reasonable restrictions, to terminate a pregnancy. These rights are aspects of the right of privacy which exists within the penumbra of the First Amendment to the United States Constitution ... , and is express in section 1 of article I of the California Constitution which includes among the inalienable rights possessed by all persons in this state, that of 'privacy.' They are also within the concept of liberty protected against arbitrary restrictions by the Fourteenth Amendment." (40 C.3d 161.)

(c) "We realize that election of the method of contraception to be utilized, or indeed whether to choose contraception at all, cannot realistically be deemed a 'choice' available to an incompetent since any election must of necessity be made on behalf of the incompetent by others. The interests of the incompetent which mandate recognition of procreative choice as an aspect of the fundamental right to privacy and liberty do not differ from the interests of women able to give voluntary consent to this procedure, however. That these interests include the individual's right to personal growth and development is implicit in decisions of both the United States Supreme Court and this court." (40 C.3d 162.)

(d) "True protection of procreative choice can be accomplished only if the state permits the court-supervised substituted judgment of the conservator to be exercised on behalf of a conservatee who is unable to personally exercise this right. Limiting the exercise of that judgment by denying the right to effective contraception through sterilization to this class of conservatees denies them a right held not only by conservatees who are competent to consent, but by all other women." (40 C.3d 168.) (On 1986 amendment of *Prob.C. 2356(d)*, limiting its prohibition to *minors*, see 14 *Summary* (10th), *Wills and Probate*, §1059.)

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A. Rights Under Federal Constitution.

7. Withdrawal of Life Support.

7 *Witkin Sum. Cal. Law Const Law* § 571

[§ 571] Withdrawal of Life Support.

In *Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224, Nancy Cruzan, after a vehicle accident, was in a Missouri state hospital in a persistent vegetative state. Her parents obtained authorization from the state trial court to terminate artificial nutrition and hydration procedures, but the state Supreme Court reversed, holding that, in the absence of a statutory living will, "or clear and convincing evidence," no person can assume the choice of death for an incompetent. The issue before the U.S. Supreme Court was whether Cruzan had a federal constitutional right to require the hospital to withdraw life-sustaining treatment under the circumstances. *Held*, Missouri judgment affirmed.

(a) After the seminal *Quinlan* decision in New Jersey, most courts based a right to refuse treatment either solely on the common law right to informed consent or on both the common law right and a constitutional privacy right. (110 S.Ct. 2847, 111 L.Ed.2d 237.) "As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond that, these decisions demonstrate both similarity and diversity in their approach to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources--state constitutions, statutes, and common law--which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. This is the first case in which we have been squarely presented with the issue of whether the United States Constitution grants what is in common parlance referred to as a 'right to die.' " (110 S.Ct. 2851, 111 L.Ed.2d 241.)

(b) A number of cases determine that a person has a "liberty interest" under the Due Process Clause in refusing medical treatment, and for the purposes of this case "we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." (110 S.Ct. 2852, 111 L.Ed.2d 242.) "Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient ... , but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent." (110 S.Ct. 2852, 111 L.Ed.2d 243.)

(c) The U.S. Constitution does not forbid the establishment of this procedural requirement. The Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment; and a state is entitled to guard against potential abuses in surrogate decisionmaking. Similarly, a state may consider that a judicial proceeding

may not be an adversarial one with the guarantee of accurate fact-finding. And a state may properly decline to make judgments about the "quality" of life that a particular individual may enjoy. (110 S.Ct. 2852, 2853, 111 L.Ed.2d 243, 244.)

(d) "In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to prior expressed wishes of the incompetent individual, or whether they allow more general proof of what the individual's decision would have been, require a clear and convincing standard of proof for such evidence." (110 S.Ct. 2854, 111 L.Ed.2d 245.) The testimony at the trial consisted primarily of Nancy Cruzan's statement made to a housemate before her accident, and did not deal in terms with withdrawal of life support; the Missouri Court in holding that this did not amount to clear and convincing evidence, did not commit constitutional error. (110 S.Ct. 2855, 111 L.Ed.2d 246.)

(e) "If the State were required by the United States Constitution to repose a right of 'substituted judgment' with anyone, the Cruzans would surely qualify. But we do not think the Due Process clause requires the State to repose judgment on these matters with anyone but the patient herself." (110 S.Ct. 2855, 111 L.Ed.2d 247.)

Two justices filed concurring opinions (110 S.Ct. 2856, 2859, 111 L.Ed.2d 247, 251), three others joined in a dissenting opinion (110 S.Ct. 2863, 111 L.Ed.2d 256), and one filed a separate dissenting opinion (110 S.Ct. 2878, 111 L.Ed.2d 275). (See *Conservatorship of Wendland* (2001) 26 C.4th 519, 546, 110 C.R.2d 412, 28 P.3d 151, 14 Summary (10th), *Wills and Probate*, §996 [before withholding hydration and nutrition from conscious but incompetent conservatee, conservator must prove by clear and convincing evidence either that conservatee wished to refuse life sustaining treatment or that withholding treatment is in conservatee's best interest]; 31 *Loyola L.A. L. Rev.* 1115 [Euthanasia, Morality, and Law]; 17 *J. Juvenile Law* 1 [incompetent child's right to have medical treatment terminated when there is uncontroverted evidence that medical assistance is futile]; 18 *Pepperdine L. Rev.* 1011; 2 *Pepperdine Dispute Resolution L. J.* 285 [definitional inquiry]; 36 *San Diego L. Rev.* 997 [battery, wrongful living, and right to bodily integrity]; 43 *Stanf. L. Rev.* 659 [The Changing Face of Death: Computers, Consciousness, and Nancy Cruzan]; 36 *U.S.F. L. Rev.* 237 [applying *Cruzan* to treatment of critically ill infant]; 66 *A.L.R.5th* 111 [Prisoner's Right To Die or Refuse Medical Treatment]; 40 *Proof of Facts* 3d 287 [Proof of Basis for Refusal of Discontinuance of Life-Sustaining Treatment on Behalf of Incapacitated Person].)

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A. Rights Under Federal Constitution.

8. Assisted Suicide.

7 *Witkin Sum. Cal. Law Const Law* § 572

[§ 572] Assisted Suicide.

Washington v. Glucksberg (1997) 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772, held that Washington's ban on assisting suicide does not violate the Due Process Clause.

(a) Both suicide and assisted suicide have been punished or otherwise disapproved for over 700 years in the Anglo-American common law tradition. (117 S.Ct. 2263, 138 L.Ed.2d 782.) By the time the Fourteenth Amendment was ratified, it was a crime in most states to assist a suicide. (117 S.Ct. 2265, 138 L.Ed.2d 784.) In spite of changes in medical technology and an increased emphasis on end-of-life decisionmaking, the laws in almost every state, as well as almost every western democracy, continue to prohibit assisting suicide. (117 S.Ct. 2265, 2266, 138 L.Ed.2d 785.)

(b) Under substantive due process analysis, the Due Process Clause specially protects fundamental rights and liberties deeply rooted in our nation's history and legal tradition. (117 S.Ct. 2268, 138 L.Ed.2d 787, citing *Moore v. East Cleveland, Ohio* (1977) 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (plurality opinion).) The asserted fundamental liberty interest must be specifically described. (117 S.Ct. 2268, 138 L.Ed.2d 788, citing *Reno v. Flores* (1993) 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1.)

(c) While our legal tradition has long recognized the right to be free of unwanted medical treatment, even where death may result, this right is widely regarded as distinct from the right to assistance in committing suicide. (117 S.Ct. 2270, 138 L.Ed.2d 791, citing *Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224, *supra*, §571.) While many of the fundamental rights protected by the Due Process Clause involve personal autonomy, this does not mean that all important, intimate, and personal decisions are so protected. (117 S.Ct. 2271, 138 L.Ed.2d 792.)

(d) Due process requires that Washington's assisted suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met. The legitimate state policies of (1) preservation of human life, (2) protecting the integrity and ethics of the medical profession, (3) protecting vulnerable persons from coercion and undue influence in end-of-life situations and from prejudice, negative stereotypes, and societal indifference, and (4) avoiding policies that open the door to voluntary and even involuntary euthanasia are all reasonably related to the assisted suicide ban. (117 S.Ct. 2271, 138 L.Ed.2d 792.)

In *Vacco v. Quill* (1997) 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834, several doctors and terminally ill patients brought an action alleging that New York's ban on assisted suicide violates the Equal Protection Clause. *Held*, the ban does not violate equal protection.

(a) On their faces the statutes permitting patients to refuse medical treatment and the New York ban on physician-assisted suicide treat all persons similarly, permitting no one to assist a suicide and allowing anyone who is competent to refuse medical treatment. Generally, laws that apply evenhandedly to all "unquestionably comply" with the *Equal Protection Clause*. (117 S.Ct. 2297, 2298, 138 L.Ed.2d 841, citing *New York City Transit Authority v. Beazer* (1979) 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587.)

(b) The Court of Appeals, however, concluded that terminally ill people who wish to hasten their deaths are not treated equally, since those on life-support systems may "hasten death," while those not on life support may not, because of the ban. But refusing lifesaving measures is not equivalent to assisted suicide for equal protection purposes. (117 S.Ct. 2298, 138 L.Ed.2d 842.)

(1) A patient who refuses life-sustaining medical treatment dies from the underlying pathology, while a patient who ingests lethal medication is killed by that medication. (117 S.Ct. 2298, 138 L.Ed.2d 842.)

(2) A physician who withdraws or does not begin life-sustaining medical care intends to respect the patient's wishes to cease treatment. A physician who assists suicide intends that the patient die. (117 S.Ct. 2298, 138 L.Ed.2d 842.)

(3) Where life-sustaining measures are withdrawn, death may be an unintended but foreseeable consequence, while in assisted suicide death is the intended result. (117 S.Ct. 2299, 138 L.Ed.2d 843.)

(4) The right to refuse treatment is not grounded in any supposed "right to hasten death," but instead on "well established, traditional rights to bodily integrity and freedom from unwanted touching." (117 S.Ct. 2301, 138 L.Ed.2d 846, citing *Cruzan*)

(5) Where a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect classification," it will be upheld if it bears a rational relation to some legitimate legislative end. (117 S.Ct. 2297, 138 L.Ed.2d 841, citing *Romer v. Evans* (1996) 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855, *infra*, §798.) The state's reasons for prohibiting assisted suicide, including "prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia ... easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end." (117 S.Ct. 2302, 138 L.Ed.2d 847.)

A number of law reviews have commented on *Glucksberg* and *Vacco*, and the question of assisted suicide. (See 111 *Harv. L. Rev.* 237 [*Glucksberg* and *Vacco*]; 85 *Cal. L. Rev.* 371 [physician-assisted suicide in Second and Ninth Circuits]; 21 *Hastings Const. L. Q.* 777, 799 [constitutional challenges to bans on assisted suicide]; 24 *Hastings Const. L. Q.* 863 [assisted suicide cases and heritage of *Roe v. Wade*]; 24 *Hastings Const. L. Q.* 903, 947 [*Glucksberg* and *Vacco*]; 26 *Golden Gate L. Rev.* 1 [constitutionality of statutory ban on assisted suicide]; 31 *Loyola L.A. L. Rev.* 1115 [Euthanasia, Morality, and Law]; 24 *Pepperdine L. Rev.* 1327 [deciding legality of physician-assisted suicide]; 26 *Pepperdine L. Rev.* 121 [*Glucksberg* and *Vacco*]; 38 *San Diego L. Rev.* 297 [Pain Relief Promotion Act of 1999 and physician-assisted suicide]; 19 *Thomas Jefferson L. Rev.* 149 [Liberty Versus Life: a Societal Dilemma]; 37 *U.S.F. L. Rev.* 1065 [Attorney General's attempt to override state controlled medical practice]; 28 *West L.A. L. Rev.* 81 [betrayal of ultimate civil liberty].)

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A. Rights Under Federal Constitution.

9. Sodomy Laws.

7 Witkin Sum. Cal. Law Const Law § 573

[§ 573] Sodomy Laws.

Bowers v. Hardwick (1986) 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140, upheld the enforcement of a sodomy law against a practicing homosexual, charged with committing sodomy with another adult male in the bedroom of his home. (See 100 Harv. L. Rev. 210 [*Bowers*]; 106 Harv. L. Rev. 1370 [Kentucky case holding that criminalization of homosexual sodomy violates state constitutional guaranties of privacy and equal protection]; 12 Hastings Const. L. Q. 669 [military discharge for homosexual activity]; 20 Loyola L.A. L. Rev. 1013 [*Bowers*]; 14 Pepperdine L. Rev. 313 [same]; 23 San Diego L. Rev. 957 [same]; 62 So. Cal. L. Rev. 1297 [same]; 19 Hastings Const. L. Q. 1009 [*Bowers* Revised in the Context of State Constitutions]; 49 Stanf. L. Rev. 45 [*Bowers*].)

However, *Bowers v. Hardwick* was overruled in *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508. Petitioners, two adult men, were arrested in one of their homes for violating the Texas sodomy statute, which proscribed certain intimate sexual conduct between two persons of the same sex. They were both fined on pleas of nolo contendere, and their convictions were upheld by the Court of Appeals based on *Bowers*. *Held*, reversed.

(a) This "case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." (123 S.Ct. 2476, 156 L.Ed.2d 516.) *Bowers* failed "to appreciate the extent of the liberty interest at stake." It stated the issue as whether the Constitution confers a fundamental right on homosexuals to engage in sodomy, and thus whether to invalidate state laws that make this conduct illegal. Although these laws purport to do no more than prohibit particular sex acts, their penalties and purposes "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." (123 S.Ct. 2478, 156 L.Ed.2d 518.)

(b) "[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," as asserted in *Bowers*. (123 S.Ct. 2478, 156 L.Ed.2d 519.) "[E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally." (123 S.Ct. 2479, 156 L.Ed.2d 519.) "Instead of targeting relations between consenting adults in private, 19th century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals." (123

S.Ct. 2479, 156 L.Ed.2d 520.) "[F]ar from possessing 'ancient roots,' ... American laws targeting same-sex couples did not develop until the last third of the 20th century." In fact, only 9 states have singled out same-sex relations for criminal prosecution. (*123 S.Ct. 2479, 156 L.Ed.2d 520.*)

(c) Of course, *Bowers* was making the broader point that homosexuality has been condemned as immoral for centuries. Religious beliefs and respect for the traditional family helped shape this condemnation. But these considerations do not address whether the majority may use the state to enforce their views through the operation of criminal law. Even before *Bowers*, there was "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." (*123 S.Ct. 2480, 156 L.Ed.2d 521.*)

(d) In *Romer v. Evans* (1996) 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855, *infra*, §798, the Court struck down on equal protection grounds class-based legislation that singled out homosexuals, lesbians, and bisexuals and deprived them of protection under Colorado's anti-discrimination laws. If the Court here were to invalidate the Texas statute on equal protection grounds, "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." (*123 S.Ct. 2482, 156 L.Ed.2d 523.*)

(e) "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons." Further, the stigma imposed by the criminal statute is not trivial. Although only a class C misdemeanor, conviction brings a criminal record and the possibility of being forced to register as a sex offender in certain states. (*123 S.Ct. 2482, 156 L.Ed.2d 523.*)

(f) The doctrine of *stare decisis* is not a bar to overruling *Bowers*. *Bowers* has not induced detrimental reliance. In fact, that decision has caused uncertainty because "the precedents before and after its issuance contradict its central holding." (*123 S.Ct. 2483, 156 L.Ed.2d 523, 524.*)

One justice concurred in the judgment. (*123 S.Ct. 2484, 156 L.Ed.2d 526.*) Three justices dissented in two opinions (*123 S.Ct. 2488, 2498, 156 L.Ed.2d 530, 543*), asserting that there is no constitutional right to "liberty" under the *Due Process Clause*. (*123 S.Ct. 2491, 2498, 156 L.Ed.2d 535, 543.*) (See 3 Rotunda, Supp., §18.28; 117 *Harv. L. Rev.* 297, 1894 [*Lawrence*]; 40 *Cal. Western L. Rev.* 149 [same]; 26 *Thomas Jefferson L. Rev.* 447 [effect of *Lawrence* on same-sex marriage bans]; 31 *Western State L. Rev.* 163 [protecting right to intimate sexual relations, right to abortion, and Justice Scalia's implausible dissent in *Lawrence v. Texas*].)

SUPPLEMENT: [This section is current through the latest supplement]

See 4 Rotunda (4th), §18.28; 96 *Cal. L. Rev.* 505 [*Lawrence v. Texas*]; 35 *McGeorge L. Rev.* 685 [same]; 38 *U.C. Davis L. Rev.* 509 [same].



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A. Rights Under Federal Constitution.

10. Drug Prescription Records.

7 *Witkin Sum. Cal. Law Const Law* § 574

[§ 574] Drug Prescription Records.

In *Whalen v. Roe* (1977) 429 U.S. 589, 97 S.Ct. 869, 872, 51 L.Ed.2d 64, 68, the question was whether a state "may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market." The New York law involved was upheld as a valid exercise of police power, against the charge that it was a violation of both of the major kinds of privacy: the interest in avoiding disclosure of personal matters, and the interest in independence in making certain kinds of important decisions. (97 S.Ct. 877, 51 L.Ed.2d 75.) Neither the immediate nor the threatened impact of the patient identification requirements on either the reputation or the independence of patients was an invasion of the constitutional right. (97 S.Ct. 878, 51 L.Ed.2d 76.)

The Court, however, was careful to limit its holding: "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our armed forces and the enforcement of the criminal laws, all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data--whether intentional or unintentional--or by a system that did not contain comparable security provisions." (97 S.Ct. 879, 51 L.Ed.2d 77.) (See 3 Rotunda, §18.30(b).)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Rotunda (4th), §18.30.



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B. Rights Under California Law.

1. California Constitutional Provision.

a. In General.

1. Nature and Scope.

7 *Witkin Sum. Cal. Law Const Law* § 575

[§ 575] Nature and Scope.

Cal. Const., Art. I, §1, stating the "inalienable rights" of all "people," includes the right of privacy. (See *supra*, §178; 19 *Hastings Const. L. Q.* 1107 [privacy rights in private workplace]; 31 *Loyola L.A. L. Rev.* 907 [privacy and due process rights of de facto competent minors]; 19 *Pepperdine L. Rev.* 327 [discussion of common law background and constitutional provisions]; 70 *So. Cal. L. Rev.* 1805 [normative and social bases for according sexual relations "fundamental right" status]; 1 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §6:1 et seq. [text and forms].)

In *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, *supra*, §357, the court held that police surveillance of university classrooms and organizations was a violation of First Amendment freedoms. But the court went on to find it also a violation of the broadened right of privacy in the California Constitution.

(a) The statement in the election brochure--the only legislative history available--points out that the objective of the amendment was to give a judicial remedy against government snooping. "First, the statement identifies the principal 'mischiefs' at which the amendment is directed: (1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. Second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, 'creates a legal and enforceable right of privacy for every Californian.' " (13 C.3d 775.)

(b) The police surveillance challenged here "epitomizes the kind of governmental conduct which the new constitutional amendment condemns." (13 C.3d 775.) Hence, the allegations state a *prima facie* violation of the constitutional right, which defendant may contest by designating compelling governmental interests. (13 C.3d 776.)

(c) "The motto of one of our great universities--Stanford University--is 'The wind of freedom blows,' but the air of its classrooms would be befouled indeed by the presence of secret police. In the course of classroom debate some

thoughts will be hazarded only as the trial balloons of new theories. Yet such propositions, that are tentative only, will nevertheless be recorded by police officers, filtered through the minds of the listening informers, often incorrectly misstated to their superiors and sometimes maliciously distended. Only a brave soul would dare to express anything other than orthodoxy under such circumstances. But the classroom of the university should be a forum of free expression; its very function would largely be destroyed by the practices described in the complaint before us." (13 C.3d 777.)

In *Kees v. Medical Bd. of Calif.* (1992) 7 C.A.4th 1801, 10 C.R.2d 112, B. & P.C. 820 was challenged as violative of the right to privacy. Under that statute, if it appears that a licensed physician's ability to practice medicine may be impaired due to mental illness, or to physical illness affecting competency, the physician may be ordered to submit to a psychiatric examination. In *Kees*, the physician was ordered to submit to a psychiatric examination and to any further examinations deemed necessary by the examining physician. He submitted to the first examination, but did not submit to a later order to undergo a second one. *Held*, the first examination was properly ordered, but there was an insufficient showing to justify the second one.

(a) The right to privacy includes the right to mental privacy, and any invasion of that right requires a "compelling interest." (7 C.A.4th 1812, 1813, citing *Long Beach City Employees Assn. v. Long Beach* (1986) 41 C.3d 937, 227 C.R. 90, 719 P.2d 660, *infra*, §591.) The need to protect the public from the risk of harm by impaired physicians is compelling, and B. & P.C. 820 allows a mental examination only when that "is the least intrusive means of determining a physician's mental condition." (7 C.A.4th 1813.) Here, the order for the initial examination was proper in light of reports about the physician's behavior and a psychiatrist's opinion that a psychiatric evaluation was warranted. (7 C.A.4th 1815.)

(b) "Repetitive mental examinations are permissible if there is a showing of good cause." (7 C.A.4th 1814.) This was not shown here. Relying on the overbroad nature of the original order, the board ordered the second examination without any showing of good cause. (7 C.A.4th 1815.) (On privacy rights regarding communications to psychotherapist, see *Cutter v. Brownbridge* (1986) 183 C.A.3d 836, 841, 228 C.R. 545, 2 Cal. Evidence (4th), Witnesses, §222.)

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B. Rights Under California Law.

1. California Constitutional Provision.

a. In General.

2. Elements and Analysis.

7 Witkin Sum. Cal. Law Const Law § 576

[§ 576] Elements and Analysis.

Hill v. National Collegiate Athletic Assn. (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, *infra*, §594, held that the NCAA's postseason drug testing program for college athletes did not violate the Privacy Initiative in Cal. Const., Art. I, §1.

(a) Cal. Const., Art. I, §1, applies to private as well as government entities. (7 C.4th 16, 20.) However, as applied to private entities, the initiative does not necessarily require a compelling state interest to justify any activity that has an impact on individual privacy. (7 C.4th 20, 22.)

(b) The right to privacy has sources both in common law and under the federal *Constitution*. (7 C.4th 23, 28.) Properly analyzed, neither the federal penumbral "privacy" decisions nor the California decisions construing the Privacy Initiative require use of a compelling interest standard in all situations. (7 C.4th 32, 34.) Rather, "[t]he particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed." (7 C.4th 34.)

(c) There are three elements of a cause of action for violation of the state constitutional right to privacy action:

(1) First, there must be a specific, legally protected privacy interest. These interests "are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (7 C.4th 35.) Whether a legally recognized privacy interest is present in a given case is a question of law. (7 C.4th 40.)

(2) Second, there must be a reasonable expectation of privacy, i.e., "an objective entitlement founded on broadly based and widely accepted community norms," on plaintiff's part. (7 C.4th 36, 37.) This is a mixed question of law and

fact. (7 C.4th 40.)

(3) Third, "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (7 C.4th 37.) This also is a mixed question of law and fact. (7 C.4th 40.)

(d) Privacy interests are not absolute, but must be balanced against other important interests. (7 C.4th 37.) A defendant may prevail by negating any of the three elements or by proving, as an affirmative defense, that the invasion of privacy is justified because it substantially furthers one or more countervailing interests. (7 C.4th 40.) When confronted with a defense based on countervailing interests, the plaintiff may undertake the burden of showing the availability and use of protective measures, safeguards, and alternatives to the defendant's conduct that would minimize the privacy intrusion. (7 C.4th 38, 40.) The existence of countervailing interests or alternative courses of conduct present threshold questions of law, while the relative strength of those interests and the feasibility of alternatives present mixed questions of law and fact. (7 C.4th 40.)

(e) Government generally has more power than do private entities, and alternatives generally exist when dealing with private entities; also, private conduct carries its own mantle of constitutional protection. (7 C.4th 38, 39.) For these reasons, "assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action." (7 C.4th 38.)

(f) The "generalized differences between public and private action may affect privacy rights differently in different contexts. If, for example, a plaintiff claiming a violation of the state constitutional right to privacy was able to choose freely among competing public or private entities in obtaining access to some opportunity, commodity, or service, his or her privacy interest may weigh less in the balance. In contrast, if a public or private entity controls access to a vitally necessary item, it may have a correspondingly greater impact on the privacy rights of those with whom it deals." (7 C.4th 39.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Pioneer Electronics (USA) v. Superior Court* (2007) 40 C.4th 360, 53 C.R.3d 513, 150 P.3d 198 [applying *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, text, p. 955; in class action, trial court did not err in ordering defendant to send precertification notice to complaining customers that required them to return written objection if they did not want their contact information to be given to plaintiff's attorney]; *Belaire-West Landscape v. Superior Court* (2007) 149 C.A.4th 554, 561, 57 C.R.3d 197 [following *Pioneer Electronics*; opt-out notice adequately protected privacy rights of defendant's current and former employees in class action seeking relief for violations of employment laws]; *Puerto v. Superior Court* (2008) 158 C.A.4th 1242, 1251, 1259, 70 C.R.3d 701 [relying on and distinguishing *Pioneer Electronics*; trial court abused discretion in imposing opt-in system for plaintiffs to discover contact information for witnesses that defendant had already identified through responses to interrogatories; opt-in mechanism exceeded protections necessary to safeguard legitimate privacy interests in addresses and telephone numbers of witnesses]; *Alch v. Superior Court* (2008) 165 C.A.4th 1412, 1422, 1427, 82 C.R.3d 470 [relying on *Hill*, *Pioneer Electronics*, and *Puerto*; in class action for age discrimination, trial court erred in denying access to all data from third parties who objected to its discovery by failing to consider whether more nuanced approach to different categories of data would have satisfied balance between privacy interests of third parties and countervailing interests of litigants and state for discovery, including state's interest in preventing discrimination].



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CHAPTER X - Constitutional Law

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VIII. PRIVACY

B. Rights Under California Law.

1. California Constitutional Provision.

a. In General.

3. Rights of Partnership or Corporation.

7 *Witkin Sum. Cal. Law Const Law* § 577

[§ 577] Rights of Partnership or Corporation.

In *H & M Associates v. El Centro* (1980) 109 C.A.3d 399, 167 C.R. 392, plaintiff limited partnership was the owner of an apartment complex consisting of 306 units. The complaint alleged that defendant city, through its city manager, terminated water service to all apartments without affording plaintiff a hearing or opportunity to pay amounts owing; that the city manager telephoned this information to plaintiff's mortgagees, the Federal Housing Administration, the local newspaper, and several other governmental agencies; and that as a result, plaintiff lost many tenants, became unable to make mortgage payments, and lost the property on foreclosure. *Held*, a cause of action was stated for interference with contract (5 *Summary* (10th), *Torts*, §737) and for invasion of privacy.

Despite the modern recognition of the partnership as an entity (109 C.A.3d 409, citing the text), there is considerable uncertainty as to the right of privacy of corporations or partnerships (109 C.A.3d 410). Plaintiff does not assert "its" right to be left alone; the damages claimed relate to its economic loss. (109 C.A.3d 410.) However, businesses have zones of privacy that are protected by various statutes (109 C.A.3d 410, 411), and the constitutional provision protects the privacy rights of "all people." Although the facts of the present case are quite different from those in *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, *supra*, §575, and *Porten v. University of San Francisco* (1976) 64 C.A.3d 825, 134 C.R. 839, *infra*, §595, "what appears to be the unsolicited acts of the City fall within the framework of plaintiff's right to privacy." (109 C.A.3d 411.) (See 24 *Santa Clara L. Rev.* 53.)

In *Roberts v. Gulf Oil Corp.* (1983) 147 C.A.3d 770, 195 C.R. 393, plaintiff county assessor obtained a subpoena duces tecum compelling defendant corporation to produce records concerning its properties. Defendant conceded that it was required to furnish raw data, but refused to furnish interpretative data on studies, reports, and projects. *Held*, the statutes supported the assessor's demand (147 C.A.3d 780 *et seq.*), and defendant's assertion of the right to privacy was unavailable.

(a) *General constitutional right to privacy.* Corporations have "some right to privacy." But here, the assessor is seeking information that would assure that defendant and other corporations like it pay their fair share of taxes, and the assessor's right prevails over defendant's "minimal and insubstantial privacy interest in the information sought." (147 C.A.3d 795, 796, 797, 800.)

(b) *California Constitution's right to privacy.* Cal. Const., Art. I, §1, refers to "people," not "persons"; and the privacy right was intended to protect individuals against actions of the Government and business interests. Hence, a corporation, though for some purposes regarded as a "person," cannot claim a privacy right under this section of the *California Constitution*. (147 C.A.3d 790, 793.) *H & M Associates* is a "unique case" that "did not address the issue whether the right to privacy for corporations is a fundamental right that can be asserted as a shield to prevent government access to relevant documents." (147 C.A.3d 793, footnote 16.) (See *Ameri-Med. Corp. v. Work. Comp. App. Bd.* (1996) 42 C.A.4th 1260, 1287, 1288, 50 C.R.2d 366 [corporate medical clinic did not have constitutional right of privacy, but it did have privacy interest in financial and employment information unrelated to fees and charges that were subject of action].)

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B. Rights Under California Law.

1. California Constitutional Provision.

b. Abortion.

1. Public Funding.

7 Witkin Sum. Cal. Law Const Law § 578

[§ 578] Public Funding.

In *Committee To Defend Reproductive Rights v. Myers* (1981) 29 C.3d 252, 172 C.R. 866, 625 P.2d 779, the California Legislature, in its budget acts of 1978 and ensuing years, provided for Medi-Cal funding of expenses incurred by indigent women who decide to bear a child, but (except in specified exceptional circumstances) denied funding to those who chose to have an abortion. *Held*, the restrictions were unconstitutional.

(a) *California Constitution is controlling.* Under the reasoning of *People v. Brisendine* (1975) 13 C.3d 528, 119 C.R. 315, 531 P.2d 1099, and subsequent cases (*supra*, §109), the court must exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions. (29 C.3d 261, and footnote 4.)

(b) *California's application of doctrine of unconstitutional conditions.*

(1) The California Supreme Court, in *People v. Belous* (1969) 71 C.2d 954, 80 C.R. 354, 458 P.2d 194, *supra*, §561, and the U.S. Supreme Court in *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, *supra*, §561, recognized the constitutional right of procreative choice as an element of the constitutional right of privacy. (29 C.3d 262.)

(2) In *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 171 P.2d 885, *infra*, §813, the court laid down the rule that a state has no power to impose an unconstitutional requirement as a condition for granting a privilege. (29 C.3d 263.) The *Danskin* principle has since been applied in many "public benefit" programs conditioning receipt of benefits on the waiver or forfeiture of a broad range of constitutional rights--access to a public forum, public employment, welfare benefits, public housing, unemployment benefits, and the use of public property. (29 C.3d 264.)

(3) *Bagley v. Washington Township Hosp. Dist.* (1966) 65 C.2d 499, 55 C.R. 401, 421 P.2d 409, *supra*, §255, established a three-part standard that the state must satisfy to justify exclusion of potential recipients of benefits solely on the basis of their exercise of constitutional rights: (a) The state must establish that the imposed conditions relate to the purpose of the legislation conferring the benefit; (b) the utility of imposing the conditions must outweigh any resulting impairment of the constitutional right; and (c) the state must establish the unavailability of less offensive

alternatives. (29 C.3d 265, 266.) The *Danskin-Bagley* line of decisions makes it clear that the California approach is different from that of the United States Supreme Court, and therefore *Harris v. McRae* (1980) 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784, is not persuasive. (29 C.3d 266 et seq.; see supra, §568.)

(c) *Applying Bagley standards.*

(1) The restrictions imposed on poor women's right of procreative choice do not relate to the primary purpose of the Medi-Cal progra--affording health care to persons who cannot afford it. (29 C.3d 271, 272.)

(2) The utility of imposing the restrictions does not outweigh the impairment of the constitutional right of procreative choice as an aspect of the right of privacy. These are among the most intimate and fundamental of all constitutional rights (29 C.3d 275), and the impairment "is significantly greater than the impairment of rights involved in almost all the past California cases in this field." (29 C.3d 276.) The state interest, by contrast, is not compelling. (a) Whatever money is saved in refusing to fund abortions will be spent many times over in paying maternity care and childbirth expenses and supporting children of indigent mothers. (29 C.3d 277.) (b) The interest in protecting the potential life of the fetus "clashes head-on with the woman's own fundamental right of procreative choice" (29 C.3d 279); and under *Roe v. Wade* the protection of a nonviable fetus is not a compelling state interest (29 C.3d 280). This right of procreative choice as an aspect of the right of privacy under the explicit provisions of the California Constitution prevails over the asserted state's interest in protecting a nonviable fetus. (29 C.3d 281.) Moreover, the state has not undertaken to protect the life of all fetuses, but has singled out poor women and has subordinated only their constitutional right of procreative choice to the concern for fetal life. (29 C.3d 281.)

(3) The statutory scheme does not serve the state interest in a manner least offensive to the woman's right of procreative choice. The argument that the legislation simply attempts to aid poor women who have already decided to bear a child is unconvincing. The state could readily meet the needs of indigent women by funding impartially the expenses of childbirth and abortion. (29 C.3d 283.)

(d) *Conclusion.* "By virtue of the explicit protection afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution ... , the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state--rich or poor--is guaranteed the constitutional right to make that decision *as an individual*, uncoerced by governmental intrusion. Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature. ... If the state cannot directly prohibit a woman's right to obtain an abortion, may the state by discriminatory financing indirectly nullify that constitutional right? Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to have an abortion." (29 C.3d 284.)

One lengthy concurring opinion agrees with the majority's conclusion but emphasizes the strict judicial scrutiny test. (29 C.3d 289.) Two justices joined in a dissent, criticizing the majority's constitutional analysis, its disregard of the holding of the United States Supreme Court, and its lack of deference to the legislative branch of government. (29 C.3d 297 et seq.) (See 70 Cal. L. Rev. 978; 33 Hastings L. J. 1475; 24 Cal. Western L. Rev. 107 [abortion funding in California]; 118 A.L.R.5th 463 [validity of state laws limiting public funding for abortions sought by indigent women].)

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B. Rights Under California Law.

1. California Constitutional Provision.

b. Abortion.

2. Rights of Minors.

7 *Witkin Sum. Cal. Law Const Law* § 579

[§ 579] Rights of Minors.

American Academy of Pediatrics v. Lungren (1997) 16 C.4th 307, 66 C.R.2d 210, 940 P.2d 797, considered the validity, under the California Constitution, of the requirement that a pregnant minor secure parental consent or judicial authorization before she may obtain an abortion. *Held*, the law violates the minor's right of privacy guaranteed by Cal. Const., Art. I, §1.

(a) *History of medical consent laws.* The common law required a parent, guardian, or other legally authorized person to provide consent for minors to receive medical treatment or services, and this requirement remains the general rule in California. However, over the past 40 years, California has enacted a variety of limited medical emancipation statutes allowing minors to consent to medical treatment in various situations. These provisions embody "a legislative recognition that, particularly in matters concerning sexual conduct, minors frequently are reluctant to inform their parents of medical conditions relating to such conduct, and consequently that there is a considerable risk that minors will postpone or avoid seeking needed medical care." Until 1987, a minor was entitled to obtain an abortion on the same grounds as an adult; in that year an abortion consent statute was enacted, providing that a minor may obtain a medically safe abortion only if she first obtains parental consent or judicial authorization. (16 C.4th 314.)

(b) *Protection of reproductive privacy under California Constitution.* The consent statute was drafted to comply with requirements of applicable federal decisions upholding parental consent laws in other states. However, "[b]ecause the applicable California authority establishes that the protection afforded by the California Constitution of a pregnant woman's right of choice is broader than the constitutional protection afforded by the federal constitution as interpreted by the United States Supreme Court," the consent statute must be evaluated under state constitutional principles. (16 C.4th 324, 328.)

(c) *Threshold elements.* To establish a significant intrusion on her privacy right under the state Constitution, plaintiff must show (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. (16 C.4th 330, citing *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, *infra*, §594.)

(1) "[B]ecause the decision whether to continue or terminate her pregnancy has such a substantial effect on a pregnant minor's control over her personal bodily integrity, has such serious long-term consequences in determining her life choices, is so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and ... is a decision that cannot be postponed until adulthood, we conclude that a minor who is pregnant has a protected privacy interest under the California Constitution in making the decision whether to continue or to terminate her own pregnancy--and that this interest is intruded upon by" the consent statute. (16 C.4th 337.)

(2) Because the consent statute impinges on "a fundamental autonomy privacy interest of pregnant minors protected by the state constitutional privacy clause, and because the statute applies to all such minors ... there is absolutely nothing in the circumstances of the present case that would support a conclusion that the pregnant minors affected by this legislation do not have a 'reasonable expectation of privacy.'" (16 C.4th 338.)

(3) The consent statute seriously invades a privacy interest in that it denies pregnant minors the ability to obtain medically safe abortions on their own, in some instances leading them to seek "back-alley abortions" or bear unwanted children, and delays minors' access to a medically safe abortion, thereby increasing the health risks imposed by an abortion. (16 C.4th 339.)

(d) *Appropriate test.* In analyzing the asserted justifications for the statute, it is necessary to determine the appropriate standard these justifications must satisfy and the effect of a facial challenge to the statute as a whole rather than to the statute as applied to a particular individual or setting:

(1) A statute that impinges on the fundamental autonomy privacy right of either a minor or an adult must be evaluated under the demanding "compelling interest" test. (16 C.4th 340.)

(2) To overcome a facial challenge to the constitutionality of a statute, it is not sufficient to show that the provisions of the statute may be constitutionally applied in even a single circumstance covered by the statute. Instead, "the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means." (16 C.4th 342.)

(e) *The consent statute does not further a compelling state interest.* The state's interests in protecting the health of minors and fostering the parent-child relationship are compelling interests, but these interests are not furthered by the statute:

(1) The trial court was not required to defer to the legislative findings accompanying the statute. When a statute impinges on a constitutional right, legislative findings concerning the need for or probable effect of the statute are not determinative. Although courts must give great weight to legislative findings, "the deference accorded such findings does not foreclose a court's independent judgment on facts bearing on an issue of constitutional law." (16 C.4th 348, quoting *Professional Engineers in Calif. Government v. Department of Trans.* (1997) 15 C.4th 543, 63 C.R.2d 467, 936 P.2d 473, 3 Summary (10th), *Agency and Employment*, §19.)

(2) The contention that the restrictions are necessary to protect a pregnant minor's physical and emotional health are belied by the fact that California law authorizes a minor, without parental consent, to obtain medical care and make other important decisions in analogous context that pose equal or greater risks to her health and that of her child, including the decision to continue her pregnancy and give birth to a child, to obtain medical care for all conditions relating to pregnancy, and to keep her child or to give the child up for adoption. In addition, numerous other statutes authorize minors, without parental consent, to obtain medical care in a variety of settings relating to sexual activity, including medical care related to sexually transmitted diseases, rape, and sexual assault. This legislation rests on a long-standing legislative recognition that minors are often reluctant to disclose medical needs arising out of sexual activity to their parents, and consequently, the minors' health will best be *protected* by authorizing treatment without

parental consent or judicial authorization. (16 C.4th 352.)

(3) Overwhelming evidence presented at trial, much of it uncontested, supports the conclusion that the consent statute would injure, instead of protect, the asserted interest of the minors' health and the parent-child relationship. (16 C.4th 355.) This evidence includes indications that use of the judicial bypass procedure would (a) delay an abortion, thereby increasing its medical risks; (b) inflict stress on the minor without providing any greater protection than that provided by the health care provider under prior law; and (c) lead some minors to attempt to terminate their pregnancies themselves or seek illegal abortions to avoid the court process. (16 C.4th 356.)

One justice concurred in the judgment. (16 C.4th 360.) Three justices dissented. (16 C.4th 384, 410, 418.) (See 33 U.S.F. L. Rev. 133 [Lungren]; 77 A.L.R.5th 1 [parental consent and notification statutes]; on abortion without parental consent, see 1 Summary (10th), Contracts, §39; 5 Summary (10th), Torts, §391.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Rights Under California Law.

1. California Constitutional Provision.

c. Medical Records and Information.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 580

[§ 580] In General.

In *Pettus v. Cole* (1996) 49 C.A.4th 402, 57 C.R.2d 46, an employee who requested leave from work for stress-related disability was examined by two psychiatrists, who, without the employee's authorization, reported the examination results, including details of the employee's medical history and psychological profile, to the employer. Based on these reports, the employer requested the employee, as a condition of continued employment, to enter an inpatient alcohol treatment program. When he refused, the employee was fired. He sued the employer and both psychiatrists, claiming violations of the Confidentiality of Medical Information Act (C.C. 56 et seq.; see 2 *Cal. Evidence* (4th), *Witnesses*, §518 et seq.) and invasion of his constitutional right of privacy. In a bench trial, judgments were entered in favor of all defendants and against plaintiff. *Held*, reversed and remanded.

(a) *Constitutional claim against psychiatrists.*

(1) Plaintiff established all three elements of a prima facie showing of invasion of privacy. He had a *legally cognizable interest* in the details of his medical and psychiatric history. (49 C.A.4th 440.) He had a *reasonable expectation of privacy* in the information he conveyed to the psychiatrists. (49 C.A.4th 441.) And their disclosures, which they must have known could prove highly embarrassing to plaintiff and disruptive of his relationship with his employer, constituted a *serious interference* with plaintiff's privacy rights. (49 C.A.4th 443.)

(2) Neither the employer's expectation that it would receive a full report, nor its "need" for details in order to evaluate plaintiff's request for leave justified the invasion of his privacy interest. The employer's expectation should have been altered by the enactment of C.C. 56.10(c)(8)(B) (limiting information health care workers paid by employers may disclose regarding an employee's medical condition requiring leave from work) and its need would have been met by substantially less information than was given. (49 C.A.4th 445, 446.) If plaintiff posed a threat to a coworker, as claimed by one defendant, then the warning required by *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, 6 *Summary* (10th), *Torts*, §1050, would have been appropriate. Neither of the psychiatrists claimed that the reports they submitted constituted a *Tarasoff* warning. (49 C.A.4th 446, 447.)

(3) After the psychiatrists' motion for judgment was granted, the employer presented evidence that may defeat

plaintiff's constitutional claim. In light of statements made by plaintiff to his supervisors before he consulted either psychiatrist, it may be found that, by voluntarily disclosing some of the sensitive information subsequently transmitted by the psychiatrists, he waived his constitutional privacy claim. Because the evidence conflicts on this point, a remand is necessary. (49 C.A.4th 448, 449.)

(b) *Constitutional claim against employer.*

(1) Plaintiff also made a prima facie showing of a constitutional violation by the employer. He had a cognizable interest in maintaining the privacy of the detailed medical information he conveyed to the psychiatrists, and disclosure and misuse of that information violated his *informational* privacy rights. (49 C.A.4th 457.) More importantly, he had an *autonomy* privacy interest in "making intimate personal decisions about an appropriate course of medical treatment for his disabling stress condition, without undue intrusion or interference from his employer." (49 C.A.4th 457.) The interference with these interests, "involving both a misuse of the employee's private medical information and a penalty for his assertion of his autonomy privacy interests--was 'an egregious breach of the social norms underlying the privacy right.' " (49 C.A.4th 460, quoting *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, *infra*, §594.)

(2) The employer failed to identify any countervailing interest sufficient to justify its interference. The intrusion into plaintiff's autonomy privacy interest would require a compelling interest, which the employer did not establish. Requiring plaintiff to enroll in an inpatient alcohol treatment program was unnecessary and inappropriate to address the problems underlying his disability claim, and none of the physicians consulted by the employer recommended this treatment. Less intrusive alternatives were available, including a grant of the requested disability leave, with a requirement of further evaluation before a return to work. (49 C.A.4th 461, 462.) (See *Garrett v. Young* (2003) 109 C.A.4th 1393, 1410, 1 C.R.3d 134, 2 Cal. Evidence (4th), Witnesses, §518 [because protections of Confidentiality of Medical Information Act are in addition to other available remedies, it is theoretically possible for disclosure that does not violate Act to violate patient's right to privacy; however, plaintiff's claim here failed because she had no reasonable expectation of privacy in information conveyed to employer]; C.C. 1798.91 [businesses may not obtain medical information directly from individuals for direct marketing purposes without providing mandated disclosures and obtaining consent]; on statutory claim under C.C. 56 et seq., see 2 Cal. Evidence (4th), Witnesses, §518 et seq.; on improper disclosure of HIV-positive status, see *infra*, §582.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Privacy Compliance and Litigation, Chap. 7.



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B. Rights Under California Law.

1. California Constitutional Provision.
- c. Medical Records and Information.
2. Discovery of Medical Patient's Records.

7 Witkin Sum. Cal. Law Const Law § 581

[§ 581] Discovery of Medical Patient's Records.

In *Board of Med. Quality Assur. v. Gherardini* (1979) 93 C.A.3d 669, 156 C.R. 55, the medical board, investigating a charge of medical malpractice, sought to compel a hospital to produce medical records of patients on the basis of conclusionary statements without a showing of good cause or consent of the patients. *Held*, order granting petition reversed. "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." (93 C.A.3d 678.) (See *Kizer v. Sulnick* (1988) 202 C.A.3d 431, 248 C.R. 712 [Department of Health Services, in connection with investigation of hazardous waste facility, sought medical study on health effects on nearby residents; *held*, distinguishing *Gherardini*, study was material and relevant, and privacy could be protected by deletion of any identifying information].)

In *Heda v. Superior Court* (1990) 225 C.A.3d 525, 275 C.R. 136, plaintiff brought a malpractice action against defendant doctor, and moved for trial preference under C.C.P. 36(d) (7 Cal. Proc. (4th), Trial, §81) on the ground that defendant was suffering from a terminal illness. She then propounded interrogatories asking defendant to describe his physical ailments, state his doctors' prognosis, and also furnish his medical records. The trial court ordered defendant to answer. *Held*, mandamus granted to vacate the order. To win her trial preference motion, plaintiff may need the documentation she seeks, but her "desire for trial preference does not outweigh defendant's constitutional right to privacy for medical records. Defendant's presence at trial, while desirable, is not essential. Much of what plaintiff seeks by her preference motion, she may obtain by deposing defendant. Under proper conditions, she may video-tape the deposition and may introduce the videotape at trial if defendant is not available. ... If defendant does not survive, she may substitute his estate as defendant in the action." (225 C.A.3d 528.) (On use of videotape at trial, see 2 Cal. Evidence (4th), Discovery, §79.)

When the constitutional right of privacy is involved, the party seeking discovery of medical records must do more than satisfy the relevancy standard of C.C.P. 2017.010 (see 2 Cal. Evidence (4th), Discovery, Supp., §9 et seq.); he or she must demonstrate a compelling need that outweighs privacy rights when the interests are balanced. (*Lantz v. Superior Court* (1994) 28 C.A.4th 1839, 1853, 1854, 34 C.R.2d 358 [decided under former C.C.P. 2017]; see *Brillantes v. Superior Court* (1996) 51 C.A.4th 323, 342, 58 C.R.2d 770 [privacy interest of Medi-Cal patients in their files is not absolute; records can be used to investigate fraud in administration of program]; *Susan S. v. Israels* (1997) 55 C.A.4th

1290, 1294, 67 C.R.2d 42 [defense attorney's unauthorized reading and dissemination of crime victim's confidential mental health record violated victim's constitutional right of privacy]; *Johnson v. Superior Court* (2000) 80 C.A.4th 1050, 1068, 95 C.R.2d 864 [trial court erred in denying plaintiff parents' motion to compel sperm donor's deposition and production of medical information in action against sperm bank for sale of genetically defective sperm; however, discovery order must be fashioned to protect identity of donor and his family members and to limit discovery to issues relevant to pending litigation]; *Mansell v. Otto* (2003) 108 C.A.4th 265, 273, 133 C.R.2d 276 [distinguishing *Susan S.*; valid claim for invasion of privacy based on noncommunicative acts requires more than mere act of reading or disseminating confidential materials; courts find liability when lack of prior judicial review combines with voluntary disclosure of confidential information]; *Bearman v. Superior Court* (2004) 117 C.A.4th 463, 468, 11 C.R.3d 644 [medical board lacked good cause to obtain patient's records in investigating whether doctor had violated law or was negligent in prescribing marijuana; records sought must be relevant and material to inquiry such that trial court may independently make finding of good cause to order disclosure]; 31 *Golden Gate L. Rev.* 193 [*Johnson*].)

SUPPLEMENT: [This section is current through the latest supplement]

Trial preference under C.C.P. 36(d):

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §71.



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1. California Constitutional Provision.
- c. Medical Records and Information.
3. Disclosure of HIV-Positive Status.

7 *Witkin Sum. Cal. Law Const Law* § 582

[§ 582] Disclosure of HIV-Positive Status.

In *Urbaniak v. Newton* (1991) 226 C.A.3d 1128, 277 C.R. 354, plaintiff disclosed his positive HIV status to a nurse following a medical examination solely for the purpose of alerting her to the need to sterilize the medical equipment used in his examination. However, his HIV status was added to the report on his examination. The report was then disseminated to his counsel, insurance companies, and ultimately to the Workers' Compensation Appeals Board.

(a) Under appropriate circumstances, disclosure of HIV-positive status may be entitled to protection under Cal. Const., Art. I, §1. "The condition is ordinarily associated either with sexual preference or intravenous drug uses. It ought not to be, but quite commonly is, viewed with mistrust or opprobrium. Under the test of tortious invasion of privacy, it is clearly a 'private fact' of which the disclosure may 'be offensive and objectionable to a reasonable [person] of ordinary sensibilities.' ... In the field of constitutional law, federal decisions concerning the right of privacy accorded to sexual practices, and California precedents dealing with the privacy attaching to medical records and the psychotherapist-patient relationship, provide judicial recognition of privacy interests in closely related areas of life." (226 C.A.3d 1140.)

(b) "The circumstances under which disclosure of HIV positive status may give rise to a cause of action pursuant to article I, section 1, are governed by the concept of 'improper use of information properly obtained.' ... In the field of health care, disclosure of information about a patient constitutes 'improper use' when it will subvert a public interest favoring communication of confidential information by violating the patient's reasonable expectations of privacy. We find such a public interest here in a patient's disclosure of HIV positive status for the purpose of alerting a health care worker to the need for safety precautions. ... The evidence here would support the inference that Urbaniak reasonably anticipated privacy. By enforcing such reasonable expectations of privacy, the courts will simultaneously foster needed disclosures of HIV positive status and protect against their abuse." (226 C.A.3d 1140.) (See *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 C.A.4th 345, 353, 101 C.R.2d 916 [plaintiff adequately pleaded violation of right to privacy by alleging defendant's disclosure of documents showing plaintiff's HIV status in disregard for their confidentiality, and use of documents in proceeding to which they had no relevance; *Health & Saf.C. 120980* applies only to "health care providers responsible for receiving and keeping custody of test results in the course of medical diagnosis or treatment"]; 29 Cal. Western L. Rev. 471 [protecting HIV confidentiality after *Urbaniak*]; 12 A.L.R. 5th 149 [state statutes or

regulations expressly governing disclosure of fact that person has tested positive for HIV or AIDS]; on *Health & Saf.C. 120980*, imposing liability for wrongful disclosure of AIDS test results, see 5 *Summary* (10th), *Torts*, §153.)

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1. California Constitutional Provision.

d. Employment.

1. In General.

7 Witkin Sum. Cal. Law Const Law § 583

[§ 583] In General.

(1) *Improper Posting of Notice of Employee's Termination.* In *Payton v. Santa Clara* (1982) 132 C.A.3d 152, 183 C.R. 17, a former city employee sued the city for damages arising out of the city's alleged misconduct in posting in a public employee workroom notice of his termination and the reasons for it. *Held*, the complaint stated a prima facie violation of the right to privacy, and a general demurrer was improperly sustained. (132 C.A.3d 154.)

(2) *Discovery of Statements Made in Mediation.* In *Garstang v. Superior Court* (1995) 39 C.A.4th 526, 46 C.R.2d 84, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §158, the court held that statements made to a university ombudsman during mediation sessions were confidential and did not have to be revealed during discovery because the ombudsman system was based on the premise that information disclosed during the proceedings would remain confidential, and the relationship between university employees and the ombudsman is one that is worthy of societal support. (39 C.A.4th 533, 535.)

Rinaker v. Superior Court (1998) 62 C.A.4th 155, 74 C.R.2d 464, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §154, involved the mediation of a civil harassment action and a juvenile delinquency proceeding arising from the same transaction. The court held that the constitutional right to privacy did not shield the mediator in the civil harassment action from testifying in the juvenile delinquency proceeding as to inconsistent statements made by the victim. The interest in promoting settlements, in this case through confidential mediation of the harassment action, must yield to the constitutional right to effective impeachment. Neither the mediator nor the victim had a reasonable expectation that inconsistent statements made about the minors would remain private if the victim were called to testify about the minors in the juvenile delinquency proceeding. (62 C.A.4th 167.)

(3) *Discovery of Statements Made in Termination Proceedings.* *Garstang* was distinguished in *Saeta v. Superior Court* (2004) 117 C.A.4th 261, 11 C.R.3d 610. Statements made during a hearing conducted by an employment termination review panel, which was neither an arbitration nor a mediation, were not privileged, and an order compelling a panel member's deposition testimony did not violate the member's right to privacy. The parties at the hearing had no expectation that statements made there were confidential, and the panel member's right to privacy was outweighed by the employee's need for discovery. (117 C.A.4th 272.)

(4) *Medical Exam.* In *Feminist Women's Health Center v. Superior Court* (1997) 52 C.A.4th 1234, 61 C.R.2d 187, the court held that a requirement that a health worker perform a cervical self-examination in front of other females was a reasonable condition of employment and did not violate the worker's right of privacy where the written employment agreement evidenced her knowledge of the condition and her agreement to be bound by it. (52 C.A.4th 1249.)

(5) *Sexual Orientation.* In *Leibert v. Transworld Systems* (1995) 32 C.A.4th 1693, 39 C.R.2d 65, the court held that a complaint that an employee's state constitutional right to privacy was violated when his employer used information about his sexual orientation as grounds to terminate his employment, though deplorable, did not allege a legally protected privacy interest. (32 C.A.4th 1702.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Privacy Compliance and Litigation, Chap. 8.



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2. Disclosure of University Tenure Proceedings.

7 Witkin Sum. Cal. Law Const Law § 584

[§ 584] Disclosure of University Tenure Proceedings.

In *Kahn v. Superior Court* (1987) 188 C.A.3d 752, 233 C.R. 662, a candidate for permanent appointment to a university faculty brought an action for defamation and tortious interference with advantageous business relationship against a tenured professor of the university who participated in a private department meeting to consider the appointment. Although a search committee had unanimously recommended the candidate's appointment, the department failed to endorse the recommendation. The candidate gathered information that convinced him that the professor had persuaded the department to deny the appointment on nonacademic grounds. However, his complaint made no claim of discrimination, and he had been given a comprehensive summary of events that took place and the reasons for refusal of the appointment. The trial court entered a protective order staying discovery but allowing the candidate to take the professor's deposition for the sole purpose of inquiring into his statements, motives, actions, and conduct in connection with the review and evaluation of the candidate's application. *Held*, mandamus granted to prevent taking the deposition.

(a) The comments made and the vote taken during the department meeting were covered by the communicators' constitutional right to privacy. (188 C.A.3d 769.)

(b) The candidate's interest in recovering monetary damages for improper denial of the appointment, and the compelling state interest in facilitating the ascertainment of truth in connection with legal proceedings, were outweighed by the professor's right to discuss with his colleagues the candidate's qualifications in confidence without fear of compelled disclosure, and by the public interest in promoting academic excellence. (188 C.A.3d 769, 770.) (See *Scharf v. Regents of Univ. of Calif.* (1991) 234 C.A.3d 1393, 1409, 286 C.R. 227 [discussing *Kahn*].)

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3. Disclosure of Employee Personnel Records.

7 *Witkin Sum. Cal. Law Const Law* § 585

[§ 585] Disclosure of Employee Personnel Records.

In *El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 C.A.3d 342, 235 C.R. 303, plaintiffs brought an employment discrimination action on the basis of gender and sex against defendant association, their former employer. In discovery proceedings, plaintiffs moved to compel production of the entire personnel file of a nonparty employee, claiming that he was the only male employed by defendant in the same capacity as plaintiffs, that he had received compensation and benefits not afforded to plaintiffs, and that disclosure of his personnel file was necessary to facilitate prosecution of plaintiffs' action. The nonparty employee sought mandamus to nullify the trial court order granting plaintiffs' motion. *Held*, writ granted.

(a) The personnel records of petitioner were protected by the right of privacy, and the record was inadequate to support a conclusion that disclosure of the entire personnel record was justified. Consideration should be given to whether less intrusive means, such as deposing the nonparty employee and others, would yield the information sought. (190 C.A.3d 346.)

(b) Even if it is determined that no less intrusive means exist, the trial court "should first examine the file in camera and order disclosure of only that information which might be relevant to the lawsuit." (190 C.A.3d 346.) (See *Board of Trustees v. Superior Court* (1981) 119 C.A.3d 516, 524, 526, 174 C.R. 160 [in defamation action by professor against his former university employer, discovery of personnel, tenure, and promotion records of nonparty former university professor was improper]; 14 *Loyola L.A. L. Rev.* 385 [violation of employee's privacy through disclosure of records].)

In *Michael v. Gates* (1995) 38 C.A.4th 737, 745, 45 C.R.2d 163, the court held that there was no violation of a police officer's constitutional right to privacy where a limited review of his personnel file did not do injustice to his reasonable expectation of privacy. (See *Rosales v. Los Angeles* (2000) 82 C.A.4th 419, 429, 98 C.R.2d 144 [following *Michael*; police officer had no reasonable expectation that his personnel records would not be disclosed to plaintiff's counsel or used by city in defending action alleging officer's sexual misconduct during employment].)

In *Gilbert v. San Jose* (2004) 114 C.A.4th 606, 7 C.R.3d 692, the court held that before a city could disclose personal information collected under a city ordinance from employees working in the gambling industry, the city must

take reasonable steps to notify the employee to whom the information pertains of the pendency and nature of the request. The employee then must be afforded a fair opportunity to object to the disclosure and to limit the scope and nature of discovery. (114 C.A.4th 615.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 971, first line of last paragraph of section, publication date of *Gilbert v. San Jose* should be 2003.



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e. Criminal Investigations and Prosecution.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 586

[§ 586] In General.

People v. Wiener (1994) 29 C.A.4th 1300, 1305, 1312, 35 C.R.2d 321, held that P.C. 311.2, prohibiting the sale or distribution of obscene matter (see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §89), does not violate the state constitutional right to privacy.

Baughman v. California (1995) 38 C.A.4th 182, 187, 45 C.R.2d 82, held that a search by campus police, under a search warrant and as part of a criminal investigation into computer theft, justified the invasion of privacy and destruction of plaintiff's computer discs, which were similar to what police were looking for.

In *People v. Martinez* (2001) 88 C.A.4th 465, 475, 105 C.R.2d 841, the use of, and testimony concerning, defendant's psychiatric treatment and evaluation in a trial to determine whether he should be committed as a sexually violent predator did not violate defendant's right to privacy.

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2. Arrest Records.

aa. Protected Acts.

7 Witkin Sum. Cal. Law Const Law § 587

[§ 587] Protected Acts.

In *Central Valley Chapter 7th Step Foundation v. Younger* (1979) 95 C.A.3d 212, 157 C.R. 117, the court examined the procedure of the California Department of Justice in sending arrest records to public employers without deleting arrests that did not result in a conviction. Distinguishing *Loder v. Municipal Court* (1976) 17 C.3d 859, 132 C.R. 464, 553 P.2d 624, *infra*, §588, the court held that the allegations of plaintiffs brought the case within the third "mischief" of *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, *supra*, §575; i.e., the dissemination of this data does not further law enforcement or criminal justice. (95 C.A.3d 236.) (See *Pitman v. Oakland* (1988) 197 C.A.3d 1037, 1045, 243 C.R. 306, *infra*, §588 [distinguishing *Central Valley*].)

In *Central Valley Chapter of the 7th Step Foundation v. Younger* (1989) 214 C.A.3d 145, 262 C.R. 496, the court reexamined the procedure considered in *Central Valley I*, *supra*, and again imposed restrictions on the dissemination of arrest records. Under P.C. 11105 and *Lab.C.* 432.7, the Department of Justice is required to furnish criminal history information (arrest records) to specified public agencies (exempt employers) but is prohibited from providing this information to others (nonexempt employers).

(a) Prior cases have held that retention and dissemination of arrest records impinges on the right to privacy guaranteed by Cal. Const., Art. I, §1. (214 C.A.3d 162, citing *Central Valley I*, *Loder*, and *Pitman*.)

(b) Law enforcement agencies may *maintain* these records (214 C.A.3d 161), but no compelling interest justifies dissemination of nonconviction data to nonexempt employers (214 C.A.3d 162, 165).

(c) Dissemination of this information to exempt employers is permitted. However, the department may not disseminate incomplete information without attempting to obtain complete information. Thus, an attempt must be made to determine whether ordered diversion has been successfully completed and whether an individual was exonerated where arrest was followed by dismissal or release. (214 C.A.3d 167, 170.)

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2. Arrest Records.

bb. Unprotected Acts.

7 *Witkin Sum. Cal. Law Const Law* § 588

[§ 588] Unprotected Acts.

An attempt to use the constitutional provision as the basis for compelled erasure or return of arrest records was unsuccessful in *Loder v. Municipal Court* (1976) 17 C.3d 859, 132 C.R. 464, 553 P.2d 624. The arrest for misdemeanors was apparently valid, but the authorities decided not to prosecute, and the complaint was dismissed for lack of prosecution, concurrently with plaintiff's execution of a covenant not to sue. The court pointed out that an invasion of individual privacy may be justified by a compelling interest, and listed a great many appropriate uses of arrest records in investigation of crime and identification of arrested persons, and in pretrial and posttrial proceedings, e.g., release on own recognizance, probation, and parole. These purposes constitute a substantial governmental interest (17 C.3d 868), and the arrestee's legitimate need for protection against improper use is the subject of numerous statutory provisions (17 C.3d 869 et seq.). The absence of any statute requiring expungement of the record in a case of this kind indicates a legislative determination that the compelling state interests outweigh the speculative harm asserted by plaintiff. (17 C.3d 876.) Other state and federal courts "have reaffirmed the rule that limited retention and dissemination of arrest records does not violate the right of privacy." (17 C.3d 877.)

In *Pitman v. Oakland* (1988) 197 C.A.3d 1037, 243 C.R. 306, plaintiff, a police communications dispatcher, was discharged following a disclosure of his arrest record to defendant city, his employer. He brought an action for violation of his constitutional right of privacy, relying on *Central Valley Chapter of the 7th Step Foundation v. Younger* (1979) 95 C.A.3d 212, 157 C.R. 117, supra, §587. It appeared, however, that plaintiff was subsequently convicted of a crime based on the arrest. *Held*, no cause of action was stated. "[W]here a plaintiff seeks to state a privacy cause of action for damages based upon the dissemination and utilization of arrest data, an essential element of the cause of action, *to be pleaded and proved*, is that the arrest data did not result in a conviction." (197 C.A.3d 1046.) (See *Alarcon v. Murphy* (1988) 201 C.A.3d 1, 6, 248 C.R. 26 [plaintiff's right to privacy was not invaded by police disclosure that he was suspect in murder case, despite lack of probable cause to arrest him for murder, where affidavit for search and arrest warrants on related charges revealed that he was murder suspect]; *American G.I. Forum v. Miller* (1990) 218 C.A.3d 859, 866, 867, 267 C.R. 371 [gathering and disseminating information on arrestee's status as "undocumented person" on standard arrest form does not violate right to privacy or due process; under *Loder*, privacy concerns are outweighed by governmental

interest].)

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3. Sex Crimes.

7 *Witkin Sum. Cal. Law Const Law* § 589

[§ 589] Sex Crimes.

(1) *In General.* In *People v. Baldwin* (1974) 37 C.A.3d 385, 112 C.R. 290, the court, affirming a conviction for oral copulation in a public place (P.C. 288a), rejected appellant's claims that the statute was an unconstitutional invasion of religious freedom (*supra*, §505) and an invasion of the right of privacy. On the privacy point, the court said:

"The real thrust of defendants' argument is that oral copulation is and should be recognized as a socially acceptable practice. When, therefore, they speak of a constitutional right to privacy or a right to be protected from an unconstitutional deprivation of their right to liberty, they seek, in effect, judicial repeal, actually, for social reasons, but under the handy guise of a vaguely defined constitutional right, of a law the repeal of which by the Legislature on social grounds has not been brought about." (37 C.A.3d 394.) (See *In re T.A.J.* (1998) 62 C.A.4th 1350, 1361, 73 C.R.2d 331 [there is no privacy right among minors to engage in consensual sexual intercourse, nor does minor have legitimate expectation of privacy to engage in consensual sexual activity with another minor].)

(2) *Megan's Law.* California requires the collection and limited disclosure of information regarding sex offenders. (P.C. 290.4; see 3 *Cal. Crim. Law* (3d), *Punishment*, §189 et seq.) Additional public disclosure, including an offender's address, is required both (a) in the case of a high-risk sex offender, and (b) when there is a reasonable suspicion that a person is at risk from a sex offender. (P.C. 290.45; see 3 *Cal. Crim. Law* (3d), *Punishment, Supp.*, §191.) (See *Fredenburg v. Fremont* (2004) 119 C.A.4th 408, 421, 14 C.R.3d 437 [city website with "pin maps" showing general location, but not name and address, of sex offenders living in city did not violate Megan's law; offender had no constitutionally protected right to privacy in general location of his residence].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Megan's Law.* P.C. 290.45, as amended in 2005, now provides for additional public disclosure "when necessary to ensure the public safety based on information available" to a designated law enforcement entity concerning a person required to register as a sex offender under P.C. 290. The statute applies to every offense listed in P.C. 290, regardless of when it was committed. (P.C. 290.45(g).)



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4. Possession of Marijuana.

7 *Witkin Sum. Cal. Law Const Law* § 590

[§ 590] Possession of Marijuana.

In *National Organization for Reform of Marijuana Laws v. Gain* (1979) 100 C.A.3d 586, 161 C.R. 181, individual taxpayers and an organization brought an action against local law enforcement officials and the district attorney attacking sections of the Health and Safety Code that prohibit the private possession and use of marijuana by adults. Following the approach in *People v. Privitera* (1979) 23 C.3d 697, 153 C.R. 431, 591 P.2d 919, *infra*, §600, the court declared that the California constitutional right of privacy "does not guarantee adult Californians the privilege of smoking a possibly harmful drug, even in the privacy of their homes." (100 C.A.3d 593.) (For discussion of statutes permitting medical use of marijuana, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §70.)

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1. California Constitutional Provision.

e. Criminal Investigations and Prosecution.

5. Compulsory Polygraph Examination.

7 *Witkin Sum. Cal. Law Const Law* § 591

[§ 591] Compulsory Polygraph Examination.

In *Long Beach City Employees Assn. v. Long Beach* (1986) 41 C.3d 937, 227 C.R. 90, 719 P.2d 660, a city, as part of an internal theft investigation, ordered certain public employees to submit to a polygraph examination as a condition of continued employment. Under *Lab.C. 432.2* and *Govt.C. 3307*, the only employees in the state subject to compulsory examinations were public employees who were not "public safety officers." *Held*, the legislative classification was a denial of equal protection (see *infra*, §694 et seq.) and possibly a violation of the right of privacy.

(a) "If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality." (41 C.3d 944.)

(b) "A polygraph examination is specifically designed to overcome this privacy by compelling communication of 'thoughts, sentiments, and emotions' which the examinee may have chosen not to communicate. The standard polygraph test is far more intrusive than a series of questions related directly to the employee's job performance or knowledge of the crimes under investigation." (41 C.3d 944.)

(c) "The intrusiveness of polygraph questions on private matters is exacerbated by three factors that make the process fundamentally different from verbal interrogation. First, '[t]he polygraph merely records general emotional arousal. It cannot distinguish anxiety or indignation from guilt.' ... Second, an employee who is asked an embarrassing personal question may be reluctant to refuse to answer it for fear of appearing dishonest. ... Finally, even if an employee chooses not to *verbally* answer a question on a personal matter, the polygraph will record his or her *psychological* response in any event." (41 C.3d 946.)

(d) "[W]e find that polygraph examinations inherently intrude upon the constitutionally protected zone of individual privacy." (41 C.3d 948.) However, because "CEA relies primarily on its contention that Bureau employees were denied equal protection, we need not decide at this juncture whether their right of privacy was improperly violated irrespective of the legislative classification that exempts private sector employees and all 'public safety officers'; from involuntary polygraph testing. To decide the latter question, we would inquire whether the City had demonstrated a compelling governmental interest in administering the polygraph examinations to these employees and whether this

interest could be accomplished by less intrusive means." (41 C.3d 948, footnote 12.)

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1. California Constitutional Provision.

f. Drug Testing.

1. In General: Employee or Applicant.

7 *Witkin Sum. Cal. Law Const Law* § 592

[§ 592] In General: Employee or Applicant.

In *Wilkinson v. Times Mirror Corp.* (1989) 215 C.A.3d 1034, 264 C.R. 194, plaintiffs challenged a publishing company's requirement that all job applicants submit to a drug and alcohol test as part of a preemployment medical examination. *Held*, the requirement did not violate the right to privacy.

(a) The privacy provision of the California Constitution protects against private as well as government action. (215 C.A.3d 1040, 1043.) But the right is not absolute, and the courts have not required a compelling justification for every action that has some impact on the right. Rather, when the challenged conduct does not substantially burden the right, the question is whether the conduct is reasonable. (215 C.A.3d 1046, 1047.)

(b) Here, "[p]erhaps the most important factor in our analysis is that plaintiffs are applicants for employment, not employees, either public or private." (215 C.A.3d 1048.) California law permits private employers to condition job offers on the results of a medical examination, and urinalysis is a routine part of these examinations. "Thus subjecting urine samples to analysis for alcohol and drugs is only slightly more intrusive than the procedures which plaintiffs already reasonably had to expect as job seekers with private business." (215 C.A.3d 1049.)

(c) Also, defendant informs applicants of the drug-testing requirement, the testing procedures are designed to be minimally intrusive, and the results are confidential. (215 C.A.3d 1049.) "Simply put, applicants for jobs at Matthew Bender have a choice; they may consent to the limited invasion of their privacy resulting from the testing, or may decline both the test and the conditional offer of employment." (215 C.A.3d 1049.) (See *Semore v. Pool* (1990) 217 C.A.3d 1087, 1094, 266 C.R. 280 [following *Wilkinson*].)

In *Loder v. Glendale* (1997) 14 C.4th 846, 59 C.R.2d 696, 927 P.2d 1200, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §323, the court considered the validity of a program adopted by the city of Glendale under which everyone who was offered a new position by the city was required to submit to testing for drugs and alcohol. Five opinions were filed in the case, none of which commanded a majority. Four justices concluded that the program was invalid as applied to current employees seeking promotions, while five justices concluded that it was valid as applied to new job applicants. (14 C.4th 852, 853, and footnote 1.) (See *Pilkington Barnes Hind v. Superior Court* (1998) 66

C.A.4th 28, 34, 77 C.R.2d 596 [following *Loder*; job applicant who delays in submitting to preemployment drug test until after start of employment may not evade testing requirement on ground that applicant became "employee" who is immune from testing]; *Smith v. Fresno Irr. Dist. (1999) 72 C.A.4th 147, 162, 166, 84 C.R.2d 775* [constitutionality of drug testing is determined on case-by-case basis; plaintiff employee's expectation of privacy was diminished by defendant employer giving 6 months' notice before implementing of testing program, and was outweighed by defendant's legitimate and substantial safety-related reasons for testing construction and maintenance workers]; *Edgerton v. State Personnel Bd. (2000) 83 C.A.4th 1350, 1360, 100 C.R.2d 491* [off-duty drug testing violated employee's right to privacy].)

Mandatory drug testing has arisen in other contexts. (See *American Federation of Labor-Congress of Industrial Organizations v. Unemp. Ins. App. Bd. (1994) 23 C.A.4th 51, 58, 28 C.R.2d 210, 3 Summary (10th), Agency and Employment, §519* [denial of unemployment compensation to employee discharged for refusing to take drug test]; *Kraslawsky v. Upper Deck Co. (1997) 56 C.A.4th 179, 185, 193, 65 C.R.2d 297* [discussing *Hill v. National Collegiate Athletic Assn. (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, infra, §594*; privacy interests may be violated even though drug and alcohol testing is not visually monitored]; on drug testing as violating prohibition of Fourth and Fourteenth Amendments against unreasonable searches, see *4 Cal. Crim. Law (3d), Illegally Obtained Evidence, §321 et seq.*)

The commentary on mandatory drug testing in the workplace has been extensive. (See *86 Cal. L. Rev. 119* [Individual Privacy Interests and the "Special Needs" Analysis for Involuntary Drug and HIV Tests]; *17 Hastings Const. L. Q. 533*; *19 Hastings Const. L. Q. 1107* [privacy rights in private workplace]; *27 Pacific L. J. 1699* [constitutionality of mandatory drug testing as condition of entering housing and job training program]; *27 San Diego L. Rev. 29* [analysis of law on employment drug testing in light of workplace realities]; *22 Southwestern U. L. Rev. 307* [Is There Privacy in the Workplace?]; *23 U.S.F. L. Rev. 221* [L.M.R.A. §301 and Random Drug Testing by Employers]; *26 U.S.F. L. Rev. 559* [random drug testing in aviation industry]; *28 Proof of Facts 3d 185* [proof of violation of privacy rights in employment drug testing]; *96 A.L.R.5th 485* [validity and operation of preemployment drug testing--state cases]; *145 A.L.R. Fed 335* [supreme court's views on mandatory testing for drugs or alcohol].)

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See C.E.B., Privacy Compliance and Litigation, §8.44 et seq.; *27 California Lawyer 41* (March 2007) [Trends in Employee Drug Testing]. *Mandatory drug testing in other contexts: In re Carmen M. (2006) 141 C.A.4th 478, 46 C.R.3d 117*, held that the privacy rights of a dependent child were not violated by court-ordered drug testing. The child had a recent history of drug abuse and had responded well to a drug treatment program that included random drug testing. Under the order, further testing was to be done only if there was a reasonable suspicion that the child was using drugs. (*141 C.A.4th 494.*) The court noted that this kind of order should include adequate safeguards to protect the child's privacy. (*141 C.A.4th 496.*)



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f. Drug Testing.

2. Distinction: Safety Interest Insufficient To Justify Intrusion.

7 *Witkin Sum. Cal. Law Const Law* § 593

[§ 593] Distinction: Safety Interest Insufficient To Justify Intrusion.

In *Luck v. Southern Pac. Trans. Co.* (1990) 218 C.A.3d 1, 267 C.R. 618, plaintiff, employed by defendant as a computer programmer, had no tasks involving operation of trains or railroad equipment. She was discharged when she refused to submit a urine sample as part of an unannounced drug test by her employer. In this action for wrongful termination and intentional infliction of emotional distress, she received an award of compensatory and punitive damages. *Held*, judgment affirmed.

(a) *State and federal constitutional rights.* The U.S. and California Supreme Courts have held that urinalysis intrudes upon reasonable expectations of privacy. (218 C.A.3d 15, 16, discussing *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §321, and *Wilkinson v. Times Mirror Corp.* (1989) 215 C.A.3d 1034, 264 C.R. 194, *supra*, §592.) Defendant's contention that the California constitutional provision gives only informational protection is unsound; Cal. Const., Art. I, §1, has been held to protect a diverse range of personal freedoms. (218 C.A.3d 16.) In *Long Beach City Employees Assn. v. Long Beach* (1986) 41 C.3d 937, 227 C.R. 90, 719 P.2d 660, *supra*, §591, the court held that polygraph examinations are an intrusion on the right; "it seems reasonable to infer that our Supreme Court, like the United States Supreme Court in the Fourth Amendment context, would find both the collection and testing of urine to be privacy interests protected by article I, section 1." (218 C.A.3d 17.)

(b) *Private employer.* Cal. Const., Art. I, §1, does not specify whether its privacy provisions are limited to state action; but California cases and commentators agree that it reaches both governmental and nongovernmental conduct. (218 C.A.3d 17, citing *Wilkinson*.)

(c) *Public interests.* The constitutional right to privacy does not prohibit all incursions into individual privacy; but to be valid the invasion must be justified by a compelling interest. (218 C.A.3d 20.) Defendant argued that its interest in rail safety justified the invasion. No case law addresses this issue, but the United States Supreme Court decisions in *Skinner*, *supra*, and *National Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §322, considering safety issues in Fourth Amendment privacy cases, are persuasive authority. (218 C.A.3d 21, 22.) When an employer asserts an interest that is not obviously

applicable to the specific employee in question, federal decisions applying *Skinner* and *Von Raab* hold that testing is not justifiable "absent a clear, direct nexus between the employee's duties and the nature of the feared harm." (218 C.A.3d 23.)

In this case, "Southern Pacific suggested only indirect, potential safety ramifications that might result from an imprudent decision that an employee working as Luck did might make if her judgment was impaired by drugs. Under the federal authorities, Luck's job did not have sufficient safety aspects to constitute a safety interest that might be balanced against the intrusion upon her privacy rights. When we also consider that the interest must be compelling in order to justify an intrusion of her privacy rights under our state Constitution--a higher showing than would be required under the Fourth Amendment analysis used by federal courts--it is clear that the trial court's implied ruling that Southern Pacific's safety interest did not justify the invasion of Luck's privacy was correct." (218 C.A.3d 23.) (For limitation on compelling interest test where college athletes are involved, see *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, *infra*, §594.)

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f. Drug Testing.

3. Athletes.

7 *Witkin Sum. Cal. Law Const Law* § 594

[§ 594] Athletes.

In *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, student athletes challenged the NCAA's drug testing program under which randomly selected college athletes in postseason competition were required to provide urine samples for chemical analysis. The trial court, finding that the program violated the athletes' right to privacy under Cal. Const., Art. I, §1, granted a permanent injunction, and the Court of Appeal affirmed. *Held*, the program did not violate the constitutional provision.

(a) The NCAA's drug testing program, which involves observation of urination and disclosure of medical information, implicates both autonomy privacy and information privacy. (7 C.4th 40, 41.) However, participation in intercollegiate athletics involves close regulation and scrutiny and carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy. Drug testing has become a highly visible, pervasive, and well-accepted part of athletic competition, and is a reasonably expected part of an athlete's life. (7 C.4th 41, 42.) Also, the athletes have no right to participate in intercollegiate competition; their ability to do so necessarily depends on their willingness to adhere to the rules that have been collectively adopted. (7 C.4th 43.)

(b) Plaintiff's privacy interests, although diminished, are not *de minimis*. (7 C.4th 43.) The NCAA justifies its intrusion on these diminished expectations by asserting two countervailing interests: (1) safeguarding the integrity of athletic competition; and (2) protecting the health and safety of student athletes. (7 C.4th 43, 44.) These interests are substantial (7 C.4th 44, 48), and the NCAA was not required to prove that "no less intrusive means" were available (7 C.4th 50). Neither case law nor the language or history of Cal. Const., Art. I, §1, justifies imposition of a "least offensive alternative" burden. (7 C.4th 50.)

(c) Blanket or random drug testing of current employees or employment applicants involves other considerations. "Employment settings are diverse, complex, and very different from intercollegiate athletic competition. Reasonable expectations of privacy in those settings are generally not diminished by the emphasis on bodily condition, physical training, and extracurricular competition inherent in athletics." (7 C.4th 54.)

Two justices filed concurring and dissenting opinions. (7 C.4th 58, 62.) A third justice filed a dissenting opinion,

expressing the view that "[t]he majority all but abrogate the right of privacy." (7 *C.4th* 73.) (See 22 *Pepperdine L. Rev.* 794 [*Hill*]; 29 *U.S.F. L. Rev.* 197 [same]; on challenging substance abuse testing in schools and colleges as violation of prohibition of Fourth and Fourteenth Amendments against unreasonable searches, see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §§324, 325.)

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1. Disclosure of University Grades.

7 *Witkin Sum. Cal. Law Const Law* § 595

[§ 595] Disclosure of University Grades.

The third "mischief" referred to in *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, supra, §575, was the basis of a successful pleading in *Porten v. University of San Francisco* (1976) 64 C.A.3d 825, 134 C.R. 839. Plaintiff alleged that he had authorized use of his Columbia University grades by defendant University of San Francisco only for evaluation of his application for admission, and that defendant had disclosed them to the State Scholarship and Loan Commission without any request by that body or any need for the transcript. *Held*, a cause of action was stated.

(a) There was no violation of the modern common law right of privacy, because the communication was not to the public or to a large number of persons. (64 C.A.3d 828; see 5 *Summary* (10th), *Torts*, §651.)

(b) However, the self-executing provision of the Constitution conferred a right of action that was intended to go beyond the scope of the decisional law on the tort action. (64 C.A.3d 829.) Under *White v. Davis*, the provision was violated by the alleged improper disclosure of information obtained for a specific purpose in the absence of a compelling public interest justifying it. (64 C.A.3d 832.) The court added, however, that if it appeared that an officer or employee of the Commission, in the proper course of his or her duties, had sought the transcript, appellant's claim of invasion of privacy would fail. (64 C.A.3d 832, footnote 4.)

The 1980 Legislature implemented the *Porten* decision by the enactment of *Educ.C. 67137 et seq.*, authorizing a civil action for wrongful disclosure of students' records. (See 12 *Pacific L. J.* 413.) However, these statutes were repealed in 1995.

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2. Discovery of Sexual Experiences.

7 *Witkin Sum. Cal. Law Const Law* § 596

[§ 596] Discovery of Sexual Experiences.

In *Fults v. Superior Court* (1979) 88 C.A.3d 899, 152 C.R. 210, the district attorney brought a paternity suit on behalf of petitioner against C, the alleged father of the child. C denied paternity and propounded interrogatories seeking names of all persons with whom petitioner had engaged in illicit sexual relations. Petitioner answered that she had engaged in no such relations during a period of 3 months before and 3 months after the likely date of conception, but the trial judge ordered her to answer for periods of 1 year before and after the date. *Held*, the order was overbroad and an invasion of her constitutional right.

(a) As in *Britt v. Superior Court* (1978) 20 C.3d 844, 143 C.R. 695, 574 P.2d 766, *supra*, §382, dealing with associational privacy, the interrogatories here dealt with a well-established zone of privacy in sexual relations. (88 C.A.3d 903, 904.)

(b) There was no showing that the inquiry into petitioner's sexual experiences during remote periods was likely to turn up material information; hence, the right of privacy must prevail. (88 C.A.3d 904, 905.) (See *Boler v. Superior Court* (1987) 201 C.A.3d 467, 474, 475, 247 C.R. 185, 2 Cal. Evidence (4th), *Discovery*, §14 [trial court in sexual harassment suit against employer ordered discovery of identities of all female employees with whom defendant had sexual relations; *held*, under *Fults*, order was overbroad intrusion into sexual privacy of employer and his unnamed sexual partners]; *Roman Catholic Bishop of San Diego v. Superior Court* (1996) 42 C.A.4th 1556, 1567, 50 C.R.2d 399 [church had no duty to investigate priest's sexual history before hiring him because that inquiry would have violated his right to privacy in sexual matters].)

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3. Zoning Regulations and Restrictive Covenants.

7 *Witkin Sum. Cal. Law Const Law* § 597

[§ 597] Zoning Regulations and Restrictive Covenants.

In *Park Redlands Covenant Control Committee v. Simon* (1986) 181 C.A.3d 87, 226 C.R. 199, plaintiff, a homeowners association committee, brought an action against defendants, owners of a home within the development, alleging violation of two restrictive covenants: (1) "This project is designed and intended for the use and residence of persons who have attained age 45." (2) "The number of residents in a unit shall be no more than three." Defendants allowed their 31-year-old daughter and her small child, and their 26-year-old son to live with them periodically. *Held*, the age restriction was invalid under the Unruh Act (see *infra*, §898 et seq.), and the number restriction violated the California constitutional right to privacy.

(a) The covenant prevented defendants from providing a place to live to any more than one of their two children. "Thus, both the more general right to choose with whom they live, and the right to live as a family, are directly impinged upon by this restriction." (181 C.A.3d 97.)

(b) The interest involved is the control of population density within the development. But *Santa Barbara v. Adamson* (1980) 27 C.3d 123, 164 C.R. 539, 610 P.2d 436, *infra*, §1032, and *Chula Vista v. Pagard* (1981) 115 C.A.3d 785, 171 C.R. 738, held that a regulation of population density must be made by reference to floor space and facilities. The "amorphous restriction" in this case operates in "a completely capricious fashion." (181 C.A.3d 97.)

(c) Whether a private restrictive covenant can be considered state action violative of the right of privacy is the subject of some difference of opinion (181 C.A.3d 98), but state action here can be established on two theories: *First*, under *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, *infra*, §700, the court's enforcement of the covenant may be regarded as state action. (181 C.A.3d 98.) *Second*, the city of Redlands, in return for a special use permit, required the imposition of the age and number limitations in the recorded restrictions; and the court cannot ignore the role played by the city in creating and continuing the existence of this "private" restriction. (181 C.A.3d 99.)

In *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 C.4th 361, 33 C.R.2d 63, 878 P.2d 1275, 12 Summary (10th), *Real Property*, §114, plaintiff sued her homeowners association to prevent enforcement of a prohibition in the association's recorded covenants, conditions, and restrictions against keeping pets, contending that the

restriction violated her right to privacy under Cal. Const., Art. I, §1. *Held*, the constitutional provision does not guarantee condominium owners the right to keep cats or dogs as household pets. (8 C.4th 387.) No fundamental public policy favors keeping pets in a condominium project. Neither the federal or state Constitutions nor any California statute confers a general right to keep household pets in common interest developments; nothing in the ballot arguments relating to the privacy provision supports this right; and case law does not recognize a privacy right to keep pets--courts that have considered condominium pet restrictions have uniformly upheld them. (8 C.4th 388, citing sister state cases.) (See 23 *Pepperdine L. Rev.* 1; 36 *Santa Clara L. Rev.* 793.)

In *Tom v. San Francisco* (2004) 120 C.A.4th 674, 680, 16 C.R.3d 13, defendant city, in an effort to discourage the conversion of rental housing into owner-occupied housing, adopted an ordinance requiring all tenants in common to have a right of access to all units in the property, and prohibiting tenants in common from making agreements giving them exclusive rights in individual units. *Held*, the ordinance violated the state right to privacy. Based on the sanctity of the home, plaintiff established the three required elements for a cause of action alleging a violation of the state privacy right under *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, *supra*, §594. (120 C.A.4th 679.) Defendant's goal of providing more rental housing was not a sufficiently strong countervailing interest. The Ellis Act (Govt.C. 7060 et seq.) prevents local jurisdictions from passing ordinances that limit the rights of landlords from going out of the business of renting, and a governmental interest in precluding landlords from going out of the rental business "would not justify an extreme privacy violation, such as rendering homeowners unable to determine the persons with whom they should live, or forcing them to share their homes with others who are unwelcome." (120 C.A.4th 687.)

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4. Psychosurgery and Shock Treatment.

7 Witkin Sum. Cal. Law Const Law § 598

[§ 598] Psychosurgery and Shock Treatment.

In *Aden v. Younger* (1976) 57 C.A.3d 662, 129 C.R. 535, provisions of the Lanterman-Petris-Short Act (see 3 *Cal. Proc.* (4th), *Actions*, §29 et seq.) specifying conditions under which psychosurgery and electroconvulsive therapy (shock treatment) may be performed were challenged by petitioners, who were patients seeking this treatment and doctors qualified to perform it. The principal contention, that the consent restrictions violated the patient's right of privacy, was upheld.

(a) The right of privacy as an element of due process (see *supra*, §558 et seq.) includes privacy of the mind. "Here the state has sought to control neither what is thought by mental patients, nor how they think. Rather, the state is attempting to regulate the use of procedures which touch upon thought processes in significant ways, with neither the intention nor the effect of regulating thought processes, per se. Yet despite the lack of any showing the state has attempted to regulate freedom of thought, this legislation may diminish this right. If so, the legislation can only be sustained by showing (1) it is necessary to further a 'compelling state interest' and (2) the least drastic means has been employed to further those interests." (57 C.A.3d 679.)

(b) The state's interests are the protection of the right to refuse treatment and the prevention of unnecessary administration of hazardous and intrusive treatments. (57 C.A.3d 680.)

(c) The provision that a "responsible relative" be informed of listed items constituting "informed consent" results in a disclosure of the nature and seriousness of the patient's disorder, and violates his or her right of privacy. And, because the relative has no standing to assert the patient's rights, it is doubtful that the disclosure furthers the protection of those rights; hence, no compelling state interest appears. (57 C.A.3d 681.)

(d) The reporting system to control possible abuses of patients' rights, making treatment records available to the Director of Health, state legislators, and county supervisors, is valid only if the patient's identity is not disclosed. (57 C.A.3d 681.) But the provision making this information available to the patient, his or her attorney, conservator, or guardian, is only a limited invasion of privacy and is valid. (57 C.A.3d 681.)

(e) The provision for a review of treatments by a committee of three appointed physicians is both valid and invalid: (1) As to the incompetent patient who is incapable of giving an informed consent, the review of his or her decision is justifiable. (57 C.A.3d 682.) (2) As to the involuntary patient, a review committee's decision is likewise justified by the state's interest in preventing involuntary administration of psychosurgery. (57 C.A.3d 682.) (3) However, as to the competent and voluntary patient who gives a consent, a distinction must be made between psychosurgery and shock treatment:

First, psychosurgery is a hazardous, experimental treatment of last resort, and requiring unanimous approval by a review committee is a justifiable restraint on the patient's right to privacy. (57 C.A.3d 683.)

Second, shock treatment is not an experimental procedure and its hazards are not as serious as those of psychosurgery. Hence, where informed consent is adequately insured, there is no justification for infringing on the patient's right to privacy in selecting the treatment. (57 C.A.3d 684.)

(f) Further, the requirement that the procedure be "critically" needed for the patient's welfare was unconstitutionally vague (57 C.A.3d 678); the lack of an adequate hearing for patients on the issues of competency and voluntariness was a denial of procedural due process (57 C.A.3d 684); and the unconstitutional provisions were not severable (57 C.A.3d 685). (See 15 Santa Clara Lawyer 725; for statutory amendments to ensure greater protection of patient's right of privacy, see 5 *Summary* (10th), *Torts*, §390.)

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Lantermann-Petris-Short Act:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.



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5. Identities of Prospective Jurors.

7 *Witkin Sum. Cal. Law Const Law* § 599

[§ 599] Identities of Prospective Jurors.

In *Lehman v. San Francisco* (1978) 80 C.A.3d 309, 145 C.R. 493, plaintiff was called as a juror in a civil case. The jury commissioner, acting under Govt.C. 6250 et seq., disclosed the identities of prospective jurors to the litigants, who investigated and compiled information concerning them. Plaintiff requested that the judge require disclosure to him of the information gathered, and on denial of his request brought this action against defendant city for violation of his right of privacy. *Held*, judgment for defendant on demurrer affirmed.

(a) Defendant's conduct in disclosing the names did not involve the gathering or disclosure of sensitive or personal information; the information was gathered by others. (80 C.A.3d 313.)

(b) None of the four "mischiefs" of *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, *supra*, §575, was involved.

(c) There was no duty on the part of the judge to require the litigants to disclose the information; he had no knowledge of what had been gathered, and there had been no judicial determination that the litigants had done anything improper. (80 C.A.3d 314.)

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6. Drug Efficacy Requirement.

7 *Witkin Sum. Cal. Law Const Law* § 600

[§ 600] Drug Efficacy Requirement.

In *People v. Privitera* (1979) 23 C.3d 697, 153 C.R. 431, 591 P.2d 919, defendants were convicted of the felony of conspiracy to sell and prescribe the unapproved drug Laetrile for the alleviation or cure of cancer. *Held*, freedom to obtain drugs of unproven efficacy (prohibited by statutes and administrative regulations) is not within the right of privacy guaranteed by the federal or California Constitutions. The U.S. Supreme Court in *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, *supra*, §561, and *Whalen v. Roe* (1977) 429 U.S. 589, 97 S.Ct. 869, 872, 51 L.Ed.2d 64, 68, *supra*, §574, recognized that certification of a drug's efficacy is a reasonable means to insure health and safety, and that the "important decisions" falling within the right of privacy do not include medical treatment. (23 C.3d 702, 703, 709.) (See 13 *Loyola L.A. L. Rev.* 227 [*Privitera*]; 13 *Southwestern L. Rev.* 531 [constitutional analysis of federal drug marketing regulations and FDA implementation]; 25 *U.C.L.A. L. Rev.* 577 [drug efficacy requirement and right of privacy]; 5 *A.L.R.4th* 219 [right of patient to obtain, or physician to prescribe Laetrile].)

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7. Fingerprint and Photograph Requirements.

7 *Witkin Sum. Cal. Law Const Law* § 601

[§ 601] Fingerprint and Photograph Requirements.

(a) *Fingerprints*. A mandatory fingerprint requirement, as a condition for obtaining a driver's license, does not improperly infringe on an individual's right of privacy. (*Perkey v. Department of Motor Vehicles* (1986) 42 C.3d 185, 191, 228 C.R. 169, 721 P.2d 50, *infra*, §604; see *People v. Stuller* (1970) 10 C.A.3d 582, 595, 89 C.R. 158 [ordinance requiring bartenders to submit fingerprints to local police department upheld]; *Miller v. Murphy* (1983) 143 C.A.3d 337, 343, 191 C.R. 740 [municipal ordinance requiring customers of pawnbrokers to be fingerprinted upheld]; *Sheyko v. Saenz* (2003) 112 C.A.4th 675, 688, 5 C.R.3d 350 [fingerprinting of welfare applicants and recipients does not violate their right to privacy].)

(b) *Photograph on Driver's License*. A driver's license is normally under the driver's control, and the requirement of a photograph of the driver on the original and on the copy retained by the Department of Motor Vehicles does not constitute an invasion of his or her privacy. (*Stackler v. Department of Motor Vehicles* (1980) 105 C.A.3d 240, 246, 247, 164 C.R. 203.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. California Constitutional Provision.

g. Other Illustrations.

8. Miscellaneous Examples.

7 *Witkin Sum. Cal. Law Const Law* § 602

[§ 602] Miscellaneous Examples.

(1) *Health Care*. In *Lackner v. Department of Health Services* (1994) 29 C.A.4th 1760, 1763, 35 C.R.2d 482, the court held that even if plaintiff had a privacy right to choose a health care provider, enrolling him in a managed care plan if he did not elect a fee-for-service provider was not a "serious" breach of privacy, where he had 30 days to elect the provider and establish a relationship with it. (See *Rains v. Belshe* (1995) 32 C.A.4th 157, 38 C.R.2d 185, *infra*, §655 [rejecting privacy and due process challenges to *Health & Saf.C. 1418.8*, relating to medical care of incompetent patients].)

(2) *Interference With Right To Marry*. Although the right to marry is a protected privacy right, it is not absolute. The court must balance it against important competing interests. In *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 C.A.4th 1288, 1307, 120 C.R.2d 670, plaintiff, an employee of defendant police officers' benefits association, had access to personnel and medical files. *Held*, she was properly terminated for pursuing an intimate relationship with an incarcerated felon after being given the choice of ending the relationship or losing her job. Defendant had a legitimate interest in protecting the officers and their families by preventing disclosure of confidential information about them to criminals, and no feasible alternatives to safeguard the information were shown. (98 C.A.4th 1313.)

(3) *Interference with Right To Pursue Sexual Relationship*. *Barbee v. Household Automotive Finance Corp.* (2004) 113 C.A.4th 525, 6 C.R.3d 406, held that although plaintiff employee may have had a constitutionally protected privacy interest in pursuing an intimate relationship, he did not have a reasonable expectation of privacy in pursuing an intimate relationship with a subordinate in violation of company policy. (113 C.A.4th 531.)

(4) *Interference With Right To Die*. In *Bartling v. Superior Court* (1984) 163 C.A.3d 186, 195, 209 C.R. 220, 5 *Summary* (10th), *Torts*, §127, the court, upholding the right of a competent adult patient with an incurable illness to have his life-support equipment disconnected, said: "The constitutional right of privacy guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity." (See *Bouvia v. Superior Court* (1986) 179 C.A.3d 1127, 1137, 225 C.R. 297, 5 *Summary* (10th), *Torts*, §127; *Conservatorship of Wendland* (2001) 26 C.4th 519, 531, 110 C.R.2d 412, 28 P.3d 151, 14 *Summary* (10th), *Wills and Probate*, §996 [citing *Bartling*]; 75 *Cal. L. Rev.* 707 [Suicidal Competence and the Patient's Right To Refuse Lifesaving Treatment]; 39 *Stanf. L. Rev.* 689 [right to die]; for legislative recognition of "right to die," see *Health Care Decisions Law* (*Prob.C. 4600 et seq.*), 14 *Summary*

(10th), *Wills and Probate*, §882 et seq.; on rejection of claim of federal constitutional right to die, see *supra*, §571.)

(5) *Prohibition of Sterilization of Incompetent Conservatee*. The former provision of *Prob.C.* 2356(d), prohibiting sterilization of an incompetent ward or conservatee, was held a violation of a developmentally disabled person's right of privacy under the federal and California Constitutions. (*In re Conservatorship of Valerie N.* (1985) 40 C.3d 143, 160, 219 C.R. 387, 707 P.2d 760, *supra*, §570.)

(6) *Improper Condition for Welfare Assistance*. In *Robbins v. Superior Court* (1985) 38 C.3d 199, 211 C.R. 398, 695 P.2d 695, the court expressed its approval of the contention that in kind benefits (food and shelter at a county-run facility) offered by a county in its general assistance program, infringed on the right of privacy of single, employable residents. (38 C.3d 213.)

(7) *Prohibition of Political Advertising on Municipal Bus*. In *Women's Int. League for Peace and Freedom, Fresno Branch v. Fresno* (1986) 186 C.A.3d 30, 237 C.R. 577, a city ordinance prohibited all forms of political advertising on city-owned-and-operated buses, although commercial advertising was permitted. In an action by plaintiff, an unincorporated political organization, the trial court declared the ordinance unconstitutional and enjoined defendant-city from enforcing the ordinance against plaintiff. *Held*, judgment reversed. "Courts are well aware that public transportation exposes passengers to increasingly unpleasant experiences. Sensitivity to the safety and personal feelings of passengers may permit reasonable restrictions against forms of activity and expression which may come into conflict with the constitutionally protected privacy rights of the passengers." In this case, "privacy rights of the 'captive audience' justified the exclusion within transit buses of all forms of expression which could not otherwise be restricted." (186 C.A.3d 41.)

(8) *Rental Records*. In *Department of Fair Emp. & Housing v. Superior Court* (2002) 99 C.A.4th 896, 903, 121 C.R.2d 615, the court applied the balancing test of *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26, 26 C.R.2d 834, 865 P.2d 633, *supra*, §594, to hold that the compelling state interest in protecting prospective tenants from discrimination outweighs the privacy interests of present and past tenants and applicants in their rental records.

(9) *No Privilege for Union Representative*. The right of privacy is not violated by requiring a union representative to name those employees involved in a discrimination case. (*American Airlines v. Superior Court* (2003) 114 C.A.4th 881, 893, 8 C.R.3d 146, distinguishing *Britt v. Superior Court* (1978) 20 C.3d 844, 143 C.R. 695, 574 P.2d 766, *supra*, §382.)

(10) *Video Surveillance*. *Vo v. Garden Grove* (2004) 115 C.A.4th 425, 9 C.R.3d 257, held that an ordinance requiring CyberCafes to have video surveillance showing the physical features of persons and the activity in the premises does not violate protected privacy interests of patrons in either their activity on the premises or their physical features. (115 C.A.4th 447.) A person's physical features are not confidential, and there is no reasonable expectation of privacy in a public retail establishment. (115 C.A.4th 448.)

SUPPLEMENT: [This section is current through the latest supplement]

(11) *(New) Identity of Putative Class Members*. In *Tien v. Superior Court* (2006) 139 C.A.4th 528, 540, 43 C.R.3d 121, the court held that the privacy rights of putative class members who contacted plaintiff's attorney in response to a neutral letter regarding a class action outweighed defendant employer's need to learn the identity of those class members, many of whom were current employees.



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B. Rights Under California Law.

2. Right to Financial Privacy Act.

7 *Witkin Sum. Cal. Law Const Law* § 603

[§ 603] Right to Financial Privacy Act.

(1) *Background and General Purpose.* The federal Bank Secrecy Act of 1970, requiring reporting of financial transactions, was upheld by the United States Supreme Court, which rejected a claim of Fourth Amendment right of privacy in bank records. (See *California Bankers Assn. v. Shultz* (1974) 416 U.S. 21, 94 S.Ct. 1494, 1510, 39 L.Ed.2d 812, 835; *United States v. Miller* (1976) 425 U.S. 435, 96 S.Ct. 1619, 1625, 48 L.Ed.2d 71, 77; 2 *Cal. Evidence* (4th), *Witnesses* §460.) The California Supreme Court came to a different conclusion, finding a protectible right of privacy in Cal. Const., Art. I, §1. (See *Burrows v. Superior Court* (1974) 13 C.3d 238, 246, 118 C.R. 166, 529 P.2d 590; *Valley Bank of Nevada v. Superior Court* (1975) 15 C.3d 652, 656, 125 C.R. 553, 542 P.2d 977; 2 *Cal. Evidence* (4th), *Witnesses* §461; 64 *Cal. L. Rev.* 470 [Burrows]; 28 *Hastings L. J.* 247 [IRS Access to Bank Records]; 10 *Southwestern U. L. Rev.* 13 [Privacy and Banking Records]; 33 *A.L.R.5th* 453 [search and seizure of bank records pertaining to customer as violation of customer's rights under state law].)

The 1976 Legislature responded with the California Right to Financial Privacy Act. (*Govt.C.* 7460 et seq.; see 8 *Pacific L. J.* 251.) The Act provides criminal and civil sanctions for its violation (*Govt.C.* 7485, 7486, 7487, 7488), and that evidence improperly obtained is "inadmissible in any proceeding" except one to enforce the Act. (*Govt.C.* 7489.) (See 10 *Pacific L. J.* 384 [1978 amendments to Act, dealing particularly with authorized subpoena procedures]; on Financial Information Privacy Act, *Fin.C.* 4050 et seq., see *infra*, §607.)

(2) *Confidentiality of Financial Records.* Subject to conditions and exceptions, "no officer, employee, or agent of a state or local agency or department thereof, in connection with a civil or criminal investigation of a customer, whether or not such investigation is being conducted pursuant to formal judicial or administrative proceedings, may request or receive copies of, or the information contained in, the financial records of any customer from a financial institution" unless (a) the records are described "with particularity"; (b) they "are consistent with the scope and requirements of the investigation"; and (c) the customer either authorizes the disclosure (as prescribed in *Govt.C.* 7473), or the conditions for permitted disclosure, specified in *Govt.C.* 7474, 7475, or 7476, are met. (*Govt.C.* 7470(a).) The institutions must keep records of all examinations and disclosures for 5 years and make these records available to their customers. (*Govt.C.* 7470(c).)

Law enforcement agencies are authorized to initiate contact with a financial institution if there is reason to believe that the institution is a victim of a crime; if the institution concludes that it is a victim, it may disclose relevant records

pursuant to *Govt.C. 7471(c)*. (*Govt.C. 7470(d)*.)

(3) *Restrictions on Disclosure*. Financial institutions are prohibited from furnishing financial information for state and local investigations of their customers except in conformity with P.C. 14160 et seq. or *Govt.C. 7473* et seq. (*Govt.C. 7471(a)*.) However: (a) They are not required to determine whether the conditions have actually been met if the document served "shows compliance on its face." (*Govt.C. 7470(b)*.) (b) Disclosures in the ordinary course of business, where there is no reasonable cause to believe that they will be used in an investigation of a customer, are permitted. (*Govt.C. 7471(b)*.) (c) The institutions may initiate disclosures "concerning suspected violation of any law." (*Govt.C. 7471(c)*.) (On the immunity of financial institutions for good faith refusals to make disclosures, see *Govt.C. 7471(d)*.)

(4) *Conditions for Disclosure*. The circumstances under which a disclosure is proper are set forth in *Govt.C. 7473* et seq.

(a) A *customer* may authorize disclosure by complying with the requirements of *Govt.C. 7473*. In some cases, however, authorization is mandatory as a condition of a license or privilege to do business. (See, e.g., *B. & P.C. 6069* [attorneys], *B. & P.C. 10145, 10146* [real estate licensees and brokers].) (See also *Unemp.Ins.C. 1092* [employing units must furnish authorization for disclosure of bank records]; on waivers, see *Govt.C. 7490*.)

(b) Three procedures for obtaining records and information from financial institutions are available to state and local agencies: (1) An *administrative summons or subpoena*, if a copy is served on the customer, and it includes the name of the agency or department and the "statutory purpose" for which the information is sought, and the customer does not notify the institution within 10 days that he or she has moved to quash within 10 days of service. (*Govt.C. 7474(a)*); for exceptions, see *Govt.C. 7474(b)*.) (2) A *search warrant* issued pursuant to P.C. 1523 et seq. (see 4 *Cal. Crim. Law (3d)*, *Illegally Obtained Evidence*, §79 et seq.). (*Govt.C. 7475*.) (3) A *judicial subpoena or subpoena duces tecum*, if it is served on the customer and he or she does not move to quash within 10 days of service. (*Govt.C. 7476(a)*.) (On grand jury investigations, see *Govt.C. 7476(b)*.)

(5) *Exempted Disclosures*. Exceptions to the Act are specified; e.g., information that is not obtained from the customers' financial records; criminal investigations of crime reports of fraudulent use of checks, etc.; and investigations of designated state agencies and officers pursuant to statute. Further, the Act exempts a county auditor-controller or director of finance when investigating fraud against the county, but provides that a county auditor-controller or director of finance who unlawfully discloses the authorized information is guilty of a misdemeanor. (*Govt.C. 7480*; see *Govt.C. 7493* [right to obtain credit reports from "anyone other than a financial institution"].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Background and General Purpose*. See C.E.B., Privacy Compliance and Litigation, §6.46.



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B. Rights Under California Law.

3. Information Practices Act.

7 *Witkin Sum. Cal. Law Const Law* § 604

[§ 604] Information Practices Act.

(1) *Nature of Act.* The Information Practices Act of 1977 (C.C. 1798 et seq.) deals with the growing threat to privacy by the indiscriminate collection, maintenance, and dissemination of personal information, which has been enhanced by increased use of new information technology. The statute places strict limits on these activities. (C.C. 1798.1.) (See C.C. 1798.3 [definitions]; 5 San Fernando Valley L. Rev. 321 [Research Access into Automated Criminal Justice Information Systems and the Right to Privacy].)

(2) *Scope and General Provisions.* (a) All state agencies are subject to the Act, except the Legislature, the State Compensation Insurance Fund, judicial agencies established pursuant to Article VI of the Constitution, and local agencies as defined in *Govt.C. 6252(a)* (cities and counties, school districts, boards and commissions, etc.). (C.C. 1798.3(b).) (b) Civil remedies are provided (see C.C. 1798.45 et seq., 1798.77); intentional violations by state officers and employees are grounds for discipline, including dismissal (C.C. 1798.55); and criminal sanctions are included (C.C. 1798.56, 1798.57). (c) The Act is to be liberally construed to protect the constitutional and statutory right of privacy. (C.C. 1798.63.) (On rules of construction, see C.C. 1798.70 et seq.)

(3) *Regulation of Records.* Each agency must minimize the personal information it collects and maintains. (C.C. 1798.14.) To the "greatest extent practicable," information must be obtained from the individual involved (C.C. 1798.15), and all sources of information must be maintained (C.C. 1798.16). (On forms used to collect information, see C.C. 1798.17; on updating information, see C.C. 1798.18.) Each agency must also "ensure that no record containing personal information shall be modified, transferred, or destroyed to avoid compliance" with the Act. (C.C. 1798.77.)

(4) *Disclosures.* Disclosures of personal information are limited to those authorized in the 22 subsections of C.C. 1798.24. An accurate accounting of certain disclosures must be made, including those pursuant to subpoena or search warrant and those to law enforcement agencies. (C.C. 1798.25.) (See *Lorig v. Medical Bd.* (2000) 78 C.A.4th 462, 469, 92 C.R.2d 862 [disclosure of physicians' home addresses on medical board's website does not violate Act because Act allows disclosure of names and addresses of professional licensees, and physicians may choose to supply business address or post office box number as their "address of record"]; *Jennifer M. v. Redwood Women's Health Center* (2001) 88 C.A.4th 81, 87, 105 C.R.2d 544 [because Act only imposes limitations on government agencies, it did not cover private medical clinic, even though clinic contracted with state to provide Medi-Cal services; issue of first impression]; *California Teachers Assn. v. California Com. on Teacher Credentialing* (2003) 111 C.A.4th 1001, 1011, 4 C.R.3d 369

[regulation that permitted disclosure of addresses of complaining witnesses in investigation into teacher's alleged misconduct was invalid; it conflicted with Act and expanded discovery beyond other statutory requirements].)

(5) *Access to and Correction of Records of Personal Information.* (a) Individuals must be informed, on request, if an agency maintains a record of personal information about them, and they must also be advised of the procedures for obtaining access to and contesting the accuracy of those records. (C.C. 1798.32; on procedures, see C.C. 1798.33, 1798.34.) (b) Requests for an amendment of a record must be complied with within 30 days unless the agency informs the person affected of the reasons for its refusal, and the procedures for reviewing the refusal. (C.C. 1798.35; see C.C. 1798.36 [procedures]; C.C. 1798.37 [inclusion of individual's statement disputing record].) These procedures are not available, however, for records that evidence property rights. (C.C. 1798.39.) (c) Agencies must not disclose, and must delete, any information about another person. (C.C. 1798.42.) Agencies need not disclose any exempt information (see C.C. 1798.40) about the individual requesting access and may delete that information from any disclosures. (C.C. 1798.43.)

If it is determined that information requested is exempt from access, the requesting party must be informed that disclosure is not required by law. (C.C. 1798.41(a); on review, see C.C. 1798.41(b).) (On conditions that permit informing individual that it maintains no record, despite existence of record of confidential information, see C.C. 1798.41(c).)

In *Perkey v. Department of Motor Vehicles* (1986) 42 C.3d 185, 228 C.R. 169, 721 P.2d 50, the department's dissemination of fingerprint data to third parties for purposes unrelated to motor vehicle safety was held violative of the Information Practices Act. "Although fingerprints, as such, are not specifically listed in the definition of 'personal information,' there can be no doubt that the Act was intended to provide protection for precisely this type of record. Fingerprints fall within the category of information 'that identifies or describes an individual.' (§1798.3.) Moreover, a fingerprint is a much more private matter than a name or address and its disclosure can lead to much greater intrusions on privacy than the simple disclosure of an individual's name." (42 C.3d 193.) (See 14 *Pepperdine L. Rev.* 512.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Act.* See C.E.B., Privacy Compliance and Litigation, §6.47 et seq.

(2) *Scope and General Provisions.* See *Bates v. Franchise Tax Bd.* (2004) 124 C.A.4th 367, 377, 382, 21 C.R.3d 285 [Act does not apply to nonpersonal information used by Franchise Tax Board to estimate income for taxpayers who fail to file return; Act does not supersede claims filing requirements of Government Claims Act].



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B. Rights Under California Law.

4. Medical Records and Information.

7 *Witkin Sum. Cal. Law Const Law* § 605

[§ 605] Medical Records and Information.

(1) *In General*. Patients are guaranteed access to their medical records (*Health & Saf.C. 123100* et seq.), but disclosure of minors' records (*Health & Saf.C. 123115*) and alcohol and drug abuse records (*Health & Saf.C. 123125*) are limited. (See 2 *Cal. Evidence (4th), Discovery*, §120.)

(2) *Confidentiality of Medical Information Act*. The disclosure of medical information by health care providers and other specified persons is regulated. (See C.C. 56 et seq.; 2 *Cal. Evidence (4th), Witnesses*, §518 et seq.)

(3) *Genetic Test Results*. The unauthorized disclosure by health care service plans, self-insured welfare benefit plans, and life and disability insurers, of genetic test results contained in an applicant's or enrollee's medical records is prohibited. (See C.C. 56.17; *Ins.C. 10123.35*; *Ins.C. 10140.1*; 22 *Southwestern U. L. Rev.* 1211, 1224 [proposed legislation to add "genetic characteristics" to list of traits that may not form basis of discrimination by employers or insurers (bill vetoed by Governor)].)

(4) *Records of Persons With Developmental Disabilities*. These records are confidential. (*Welf.C. 4514*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *In re Christopher M.* (2005) 127 C.A.4th 684, 695, 26 C.R.3d 61 [applying *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, text, §576; court did not violate minor's right to privacy by imposing probation condition that his medical and psychological treatment records be made available to trial court and to probation department; invasion of defendant's privacy interest was justified by state's interest in protecting public from defendant's violent conduct and in determining whether he was complying with numerous conditions of probation]. (2) *Confidentiality of Medical Information Act*. See C.E.B., *Privacy Compliance and Litigation*, §7.4 et seq.



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B. Rights Under California Law.

5. Motor Vehicle Records.

7 *Witkin Sum. Cal. Law Const Law* § 606

[§ 606] Motor Vehicle Records.

(1) *In General.* The sale of information from records of motor vehicle registration is subject to conditions designed to protect against misuse. (*Veh.C. 1810(b)*.) And a person's registration or driver's license record may be suppressed from other persons on a showing that the person has reasonable cause to believe that he or she is the subject of stalking or that a threat of death or great bodily injury exists. (*Veh.C. 1808.21(d)*.) Suppression is for a 1-year period but may be renewed. Further, records may be suppressed when a person submits a certificate or identification card showing participation in a state program protecting victims of domestic violence or stalking. Suppression of records under this provision lasts for 4 years, and may be renewed for subsequent 4-year periods. (*Veh.C. 1808.21(e)*.)

(2) *Home Addresses in DMV Records.* Residence addresses in the Department of Motor Vehicle's records are confidential and their disclosure is prohibited except for specified purposes. (*Veh.C. 1808.21*; see *Veh.C. 1808.22* [exemptions]; *Veh.C. 1808.23* [same]; *Veh.C. 1808.45* [unauthorized disclosure or false representation to obtain information is misdemeanor]; *Veh.C. 1808.46* [civil penalty up to \$ 100,000 for unauthorized distribution or false representations to obtain information]; *State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 C.A.4th 1076, 1081, 62 C.R.2d 178 [DMV must release address of purported owner of motor vehicle to attorney investigating potential claim against unknown party for conversion of vehicle].)

The Vehicle Code further provides that the home addresses of specified law enforcement officers and other state and local public officials and employees are confidential, if the person so requests. (See *Veh.C. 1808.4*; *Veh.C. 1808.6* [specified officers and employees of Department of Corrections]; *Veh.C. 1808.2* [investigators for district attorney and peace officers employed by Board of Prison Terms]; *Veh.C. 1808.9* [person whose home address is confidential under *Veh.C. 1808.2*, *1808.4*, or *1808.6* may be required to demonstrate eligibility on renewal of license]; 2 *Cal. Evidence* (4th), *Witnesses*, §528.)

(3) *Social Security and Other Identifying Numbers on DMV Application Forms.* Application forms for driver's licenses and identification cards must contain a section for the applicant's Social Security number. Application forms for motor vehicle registrations and certificates of title must contain a section for the applicant's driver's license or identification card number. All applicants must furnish the appropriate number. The number is not a public record, may not be included on any document issued by the department, and may not be disclosed by the department except for specified purposes. (*Veh.C. 1653.5*; see *Lauderbach v. Zolin* (1995) 35 C.A.4th 578, 584, 585, 41 C.R.2d 434

[upholding, except for aliens whose presence is authorized by federal law but who are ineligible to obtain number, requirement that applicants furnish Social Security number]; *Nowlin v. Department of Motor Vehicles* (1997) 53 C.A.4th 1529, 1536, 62 C.R.2d 409 [DMV may properly require applicants for new and renewal driver's licenses to obtain and disclose their Social Security numbers; following *Lauderbach*.])

(4) *Insurance or Bond Information on Registration Applications*. Information regarding any motor vehicle liability insurance policy or surety bond disclosed in an application for renewal of motor vehicle registration is confidential. (*Veh.C. 1808.24*.)

(5) *Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Act*. The disclosure by insurers of information relating to motor vehicle theft or motor vehicle insurance fraud is regulated. (See *Ins.C. 1874* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Rights Under California Law.

6. Other Privacy Statutes.

7 *Witkin Sum. Cal. Law Const Law* § 607

[§ 607] Other Privacy Statutes.

(1) *Breast-feeding Mothers*. "[A] mother may breast-feed her child in any location, public or private, except the private home or residence of another, where the mother and the child are otherwise authorized to be present." (C.C. 43.3; see 29 *McGeorge L. Rev.* 447 [mother's right to breast-feed in public].)

(2) *Business Records*. The Civil Code regulates disclosures by persons performing bookkeeping services. (See C.C. 1799 et seq.)

(3) *Computer and Internet Privacy*. State and local agencies and persons intending to cause imminent bodily harm are prohibited from posting the home address or telephone number of any elected or appointed official, or any specified public safety official, on the Internet without the individual's written permission. (*Govt.C.* 6254.21.) State agencies are prohibited from distributing or selling "any electronically collected personal information about users to any third party without prior written permission from the user, except as required to investigate possible violations" of P.C. 502 (see 2 *Cal. Crim. Law* (3d), *Crimes Against Property* §228 et seq.) or as authorized under the Information Practices Act (supra, §604). (*Govt.C.* 11015.5.) Further, operators of commercial websites or online services that collect personally identifiable information through the Internet about California residents who use their services must post their privacy policies conspicuously on their websites. (*B. & P.C.* 22575(a).) The privacy policy must identify the categories of personally identifiable information the operator collects and the categories of third parties with whom the operator may share that personal information. (*B. & P.C.* 22575(b)(1).) (See 104 *Harv. L. Rev.* 1898 [proposed legislation on computer crime]; 112 *Harv. L. Rev.* 1575 [right to speak in cyberspace]; 34 *San Diego L. Rev.* 1153 [informational privacy in age of Internet]; 50 *Stanf. L. Rev.* 1193 [same].)

(4) *Customer Records*. Businesses must take reasonable steps to destroy, erase, or obliterate personal information about customers in records they will no longer retain. (C.C. 1798.80 et seq.; see C.C. 1798.84 [injured customer may seek damages, civil penalty, and injunctive relief against business].) Businesses that own or license personal information about California residents must implement and maintain reasonable security procedures. (C.C. 1798.81.5 [exempting certain health care providers, financial institutions, etc., that are covered by other privacy statutes].) Security breaches of computerized data systems must be disclosed to California residents when their unencrypted personal information is reasonably believed to have been acquired by an unauthorized person. (C.C. 1798.29, 1798.82.) Businesses must notify their customers when they disclose specified personal information to third parties if the

businesses know or reasonably should know that the third parties used the personal information for direct marketing purposes. (C.C. 1798.83.) (See 56 *Stanf. L. Rev.* 191 [Data Retention: Privacy, Anonymity, and Accountability Online].)

(5) *Educational Records*. The Family Educational Rights and Privacy Act (FERPA) guarantees parents access to, and otherwise protects the privacy of, these records. (See 20 U.S.C., §1232g; *Owasso Independent School Dist. No. I-011 v. Falvo* (2002) 534 U.S. 426, 122 S.Ct. 934, 939, 151 L.Ed.2d 896, 904 [peer-graded work and assignments are not educational records subject to protection under 20 U.S.C., §1232g]; *Rim of the World Unified School Dist. v. Superior Court* (2002) 104 C.A.4th 1393, 1397, 129 C.R.2d 11 [statute mandating disclosure of student expulsion records is preempted by FERPA]; 52 So. Cal. L. Rev. 1163; on privacy of records of elementary and secondary school students, see *Educ.C.* 49073 et seq.)

(6) *Financial Information Privacy Act*. *Fin.C.* 4050 et seq. provide for notice and choice for consumers regarding how their nonpublic personal information is shared or sold by their financial institutions. The Act is intended to afford persons greater privacy protections than those found in the federal Gramm-Leach-Bliley Act. (*Fin.C.* 4050; on California Right to Financial Privacy Act, see *supra*, §603.) The Act provides a civil penalty for its violation. (*Fin.C.* 4057.)

(7) *Personal Information Sent Through Mail*. State agencies are prohibited from sending any outgoing U.S. mail to individuals containing personal information about that individual, including his or her Social Security, driver's license, or credit card numbers, except where the information is within sealed correspondence and cannot be viewed from the outside. (*Govt.C.* 11019.7.)

(8) *Reproductive Privacy Act*. The state is prohibited from denying or interfering with "a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted" by the Act. (*Health & Saf.C.* 123462.)

(9) *Signatures of Persons Signing Initiative, Referendum, or Recall Petitions*. Circulators are prohibited from using these signatures for any purpose other than qualifying the petition. (*Elec.C.* 18650; see *Bilofsky v. Deukmejian* (1981) 124 C.A.3d 825, 177 C.R. 621 [upholding statute (former *Elec.C.* 29770) against First Amendment challenges].) Specific notifications must be given to and by initiative proponents, circulators, and signers that it is a misdemeanor to allow the signatures to be used for any purpose other than qualification of the ballot measure. (See *Elec.C.* 101.5, 9608 et seq., effective until 2005.)

(10) *Social Security Numbers*. The disclosure of a person's Social Security number is restricted. (See C.C. 1798.85.)

(11) *Telephone and Telegraph Customer Records*. The disclosure of personal calling patterns, credit, and other specified information relating to residential and mobile telephone and telegraph customers is regulated. (See *Pub.Util.C.* 2891 et seq.)

(12) *Records Involving Administration of Unemployment Insurance Law*. Disclosure of these records is regulated. (See *Unemp.Ins.C.* 1094, 1095, 1095.2 [disclosure of wage information to private entities to verify information given by individual in connection with specific credit transaction].)

(13) *Voter Registration Records*. The home address, telephone number, e-mail address, and precinct or other number specified by the Secretary of State for voter registration purposes are confidential and may not be disclosed. (*Govt.C.* 6254.4.) And the California driver's license or identification number, Social Security number, or other identification used by the state for voter identification as shown on a voter's registration card or added to voter registration records to comply with the Help America Vote Act are confidential and must not be disclosed. (*Govt.C.* 6254.4(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Breast-feeding Mothers*. See 5 A.L.R.6th 485 [validity of governmental or private regulation of breast-feeding].(3)

Computer and Internet Privacy. Posting personal information on the Internet about providers, employees, volunteers, or patients of reproductive health services with the intent to threaten or cause bodily injury to the person identified is prohibited. (Govt.C. 6218, added in 2006; see C.E.B., Privacy Compliance and Litigation, Chap. 4; 38 McGeorge L. Rev. 159.)

(5) *Educational Records.* See *BRV v. Superior Court* (2006) 143 C.A.4th 742, 754, 49 C.R.3d 519 [investigative report concerning pupils' charges of misconduct against principal was not protected from disclosure as pupil record].(6) *Financial Information Privacy Act.* The affiliate-sharing preemption clause of the federal Fair Credit Reporting Act (FCRA) preempts the California Financial Information Privacy Act insofar as it attempts to regulate the sharing of information between financial institutions and their affiliates. However, *Fin.C. 4053(b)(1)* has nonpreempted applications that can be severed. Hence, the California Act applies to non-consumer report information. (*American Bankers Assn. v. Lockyer* (9th Cir. 2008) 541 F.3d 1214, 1216 [Court of Appeals narrowed scope of state statute to exclude regulation of consumer report information as defined by FCRA].)

(6A) *(New) Identification Documents.* Except as specified in the statute, it is a crime for a person or entity intentionally, and without permission, to remotely read, or attempt to read, a person's identification document using radio frequency identification. (C.C. 1798.79, added in 2008.) Identification documents include drivers' licenses, state identification cards, health or benefit cards, employee and student identification cards, business licenses and certificates, and public library cards. (C.C. 1798.795, added in 2008.)

(9) *Signatures of Persons Signing Initiative, Referendum, or Recall Petitions.* Elec.C. 9608 et seq., added in 2005, provide the notifications that must be given to and by initiative proponents, circulators, and signers.(10) *Social Security Numbers.* The 2007 Legislature made numerous statutory amendments and additions to protect the public disclosure of Social Security numbers (See, e.g., C.C. 1798.89 [only partial Social Security number may be displayed on recorded documents that are open to public]; Govt.C. 15705 [Franchise Tax Board must truncate Social Security numbers on lien abstracts and other disclosable records]; Govt.C. 27300 et seq. [Social Security Number Truncation Program].)

(13) *Voter Registration Records.* The voter's signature, as shown on the voter registration card, is confidential. (Govt.C. 6254.4(d), added in 2005.)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law IX. PRIVILEGES AND IMMUNITIES A. United States Citizenship. 1. The Abridgement Clause.

7 *Witkin Sum. Cal. Law Const Law* § 608

[§ 608] The Abridgement Clause.

The Fourteenth Amendment of the federal Constitution provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." By virtue of this provision, a citizen of the United States is protected against certain action by any state, even the state of which he or she is a citizen. Unlike the Equal Protection Clause (*infra*, §695), this Clause does not refer to "persons;" thus, *corporations* are not included. (*Asbury Hosp. v. Cass County, North Dakota* (1945) 326 U.S. 207, 66 S.Ct. 61, 63, 90 L.Ed. 6, 11.) (See 34 *San Diego L. Rev.* 681 [Citizenship and the Fourteenth Amendment]; 34 *San Diego L. Rev.* 809 [The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment]; 28 *Hastings Const. L. Q.* 235 [Privileges or Immunities: The Missing Link in Establishing Congressional Power To Abrogate State Eleventh Amendment Immunity]; 16*B Am.Jur.2d* (1998 ed.), *Constitutional Law* §745 et seq.; 2 Rotunda, §14.3; 1 Tribe, §7-2.)

As originally interpreted, the Abridgement Clause gave only a vague and limited protection. Thus, in the *Slaughter-House Cases* (1872) 83 U.S. 36, 21 L.Ed. 394, the Court held that the privileges and immunities of United States citizenship did not include civil rights generally, but were restricted to those rights owing their existence to the federal Government, Constitution, or laws. In *Maxwell v. Dow* (1900) 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597, it was decided that the first eight amendments to the federal Constitution were not included. And in *Breedlove v. Suttles* (1937) 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252 (later overruled; see *supra*, §243), it was held that the privilege of *voting* for state officers is not derived from the federal Constitution or laws but is conferred by the state, and that the state may condition the privilege by imposing a *poll tax*. (See *Snowden v. Hughes* (1944) 321 U.S. 1, 64 S.Ct. 397, 400, 88 L.Ed. 497, 502 [right to become candidate for *state* office is not privilege of national citizenship]; 55 *Hastings L. J.* 333 [*Slaughter House Cases*]; 23 *Thomas Jefferson L. Rev.* 241 [same]; 1 Tribe, §§7-3, 7-4.)

As a result of these decisions, this part of the Fourteenth Amendment became known as the "forgotten clause." Its scope was defined by such general declarations as the remarks in the *Slaughter House Cases* to the effect that it protects the right to come to the seat of government, to transact business with the Government, to seek its protection, to share its offices, to have free access to its seaports and to the courts of justice of the states, to use the navigable waters, and to make use of rights secured to citizens of the United States by treaties with foreign nations.

An attempt to revive the Abridgement Clause and enlarge its effect was made in *Colgate v. Harvey* (1935) 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299. The Court held that national citizenship gave a citizen of Vermont the privilege of

transacting any lawful business, and making contracts or loans in any other state, without interference by discriminatory state taxation which might become so heavy as to destroy the privilege. But the case was soon overruled by *Madden v. Kentucky* (1940) 309 U.S. 83, 60 S.Ct. 406, 410, 84 L.Ed. 590, 595, where the Court declared that "the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship."

Nevertheless, there are indications that the Abridgement Clause may have some practical content. In *Hague v. Committee for Industiral Organization* (1939) 307 U.S. 496, 59 S.Ct. 954, 957, 83 L.Ed. 1423, 1429, one of the opinions took the position that United States citizenship gave plaintiffs, labor organizers, the privilege of meeting and freely discussing national legislation affecting labor relations (the Wagner Act). And in *Edwards v. California* (1941) 314 U.S. 160, 62 S.Ct. 164, 169, 86 L.Ed. 119, 127, four justices, in a concurring opinion, contended that the right of an indigent person to move freely between states was a privilege of national citizenship. (See *Acosta v. San Diego* (1954) 126 C.A.2d 455, 465, 272 P.2d 92 [Indian on federal reservation in California is entitled to privileges of California citizens]; 102 Harv. L. Rev. 1925 [Congressional Power To Define and Enforce the Rights of National Citizenship]; 24 Southwestern U. L. Rev. 319 [Edwards]; on right to travel, see supra, §403.)

SUPPLEMENT: [This section is current through the latest supplement]

See 2 Rotunda 4th, §14.3; 45 *San Diego L. Rev.* 673, 709 [economic liberties]; 80 *So. Cal. L. Rev.* 1383 [how Ninth Amendment and Privileges and Immunities Clause protect unenumerated constitutional rights]. *Correction:* Page 998, second line of last paragraph, "*Hague v. Committee for Industiral Organization*" should read "*Hague v. Committee for Industrial Organization*".



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Witkin Summary of California Law
IX. PRIVILEGES AND IMMUNITIES
A. United States Citizenship.
2. Access to Courts.

7 *Witkin Sum. Cal. Law Const Law* § 609

[§ 609] Access to Courts.

In *Christopher v. Harbury* (2002) 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413, the Court discussed the requirements for bringing an action claiming an unconstitutional denial of access to the courts. Plaintiff alleged that United States Government officials concealed information about her husband, a foreign dissident held in his own country, and that this deception prevented her from filing a timely action that might have saved her husband's life. *Held*, no actionable claim was stated.

(a) "Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. ... It follows that the underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation. It follows, too, that when the access claim (like this one) looks backward, the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." (122 S.Ct. 2186, 153 L.Ed.2d 424.)

(b) In a denial of access complaint, the plaintiff should state the underlying claim in accordance with *F.R.Civ.P., Rule 8(a)*, "just as if it were being independently pursued, and a like plain statement should describe any remedy available under the access claim and presently unique to it." (122 S.Ct. 2188, 153 L.Ed.2d 426.) Here, plaintiff's "complaint failed to identify the underlying cause of action that the alleged deception had compromised," leaving the court and defendants to guess at the unstated cause of action and the remedy being sought independently of relief sought in the other 24 counts of the complaint. (122 S.Ct. 2188, 153 L.Ed.2d 426.)

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IX. PRIVILEGES AND IMMUNITIES

B. State Citizenship.

1. The Entitlement Clause.

a. Nature and Purpose.

7 *Witkin Sum. Cal. Law Const Law* § 610

[§ 610] Nature and Purpose.

(1) *Rights of Nonresidents.* U.S. Const., Art. IV, §2, provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." These are privileges and immunities that citizens of one state are entitled to claim *while in another state*, by virtue of their state citizenship. The section prevents a state from treating a citizen of another state as an alien, discriminating against him or her in favor of its own citizens. "The primary purpose of this clause ... was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." (*Toomer v. Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, 1471, *infra*, §612; see *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 105 S.Ct. 1272, 1276, 84 L.Ed.2d 205, 211, *infra*, §614 [Clause "was intended to create a national economic union"]; *Saenz v. Roe* (1999) 526 U.S. 489, 119 S.Ct. 1518, 1525, 1526, 143 L.Ed.2d 689, 703 [Welf.C. 11450.03, providing welfare benefits for new residents based on lesser amount recipient would have received in state of former residency, violated Privileges and Immunity Clause; newly arrived citizens have same right to privileges and immunities enjoyed by other citizens]; 113 *Harv. L. Rev.* 110 [Saenz]; 20 *Hastings Const. L. Q.* 391 [What States Owe Outsiders]; 52 *Stanford L. Rev.* 709 [Saenz]; 48 U.C.L.A. L. Rev. [same]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §745 et seq.; 1 *Tribe*, §§6-36, 6-37.)

The Clause bars discrimination against citizens of other states where nonresidence is the only substantial reason for the different treatment; it does not preclude disparity of treatment where there are valid, independent reasons for it. (*Davis v. Franchise Tax Bd.* (1977) 71 C.A.3d 998, 1001, 139 C.R. 797.)

(2) *Extension of Privileges to Persons Aggrieved.* The language of this section of the Constitution differs from that used in the Fourteenth Amendment. The Abridgement Clause of the Fourteenth Amendment renders void any acts that abridge the privileges or immunities protected thereby. (See *supra*, §608.) But Article IV, §2, declares that the citizens of each state "shall be entitled" to the privileges or immunities included within the meaning of the section. *Quong Ham Wah Co. v. Industrial Acc. Com. of Calif.* (1920) 184 C. 26, 39, 192 P. 1021, held that where a privilege is granted in violation of the section, the statute is not void; the constitutional clause becomes a part of the statute and *extends its benefits* to the citizens of other states.

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B. State Citizenship.

1. The Entitlement Clause.

b. Scope.

7 *Witkin Sum. Cal. Law Const Law* § 611

[§ 611] Scope.

The original construction of the Entitlement Clause, like that given the Fourteenth Amendment Abridgement Clause (*supra*, §608), was narrow. It was said that the privileges include only those that are *fundamental*, such as the right to acquire and possess property, to pass into any other state, to reside there and engage in lawful commerce or business, or to be exempt from any higher taxes than are imposed by the state on its own citizens. (See *Blake v. McClung* (1898) 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432; *Doe v. Bolton* (1973) 410 U.S. 179, 93 S.Ct. 739, 751, 35 L.Ed.2d 201, 218, *supra*, §561 [Entitlement Clause protects persons who enter state seeking available medical services].)

Later decisions have extended the Entitlement Clause to the right to practice law (see *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205, *infra*, §614) and the right to be employed on local public works projects (see *United Bldg. & Const. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden* (1984) 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249, *infra*, §613).

Corporations are not citizens within the meaning of the Clause. (*Blake v. McClung*, *supra*; *Asbury Hosp. v. Cass County, North Dakota* (1945) 326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6.) They may, however, invoke the Equal Protection Clause of the Fourteenth Amendment, and it is difficult to conceive of a right protected by the Privileges and Immunities Clause that is not also within the scope of the Equal Protection Clause. (See *infra*, §694 et seq.)

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B. State Citizenship.
2. Wild Animals and Fish.

7 *Witkin Sum. Cal. Law Const Law* § 612

[§ 612] Wild Animals and Fish.

In *Corfield v. Coryell* (1825) *Fed. Cas.* 3, 230 (discussed in *Blake v. McClung* (1898) 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432), a state statute prohibited nonresidents from taking oysters from waters within the state. *Held*, the statute was valid. The oysters, like wild animals and fish, were *ferae naturae*; they were the common property of the citizens of the state; and, while citizens of other states were entitled to the protection of their private rights, the Constitution gave them no share in this common property.

But this theory of valid discrimination in dealing with wild animals and fish within a state was qualified in *Toomer v. Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460, 1474, *supra*, §610. A South Carolina statute regulated the taking of migratory shrimp (free-swimming fish that migrate through the waters of several states) from its 3-mile coastal belt. An annual license fee was imposed for each shrimp boat: \$ 25 for resident owners, \$ 2,500 for nonresidents. *Held*, the statute violated Article IV, §2. It was clearly and drastically discriminatory to the point of practically excluding nonresident operators; the free-swimming migratory fish of the ocean, unlike those within the inland waters of a state, are not the special property of the state. Hence, this regulation of commercial shrimping, like the regulation of any other calling, came within the Privileges and Immunities Clause. (For similar holding relating to aliens under the Equal Protection Clause, see *infra*, §721.)

The continued vitality of the views expressed in *Corfield* was asserted in *Baldwin v. Fish & Game Com. of Montana* (1978) 436 U.S. 371, 98 S.Ct. 1852, 1860, 56 L.Ed.2d 354, upholding a Montana statute that charged nonresidents \$ 225 for an elk-hunting license, while residents paid only \$ 30. The court pointed out that elk hunting is a sport, not a means to the nonresident's livelihood, and added that "[t]he elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved." (98 S.Ct. 1862, 56 L.Ed.2d 368.) (On impact of Commerce Clause on export of state's natural resources, see *Hughes v. Oklahoma* (1979) 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250, *infra*, §1299.)

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B. State Citizenship.
3. Employment Discrimination.

7 *Witkin Sum. Cal. Law Const Law* § 613

[§ 613] Employment Discrimination.

(1) *Statutory Preference to State Residents.* In *Hicklin v. Orbeck* (1978) 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397, Alaska's "Local Hire Under State Leases" law required the employment of Alaska residents in preference to nonresidents in all oil or gas leases, easements, etc., to which the state is a party. *Held*, the statute was unconstitutional. "Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not." (98 S.Ct. 2489, 57 L.Ed.2d 406.) The Commerce Clause cases call for the same result. (98 S.Ct. 2491, 57 L.Ed.2d 408; see *infra*, §1298.) (See 22 *Southwestern U. L. Rev.* 1 [constitutionality of state preference laws].)

(2) *Statutory Preference to Local Residents.* In *United Bldg. & Const. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden* (1984) 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249, the city of Camden, New Jersey, to alleviate an employment crisis, adopted an ordinance requiring that at least 40% of the employees of contractors working on city construction projects be Camden residents. *Held*, the ordinance was unconstitutional.

(a) *Municipal ordinance within scope of Clause.* The ordinance would not have gone into effect without express approval by the State Treasurer; hence state action was involved. (104 S.Ct. 1025, 79 L.Ed.2d 256.) But even if the ordinance had been adopted solely by the city and not pursuant to a state program or with state approval, it would still be subject to the Entitlement Clause. A municipality is a political subdivision of the state from which its authority derives; and "[i]t is as true of the Privileges and Immunities Clause as of the Equal Protection Clause that what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State." (104 S.Ct. 1026, 79 L.Ed.2d 256.)

(b) *Discrimination on basis of municipal residence.* The contention that the Entitlement Clause applies only to distinctions based on *state citizenship* cannot be accepted. Although the Clause contains this language, "it is now established that the terms 'citizen' and 'resident' are 'essentially interchangeable,' ... for purposes of analysis of most cases under the Privileges and Immunities Clause." (104 S.Ct. 1026, 79 L.Ed.2d 257.) A person who is not residing in a state is not residing in a city within that state; hence, whether the exercise of a privilege is conditioned on state residency or on municipal residency, he or she will be excluded. The fact that New Jersey citizens not residing in Camden will also be disadvantaged does not render the ordinance immune from constitutional challenge. New Jersey citizens may seek legislation to remedy discrimination against them; out-of-state citizens have no similar opportunity.

(104 S.Ct. 1027, 79 L.Ed.2d 257.)

(c) *Fundamental nature of public employment right.* To come within the protection of the Entitlement Clause, the interest must be "fundamental" (see *supra*, §611), and pursuit of a common calling is one of the most fundamental of these interests. (104 S.Ct. 1028, 79 L.Ed.2d 258.) Public employment, however, is qualitatively different, and calls for a significant distinction:

(1) It has been held that there is no fundamental right to government employment for purposes of the *Equal Protection Clause*. (104 S.Ct. 1028, 79 L.Ed.2d 259.)

(2) The Commerce Clause acts as an implied restraint on state regulatory powers; but when the city acts solely as a market participant in setting conditions for public employment, no conflict between state regulation and federal regulatory authority can arise. The Privileges and Immunities Clause has a different effect. It imposes a direct restraint on state action in the interests of interstate harmony. "It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce." (104 S.Ct. 1028, 79 L.Ed.2d 259, 260.) The analysis in *Hicklin v. Orbeck*, *supra*, is appropriate here. (104 S.Ct. 1029, 79 L.Ed.2d 260.)

(3) "In sum, Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents. But that same exercise of power to bias the employment decisions of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause. A determination of whether a privilege is 'fundamental' for purposes of that Clause does not depend on whether the employees of private contractors and subcontractors engaged in public works projects can or cannot be said to be 'working for the city.' The opportunity to seek employment with such private employers is 'sufficiently basic to the livelihood of the Nation' ... as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city." (104 S.Ct. 1029, 79 L.Ed.2d 260.)

(d) *City's justification for the ordinance.* The city contended that the ordinance was reasonably designed to counteract the economic evil of nonresidents living off Camden without living in Camden, and was carefully tailored to avoid unreasonable harm to nonresidents by leaving them with access to 60% of the available positions. This justification cannot be remedied on the present record without trial or findings. The case is therefore remanded to the New Jersey Supreme Court to determine the best method of making the necessary findings. (104 S.Ct. 1030, 79 L.Ed.2d 261.) (See 86 Cal. L. Rev. 1335 [resident hiring preferences: public spending exception to Privileges and Immunities Clause]; 15 Southwestern L. Rev. 431 ["substantial reason" requirement for discrimination based on residency].)

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B. State Citizenship.
4. Residency Requirement for Attorney.

7 *Witkin Sum. Cal. Law Const Law* § 614

[§ 614] Residency Requirement for Attorney.

In *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205, Piper, residing in Vermont about 400 yards from the New Hampshire border, took and passed the New Hampshire bar examination and was qualified in all other respects to become a member of the Bar of that state. However, New Hampshire Supreme Court Rule 42 limited bar admission to state residents, and the Court refused to swear her in unless she established a New Hampshire home address. Citing personal reasons (expense of giving up her Vermont home, young children), she brought an action in the United States district court against the state supreme court alleging that Rule 42 violated the Entitlement Clause (Art. IV, §2). *Held*, the residency requirement was unconstitutional.

(a) The Entitlement Clause "was intended to create a national economic union." And the Court repeatedly has found that one of the privileges is that of doing business on terms of substantial equality. (105 S.Ct. 1276, 84 L.Ed.2d 211, citing *Toomer v. Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460, 1474, *supra*, §610, *Hicklin v. Orbeck* (1978) 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397, *supra*, §613, and *Ward v. Maryland* (1870) 79 U.S. 418, 20 L.Ed. 449.)

(b) Nothing in these prior cases suggests that the practice of law should not be viewed as one of the privileges. It is important to the national economy; and in addition, the legal profession has a noncommercial role and duty. "Out-of-state lawyers may--and often do--represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. ... The lawyer who champions unpopular causes surely is as important to the 'maintenance or well-being of the Union,' ... as was the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin*." (105 S.Ct. 1277, 84 L.Ed.2d 212.)

(c) The state's contention that the Entitlement Clause is inapplicable to law practice because a lawyer's activities are bound up with the exercise of judicial power is untenable. A lawyer is not an officer of the state in any political sense. (105 S.Ct. 1278, 84 L.Ed.2d 212.)

(d) The Entitlement Clause does not preclude discrimination where (1) there is a substantial reason for the difference in treatment, and (2) the discrimination bears a substantial relationship to the state's objective. (105 S.Ct. 1279, 84 L.Ed.2d 213, citing *United Bldg. & Const. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden* (1984) 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249, *supra*, §613.) But the state's justifications do not meet

the test of substantiality. There is no evidence to support the claim that nonresidents might be less likely to keep abreast of local rules and procedures or that they will conduct their practices in a dishonest manner. (105 S.Ct. 1279, 84 L.Ed.2d 214.) The additional assertion that a nonresident member would at times be unavailable for court proceedings has more merit, but does not call for exclusion of nonresidents. The trial court, by rule or exercise of discretion, may require a lawyer residing at a great distance to retain a local attorney. (105 S.Ct. 1280, 84 L.Ed.2d 215.) The final argument, that nonresidents would be disinclined to do their share of *pro bono* work, is unconvincing; it is reasonable to believe that most lawyers who become members of a state bar will endeavor to perform their share of the services. (105 S.Ct. 1280, 84 L.Ed.2d 215.)

One justice dissented, contending that the practice of law is fundamentally different from other occupations practiced across state lines. (105 S.Ct. 1281, 84 L.Ed.2d 216.) (See 53 A.L.R.3d 1187.)

In *Supreme Court of Virginia v. Friedman* (1988) 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56, *Piper* was extended to Virginia's rule governing admission of attorneys on motion without taking the bar examination. "The clear import of *Piper* is that the Clause is implicated whenever, as is the case here, a state does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents." (108 S.Ct. 2265, 101 L.Ed.2d 64.) (See *Barnard v. Thorstenn* (1989) 489 U.S. 546, 109 S.Ct. 1294, 1299, 1302, 103 L.Ed.2d 559, 568, 572 [residency requirement for admission to Virgin Islands Bar violates Privileges and Immunities Clause; rejecting justifications similar to those rejected in *Piper*].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

X. DUE PROCESS OF LAW

A. Nature and Scope of Guarantee.

1. Procedural and Substantive Due Process.

7 Witkin Sum. Cal. Law Const Law § 615

[§ 615] Procedural and Substantive Due Process.

(1) *Federal Constitution*. The Fourteenth Amendment to the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Fifth Amendment states a similar restriction on the federal Government. (On liberty interest protected, see *Smith v. Organization of Foster Families for Equality & Reform* (1977) 431 U.S. 816, 97 S.Ct. 2094, 2107, 53 L.Ed.2d 14, 31, 10 Summary (10th), *Parent and Child*, §8; *In re Roger S.* (1977) 19 C.3d 921, 927, 141 C.R. 298, 569 P.2d 1286, *infra*, §653; on property interest protected, see *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, *infra*, §691; *American Mfrs. Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40, 119 S.Ct. 977, 990, 143 L.Ed.2d 130, 149 [Due Process Clause did not require workers' compensation insurers to pay disputed medical bills prior to determination that treatment was reasonable and necessary because employee's property interest in payment did not attach until particular treatment was determined to be reasonable and necessary]; *Ryan v. California Interscholastic Federation - San Diego Section* (2001) 94 C.A.4th 1048, 1061, 114 C.R.2d 798 [students do not have protected interest under federal Constitution to participate in interscholastic sports]; on fundamental rights protected by Fourteenth Amendment generally, see *supra*, §218 et seq.)

"[T]he phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." (*Lassiter v. Department of Social Services of Durham County, North Carolina* (1981) 452 U.S. 18, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640, 648; see *People v. Sutton* (1993) 19 C.A.4th 795, 803, 804, 23 C.R.2d 632, citing the text ["trial court violated due process by admitting the evidence regarding defendant's exercise of his extradition rights"].)

In its origin, the meaning of the term "due process" was *procedural*. The protection was against judicial or administrative procedure that, by reason of denial of notice and opportunity for a hearing, unfairly deprived a person of property or personal rights. (See *infra*, §637 et seq.) But in its development in the United States, the Due Process Clause has been interpreted as a limitation on the legislative as well as the judicial and executive branches of the Government, thus preventing arbitrary and unreasonable legislation. This aspect of the subject is known as *substantive* due process, to distinguish it from *procedural* due process. (See *Davidson v. New Orleans* (1877) 96 U.S. 97, 24 L.Ed. 616; 18 Cal. L. Rev. 583; 13 Southwestern L. Rev. 479 [Substantive Due Process: A Doctrine of Regulatory Control]; *infra*, §623 et seq.; for historical analyses, see *Adamson v. California* (1947) 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903; 40 Cal. L.

Rev. 483; 64 *Harv. L. Rev.* 939; 81 *Harv. L. Rev.* 1439 [erosion of right-privilege distinction]; 21 *So. Cal. L. Rev.* 47; 7 *Stanf. L. Rev.* 3; 11 *U.C.L.A. L. Rev.* 481; on particular rights, see *supra*, §218 et seq.)

Substantive due process is best illustrated by cases dealing with the police power (see *infra*, §983), but the Clause also restricts other governmental powers (see *infra*, §1112 et seq., and 9 *Summary* (10th), *Taxation*, §25 et seq.).

(2) *State Constitution.* The California Constitution also contains due process guarantees. (Art. I, §§7, 15.) (See *People v. Ramirez* (1979) 25 *C.3d* 260, 265, 266, 268, 158 *C.R.* 316, 599 *P.2d* 622, 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare* §135 [rejecting federal court analysis and stating different approach for California]; *San Jose Police Officers Assn. v. San Jose* (1988) 199 *C.A.3d* 1471, 1478, 245 *C.R.* 728 [applying *Ramirez* analysis]; 69 *Cal. L. Rev.* 1073.)

Under the California Constitution, "a claimant need not establish a property or liberty interest as a prerequisite to invoking due process protection. ... Focused rather on an individual's liberty interest to be free from arbitrary adjudicative procedures ... , procedural due process under the California Constitution is 'much more inclusive' and protects a broader range of interests than under the federal Constitution." (*Ryan v. California Interscholastic Federation - San Diego Section*, *supra*, 94 *C.A.4th* 1069, citing *Ramirez*.) However, a "claimant must nevertheless identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution and the *Ramirez* analysis of what procedure is due." Playing interscholastic sports is not such a statutorily conferred benefit. (94 *C.A.4th* 1071.)

(3) *Texts and Law Reviews.* Commentary on due process has been extensive. (See 2 Rotunda, Chap. 15; 2 Tribe, Chap. 10; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §890 et seq.; 1 *Cal. Civil Practice* (2003 ed.), *Civil Rights Litigation*, §7:1 et seq. [text and forms for actions involving due process]; 100 *Harv. L. Rev.* 144 [negligence by state officials as deprivation without due process]; 103 *Harv. L. Rev.* 1363 [Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered]; 105 *Harv. L. Rev.* 1217 [Federal Extraterritoriality and Fifth Amendment Due Process]; 33 *McGeorge L. Rev.* 473 [stereoscopic approach to equal protection and due process]; 30 *Pepperdine L. Rev.* 124 [accountability when child under protection of social service agency is injured or killed]; 32 *San Diego L. Rev.* 1 [substantive due process and right of parents to corporally punish children]; 65 *So. Cal. L. Rev.* 2705 [Due Process: Accuracy or Opportunity?]; 65 *So. Cal. L. Rev.* 2743 [Justice Scalia's Due Process Methodology: Examining Specific Traditions]; 172 *A.L.R. Fed* 1 [Equal Protection and Due Process Clause challenges based on discrimination--Supreme Court cases].)

West's Key Number Digest, Constitutional Law k.251 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Texts and Law Reviews.* See 2 Rotunda 4th, Chap. 15.



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CHAPTER X - Constitutional Law

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X. DUE PROCESS OF LAW

A. Nature and Scope of Guarantee.

2. Protection Only Against Government Action.

7 *Witkin Sum. Cal. Law Const Law* § 616

[§ 616] Protection Only Against Government Action.

"[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. ... Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent the government 'from abusing [its] power, or employing it as an instrument of oppression.' ... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes." (*DeShaney v. Winnebago County Dept. of Social Services* (1989) 489 U.S. 189, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249, 258, 10 Summary (10th), *Parent and Child*, §6; see *Kathleen R. v. Livermore* (2001) 87 C.A.4th 684, 698, 104 C.R.2d 772 [city library that provided unsupervised, free Internet access did not affirmatively place minors in danger of downloading objectionable material; providing Internet access was not affirmative governmental action creating duty to protect under *DeShaney*]; 105 *Harv. L. Rev.* 1359 [*DeShaney*]; 24 *J. Juvenile Law* 218 [*Kathleen R.*]; 27 *Loyola L.A. L. Rev.* 435 [*DeShaney*]; 65 *So. Cal. L. Rev.* 781 [State Action and the Obligation of the States to Prevent Private Harm]; 68 *So. Cal. L. Rev.* 1295 [due process and equal protection challenges to inadequate police response in domestic violence situations]; 159 *A.L.R. Fed* 37 ["State-Created Danger," or Similar Theory, as Basis for Civil Rights Action under 42 U.S.C., §1983]; on what constitutes state action, see *infra*, §619 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Castle Rock, Colorado v. Gonzales (2005) 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658, answered a question similar to that left open in *DeShaney v. Winnebago County Dept. of Social Services* (1989) 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249, text, p. 1009, on whether a state child protective statute entitled a child to receive protective services, which entitlement would enjoy due process protection. Here, plaintiff's children were murdered by her husband after he took them in violation of a restraining order, which the police had refused to enforce. Plaintiff claimed that the police had a history of not enforcing similar restraining orders. *Held*, plaintiff had no constitutionally protected property interest in having the police enforce the restraining order when they had probable cause to believe that it had been violated.

(a) For a benefit to be a property interest protected by the procedural component of the Due Process Clause, a person must "have a legitimate claim of entitlement to it." (125 S.Ct. 2803, 162 L.Ed.2d 668.) And "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." (125 S.Ct. 2803, 162 L.Ed.2d 669.)

(b) The preprinted statutory language on the back of the restraining order stating that peace officers are to use every reasonable effort to enforce the order, and to arrest or seek a warrant for the arrest of a restrained person where there is probable cause that the order has been violated, does not make "enforcement of restraining orders *mandatory*. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." (125 S.Ct. 2805, 162 L.Ed.2d 670, 671.) Thus, despite probable cause to believe that a restraining order has been violated, the police have some discretion to determine whether to act to enforce it. (125 S.Ct. 2806, 162 L.Ed.2d 672.)

(c) Even if the police had acted to enforce the order, this would have meant seeking an arrest warrant, because plaintiff's husband was not present. But seeking an arrest warrant is entitlement to nothing but procedure, which cannot be the basis for a property interest. (125 S.Ct. 2808, 162 L.Ed.2d 674.)

(d) Even if the state statute "made enforcement of restraining orders 'mandatory' because of the domestic-violence context of the underlying statute, that would not necessarily mean that state law gave" plaintiff an entitlement to enforce it. "Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people. ... The serving of public rather than private ends is the normal course" of criminal law because criminal acts strike at society, not just at the individual victim. It is on this basis that a prosecutor may prosecute a domestic assault even if the victim withdraws the complaint. (125 S.Ct. 2808, 2809, 162 L.Ed.2d 675.)

(e) The Court concluded that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law.' " (125 S.Ct. 2810, 162 L.Ed.2d 676.)

Two justices joined in a lengthy dissent. (125 S.Ct. 2813, 162 L.Ed.2d 679.) (See *O'Dea v. Bunnell* (2007) 151 C.A.4th 214, 224, 59 C.R.3d 684 [following *DeShaney*; plaintiff correctional officer had no substantive due process claim for deprivation of liberty interests under 42 U.S.C., §1983 when he was injured while quelling fight between prison gangs; although plaintiff alleged that other officers orchestrated fight, he was not injured by state action; placing plaintiff in dangerous situation was not affirmative act of restraining individual's freedom to act on own behalf]; 119 *Harv. L. Rev.* 208 [Castle Rock, Colorado]; 58 *Hastings L. J.* 387 [same].)



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CHAPTER X - Constitutional Law

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X. DUE PROCESS OF LAW

A. Nature and Scope of Guarantee.

3. No Action for Money Damages.

7 *Witkin Sum. Cal. Law Const Law* § 617

[§ 617] No Action for Money Damages.

In *Bonner v. Santa Ana* (1996) 45 C.A.4th 1465, 53 C.R.2d 671, plaintiff, a homeless person whose possessions had been thrown away by workers for defendant city, sought money damages for violation of the Equal Protection and Due Process Clauses of the California Constitution. *Held*, money damages are not available for violation of the state Due Process Clause.

(a) *Gates v. Superior Court* (1995) 32 C.A.4th 481, 38 C.R.2d 489, 5 *Summary* (10th), *Torts*, §303, established that the key issue in deciding whether a state constitutional provision may be enforced by an action for money damages is not whether the text is self-executing, but whether the voters who ratified the provision intended it to be so enforceable. (45 C.A.4th 1472.) The California Due Process Clause does not mention money damages and was intended to add to the state Constitution the same right that is in the federal one. (45 C.A.4th 1473, 1474.)

(b) *Davis v. Passman* (1979) 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846, 5 *Summary* (10th), *Torts*, §16, held that violations of the federal Due Process Clause could be enforced by an action for money damages. (45 C.A.4th 1474.) However, that decision was predicated on the absence of an alternative judicial remedy. Here, plaintiff had an effective legal remedy--an action for conversion. (45 C.A.4th 1475, 1476; on rejection of the equal protection claim, see *infra*, §705.) (See *Carlsbad Aquafarm v. Department of Health Services* (2000) 83 C.A.4th 809, 820, 821, 100 C.R.2d 87 [discussing *Gates*, *Bonner*, and *Davis*; no money damages where plaintiff had other available remedies]; *Katzberg v. Regents of Univ. of Calif.* (2002) 29 C.4th 300, 320, 328, 127 C.R.2d 482, 58 P.3d 339, 5 *Summary* (10th), *Torts*, §17 [criticizing *Bonner* and approving *Carlsbad Aquafarm*; California Due Process Clause does not provide for damages action for violation of liberty interest, at least where other meaningful remedy is available]; 75 A.L.R.5th 619 [implied action for damages for state constitutional violations].)

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X. DUE PROCESS OF LAW

A. Nature and Scope of Guarantee.

4. Persons Protected.

7 *Witkin Sum. Cal. Law Const Law* § 618

[§ 618] Persons Protected.

(1) *Clause Applies to Persons.* The protection of the Due Process Clause is not, like that of the Privileges and Immunities Clause (*supra*, §§608, 610), confined to citizens. It extends to *all persons*, including corporations. (*Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania* (1888) 125 U.S. 181, 8 S.Ct. 737, 741, 31 L.Ed. 650, 653.) But a governmental subdivision, such as a county, is not a person within the meaning of the Clause. (*Riley v. Stack* (1932) 128 C.A. 480, 483, 18 P.2d 110.)

(2) *Aliens.* Lawfully permanent resident aliens are persons within the meaning of the Fourteenth Amendment. (See *Kwong Hai Chew v. Colding* (1953) 344 U.S. 590, 73 S.Ct. 472, 477, 97 L.Ed. 576, 585, *supra*, §476.) In most instances, their rights have found protection under the Equal Protection Clause (*infra*, §721 et seq.). The issue of due process has been raised, however, in connection with *deportation* (see *supra*, §476), and unsuccessfully against the exercise of the *war power* over enemy aliens (*infra*, §1326).

(3) *Distinction: Foreign Governmental Action.* Foreign nationals cannot invoke the Due Process Clause as a protection against arbitrary acts of their own governments. In *United States v. Belmont* (1937) 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134, money deposited with defendant banker in New York by a Russian corporation before 1918 was confiscated by the Russian Government. In answer to defendant's objection, it was held that "our policy, Constitution, and laws have no extraterritorial operation, unless in respect to our own citizens," and what another sovereign nation has done in the way of taking property of its citizens is not a matter for judicial consideration here. (57 S.Ct. 761, 81 L.Ed. 1140.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Aliens.* See 95 Cal. L. Rev. 169 [requiring appointed counsel for asylum seekers].



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A. Nature and Scope of Guarantee.

5. State Action.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 619

[§ 619] In General.

(1) *Nature of Activity*. State action prohibited by the Fourteenth Amendment is usually legislative action; but it need not be. It may be executive or judicial action. (See *Adams v. Department of Motor Vehicles* (1974) 11 C.3d 146, 152, 113 C.R. 145, 520 P.2d 961, *infra*, §647; 2 Rotunda, Chap. 16; 18 *Hastings Const. L. Q.* 587 [state action doctrine and Rehnquist Court]; 76 *Proof of Facts* 3d 89 [conduct of homeowners association prohibiting political signs as state action]; 93 *Am.Jur. Trials* 293 [homeowners association defense of free speech to property owner's claim of state action in enforcing restrictive covenant prohibiting yard signs]; on equivalent "color of law" requirement for actions under 42 U.S.C., §1983, see *infra*, §828.)

Thus, in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, *supra*, §426, Alabama courts applied a rule of law that was held to be an unconstitutional infringement of free speech and press. It was immaterial that the law was applied in a civil action, and that it was common law supplemented by statute. "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." (84 S.Ct. 718, 11 L.Ed.2d 697.) (See *Sokol v. Public Util. Com.* (1966) 65 C.2d 247, 252, 53 C.R. 673, 418 P.2d 265, *infra*, §683.)

(2) *Activity Not Amounting to State Action*. In several situations, participation by the state has been held to be insufficient to constitute state action:

(a) *Regulation of Public Utilities*. In *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477, plaintiff, a customer of defendant private utility corporation, sought damages for termination of her service, pursuant to state law, without notice and an opportunity for a hearing. Her claim that state action was involved was based on the theory that acts of an extensively regulated public utility, with a virtual monopoly and performing an essential public service, are attributable to the state. *Held*, distinguishing *Public Util. Com. of Dist. of Columbia v. Pollak* (1952) 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068, and *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, *infra*, §698, there was no state action. (See 89 *Harv. L. Rev.* 139.)

(b) *Regulation of Banks*. In *Kruger v. Wells Fargo Bank* (1974) 11 C.3d 352, 113 C.R. 449, 521 P.2d 441, the banker's equitable setoff was upheld. (See 4 *Summary* (10th), *Negotiable Instruments*, §83.) The due process challenge

was rejected on the ground that no state involvement sufficient to constitute state action was shown. The court pointed out that prior cases successfully invoking the Due Process Clause involved some ministerial act of a court clerk, sheriff, or other state official; here, there was only the act of a private party. (11 C.3d 360.) And the fact that the equitable right of setoff is recognized by statute (C.C.P. 431.70) does not make it state action, for the statute did not alter its equitable nature or its availability to either party. (11 C.3d 362.)

As to the final argument, that state action is involved because banks owe their legal existence to state law, are subject to extensive regulation, and have great influence on the economic health of the nation, the court observed that the concept of state action may evolve to this point but has not yet done so. The test under *Burton*, is that the state must be a joint participant in the activity. "The present case, unlike *Burton*, involves the private decision of a private business operating on private property." (11 C.3d 366.) (See 63 Cal. L. Rev. 135; 4 Southwestern L. Rev. 285; 65 A.L.R.3d 1284 [post-Sniadach status of banker's right to set off bank's claim against depositor's funds].)

(c) *Statutory Recognition of Self-Help Remedies. Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185, held that a warehouseman's sale of stored goods pursuant to the self-help provision of U.C.C. 7210 (see 13 Summary (10th), *Personal Property*, §229) is not state action. (See 92 Harv. L. Rev. 120; 6 Hastings Const. L. Q. 110.)

(d) *Treatment of Medicaid Patients.* In *Blum v. Yaretsky* (1982) 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534, a private nursing home's decision to discharge or transfer a Medicaid patient was held not to satisfy the state action requirement. A state "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." (102 S.Ct. 2786, 73 L.Ed.2d 546.)

(e) *Workers' Compensation Insurers. American Mfrs. Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40, 119 S.Ct. 977, 986, 143 L.Ed.2d 130, 144, held that although private workers' compensation insurers are authorized by the state to withhold payment for disputed medical treatment pending review, they are not "state actors."

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Activity.* See 2 Rotunda 4th, Chap. 16.



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A. Nature and Scope of Guarantee.

5. State Action.

b. Government Assisted Housing Projects.

7 *Witkin Sum. Cal. Law Const Law* § 620

[§ 620] Government Assisted Housing Projects.

In *Appel v. Beyer* (1974) 39 C.A.3d Supp. 7, 114 C.R. 336, the court held that housing projects carried out by joint participation of private enterprise and government under the National Housing Act and the Housing and Urban Development Act involve state action, and therefore call for due process in eviction of a tenant holding over after expiration of the rental term.

Two cases were consolidated: *Appel*, in which the landlord operated a residential apartment complex financed by a federally guaranteed mortgage loan, and *Korda v. McDaniels*, in which a similarly financed residential project also benefited by rent supplement payments from FHA (now HUD) on behalf of the tenant. In each case, the landlord received governmental assistance in the form of low interest long-term loans, small capital investment, and income tax benefits. In consideration of this financial assistance, he was required to accept only low or moderate income tenants whose eligibility was approved by FHA, and to charge rents only at rates approved by FHA; also, FHA had to approve the project's economic feasibility, design, title status, street access, owner's credit and construction costs, and it could take over management in the event of default.

In each case, the landlord gave the tenant the 30-day notice of termination under C.C. 1946 and sued for unlawful detainer (see 12 *Summary* (10th), *Real Property*, §§680, 703 et seq.). The tenants pleaded the affirmative defense that a due process notice and hearing on the cause for termination was required. The trial judge rejected the defense and rendered judgment for the landlord. *Held*, reversed.

(a) "[T]he primary function of this owner and this housing project is to provide a conduit for federal power to turn the wheel of federal policy. Any benefit to the owner or tenant is a product of governmental action. The government is, essentially, the landlord. Without the government, there would be no such low-cost housing; with the government, the quality and cost of the housing is such as the government allows." (39 C.A.3d Supp. 13.)

(b) The government has become a joint participant and the project is not purely private, under the holdings in *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, *infra*, §698, and federal and state decisions involving governmentally assisted housing projects. (39 C.A.3d Supp. 13.)

(c) The government's policy of offering decent housing at low cost for persons of modest means, by inducing private enterprise to supply it through federal subsidization, coupled with acceptance and reliance by the tenants, created "status by entitlement," a "species of property." (39 C.A.3d Supp. 15.) Under *Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, infra, §685, and federal and state decisions on publicly owned or governmentally assisted housing, this property right or entitlement protected tenants from eviction without prior notice and proof of good cause. (39 C.A.3d Supp. 16.)

(d) "The best procedural due process in such cases would be (1) a written notice from landlord to tenant setting forth the facts claimed to constitute good cause for eviction and (2) pleading and proof of those facts in the subsequent unlawful detainer action. That is the procedure recommended by a number of the courts considering the problem . . . Administrative type procedures that avoid judicial hearings, while sometimes nominally approved . . . have not always had acceptance when challenged." (39 C.A.3d Supp. 19.)

(e) What constitutes "good cause" for eviction depends on "the facts perceived in relation to the purposes of the relevant housing law and the posture of the affected parties." (39 C.A.3d Supp. 19.) "In some instances it has been intimated that guidelines to good cause for eviction are found in the definition of 'undesirable' tenants set forth in the regulations of the supervising public agency . . . or in the 'standards for eligibility' established by such regulations . . . or simply in destructive or anti-social conduct of the tenant." (39 C.A.3d Supp. 19.) (See *Department of Housing & Urban Dev. v. Rucker* (2002) 535 U.S. 125, 122 S.Ct. 1230, 1233, 152 L.Ed.2d 258, 266 [under 42 U.S.C., §1437d(l)(6), public housing authorities may terminate tenancies for *any* drug-related criminal activity of household members or guests, regardless of whether tenant knew of that activity]; 37 U.C. Davis L. Rev. 1175 [Rucker].)

SUPPLEMENT: [This section is current through the latest supplement]



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X. DUE PROCESS OF LAW

A. Nature and Scope of Guarantee.

5. State Action.

c. Nonjudicial Foreclosure.

7 *Witkin Sum. Cal. Law Const Law* § 621

[§ 621] Nonjudicial Foreclosure.

In *Garfinkle v. Superior Court* (1978) 21 C.3d 268, 146 C.R. 208, 578 P.2d 925, plaintiffs Mr. and Mrs. G bought a home from Mr. and Mrs. L, whose loan was secured by a deed of trust in favor of defendant bank. The deed of trust contained due-on-sale and power of sale clauses. Defendant offered to let plaintiffs assume the L loan at an increased rate of interest. Plaintiffs refused, and defendant accelerated the loan, making the total balance due. On default, defendant gave notice under C.C. 2924. Plaintiffs sought declaratory and injunctive relief, challenging the constitutionality of the procedure of nonjudicial sale. *Held*, the statute is constitutional.

(a) *Federal Constitution: Fourteenth Amendment due process.* The challenge depends on whether California's procedure constitutes state action; i.e., "whether the state is significantly involved in the nonjudicial foreclosure procedure so as to bring that procedure within the reach of the due process clause." (21 C.3d 276.) Plaintiffs' contention, primarily based on *Connolly Dev. v. Superior Court* (1976) 17 C.3d 803, 827, 132 C.R. 477, 553 P.2d 637, *infra*, §647, is unsound; there are significant differences between the creditors' remedies involved in *Connolly* and the power of sale procedure:

(1) The mechanic's lien and stop notice procedure are authorized by statute; the power of sale is authorized solely by the contract. (21 C.3d 277.)

(2) Although the exercise of the contractual remedy has been subjected to comprehensive statutory regulation, this does not constitute state encouragement or facilitation of use of the remedy. (a) The statutes do not authorize or compel inclusion of a power of sale provision. (b) The statutes do not compel exercise of the power of sale. (21 C.3d 278.)

(3) Acknowledging the legal validity of the title transferred by nonjudicial foreclosure is not an encouragement of the procedure, for virtually all private arrangements between parties assume the supportive role of the state. The statutory regulations, enacted primarily to protect the debtor, do not make the creditor's action state action. (21 C.3d 279.)

(4) The acts of the county recorder in connection with nonjudicial foreclosure are ministerial in nature, and not discretionary acts that might be deemed state action. (21 C.3d 280.)

(5) Judicial intervention to enforce rights acquired at a trustee's sale (i.e., unlawful detainer against the trustor) does not constitute state involvement; any party with rights under a contract may find it necessary to resort to the courts to enforce those rights. (21 C.3d 280.)

(6) Finally, the argument based on *Adams v. Department of Motor Vehicles* (1974) 11 C.3d 146, 113 C.R. 145, 520 P.2d 961, *infra*, §647, that state action is involved because the state has delegated the traditional function of enforcement of liens, is untenable. The power of sale in nonjudicial foreclosure, unlike that involved in *Adams*, is contractual, not statutory; and nonjudicial foreclosure has been recognized for over a century, hence, it cannot be regarded as a function traditionally and exclusively performed by the state. (21 C.3d 281.)

(b) *California Constitution: Due process under Article I, §7(a)*. Although this section does not expressly contain the requirement of state action, under *Kruger v. Wells Fargo Bank* (1974) 11 C.3d 352, 113 C.R. 449, 521 P.2d 441, *supra*, §619, the requirement is implicit. And although federal decisions on the requirement under the Fifth and Fourteenth Amendments are not binding, "we have found no reason to depart from those cases in the present context." (21 C.3d 281, 282.) Hence, for the reasons set forth in relation to the federal constitutional claim, the claim under the California Constitution is rejected. (21 C.3d 282.) (See 67 Cal. L. Rev. 684.)

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A. Nature and Scope of Guarantee.

5. State Action.

d. Athletic Associations.

7 *Witkin Sum. Cal. Law Const Law* § 622

[§ 622] Athletic Associations.

(1) *No State Action.* In *National Collegiate Athletic Assn. v. Tarkanian* (1988) 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469, the NCAA, an unincorporated association of public and private universities and colleges that regulates intercollegiate athletics, imposed sanctions on the University of Nevada, Las Vegas (UNLV), a state university, for recruiting violations, and threatened further sanctions if UNLV did not suspend Tarkanian, the basketball coach. UNLV suspended him, and Tarkanian sued in state court, alleging violation of his Fourteenth Amendment due process rights and 42 U.S.C., §1983 (*infra*, §819). *Held*, the NCAA's participation was not state action.

(a) UNLV's action was state action, but the question is "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action." (109 S.Ct. 462, 102 L.Ed.2d 485.) The answer is no. "Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated" those standards. (109 S.Ct. 463, 102 L.Ed.2d 487.)

(b) The claim that UNLV delegated its authority to the NCAA ignores the adversary relationship between the NCAA and UNLV throughout the investigation. (109 S.Ct. 464, 102 L.Ed.2d 487.) The NCAA did not discipline Tarkanian, but simply used its authority to threaten sanctions against UNLV, which had options other than suspension. (109 S.Ct. 465, 102 L.Ed.2d 488, 489.)

(c) The claim that the NCAA's power left UNLV with no real alternative, even if true, still does not convert the NCAA into a state actor. (109 S.Ct. 465, 102 L.Ed.2d 489.) (See 103 *Harv. L. Rev.* 187; 29 *Cal. Western L. Rev.* 429 [college sports and NCAA enforcement procedures].)

(2) *State Action.* In *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001) 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807, the issue was "whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school." (121 S.Ct. 927, 148 L.Ed.2d 814.) *Held*, plaintiff private member school could bring an action against defendant association under 42 U.S.C., §1983 (*infra*, §819).

(a) Defendant's regulatory activity "should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the Association, there being no offsetting reason to see the Association's acts in any other way." (121 S.Ct. 927, 148 L.Ed.2d 814.) State action may be found if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' " (121 S.Ct. 930, 148 L.Ed.2d 817, quoting *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477, *supra*, §619.)

(b) Here, unlike in *Tarkanian*, all the member public schools were located within a single state. (121 S.Ct. 931, 148 L.Ed.2d 818.) "[T]o the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling." The public school officials "do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. Only the 16% minority of private school membership prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable." (121 S.Ct. 932, 148 L.Ed.2d 819.) Further, state board members are assigned *ex officio* to serve on defendant's committees, and the defendant's ministerial employees are eligible for membership in the state retirement system. (121 S.Ct. 932, 148 L.Ed.2d 821.)

Four justices dissented, stating that the Court had never before found state action based on mere "entwinement." (121 S.Ct. 935, 148 L.Ed.2d 823.) (See 115 Harv. L. Rev. 437 [*Brentwood Academy*].)

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X. DUE PROCESS OF LAW

B. Retrospective Legislation.

1. Changes Affecting Substantive Rights.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 623

[§ 623] In General.

(1) *What Constitutes Invalid Retrospective Law.* A retrospective or retroactive law is not invalid *as such*. Neither the federal nor the California Constitution prohibits the enactment of legislation operating on preexisting matters, rights, or obligations. (*League v. Texas* (1902) 184 U.S. 156, 22 S.Ct. 475, 46 L.Ed. 478; *McCann v. Jordan* (1933) 218 C. 577, 579, 24 P.2d 457; *Macedo v. Macedo* (1938) 29 C.A.2d 387, 390, 84 P.2d 552.)

A retrospective law is invalid, however, if it conflicts with certain constitutional protections, e.g., if it (a) is an *ex post facto* law (1 *Cal. Crim. Law* (3d), *Introduction to Crimes*, §10 et seq.), (b) impairs the *obligation of a contract* (infra, §1278) or (c) deprives a person of a *vested right* or substantially impairs that right, thereby denying *due process*. (*Roberts v. Wehmeyer* (1923) 191 C. 601, 612, 218 P. 22; see 110 *Harv. L. Rev.* 1055 [Retroactivity and Legal Change: An Equilibrium Approach]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §690 et seq.; 2 Rotunda, §§15.8, 15.9.)

(2) *Statute Prospective in Effect.* Even though a statute in some respects deals with a prior event or transaction, its actual effect may be prospective and its operation valid. (See *Record v. Indemnity Ins. Co. of North America* (1951) 103 C.A.2d 434, 443, 229 P.2d 851 [amendment providing for attorneys' fee in industrial accident case, validly applied to *prior injury* where fee was for *subsequent services*]; *Sheyko v. Saenz* (2003) 112 C.A.4th 675, 702, 5 C.R.3d 350 [law requiring welfare applicants and recipients to be fingerprinted to prevent fraud is eligibility requirement under which nobody loses past benefits for present noncompliance; if past "applicant" is not also "recipient," e.g., applicant filed papers for minor, and chooses not to be fingerprinted, present recipient can find new person to take responsibility for filing required forms]; infra, §630.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *What Constitutes Invalid Retrospective Law.* See 2 Rotunda 4th, §§15.8, 15.9.



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b. Clarification of Existing Law.

7 *Witkin Sum. Cal. Law Const Law* § 624

[§ 624] Clarification of Existing Law.

An amendment that "merely clarifies existing law may be given retroactive effect even without an expression of legislative intent for retroactivity." (*Negrette v. California State Lottery Com.* (1994) 21 C.A.4th 1739, 1744, 26 C.R.2d 809 [amendment defining "substantial proof," for purposes of validating claim for state lottery prize when actual winning ticket is not received, was properly applied to claim filed before amendment was enacted]; see *Borden v. Division of Med. Quality* (1994) 30 C.A.4th 874, 878, 35 C.R.2d 905 [amendment making protection of public highest consideration in disciplining physicians could be applied retroactively, where it was declaratory of existing law, revocation of physician's license existed both before and after amendment, and medical board always had broad discretion].)

In *Western Sec. Bank v. Superior Court* (1997) 15 C.4th 232, 62 C.R.2d 243, 933 P.2d 507, the issuer of letters of credit brought a declaratory relief action against a bank that had loaned money to a partnership to purchase a shopping center. After the partnership defaulted, the bank modified the terms of the loan and was given unconditional, irrevocable standby letters of credit by the general partners as additional security. When the partnership again went into default, the bank nonjudicially foreclosed on the real property security and attempted to draw on the standby letters of credit of which it was the beneficiary. The Court of Appeal held that, under C.C.P. 580d, California's antideficiency legislation, the issuer of a standby letter of credit, provided to a real property lender as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure. The Supreme Court granted review, and while the matter was pending, the Legislature passed an urgency statute to state that a letter of credit is not a form of suretyship obligation (amending C.C. 2787), excluding letters of credit from the purview of antideficiency laws (adding C.C.P. 580.5), and declaring unenforceable letters of credit issued to avoid defaults on purchase money mortgages for owner-occupied real property containing one to four residential units (adding C.C.P. 580.7). The Supreme Court transferred the case to the Court of Appeal to reconsider its decision in light of the legislation. The Court of Appeal determined that the statute constituted a substantial change in existing law and, in the absence of clear evidence that the Legislature intended the statute to operate retrospectively, held that it did not affect its prior conclusions on the parties' rights and obligations. *Held*, in a 4-3 opinion, the statute applied.

(a) *Intent that statute operate retrospectively.* "[S]tatutes do not operate retrospectively unless the Legislature

plainly intended them to do so." (15 C.4th 243.) When a statute provides that it clarifies or declares existing law, it is indicative of a legislative intent that the statute applies to all existing causes of action from the date of its enactment, and the court must give effect to this intention unless there is some constitutional objection. (15 C.4th 244.) Here, the Legislature made its intent plain: " 'to confirm the independent nature of the letter of credit engagement and to abrogate the holding' " in the earlier opinion in this case. (15 C.4th 245.) The Legislature's intent was also evident in its statement of the facts justifying the statute's enactment as an urgency statute: " 'In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately.' " (15 C.4th 245.) "If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect." (15 C.4th 246.)

(b) *Change versus clarification in law.*

(1) The amendment to C.C. 2787 "plainly made no substantive change in the law." (15 C.4th 246.) The amendment added a statement that a "letter of credit is not a form of suretyship obligation." While generally a surety's liability for an obligation is secondary to, and derivative of, the principal's liability for that obligation, the liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. Thus, as the amendment made clear, "existing law viewed a letter of credit as an obligation of the issuing bank rather than as a form of guaranty or a surety obligation." (15 C.4th 247.)

(2) C.C.P. 580.5 specifies that letter of credit transactions do not violate the antideficiency laws, and that a lender's resort to a letter of credit and the issuer's right to reimbursement do not constitute an "action" under C.C.P. 726, or a failure to proceed against security, regardless of whether they come before or after a foreclosure. (15 C.4th 247.) The Court of Appeal, citing *Union Bank v. Gradsky* (1968) 265 C.A.2d 40, 71 C.R. 64, 4 Summary (10th), *Security Transactions in Real Property*, §202, and *Commonwealth Mortg. Assur. Co. v. Superior Court* (1989) 211 C.A.3d 508, 259 C.R. 425, 4 Summary (10th), *Security Transactions in Real Property*, §202, saw this section as a change in the law by analogizing standby letters of credit to guaranties and emphasizing the similarities of purpose and function. *Gradsky* held that after nonjudicial foreclosure of real property secured by a note, the creditor could not recover the note's unpaid balance from a guarantor. (15 C.4th 248.) *Commonwealth Mortgage* followed *Gradsky*, to hold that a mortgage guaranty insurer could not enforce indemnity agreements to obtain reimbursement from the debtors for the insurer's payment to the lender after the lender's nonjudicial sale of its real property security. (15 C.4th 249.) The Court of Appeal mistook standby letters of credit by seeing them only as a form of guaranty. (15 C.4th 250.) The Court of Appeal also overlooked that the parties specifically intended the standby letters of credit to be additional security. "When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments." (15 C.4th 251.) C.C.P. 580d "does not limit the security for notes given for the purchase of real property only to trust deeds; other security may be given as well. ... Creditors may resort to such other security in addition to nonjudicial foreclosure of the real property security." (15 C.4th 252.)

(3) C.C.P. 580.7, declaring unenforceable letters of credit issued to avoid defaults in purchase money mortgages for owner-occupied real property containing one to four residential units, was specifically made effective as to letters of credit issued after the effective date of the statute. (15 C.4th 247, footnote 6.)

(c) *No change in law.* The Legislature plainly intended the statutes, other than C.C.P. 580.7, to apply to existing loan transactions supported by outstanding letters of credit. Therefore, the Legislature's action did not effect a change in the law, but was simply a clarification that confirmed the state of the law prior to the Court of Appeal's first opinion. (15 C.4th 252.)

Three justices dissented and concurred in two separate opinions. All three justices expressed the view that the statute went beyond a mere clarification of existing law, and they would have given the statute prospective application only. (15 C.4th 253, 254.) (See *Murray v. Oceanside Unified School Dist.* (2000) 79 C.A.4th 1338, 1348, 1354, 95 C.R.2d 28, citing the text [applying *Western Sec. Bank* to repeal of *Lab.C. 1102.1* (prohibiting discrimination in

workplace based on sexual orientation) and placement of statute's protections within FEHA (*Govt.C. 12940(j)(1)*)).

SUPPLEMENT: [This section is current through the latest supplement]

See *Carter v. California Dept. of Veterans Affairs* (2006) 38 C.4th 914, 929, 44 C.R.3d 223, 135 P.3d 637 [making material changes in language of statute does not preclude finding of clarification].



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B. Retrospective Legislation.

1. Changes Affecting Substantive Rights.

c. Vested Right as Basis of Attack.

1. Rule and Test.

7 *Witkin Sum. Cal. Law Const Law* § 625

[§ 625] Rule and Test.

A person attacking a retrospective law must first establish some vested right. (See *Santa Barbara v. Modern Neon Sign Co.* (1961) 189 C.A.2d 188, 195, 11 C.R. 57 [zoning cases on invalidity of destruction of nonconforming use without reasonable amortization period (see *infra*, §1044) applied by analogy to ordinance requiring removal, within 1 year, of moving signs visible from highway]; *Cox v. State Social Welfare Bd.* (1961) 193 C.A.2d 708, 718, 14 C.R. 776 [legislative power to withdraw or specify conditions on old age benefits upheld; no vested right]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §699 et seq.; *infra*, §626 et seq.; on retroactive tax legislation, see 9 *Summary* (10th), *Taxation*, §30.)

An attempt by *repeal* of a statute to deprive a plaintiff of an accrued contractual cause of action is a violation of the Due Process Clause as well as the Contract Clause. (*Coombes v. Getz* (1932) 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866, *infra*, §1281; see *Wexler v. Los Angeles* (1952) 110 C.A.2d 740, 747, 243 P.2d 868 [divorced mother's accrued cause of action for child's death was not subject to statutory change making father a necessary party].)

The vested right concept was reexamined in *Flournoy v. California* (1964) 230 C.A.2d 520, 41 C.R. 190, upholding the retroactive application of statutory immunities under the governmental Tort Claims Act (see 5 *Summary* (10th), *Torts*, §222).

(a) The term "vested right" is not susceptible of clear definition, and its meaning is not dependent on the distinction between statutory and common law rights or between contract and tort causes of action. (230 C.A.2d 531.)

(b) Retroactivity is determined by certain factors: "[T]he nature and strength of the policy interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters." (230 C.A.2d 532, quoting 73 *Harv. L. Rev.* 697.) The first factor is illustrated by the mortgage moratorium case, *Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, *infra*, §1289; the second is applied by the cases that distinguish between statutes affecting rights and those affecting remedies; and the third involves the element of reliance or reasonable expectation of continuance of preexisting law. (230 C.A.2d 531.)

(c) Here, the public interest in the limited defense given by *Govt.C. 835.4* is important; the effect on the preenactment right is not great, and retroactivity involves no element of surprise, "Grouping together the three factors, upon the summation of which constitutional retroactivity depends, we find here legislation wherein public interest is great and such interest attaches importantly to its retroactive application. We weigh this against a right which has not been, in our estimate, grievously impaired. And also, as a part of the weighing process, we deal with a right which only existed through the retroactive application of *Muskopf*. The result of this weighing tips the scales to require our decision that the legislative declaration of retroactivity ... is not unconstitutional--as applied to the facts and provisions of the 1963 legislation here involved." (230 C.A.2d 537.)

"In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (*In re Marriage of Bouquet* (1976) 16 C.3d 583, 592, 128 C.R. 427, 546 P.2d 1371.)

In *Graczyk v. Work. Comp. App. Bd.* (1986) 184 C.A.3d 997, 229 C.R. 494, plaintiff, a state university student, was injured playing football on the university team. His workers' compensation claim was rejected on the ground that he was excluded from coverage by *Lab.C. 3352*. The statute was then amended to clarify an earlier amendment excluding uncompensated participants in athletic events, by specifically excluding students participating in amateur sporting events sponsored by public agencies. The amending statute contained a legislative finding that the amendment was declarative of existing law and stated that it was to apply to claims filed prior to its effective date. *Held*, denial of claim affirmed.

(a) Plaintiff's inchoate right to benefits under the workers' compensation law was wholly statutory and had not been reduced to judgment at the time of the clarifying amendment. "Where a right of action does not exist at common law, but depends solely on statute, the repeal of the statute destroys the inchoate right unless it has been reduced to final judgment, or unless the repealing statute contains a saving clause." (184 C.A.3d 1006.) Thus, plaintiff had no vested right in employee status at the time of his injury. (184 C.A.3d 1007.)

(b) Retroactive application is also justified by the policy factors set forth in *Flournoy*. The state has a significant interest in defining the employer-employee status, and retroactive application serves this interest by clarifying the exclusion of athletes under the earlier amendment. (184 C.A.3d 1008.)

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c. Vested Right as Basis of Attack.

2. Permit Cases.

aa. In General.

7 *Witkin Sum. Cal. Law Const Law* § 626

[§ 626] In General.

(1) *No Vested Right*. If a landowner applies for or obtains a permit to construct a building under an existing zoning ordinance, and thereafter the ordinance is amended to prohibit structures of that type in the particular zone, the new law may operate retroactively to compel denial or revocation of the permit where the landowner has not engaged in substantial building or incurred expenses in connection with building. (*Brougher v. Board of Public Works of San Francisco* (1928) 205 C. 426, 432, 271 P. 487; see *McCann v. Jordan* (1933) 218 C. 577, 579, 24 P.2d 457; *Avco Community Developers v. South Coast Regional Com.* (1976) 17 C.3d 785, 791, 132 C.R. 386, 553 P.2d 546; *Vincent Petroleum Corp. v. Culver City* (1941) 43 C.A.2d 511, 516, 111 P.2d 433 [license or permit issued under police power, e.g., to drill for oil in particular district, is mere privilege and not property, and can be revoked at any time]; *Hermosa Beach Stop Oil Coalition v. Hermosa Beach* (2001) 86 C.A.4th 534, 552, 103 C.R.2d 447 [even though defendant had contract with city to drill for oil, it had no vested right to do so when initiative prohibiting oil drilling was passed; defendant had never acquired necessary permits and no substantial work had been done towards constructing project].)

In *Spindler Realty Corp. v. Monning* (1966) 243 C.A.2d 255, 53 C.R. 7, plaintiff, contemplating the construction of a hotel or apartment house, obtained a grading permit, and spent a considerable sum grading. But before he could complete his plans and get a building permit, the city adopted a rezoning ordinance prohibiting the proposed use. *Held*, a grading permit, though here a necessary prerequisite to a building permit, was not its equivalent, and no vested right arose. (243 C.A.2d 264.) (See *Stokes v. Board of Permit App.* (1997) 52 C.A.4th 1348, 1357, 61 C.R.2d 181 [property owner had no vested right to complete construction of bathhouse despite spending almost \$ 400,000 in improvements where he misrepresented current use of property and misled city into issuing building permits based on this misrepresentation]; *Arviv Enterprises v. South Valley Area Planning Com.* (2002) 101 C.A.4th 1333, 1349, 125 C.R.2d 140 [imposition of building hiatus to allow plaintiff developer to complete environmental impact report on total development did not interfere with plaintiff's vested right to build permitted part of development where initial permit was issued without compliance with California Environmental Quality Act or area specific plan].)

(2) *Vested Right*. In *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 C.A.2d 776, 194 P.2d 148, defendant city granted a permit to drill for oil and plaintiff incurred substantial expenses in preparation for drilling. *Held*, plaintiff

obtained a vested right to drill, and the attempted revocation of the permit was a denial of due process. *Vincent Petroleum Corp.*, *supra*, was distinguished and its language limited to the situation in which the permittee fails to comply with the conditions of the permit. (85 C.A.2d 795.) (See *Russ Bldg. Partnership v. San Francisco* (1988) 44 C.3d 839, 846, 244 C.R. 682, 750 P.2d 324, *infra*, §627; *Highland Dev. Co. v. Los Angeles* (1985) 170 C.A.3d 169, 186, 215 C.R. 881 [dictum]; *Griffin v. Marin* (1958) 157 C.A.2d 507, 511, 321 P.2d 148]; *Kaufman & Broad Cen. Valley v. Modesto* (1994) 25 C.A.4th 1577, 1588, 1589, 30 C.R.2d 904 [tentative map statutes incorporate due process notice requirements, and fee increases after developer's rights have vested are limited to those for which adequate standards for determining scope and extent of increases existed at time map was deemed complete]; *Davidson v. San Diego* (1996) 49 C.A.4th 639, 646, 648, 56 C.R.2d 617 [developer had vested right under zoning ordinance to have permit application considered under regulations that existed on date it was submitted; however, plaintiff could be required to abide by later regulations necessary to protect public health and safety]; 22 *Loyola L.A. L. Rev.* 791 [vested rights], 813 [Development Agreement and Vesting Tentative Map]; 28 *Santa Clara L. Rev.* 417 [when real property rights vest in California].)

(3) *Criticism of Rule.* In *Raley v. California Tahoe Regional Planning Agency* (1977) 68 C.A.3d 965, 975, 985, 137 C.R. 699, the court, finding no vested right on which an attack could be successfully made, strongly criticized the operation of the rule. Plaintiff, developer of a shopping center near Lake Tahoe, received preliminary approval from the Tahoe Regional Planning Agency (TRPA) and the California Tahoe Regional Planning Agency (CTRPA). After changes in the membership of CTRPA, it reviewed the highway improvement plan providing access to the shopping center, and adopted an interim plan requiring review of the environmental impact of projects for which construction had not commenced. Plaintiff had not yet acquired a building permit or spent money for actual construction, but had incurred substantial expenses in reliance on the preliminary approval. The trial judge granted a writ restraining CTRPA from interfering with the development. *Held*, reversed.

(a) A property developer cannot challenge changes in zoning or other land use regulations during the preparatory stages of his or her project (see *infra*, §1040). When the developer obtains a building permit and expends substantial funds in reliance on it, a vested right to proceed may be acquired (68 C.A.3d 975); here, however, plaintiff merely obtained a preliminary approval of the project, and no vested right resulted from that. (68 C.A.3d 977.)

(b) Plaintiff also sought to support the judgment on the theory of equitable estoppel arising from discriminatory conduct of the agency; but the record failed to show arbitrary or capricious action. (68 C.A.3d 983.)

(c) Though compelled, the result is unfortunate. Plaintiff "spent \$ 150,000 in reliance upon a land use permit lawfully granted by a state instrumentality which was then repudiated by a related state instrumentality"; plaintiff was "the victim of maladroitly engineered environmental controls"; the mechanisms to protect the environment involved protracted and undependable administrative procedures, so that "many entrepreneurs run out of money or heart or both long before the finish line"; the "vested rights rule gives a green light to administrative vacillation virtually up to the moment the builder starts pouring concrete." (68 C.A.3d 984, 985.)

(d) "[T]he vested rights rule draws a distinction between 'soft' development costs (land, options, planning and design) and 'hard' construction costs. Only the latter evoke the rule's protection. To the developer both kinds of cost represent dollars of equal hardness. The vested rights rule draws no distinction between two kinds of regulatory-administrative shifts: (a) demands emanating from new regulatory laws or changing socioeconomic conditions; (b) an administrative change-of-mind on the part of a single administrative board. Such a change-of-mind occurred here." (68 C.A.3d 985.) (See 29 *Hastings L. J.* 623.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *No Vested Right.* See *Hafen v. Orange* (2005) 128 C.A.4th 133, 142, 26 C.R.3d 584 [following *Avco Community Developers v. South Coast Regional Com.* (1976) 17 C.3d 785, 132 C.R. 386, 553 P.2d 546, text, p. 1023; trial court erred in issuing writ compelling county to issue grading permit without developer first obtaining site plan permit, as required by zoning regulation adopted after tentative parcel map was approved, where developer had no vested right that would exempt him from compliance].



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2. Permit Cases.

bb. Distinction: Permit Subject to Condition.

7 *Witkin Sum. Cal. Law Const Law* § 627

[§ 627] Distinction: Permit Subject to Condition.

In *Russ Bldg. Partnership v. San Francisco* (1988) 44 C.3d 839, 244 C.R. 682, 750 P.2d 324, plaintiffs received permits to develop new office buildings, performed substantial work, and therefore had a vested right to complete them under the conditions of the permit. But the Planning Commission's resolution approving the permit contained this language: "In recognition of the need for expanded transportation services to meet peak demand generated by cumulative office development in the downtown area, [the developer] shall participate in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City." Nearly 2 years later, defendant enacted the Transit Impact Development Fee ordinance (TIDF), requiring developers of downtown buildings to pay a fee not exceeding \$ 5 per square foot of new office space, to provide revenue for the municipal railway to offset the anticipated costs of the increased peak-period ridership. Plaintiffs filed actions challenging the retroactive application of the ordinance, and the trial court found that TIDF did not impair their vested right. The Court of Appeal disagreed, but the Supreme Court, on review, reversed that part of the judgment of the Court of Appeal, holding that the condition of the permit encompassed the TIDF, and therefore that its imposition did not impair the developers' vested rights.

(a) Plaintiffs argued that the language of the transit mitigation condition was intended only to describe a funding mechanism that would include both prior and present developments, and not one directed solely at new developments. (44 C.3d 847.) But plaintiffs understood that they would be required to pay some amount to fund increased transit demands, and, while the TIDF is not an assessment district, it is a "similar fair and appropriate" transit funding mechanism. (44 C.3d 854.)

(b) Plaintiffs also argued that it is not the intent of the language but rather what plaintiffs understood it to provide that is dispositive of their claim; i.e., that their vested rights were limited by the condition only to the extent that its language provided notice of the imposition of the TIDF. This is unsound. "A vested right requires more than a good faith subjective belief that one has it. ... Ambiguous enactments are subject to construction according to established rules, and while a vested right may protect a party from future enactments it provides no protection against the appropriate application of those rules to the enactment that created the right." (44 C.3d 853.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Community Property Cases.

7 *Witkin Sum. Cal. Law Const Law* § 628

[§ 628] Community Property Cases.

In California, a number of amendments to our community property laws have been adopted to equalize the rights and interests of the spouses, mainly by enlarging those of the wife and limiting those of the husband. Where rights have been limited, the courts have usually held that the amendments could not be retroactively applied to property previously acquired. (See *In re Marriage of Buol* (1985) 39 C.3d 751, 762, 218 C.R. 31, 705 P.2d 354, 11 Summary (10th), Community Property, §229; *In re Marriage of Fabian* (1986) 41 C.3d 440, 449, 224 C.R. 333, 715 P.2d 253, 11 Summary (10th), Community Property, §230; *In re Marriage of Heikes* (1995) 10 C.4th 1211, 1218, 1225, 44 C.R.2d 155, 899 P.2d 1349, 11 Summary (10th), Community Property, §230 [due process precluded application of former C.C. 4800.2, requiring reimbursement for separate property contributions to acquisition of community property, to property acquired before effective date of statute].)

However, retroactive application is justified when necessary to serve a sufficiently important state interest. (See *Addison v. Addison* (1965) 62 C.2d 558, 566, 43 C.R. 97, 399 P.2d 897 [quasi-community property legislation]; *In re Marriage of Bouquet* (1976) 16 C.3d 583, 592, 128 C.R. 427, 546 P.2d 1371, supra, §625 [amendment making husband's earnings after separation his separate property, applied to rights whenever acquired]; *In re Marriage of Barnes* (1987) 43 C.3d 1371, 1376, 1377, 240 C.R. 855, 743 P.2d 915 [treatment of military retirement benefits as community property]; *Robertson v. Willis* (1978) 77 C.A.3d 358, 365, 369, 143 C.R. 523 [statute making community property liable for debts of either spouse contracted after marriage]; 11 Summary (10th), Community Property, §229 et seq.)

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d. Changes in Conditions of License.

7 *Witkin Sum. Cal. Law Const Law* § 629

[§ 629] Changes in Conditions of License.

It is frequently declared that the license to practice a profession or calling, such as medicine or law, once obtained by compliance with legally prescribed conditions, is a "property right" or "vested property right" that is entitled to protection. The cases that state this proposition are, however, mainly concerned with arbitrary proceedings that deny procedural due process. A distinct question arises where a regulatory statute retroactively changes the qualifications for the license, so that the licensee faces more onerous conditions or is actually prevented from further practice.

In *Rosenblatt v. California State Bd. of Pharmacy, Dept. of Professional & Vocational Standards* (1945) 69 C.A.2d 69, 158 P.2d 199, the court held that granting the license confers no vested right on the licensee, and that the licensee accepts it subject to the power of the state to impose further regulations in the public interest. Accordingly, while petitioner had qualified and had been licensed as an "assistant pharmacist" on the basis of certain training and experience, it was held proper to deny him a renewal license after the Legislature repealed the statutes permitting persons of such lesser skill to engage in this work. (69 C.A.2d 73.)

In *Castleman v. Scudder* (1947) 81 C.A.2d 737, 185 P.2d 35, petitioners, business opportunity brokers, made contracts to sell businesses. The contracts lacked a definite termination date. Thereafter, a statute was enacted to provide for revocation or suspension of a broker's license for demanding a fee under this kind of a contract. *Held*, the statute was applicable to petitioners, who made claims for commissions after the statute became effective. "[H]aving qualified as licensees in a business already regulated under the police power of the state, they thereby accepted such licenses subject to the possibility of further regulatory legislation upon the same subject matter." (81 C.A.2d 740.)

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2. Changes in Procedure.

a. Valid Retrospective Laws.

7 *Witkin Sum. Cal. Law Const Law* § 630

[§ 630] Valid Retrospective Laws.

There is no vested right in existing remedies and rules of procedure and evidence. Hence, generally speaking, the Legislature may change these rules and make the changes apply retroactively to causes of action or rights that accrued prior to the change. (*Mattson v. Department of Labor & Industries of Washington* (1934) 293 U.S. 151, 55 S.Ct. 14, 79 L.Ed. 251; *San Bernardino v. State Industrial Acc. Com.* (1933) 217 C. 618, 628, 20 P.2d 673; *Patek v. California Cotton Mills* (1935) 4 C.A.2d 12, 15, 40 P.2d 927; see *Landau v. Superior Court* (1998) 81 C.A.4th 191, 213, 97 C.R.2d 657 [although statutory amendment requiring writ review of decisions revoking physicians' licenses operated prospectively, it applied to proceedings begun before effective date of amendment because amendment related only to procedure]; *Florence Western Med. Clinic v. Bonta* (2000) 77 C.A.4th 493, 503, 91 C.R.2d 609 [statute is applied retroactively only if it changes legal consequences of act *completed* before effective date of statute; statute addressing procedures to be used in legal proceedings not yet concluded operates prospectively for acts *to be performed* after effective date of statute]; *Physicians Committee for Responsible Medicine v. Tyson Foods* (2004) 119 C.A.4th 120, 127, 13 C.R.3d 926 [statute limiting applicability of anti-SLAPP statute]; 41 A.L.R.2d 798 [venue statutes]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §§705, 706.)

In *Los Angeles v. Oliver* (1929) 102 C.A. 299, 315, 283 P. 298, at the time a condemnation suit was brought, the statute made the value of the property determinable as of the time of *trial*; an amendment that changed the time to that of *summons* (23 months earlier) was held validly applicable to a suit already commenced. The only vested right was that just compensation be paid, and the procedure for ascertainment, within reasonable limits, was subject to legislative change. (102 C.A. 311.) (See *Mercury Herald Co. v. Moore* (1943) 22 C.2d 269, 274, 138 P.2d 673 [changes in procedure to redeem lands sold for tax delinquency]; *Casey v. Katz* (1952) 114 C.A.2d 391, 393, 250 P.2d 291 [amendment requiring filing of claim against estate of decedent tortfeasor was validly applied to cause of action for malicious prosecution that arose prior to amendment]; *Halbert v. Berlinger* (1954) 127 C.A.2d 6, 14, 273 P.2d 274 [same amendment; following *Casey*]; *Hogan v. Ingold* (1952) 38 C.2d 802, 812, 243 P.2d 1 [statute requiring security for costs in shareholder's derivative suit was validly applied to action commenced after enactment, although brought by plaintiff who acquired his shares before, and based on wrongs allegedly committed before]; *Owens v. Superior Court* (1959) 52 C.2d 822, 833, 345 P.2d 921, 2 Cal. Proc. (4th), *Jurisdiction*, §129 [provision governing service on person leaving state]; *Sitzman v. City Bd. of Education of Eureka* (1964) 61 C.2d 88, 90, 37 C.R. 191, 389 P.2d 719 [law giving

probationary teacher right to hearing and protection against dismissal except for cause]; *Aronson v. Superior Court* (1987) 191 C.A.3d 294, 297, 236 C.R. 347, 3 Cal. Proc. (4th), Actions, §432 [retroactive application of shortened statute of limitations]; *Plotkin v. Sajahtera* (2003) 106 C.A.4th 953, 961, 131 C.R.2d 303 [amendment of parking lot signage ordinance that stated it was declaratory of existing law, and city council's stated intent that purpose of amendment was to instruct code enforcement personnel that "clarification" applied to their recent issuance of warning letters and to future enforcement, showed council's intent that amendment apply retroactively]; 81 A.L.R.2d 417 [shortening time allowed for appellate review]; 98 A.L.R.2d 1105 [imposing, removing, or changing monetary limitation of recovery for personal injury or death].)

SUPPLEMENT: [This section is current through the latest supplement]

Owens case:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §128.

Aronson case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §459. *Correction:* Page 1028, sixth line of first paragraph, "*San Bernardino v. State Industrial Acc. Com.*" should read "*San Bernardino v. Industrial Acc. Com.*"



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2. Changes in Procedure.

b. Efficient Remedy Must Be Left.

7 *Witkin Sum. Cal. Law Const Law* § 631

[§ 631] Efficient Remedy Must Be Left.

(1) *In General.* An important qualification of the rule stated in the preceding section is that the Legislature cannot, by a purported change in procedure, cut off all remedy. Unless it leaves a reasonably efficient remedy to enforce the right, the right itself is affected, and the statute will be held invalid as an impairment of a substantive right (*supra*, §623). (See *Lane v. Wilson* (1939) 307 U.S. 268, 59 S.Ct. 872, 876, 83 L.Ed. 1281, 1283 [statute requiring Blacks to register in a 12-day period or be perpetually barred from voting; period held too restricted].)

The distinction is illustrated by cases dealing with the 1933 amendments to former C.C.P. 583 (now C.C.P. 583.310 et seq.), providing for mandatory dismissal of an action not brought to trial within 5 years. Formerly, the period ran from the filing of the *answer*; by amendment the period ran from filing of the *action* (complaint), an earlier date. As to pending actions in which the time had already run if the new statute were applied, it was invalid because it immediately cut off the entire remedy. (*Coleman v. Superior Court* (1933) 135 C.A. 74, 76, 26 P.2d 673.) But as to pending actions in which a substantial period of time still remained to bring the case to trial, the amendment was given a valid retroactive application. (*Rosefield Packing Co. v. Superior Court* (1935) 4 C.2d 120, 122, 47 P.2d 716; see *Casey v. Katz* (1952) 114 C.A.2d 391, 393, 250 P.2d 291 [time adequate]; *Halbert v. Berlinger* (1954) 127 C.A.2d 6, 14, 273 P.2d 274 [same]; *Aronson v. Superior Court* (1987) 191 C.A.3d 294, 296, 236 C.R. 347 [retroactive shortening of statute of limitations; under *Rosefield*, reasonable time is question of law]; *Santangelo v. Allstate Ins. Co.* (1998) 65 C.A.4th 804, 816, 76 C.R.2d 735 [statute requiring arbitration to be concluded within 5 years was properly applied to claim that had been pending 4 years and 10 months when statute went into effect; 2 months to complete arbitration was reasonable under facts of case].)

There is considerable authority to the effect that the statute must, in these situations, expressly provide a reasonable time limit, and that where the Legislature fails to do so, retroactive application is invalid even though in fact a substantial period was available before it became effective. However, in *Rosefield*, California took the contrary position.

(2) *Doctrine Inapplicable to Remedy of State or Local Agency.* The doctrine that an efficient remedy must be left is relevant only where a statute affects the remedy of a private person. It does not apply where the state gives up a remedy of its own or of one of its agencies. The issue in this kind of case is not due process, but whether the Legislature has made a gift of public money in violation of the constitutional prohibition. (*California Emp. Stabilization Com. v. Payne*

(1947) 31 C.2d 210, 215, 187 P.2d 702, 9 Summary (10th), Taxation, §18.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Deprivation of Defense.

7 *Witkin Sum. Cal. Law Const Law* § 632

[§ 632] Deprivation of Defense.

It has been held that a statute that deprives a person of an existing defense to another's claim may be deemed an impairment of a vested right; i.e., the immunity from successful suit is equivalent to a right. Thus, in *Morris v. Pacific Elec. Ry. Co.* (1935) 2 C.2d 764, 43 P.2d 276, the law at the time of an automobile accident made violation of the speed limit contributory negligence per se, barring recovery. After the suit was commenced, an amendment made this violation only prima facie evidence of negligence. *Held*, the amendment could not be applied to the pending action, for it would deprive the defendant of an absolute defense. (2 C.2d 767.)

There are two chief illustrations of statutes taking away existing defenses:

(1) *Statutes of Limitation*. Where the statute has not yet run, the Legislature may validly extend the period. (*Mudd v. McColgan* (1947) 30 C.2d 463, 468, 183 P.2d 10.) But where it has already run, the defense is regarded in most states as a vested right and the Legislature cannot remove the bar and destroy the defense by a retroactive law. (See *Chambers v. Gallagher* (1918) 177 C. 704, 708, 171 P. 931.) The United States Supreme Court has taken the contrary position, holding that the statute of limitations ordinarily relates to remedies rather than rights, and that the retroactive revival of a barred personal claim for money or damages merely disappoints a hope of defense and does not deprive the defendant of a vested right. Under this view, an extension of the period of the statute is void only where the lapse of time has created a *property right*, e.g., a title to real or personal property by adverse possession. (*Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628, 1635.) (See 3 *Cal. Proc.* (4th), *Actions*, §§433, 434.)

(2) *Curative Statutes*. Where the performance of governmental functions is unauthorized or invalid, by reason of irregularities or inaccuracies in compliance with law, the Legislature may sometimes remedy the defects and validate the acts by a curative statute. The theory is that what the Legislature could have authorized originally it can later validate by ratification, and that procedural requirements that it could have omitted originally it can dispense with later. (See *Graham v. Goodcell* (1931) 282 U.S. 409, 51 S.Ct. 186, 194, 75 L.Ed. 415, 440; *Swayne & Hoyt v. United States* (1937) 300 U.S. 297, 57 S.Ct. 478, 480, 81 L.Ed. 659, 663; *Chase v. Trout* (1905) 146 C. 350, 358, 80 P. 81; *Talbot v. Wake* (1977) 74 C.A.3d 428, 438, 141 C.R. 463; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §707; 9 *Summary* (10th), *Taxation*, §30.) But where a right or title has already vested, it cannot be impaired by subsequent curative legislation. (*Miller v. McKenna* (1944) 23 C.2d 774, 781, 147 P.2d 531.) (On clarification of existing statute, see *supra*, §624.)

SUPPLEMENT: [This section is current through the latest supplement]

See *As You Sow v. Conbraco Industries* (2005) 135 C.A.4th 431, 460, 37 C.R.3d 399 [following *Morris v. Pacific Elec. Ry. Co.* (1935) 2 C.2d 764, 43 P.2d 276, text, p. 1030; mandated water testing procedure was properly characterized as substantive regulation providing substantive defense; its repeal did not operate retroactively to permit plaintiff to have new trial without being subject to requirements of former regulation].(1) *Statutes of Limitation*.

Cross-Reference: 3 Cal. Proc. (5th), Actions, §458 et seq.



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B. Retrospective Legislation.

4. Construction Against Retroactivity.

a. General Rule.

7 *Witkin Sum. Cal. Law Const Law* § 633

[§ 633] General Rule.

A statute affecting a substantive right will, if possible, be construed prospectively to avoid a declaration of unconstitutionality. (See *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 1207, 246 C.R. 629, 753 P.2d 585, *infra*, §634; *McClung v. Employment Dev. Dept.* (2004) 34 C.4th 467, 475, 20 C.R.3d 428, 99 P.3d 1015, *infra*, §928 [where court had definitively ruled that statute did not impose personal liability on nonsupervisory coworkers, subsequent amendment to impose that liability, stating that statute is "declaratory of existing law," does not make statute apply retroactively]; *Saso v. Furtado* (1951) 104 C.A.2d 759, 764, 232 P.2d 583 [statutory regulation restricting manner and extent of transfer of liquor license was inapplicable to agreement to transfer, performance of which was due before act went into effect]; *Wienholz v. Kaiser Foundation Hosp.* (1989) 217 C.A.3d 1501, 1503, 267 C.R. 1 [amendment to B. & P.C. 6146, raising maximum contingency fee in medical malpractice case, applies prospectively; hence, trial court could not award fee in excess of statutory limits in effect at time fee agreement was entered]; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 C.A.4th 1538, 1551, 6 C.R.2d 698, citing the text; *Aktar v. Anderson* (1997) 58 C.A.4th 1166, 1182, 68 C.R.2d 595 [because retroactive application of statute mandating recoupment of food stamp overissuances would increase recipient's liability for past benefits, statute would be applied prospectively]; *Riley v. Hilton Hotels Corp.* (2002) 100 C.A.4th 599, 607, 123 C.R.2d 157 [ordinance stating that new enactment is "declaratory of existing law and does not alter" meaning of former section, as adopted in 1962, does not expressly declare that change is retroactive or evidence intent to rebut presumption of prospective application]; *West Hollywood v. 1112 Inv. Co.* (2003) 105 C.A.4th 1134, 1143, 130 C.R.2d 168 [amendment to rent control statute that changed, as opposed to clarified, law by closing loophole, would be given prospective effect]; cf. *McKeon v. Hastings College* (1986) 185 C.A.3d 877, 887, 888, 230 C.R. 176 [administrative regulations are subject to same rule; here, however, defendant consented to retroactive application, thus waiving protection of rule against retroactivity]; *Mahon v. Safeco Title Ins. Co.* (1988) 199 C.A.3d 616, 620, 623, 245 C.R. 103 [retroactive application was proper where prior law was unsettled, so there could be no justifiable reliance on it].)

Even a procedural statute that may validly be given a retroactive operation will ordinarily, for reasons of fairness, be construed as prospective unless the legislative intent to make it retroactive clearly appears. (*Krause v. Rarity* (1930) 210 C. 644, 655, 293 P. 62; *Rainey v. Michel* (1936) 6 C.2d 259, 281, 57 P.2d 932; *Douglas Aircraft Co. v. Cranston* (1962) 58 C.2d 462, 465, 24 C.R. 851, 374 P.2d 819; *Roten-Oeschger v. Flournoy* (1977) 72 C.A.3d 254, 259, 139 C.R.

731; *Johnson v. Alexis* (1983) 143 C.A.3d 82, 85, 191 C.R. 529; *Utter v. Alexis* (1985) 173 C.A.3d 194, 197, 219 C.R. 30.)

Thus, in *DiGenova v. State Bd. of Education* (1962) 57 C.2d 167, 18 C.R. 369, 367 P.2d 865, the Education Code was amended to require the revocation of teaching credentials of persons convicted of designated sex offenses. *Held*, the new law was inapplicable to petitioner, convicted before its adoption. "It is settled therefore that no statute is to be given retroactive effect unless the Legislature has expressly so declared and that this rule is not limited by a requirement that a statute be liberally construed to effect its objects and promote justice." (57 C.2d 174.)

This policy is particularly strong where the statute, though partly procedural in form, is mainly substantive in nature or effect. In *Aetna Cas. & Surety Co. v. Industrial Acc. Com.* (1947) 30 C.2d 388, 182 P.2d 159, the contention was made that there is no presumption against retrospective construction of statutes relating merely to remedies and modes of procedure. The court's answer was as follows: "This reasoning ... assumes a clear-cut distinction between purely 'procedural' and purely 'substantive' legislation. In truth, the distinction relates not so much to the form of the statute as to its effects. If *substantial* changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." (30 C.2d 394.) (See *California, Subsequent Injuries Fund v. Industrial Acc. Com.* (1957) 48 C.2d 355, 361, 310 P.2d 1 [following *Aetna*]; *Estate of Giordano* (1948) 85 C.A.2d 588, 594, 193 P.2d 771 [statute changing burden of proof as to reciprocal inheritance rights]; *Ghera v. Sugar Pine Lumber Co.* (1964) 224 C.A.2d 88, 89, 36 C.R. 305, 3 Cal. Proc. (4th), Actions, §431 [new statute enlarging limitation period for recovery of penal damages for trespass]; *General Ins. Co. v. Commerce Hyatt House* (1970) 5 C.A.3d 460, 471, 85 C.R. 317 [statute providing that parties to contract may require written notice of intention to rely on excuse of prevention]; *Estate of Hilton* (1996) 44 C.A.4th 890, 908, 910, 52 C.R.2d 491, 14 Summary (10th), Wills and Probate, §538 [amendment modifying statutory fee schedule paid to attorneys in estate matters, whether substantive or procedural, could not be applied retroactively to prior partial statutory fee orders]; 66 A.L.R.2d 1444 [changing manner of distribution of recovery or settlement for wrongful death]; 98 A.L.R.2d 1105 [statute imposing, removing, or changing monetary limitation of recovery for personal injury or death].)

In *People v. Smith* (1983) 34 C.3d 251, 259, 193 C.R. 692, 667 P.2d 149, the question was whether Proposition 8 (The Victims' Bill of Rights; see 1 Cal. Criminal Law (3d), *Introduction to Crimes*, §102 et seq.) applied to a crime committed before its adoption. The court observed that some of the provisions, though procedural in form, might affect rights of a defendant so substantial as to come within the prohibition of ex post facto laws. (34 C.3d 259, 260, 261, 262.) Hence, "to avoid doubts as to the constitutionality of this measure under the ex post facto clause, we construe Proposition 8 to apply only to criminal proceedings arising out of offenses committed on or after the date it took effect." (34 C.3d 262.) (On ex post facto laws generally, see 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §10 et seq.)

In *re Cindy B.* (1987) 192 C.A.3d 771, 779, 237 C.R. 677, involving an amendment to C.C. 232(a)(2) to allow termination of parental rights on expanded grounds, was held nonretroactive for the following reasons: (a) The amendment had a potent substantive effect; (b) there was no clear legislative intent to make it retroactive; (c) there was no express declaration of retroactivity; (d) the legislative scheme required prospective application; (e) lack of notice raised a question of due process, calling for a construction to avoid unconstitutionality. (192 C.A.3d 779 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Elsner v. Uveges* (2004) 34 C.4th 915, 938, 22 C.R.3d 530, 102 P.3d 915 [trial court erred in retroactively applying statutory amendment providing for use of Cal-OSHA provisions in employee negligence actions against nonemployers; amendment changed legal consequences of past conduct that might have satisfied common law standard of care applicable when injury occurred, and nothing in statute provided for retroactive application]; *La Mesa v. California Joint Powers Ins. Authority* (2005) 131 C.A.4th 66, 74, 31 C.R.3d 411 [statutory statement that statute does not apply to actions filed on or before particular date, which was more than 4 years before statute's effective date, amounted to statement of retroactivity]. *Ghera case*:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §458.



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B. Retrospective Legislation.

4. Construction Against Retroactivity.

b. Initiative Measure.

7 *Witkin Sum. Cal. Law Const Law* § 634

[§ 634] Initiative Measure.

Where an initiative measure is involved, the court must look to the intent of the voters. In *Russell v. Superior Court* (1986) 185 C.A.3d 810, 814, 230 C.R. 102, the Fair Responsibility Act of 1986 (Proposition 51; see 5 *Summary* (10th), *Torts*, §52 et seq.) was held nonretroactive on the following analysis: (a) the Act contained no express provision for retroactivity; (b) nothing in its wording suggested retroactive intent, for the operative language was worded in the future tense; (c) the ballot arguments and analysis were either worded in the future tense, or were ambiguously worded in the present tense without sufficient indication that the voters understood that passage of the Act would impact pending cases; (d) the Act's "findings," reciting inequities of joint liability and the imminent financial crisis facing "deep pocket" public entity defendants, do not show a clear intent for immediate application to pending cases; a prospective application would satisfy the desire for immediate relief, and retroactive application would result in a windfall to insurance companies.

The same conclusion on the nonretroactivity of Proposition 51 was reached in *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 1212, 246 C.R. 629, 753 P.2d 585, on an elaborate review of the case law:

(a) The traditional approach was stated in *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 103 S.Ct. 407, 412, 74 L.Ed.2d 235, 243: "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. ... This court has often pointed out: '[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. ... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." ' ' (44 C.3d 1207.)

(b) California cases are in accord. (44 C.3d 1207, citing *Aetna Cas. & Surety Co. v. Industrial Acc. Com.* (1947) 30 C.2d 388, 182 P.2d 159, supra, §633, and the text.) And C.C. 3, stating that no part of the Code is retroactive unless expressly so declared, "represents a specific legislative codification of this general legal principle." (44 C.3d 1207; see footnote 11, and 44 C.3d 1208, citing many cases.)

(c) The drafters of the statute, in omitting any provision on retroactivity, "must have recognized that the statute

would not be applied retroactively." (44 C.3d 1211.)

(d) Defendants (the alleged tortfeasors) contended that the intent of the electorate is controlling over that of the drafters, and that the voters intended a retroactive application. This is unsound:

(1) There is no reliable basis for finding this conflicting intent; neither the Legislative Analyst's analysis nor any of the statements of proponents or opponents in the ballot pamphlet spoke to the retroactivity question. "Because past cases have long made it clear that initiative measures are subject to the ordinary rules and canons of statutory construction ... , informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure--like other statutes--would be applied prospectively because no express provision for retroactive application was included in the proposition." (44 C.3d 1212.)

(2) The claim that the declared "remedial" purpose of the measure demonstrates an intended retroactivity cannot be sustained. "Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively." (44 C.3d 1213.)

(3) If the voters had considered the issue, they might have recognized that retroactive application could result in placing individuals who had acted in reliance on the old law in a worse position than litigants under the new law. (44 C.3d 1215 et seq., discussing problems of joinder of tortfeasors and settlement.)

(4) Defendants also argued that even if there is insufficient evidence of an intent of the electorate, this intent should be inferred by the court from the measure's statement of purpose and the election brochure arguments, which demonstrate that the proposition was adopted to meet a liability insurance crisis that cannot be alleviated by a prospective application. This argument is based on a mistaken view of the consequences. The vast majority of tort actions are resolved by settlement rather than by trial, and because the amounts at which cases are settled reflect the defendant's potential liability at trial, the effects of the measure on damages actually paid are likely to be felt at a much earlier date than defendants predict. (44 C.3d 1218, 1219.)

(5) Statutory provisions similar to Proposition 51 were enacted in other states at approximately the same time as California's measure, and in response to the same concerns over the effects of high liability insurance premiums. A review of these provisions demonstrates that this factor does not necessarily evidence an intent to apply the statute retroactively. The legislative bodies that focused on the issue arrived at different conclusions of whether, and to what extent, such a statutory modification should apply to preexisting causes of action. (44 C.3d 1220.)

(e) Defendants also contended that the measure should be applied retroactively by analogy to the retroactive application of *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, 6 Summary (10th), *Torts*, §1329 (the decision abolishing the defense of contributory negligence and substituting the doctrine of comparative negligence). But *Li* was a change in common law doctrine made by judicial decision, not statutory enactment. "It is because of this difference in the governing legal principles that in most states in which the comparative negligence rule has been adopted through judicial decision--like California--the newly adopted rule has been applied to at least some pending cases ... , while in those states in which comparative negligence has been established by statute, the change has almost uniformly been applied prospectively." (44 C.3d 1221.)

A strong dissent of three justices attacks the reasoning of the majority opinion on all major points. (44 C.3d 1242.) (See *Yoshioka v. Superior Court* (1997) 58 C.A.4th 972, 978, 68 C.R.2d 553 [retroactive application of Proposition 213 (C.C. 3333.4), initiative prohibiting uninsured motorists and drunk drivers from collecting noneconomic damages in motor vehicle accident cases, does not violate due process]; *Jenkins v. Los Angeles* (1999) 74 C.A.4th 524, 536, 88 C.R.2d 149, 6 Summary (10th), *Torts*, §1657 [following *Yoshioka*; Proposition 213 (C.C. 3333.3), prohibiting convicted felon from recovering damages for negligence if injuries were proximately caused by commission of felony or

immediate flight, is constitutional and applies retroactively]; *Rosasco v. Commission on Judicial Performance* (2000) 82 C.A.4th 315, 320, 323, 98 C.R.2d 111 [amendment of Cal. Const., Art. VI, §18(d) (Proposition 190) to provide sanctions against former judges for specified misconduct while in office, operated prospectively only in absence of express provision for retroactive application; following *Evangelatos*].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Construction Against Retroactivity.

c. Repeal of Statute Without Saving Clause.

7 *Witkin Sum. Cal. Law Const Law* § 635

[§ 635] Repeal of Statute Without Saving Clause.

An exception to the rule of prospective construction is recognized where a right of action is created by statute and the statute is repealed without a saving clause. The repeal will operate retroactively to terminate a pending action based on the statute. (See 3 *Cal. Proc.* (4th), *Actions*, §72 [statutory right of action repealed].) The same is true where a penal law is repealed without a saving clause; pending prosecutions under the old law are abated. (See 1 *Cal. Crim. Law* (3d), *Introduction to Crimes*, §66.)

In *Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 *C.3d* 819, 135 *C.R.* 526, 558 *P.2d* 1, the court pointed out that this principle has broad application to criminal statutes, quasi-criminal statutes (e.g., those imposing forfeitures or statutory penalties), and civil statutes. (18 *C.3d* 829, 830.) In this case, it was applied to the 1976 legislation changing the treatment of marijuana offenders by reducing the penalty for possession of small amounts, and prohibiting a public entity, including a school district, from revoking an individual's employment on the basis of a pre-1976 conviction for possession of marijuana (*Health & Saf.C. 11361.7(b)*). The dismissal of defendant teacher, based on such a conviction, was held improper, for the repeal of the criminal statute making possession either a felony or misdemeanor eliminated the authority of the school board to treat it as a felony and hence, a ground of dismissal under the *Education Code*. (18 *C.3d* 830.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §20.



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C. Extraterritorial Legislation.

7 Witkin Sum. Cal. Law Const Law § 636

[§ 636] Extraterritorial Legislation.

Rights vested in one state cannot be impaired by legislation of another. So, if a citizen of one state exercises his or her privilege of coming into another, the latter state cannot, as a condition of entrance, compel that person to give up property rights vested elsewhere. (See *Estate of Thornton* (1934) 1 C.2d 1, 5, 33 P.2d 1, 11 Summary (10th), *Community Property*, §252.) Similarly, one state cannot tax land or interests in land situated outside its borders. (*Senior v. Braden* (1935) 295 U.S. 422, 55 S.Ct. 800, 79 L.Ed. 1520; see 9 Summary (10th), *Taxation*, §32.)

One state cannot impose additional burdens and liabilities on a party under a contract validly made in another state. (*Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* (1934) 292 U.S. 143, 54 S.Ct. 634, 636, 78 L.Ed. 1178, 1181.) However, *Osborn v. Ozlin* (1940) 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074, held that a state may require that all insurance contracts on property or persons within the state be signed by a local agent who receives the usual fee, even though the contract is written outside the state with a broker outside the state. "[T]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (60 S.Ct. 761, 84 L.Ed. 1078.) (See *Watson v. Employers Liab. Assur. Corp.* (1954) 348 U.S. 66, 75 S.Ct. 166, 170, 99 L.Ed. 74, 82 [state statute allowing direct tort action against liability insurer was validly applied to foreign insurer whose contract was made in another state with a clause against such action].)

Statutes providing for escheat of intangible property, such as unclaimed insurance money due on matured policies, or shares of stock and dividends, raise serious questions of extraterritoriality, for the situs of the intangible is fictional, and more than one state may seek to apply its statute to the property. The constitutional principle is now established that the holder of the property (e.g., the insurance company or other corporation) is deprived of due process if it is compelled to give it up in one jurisdiction without assurance of freedom from suit in another. (See *Western Union Tel. Co. v. Pennsylvania* (1961) 368 U.S. 71, 82 S.Ct. 199, 201, 7 L.Ed.2d 139, 142; *Texas v. New Jersey* (1965) 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596; 2 Cal. Proc. (4th), *Jurisdiction*, §252.)

SUPPLEMENT: [This section is current through the latest supplement]
Escheat of intangible property:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §261.



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D. Nature of Procedural Due Process.

1. Long-Established and New Procedures.

7 *Witkin Sum. Cal. Law Const Law* § 637

[§ 637] Long-Established and New Procedures.

Procedure established by long usage is usually considered sufficient to fulfill the requirements of due process. (See *Frank v. Maryland* (1959) 359 U.S. 360, 79 S.Ct. 804, 811, 3 L.Ed.2d 877, 884.) But it is not necessary that new procedure conform to past usage; it is sufficient if the methods are in harmony with the underlying principles of the constitutional guarantee. (See *Twining v. New Jersey* (1908) 211 U.S. 78, 29 S.Ct. 14, 20, 53 L.Ed. 97, 107; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 54 S.Ct. 330, 332, 78 L.Ed. 674, 677; *People v. Troche* (1928) 206 C. 35, 42, 273 P. 767; *Bell v. Farmers Ins. Exchange* (2004) 115 C.A.4th 715, 751, 9 C.R.3d 544 [use of statistical methodology of random sampling and extrapolation reflected level of accuracy that was consistent with due process in determining aggregate classwide damages in action to recover unpaid overtime pay]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §901 et seq.; 3 Rotunda, §17.1; 2 Tribe, §10-7 et seq.)

Thus, in *Hurtado v. California* (1884) 110 U.S. 516, 4 S.Ct. 111, 122, 28 L.Ed. 232, 239, California added to its established method of *indictment* of criminals charged with felonies the alternative procedure of *information*. Held, because the rights of the accused were fully protected under the new procedure, it was valid.

Another innovation was found consistent with due process in *Smith v. Smith* (1954) 125 C.A.2d 154, 270 P.2d 613, upholding the constitutionality of the Uniform Reciprocal Enforcement of Support Act (see 8 *Cal. Procedure* (4th), *Enforcement of Judgment*, §398A et seq.): (a) The courts of two sovereigns may be allowed to participate in taking evidence in a single case with one acting in an ancillary capacity to the deciding court in another forum. (b) The defendant in the responding state may be bound by a judgment of support without the plaintiff being present; this is a matter of practice, not jurisdiction, and the defendant may examine the plaintiff by deposition taken outside the forum state. (125 C.A.2d 167.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Rotunda (4th), §17.1.



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D. Nature of Procedural Due Process.

2. Notice Is Fundamental.

7 Witkin Sum. Cal. Law Const Law § 638

[§ 638] Notice Is Fundamental.

Notice is fundamental to due process: "Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." (*Lambert v. California* (1957) 355 U.S. 225, 78 S.Ct. 240, 243, 2 L.Ed.2d 228, 231; *People v. Swink* (1984) 150 C.A.3d 1076, 1079, 198 C.R. 290, *infra*, §659; see *West Covina v. Perkins* (1999) 525 U.S. 234, 119 S.Ct. 678, 681, 142 L.Ed.2d 636, 643 [in seizing property subject to search warrant, no individualized notice of state law remedies for its return need be given because that information is available in published statutes and case law]; 16B Am.Jur.2d (1998 ed.), *Constitutional Law* §931 et seq.)

Thus, our former "arrest and bail" statute was held unconstitutional because it deprived the defendant of liberty through the act of a law enforcement officer; and the provision that the defendant might apply to the court to vacate the arrest order or reduce bail did not afford a fair opportunity to challenge the imprisonment, for there was no requirement of notice of this right. (*In re Harris* (1968) 69 C.2d 486, 490, 72 C.R. 340, 446 P.2d 148, 6 Cal. Proc. (4th), *Provisional Remedies*, §5.)

In *Groppi v. Leslie* (1972) 404 U.S. 496, 92 S.Ct. 582, 30 L.Ed.2d 632, petitioner was alleged to have disrupted a session of the Wisconsin Legislature by a sit-in on the floor of the Assembly lasting from midday to nearly midnight. Two days after the event, without notice, a contempt resolution was passed, served on petitioner in jail (where he was already confined following arrest), and his subsequent confinement was pursuant to this contempt resolution. *Held*, relief on habeas corpus should have been granted; the confinement was a violation of due process.

The opinion repeats familiar basic principles, and emphasizes the fact that summary procedure was unnecessary where the event occurred 2 days before. (a) In such event, the opportunity for a hearing would enable the alleged contemnor to establish mistaken identity, mental incompetency as a defense, or other matters in mitigation. (b) When immediate action is taken, the contemnor is present, no question of identity arises, and he or she has an opportunity to speak, in the nature of the right of allocution of a criminal defendant. (92 S.Ct. 587, 30 L.Ed.2d 639.) *Ex parte Terry* (1888) 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, where the court acted promptly after the lawyer contemnor had voluntarily left the courtroom, is distinguishable. (92 S.Ct. 588, 30 L.Ed.2d 640.) "While a different result might well follow had the Wisconsin Assembly acted immediately upon occurrence of the contemptuous conduct and while the

contemnor was in the chamber, or nearly within the Capitol building, as in *Terry*, we conclude the procedures employed in this case were beyond the legitimate scope of that power because of the absence of notice or any opportunity to respond." (92 S.Ct. 588, 30 L.Ed.2d 640.)

SUPPLEMENT: [This section is current through the latest supplement]

In re Harris case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §5.



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D. Nature of Procedural Due Process.

3. Non-Essential Matters.

7 *Witkin Sum. Cal. Law Const Law* § 639

[§ 639] Non-Essential Matters.

Due process does not require a judicial proceeding. (*Anderson Nat. Bank v. Lueckett* (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, *infra*, §658; 16B Am.Jur.2d (1998 ed.), *Constitutional Law* §967.) And it does not guarantee either a correct decision or consistency in decisions. (*Central Land Co. of West Virginia v. Laidley* (1895) 159 U.S. 103, 16 S.Ct. 80, 83, 40 L.Ed. 91, 95; *Worcester County Trust Co. v. Riley* (1937) 302 U.S. 292, 58 S.Ct. 185, 188, 82 L.Ed. 268, 275; see 16B Am.Jur.2d (1998 ed.), *Constitutional Law* §921.)

The right of *appeal* to a higher court is not essential to due process in judicial proceedings. (See *McKane v. Durston* (1894) 153 U.S. 684, 14 S.Ct. 913, 914, 38 L.Ed. 867, 868; *Superior Wheeler Cake Corp. v. Superior Court* (1928) 203 C. 384, 386, 264 P. 488; *Rucker v. Superior Court* (1930) 104 C.A. 683, 685, 286 P. 732; 9 Cal. Proc. (4th), *Appeal*, §2; 16B Am.Jur.2d (1998 ed.), *Constitutional Law* §972; on right of *review* in administrative proceedings, see 9 Cal. Proc. (4th), *Administrative Proceedings*, §103 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Right of appeal in judicial proceedings:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §2.

Right of review in administrative proceedings:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §120 et seq.



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E. Procedural Due Process in Judicial Proceedings.

1. Essential Elements.

a. Jurisdiction, Notice, and Hearing.

7 *Witkin Sum. Cal. Law Const Law* § 640

[§ 640] Jurisdiction, Notice, and Hearing.

The elements of due process in judicial proceedings are covered in detail in *California Procedure* and will be briefly summarized in this and the following sections:

(1) *Jurisdiction*. The court must have jurisdiction over the parties and the subject matter of the action; i.e., the case must be one that the court is empowered to consider, and the parties must be given notice of the proceeding unless they waive this notice by a voluntary appearance. (*Scott v. McNeal* (1894) 154 U.S. 34, 14 S.Ct. 1108, 1112, 38 L.Ed. 896, 901; *Harrington v. Superior Court* (1924) 194 C. 185, 188, 228 P. 15; 2 *Cal. Proc.* (4th), *Jurisdiction*, §§10, 11, 108 et seq.) A personal judgment is therefore binding only on parties to the proceeding and persons in privity with them; it cannot validly bind strangers with adverse interests. (*Riley v. New York Trust Co.* (1942) 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885; *Hansberry v. Lee* (1940) 311 U.S. 32, 61 S.Ct. 115, 117, 85 L.Ed. 22, 26; 7 *Cal. Proc.* (4th), *Judgment*, §388 et seq.)

(2) *Notice and Opportunity for Hearing*. The parties must have reasonable notice and an opportunity for hearing. (*Twining v. New Jersey* (1908) 211 U.S. 78, 29 S.Ct. 14, 20, 53 L.Ed. 97, 111; *Griffin v. Griffin* (1946) 327 U.S. 220, 66 S.Ct. 556, 560, 90 L.Ed. 635, 640; *In re Lambert* (1901) 134 C. 626, 634, 66 P. 851; *People v. Lawrence* (1956) 140 C.A.2d 133, 137, 295 P.2d 4; see *Anderson v. Superior Court* (1989) 213 C.A.3d 1321, 1330, 1331, 262 C.R. 405 [custodial mothers who were exempt from work requirements for AFDC, appearing in matters relating to fathers' child support obligations, were ordered by court to undertake job searches or have AFDC benefits reduced; *held*, lack of adequate and timely notice, before appearance, of procedure under which they might lose benefits, violated due process]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §114 et seq.; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §931 et seq.; 3 *Rotunda*, §17.10.) However, a formal hearing is not always required. (See *Conservatorship of Moore* (1986) 185 C.A.3d 718, 728, 229 C.R. 875 [ex parte procedure and notice under Welf.C. 5362 is not violation of conservatee's due process rights].)

West's Key Number Digest, Constitutional Law k.256 et seq., 304 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Jurisdiction*.

Cross-References: 2 *Cal. Proc.* (5th), *Jurisdiction*, §§11, 12, 106 et seq.; 7 *Cal. Proc.* (5th), *Judgment*, §452 et seq.

(2) *Notice and Opportunity for Hearing.*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §112 et seq.



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E. Procedural Due Process in Judicial Proceedings.

1. Essential Elements.

b. Fair Hearing.

1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 641

[§ 641] In General.

The right to a hearing includes the right to produce evidence and to cross-examine adverse witnesses. (See *Fewel v. Fewel* (1943) 23 C.2d 431, 434, 144 P.2d 592; *Estate of Buchman* (1954) 123 C.A.2d 546, 559, 267 P.2d 73; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §953 et seq.; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §§3 et seq., 224 et seq.) It also includes the right to appear by counsel. (*Mendoza v. Small Claims Court of Lost Angeles Judicial Dist.* (1958) 49 C.2d 668, 673, 321 P.2d 9; 2 *Cal. Proc.* (4th), *Jurisdiction*, §296.) (For discussion of denial of fair hearing as jurisdictional defect, see 2 *Cal. Proc.* (4th), *Jurisdiction*, §293 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-References: 2 *Cal. Proc.* (5th), *Jurisdiction*, §305; 2 *Cal. Proc.* (5th), *Jurisdiction*, §302 et seq. *Correction:* Page 1042, sixth line of section, "*Mendoza v. Small Claims Court of Lost Angeles Judicial Dist.*" should read "*Mendoza v. Small Claims Court of Los Angeles Judicial Dist.*".



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CHAPTER X - Constitutional Law

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X. DUE PROCESS OF LAW

E. Procedural Due Process in Judicial Proceedings.

1. Essential Elements.

b. Fair Hearing.

2. Impartial Judge.

7 *Witkin Sum. Cal. Law Const Law* § 642

[§ 642] Impartial Judge.

An essential element of a fair hearing is an impartial judge. Thus, a judge with a pecuniary interest should not preside over a hearing; and a trial for misdemeanor before a local judge who received costs from a convicted defendant as an addition to his salary was held a denial of due process. (*Tumey v. Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 444, 71 L.Ed. 749, 758; see *Ward v. Village of Monroeville, Ohio* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 [*Tumey* doctrine applied to trial on traffic charge before local mayor whose court fines supplied substantial portion of village funds, despite fact that mayor did not personally receive any money; test is existence of possible temptation to be partisan]; 72 A.L.R.3d 375 [disqualification of judge for pecuniary interest in fines, forfeitures, or fees payable by litigants].) (On pecuniary interest of members of *administrative body*, see *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 C.A.3d 983, 988, 138 C.R. 594, *infra*, §671 [discussing *Tumey* and *Ward*].)

In re Murchison (1955) 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, reached the same conclusion on a different principle of impartiality: A judge cannot be both prosecutor and judge. A Michigan law authorized any judge of a court of record to act as a "one-man grand jury" to investigate crime. One of these judges questioned M, a police officer, about gambling and bribery, and charged him with perjury. The judge then ordered M to show cause why he should not be punished for contempt, held the hearing himself, and sentenced M for contempt. *Held*, this was a denial of due process. "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. ... A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." (75 S.Ct. 625, 99 L.Ed. 946.)

In *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823, involving a bad-faith insurance claim, the state supreme court justice who wrote the opinion and cast the deciding vote for the insured on appeal failed to recuse himself even though he was engaged in similar litigation against his own insurer. *Held*, his participation violated defendant insurer's due process rights. The issues on appeal involved an unsettled area and the opinion "possibly made new law." (106 S.Ct. 1586, 89 L.Ed.2d 833.) In participating in the decision, the justice acted as a judge in his own case and had a direct, personal, substantial, and pecuniary interest in the outcome. (106 S.Ct. 1586, 1587, 89 L.Ed.2d 834, 835, citing *Tumey*, *Ward*, and *Murchison*.)

In *Catchpole v. Brannon* (1995) 36 C.A.4th 237, 42 C.R.2d 440, plaintiff sued her former employers for sexual harassment, assault and battery, and infliction of emotional distress. Judgment was rendered for defendants by the trial court sitting without a jury, and plaintiff appealed, claiming gender bias by the trial judge. *Held*, reversed for a new trial on all issues before a different judge.

(a) "Whatever disagreement there may be in our jurisprudence as to the scope of the phrase 'due process of law,' there is no dispute that it minimally contemplates the opportunity to be fully and fairly heard before an impartial decision maker. The presence of judicial partiality is, of course, most pernicious where--as claimed here--it bears directly on the matter to be decided." (36 C.A.4th 245.)

(b) On appeal, plaintiff is not required to demonstrate actual bias. "Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided ... , but should reverse the judgment and remand the matter to a different judge for a new trial on all issues." (36 C.A.4th 247.)

(c) "Appellant's claim of gender bias rests on the related contentions that the trial judge displayed a belief that sexual harassment cases are relatively unimportant and invoked sexual stereotypes in evaluating appellant's behavior and credibility. There is, unfortunately, substance to these claims. Two factors create the strong impression of gender bias. The first is the tenor of the proceedings and impatience the trial judge repeatedly expressed, which conveyed the sense he considered sexual harassment cases 'detrimental to everyone concerned' and a misuse of the judicial system. The second factor relates to the assessment of appellant's credibility. The court's finding that appellant was not believable, the primary justification provided for the judgment against her, rests on stereotyped thinking about women and misconceptions of the social and economic realities many women confront. Considered as a whole, the court's comments reflect a predetermined disposition to rule against appellant based on her status as a woman." These factors "provide a reasonable person ample basis upon which to doubt whether appellant received a fair trial." (36 C.A.4th 249.) (See *Hall v. Harker* (1999) 69 C.A.4th 836, 843, 82 C.R.2d 44 [appearance of bias against attorneys; following *Catchpole*].)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Essential Elements.

b. Fair Hearing.

3. Communications Between Judges.

7 *Witkin Sum. Cal. Law Const Law* § 643

[§ 643] Communications Between Judges.

A due process challenge to ex parte communications between judges was rejected in *People v. Hernandez* (1984) 160 C.A.3d 725, 206 C.R. 843. After defendant had pleaded guilty to robbery, A, the trial judge, had a conversation with Judge C about that judge's use of sentencing criteria in a similar case. *Held*, the conversation was not a violation of the Canons of Judicial Ethics (see 2 *Cal. Proc.* (4th), *Courts*, §53 et seq.), and did not deprive defendant of procedural due process.

(a) Defendant's counsel argued that because neither he nor the accused was present at the consultation, the accused was denied the opportunity to be heard in response to the statements of the consulted judge. Because Judge A stated on the record that he had consulted Judge C, and all parties were given an opportunity to respond to Judge A's statements, counsel in effect contended that any ex parte communication between judges on a pending criminal case is a violation of the defendant's due process rights. (160 C.A.3d 742.)

(b) The risk that a defendant will be deprived of his or her interest in being heard by an impartial tribunal "is minimal in light of the safeguards." The defendant may move to disqualify a judge he or she believes not to be fair and impartial, or may move to disqualify the judge for actual bias. (See 2 *Cal. Proc.* (4th), *Courts*, §91 et seq.) No motion was made here, and there is no showing that Judge A received any evidence in the conversation or considered any facts outside the record. (160 C.A.3d 745.)

(c) The real issue raised by defendant's argument is that of *appearance of fairness*; and in assessing the propriety of conversation between judges on a pending matter, consideration must be given to the "dignitary interests" of the individual and the "responsibility" of the judicial officer. (160 C.A.3d 748.) Here, defendant had an opportunity to present his "story," and did not question the honesty and integrity of the judge or his proper performance of his judicial functions. (160 C.A.3d 749.)

(d) "The governmental interest is the same as a litigant's interest--having fair, knowledgeable and impartial judicial officers presiding over disputed matters. To deprive judges of the opportunity to discuss cases with their colleagues in the context we have discussed would, as previously noted, not add to or detract from fairness or impartiality in fact.

However, to prohibit contact between judges on pending matters would be adverse to governmental interests in a knowledgeable judiciary and facilitating the judiciary's ability to exercise its discretion wisely." (160 C.A.3d 749.)

SUPPLEMENT: [This section is current through the latest supplement]

Cannons of Judicial Ethics:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §55 et seq.

Disqualification of judge:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §93 et seq.



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2. Actions In Personam.

7 Witkin Sum. Cal. Law Const Law § 644

[§ 644] Actions In Personam.

An action *in personam*, or personal action, is one that seeks to impose a liability or obligation on a particular person or persons, and jurisdiction of the party or parties is necessary for the validity of the judgment. (See 2 Cal. Proc. (4th), *Jurisdiction*, §108.) In the celebrated case of *Pennoyer v. Neff* (1877) 95 U.S. 714, 24 L.Ed. 565, 572, the court laid down the rule that *jurisdiction to render a personal judgment against a nonresident must be obtained by personal service of process on the defendant within the territorial jurisdiction of the state*. In that case, an Oregon statute provided that, in an action against a nonresident having property within the state, service might be made by publication. Neff, a nonresident, owned real property in the state. Mitchell brought an action against him for services as attorney. Summons was published *but the property was not attached*. Neff did not appear; judgment by default was entered, and the plaintiff levied execution on the property and sold it. Pennoyer purchased at the sale and Neff brought this action against him. *Held*, the judgment was void, and Neff was entitled to recover the property; the authority of the courts of a state is restricted to its territorial limits, and they have no power to enforce a personal judgment against a nonresident, based on service by publication.

The doctrine of *Pennoyer v. Neff* has undergone considerable attrition, and today stands for little more than the proposition that personal service within the state is the typical and preferred method, and that substituted or constructive service is justifiable only under special circumstances. (See 2 Cal. Proc. (4th), *Jurisdiction*, §118 et seq.) The important special circumstances under which substituted service has been held constitutionally valid are as follows:

(1) Action against person domiciled in the state but absent. (*Milliken v. Meyer* (1940) 311 U.S. 457, 61 S.Ct. 339, 342, 85 L.Ed. 278, 283; *Allen v. Superior Court* (1953) 41 C.2d 306, 309, 259 P.2d 905; 2 Cal. Proc. (4th), *Jurisdiction*, §129.)

(2) Action against nonresident doing business in the state, on cause of action arising out of the business. (*Henry L. Doherty & Co. v. Goodman* (1935) 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097; *Travelers Health Assn. v. Virginia* (1950) 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154; *Lewis Mfg. Co. v. Superior Court* (1956) 140 C.A.2d 245, 255, 295 P.2d 145; 2 Cal. Proc. (4th), *Jurisdiction*, §133.)

(3) Action against nonresident motorist for automobile tort committed within the state. (*Hess v. Pawloski* (1927) 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; cf. *Wuchter v. Pizzutti* (1928) 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446

[statute was invalid where there was no requirement for mailing notice or other notification of defendant]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §138.)

(4) Action against person who expressly consents to substituted service. (See *Frey & Horgan Corp. v. Superior Court* (1936) 5 C.2d 401, 404, 55 P.2d 203 [contract provision]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §179 et seq.)

The Second Restatement of Conflict of Laws and the California Jurisdiction and Procedure Act of 1969 recognize additional bases of personal jurisdiction, including residence, nationality or citizenship, doing an act in the state, causing an effect in the state by an act done elsewhere, ownership, use, or possession of a thing in the state, and "other relationships to the state which make the exercise of judicial jurisdiction reasonable." (*Rest.2d, Conflict of Laws* §27; see C.C.P. 410.10; 2 *Cal. Proc.* (4th), *Jurisdiction*, §110 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Jurisdiction of party:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §106. *Substituted or constructive service:*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §116 et seq.

(1) *Person domiciled in state but absent:*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §127.

(2) *Nonresident doing business in state:*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §139.

(3) *Nonresident motorist:*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §144.

(4) *Person who consents to substituted service:*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §187 et seq.

Second Restatement of Conflict of Laws:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §108 et seq.



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3. Proceedings In Rem.

7 *Witkin Sum. Cal. Law Const Law* § 645

[§ 645] Proceedings In Rem.

An action or proceeding *in rem* is one that seeks to affect the interests of all persons in certain property. An action or proceeding *quasi in rem* is one in which the plaintiff seeks to satisfy a personal claim out of property seized and subjected to the jurisdiction of the court, or to determine the interests of a particular person or persons in certain property. (See 2 *Cal. Proc. (4th), Jurisdiction*, §234 et seq.)

The basic elements of jurisdiction are (1) situs of the property within the state, and (2) jurisdiction of a competent court over the property, by valid notice and opportunity for a hearing. (See *Mullane v. Central Hanover Bank (1950)* 339 U.S. 306, 70 S.Ct. 652, 656, 94 L.Ed. 865, 872; *Hanson v. Denckla (1958)* 357 U.S. 235, 78 S.Ct. 1228, 1236, 1238, 2 L.Ed.2d 1283, 1293, 1296; *Taylor v. Taylor (1923)* 192 C. 71, 76, 218 P. 756; *Atkinson v. Superior Court (1957)* 49 C.2d 338, 342, 316 P.2d 960; 2 *Cal. Proc. (4th), Jurisdiction*, §244.)

Proceedings involving *status*, such as divorce, annulment, guardianship, and adoption, have sometimes been described as "substantially in rem," the status being regarded as a "res" or subject matter located within the state of domicile of the person whose status is involved. (See 2 *Cal. Proc. (4th), Jurisdiction*, §§151A et seq., 261 et seq.; 11 *Summary (10th), Husband and Wife*, §129 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Actions in rem:

Cross-Reference: 2 *Cal. Proc. (5th), Jurisdiction*, §243 et seq. *Elements:*

Cross-Reference: 2 *Cal. Proc. (5th), Jurisdiction*, §253.

Proceedings involving status:

Cross-Reference: 2 *Cal. Proc. (5th), Jurisdiction*, §127 et seq., §270 et seq.



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4. Creditors' Remedies.

a. In General: Sniadach Rule.

7 *Witkin Sum. Cal. Law Const Law* § 646

[§ 646] In General: Sniadach Rule.

In a series of significant decisions, the United States and California Supreme Courts held the traditional prejudgment seizure remedies--garnishment, attachment, and replevin (California claim and delivery)--unconstitutional, except in special situations. The common element in each, the taking of property without an opportunity for a hearing, is a denial of due process. (See *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 [prejudgment garnishment of wages]; *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, 6 Cal. Proc. (4th), *Provisional Remedies*, §249 [prejudgment replevin]; *Blair v. Pitchess* (1971) 5 C.3d 258, 270, 96 C.R. 42, 486 P.2d 1242, 6 Cal. Proc. (4th), *Provisional Remedies*, §248 [claim and delivery]; *Randone v. Appellate Department* (1971) 5 C.3d 536, 547, 96 C.R. 709, 488 P.2d 13, 6 Cal. Proc. (4th), *Provisional Remedies*, §49 [attachment]; *People v. Surety Ins. Co.* (1978) 82 C.A.3d 229, 237, 147 C.R. 65 [comprehensive listing of cases applying *Sniadach* rule in four categories]; cf. *Mitchell v. W.T. Grant Co.* (1974) 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, 6 Cal. Proc. (4th), *Provisional Remedies*, §250 [Louisiana sequestration statute held valid]; and see 3 Rotunda, §17.9; 88 Harv. L. Rev. 71 [*Sniadach*, *Fuentes*, *Mitchell*]; 8 Loyola L.A. L. Rev. 339 [From *Sniadach* to *North Georgia Finishing*]; 26 Stanf. L. Rev. 673 [*Randone*]; for discussion of cases and statutory procedure for attachment and claim and delivery, see 6 Cal. Proc. (4th), *Provisional Remedies*, §§49 et seq., 248 et seq.; on garnishment, see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §232 et seq.)

North Georgia Finishing v. Di-Chem (1975) 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751, attempts to explain the distinction between statutes invalid under *Fuentes v. Shevin* and valid under *Mitchell v. W.T. Grant Co.*. Georgia had a traditional garnishment statute authorizing a creditor to garnish on a conclusory affidavit and bond, with the writ issued by a court clerk, and no method of discharge except by filing a bond. *Held*, the statute was invalid.

(a) The Georgia court thought that *Sniadach* was limited to garnishment of wages, but failed to consider *Fuentes*, which holds that the Due Process Clause applies to any deprivation of property without notice and opportunity for a hearing. "Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer." (95 S.Ct. 722, 42 L.Ed.2d 757.)

(b) *Mitchell v. W.T. Grant Co.* does not support the statute. In that case, the affidavit required facts and a judge passed on it; also, an immediate hearing after seizure was provided. (95 S.Ct. 722, 42 L.Ed.2d 757.)

(c) The contention that both *Fuentes* and *Mitchell* deal only with consumers who are victims of contracts of adhesion is untenable. "It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." (95 S.Ct. 723, 42 L.Ed.2d 758.) (See 88 Harv. L. Rev. 1510; 8 Loyola L.A. L. Rev. 339; 9 Southwestern L. Rev. 785.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Rotunda (4th), §17.9.

Fuentes case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §247.

Blair case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §246.

Randone case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §50.

Mitchell case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §248.

Attachment and claim and delivery:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §§50 et seq., 246 et seq.

Garnishment:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §241 et seq.



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b. Illustrations.

7 *Witkin Sum. Cal. Law Const Law* § 647

[§ 647] Illustrations.

(1) *Cases Holding Statutes Invalid*. The following are examples of statutes found defective under the standard laid down in the *Sniadach* line of cases (*supra*, §646):

The statutory requirement of a bond on appeal from a judgment of the small claims court was held invalid in *Brooks v. Small Claims Court* (1973) 8 C.3d 661, 105 C.R. 785, 504 P.2d 1249. The opinion points out that the small claims court was being used largely by institutional creditors with highly developed skills in processing claims, and that the ordinary debtor, without the right to counsel until appeal, was at a decided disadvantage. (8 C.3d 669.) Thus, the requirement of an undertaking on appeal "constitutes a taking of property prior to a due process hearing with right to counsel." (8 C.3d 667.) (See 62 Cal. L. Rev. 421.)

In *Adams v. Department of Motor Vehicles* (1974) 11 C.3d 146, 113 C.R. 145, 520 P.2d 961, the garageman's lien statute was held invalid to the extent that it provided for sale without adequate notice. The court found state action notwithstanding the fact that no state officers or court processes were involved. The vehicle service lien and enforcement procedures are created and governed by statute, the procedure is administered by the Department of Motor Vehicles, and the transfer of title to a lien sale buyer is recorded by the department. Due process was violated by the short notice provisions--30 days for a car worth over \$ 500, 20 days if worth less than that--and by the short periods of redemption. (11 C.3d 155, 156, 157.) (For amendments designed to cure the constitutional defects, see 13 *Summary* (10th), *Personal Property*, §237; and see *Martin v. Heady* (1980) 103 C.A.3d 580, 587, 589, 163 C.R. 117 [involuntary lien sale procedures in aircraft lien law held invalid under *Adams*]; 26 *Hastings L. J.* 383 [due process in consumer protection: repossession and adhesion contracts]; 6 *Pacific L. J.* 98 [*Adams* case]; 14 Santa Clara Lawyer 659 [State Action in Self-Help Automobile Repossession].)

(2) *Cases Holding Statutes Valid*. The following are examples of statutes that meet the *Sniadach* standard:

Forcible entry and wrongful detainer statutes, with provisions for speedy trial and restriction of the issues to rent and performance of the covenants of the lease, are valid. The short period is not oppressive where the tenant is given a proper hearing, and limitation of the issues in the summary proceeding does not impair the tenant's right to bring an action and litigate a claim for damages or other relief. (*Lindsey v. Normet* (1972) 405 U.S. 56, 92 S.Ct. 862, 869, 31

L.Ed.2d 36, 45 [Oregon statute].)

Levy of execution without a hearing is proper despite the existence of exempt property; i.e., the debtor can constitutionally be required to make an affirmative claim of exemption. (*Phillips v. Bartolomie* (1975) 46 C.A.3d 346, 350, 121 C.R. 56, 8 Cal. Proc. (4th), *Enforcement of Judgment*, §162; *Taylor v. Madigan* (1975) 53 C.A.3d 943, 963, 126 C.R. 376, 8 Cal. Proc. (4th), *Enforcement of Judgment*, §221.) (See *Wyshak v. Wyshak* (1977) 70 C.A.3d 384, 388, 394, 138 C.R. 811 [execution of judgments providing for installment support payments are valid].)

The statutory procedure for recordation of a mechanic's lien and bonded stop notice is constitutional. (*Connolly Dev. v. Superior Court* (1976) 17 C.3d 803, 827, 132 C.R. 477, 553 P.2d 637, 3 Cal. Proc. (4th), *Actions*, §215; see 65 Cal. L. Rev. 513.)

A statute that requires an affirmative demand for a hearing is valid. In *People v. Surety Ins. Co.* (1978) 82 C.A.3d 229, 147 C.R. 65, the lower court ordered forfeiture of bail when the defendant was not surrendered after conviction. Appellant insurer contended that P.C. 1305 (see 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §103) is unconstitutional in providing for a declaration of forfeiture without notice and hearing. *Held*, the statute is valid. The mere declaration did not deprive appellant of any substantial right; and the resulting judgment could be entered only after expiration of a 180-day period during which appellant had notice and an opportunity for a hearing. (82 C.A.3d 238.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cases Holding Statutes Valid.*

Phillips case:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §171.

Taylor case:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §229.

Connolly case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §221.



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5. Indigent's Access to Courts.
a. Indigent Plaintiffs.

7 *Witkin Sum. Cal. Law Const Law* § 648

[§ 648] Indigent Plaintiffs.

The principles of due process in judicial proceedings were developed in connection with the rights of *defendants* brought into court by plaintiffs. (See *supra*, §426 et seq.) But due process may also be involved where a *plaintiff* can only assert a claim or settle a dispute in a judicial proceeding. The plaintiff must have access to the judicial forum, and if, by reason of indigency, he or she cannot pay court fees or costs, imposition of these charges may effectively deny this access.

No decision has yet established a right of all indigents in all circumstances to litigate without payment of fees and costs. But in *Boddie v. Connecticut* (1971) 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, 3 Cal. Proc. (4th), Actions, §391, the court held that the right does exist in actions for divorce. "[A] state may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." (91 S.Ct. 789, 28 L.Ed.2d 122.) (See *Earls v. Superior Court* (1971) 6 C.3d 109, 113, 98 C.R. 302, 490 P.2d 814; *Cohen v. Board of Supervisors* (1971) 20 C.A.3d 236, 239, 97 C.R. 550 [plaintiff was not entitled to county payment of cost of service by publication on spouse who could not be personally served, because alternative methods of service, e.g., mailing, were available]; 52 A.L.R.3d 844 [marital actions]; 3 Rotunda, §17.10; 3 Cal. Proc. (4th), Actions, §§391, 403.)

The narrow scope of the *Boddie* rule is emphasized in two later decisions:

(1) A person seeking a discharge in bankruptcy may not claim exemption from fees; i.e., the interest he or she asserts is not of the same constitutional level as that of a person seeking to dissolve a marriage. (*United States v. Kras* (1973) 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626, *infra*, §804.)

(2) A recipient of welfare relief whose benefits are affected by an adverse administrative decision is not entitled to judicial review without payment of fees. Due process requires a pretermination evidentiary hearing under the rule of *Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, *infra*, §685, but the interest of the welfare recipient in judicial review of the administrative determination is not greater than that of the person seeking a bankruptcy discharge. (*Ortwein v. Schwab* (1973) 410 U.S. 656, 93 S.Ct. 1172, 1174, 35 L.Ed.2d 572, 575.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Rotunda (4th), §17.10.

Boddie case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §417.

Indigency in marital cases:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §§417, 428.



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7 *Witkin Sum. Cal. Law Const Law* § 649

[§ 649] Indigent Defendants.

In *Little v. Streater* (1981) 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627, a Connecticut statute provided that in paternity actions the cost of blood grouping tests must be borne by the party requesting them. Appellant, an indigent state prisoner, was the defendant in a paternity suit brought by a mother who was receiving public assistance for the child. His motion for an order directing blood grouping tests on the mother and child at state expense was denied, and the trial judge found that he was the father and ordered payments of child support. *Held*, judgment reversed.

(a) The standards governing appellant's due process claim are those set forth in *Boddie v. Connecticut* (1971) 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, *supra*, §648, and *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, *infra*, §687. (101 S.Ct. 2205, 2209, 2210, 68 L.Ed.2d 632, 638, 639.)

(b) Under the Connecticut statute, the mother may rely on the *prima facie* case of her accusation, and the burden is on the reputed father to show his innocence by evidence other than his own testimony. "Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks 'a meaningful opportunity to be heard.' " (101 S.Ct. 2210, 68 L.Ed.2d 638.)

There is no general constitutional right to appointment of counsel in a civil action. (See 1 *Cal. Proc.* (4th), *Attorneys*, §74.) The United States Supreme Court has recognized an indigent's right to appointed counsel only where the indigent may lose physical liberty if he or she loses the litigation; "[i]t is against this presumption that all the other elements in the due process decision must be measured." (*Lassiter v. Department of Social Services of Durham County, North Carolina* (1981) 452 U.S. 18, 101 S.Ct. 2153, 2159, 68 L.Ed.2d 640, 649 [no constitutional right to appointment of counsel for indigent parents in a proceeding to terminate parental rights]; see *Iraheta v. Superior Court* (1999) 70 C.A.4th 1500, 1511, 1514, 83 C.R.2d 471 [following *Lassiter*; no right to appointment of counsel in civil action for injunction to abate conduct of criminal street gangs as public nuisance; possibility of future imprisonment for violation of injunction was not determinative]; 95 *Harv. L. Rev.* 132 [*Little and Lassiter*]; 15 *U.C. Davis L. Rev.* 1123 [*Lassiter*]; on appointment of counsel for indigent criminal defendants, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §170 et seq.)

However, an indigent prisoner who is named as a defendant in a civil action is entitled to appointed counsel when

the prisoner is "confronted with a bona fide legal action threatening" his or her interests and "no other relief will preserve" his or her right of access to the courts. (*Payne v. Superior Court* (1976) 17 C.3d 908, 924, 132 C.R. 405, 553 P.2d 565, 1 Cal. Proc. (4th), Attorneys, §75; see *Yarbrough v. Superior Court* (1985) 39 C.3d 197, 216 C.R. 425, 702 P.2d 583, 1 Cal. Proc. (4th), Attorneys, §78.)

There is no constitutional right to *appointment of an interpreter* for an indigent civil defendant unable to speak or understand English. (*Jara v. Municipal Court* (1978) 21 C.3d 181, 186, 145 C.R. 847, 578 P.2d 94, 3 Cal. Proc. (4th), Actions, §396.)

SUPPLEMENT: [This section is current through the latest supplement]

No right to counsel in civil case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §48. *Payne case:*

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §49.

Yarbrough case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §52.

Jara case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §422.



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CHAPTER X - Constitutional Law

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X. DUE PROCESS OF LAW

E. Procedural Due Process in Judicial Proceedings.

6. Hearing on Child Custody.

7 *Witkin Sum. Cal. Law Const Law* § 650

[§ 650] Hearing on Child Custody.

In *Stanley v. Illinois* (1972) 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551, petitioner lived with a woman for 18 years and had three illegitimate children. On her death, the Illinois court declared the children wards of the court and placed them under guardianship, without any hearing or consideration of petitioner's fitness for custody. This was in compliance with Illinois law, which required notice and hearing and proof of unfitness before a child could be taken from a *married* parent, but presumed that an *unmarried father* was unfit. *Held*, the presumption was a denial of due process. Although the state may be correct in asserting that most unmarried fathers are unsuitable and neglectful parents, not all are unfit. If petitioner is a fit parent, the goals of the state law are not achieved by separating him from his children. (92 S.Ct. 1213, 1214, 31 L.Ed.2d 559.) The convenience of the procedure by presumption rather than proof cannot justify refusal of a hearing to a father on the substantial interest in custody of his children. (92 S.Ct. 1215, 31 L.Ed.2d 561.) (For equal protection issue, see *infra*, §775; for California cases applying *Stanley*, see 10 *Summary* (10th), *Parent and Child*, §61 et seq.)

In *Quilloin v. Walcott* (1978) 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511, a Georgia statute denied the authority of an unwed natural father to prevent adoption of an illegitimate child; i.e., the consent of the mother with custody was sufficient where the father had failed to legitimate the child. In this case, the father had not petitioned for legitimation during the 11-year period between the child's birth and filing of the adoption petition, and had never sought custody or contributed to the child's support; but he contended that an adoption decree could not be rendered without a finding that he was unfit. The lower court denied his petition for legitimation and granted the petition for adoption. Thus, the issue was not denial of a hearing, for a full hearing had been given on his legitimation petition. The issue was one not covered by *Stanley*: whether, under the circumstances (the father's failure to shoulder any significant responsibility for the child), the state could give him less veto authority than it provides to a married father. The Court held that the decree granted under those circumstances was not a denial of due process or equal protection. (98 S.Ct. 555, 54 L.Ed.2d 520.) (See 6 *Hastings Const. L. Q.* 83.)

Lehr v. Robertson (1983) 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614, involved a New York statute that created a "putative father registry." A man who files with the registry demonstrates his intent to claim paternity of a child born out of wedlock, and is therefore entitled to receive notice of any proceeding to adopt the child. New York law also provided for notice to several other classes of possible fathers of children born out of wedlock (those adjudicated to be the father, those identified as the father on the birth certificate, those who live openly with the child and mother and

hold themselves out to be the father, those identified as the father by the mother in a sworn written statement, and those who were married to the mother before the child was 6 months old). Plaintiff did not register and was not in any of the designated classes, he had never provided the mother or the child with any financial support, and he had never offered to marry the mother. But he challenged the New York statutory scheme on the ground that he had a constitutional right to prior notice and an opportunity to be heard before being deprived of his interest in the parent-child relationship. *Held*, the statute was validly applied. The extent to which a natural father's biological relationship with his illegitimate child receives protection under the Due Process Clause is determined by the principles laid down in *Stanley* and *Quilloin*, *supra*, and *Caban v. Mohammed* (1979) 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297, *infra*, §776.

(a) When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in rearing his child, his interest in personal contact with the child acquires substantial protection under the Due Process Clause. The mere existence of a biological link does not merit equivalent constitutional protection. (103 S.Ct. 2993, 77 L.Ed.2d 627.)

(b) Plaintiff never had any significant custodial, personal, or financial relationship with the child, and did not seek to establish a legal tie until after the child was 2 years old. (103 S.Ct. 2994, 77 L.Ed.2d 627.)

Three justices dissented, contending that by filing a suit to establish paternity and notifying the adoption court of his action and interest, plaintiff effectively made himself known, and "it is the sheerest formalism to deny him a hearing because he informed the State in the wrong manner." (103 S.Ct. 3000, 77 L.Ed.2d 635.) (See 104 Harv. L. Rev. 800 [New York case on unwed fathers]; on biological father's due process right to establish paternity despite existence of presumed father, see *Michael M. v. Giovanna F.* (1992) 5 C.A.4th 1272, 7 C.R.2d 460, *infra*, §777.)

SUPPLEMENT: [This section is current through the latest supplement]
See 28 A.L.R.6th 349 [Requirements and Effects of Putative Father Registries].



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X. DUE PROCESS OF LAW

E. Procedural Due Process in Judicial Proceedings.

7. Commitment of Mentally Ill Person.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 651

[§ 651] In General.

The involuntary commitment of mentally ill persons raises a number of due process questions. (See 3 Rotunda, §17.9; 87 *Harv. L. Rev.* 1193 [Developments in the Law]; 70 *Cal. L. Rev.* 54 [The Case Against Involuntary Commitment of the Mentally Disordered]; 7 *Loyola L.A. L. Rev.* 93 [Civil Commitment under California L.P.S. Act]; 22 *Santa Clara L. Rev.* 807 [involuntary commitments in California under L.P.S. Act]; 31 *Stanf. L. Rev.* 541 et seq. [symposium]; 28 *U.C.L.A. L. Rev.* 906 [Involuntary Civil Commitment: The Inadequacy of Existing Procedural and Substantive Protections]; *infra*, §§653, 654; on California's involuntary commitment statute (L.P.S. Act), see 3 *Cal. Proc.* (4th), *Actions*, §29 et seq.; on hearing required for revocation of outpatient status of person previously acquitted of a criminal charge on an insanity plea, see *In re Anderson* (1977) 73 *C.A.3d* 38, 140 *C.R.* 546; 29 *A.L.R.4th* 394.)

In *Addington v. Texas* (1979) 441 *U.S.* 418, 99 *S.Ct.* 1804, 60 *L.Ed.2d* 323, the court examined the question of the standard of proof required to commit an individual involuntarily, for an indefinite period, to a state mental hospital.

(a) *The three standards.* (1) In a typical civil case involving a monetary dispute between private parties, society has a minimal concern. The burden of proof is a mere preponderance of the evidence, the litigants sharing the risk of error in roughly equal fashion. (2) In a criminal case, the interests of the defendant are such that historically and without any explicit constitutional requirement they are protected by standards designed to exclude as nearly as possible the likelihood of an erroneous judgment. The burden is to prove guilt beyond a reasonable doubt. (3) The intermediate standard--some combination of "clear," "cogent," "unequivocal" and "convincing"--is used in civil cases involving allegations of fraud or quasi-criminal wrongdoing, or where particularly important individual interests are involved. (99 *S.Ct.* 1808, 60 *L.Ed.2d* 329.)

(b) *Role of jury.* "[E]fforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise. ... We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence." (99 *S.Ct.* 1808, 60 *L.Ed.2d* 330.) Nevertheless, in cases involving individual rights, whether criminal or civil, the standard reflects the value society places on individual liberty. (99 *S.Ct.* 1809, 60 *L.Ed.2d* 330.)

(c) *Proper standard for civil commitment proceeding.*

(1) *Preponderance is not sufficient.* The individual's interest is of such weight and gravity that he or she should not be asked to share equally with society the risk of error. Hence, confinement requires more substantial proof than a preponderance. (99 S.Ct. 1810, 60 L.Ed.2d 331.)

(2) *Beyond reasonable doubt is not necessary.* In *re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, 10 Summary (10th), *Parent and Child*, §878, saw no controlling difference in loss of liberty and stigma between conviction of an adult and a delinquency adjudication of a juvenile. But a civil commitment is different. It involves layers of professional review, and the concern of family and friends generally will provide continuous opportunities for correction of an erroneous commitment. (99 S.Ct. 1810, 1811, 60 L.Ed.2d 332.) Moreover, in view of the lack of certainty and fallibility of psychiatric diagnosis, there is a serious question whether a state could ever meet the burden of proof beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. (99 S.Ct. 1811, 60 L.Ed.2d 333.) Some states have, either legislatively or judicially, adopted the criminal law standard, but due process does not require it. (99 S.Ct. 1812, 60 L.Ed.2d 334.)

(3) *Clear and convincing evidence is required.* This middle level, adopted in various forms by 25 states, strikes a fair balance between the rights of the individual and the legitimate concerns of the state, and is required to meet the due process guarantee. (99 S.Ct. 1812, 1813, 60 L.Ed.2d 334, 335.) The additional term "unequivocal"--calling for proof that admits of no doubt, and approximating the burden in criminal cases--was held necessary in deportation and denaturalization cases (see *supra*, §§194, 476), where the issues were susceptible of objective proof and the consequences to the individual were unusually drastic. This is not a constitutional requirement for civil commitment cases. (99 S.Ct. 1812, 1813, 60 L.Ed.2d 335.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Rotunda (4th), §17.9.

On commitment under Sexually Violent Predators Act, see 3 *Cal. Crim. Law* (3d), *Punishment*, §193 et seq.

L.P.S. Act:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.



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b. Defendant Not Guilty by Reason of Insanity.

7 *Witkin Sum. Cal. Law Const Law* § 652

[§ 652] Defendant Not Guilty by Reason of Insanity.

In *Foucha v. Louisiana* (1992) 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437, the Louisiana commitment scheme allowed a person acquitted by reason of insanity to be committed to a mental institution until he was able to demonstrate that he was not dangerous to himself and others, even though he did not suffer from any mental illness. *Held*, this procedure violates due process. "[T]he State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no longer exists." (112 S.Ct. 1788, 118 L.Ed.2d 452.)

Two justices joined in one dissenting opinion (112 S.Ct. 1791, 118 L.Ed.2d 455), and three justices joined in another (112 S.Ct. 1797, 118 L.Ed.2d 463). (See *People v. Beck* (1996) 47 C.A.4th 1676, 1683, 1685, 1687, 55 C.R.2d 340 [defendant acquitted on basis of insanity; requirement that, after finding that he is not mentally ill or prone to violence, he must spend 1 year in outpatient program before unconditional release, held constitutional].)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Commitment of Mentally Ill Person.

c. Minor.

1. California Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 653

[§ 653] California Decisions.

In re Roger S. (1977) 19 C.3d 921, 141 C.R. 298, 569 P.2d 1286, explored the right of a minor of 14 years or more to procedural due process when committed to a state hospital on application of his or her parent or guardian, and held the existing procedure constitutionally defective.

(a) *Liberty interest of minor.* Personal liberty, with its principal ingredient of freedom from bodily restraint, is a fundamental interest protected by the *California and United States Constitutions*. (19 C.3d 927.) But the liberty interest of a minor is not coextensive with that of an adult, for the parent's own liberty includes the right to direct the upbringing of children. (19 C.3d 928; see *Wisconsin v. Yoder* (1972) 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15, supra, §519.) When the state itself initiates action to deprive the minor of liberty, he or she is clearly entitled to due process. The question presented by this case, however, is what rights the minor has when a parent initiates the action. (19 C.3d 928.)

(b) *Limits of parental power.* The parent does not have the unrestricted power to place a child in a state operated mental hospital, thereby waiving the due process rights that the child would have if the state sought the commitment.

(1) The situation is different from that involving hospitalization for treatment of a physical condition. There is physical restraint, injury to reputation, and the greater possibility of mistaken diagnosis than in cases of physical illness. "The serious consequences attendant upon involuntary commitment of a minor as a mentally ill or disordered person, and the significant potential for error in diagnosis convinces us that a minor who is mature enough to participate intelligently in the decision to independently assert his right to due process in the commitment decision must be permitted to do so." (19 C.3d 929.)

(2) Although to permit the child to assert this right does to some extent conflict with parental authority, a substantial state interest justifies it. Society has an interest in avoiding an erroneous commitment that might jeopardize the health or safety of the child. (19 C.3d 930.)

(3) Recognition of the right does not impermissibly impinge on the parent's right of control, for neither the state nor the parent has an interest in unnecessary curtailment of the child's freedom. (19 C.3d 930.)

(4) Recognition of the child's right would not necessarily weaken the family unit; it is the minor who wishes to return, and the parent who would remove him. (19 C.3d 930.)

(c) *No denial of equal protection.* The contention of the minor that equal protection demands that he receive all of the substantive and procedural rights extended to adults by the L.P.S. Act (see 3 Cal. Proc. (4th), Actions, §29 et seq.) and to juvenile court wards (see 10 Summary (10th), Parent and Child, §949) cannot be accepted. The liberty interest of a minor is qualitatively different from that of an adult, being subject to greater state regulation and even greater control by his or her parents; hence minors are not similarly situated with adults for purposes of equal protection analysis. (19 C.3d 934.)

(d) *Requirements of due process.* The procedures required by the L.P.S. Act are not mandated by due process. But procedures must be followed that will ensure the child a fair opportunity to establish that he is not mentally ill or disordered, or that, even if he is, confinement in a state mental hospital is unnecessary to protect him or others and might harm rather than improve his condition. (19 C.3d 935.) The present screening procedure does not offer an adequate forum in which to resolve either the disputed questions of fact or conflicting medical opinions. (19 C.3d 936.)

(1) In view of the drastic invasion of the minor's right to personal liberty, and the potential damage that may accompany an erroneous placement, there must be an opportunity for "a precommitment hearing before a neutral factfinder." Postadmission procedures are inadequate. (19 C.3d 937.)

(2) "[A]t a minimum, due process requires that the person receive a hearing after adequate written notice of the basis for the proposed action; an opportunity to appear in person and to present evidence in his own behalf; the right to confrontation by, and the opportunity to cross-examine, adverse witnesses; a neutral and detached decision maker; findings by a preponderance of the evidence; and a record of the proceeding adequate to permit meaningful judicial or appellate review." (19 C.3d 937.) Because the minor may be presumed to lack the ability to produce and present evidence or to discover and propose alternative treatment, "due process also requires that counsel be provided for the minor." (19 C.3d 938.) (See 19 C.3d 938, footnote 10, pointing out that the minor may waive any of these rights, providing that he is aware of the consequences and does so voluntarily and intelligently; and noting the suggestion of a commentator that a certificate of counsel should accompany the waiver.)

(3) The minor is not entitled to either a jury trial or a judicial hearing. A judicial hearing is required when the state seeks to deprive an adult of his or her liberty by commitment to a mental hospital; but when a parent, who has the right and obligation to control the child's personal liberty, takes this action, an administrative hearing may be adequate. (19 C.3d 939.)

(4) The evidentiary requirement of proof beyond a reasonable doubt does not apply; the lesser standard of proof by a preponderance of evidence will satisfy due process in these hearings. (19 C.3d 939.)

(e) *Rights of minors previously committed.* Minors already committed under Welf.C. 6000 are not entitled to release, but are entitled to a hearing, on request, on the propriety of their continued confinement. (19 C.3d 939, 940.) They may accordingly seek relief by habeas corpus in the superior court; and on a petition stating a prima facie case an order to show cause should issue and a hearing should be held. (19 C.3d 940.)

The court expressly refrained from considering (1) the validity of the procedure as applied to children under 14 (19 C.3d 927, footnote 3, 931); (2) whether parents may compel minors of 14 or over to submit to medical and/or psychiatric treatment in a closed private facility or on an outpatient basis (19 C.3d 927, footnote 3). (See 66 Cal. L. Rev. 344; 70 Cal. L. Rev. 373 [impact of *Roger S.* on California mental health system]; 48 Hastings L. J. 1137 [protecting children from involuntary civil commitment because of their sexual orientation]; 17 U.S.F. L. Rev. 797 [due process issues in mental health treatment commitment of minors].)

"Counsel," as required by *Roger S.* (19 C.3d 938), means an attorney; a local court rule permitting appointment of a nonlawyer "advisor" is invalid. (*In re Antoine C.* (1986) 186 C.A.3d 424, 427, 230 C.R. 738.)

SUPPLEMENT: [This section is current through the latest supplement]

L.P.S. Act:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.



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c. Minor.

2. United States Supreme Court Decisions.

7 *Witkin Sum. Cal. Law Const Law* § 654

[§ 654] United States Supreme Court Decisions.

In *Parham v. J.R.* (1979) 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101, involving a Georgia statute, the court made a definitive ruling on the issue of what process is constitutionally due a minor child whose parent or guardian seeks state administered mental health care for the child. In upholding the validity of the statute, the court applied the criteria of *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, *infra*, §687, as follows:

(a) *Interest of the child.* The child has a substantial liberty interest in not being confined unnecessarily and not being labeled erroneously as mentally ill. (99 S.Ct. 2503, 61 L.Ed.2d 118.)

(b) *Interests of the parents.* The cases have always recognized the broad parental authority over minor children; and this includes the duty to seek and follow medical advice. There are limits, however, as in the holding of *Planned Parenthood of Central Missouri v. Danforth* (1976) 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, *supra*, §563, that an absolute veto over a child's decision to have an abortion is unconstitutional. But this does not mean that the power to make these decisions should be transferred from the parents to an agency or officer of the state. (99 S.Ct. 2504, 2505, 61 L.Ed.2d 119, 120.) "In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply." However, "parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment." (99 S.Ct. 2505, 61 L.Ed.2d 120.)

(c) *Interest of the state.* The state has a significant interest in confining the use of its costly mental health facilities to cases of genuine need, and in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance. (99 S.Ct. 2505, 61 L.Ed.2d 120.) It also has an interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming "procedural minuets" before the admission, and in utilization of the time of psychiatrists, psychologists, and other behavioral specialists in patient care rather than in preparation for and participation in hearings. (99 S.Ct. 2506, 61 L.Ed.2d 120.)

(d) *Due process is satisfied if inquiry is made by neutral factfinder.* "[T]he risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied That inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure." (99 S.Ct. 2506, 61 L.Ed.2d 121.)

(e) *Formal hearing is not required.* (1) Due process does not require that the neutral trier of fact be law-trained or a judicial or administrative officer; a staff physician will suffice. (2) It is not necessary that the deciding physician conduct a formal or quasi-formal hearing; informal traditional medical investigative techniques will suffice. The questions are essentially medical in character. (99 S.Ct. 2507, 61 L.Ed.2d 123.) Moreover, a formalized hearing may be a significant intrusion into the parent-child relationship, and there is a serious risk that an adversarial confrontation will adversely affect the ability of the parents to assist the child while in the hospital and to facilitate his return home. (99 S.Ct. 2508, 61 L.Ed.2d 124.)

(f) *Commitment of ward calls for same rule.* Although there are differences between a request for admission to a state mental hospital made by the child's parents and one made by the state on behalf of a ward, the differences do not justify requiring different procedures for admission. The state agency having custody of the child has a duty to consider its best interests, and "the State may constitutionally allow that custodial agency to speak for the child, subject, of course, to the restrictions governing natural parents." (99 S.Ct. 2512, 61 L.Ed.2d 129.) It is possible, however, that procedures required in reviewing a ward's need for continuing care should be different. (99 S.Ct. 2512, 61 L.Ed.2d 129.)

One justice concurred, and three justices joined in a concurring and dissenting opinion, chiefly asserting that the Georgia statute was unconstitutional in failing to accord precommitment hearings to juvenile wards. (99 S.Ct. 2513, 2515, 61 L.Ed.2d 130, 133.) (See *Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles* (1979) 442 U.S. 640, 99 S.Ct. 2523, 2526, 2528, 61 L.Ed.2d 142, 148, 151 [Pennsylvania's procedures met *Parham* test and satisfied due process]; 93 Harv. L. Rev. 89 [Parham]; 7 Hastings Const. L. Q. 387 [same]; 32 Hastings L. J. 1285 [same]; 48 Hastings L. J. 1137 [protecting children from involuntary civil commitment because of their sexual orientation]; 31 Loyola L.A. L. Rev. 929 [observations on juvenile commitment cases]; 20 Santa Clara L. Rev. 269 [Parham].)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Treatment of Incompetent Nursing Home Patient.

7 *Witkin Sum. Cal. Law Const Law* § 655

[§ 655] Treatment of Incompetent Nursing Home Patient.

In *Rains v. Belshe*' (1995) 32 C.A.4th 157, 38 C.R.2d 185, the constitutionality of *Health & Saf.C. 1418.8* was at issue. The statute "allows certain incompetent patients residing in nursing homes or intermediate care facilities to receive medical treatment, after a physician has determined a patient's incapacity to give informed consent to the treatment and an interdisciplinary review team has determined such treatment is medically appropriate." (32 C.A.4th 162.) The statute was designed to deal with the need for quick, routine, and often ongoing medical care for those nursing home patients who lack the capacity to consent to the procedure in question and who do not have another person with legal authority to give that consent. (32 C.A.4th 166.) *Held*, the statute is constitutional.

(a) Under the analytical framework of *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, *supra*, §594, although incompetent patients have a right to privacy, *Health & Saf.C. 1418.8* neither invades a *reasonable* expectation of privacy, nor is it a serious invasion of the right to privacy. (32 C.A.4th 171, 173, 175.) Under the traditional balancing approach, an invasion of privacy is justified by a compelling state interest. (32 C.A.4th 175, 177.)

(b) Procedural due process is satisfied, even though the determination of incapacity is made by the patient's physician, by (1) the presumption that physicians will act ethically; (2) a clear standard and method, including an interview with the patient, to guide the physician in making the determination; (3) the review of the decision by a patient's representative in most, if not all, cases; (4) the right to have the decision judicially reviewed; and (5) the applicability of relevant state and federal standards. (32 C.A.4th 178, 186, 187, citing *Washington v. Harper* (1990) 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Procedural Due Process in Judicial Proceedings.

9. Restraining Criminal Nuisance.

7 *Witkin Sum. Cal. Law Const Law* § 656

[§ 656] Restraining Criminal Nuisance.

The Red Light Abatement Law authorizes a temporary restraining order or injunction against a nuisance consisting of a place used for lewdness, etc. (P.C. 11225, 11227; see 13 *Summary* (10th), *Equity*, §146 et seq.) In *Skinner v. Superior Court* (1977) 69 C.A.3d 183, 137 C.R. 851, an action against the operators of a motion picture theater, the court issued ex parte temporary restraining orders, pursuant to which the police seized films and all other personal property in the theater and closed it. *Held*, the restraining orders were void.

(a) The extraordinary circumstances justifying deprivation of a property interest without notice and an opportunity for a hearing in *Randone v. Appellate Department* (1971) 5 C.3d 536, 547, 96 C.R. 709, 488 P.2d 13, 6 Cal. Proc. (4th), *Provisional Remedies*, §49, were not present here. (69 C.A.3d 188.)

(b) The provisions for immediate seizure and removal of all personal property on the premises, and the arrest of persons found there, had the effect of a "general warrant" without description of the persons or things to be seized, in violation of the *Fourth Amendment*. (69 C.A.3d 189; see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §1 et seq.)

(c) No showing was made that great or irreparable injury would result if the matter were heard on notice under C.C.P. 527. (69 C.A.3d 189.) (On procedure for obtaining temporary restraining order, see 6 Cal. Proc. (4th), *Provisional Remedies*, §362 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Randone case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §50.

Procedure for obtaining temporary restraining order:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §363 et seq.



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F. Procedural Due Process in Administrative Proceedings.

1. Right to Notice and Hearing.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 657

[§ 657] In General.

(1) *In General.* Procedural due process does not require a trial before a court. A proceeding before an administrative officer or board is adequate if the basic requirements of notice and opportunity for hearing are met. (See *Ohio Bell Tel. Co. v. Public Util. Com. of Ohio* (1937) 301 U.S. 292, 304, 57 S.Ct. 724, 730, 81 L.Ed. 1093, 1101 [it is necessary that "the 'inexorable safeguard' ... of a fair and open hearing be maintained in its integrity. ... The right to such a hearing is one of 'the rudiments of fair play' ... assured to every litigant by the Fourteenth Amendment as a minimal requirement"]; *Rosenblit v. Superior Court* (1991) 231 C.A.3d 1434, 1444, 282 C.R. 819, *infra*, §659; *Beck Dev. Co. v. Southern Pac. Trans. Co.* (1996) 44 C.A.4th 1160, 1188, 1189, 52 C.R.2d 518 [determination by Department of Toxic Substances Control that land is hazardous waste property is quasi-judicial in nature and requires notice and hearing comporting with due process standards]; *Burt v. Orange* (2004) 120 C.A.4th 273, 285, 15 C.R.3d 373 [trial court erred in denying plaintiff's petition for hearing on county's decision to file suspected child abuse report on her; plaintiff asserted sufficient claim for familial and informational privacy, and Child Abuse and Neglect Reporting Act impliedly recognizes that suspected child abuser has right to present timely challenge to filed report and must be given reasonable opportunity to rebut charge]; *supra*, §638 et seq.; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §967; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §294 et seq.)

(2) *Texts and Commentary.* The legal literature on due process in administrative proceedings is extensive. (See *Pierce*, 2 *Administrative Law Treatise* 4th, Chaps. 9, 10; C.E.B., *Administrative Hearing Practice* 2d, Chaps. 3, 7; 87 *Harv. L. Rev.* 629 [Violations by Agencies of Their Own Regulations]; 88 *Harv. L. Rev.* 1815 [Federal Agency Assistance to Impecunious Intervenors]; 95 *Harv. L. Rev.* 1195 [Public Programs and Private Rights]; 104 *Harv. L. Rev.* 769 [book review of Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy*]; 78 *Cal. L. Rev.* 1415; 15 *Hastings L. J.* 373 [review of Wade, *Toward Administrative Justice*]; 19 *Hastings L. J.* 1313 [Selective Service System]; 7 *Pepperdine L. Rev.* 553 [Current Trends in Administrative Law]; 4 *San Diego L. Rev.* 141 [standing to intervene, F.C.C. hearings]; 16 *San Diego L. Rev.* 287 [Institutional Due Process in the Twenty-First Century: The Future of the Hearing Requirement]; 16 *Stanf. L. Rev.* 603 [administrative sanctions]; 16 *Stanf. L. Rev.* 1035 [discovery in federal administrative proceedings]; 23 *Stanf. L. Rev.* 173 [review of Davis, *Discretionary Justice*]; 27 *Stanf. L. Rev.* 1041 [Crisis and Legitimacy in the Administrative Process]; 5 *U.C. Davis L. Rev.* 1 [entire volume on legal problems of administrative practice]; 39 *U.C.L.A. L. Rev.* 1055 [Symposium: Contemporary Issues in Administrative Adjudication].)

(For further references relating to administrative law and procedure, see 9 *Cal. Proc. (4th), Administrative Proceedings, §1*; for the Model State Administrative Procedure Act (1981), see 15 U.L.A. (Master Ed.), p. 174, 15A U.L.A. (Master Ed.), p. 1.)

West's Key Number Digest, Constitutional Law k.318

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Texts and Commentary*.

Cross-Reference: 9 *Cal. Proc. (5th), Administrative Proceedings, §1*.



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1. Right to Notice and Hearing.

b. Adequate Notice and Hearing.

7 *Witkin Sum. Cal. Law Const Law* § 658

[§ 658] Adequate Notice and Hearing.

(1) *In General.* The sufficiency of the notice and hearing is determined by considering the purpose of the procedure, its effect on the rights asserted, and other circumstances. (*Anderson Nat. Bank v. Lueckett* (1944) 321 U.S. 233, 64 S.Ct. 599, 606, 88 L.Ed. 692, 705 ["fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked"]; *Blinder, Robinson & Co. v. Tom* (1986) 181 C.A.3d 283, 289, 226 C.R. 339, quoting the text; *California Teachers Assn. v. Butte Community College Dist. Bd. of Trustees* (1996) 48 C.A.4th 1293, 1302, 56 C.R.2d 269 [community college district's layoff of instructor was valid, even though initial determination to terminate was made without required hearing, where proper hearing, at which matter was considered de novo, was held before district made its final decision].)

(2) *Required Statutory Provision for Notice and Hearing.* It has been held that the *statute itself* must provide for notice and hearing, and that the absence thereof is not cured by extraofficial or casual notice, or a hearing granted as a matter of discretion. (*Coe v. Armour Fertilizer Works* (1915) 237 U.S. 413, 35 S.Ct. 625, 629, 59 L.Ed. 1027, 1032; *H. Moffat Co. v. Hecke* (1924) 68 C.A. 35, 39, 228 P. 546.) This rule may, however, be satisfied by construing general statutory language to require notice and hearing, despite the absence of an express provision. (See *Aylward v. State Bd. of Chiropractic Examiners* (1948) 31 C.2d 833, 838, 192 P.2d 929; *Bess v. Park* (1956) 144 C.A.2d 798, 802, 301 P.2d 978 [provision that administrative officer "shall hear and determine" controversy implies that both parties will be given reasonable notice and opportunity for hearing].)

(3) *Kinds of Notice.* Under proper circumstances, various kinds of notice have been upheld; e.g., mail or posting. (See *Anderson Nat. Bank v. Lueckett*, *supra* [posting]; *Simpson v. Los Angeles* (1953) 40 C.2d 271, 280, 253 P.2d 464 [5-day notice before disposition of unclaimed dog]; *Bess v. Park* (1956) 144 C.A.2d 798, 804, 301 P.2d 978 [notice by ordinary mail to address of licensed business].)

In *Atkins v. Parker* (1985) 472 U.S. 115, 105 S.Ct. 2520, 86 L.Ed.2d 81, the Massachusetts Department of Public Welfare mailed a notice to over 16,000 food stamp recipients informing them in general terms of a change in federal law that might result in either a reduction or a termination of their benefits. The district court and Court of Appeals decided that the notice was defective in failing to advise each household of the precise change in benefits or to provide each with the information necessary to calculate the change. *Held*, reversed. "Surely Congress can presume that such a

notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood." (105 S.Ct. 2531, 86 L.Ed.2d 94.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Kinds of Notice*. Due process is satisfied by actual notice. (*Benson v. California Coastal Com.* (2006) 139 C.A.4th 348, 353, 42 C.R.3d 580 [landowner who failed to appear after receiving written notice of hearing was not entitled to rely on conversations with staff of Coastal Commission predicting what action commission might take and regarding landowner's need to attend hearing].)

See *California School Employees Assn. v. Livingston Union School Dist.* (2007) 149 C.A.4th 391, 400, 56 C.R.3d 923 [disciplinary notice to school district employee, who was off for summer break, giving him 5 days' notice from date of mailed service to request hearing, did not satisfy due process].



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1. Right to Notice and Hearing.
- c. Illustrations of Inadequate Procedure.

7 *Witkin Sum. Cal. Law Const Law* § 659

[§ 659] Illustrations of Inadequate Procedure.

Proceedings that wholly deny notice or hearing, or provide inadequate methods, are lacking in due process. (See *Morgan v. United States* (1938) 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; *Morgan v. United States* (1936) 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129; *Kwong Hai Chew v. Colding* (1953) 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576, supra, §476 [expulsion of resident alien without hearing]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 C.A.2d 776, 797, 194 P.2d 148 [revocation by city council of permit to drill for oil, without notice or hearing]; *Andrews v. State Bd. of Registration for Civil & Professional Engineers* (1954) 123 C.A.2d 685, 695, 267 P.2d 352 [denial of application for registration as electrical engineer without hearing]; *Merco Const. Engineers v. Los Angeles Unified School Dist. of Los Angeles* (1969) 274 C.A.2d 154, 168, 79 C.R. 23 [statutory penalty on prime contractor for failure to list proposed subcontractors in bid, imposed by simple billing or deducting without notice]; *In re Roger S.* (1977) 19 C.3d 921, 939, 141 C.R. 298, 569 P.2d 1286, supra, §653 [hearing required for involuntary commitment of minor initiated by parent]; *Petrillo v. Bay Area Rapid Transit Dist.* (1988) 197 C.A.3d 798, 807, 808, 243 C.R. 74 [termination of disability retirement benefits].)

In *Wisconsin v. Constantineau* (1971) 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515, a 40-year-old Wisconsin statute authorized various local officials to publicly post a written notice prohibiting the sale or gift of liquor to a person whose bad drinking habits put his or her family in want, or made the person dangerous to the peace, etc. The chief of police of Hartford published a notice forbidding sales to Mrs. C., an adult resident, for 1 year. She sued in the federal district court, and a three-judge court held the law unconstitutional. *Held*, affirmed. The posting was a degrading label, and where a person's good name is at stake, notice and an opportunity for hearing are essential. This Act contained no provision for either. (91 S.Ct. 510, 27 L.Ed.2d 518.)

In *Vlandis v. Kline* (1973) 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63, Connecticut imposed higher tuition and fees for nonresident university students than for resident students. The classification was not challenged (see *infra*, §742), but two students, claiming to be bona fide residents, attacked the statutory provision creating a *conclusive presumption* of nonresident status, for the entire period of attendance, if the applicant was living outside the state at the time of application. *Held*, the presumption operated to deny due process. Conclusive presumptions were disfavored in *Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90, *infra*, §662, and *Stanley v. Illinois* (1972) 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551, supra, §650. Here, the state has "reasonable alternative means of making the crucial

determination," and due process requires "that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates." (93 S.Ct. 2236, 37 L.Ed.2d 71.) (See *United States Dept. of Agriculture v. Murry* (1973) 413 U.S. 508, 93 S.Ct. 2832, 2835, 37 L.Ed.2d 767, 773 [Vlandis followed, conclusive presumption in Federal Food Stamp Act invalidated]; *Atkisson v. Kern County Housing Authority* (1976) 59 C.A.3d 89, 96, 130 C.R. 375, *infra*, §785 [following *Vlandis* and *Murry*]; 87 Harv. L. Rev. 67 [Vlandis].)

In *People v. Lockheed Shipbuilding & Const. Co.* (1973) 35 C.A.3d 776, 111 C.R. 106, former Lab.C. 6313 provided that the Division of Industrial Safety may investigate the cause of all industrial injuries resulting in disability or death, and make "just and reasonable" orders or recommendations with respect to the cause; and former Lab.C. 6315 made violation of any of these orders or recommendations a misdemeanor. A misdemeanor complaint was filed against defendant corporation and certain individuals, charging violations of five orders. *Held*, Lab.C. 6315, as applied to orders made under Lab.C. 6313, is unconstitutional.

(a) The provision for investigations and recommendations is by itself valid. But when coupled with the criminal sanction, it is violative of due process. Neither notice nor an opportunity for hearing is afforded before the penalty is imposed, and the statute itself must provide for both where the proceeding is quasi-judicial. (35 C.A.3d 780, 781, quoting the text.)

(b) The constitutional requirement does not apply to quasi-legislative action (see *infra*, §674), but the orders made under Lab.C. 6313 are quasi-judicial. They do not affect classes of employers or places of employment, but are directed to a specific employer after an accident. (35 C.A.3d 781.)

(c) The summary action exception (see *infra*, §678) cannot justify the statute; it does not provide for any hearing, either before or after the supposed emergency, and provision for a hearing at some stage is essential. (35 C.A.3d 781, quoting the text.)

(d) The statutes were invalid as arbitrary special legislation, conferring on an administrative agency authority "to make law in individual cases, involving an individual employer, without a hearing and solely on its untrammelled opinion as to the wisdom of such a rule." (35 C.A.3d 785.)

In *Kash Enterprises v. Los Angeles* (1977) 19 C.3d 294, 138 C.R. 53, 562 P.2d 1302, a Los Angeles municipal ordinance validly regulated the time, place, and manner of maintaining newsracks on the city's sidewalks. (See *supra*, §351.) It further provided, however, that a public officer could summarily remove any newsrack that he or she believed to be in violation of the regulations; that thereafter the owner would be notified of the seizure and informed that it would be deemed abandoned and destroyed unless the owner claimed it within 45 days and paid the cost of removal. *Held*, these provisions, which gave no hearing on the merits either before or after the seizure, constituted a denial of procedural due process. (19 C.3d 308, 309.) The court rejected the suggestion that the owner's option of instituting an action against the city after notice of seizure was sufficient to sustain a seizure procedure that afforded no hearing. (19 C.3d 309.)

In *People v. Swink* (1984) 150 C.A.3d 1076, 198 C.R. 290, S posted \$ 5,000 cash bail to guarantee the appearance of L at a preliminary hearing. L failed to appear, the bail was forfeited, and pursuant to P.C. 1305, a notice was mailed to S stating that "bail will remain forfeited until the defendant appears." P.C. 1305 permits setting aside a forfeiture if the defendant appears within 180 days, and after that period expired, the cash bail was paid over to the county treasurer. L appeared 10 days later, and S moved to discharge the forfeiture, but the trial court denied the motion. *Held*, reversed. The notice sent under P.C. 1305 was a denial of procedural due process because it did not inform a lay surety of the statutory procedure and time limitations for setting aside the forfeiture. It merely referred to the declaration of forfeiture, and by failing to mention time limitations, implied that the forfeiture would be automatically discharged on appearance of the defendant. (150 C.A.3d 1081.)

In *Boehm v. Merced* (1985) 163 C.A.3d 447, 209 C.R. 530, the board of supervisors of defendant county reduced

general assistance grant levels for indigent county residents, and authorized a hearing to any recipient who requested it within 2 days of the date of notice of the action. *Held*, on a review of the case law, the 2-day limitation was a denial of due process. (163 C.A.3d 456.)

Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265, held that a state could not terminate a discharged employee's right to a hearing before the state's Fair Employment Practices Commission for failure to comply with a procedural requirement, where the failure was due to inaction of a state official over whom the employee had no control. The state may erect reasonable procedural requirements for triggering the right to an adjudication, e.g., statutes of limitation or filing fees; and it may terminate a claim for failure to comply with a reasonable procedural or evidentiary rule; but an opportunity for a hearing must be given at a meaningful time and in a meaningful manner, and it was denied in this case. (102 S.Ct. 1158, 1159, 71 L.Ed.2d 279.) (See 96 Harv. L. Rev. 96.)

In *Rosenblit v. Superior Court* (1991) 231 C.A.3d 1434, 282 C.R. 819, plaintiff doctor obtained medical staff privileges at respondent hospital in 1986, and in January 1988 a newly appointed executive committee of the hospital suspended his privileges and scheduled a hearing. The hospital gave him inadequate notice of charges, it denied him access to records, it refused to allow him representation by counsel, and it rejected his request to question members of the panel on bias. The hearing was then conducted, and the panel rendered a decision against him with no specific findings. The trial court denied his petition for mandamus. *Held*, reversed with directions to grant a writ compelling the hospital to afford him a fair hearing.

(a) "In evaluating whether Hospital provided Rosenblit a fair hearing, the inadequacy of the notice, the refusal to permit copying of medical records, and the vagueness of the administrative findings are inextricably related. Having reviewed the cumulative impact of the manner in which Hospital initiated its proceedings, responded to Rosenblit's repeated requests for specificity, and ultimately rendered judgment on his professional competency, we conclude the proceedings had a notable stench of unfairness." (231 C.A.3d 1445.)

(b) "The record demonstrates Hospital was dedicated to removing Rosenblit rather than providing a physician with a fair opportunity to defend his treatment regimen. Hospital resisted fair treatment at every crucial step of the proceedings. Since Rosenblit was kept in the dark about the specific charges made against him, of his asserted opportunity to obtain copies of the charts, and finally of the basis upon which the hearing panel decided the issues adversely to him, he was denied the basic right to a fair hearing. We agree with amicus that such a charade does not serve the public interest." (231 C.A.3d 1448.)

(c) The right to a fair procedure includes the right to impartial adjudicators, and fairness requires a practical method of testing impartiality. (231 C.A.3d 1448; see *infra*, §666.) Here, the hearing panel conducted a private voir dire; and the chairman of the appellate board and the chairman of the judicial review committee had both been treating physicians on one of the cases under scrutiny. "In circumstances such as these, an opportunity to expose potential bias is essential. Rosenblit was denied any semblance of fairness by the secret unreported voir dire conducted by the members themselves." (231 C.A.3d 1448, 1449.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Cook v. Buena Park* (2005) 126 C.A.4th 1, 8, 23 C.R.3d 700 [ordinance requiring landlords to institute eviction proceedings when police suspect that tenant has engaged in or permitted illegal drug or gang-related activities violated due process; notice provided to landlord was insufficient to assure reasonable chance of success in unlawful detainer action, landlord was given only 10 days to institute action, and ordinance required landlord to prevail or be subject to specified penalties for fourth violation]; *Calvert v. Yuba* (2006) 145 C.A.4th 613, 629, 51 C.R.3d 797 [county erred in determining that mine operator had vested right under state Surface Mining and Reclamation Act to continue to mine aggregate in specific area without notice to public or adjoining landowners and without hearing; significant or substantial property deprivations triggered procedural due process protections for neighboring landowners]. *Correction:* Page 1065, third and fourth lines of first paragraph, publication dates of two cases entitled "*Morgan v. United States*" should be reversed. 298 U.S. 468 was published in 1936, and 304 U.S. 1 was published in 1938.



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F. Procedural Due Process in Administrative Proceedings.

1. Right to Notice and Hearing.

d. Right-Privilege Distinction Repudiated.

7 *Witkin Sum. Cal. Law Const Law* § 660

[§ 660] Right-Privilege Distinction Repudiated.

Where the private interest affected by governmental action could be characterized "as a mere privilege subject to the Executive's plenary power," it was traditionally held that there is no constitutional right to notice and hearing. (*Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy* (1961) 367 U.S. 886, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230, 1236, 3 Summary (10th), *Agency and Employment*, §313; see *State Bd. of Equalization of Calif. v. Superior Court* (1935) 5 C.A.2d 374, 377, 42 P.2d 1076 [license to sell liquor]; *Saso v. Furtado* (1951) 104 C.A.2d 759, 763, 232 P.2d 583 [dictum].)

The right-privilege distinction has, however, been repudiated in subsequent cases, and its application appears to be confined to situations such as that presented in *McElroy*. "[R]elevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" (*Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90, 94, *infra*, §662; see *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548, 557, *infra*, §691 [denying relief, but observing that the court "has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights"]; 75 *Harv. L. Rev.* 72, 434 [new Defense Department regulation after *McElroy*]; 81 *Harv. L. Rev.* 1439 [Demise of the Right-Privilege Distinction]; 86 *Harv. L. Rev.* 880 [government subsidized housing]; 35 *Stanf. L. Rev.* 69 [reemergence of right-privilege distinction: price of protesting too much]; 3 *Rotunda*, §17.2; 2 *Tribe*, §10-8.)

Although property interests extend beyond ownership of tangibles to specific benefits (see *Board of Regents v. Roth*, *supra*, and *Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, *infra*, §685), there must be a claim of entitlement to the benefit and not a mere expectancy or unilateral hope of it. (*Paramount Convalescent Center v. Department of Health Care Services* (1975) 15 C.3d 489, 494, 125 C.R. 265, 542 P.2d 1 [under California statutes, licensed nursing home had no property interest in annual renewal of contract].)

SUPPLEMENT: [This section is current through the latest supplement]

See 3 *Rotunda* (4th), §17.2.



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1. Right to Notice and Hearing.

e. Right To Practice Profession Involved.

7 *Witkin Sum. Cal. Law Const Law* § 661

[§ 661] Right To Practice Profession Involved.

In *Endler v. Schutzbank* (1968) 68 C.2d 162, 65 C.R. 297, 436 P.2d 297, plaintiff sued for declaratory and injunctive relief against defendant Commissioner of Corporations. The complaint alleged that plaintiff had been employed by financial institutions in California for nearly 15 years; that this employment was his main source of livelihood; that while he was office manager of H Finance Corporation, the Commissioner informed H that a former employer of plaintiff had charged him with forgery and embezzlement, and that unless plaintiff was discharged the Commissioner would take steps to revoke its license; that the Commissioner continued to threaten this action against any personal property broker employing plaintiff; and that the Commissioner refused to give plaintiff a formal hearing on the charges. *Held*, a cause of action was stated.

(a) The state, in regulating qualifications of individuals employed by licensed business establishments, must proceed within the limits of procedural due process. (68 C.2d 170.)

(b) Due process requirements are not always the same; but in *Willner v. Committee on Character & Fitness* (1963) 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224, refusal of a hearing to an applicant for the bar was held to be a denial of due process because the case involved the power to regulate an entire trade or profession. Under *Willner*, "[p]rocedural due process requires notice, confrontation, and a full hearing whenever action by the state significantly impairs an individual's freedom to pursue a private occupation." (68 C.2d 172.)

(c) The argument that the Commissioner is not proceeding directly against plaintiff, and that his employer has free choice to hire him and face discipline, is untenable. The state bears responsibility for private conduct that it encourages (here by threats). "[A]ny person whose freedom to pursue his profession is seriously restricted by an official action or course of conduct designed to discourage his employment may compel the government to afford him a hearing complying with the traditional requirements of due process." (68 C.2d 178.)

In *Slaughter v. Edwards* (1970) 11 C.A.3d 285, 90 C.R. 144, plaintiffs obtained a fraud judgment against defendant, a licensed real estate broker, and filed an application in the action for an order directing payment out of the Real Estate Education and Recovery Fund, pursuant to B. & P.C. 10470 et seq. (See 3 *Summary* (10th), *Agency and Employment*, §67 et seq.) The order was made and defendant broker appealed. *Held*, the provision for automatic suspension of the

license without a hearing was unconstitutional.

(a) Where suspension or revocation is a ministerial determination of the happening of an event, e.g., a criminal conviction, due process is satisfied by the party's day in court in the criminal proceeding. Where, however, an independent judicial or quasi-judicial determination of facts must be made, a hearing is required. (11 C.A.3d 294.)

(b) In a disciplinary proceeding under *B. & P.C. 10177.5*, to revoke a license after a final judgment, the licensee is guaranteed notice and hearing on the issue whether the fraud judgment was with reference to a transaction for which a license is required. The same issue is presented in an application to the Fund under *B. & P.C. 10471*. The determination that the claim is a proper one and therefore calls for automatic suspension of a license cannot be made in a proceeding to which the licensee was not a party. (11 C.A.3d 295.)

(c) Due process was not satisfied by the fact that defendant licensee was present at the hearing; he was called as a witness for the Commissioner, and was not a party to the proceeding. (11 C.A.3d 293, 295.) (See *Rodriguez v. Department of Real Estate* (1996) 51 C.A.4th 1289, 1299, 59 C.R.2d 652 [distinguishing *Slaughter*; subsequent statutory procedure comports with due process]; *Oberholzer v. Commission on Judicial Performance* (1999) 20 C.4th 371, 390, 84 C.R.2d 466, 975 P.2d 663 [following *Rodriguez*; Commission's procedure, which gave judge right to respond before Commission issued advisory or "stinger" letter criticizing judge's performance, comported with due process; formal hearing was not required]; for subsequent amendment to *B. & P.C. 10471* and *10473*, providing for notice and hearing, see 3 *Summary* (10th), *Agency and Employment*, §68 et seq.)

In *Hackethal v. California Med. Assn.* (1982) 138 C.A.3d 435, 441, 187 C.R. 811, the court declared that a private organization must refrain from arbitrary action in exclusion or expulsion of a member. In *Salkin v. California Dental Assn.* (1986) 176 C.A.3d 1118, 224 C.R. 352, plaintiff dentist was *publicly censured*, and brought this action alleging denial of a fair hearing. Defendant associations contended that the due process requirement applies only to exclusion and expulsion cases. *Held*, the due process requirement applies to cases where the punishment is less than expulsion, including suspension and the disciplinary censure involved here. (176 C.A.3d 1123, 1124.) A private organization, "if tinged with public stature or purpose, may not expel or discipline a member adversely affecting substantial property, contract or other economic rights, except as a result of fair proceedings which may be provided for in an atmosphere of good faith and fair play." (176 C.A.3d 1125.) (See *Shacket v. Osteopathic Med. Bd. of Calif.* (1996) 51 C.A.4th 223, 230, 58 C.R.2d 715 [medical board was not required to provide hearing on challenge to reporting entity's status as peer review body, or on whether disciplinary suspension by peer review body had merit, before disseminating report]; 10 A.L.R.5th 1 [rights as to notice and hearing in proceedings to revoke or suspend license to practice medicine].)

In *California Teachers Assn. v. California* (1999) 20 C.4th 327, 338, 347, 84 C.R.2d 425, 975 P.2d 622, the court held that *Educ.C. 44944(e)* is facially unconstitutional. The statute requires a teacher who is threatened with suspension or dismissal to pay one-half the cost of the administrative law judge at the pretermination hearing when the teacher is ultimately suspended or dismissed. It attaches a financial burden or risk to the exercise of a hearing right that effectively denies a right to the hearing itself. The state's interest in discouraging unsuccessful hearings is not a legitimate interest, and the state's interest in recouping the costs of the adjudicator does not outweigh the competing interests at stake.

California Teachers Assn. was distinguished in *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 C.4th 32, 40, 124 C.R.2d 701, 53 P.3d 119. *Zuckerman* upheld a regulation providing that chiropractors found to have committed misconduct may be liable for the reasonable prehearing costs of investigation and enforcement incurred by the Board of Chiropractic Examiners. The regulation serves the proper legislative goal of reducing the Board's operating costs, and not the improper purpose of discouraging hearing requests. (29 C.4th 42.) Further, the assessment of costs is discretionary and subject to judicial review. (29 C.4th 44.)

West's Key Number Digest, Constitutional Law k.275

SUPPLEMENT: [This section is current through the latest supplement]

See *Gray v. Superior Court* (2005) 125 C.A.4th 629, 636, 23 C.R.3d 50 [bail condition prohibiting defendant from practicing medicine, imposed on request of medical board, was constitutionally invalid; condition was imposed without prior notice, evidentiary showing, or opportunity to be heard]; *Florio v. Ontario* (2005) 130 C.A.4th 1462, 1465, 1467, 30 C.R.3d 841 [following *California Teachers Assn. v. California* (1999) 20 C.4th 327, 84 C.R.2d 425, 975 P.2d 622, text, p. 1072; provision in memorandum of understanding requiring public employee to bear one-half cost of hearing officer on appeal of termination was unconstitutional, and unconstitutionality could not be waived by collective bargaining agreement]; *American Liberty Bail Bonds v. Garamendi* (2006) 141 C.A.4th 1044, 1063, 46 C.R.3d 541, 2 Summary (10th), Insurance, Supp., §18 [distinguishing *Gray v. Superior Court*; due process does not require predeprivation hearing where statute provides for immediate suspension of license of persons charged with committing certain criminal offenses, suspension is necessary to protect integrity of industry, and adequate postdeprivation hearing is available]; *Soto v. Riverside* (2008) 162 C.A.4th 492, 499, 76 C.R.3d 21 [following *Florio*; provision in memorandum of understanding requiring disciplined employee to pay one-half of hearing cost for administrative appeal when employee chooses to use own counsel instead of being represented by union was unconstitutional].

In *Gresher v. Anderson* (2005) 127 C.A.4th 88, 25 C.R.3d 408, the court held that the process of the Department of Social Services by which certain community and child care workers may be exempted from the ban on employment imposed on those with criminal convictions failed to meet due process standards. The notice merely stated that the department had "received criminal history" about them and asked for certain information, but failed to inform them about which convictions they needed to address in their exemption request. (127 C.A.4th 104.) Further, the form letter giving notice that the exemption had been denied was inadequate for failing to specify the basis for the decision in terms sufficiently specific to permit a reasonably informed decision on whether to pursue an appeal. (127 C.A.4th 112.) (See *Doe v. Saenz* (2006) 140 C.A.4th 960, 995, 45 C.R.3d 126 [applying *Gresher* analysis to nonexempt offenses].)



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X. DUE PROCESS OF LAW

F. Procedural Due Process in Administrative Proceedings.

1. Right to Notice and Hearing.
- f. Suspension of Driver's License.

7 *Witkin Sum. Cal. Law Const Law* § 662

[§ 662] Suspension of Driver's License.

In *Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90, Georgia's Motor Vehicle Safety Responsibility Act provided for suspension of the vehicle registration and driver's license of an uninsured motorist if (1) the motorist had an accident and the aggrieved parties made a report claiming damages, and (2) the motorist failed to post security to cover the amount claimed. Petitioner, a clergyman who needed his car to travel in rural communities, was involved in an accident, and the report of the allegedly injured party claimed damages of \$ 5,000. At the administrative hearing, petitioner denied liability, but the issue was excluded from consideration. At the subsequent trial court review, evidence on the issue was admitted and petitioner was found free from fault. The state appellate court, however, held that liability was not involved and that the suspension was proper. *Held*, reversed.

(a) *Denial of procedural due process.* The statute did not require all motorists to carry insurance or post security; such a statute would be valid. Where, as here, the license was issued without security, and its possession was essential to pursuit of a livelihood, it could not be taken away without procedural due process, whether characterized as a "right" or a "privilege." (91 S.Ct. 1589, 29 L.Ed.2d 94.)

(b) *Nature of hearing required.* The administrative inquiry into fault need not take the form of a full adjudication; this can be made only in litigation between the parties involved. Because the only purpose of the statute is to obtain security or payment of a judgment resulting from the accident, the inquiry may be limited to determining "whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee." (91 S.Ct. 1590, 29 L.Ed.2d 95.)

(c) *No-fault statute distinguished.* Fault is crucial in the operation of the present statute. Several provisions indicate this; e.g., there is no suspension if the injured party executes a release or there is an adjudication of nonliability. "Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." (91 S.Ct. 1590, 29 L.Ed.2d 96.)

(d) *Emergency doctrine distinguished.* This is not an emergency situation that would justify suspension first and a hearing on the fault issue afterwards; hence due process requires an appropriate hearing before termination of the

license. (91 S.Ct. 1591, 29 L.Ed.2d 96.)

(e) *Alternative methods of making statute effective.* The state may (1) give an administrative hearing on the issue; (2) postpone the suspension until after a judicial hearing or until judgment in a damage suit by the injured party; or (3) devise an entirely new regulatory scheme consistent with due process. (91 S.Ct. 1591, 29 L.Ed.2d 96.)

The California statute, as construed, imposed a duty to determine culpability, and in that respect complied with the *Bell* test. (See *Orr v. Superior Court* (1969) 71 C.2d 220, 226, 77 C.R. 816, 454 P.2d 712, 8 Cal. Proc. (4th), *Enforcement of Judgment*, §407.) But the statute did not provide for a personal hearing prior to suspension. (The department decision was made on the basis of the written accident report.) *Rios v. Cozens* (1972) 7 C.3d 792, 103 C.R. 299, 499 P.2d 979, overruling *Orr* to the extent inconsistent, found this to be a fatal defect: "We hold that a hearing is required and that at such a hearing the licensee is entitled to review the reports or other evidence upon which the department contemplates determining that he is possibly responsible for the accident, and to present reports or testimony to establish his claim of nonculpability, all within reasonable due process procedures which the department may employ." (7 C.3d 799.)

In response to *Rios*, a compulsory financial responsibility law, not involving a finding of fault, was enacted. (See *Veh.C. 16000 et seq.*, 8 Cal. Proc. (4th), *Enforcement of Judgment*, §408 et seq.; on notice and hearing requirements, see *Veh.C. 16075*, 8 Cal. Proc. (4th), *Enforcement of Judgment*, §412.) The constitutionality of the law was upheld in *Anacker v. Sillas* (1976) 65 C.A.3d 416, 421, 135 C.R. 537, 8 Cal. Proc. (4th), *Enforcement of Judgment*, §408.

In *Dixon v. Love* (1977) 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172, the court, applying the criteria of *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, *infra*, §687, upheld an Illinois statute and administrative regulations providing for an initial summary decision based on official records, with an administrative hearing available only after the suspension or revocation takes effect. "The present case is a good illustration of the fact that procedural due process in the administrative setting does not always require application of the judicial model. When a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decisionmaking may not be the best way to assure fairness. Here the Secretary commendably sought to define the statutory standard narrowly by the use of his rulemaking authority. The decision to use objective rules in this case provides drivers with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers." (97 S.Ct. 1729, 52 L.Ed.2d 181.) (See *Mackey v. Montrym* (1979) 443 U.S. 1, 99 S.Ct. 2612, 2617, 2621, 61 L.Ed.2d 321 [following *Dixon*]; *Burkhart v. Department of Motor Vehicles* (1981) 124 C.A.3d 99, 108, 177 C.R. 175 [procedural due process, as defined in *Mathews v. Eldridge*, does not preclude use of hearsay in license suspension hearing]; *Peretto v. Department of Motor Vehicles* (1991) 235 C.A.3d 449, 460, 1 C.R.2d 392 [California procedure, under which administrative hearing is available on request before effective date of suspension, comports with due process]; *Menge v. Reed* (2000) 84 C.A.4th 1134, 1141, 101 C.R.2d 443 [following *Rios*; school bus driver who allegedly submitted adulterated urine specimen in random drug test was entitled to hearing before DMV, to determine whether she in fact adulterated specimen, prior to revocation of her school bus driver's certificate; failure to attend hearings before school district and state board did not constitute waiver of right to hearing before DMV]; 7 *Pepperdine L. Rev.* 737 [Mackey]; 60 A.L.R.3d 361 [necessity of notice and hearing]; 60 A.L.R.3d 427 [sufficiency of notice and hearing].)

SUPPLEMENT: [This section is current through the latest supplement]

Orr case:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §437. *Veh.C. 16000 et seq.*:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §438 et seq.

Veh.C. 16075:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §442.

Anacker case:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §438.



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X. DUE PROCESS OF LAW

F. Procedural Due Process in Administrative Proceedings.

2. Type of Hearing Required.

a. In General.

7 *Witkin Sum. Cal. Law Const Law* § 663

[§ 663] In General.

A number of cases "illustrate Professor Davis' observation that the law determining the adequacy of administrative hearings 'is mostly judge-made law ... ' and 'the standards are essentially the same whether judges are giving content to due process, whether they are giving meaning to inexplicit statutory provisions, or whether they are developing a kind of common law.' " (*Roth v. Los Angeles* (1975) 53 C.A.3d 679, 692, 126 C.R. 163.) (See 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §298 et seq.; Pierce, 2 *Administrative Law Treatise* 4th, Chaps. 9, 10; on adjudications under the Administrative Procedure Act generally, see 9 *Cal. Proc. (4th), Administrative Proceedings*, §47 et seq.)

United States Supreme Court decisions emphasize the flexibility of the hearing requirement and the sufficiency of various kinds of hearing procedures. Thus, in *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy* (1961) 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, 3 *Summary* (10th), *Agency and Employment*, §313, the court said: "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. ... The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. ... [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." (81 S.Ct. 1748, 6 L.Ed.2d 1236.) (See *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33, *infra*, §687.)

Hannah v. Larche (1960) 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307, is to similar effect: " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." (80 S.Ct. 1515, 4 L.Ed.2d 1321.)

Dami v. Department of Alcoholic Beverage Control (1959) 176 C.A.2d 144, 1 C.R. 213, makes the same point: "Due process cannot become a blunderbuss to pepper proceedings with alleged opportunities to be heard at every ancillary and preliminary stage, or the process of administration itself must halt. Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities. Due process is not a frozen Draconian code but the concept that in some one of multifarious procedures the accused shall be afforded before judgment the right to a full hearing. The form of the procedure is not vital, only the substance of the right." (176 C.A.2d 151.)

The hearing required is only one appropriate to the nature of the case. (*Smith v. Organization of Foster Families for Equality & Reform* (1977) 431 U.S. 816, 97 S.Ct. 2094, 2112, 53 L.Ed.2d 14, 37 [New York statutory and administrative regulations on removal of foster child from foster homes were constitutionally adequate]; see *Rosenblit v. Superior Court* (1991) 231 C.A.3d 1434, 282 C.R. 819, supra, §659; *Stacy & Witbeck v. San Francisco* (1995) 36 C.A.4th 1074, 1087, 44 C.R.2d 472 [in proceeding by city public utilities commission to declare contractor an irresponsible bidder, hearing procedures were fair where contractor received notice of hearing and charges, advance synopsis of evidence, opportunity to present witnesses and evidence, and right to counsel]; *Mohilef v. Janovici* (1996) 51 C.A.4th 267, 294, 299, 58 C.R.2d 721 [due process does not mandate sworn testimony or right to cross-examine all witnesses in administrative proceedings to abate public nuisance]; *E.W.A.P. v. Los Angeles* (1997) 56 C.A.4th 310, 324, 65 C.R.2d 325 [following *Mohilef*]; *Southern Calif. Underground Contractors v. San Diego* (2003) 108 C.A.4th 533, 544, 133 C.R.2d 527 [contractor challenging proposed debarment from further contracts with city was afforded due process by being given timely and adequate notice of reasons for proposed debarment, and by being afforded opportunity to confront witnesses at depositions, to effectively present its position in writing, and to present arguments and evidence orally before decisionmaker].) And advance notice and a hearing are not a constitutional requisite to imposition of a small administrative service fee against a licensee. (See *Escondido Imports v. Department of Motor Vehicles* (1983) 145 C.A.3d 834, 838, 839, 193 C.R. 772 [applying factors set forth in *Mathews v. Eldridge*, supra].)

In *California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 C.A.4th 841, 19 C.R.2d 357, the court, construing the Radiation Control Law, made this distinction: "[T]he Legislature specifically separated proceedings for granting or amending a license from proceedings to suspend or revoke a license, and required formal adjudicatory proceedings only with respect to the latter. ... We have found no basis for implying a formal adjudicatory hearing requirement with respect to license applications and we have found no other statutory basis for the claim that a formal adjudicatory hearing is required. Accordingly, we conclude that the proposed hearings are not statutorily required." (15 C.A.4th 867.)

In *Bollinger v. San Diego Civil Service Com.* (1999) 71 C.A.4th 568, 84 C.R.2d 27, the court stated that where an administrative agency relegates the evidentiary hearing to one or more of its members, "the better practice would be to give the employee the opportunity to respond orally or in writing to the factual findings and recommendation before a final decision is made." (71 C.A.4th 577.) However, here, a closed session ratification of a hearing officer's findings of fact and recommendation on the employee's demotion satisfied due process. The employee "received notice of the proposed demotion and the basis therefor and had the opportunity to fully respond at a public evidentiary hearing." (71 C.A.4th 578.) Further, he "could have sought review of the substantive merits of the commission's decision in his petition for writ relief, based upon the record of the evidentiary hearing." (71 C.A.4th 578.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Marvin Lieblein v. Shewry* (2006) 137 C.A.4th 700, 720, 40 C.R.3d 547 [due process did not require evidentiary hearing with live testimony before pharmacist's status as Medi-Cal provider could be terminated for failure to disclose disciplinary action against him in Medi-Cal enrollment application]; *American Liberty Bail Bonds v. Garamendi* (2006) 141 C.A.4th 1044, 1065, 46 C.R.3d 541, 2 Summary (10th), Insurance, Supp., §18 [where statute provides for immediate suspension of license of persons charged with committing certain criminal offenses, due process does not require that postdeprivation hearing delve into licensee's guilt or innocence on underlying charges].

Adjudications under Administrative Procedure Act:

7 Witkin Sum. Cal. Law Const Law § 663

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §63 et seq.



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F. Procedural Due Process in Administrative Proceedings.

2. Type of Hearing Required.

b. Evidence, Witnesses, and Cross-Examination.

7 *Witkin Sum. Cal. Law Const Law* § 664

[§ 664] Evidence, Witnesses, and Cross-Examination.

No general principle can be stated as to the nature of the administrative hearing that will comply with due process, but the following rules are illustrative:

(1) *Legally Competent Evidence*. While the common law or statutory rules governing admissibility of evidence need not be strictly followed, legally competent evidence will ordinarily be required to sustain the determination of an administrative body. (See *Consolidated Edison Co. of New York v. N.L.R.B.* (1938) 305 U.S. 197, 59 S.Ct. 206, 217, 83 L.Ed. 126, 140 [board's orders cannot be justified "without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence"]; *Walker v. San Gabriel* (1942) 20 C.2d 879, 881, 129 P.2d 349; *Armistead v. Los Angeles* (1957) 152 C.A.2d 319, 324, 313 P.2d 127; *Medical Bd. of Calif. v. Superior Court* (2003) 111 C.A.4th 163, 178, 4 C.R.3d 403 [statute providing that physician's failure to complete diversion program successfully could result in filing of accusation for discipline, which may include acts giving rise to original diversion, did not create independent basis for discipline and did not authorize medical board to impose discipline solely on physician's failure to complete program; otherwise, medical board could evade burden of proving by clear and convincing evidence that physician's ability to practice medicine was impaired]; 11 Cal. Western L. Rev. 373 [agency misconduct in investigation as basis for suppression of evidence]; 8 Southwestern L. Rev. 577 [hearsay]; 1 Cal. Evidence (4th), *Introduction*, §54 et seq.; 2 Pierce, Admin. Law 4th, Chap. 9; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §345 et seq.; C.E.B., *Administrative Hearing Practice* 2d, §7.65 et seq.)

(2) *Confidential Reports and Independent Information*. The determination cannot be based on confidential reports or independent information received by the administrative board and not known to an aggrieved party. He or she has a right to cross-examine witnesses and produce evidence in refutation. (See *Ohio Bell Tel. Co. v. Public Util. Com. of Ohio* (1937) 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093; *Morgan v. United States* (1938) 304 U.S. 1, 58 S.Ct. 773, 776, 82 L.Ed. 1129, 1132; *Willner v. Committee on Character & Fitness* (1963) 373 U.S. 96, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224, 229 [denial of admission to bar on ex parte statements violates due process]; *Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Com.* (1941) 17 C.2d 204, 210, 109 P.2d 918; 76 Harv. L. Rev. 233 [regulation and control of ex parte communications with administrative agencies]; 12 U.C.L.A. L. Rev. 969 [ex parte contacts with zoning board]; 18 A.L.R.2d 552 [administrative decision or finding based on evidence secured outside hearing, and without presence of interested party or counsel]; 2 A.L.R.3d 1266 [applications for

admission to bar]; 1 *Cal. Evidence* (4th), *Introduction*, §69 et seq.; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §345 et seq.; C.E.B., *Administrative Hearing Practice* 2d, §7.67 et seq.; on ex parte communications under the Administrative Procedure Act, see 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §58 et seq.)

In *English v. Long Beach* (1950) 35 C.2d 155, 159, 217 P.2d 22, the court said: "It has been held that where there is substantial evidence, properly admitted, which supports a tribunal's determination, its order or decision will not be annulled because of errors in ruling on the admission of other evidence. ... There is considerable difference, however, between the alleged improper admission of evidence, such as hearsay, for example, and the consideration of and reliance upon information received without the knowledge of the parties and at a time and place other than that appointed for the hearing. In the former class of cases, the parties are informed of the evidence to be used against them, they may object to it, explain it, or test it and introduce countervailing evidence. None of those safeguards are available, however, when the board secretly obtains information and bases its determination thereon." (35 C.2d 159.)

(3) *Privileges*. The privilege against self-incrimination and other privileges of witnesses are recognized in administrative proceedings. (See *Borror v. Department of Inv.* (1971) 15 C.A.3d 531, 542, 92 C.R. 525; C.E.B., *Administrative Hearing Practice* 2d, §7.109 et seq.; 1 *Cal. Evidence* (4th), *Introduction*, §74.)

While due process requires a "meaningful opportunity to be heard," it does not encompass the right to make false statements about charged misconduct. If answering an employer's investigatory question could expose the employee to criminal prosecution, the employee may exercise the constitutional right to remain silent. (*LaChance v. Erickson* (1998) 522 U.S. 262, 118 S.Ct. 753, 756, 139 L.Ed.2d 695, 700, 701 [federal agency could sanction employees for making false statements during agency's investigation of them for employment-related misconduct].)

(4) *Discovery*. Discovery in administrative proceedings is authorized by judicial decision and statute. (See 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §85.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Confidential Reports and Independent Information*.

Ex parte communications under Administrative Procedure Act:

Cross-Reference: 9 *Cal. Proc. (5th)*, *Administrative Proceedings*, §74 et seq.(4) *Discovery*.

Cross-Reference: 9 *Cal. Proc. (5th)*, *Administrative Proceedings*, §102.



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2. Type of Hearing Required.

c. Counsel.

7 *Witkin Sum. Cal. Law Const Law* § 665

[§ 665] Counsel.

(1) *General Right to Counsel.* The right to be represented by one's own counsel in administrative proceedings is unquestioned. (See *Steen v. Board of Civil Service Commrs.* (1945) 26 C.2d 716, 727, 160 P.2d 816; *Borror v. Department of Inv.* (1971) 15 C.A.3d 531, 540, 92 C.R. 525; *Govt.C.* 11509; 33 A.L.R.3d 229 [comment note].)

In *Wood v. City Civil Service Com.* (1975) 45 C.A.3d 105, 119 C.R. 175, plaintiff civil service employee was discharged, and appealed to the city's civil service commission. A hearing was regularly scheduled, but his counsel, on the day before the date set, notified the commission of his involvement in another court appearance and his inability to be present. On the hearing day, the commission waited only a half-hour and then proceeded with the evidence. Plaintiff, acting on prior advice of his counsel, remained silent, and the order of discharge was affirmed. The commission denied a rehearing and the trial court denied mandamus. *Held*, reversed with directions to issue the writ directing a rehearing of the matter. The hearing was one-sided and unfair, and it was an abuse of discretion to deny a rehearing. (45 C.A.3d 111.)

(2) *Exception: Peer Review Committee Hearings.* An exception has been recognized for peer review committee hearings on the performance of a doctor; it is sufficient to allow representation by another doctor, thus avoiding "the controversial and contentious atmosphere which would likely be created by the participation of attorneys." (*Gill v. Mercy Hosp.* (1988) 199 C.A.3d 889, 902, 245 C.R. 304.)

(3) *Right of Indigents.* Whether an indigent is entitled to appointment of counsel at public expense, as in criminal and quasi-criminal proceedings (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§149 et seq., 170 et seq.), is strongly questioned, and thus far there is little authority supporting such a constitutional right. (See 18 *U.C.L.A. L. Rev.* 758 [elaborate examination of issue, and argument for right in selected adjudicative proceedings].)

In *Borror*, *supra*, a disciplinary proceeding was instituted against petitioner by the Department of Investment, Division of Real Estate. On an inquiry by the hearing officer, petitioner said that she did not have an attorney because she could not afford one. Her license was revoked, and she sought mandamus. The superior court judge granted the writ on the theory that she had a right to appointed counsel because she could face a criminal prosecution if the accusations were sustained. (15 C.A.3d 538.) *Held*, reversed. "[W]e conclude that in a proceeding to revoke or suspend a license or

other administrative action of a disciplinary nature the licensee or respondent is entitled to have counsel of his own choosing, which burden he must bear himself, and that he is not denied due process of law when counsel is not furnished him, even though he is unable to afford counsel. Such a proceeding does not bear a close identity to the aims and objectives of criminal law enforcement, but has for its objective the protection of the public rather than to punish the offender. There is no constitutional requirement, therefore, that the hearing officer or the agency advise a party that he is entitled to be represented by counsel and that if he cannot afford counsel one will be afforded him." (15 C.A.3d 543.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Type of Hearing Required.

d. Impartial Body or Officer.

1. General Rule.

7 *Witkin Sum. Cal. Law Const Law* § 666

[§ 666] General Rule.

(1) *In General.* The hearing must be before an impartial body or officer. (See *Wong Yang Sing v. McGrath* (1950) 339 U.S. 33, 70 S.Ct. 445, 452, 94 L.Ed. 616, 626; *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 C.A.3d 983, 988, 138 C.R. 594, *infra*, §671 [review of cases]; *Applebaum v. Board of Directors* (1980) 104 C.A.3d 648, 657, 660, 163 C.R. 831; *Golden Day Schools v. State Depart. of Education* (2000) 83 C.A.4th 695, 710, 711, 99 C.R.2d 917 [day care operator debarred by state agency from applying for further contracts with state for 3 years had due process liberty interest requiring hearing on justification for debarment before impartial arbiter or tribunal; arbiter must not have participated in staff decisions leading to debarment]; 5 U.C. *Davis L. Rev.* 45 [countering prejudice in administrative decision]; 16 U.S.F. *L. Rev.* 229 [Disqualification of Administrative Law Judges in California]; 97 A.L.R.2d 1210 [member of occupation or profession sitting in license revocation proceeding]; *Pierce*, 2 Admin. Law 4th, §9.8; C.E.B., *Administrative Hearing Practice* 2d, §6.5 *et seq.*; on right to test impartiality of hearing panel by voir dire, see *Rosenblit v. Superior Court* (1991) 231 C.A.3d 1434, 282 C.R. 819, *supra*, §659.)

In *Withrow v. Larkin* (1975) 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712, a physician attacked a statute permitting the medical board to hold a hearing on suspension of a license after it had conducted the investigation. *Held*, the statute was valid. In *re Murchison* (1955) 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, *supra*, §642, is distinguishable, and the variety and complexity of administrative proceedings make it necessary to reject the broad proposition that the combination of investigating and judging functions is a denial of due process. (95 S.Ct. 1467, 43 L.Ed.2d 427.) However, a court may determine from special facts in a particular case that "the risk of unfairness is intolerably high." (95 S.Ct. 1470, 43 L.Ed.2d 730.) (See 89 Harv. *L. Rev.* 76.)

In *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assn.* (1976) 426 U.S. 482, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9, the Court followed *Withrow*, holding that a school board that had negotiated with teachers could decide to dismiss them for engaging in an illegal strike.

In *Burrell v. Los Angeles* (1989) 209 C.A.3d 568, 257 C.R. 427, a provision of the Los Angeles city charter provided for the review of disciplinary actions against city employees, but prohibited a reduction in the penalty without the consent of the department manager who initially imposed discipline. *Held*, the provision was constitutional.

(a) Prior cases have distinguished between administrative hearings and judicial proceedings in determining whether a decision maker meets the requirement of impartiality. (209 C.A.3d 577, 578, 579, discussing *Withrow*; *Murchison*; *Hortonville*; and *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823, supra, §642.)

(b) Applying these Supreme Court decisions, "the lower and intermediate federal courts have concluded that the right to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter." (209 C.A.3d 579.) The California Supreme Court has construed the state Due Process Clause in the same manner. (209 C.A.3d 581, 582.)

(c) A disciplined employee does have the right to have the reviewing body determine whether there is sufficient evidence to uphold the charges of misconduct; and the charter provision protects this right. (209 C.A.3d 581.)

(2) *Administrative Prosecutorial Officers.* The requirements for impartial hearing officers are designed for officials performing judicial or quasi-judicial functions. They are not applicable to those acting in a prosecutorial or plaintiff-like capacity. "In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." (*Marshall v. Jerrico* (1980) 446 U.S. 238, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182, 192 [upholding section of Fair Labor Standards Act providing that civil penalties collected for unlawful employment of child labor must be returned to Department of Labor as reimbursement for money spent in determining violation].)

In *Blinder, Robinson & Co. v. Tom* (1986) 181 C.A.3d 283, 226 C.R. 339, appellant challenged the constitutionality of *Govt.C. 11511* on the ground that it allows a prosecuting agency officer, rather than an impartial hearing officer, to make the determination whether to grant or deny process to compel attendance of witnesses. (181 C.A.3d 290.) The court, bound by case law upholding the statute, rejected the contention that it was facially unconstitutional, and also found nothing in the record to show that appellant could not have a fair hearing. But the opinion adds: "What troubles us about *Government Code section 11511*, and its application in this case is not merely the combination of investigatory, accusatory and adjudicatory functions in one person. It is, rather, the additional power of that same person to make the decision denying the accused the right to produce evidence at the hearing. This is accomplished by effectively denying the accused the right to take depositions without affording it the right to a review of that denial by a neutral or impartial person at an early and meaningful stage of the administrative proceedings before the burden of proof has shifted to the accused." (181 C.A.3d 295.) *Govt.C. 11511*, as amended in 1995, now only permits an agency to order deposition testimony when an administrative law judge has not been appointed.

SUPPLEMENT: [This section is current through the latest supplement]



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2. Conflict of Interest.

7 *Witkin Sum. Cal. Law Const Law* § 667

[§ 667] Conflict of Interest.

Howitt v. Superior Court (1992) 3 C.A.4th 1575, 5 C.R.2d 196, involved a conflict of interest problem. H, an Imperial County deputy sheriff, was transferred by the sheriff's department and summarily suspended without pay. He sought an administrative hearing before the County Employment Appeals Board, a quasi-independent administrative tribunal. At the hearing he discovered that the sheriff's department would be represented by a deputy county counsel, and that the county counsel himself would advise the board and prepare its written opinion. H sought mandamus to compel the county counsel's office to disqualify itself from advising the board. *Held*, the county counsel's office can perform both roles only if the adviser for the decision maker is screened from inappropriate contact with the advocate.

(a) The cases recognize a due process entitlement to an impartial decision maker, but conclude that overlapping functions do not amount to a constitutional violation unless there is specific evidence of bias. (3 C.A.4th 1580, discussing *Withrow v. Larkin* (1975) 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712, *supra*, §666, and *Kloepfer v. Commission on Judicial Performance* (1989) 49 C.3d 826, 264 C.R. 100, 782 P.2d 239, 2 Cal. Proc. (4th), Courts, §76.) "Both *Withrow* and *Kloepfer* exemplify administrative procedures which depart to some extent from the pure adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates. The departure is perhaps more dramatic in *Withrow*, where the functions of investigation and adjudication are effectively merged in the same persons, than in *Kloepfer*, where the commission's staff conducted an initial investigation. Nonetheless, these decisions and numerous others stand for the proposition that the pure adversary model is not entitled to constitutionally enshrined exclusivity as the means for resolving disputes in '[t]he incredible variety of administrative mechanisms [utilized] in this country. ... ' The mere fact that the decision maker or its staff is a more active participant in the fact-finding process--similar to the judge in European civil law systems--will not render an administrative procedure unconstitutional." (3 C.A.4th 1581.)

(b) Most of the cases that have considered a due process challenge focus on the agency, commission, or board itself, and not on a lawyer's representation of conflicting interests. But a few have considered the overlapping functions of lawyers and have reached inconsistent conclusions. (3 C.A.4th 1582.) Authority supporting a lawyer's participation in a proceeding as both an advocate and adviser to the decision maker stems largely from two cases decided long before *Withrow*. (3 C.A.4th 1583, citing *Chosick v. Reilly* (1954) 125 C.A.2d 334, 270 P.2d 547, and *Ford v. Civil Service*

Com. of Los Angeles (1958) 161 C.A.2d 692, 327 P.2d 148.) *Ford* provided the linchpin for *Greer v. Board of Education* (1975) 47 C.A.3d 98, 121 C.R. 542, which rejected a challenge, and observed that, by the very nature of the administrative process, the agency or one of its agents or representatives is bound to be involved in the initiation and prosecution of charges. (3 C.A.4th 1583.) *Midstate Theatres v. Stanislaus* (1976) 55 C.A.3d 864, 128 C.R. 54, reached a conclusion diametrically opposite to *Greer*, relying on both due process principles and an applicable statute. (3 C.A.4th 1584.)

(c) Where advocacy and decision-making roles are combined, the essential objectivity of an adjudicator is lost. "Here, as part of an adversary process, the county counsel will be asked to advise the Board about legal issues which Board members feel are relevant in deciding whether one of his subordinates wins or loses the case. To allow an advocate for one party to also act as counsel to the decision maker creates the substantial risk that the advice given to the decisionmaker, 'perhaps unconsciously,' ... will be skewed." (3 C.A.4th 1585.)

(d) "Performance of both roles by the same law office is appropriate only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." (3 C.A.4th 1586.) The burden of providing these assurances must rest with the law officer performing the dual roles. "As a practical matter, were the burden allocated otherwise, it would seldom if ever be possible for the opposing party to demonstrate that the lawyer in question had not been adequately screened. If the adviser has been screened, it should be relatively easy for county counsel to explain the screening procedures in effect. On the other hand, if there has been improper contact, it would likely be known only to the lawyers involved and perhaps to the board members. A party challenging the dual representation would have virtually no way of obtaining evidence to demonstrate any impropriety." (3 C.A.4th 1587.)

A concurring opinion criticizes the majority's premise--"that dual representation, standing alone, offends petitioner's due process rights"; this view "runs counter to the established principles which underlie the law of administrative hearing process." (3 C.A.4th 1589.) (See *Clark v. Hermosa Beach* (1996) 48 C.A.4th 1152, 1172, 56 C.R.2d 223 [city council member who lived within one block of proposed development and who, as citizen, had opposed earlier version of development plan had disqualifying conflict of interest, and his participation in council decision disapproving plan deprived developer of fair hearing]; *Nightlife Partners, Ltd. v. Beverly Hills* (2003) 108 C.A.4th 81, 93, 133 C.R.2d 234 [following *Howitt v. Superior Court*; petitioners' due process rights were violated where defendant city's advocate for initial denial of permit renewal application acted as legal adviser to administrative hearing officer reviewing that denial]; *Quintero v. Santa Ana* (2004) 114 C.A.4th 810, 814, 7 C.R.3d 896 [following *Nightlife Partners*; administrative hearing to terminate plaintiff's employment with city violated due process where deputy city attorney that represented city before personnel board also had acted as counsel for board, including revising board's rules and procedures and giving advice regarding their effect]; for further discussion of conflict of interest issue, see 1 Cal. Proc. (4th), Attorneys, §169.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Stardust Mobile Estates, LLC v. San Buenaventura* (2007) 147 C.A.4th 1170, 1190, 55 C.R.3d 218 [participation of city attorney in rent control hearing did not produce biased hearing process where city attorney acted as advocate in open court, and not as advisor to decisionmaker]; *Witt Home Ranch v. Sonoma* (2008) 165 C.A.4th 543, 569, 81 C.R.3d 123, 12 Summary (10th), *Real Property*, Supp., §822 [distinguishing *Howitt v. Superior Court* (1992) 3 C.A.4th 1575, 5 C.R.2d 196, text, p. 1082, and *Nightlife Partners, Ltd. v. Beverly Hills* (2003) 108 C.A.4th 81, 568, 133 C.R.2d 234, text, p. 1084; no bias was shown in absence of evidence that deputy county counsel, who advised both county permit department and board of supervisors regarding interpretation of Subdivision Map Act, had ever acted as advocate in connection with plaintiff's proceeding]. *Kloepfer case*:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §78. Further discussion of conflict of interest:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §145.



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3. Bias.

7 *Witkin Sum. Cal. Law Const Law* § 668

[§ 668] Bias.

(1) *Actual Bias*. Actual bias of an administrative body or officer violates due process. (See *Saks & Co. v. Beverly Hills* (1951) 107 C.A.2d 260, 264, 237 P.2d 32 [revocation of zoning variances by biased city council]; *Perlman v. Shasta Joint Junior College Dist. Bd. of Trustees* (1970) 9 C.A.3d 873, 883, 88 C.R. 563 [expulsion of student by biased and prejudiced board]; *Gai v. Selma* (1998) 68 C.A.4th 213, 221, 228, 79 C.R.2d 910 [commission member's remote, indirect, and uncertain pecuniary interest in outcome of terminated police officer's appeal did not amount to actual bias or to "probability or likelihood of actual bias"]; 10 A.L.R.3d 694 [zoning--disqualification of biased officer].)

In *Concrete Pipe & Products of Calif. v. Construction Laborers Pension Trust for Southern Calif.* (1993) 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539, the Court upheld provisions of the Employee Retirement Income Security Act (ERISA) added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) (29 U.S.C., §§1381, 1391) for determining the "withdrawal liability" of an employer who withdraws from a multiemployer pension plan. Under MPPAA, the employer's liability for its share of unvested benefits is first assessed in a notification by the "plan sponsor." If the employer objects and the dispute is not resolved, it is referred to arbitration. The sponsor's determinations and actuarial calculations are presumed correct unless a contesting party shows by a preponderance of the evidence that either (1) a determination was unreasonable or clearly erroneous, or (2) the actuarial assumptions and methods were, in the aggregate, unreasonable. Plaintiff Concrete Pipe, a withdrawing employer who lost in arbitration, challenged MPPAA on the ground that it denies access to an impartial decision maker. *Held*, the statute does not unconstitutionally deny an impartial adjudicator.

(a) Concrete Pipe argued that the plan sponsor (here, the plan trustees) might have a bias toward imposition of the greatest possible liability. There are several reasons why that might be so. (113 S.Ct. 2276, 124 L.Ed.2d 560.) However, in making their initial liability determination, the trustees are acting in an enforcement rather than an adjudicatory capacity. The first adjudication is the proceeding before the arbitrator. (113 S.Ct. 2278, 124 L.Ed.2d 562.)

(b) The first presumption, that factual determinations are correct, uses three inconsistent terms--"preponderance," "clearly erroneous," and "unreasonable"--to describe the burden of persuasion placed on the employer. (113 S.Ct. 2279, 124 L.Ed.2d 563.) The ambiguity caused by this incoherence must be resolved by construing the statute to avoid serious

constitutional problems. Thus, the presumption is construed to place the burden on the employer to disprove a challenged factual determination by a preponderance. (113 S.Ct. 2283, 124 L.Ed.2d 568.) So construed, the statute permits independent consideration of factual issues by the arbitrator, and thus is constitutional. (113 S.Ct. 2283, 124 L.Ed.2d 569.)

(c) The second presumption, that the actuarial calculations are correct, does not involve the same possibility of bias. The actuarial assumptions and methods are initially selected by the plan actuary, a trained professional, and are technical in nature. (113 S.Ct. 2284, 124 L.Ed.2d 570.) Moreover, the employer's burden is simply to show that the combination of methods and assumptions would not have been acceptable to a reasonable actuary, and thus that they fall outside the range of reasonable actuarial practice. Placing this burden on the employer does not raise a due process issue. (113 S.Ct. 2286, 124 L.Ed.2d 572.)

(2) *Appearance of Bias*. In *Andrews v. Agricultural Lab. Rel. Bd.* (1981) 28 C.3d 781, 171 C.R. 590, 623 P.2d 151, agricultural employees filed complaints under *Lab.C. 1160.2*, alleging that employers committed unfair labor practices. For the hearing, the board appointed M as a temporary administrative law officer. Counsel for the employers sought to disqualify M on a showing that he was an attorney member of a public interest law firm that had represented farm workers and Mexican-Americans challenging employment discrimination. *Held*, he was not disqualified. (a) A trier of fact with expressed political or legal views cannot be disqualified on that basis alone. (28 C.3d 791.) (b) Even if these views could result in "an appearance of bias," in the sense of a subjective belief in its existence, this is an insufficient ground for disqualification; the moving party must demonstrate the existence of actual bias. (28 C.3d 792, 793, 794.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Actual Bias*. See *Nasha L.L.C. v. Los Angeles* (2004) 125 C.A.4th 470, 483, 22 C.R.3d 772 [planning commission member's authorship of newsletter that clearly advocated position against project while its approval was pending before commission gave rise to unacceptable probability of actual bias]; 4 A.L.R.6th 263 [bias of officer in zoning proceeding requiring disqualification or affecting validity of decision; superseding 10 A.L.R.3d 694, text, p. 1085].



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4. Financial Interest.

7 *Witkin Sum. Cal. Law Const Law* § 669

[§ 669] Financial Interest.

(1) *In General.* Due process may be denied where the hearing officer or members of the hearing body have a financial interest in the outcome of the hearing. (See *Gibson v. Berryhill* (1973) 411 U.S. 564, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488, 499 [district court properly enjoined proceedings of Alabama Optometry Board where members had indirect financial interest in prohibiting practice of optometry by employees of optical companies].)

(2) *Effect of Government's Selection and Payment of Hearing Officer.* The fact that a hearing officer is paid by the employer does not, by itself, create a disqualifying financial interest. (See *Linney v. Turpen* (1996) 42 C.A.4th 763, 768, 776, 49 C.R.2d 813 [suspended police officer was not denied due process where hearing officer was selected from civil service commission list composed of persons who met specified criteria].) However, "a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. ... While the rules governing this disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently." (*Haas v. San Bernardino* (2002) 27 C.4th 1017, 1024, 1036, 119 C.R.2d 341, 45 P.3d 280 [invalidating statutory procedure used by many counties]; see *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 C.A.4th 730, 735, 110 C.R.2d 565 [following *Linney*; fact that defendant retirement board unilaterally selected hearing officers did not violate due process, and defendant was not "prohibited from both investigating and adjudicating applications for retirement benefits"]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control App. Bd. (Vicary)* (2002) 99 C.A.4th 880, 885, 121 C.R.2d 729 [following *Linney* and distinguishing *Haas*; fact that administrative law judge (ALJ) is employed by department does not necessarily mean that judge is biased in favor of department; ALJ's are protected against retaliatory dismissal by civil service laws]; *Brown v. Los Angeles* (2002) 102 C.A.4th 155, 179, 125 C.R.2d 474 [distinguishing *Haas*; due process is not violated where accused police officer selects 3 potential hearing officers from pool of eligible officers who are police department employees]; *Yaqub v. Salinas Valley Memorial Healthcare System*

(2004) 122 C.A.4th 474, 484, 18 C.R.3d 780 [following *Haas*; facts created "possible temptation" to favor defendant hospital where hearing officer's fee was paid by hospital, he had been on board of governors of hospital foundation, and he had previously presided over three hearings, including plaintiff's suspension hearing].)

(3) *Receipt of Campaign Contributions*. In *Woodland Hills Residents Assn. v. City Council* (1980) 26 C.3d 938, 164 C.R. 255, 609 P.2d 1029, a citizens' group challenged approval of a subdivision map by the Los Angeles City Council, on the ground that the developer, its engineering firm, and its attorneys had made substantial contributions to the campaign committees of council members. *Held*, the members receiving the contributions were not disqualified from action on the application for approval. The contributions were made in compliance with statutory requirements, and to disqualify council members for receiving them would threaten constitutionally protected political speech and associational freedoms. (26 C.3d 945, 946.) (See *BreakZone Billiards v. Torrance* (2000) 81 C.A.4th 1205, 1228, 97 C.R.2d 467 [following *Woodland Hills*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *McBride v. Board of Accountancy of Calif.* (2005) 130 C.A.4th 518, 525, 30 C.R.3d 287 [award of prehearing costs to accountancy board that was considering whether to discipline plaintiffs did not create impermissible pecuniary interest on board's part; board had no power to review award, except to reduce or eliminate it]; 4 A.L.R.6th 263 [interest of officer in zoning proceeding requiring disqualification or affecting validity of decision].



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5. Necessity Exception.

7 *Witkin Sum. Cal. Law Const Law* § 670

[§ 670] Necessity Exception.

When a particular agency is the only one with authority to pass on a matter, a rule of necessity may be invoked and disqualification precluded. (See *Griggs v. Board of Trustees of Merced Union High School Dist.* (1964) 61 C.2d 93, 98, 37 C.R. 194, 389 P.2d 722 [school district trustees combined investigating and prosecuting functions with adjudicating functions]; *Aluisi v. Fresno* (1960) 178 C.A.2d 443, 452, 2 C.R. 779; *Weinberg v. Cedars-Sinai Med. Center* (2004) 119 C.A.4th 1098, 1113, 15 C.R.3d 6 [rule of necessity applies to both public and private bodies].) But the rule of necessity must yield to the requirements of due process. (See *Gibson v. Berryhill* (1973) 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488, 499 [board of self-employed optometrists sought revocation of licenses of competing employee-optometrists]; C.E.B., *Administrative Hearing Practice* 2d, §6.25; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §43.)

SUPPLEMENT: [This section is current through the latest supplement]

See 28 *A.L.R.6th* 175 [Construction and Application of Rule of Necessity Providing that Administrative or Quasi-Judicial Officer Is Not Disqualified To Determine a Matter Because of Bias or Personal Interest if Case Cannot Be Heard Otherwise].



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6. Partially Interested Board.

7 *Witkin Sum. Cal. Law Const Law* § 671

[§ 671] Partially Interested Board.

A New Motor Vehicle Board was established in 1967 to hear appeals of new car dealers on eligibility for licensing, regulation of practices, and discipline for rule violations. (*Veh.C. 3000*; see *Veh.C. 3001* [four of nine members of Board must be new car dealers].) Statutes added in 1973 required the Board to institute procedures for adjudication of disputes between new car dealers and new car manufacturers (*Veh.C. 3050* and *3066*), and to determine whether a manufacturer's termination of a dealer's franchise was for good cause (*Veh.C. 3060*). In *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 C.A.3d 983, 138 C.R. 594, plaintiff manufacturer gave C, its franchisee, notice of termination for failure to develop a sufficient sales volume, but the Board, after a hearing, concluded that the termination was without good cause. In this mandamus proceeding, the trial judge held the 1973 amendments unconstitutional. *Held*, affirmed.

(a) The dealer-members of the Board have an economic stake in franchise termination cases; i.e., it is to the dealer's advantage not to have termination take place for low sales performance. (69 C.A.3d 988.) Hence, *Tumey v. Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 444, 71 L.Ed. 749, 758, *supra*, §642, *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267, and *Gibson v. Berryhill* (1973) 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488, 499, holding that pecuniary interest of the adjudicating officer or body is a denial of due process, are applicable. (69 C.A.3d 988, 990.)

(b) Prior to the 1973 amendments, there was no constitutional infirmity in the composition of the Board; it is well settled that a licensing or regulatory agency may be composed in whole or in part of members of the business or profession regulated. (69 C.A.3d 990.) But the new law gave the Board the power to regulate the economic and contractual relations of others. In effect, the Legislature took sides in controversies between dealers and manufacturers, "making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body." (69 C.A.3d 991.)

(c) In *Tumey* and the other cases cited, the entire adjudicatory body was infected by pecuniary interest, while here only a minority of the board is so infected. These cases do not hold that every multiple-person administrative agency violates due process whenever one or more members is possessed of a pecuniary interest. (69 C.A.3d 991.) Nor is a car dealer per se constitutionally ineligible to sit on the Board. "What we hold is that the combination of (1) the mandated

dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (69 C.A.3d 992.) The evil "is not eliminated by stacking the deck 4/9ths of the way rather than all the way." (69 C.A.3d 993.)

One justice dissented, relying mainly on a federal district court decision dealing with regulation of pharmacists. (69 C.A.3d 994.)

American Motors Sales Corp. was followed in *Chevrolet Motor Div. v. New Motor Vehicle Bd.* (1983) 146 C.A.3d 533, 541, 194 C.R. 270, and *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 C.A.3d 109, 114, 202 C.R. 1. In response to *Chevrolet* and *Nissan*, the board adopted a policy of voluntary recusal of dealer members in dealer-manufacturer disputes, and in 1985, *Veh.C.* 3050 and 3066 were amended to provide that a "dealer may not participate in, hear, comment, advise other members upon, or decide, any matter" involving a franchisor-franchisee dispute. The recusal policy and the 1985 amendments were held constitutional in *American Isuzu Motors v. New Motor Vehicle Bd.* (1986) 186 C.A.3d 464, 471, 473, 230 C.R. 769.

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2. Type of Hearing Required.

e. Hearing and Determination.

7 Witkin Sum. Cal. Law Const Law § 672

[§ 672] Hearing and Determination.

In judicial proceedings, an agency is free to depart from conventional practices that do not affect the fundamental fairness of the hearing. (See *Automotive Management Group v. New Motor Vehicle Bd.* (1993) 20 C.A.4th 1002, 1011, 1012, 24 C.R.2d 904, citing the text [New Motor Vehicle Board's procedure of permitting administrative law judge to adjudicate timeliness of dealer's protest of termination of franchise pursuant to franchisor's motion to dismiss protest was fair; board was not first required to "accept" protest and then hear issue itself]; *Pierce*, 1 Admin. Law 4th, Chap 8; C.E.B., *Administrative Hearing Practice* 2d, §7.34 et seq.; 84 *Harv. L. Rev.* 612 [summary judgments in administrative adjudication]; 13 *Stanf. L. Rev.* 307 [administrative declaratory orders].) Thus:

(1) There is no absolute right to make an *oral argument* on a question of law involved in the proceedings. (See *Federal Communications Com. v. WJR, The Goodwill Station* (1949) 337 U.S. 265, 69 S.Ct. 1097, 1103, 93 L.Ed. 1353, 1360.)

(2) There is no violation of constitutional due process in a *closed hearing* with the public excluded. (See *Swars v. Council of Vallejo* (1949) 33 C.2d 867, 873, 206 P.2d 355 [civil service commission]; on statutory requirements for public hearings, see *infra*, 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §79 et seq.)

(3) The standards of a judge's findings of fact need not be met; an informal report is sufficient. (*Santa Barbara v. Purcell* (1967) 251 C.A.2d 169, 177, 59 C.R. 345; see *Rogers v. Carleson* (1973) 30 C.A.3d 54, 63, 106 C.R. 140 [denial of claims for aid by Director of State Department of Social Welfare, annulled for failure to give reasons for decision; decision based on federal and state regulations, due process issue not reached]; *Rosenblit v. Superior Court* (1991) 231 C.A.3d 1434, 1445, 282 C.R. 819, *supra*, §659 [vague and conclusory findings inadequate].)

(4) It is generally held that an administrative agency *cannot reopen* and change or annul its own *final determinations* of fact, unless the statute gives it some such continuing jurisdiction. (*Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Com.* (1941) 17 C.2d 204, 209, 109 P.2d 918; *Wilbur v. United States* (1930) 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809.)

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(2) *Closed hearing:*

Cross-Reference: 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §96 et seq.



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f. Who May Render Decision.

7 *Witkin Sum. Cal. Law Const Law* § 673

[§ 673] Who May Render Decision.

In *Morgan v. United States* (1936) 298 U.S. 468, 56 S.Ct. 906, 912, 80 L.Ed. 1288, 1295, and *Morgan v. United States* (1936) 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129, the Court declared that the person who makes the determination "must consider and appraise the evidence"; that a fair hearing is denied where subordinates hold a hearing, and the decision is thereafter made by an officer who does not attend the hearing or read a transcript of the proceedings, but relies on the recommendation of the subordinates.

This rule has been substantially followed in California cases dealing with the procedure before the Workers' Compensation Appeals Board (see 2 *Summary* (10th), *Workers' Compensation*, §444), and in proceedings under the Administrative Procedure Act (see 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §47 et seq.).

In *Vollstedt v. Stockton* (1990) 220 C.A.3d 265, 269 C.R. 404, plaintiff city employee was demoted. The city civil service commission, after a 2-day hearing, recommended to the city manager that plaintiff be reinstated, but did not include a written statement of facts. The city manager, without reviewing the evidence presented at the hearing, rejected the commission's recommendation and upheld the demotion on the basis of information supplied by the city personnel director. *Held*, this procedure violated the rule of "he who decides must hear," as set forth in *Morgan* and applied in later cases. (220 C.A.3d 275, 276.)

Under *Veh.C. 3066* (supra, §671), either the New Motor Vehicle Board or an administrative law judge may preside at hearings to protest decisions to terminate automobile dealership franchises. However, a decision rendered by an administrative law judge must be reviewed by the board. (*Automotive Management Group v. New Motor Vehicle Bd.* (1993) 20 C.A.4th 1002, 1012, 1013, 24 C.R.2d 904, citing the text.)

In *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 C.A.4th 474, 18 C.R.3d 780, the court held that in the absence of evidence of impartiality, the fact that the panel for two hearings relating to plaintiff physician's suspension of hospital privileges was made up of the same three members did not violate hospital bylaws or any statute. The first hearing dealt essentially with plaintiff's competency and the second hearing dealt with his compliance with the conditions of the suspension. (122 C.A.4th 487.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Flippin v. Los Angeles City Bd. of Civil Service Commrs.* (2007) 148 C.A.4th 272, 281, 55 C.R.3d 458 [no due process violation occurred where manager who recommended termination of plaintiff's employment acted as *Skelly* hearing officer in preremoval process; no rule prevented dual function, manager did not impose discharge, and there were three more levels of administrative review, including full evidentiary hearing before neutral hearing examiner, before final discharge].

Proceedings under Administrative Procedure Act:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §63 et seq.



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3. Non-Adjudicatory Proceedings.

a. Quasi-Legislative Action.

1. Constitutional Requirement.

7 *Witkin Sum. Cal. Law Const Law* § 674

[§ 674] Constitutional Requirement.

(1) *In General.* Due process requires a hearing where the proceeding is quasi-judicial in nature (see *supra*, §657). A hearing is not required in quasi-legislative proceedings. (See *Wood v. Public Util. Com.* (1971) 4 C.3d 288, 292, 93 C.R. 455, 481 P.2d 823 [regulatory commission adopting rules governing service and fixing rates]; *California Optometric Assn. v. Lackner* (1976) 60 C.A.3d 500, 505, 131 C.R. 744 [Director of Health adopting regulations establishing Medi-Cal rates]; *Lin v. California* (2000) 78 C.A.4th 931, 935, 93 C.R.2d 88 [Denti-Cal providers had no right to hearing before being required to obtain prior authorization to perform restorative services; requirement did not terminate their relationship with Denti-Cal and, in any event, they had no entitlement to continued participation in Denti-Cal program]; *Machado v. State Water Resources Control Bd.* (2001) 90 C.A.4th 720, 726, 109 C.R.2d 116 [due process did not require hearing before issuance of cleanup and abatement order because order did not impose civil or criminal penalties or shut down or otherwise prevent operation of business, and it was issued only after observation of unlawful discharges and notification to plaintiff of problem]; 87 *Harv. L. Rev.* 782 [procedural requirements for agency rulemaking]; 63 *Cal. L. Rev.* 886 [due process rights of participation in rulemaking]; *Pierce*, 1 *Admin. Law* 4th, Chap. 7; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §200 et seq.)

(2) *Necessity of Record.* There must, however, be some record of the basis for the determination. In *California Assn. of Nursing Homes etc. v. Williams* (1970) 4 C.A.3d 800, 84 C.R. 590, 85 C.R. 735, the court said:

"Generally, an administrative agency, directed to fix rates or price levels after a hearing, may not base its decision upon evidence outside the record and not made available for rebuttal by the affected parties. In part the demand is implied from statutes calling for public hearing as an assurance of fairness. In part it derives from the ineluctable need for an administrative record as the basis of effective judicial review. In some cases effective review entails examination of the administrative findings in order to test the legal principles employed by the agency and to discern the sufficiency of the evidence. In other cases the need is for the transcribed oral testimony and the documentary exhibits." (4 C.A.3d 811.)

In *Williams*, the Medi-Cal administrator, adopting a regulation governing reimbursement of nursing homes under the Medi-Cal program, completely failed to provide a hearing or record of any evidentiary basis for its action, and

accordingly the regulation was held invalid. Private negotiations with the agency's staff and organizations affected did not constitute substantial compliance with the requirement of public hearing and opportunity for the public to participate. (4 C.A.3d 813.) (See Pierce, 1 Admin. Law 4th, Chap. 8; 18 A.L.R.2d 552 [administrative decision or finding based on evidence secured outside hearing, and without presence of interested party or counsel]; on review of quasi-legislative determinations, see 9 Cal. Proc. (4th), *Administrative Proceedings*, §39 et seq.; on attacking regulation in subsequent adjudicative proceedings in which it is applied, see *Rosas v. Montgomery* (1970) 10 C.A.3d 77, 88 C.R. 907, 8 Cal. Proc. (4th), *Extraordinary Writs*, §264.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Savient Pharmaceuticals v. Department of Health Services* (2007) 146 C.A.4th 1457, 1472, 53 C.R.3d 689 [plaintiff drug company had no right to due process hearing before its drug was delisted by state AIDS assistance program; future right to supply products pursuant to government program is not fundamental vested right].

(2) *Necessity of Record.* Review of quasi-legislative determinations:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §51 et seq.

Rosas case:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §273.



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2. Statutory Requirement.

7 *Witkin Sum. Cal. Law Const Law* § 675

[§ 675] Statutory Requirement.

Even though a quasi-legislative administrative agency is required to give a hearing, that hearing need not be a "trial-type," with opportunity for cross-examination of witnesses and rebuttal; an "argument type" hearing is sufficient. "[A] hearing allowed by legislative grace is not circumscribed by the restrictions applicable to judicial or quasi judicial adversary proceedings." (*Franchise Tax Bd. v. Superior Court* (1950) 36 C.2d 538, 549, 225 P.2d 905 [determination of tax rate for financial corporations]; see *Ray v. Parker* (1940) 15 C.2d 275, 296, 101 P.2d 665; *Security-First Nat. Bank of Los Angeles v. Franchise Tax Bd.* (1961) 55 C.2d 407, 419, 11 C.R. 289, 359 P.2d 625 [following *Franchise Tax Bd.*]; *San Mateo v. Palomar Holding Co.* (1962) 208 C.A.2d 194, 199, 24 C.R. 905, citing the text; *Rivera v. Division of Industrial Welfare* (1968) 265 C.A.2d 576, 587, 71 C.R. 739; *People v. Superior Court (Albany)* (1974) 36 C.A.3d 727, 743, 111 C.R. 733 [participation by nonmember did not taint action of qualified members supported by requisite vote]; *Building Code Action v. Energy Resources Conservation & Dev. Com.* (1980) 102 C.A.3d 577, 589, 162 C.R. 734 [rebuttal was not required in quasi-legislative hearing determining construction insulation standards]; *Pierce*, 1 Admin. Law 4th, Chap. 8.)

For the same reason, findings are not required as the basis for a regulation. (See *Pacific States Box & Basket Co. v. White* (1935) 296 U.S. 176, 56 S.Ct. 159, 164, 80 L.Ed. 138, 146; *California Drive-In Restaurant Assn. v. Clark* (1943) 22 C.2d 287, 301, 140 P.2d 657; 1 *Pierce*, Admin. Law 4th, §8.5; 60 *Cal. L. Rev.* 1276 [need for procedural innovation in administrative rulemaking].)

Govt.C. 11346 et seq. establish basic minimum procedural requirements for agency rulemaking, including notice and an opportunity for interested parties to present statements and arguments (*Govt.C. 11346.8*) and the right to obtain a judicial declaration as to the validity of a regulation by an action for declaratory relief (*Govt.C. 11350*; see 5 *Cal. Proc.* (4th), *Pleading*, §§815, 818). There is, however, no requirement of a hearing with the right to offer oral testimony and oral argument. (*California Optometric Assn. v. Lackner* (1976) 60 C.A.3d 500, 505, 131 C.R. 744.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§859, 865.



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a. Quasi-Legislative Action.

3. Approval of Subdivision Map.

7 *Witkin Sum. Cal. Law Const Law* § 676

[§ 676] Approval of Subdivision Map.

In *Horn v. Ventura* (1979) 24 C.3d 605, 156 C.R. 718, 596 P.2d 1134, defendant county's planning department considered and approved a tentative subdivision map for O's property (division into only four lots, hence not subject to the Subdivision Map Act). On the theory that this action is quasi-legislative, no notice was given to other property owners in the area who might be affected by the development. Plaintiff, an adjacent owner, sought mandamus to compel setting aside the approval. *Held*, on the facts pleaded he was entitled to this relief.

(a) Procedural due process (notice and opportunity for hearing) is required where the governmental decision is adjudicatory in nature; and the legislative-adjudicatory distinction is well settled. (24 C.3d 612, 613.) However, while a general zoning ordinance is legislative in character, less extensive use planning decisions, such as the grant of a variance or conditional use permit, are adjudicatory. (24 C.3d 613.) Subdivision approvals are similar. The issues of suitability of a subdivision plan in terms of topography, density, public health, and access rights, or community land use plans, involve the exercise of judgment and balancing of conflicting interests. (24 C.3d 614, rejecting contrary view of *San Mateo v. Palomar Holding Co.* (1962) 208 C.A.2d 194, 199, 24 C.R. 905.) Plaintiff's allegations that the plan would substantially interfere with his access to the public streets, and increase both traffic congestion and air pollution, described a deprivation requiring procedural due process protection. (24 C.3d 615.)

(b) The rule therefore is that "whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs." (24 C.3d 616.)

(c) The notice constitutionally required is that which is reasonably calculated to afford affected persons the realistic opportunity to protect their interests. (24 C.3d 617.) The notice given here--posting at central public buildings, and mailings to persons requesting notice--was inadequate. "Those persons significantly affected by a proposed subdivision cannot reasonably be expected to place themselves on a mailing list or 'haunt' county offices on the off-hand chance that a pending challenge to those interests will thereby be revealed." (24 C.3d 618.) While no specific formula should be imposed, "acceptable techniques might include notice by mail to the owners of record of property situated within a designated radius of the subject property, or by the posting of notice at or near the project site, or both." (24 C.3d 618.)

(See *Kennedy v. Hayward* (1980) 105 C.A.3d 953, 960, 165 C.R. 132 [following *Horn*].)

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b. Investigative Process.

7 *Witkin Sum. Cal. Law Const Law* § 677

[§ 677] Investigative Process.

In *Hannah v. Larche* (1960) 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307, the federal Commission on Civil Rights conducted an investigation of alleged black voting deprivations in Louisiana. Voting registrars and others were subpoenaed to bring records and explain their activities. But the Commission, though pressed, refused to disclose the identities of the complainants or to permit their cross-examination by the witnesses. In this action to enjoin the Commission from acting, the Court stated the constitutional issue as follows: "Whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants, and to have the right to cross-examine those complainants and other witnesses." (80 S.Ct. 1514, 4 L.Ed.2d 1321.) The answer was *no*. The practice of the vast majority of investigating agencies--legislative, executive, and judicial--has been to deny the rights of appraisal, confrontation, and cross-examination, and the policy is sound:

"[T]he investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investigation, and stifle the agency in its gathering of facts." (80 S.Ct. 1515, 4 L.Ed.2d 1322.)

In *Smith v. Board of Med. Quality Assur.* (1988) 202 C.A.3d 316, 248 C.R. 704, the failure of B. & P.C. 2292 to require a hearing before subjecting a physician to a professional competency examination was challenged. Under the statute, if there is reasonable cause to believe that a physician cannot practice medicine with reasonable skill and safety to patients, the Board of Medical Quality Assurance may order the competency examination. First, both the Board and an outside medical consultant must conclude that the required reasonable cause exists. Then the Board files a petition and the physician may file an opposition. These papers are reviewed by a designated body, which *may* conduct a hearing. If a reasonable cause finding is made, an oral professional competency examination is ordered before two physicians. If the physician fails this examination *and* a second one before two other physicians, an accusation of

incompetence may be filed, which, if proved, subjects the physician to discipline. In proceedings on an accusation, the physician is entitled to all due process rights. *Held*, there was no violation of due process.

(a) The reasonable cause proceeding is investigatory, not adjudicative. The authority to compel an examination that may result in evidence of incompetence and possible revocation of the physician's license does not alter this conclusion. As in *Hannah v. Larche*, the possibility that the information disclosed may be used in later proceedings does not alter the investigatory nature of this proceeding. (202 C.A.3d 322, 323.)

(b) Neither the physician's property interest in his license nor his liberty interest is violated by being required to undergo this nondisciplinary examination. If an accusation is filed, he is granted the full range of due process rights. (202 C.A.3d 326, 327.)

(c) The safeguards provided later in the process adequately protect the physician's interests, and to require the full range of due process rights at this stage of the proceedings would hamper the investigation and cause great fiscal and administrative burdens. Balancing the private and governmental interests, the state Due Process Clause does not require the full range of due process rights at the reasonable cause hearing. (202 C.A.3d 327, 329.)

(d) Giving the Board discretion whether to grant or deny a hearing does not violate equal protection. (202 C.A.3d 324, 325.) (See *Goodstein v. Cedars-Sinai Med. Center* (1998) 66 C.A.4th 1257, 1266, 78 C.R.2d 577 [peer review committee's policy of nondisclosure of identities of complainants comported with concept of fair procedure].)

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4. Summary Action Without Prior Hearing.

a. In General.

1. Nature and Scope of Exception.

7 *Witkin Sum. Cal. Law Const Law* § 678

[§ 678] Nature and Scope of Exception.

The requirement of prior notice and a hearing (see *supra*, §657) is subject to exceptions where summary action is necessary in the public interest. (See *Yakus v. United States* (1944) 321 U.S. 414, 64 S.Ct. 660, 676, 88 L.Ed. 834, 858; *Leslie's Pool Mart v. Department of Food & Agriculture* (1990) 223 C.A.3d 1524, 273 C.R. 373, *infra*, §680; Pierce, 2 Admin. Law 4th, §9.6, 12:14; C.E.B., Administrative Hearing Practice 2d, §1.38; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §297.) The following are examples:

(1) Seizure and detention or destruction, under the police power, of dangerous property, such as diseased cattle, infected food or clothing, or instruments that can be used only for illegal purposes. (See *Lawton v. Steele* (1894) 152 U.S. 133, 14 S.Ct. 499, 502, 38 L.Ed. 385, 390 [state statute, allowing officers to destroy nets used in illegal fishing, upheld]; *Ewing v. Mytinger & Casselberry* (1950) 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 [seizure of misbranded articles under federal Food, Drug and Cosmetic Act]; *Patrick v. Riley* (1930) 209 C. 350, 354, 287 P. 455; *Sandrini Bros. v. Voss* (1992) 7 C.A.4th 1398, 1404, 9 C.R.2d 763 [due process requires that means of compensation be available for wrongful seizure, but does not require that statute that creates procedure for seizure also provide remedy for wrongful seizure]; 14 *A.L.R.3d* 366 [summary destruction of gambling devices].)

(2) Seizure of property used in illegal drug trafficking. (See *Health & Saf.C. 11470 et seq.*, 3 *Cal. Crim. Law* (3d), *Punishment*, §209 et seq.; 21 U.S.C., §881; *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974) 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452, *infra*, §1060 [vessel]; *Nasir v. Sacramento County Office of the Dist. Attorney* (1992) 11 C.A.4th 976, 982, 986, 15 C.R.2d 694 [discussing categories of forfeitable properties, constitutional requirements of notice and opportunity to protect property rights, and statutory requirement that notice of administrative forfeiture proceedings includes instructions for filing claim with superior court and time limits for this filing]; 80 *Cal. L. Rev.* 1309 [Gaining Compliance With Search and Seizure Standards in the Age of Asset Forfeiture]; 38 *A.L.R.4th* 515 [necessity of conviction to support forfeiture]; 6 *A.L.R.5th* 652 [forfeiture under Uniform Controlled Substances Act or similar statute; seizure of small amount]; 6 *A.L.R.5th* 711 [same; delay in setting or holding hearing].)

In the absence of exigent circumstances, the Due Process Clause prohibits the government in a civil forfeiture case from seizing real property without first providing notice and an opportunity to be heard. (*United States v. James Daniel*

Good Real Property (1993) 510 U.S. 43, 114 S.Ct. 492, 497, 505, 126 L.Ed.2d 490, 498, 508, 3 Cal. Crim. Law (3d), *Punishment*, §205 [forfeiture of real property under 21 U.S.C., §881(a)]; see 108 Harv. L. Rev. 191 [James Daniel Good]; 22 Western State L. Rev. 125 [same].)

(3) Summary seizure by the Insurance Commissioner of the assets of an insolvent insurance company under *Ins.C. 1011*. (See *Financial Indem. Co. v. Superior Court* (1955) 45 C.2d 395, 401, 289 P.2d 233; *Rhode Island Ins. Co. v. Downey* (1949) 95 C.A.2d 220, 233, 212 P.2d 965.)

(4) Summary tax procedures. (See 9 *Summary* (10th), *Taxation*, §§22, 23.)

(5) Seizure of property of enemy aliens in wartime. (See *Estate of Stagnaro* (1951) 107 C.A.2d 98, 102, 236 P.2d 593; *infra*, §1326.)

(6) Suspension of a driver's license on the licensee's refusal to take an intoxication test. (See *Mackey v. Montrym* (1979) 443 U.S. 1, 99 S.Ct. 2612, 2617, 2621, 61 L.Ed.2d 321 [due process satisfied by provision for prompt postsuspension hearing]; 2 Cal. *Evidence* (4th), *Witnesses*, §427.)

SUPPLEMENT: [This section is current through the latest supplement]

(7) (New) *Termination of public employment for violating conflict of interest statute*. See *Board of Retirement of the Kern County Employees' Retirement Assn. v. Bellino* (2005) 126 C.A.4th 781, 790, 794, 24 C.R.3d 384 [distinguishing *Coleman v. Department of Personnel Administration* (1991) 52 C.3d 1102, 278 C.R. 346, 805 P.2d 300, text, §693; Govt.C. 53227, which prohibits employees of certain local agencies from sitting on governing bodies of those agencies and provides for automatic termination of employment on employee's being sworn into office, applied to employee of retirement association who was elected to fill one of "member" positions on its board; lack of pretermination hearing does not violate due process where employer has no discretion under statute and there is no factual issue to be resolved].

(8) (New) *Termination of at-will public employee for nondisciplinary reasons*. See *Kreutzer v. San Francisco* (2008) 166 C.A.4th 306, 321, 82 C.R.3d 644 [no name-clearing hearing was necessary for at-will employee who was released without reason being given; release of employee without reason was not in and of itself stigmatizing, and reasons underlying release were not publicly disclosed until employee challenged decision].

(9) (New) *Suspension or revocation of certification of nonpublic, nonsectarian school providing educational services to disabled children*. See *California Assn. of Private Special Education Schools v. California Dept. of Education* (2006) 141 C.A.4th 360, 375, 45 C.R.3d 888 [following *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, text, §687; education and protection of disabled children is type of governmental interest that permits revocation or suspension of certification without prior hearing].



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4. Summary Action Without Prior Hearing.

a. In General.

2. Right to Subsequent Hearing.

7 *Witkin Sum. Cal. Law Const Law* § 679

[§ 679] Right to Subsequent Hearing.

Where summary action is authorized (see *supra*, §678), there must be notice and an opportunity for a hearing at some stage; i.e., the party is entitled to a subsequent hearing to review the determination and obtain redress if it is found improper, and this subsequent opportunity for a hearing satisfies due process. (*Ewing v. Mytinger & Casselberry* (1950) 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088; *Financial Indem. Co. v. Superior Court* (1955) 45 C.2d 395, 401, 289 P.2d 233; *Stewart v. San Mateo* (1966) 246 C.A.2d 273, 286, 54 C.R. 599 [ordinance regulating private patrol officers, providing for summary revocation or suspension of permit but with subsequent hearing before administrative agency; valid]; cf. *Samuels v. McCurdy* (1925) 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568 [no specific statutory hearing is necessary; sufficient that defendant has right to seek injunction against destruction of seized property]; *Patton v. Board of Harbor Commrs.* (1970) 13 C.A.3d 536, 541, 91 C.R. 832 [city charter validly denied hearing on 5-day suspension of public employee for insubordination; detriment was too small to support constitutional right to challenge minor disciplinary action].)

In *Carrera v. Bertaini* (1976) 63 C.A.3d 721, 134 C.R. 14, the court held invalid the provision of P.C. 597f (and a local ordinance based on it) for the summary impoundment of neglected farm animals without a hearing. The owner's action to review the seizure was not an adequate remedy, for the impoundment immediately resulted in substantial charges for impound fees and costs, which, at the time of the superior court trial 6 weeks later, amounted to \$ 2,477. (63 C.A.3d 729.)

In *Menefee & Son v. Department of Food & Agriculture* (1988) 199 C.A.3d 774, 245 C.R. 166, plaintiffs planted a crop of endive and lettuce for the purpose of producing seed, and used an unauthorized toxic chemical to control birds attacking the seedlings. Defendant, the director of the Department of Food and Agriculture, acting pursuant to former Food & Ag.C. 12648, declared the field a public nuisance, seized it, and prohibited the harvest. The section then provided that if a crop had been treated with an unauthorized economic poison that could reasonably create a health hazard or an unfair business advantage, the director could declare the crop a public nuisance, seize and hold it for 30 days, and, if no action was filed to protest the seizure, order the crop destroyed. *Held*, the statute violates California's Due Process Clause (Cal. Const., Art. I, §7), for the following reasons:

(a) Its application is not limited to emergency situations, but broadly applies to any misuse of chemicals. (199 C.A.3d 782.)

(b) It fails to provide for any administrative hearing; a judicial proceeding for return of the property is not a substitute for a hearing on the merits of the seizure. (199 C.A.3d 782.)

(c) Even if a judicial action could serve as a substitute, this one is deficient. It gives the owner only 30 days to sue; it does not provide compensation in the event that the seizure proves to have been wrongful; and it does not provide the necessary type of judicial hearing. "[I]f a judicial proceeding is the owner's first and only opportunity to have a hearing on the merits of the seizure, then it is essential that the department be required to bear the burden of proof on all issues and the statute must so provide." (199 C.A.3d 782.)

(d) In this case, plaintiffs brought an action for injunctive relief and/or mandamus, and the trial judge applied the usual abuse of discretion standard for review. This standard is wholly inappropriate when the owner's court appearance is his first and only opportunity to contest the merits of the seizure. "The result of the proceedings in this case is that to the date of this decision the department has not yet been required to appear before an impartial hearing officer and carry the burden of proving any of the facts upon which it relies in seizing the ... crop. It follows that the plaintiffs have not yet been accorded the minimal due process to which they are entitled before the government may interfere with their property interests." (199 C.A.3d 783.) *Food & Ag.C. 12648(c)* was revised in 1988 to provide that notice must be given *prior* to seizure, or, if the notice would result in the director's loss of control of the crop, within 5 days of seizure, and that the owner has 15 days to request a hearing before the director.

In *Bryte v. La Mesa* (1989) 207 C.A.3d 687, 691, 255 C.R. 64, the court, following *Menefee*, held that Welf.C. 8102, providing for confiscation of a deadly weapon from a person detained for a mental examination, was invalid for failure to provide prompt administrative review. The statute was amended in 1991 to expedite the review process.

In *Bergeron v. Department of Health Services* (1999) 71 C.A.4th 17, 24, 26, 83 C.R.2d 481, no hearing was required before withholding Medi-Cal payments pending a fraud investigation where a regulation provided procedural notice mechanisms and an opportunity to respond to withholding the notice, and a full contested hearing would be afforded if the matter went to court.

SUPPLEMENT: [This section is current through the latest supplement]

See *Corrales v. Bradstreet* (2007) 153 C.A.4th 33, 60, 62 C.R.3d 440 [administrative evidentiary hearing before Labor Commissioner was not required before penalties could be imposed on employer for denying meal and rest breaks to employees; employer had ability to render decision inconsequential by filing appeal in trial court, where employer would have full due process protections and commissioner's decision was entitled to no weight].



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CHAPTER X - Constitutional Law

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X. DUE PROCESS OF LAW

F. Procedural Due Process in Administrative Proceedings.

4. Summary Action Without Prior Hearing.

a. In General.

3. Distinction: Summary Action Unnecessary.

7 *Witkin Sum. Cal. Law Const Law* § 680

[§ 680] Distinction: Summary Action Unnecessary.

In *Phillips v. San Luis Obispo County Dept. of Animal Regulation* (1986) 183 C.A.3d 372, 228 C.R. 101, plaintiffs' dog, which had bitten several children, was seized by defendant County Department of Animal Regulation, and after an informal hearing, was ordered destroyed. Plaintiff petitioned for mandamus to vacate the destruction order, contending that the regulatory ordinances were unconstitutional in failing to provide notice and a hearing to the owner before the animal was destroyed. *Held*, the writ should issue.

(a) "Principles of due process apply to all takings of non de minimis property, including such disparate objects as farm animals ... , a motorcycle engine ... , a tortoise ... , or a newsrack. ... We think that dogs, being personal property and having economic value, are also included within its reach." (183 C.A.3d 377, citing *Carrera v. Bertaini* (1976) 63 C.A.3d 721, 134 C.R. 14, *supra*, §679, *Hughes v. Neth* (1978) 80 C.A.3d 952, 146 C.R. 37, *infra*, §1060, and *Kash Enterprises v. Los Angeles* (1977) 19 C.3d 294, 138 C.R. 53, 562 P.2d 1302, *supra*, §659.)

(b) *Simpson v. Los Angeles* (1953) 40 C.2d 271, 253 P.2d 464, approving an ordinance permitting summary disposition of unclaimed dogs, is distinguishable; here, the owners claimed the dog, contested the order, and demanded a hearing. (183 C.A.3d 378.)

(c) Even where summary seizure is necessary to protect others (e.g., where a dog is rabid), there must be a prompt postseizure hearing. (183 C.A.3d 379, citing *Kash* and *Carrera*, *supra*.)

(d) The informal "courtesy hearing" in this case did not satisfy due process; the statute or ordinance must provide for notice and hearing. (183 C.A.3d 380, citing *Kash*, *supra*, and *Merco Const. Engineers v. Los Angeles Unified School Dist. of Los Angeles* (1969) 274 C.A.2d 154, 79 C.R. 23.) (See *supra*, §659.)

In *Leslie's Pool Mart v. Department of Food & Agriculture* (1990) 223 C.A.3d 1524, 273 C.R. 373, plaintiff sold swimming pool supplies, including an oxidizer used to control bacteria and algae. Defendant's employees entered plaintiff's stores and seized and quarantined the oxidizer under *Food & Ag.C. 12961 et seq.*, on the ground that it was a pesticide, that it had not been registered as such, and that its possession and sale was therefore illegal under the

Economic Poisons Act (*Food & Ag.C. 12501 et seq.*). Plaintiff was not given prior notice and was not given a hearing on the merits either before or after the seizure. The product was later registered under the Act and the quarantine was lifted. *Held*, the seizure and quarantine violated plaintiff's federal and state due process rights.

(a) Notice and a hearing are normally required *before* deprivation of property, but summary seizure may be permissible if *extraordinary circumstances*, such as an immediate threat to public health or welfare, require very prompt action. (223 C.A.3d 1531, 1532.) Here, however, defendant director knew for over a year that plaintiff was selling the oxidizer without registering it as a pesticide, and it "would be specious" to claim that there were exigent circumstances justifying summary action. (223 C.A.3d 1533.)

(b) Nor can summary action be justified on the basis of an insubstantial risk of error. The director is not likely to err as to whether a product is registered, but the question of whether the product is a pesticide that must be registered is complex. (223 C.A.3d 1533.)

(c) Defendant argues that the availability of legal relief satisfies the due process requirement of a hearing. It is unclear whether this would be sufficient under the federal Constitution. However, under California law, when summary action is allowed, a prompt postseizure *administrative* hearing is required; a judicial remedy alone does not satisfy due process. (223 C.A.3d 1532, 1536.)

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4. Summary Action Without Prior Hearing.

b. Obscene Matter.

1. Valid Seizure or Injunction.

7 *Witkin Sum. Cal. Law Const Law* § 681

[§ 681] Valid Seizure or Injunction.

Summary seizure of obscene matter under a search warrant may be authorized by a statute that complies with the requirements of due process. Thus, in *Aday v. Superior Court* (1961) 55 C.2d 789, 797, 13 C.R. 412, 362 P.2d 47, the statutory procedure was upheld where it contained the following protective provisions: (1) a preliminary ex parte determination of the issue of obscenity on probable cause before issuance of the warrant; (2) an opportunity for a determination after seizure by controverting the warrant; (3) a final judicial determination of the issue in the subsequent criminal proceeding; (4) availability of such remedies as mandamus to regain possession of the property found not obscene.

In *Kingsley Books v. Brown* (1957) 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469, the Court approved a New York statute authorizing an injunction against possession or sale of obscene matter and its surrender for destruction. Distinguishing cases on injunction against future publications (supra, §§359, 363 et seq.), the Court pointed out that seizure and destruction of instruments of *ascertained* wrongdoing is a well established practice (77 S.Ct. 1329, 1 L.Ed.2d 1473), and that the injunction proceeding, with a hearing and opportunity to refrain from violation of the law, is practically less objectionable than the continual threat of prosecution for any actual sale. There is no constitutional objection to this practice. "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by injunction or by some or all of these remedies in combination, it is a matter within the legislature's range of choice." (77 S.Ct. 1328, 1 L.Ed.2d 1474.) (See *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446, 454 [injunction proceeding; no restraint on exhibition until after full adversary proceeding and judicial determination by highest state court]; *Heller v. New York* (1973) 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 [copy of film seized only to preserve it as evidence; no restraint on exhibition].)

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4. Summary Action Without Prior Hearing.

b. Obscene Matter.

2. Invalid Procedure.

7 *Witkin Sum. Cal. Law Const Law* § 682

[§ 682] Invalid Procedure.

The procedure under a Missouri statute was held lacking in due process safeguards in *Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Missouri* (1961) 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127. A magistrate issued a search warrant on probable cause to believe that obscene matter was being kept at a place. The material seized was chosen on the spot by police officers acting on their own judgment without guides or standards, and it was suppressed for a 2-month period before the hearing. At that time, it appeared that among the publications taken were texts on sex problems and marriage, and only one-third of the total were finally held obscene. The Court pointed out that the line between obscene matter and constitutionally protected publications is finely drawn, and that the state does not have the same freedom to adopt summary procedures as it has in dealing with liquor and gambling instruments. "Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause." (81 S.Ct. 1717, 6 L.Ed.2d 1137.) *Kingsley Books v. Brown* (1957) 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469, supra, §681, was distinguished on the grounds that the New York injunction ran only against a named publication, did not authorize restraint before determination of the issue of obscenity, and provided for a speedy judicial decision. (81 S.Ct. 1717, 6 L.Ed.2d 1138.)

In *A Quantity of Copies of Books v. Kansas* (1964) 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809, a Kansas statute provided for filing a verified charge on information and belief that there was an obscene book in the county; then seizure of the book and impounding; then an adversary hearing, and, if obscenity was found, destruction. The Kansas Attorney General, believing (correctly) that the statutory scheme did not meet the requirements of *Marcus*, went further, in this case, identifying titles of a group of novels and filing copies of seven representative books with passages marked. The judge also went beyond the statute by conducting a 45-minute ex parte inquiry, looking at the books and finding them obscene. The seizure followed, and then the hearing, resulting in a determination that all were obscene and an order for destruction. *Held*, reversed, but for differing reasons. The first opinion, with four justices, followed *Marcus*, holding that a hearing after seizure is not sufficient: "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." (84 S.Ct. 1727, 12 L.Ed.2d 814.) Two other justices thought the books were not obscene, but two dissenters argued that the *Kingsley Books* test was met by the statute, and that the distinction between hearing before

and after seizure was unrealistic. (84 S.Ct. 1728, 12 L.Ed.2d 815.) (See *Roaden v. Kentucky* (1973) 413 U.S. 496, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757, 764 [seizure without warrant].)

In *Fort Wayne Books v. Indiana* (1989) 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34, the state filed a civil action against the operator of an adult bookstore, alleging that it had violated the state Racketeering Influenced and Corrupt Organizations statute (RICO) by repeated violations of the state obscenity laws. The state sought forfeiture of all property used in the racketeering activity and moved for immediate seizure of all property subject to forfeiture. After an ex parte hearing, the trial court ordered immediate seizure of the bookstore and its contents. *Held*, the pretrial seizure was improper.

(a) A single copy of a book or film may be seized on a showing of probable cause, but wholesale seizure of expressive material without a prior adversarial hearing is improper. (109 S.Ct. 927, 103 L.Ed.2d 51, 52, citing *Marcus* and *Heller v. New York* (1973) 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745.)

(b) Even assuming that probable cause exists to believe that the items are obscene and that a RICO violation has occurred, and thus that the bookstore and its contents are forfeitable, pretrial seizure is still unconstitutional. The materials are presumptively protected by the First Amendment, and seizure is allowed only after the claimed justification is established in an adversary proceeding. (109 S.Ct. 928, 929, 103 L.Ed.2d 53, 54.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 1102, third line of section, *Mossouri* should be *Missouri*.



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4. Summary Action Without Prior Hearing.

c. Termination of Utility Service.

1. Telephone Service.

7 *Witkin Sum. Cal. Law Const Law* § 683

[§ 683] Telephone Service.

In *Sokol v. Public Util. Com.* (1966) 65 C.2d 247, 53 C.R. 673, 418 P.2d 265, a Public Utilities Commission regulation required that a communications facility discontinue service to any subscriber the utility had reasonable cause to believe was using the service in connection with unlawful activity, and further provided that a written notice from a law enforcement official would constitute reasonable cause. On discontinuance, the subscriber's sole remedy was a complaint filed with the Commission, with no civil liability for damages on the part of the facility. Pursuant to a request of the San Francisco Chief of Police, asserting reasonable cause to believe that petitioner's telephones were used in connection with illegal bookmaking, the telephone company discontinued service. *Held*, the regulation was unconstitutional.

(a) *State action*. The Commission rule required removal on police request, and state officials were involved, despite the fact that a telephone company employee physically disconnected the phone. (65 C.2d 252.)

(b) *Invalid summary action*. Due process depends on the circumstances. The state argued that bookmakers rely almost exclusively on the telephone, and that abrupt discontinuance without advance notice is effective in suppressing the illegal enterprise. But it is equally effective in destroying a legal business to which telephone service is indispensable. (65 C.2d 254.) And restraint on communication by a subscriber affects his or her right of free speech. (65 C.2d 255.) If police had wished to search the premises, they would have had to show probable cause to a magistrate and get a search warrant. A comparable requirement, with the very brief delay involved, would not preclude effective law enforcement. (65 C.2d 255.)

(c) *Valid summary action*. The court laid down guidelines for a proper regulation: "[W]hatever new procedure is hereafter devised must at a minimum require that the police obtain prior authorization to secure the termination of service by satisfying an impartial tribunal that they have probable cause to act, in a manner reasonably comparable to a proceeding before a magistrate to obtain a search warrant. In addition, after service is terminated the subscriber must be promptly afforded the opportunity to challenge the allegations of the police and to secure restoration of the service." (65 C.2d 256.) (See 30 A.L.R.3d 1143 [refusal of service for gamblers]; 32 A.L.R.3d 1041 [refusal of service because of improper language].)

Following the decision in *Sokol*, the Commission adopted a rule requiring probable cause, notice, and a hearing, which the Supreme Court held valid, rejecting a number of constitutional challenges. (See *Goldin v. Public Util. Com.* (1979) 23 C.3d 638, 647, 670, 153 C.R. 802, 592 P.2d 289.)

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4. Summary Action Without Prior Hearing.

c. Termination of Utility Service.

2. Municipal Utility Service.

7 *Witkin Sum. Cal. Law Const Law* § 684

[§ 684] Municipal Utility Service.

Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30, holds that a customer's entitlement to continued service from a municipal utility is a property interest and that due process requires notice and an opportunity for a hearing before service can be terminated. The procedure found invalid was a final notice contained in bills for overdue charges, stating that service would be discontinued if payment was not made by a certain date.

(a) *Property interest.* Under state law, a public utility cannot terminate service at will, but only "for cause"; hence the customer has "a legitimate claim of entitlement" to protection of the *Due Process Clause*. (98 S.Ct. 1561, 56 L.Ed.2d 40.)

(b) *Notice.* "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing. Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified." (98 S.Ct. 1563, 56 L.Ed.2d 42.)

(c) *Hearing.* Applying the balancing approach of *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, *infra*, §687, "some administrative procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services." (98 S.Ct. 1564, 56 L.Ed.2d 44.)

(d) *Common-law remedies inadequate.* Ordinarily, due process requires the opportunity for a hearing prior to deprivation of a significant property interest. The factors that have justified exceptions (see *supra*, §680) are not present here. Judicial remedies are unsuitable to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a suit. (98 S.Ct. 1565, 1566, 56 L.Ed.2d 45, 46.)

Three justices dissented, finding no justification in the record for this "procedural innovation" based on hypothetical examples, and suggesting that the new rule is based on a policy determination rather than construction of the Constitution.

In *Perez v. San Bruno* (1980) 27 C.3d 875, 880, 68 C.R. 114, 616 P.2d 1287, the court said: "We here confront the question whether a municipality providing water, sewer, and garbage disposal services to its citizens and billing therefor by means of a single unified statement may constitutionally resort to the remedy of cessation of water service when a citizen, refusing to pay that component of the unified billing relating to garbage collection and disposal services but paying the other components thereof, fails to make full and complete payment for municipal services rendered."

Plaintiff, alleging that she disposes of all garbage by means of sanitary recycling techniques, refused to pay that portion of the unified bill, and defendant city, acting pursuant to its city code, shut off her water service. *Held*, there was no violation of substantive or procedural due process. The city, to encourage and support all components of its public health and sanitation program, has made continuance of all the offered utility services contingent on payment for all. This system is reasonably related to the legitimate goal sought to be achieved. (27 C.3d 892.)

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4. Summary Action Without Prior Hearing.

d. Denial of Welfare Aid.

1. Termination of Aid.

7 *Witkin Sum. Cal. Law Const Law* § 685

[§ 685] Termination of Aid.

(1) *Goldberg Rule. Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, involved New York's federally assisted program of Aid to Families with Dependent Children. Its administrators allowed termination of aid without prior notice and hearing, affording only a subsequent hearing with judicial review. *Held*, refusal to give a prior evidentiary hearing is a denial of procedural due process.

(a) *Welfare benefits as a right.* Welfare benefits are even more entitled to constitutional protection than unemployment compensation, tax exemption, or public employment. (90 S.Ct. 1017, 25 L.Ed.2d 296.) "Thus the crucial factor in this context--a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended--is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." (90 S.Ct. 1018, 25 L.Ed.2d 297.) The governmental interest in avoiding payment to judgment-proof ineligible persons does not override the recipient's interest; the state has other weapons, e.g., prompt hearings to cut down costs. (90 S.Ct. 1019, 25 L.Ed.2d 298.)

(b) *Nature of required hearing.* The constitutional requirement of notice and a hearing, in the present context, means that a welfare recipient must have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his or her own arguments and evidence orally. (90 S.Ct. 1020, 25 L.Ed.2d 298.) Counsel need not be provided, but the recipient must be allowed to appear with an attorney of his or her choice. (90 S.Ct. 1022, 25 L.Ed.2d 299.) The decision must rest solely on legal rules and evidence adduced at the hearing, and the officer should state the reasons for the determination and indicate the evidence relied on. (90 S.Ct. 1022, 25 L.Ed.2d 301.) The officer must be impartial. Prior involvement in the case will not necessarily bar the officer from hearing it, but he or she should not have participated in making the determination under review. (90 S.Ct. 1022, 25 L.Ed.2d 301.)

(c) *Invalidity of New York procedure.* The state uses a 7-day notice by letter, and a personal conference with a

caseworker, to convey the notice and its basis. But it does not permit recipients to appear personally to present evidence orally and confront or cross-examine adverse witnesses. These omissions are fatal. (90 S.Ct. 1021, 25 L.Ed.2d 299.)

A strong dissent criticized the freezing of welfare programs in constitutional directives, emphasized the need to prevent fraud in the enormous aid program, and argued that the holding might backfire. Because it may take years to get a person off relief rolls, officials will be reluctant to put persons on initially without an exhaustive investigation. (90 S.Ct. 1028, 25 L.Ed.2d 305.) (See 84 Harv. L. Rev. 100 [Goldberg]; 46 So. Cal. L. Rev. 1263 [same]; 5 U.C. Davis L. Rev. 542 [California Welfare Fair Hearings: An Adequate Remedy?]; 47 A.L.R.3d 277 [sufficiency of notice or hearing required prior to termination of welfare benefits]; 3 Rotunda 2d, §17.9.)

(2) *California Programs. Wheeler v. Montgomery* (1970) 397 U.S. 280, 90 S.Ct. 1026, 25 L.Ed.2d 307, dealing with the California program, followed *Goldberg*.

In *McCullough v. Terzian* (1970) 2 C.3d 647, 651, 87 C.R. 195, 470 P.2d 4, the court, on the authority of *Goldberg* and *Wheeler*, held California's Department of Social Welfare hearing procedures defective. (See 47 A.L.R.3d 277.) However, the requirements of notice and of a hearing, in English, were held to comply with the requirements of due process even though the recipient is literate in Spanish and not in English. Non-English-speaking persons have access to numerous sources for language assistance. (*Guerrero v. Carleson* (1973) 9 C.3d 808, 813, 109 C.R. 201, 512 P.2d 833; see 61 Cal. L. Rev. 1405.)

The guidelines of *Goldberg* and *McCullough* were applied in *Jennings v. Jones* (1985) 165 C.A.3d 1083, 212 C.R. 134. Defendant county terminated general assistance welfare benefits after a hearing at which the caseworker who made the decision was not present and could not be compelled to attend. *Held*, this predetermination hearing mechanism violated due process. Although the hearing need not provide all the elements of a judicial or quasi-judicial trial, the minimal requirements of confrontation and right of cross-examination must be met, and were denied here. (165 C.A.3d 1088, 1089, 1090.) "The appearance at the hearing of a file custodian does not, by itself, satisfy the requirement of confrontation nor provide for meaningful cross-examination. The recipient whose benefits are being terminated cannot cross-examine a file. Nor can there be any meaningful cross-examination of a temporary custodian who did not participate in the decision to terminate benefits, and who has no independent knowledge of the case." (165 C.A.3d 1090.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Goldberg Rule*. See 3 Rotunda (4th), §17.9.



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d. Denial of Welfare Aid.

2. Denial of Application for Aid.

7 *Witkin Sum. Cal. Law Const Law* § 686

[§ 686] Denial of Application for Aid.

The *Goldberg* requirement of a hearing on *termination* of benefits (see *supra*, §685) does not apply to the *initial denial* of an application. In view of the "wide spectrum of benefits" available to persons (e.g., public employment, public education, tax exemptions, licenses), a routine requirement of an evidentiary hearing on each denial would place an overwhelming burden on government. (*Zobriscky v. Los Angeles* (1972) 28 C.A.3d 930, 933, 105 C.R. 121 [pointing out, however, that on a proper showing an improper denial may be reviewed and an evidentiary hearing ordered].) (See 25 *Hastings L. J.* 678.)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Termination of Disability Benefits.

7 *Witkin Sum. Cal. Law Const Law* § 687

[§ 687] Termination of Disability Benefits.

Mathews v. Eldridge (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, involved the Social Security Act's provisions for disability benefits to workers. Eligibility is not based on financial need, and is entirely unrelated to the worker's income or support from other sources. The determination whether a disability exists and when it ceases is made by a state agency, which communicates with the disabled worker, obtains information from him or her and from medical sources, and gives the worker full opportunity to review medical reports and submit additional evidence. The agency's determination is subject to reconsideration on request of the worker; on denial the worker has a right to an evidentiary hearing before an administrative law judge, and ultimately to judicial review; and if the benefits are found to have been improperly terminated, the worker is entitled to retroactive payments.

In the instant case, Eldridge was awarded disability benefits in June, 1968. On a review in March, 1972, he was notified of termination. He did not seek reconsideration, but instead brought an action in the federal district court, contending that *Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, supra, §685, established his right to an evidentiary hearing prior to termination. *Held*, there is no such right.

(a) Implicit in prior decisions of the Court is the principle that the continued receipt of social security disability benefits is a statutorily created "property interest" protected by the *Fifth Amendment*. (96 S.Ct. 901, 47 L.Ed.2d 32.) The court has consistently held that *some form of hearing* is required before an individual can be finally deprived of a property interest. (96 S.Ct. 902, 47 L.Ed.2d 32.)

(b) The issue here is whether due process requires an *evidentiary hearing* prior to the initial termination of benefits. *Goldberg* is the only case holding that such a hearing is required; *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, 6 Cal. Proc. (4th), *Provisional Remedies*, §249, merely spoke of something more than an ex parte proceeding before a clerk. (96 S.Ct. 902, 47 L.Ed.2d 32, also citing *Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90, supra, §662.) Identification of the specific dictates of due process generally requires consideration of three distinct factors:

(1) The private interest that will be affected by the official action. As in *Goldberg*, the sole interest of the recipient is in the uninterrupted receipt of income pending final administrative decision on his or her claim; but, unlike the

situation in *Goldberg*, disability benefits are not based on financial need; hence the potential deprivation is generally likely to be less than in *Goldberg*, even though the long delay (over 1 year) of the administrative process makes it significant. (96 S.Ct. 905, 906, 47 L.Ed.2d 36.)

(2) The fairness and reliability of existing predetermination procedures. In welfare entitlement, a wide variety of information may be relevant; but in disability the decision in most cases turns on unbiased medical reports by physical specialists, with little reason to question credibility or veracity, and there is therefore less value in an evidentiary hearing. (96 S.Ct. 907, 47 L.Ed.2d 38.)

(3) The government's interest. A substantial expense would be incurred in providing evidentiary hearings, and the public interest in conserving scarce fiscal and administrative resources must be considered. More than that, "[t]he ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. ... The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. ... In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the social welfare system that the procedures they have provided assure fair consideration of the entitlement claims of individuals. ... This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final." (96 S.Ct. 909, 47 L.Ed.2d 41.) (See 26 *Stanf. L. Rev.* 549 [application of *Goldberg* requirements to termination of social security benefits].)

SUPPLEMENT: [This section is current through the latest supplement]
Fuentes case:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §247.



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1. In General.

7 *Witkin Sum. Cal. Law Const Law* § 688

[§ 688] In General.

(1) *Nature of Rights.* Students in colleges and schools have constitutionally protected rights (see *supra*, §487 et seq.), and in addition are entitled to due process in disciplinary proceedings taken against them. Notice of the charges and grounds, and a hearing adequate for the circumstances, are essential; but there is no requirement of a judicial-type hearing with the right to counsel, the right of cross-examination or observance of the rules of evidence, and the privilege against self-incrimination. (See *Goldberg v. Regents of Univ. of Calif.* (1967) 248 C.A.2d 867, 881, 57 C.R. 463; *Charles S. v. Board of Education* (1971) 20 C.A.3d 83, 89, 97 C.R. 422; 24 Cal. Western L. Rev. 65 [university student's right to retain counsel for disciplinary proceeding]; 48 So. Cal. L. Rev. 836 [privilege against self-incrimination]; for statutory procedure, see *infra*, §690.)

(2) *Expulsion or Dismissal.* Expulsion of a student for a major infraction of regulations requires notice and a hearing, and, if the hearing is not directly before the governing board, findings. (*Perlman v. Shasta Joint Junior College Dist. Bd. of Trustees* (1970) 9 C.A.3d 873, 879, 883, 88 C.R. 563 [expulsion order was properly nullified by lower court on showing that board was biased and had decided to expel student before hearing]; *Wong v. Regents of Univ. of Calif.* (1971) 15 C.A.3d 823, 829, 93 C.R. 502 [allegations of arbitrary dismissal for scholastic deficiency were sufficient against demurrer]; see *Andersen v. Regents of Univ. of Calif.* (1972) 22 C.A.3d 763, 99 C.R. 531 [dismissal of student for cheating; procedure fully complied with due process requirements]; 58 A.L.R.2d 903 [right of student to hearing before suspension or expulsion]; 55 Proof of Facts 3d 313 [improper expulsion of student].)

In *Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124, a medical school student was dismissed for failure to meet academic standards, after a number of academic reviews of her work. *Held*, assuming that the dismissal deprived her of a "liberty" interest in pursuing a medical career, she was not denied due process. *Goss v. Lopez* (1975) 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, *infra*, §689, dealt with a violation of rules of conduct; failure to meet academic standards calls for far less stringent procedural requirements. The historic judgment of educators, supported by many decisions, is that formal hearings before decisionmaking bodies need not be held in the case of academic dismissals. (98 S.Ct. 953, 954, 955, 55 L.Ed.2d 132, 133, 134.) (See *Regents of Univ. of Michigan v. Ewing* (1985) 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 [dismissal of student from educational program was a proper exercise of the faculty's professional judgment]; *Banks v. Dominican College* (1995) 35 C.A.4th 1545,

1551, 42 C.R.2d 110 [dismissal of university student from graduate teaching program, based on her unacceptable academic performance in clinical teaching program, was proper]; *Perez v. Hastings College of the Law* (1996) 45 C.A.4th 453, 456, 459, 53 C.R.2d 1 [dismissal of student from law school because of failure to maintain required GPA was not denial of due process where student did not show extraordinary or compelling reasons excusing his failure]; 6 *Hastings Const. L. Q.* 104 [Horowitz].)

(3) *Suspension*. The relatively minor sanction of suspension may be imposed without formal notice and hearing. Notice may be given by telephone, mail, or other appropriate method; and, if a meeting with school officials is requested, it may be informal. But the suspended student should be given an opportunity to be present at the meeting and to offer informal proof of his or her side of the case. (*Charles S. v. Board of Education*, *supra*, 20 C.A.3d 93, 94; on statutory procedure for short suspensions, see *infra*, §690.)

West's Key Number Digest, Constitutional Law k.278.5

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Rights*. See 9 U.C. Davis J. Juvenile Law & Policy 289 [effect of zero tolerance school discipline policies].



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2. Due Process in Short Suspensions.

7 *Witkin Sum. Cal. Law Const Law* § 689

[§ 689] Due Process in Short Suspensions.

In *Goss v. Lopez* (1975) 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, several high school students were suspended for misconduct under a statute authorizing suspensions up to 10 days without a hearing. *Held*, the statute was unconstitutional.

(a) The charges, if sustained and recorded, could seriously damage the students' standing with their fellow pupils and teachers and interfere with later opportunities for higher education and employment. (95 S.Ct. 736, 42 L.Ed.2d 735.) A 10-day suspension is thus a serious event, and not *de minimis*; hence, it is subject to the requirements of due process. (95 S.Ct. 737, 42 L.Ed.2d 735.)

(b) "What process is due" is a practical question; the timing and content of the notice, and the nature of the hearing, will depend on appropriate accommodation of the competing interests; but "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." (95 S.Ct. 739, 740, 42 L.Ed.2d 739.)

(c) There need be no delay between the notice and the hearing; informal discussion may occur almost immediately after the misconduct, provided that, as a general rule, notice and a hearing should preclude removal from school. And there are exceptional situations, where students pose a continuing danger to persons or property or an ongoing threat of disruption, which justify immediate removal, with notice and hearing thereafter. (95 S.Ct. 740, 42 L.Ed.2d 739.)

(d) Elaborate or formal trial-type hearings are not necessary. "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also

destroy its effectiveness as part of the teaching process." (95 S.Ct. 740, 42 L.Ed.2d 740.)

(e) This holding is limited to the short suspension not exceeding 10 days. Longer suspensions, or expulsions for the remainder of the school term, may require more formal procedures. "Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required." (95 S.Ct. 741, 42 L.Ed.2d 740.)

Four justices joined in a strong dissent. (95 S.Ct. 741, 42 L.Ed.2d 741.) (See *Granowitz v. Redlands Unified School Dist.* (2003) 105 C.A.4th 349, 356, 129 C.R.2d 410 [informal meeting of school officials, student, and student's parents to explain charges of sexual misconduct, followed by notice of suspension listing reasons for 5-day suspension, including statutes violated, satisfied due process requirements]; 89 Harv. L. Rev. 85; 94 Harv. L. Rev. 1106; 12 San Diego L. Rev. 912; 16 Santa Clara L. Rev. 147; 29 Stanf. L. Rev. 627; for 1977 legislative response to *Goss*, see *infra*, §690.)

SUPPLEMENT: [This section is current through the latest supplement]
See 45 San Diego L. Rev. 353 [*Goss v. Lopez*].



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3. Revised Statutory Procedure.

7 *Witkin Sum. Cal. Law Const Law* § 690

[§ 690] Revised Statutory Procedure.

(1) *In General.* In response to *Goss v. Lopez* (1975) 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, supra, §689, the 1977 Legislature amended the Education Code to meet the due process requirements of that decision. The statutes, as subsequently amended and renumbered, are *Educ.C. 48900* et seq. They apply to acts "related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent or principal or occurring within any other school district." (*Educ.C. 48900*; see *Fremont Union High School Dist. v. Santa Clara County Bd. of Education* (1991) 235 C.A.3d 1182, 1186, 286 C.R. 915 ["Whether the pupil is attending his or her own school or involved in his or her own school activity is not determinative"].) (On student's performance of community service in lieu of suspension or expulsion, see *Educ.C. 48900.6*.)

(2) *Suspension.* Suspensions from school by the principal, which may not exceed 5 consecutive school days, require an informal conference at which the pupil is informed of the reason for the suspension and the evidence against him or her, and is given an opportunity to present evidence in his or her defense. (*Educ.C. 48911*.) Statutes specify the grounds for suspension (see *Educ.C. 48900* et seq.; *Granowitz v. Redlands Unified School Dist.* (2003) 105 C.A.4th 349, 358, 129 C.R.2d 410 [grabbing girl's buttocks qualified as use of force and as threat to instructional process sufficient to subject student to suspension under *Educ.C. 48900.5* for first time offense]), and provide a special procedure for emergency situations (see *Educ.C. 48911(c)*; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 C.A.4th 1352, 1363, 132 C.R.2d 748 [arguing with another student and setting fire to poster, which student was not accused of doing until 2 weeks after occurrence, did not constitute clear and present danger to persons or property sufficient to require immediate suspension of student under *Educ.C. 48911*, without benefit of investigation and presuspension conference]). (On suspension from class by teacher, see *Educ.C. 48910*; on student's performance of community service in lieu of suspension or expulsion, see *Educ.C. 48900.6*.)

Local school districts are authorized to establish policies that permit school officials "to conduct a meeting with the parent or guardian of a suspended pupil to discuss the causes, the duration, the school policy involved, and other matters pertinent to the suspension." (*Educ.C. 48914*.) When a pupil is suspended, the school must make a reasonable effort to contact his or her parent or guardian in person or by phone, and the parent or guardian must be notified in writing. (*Educ.C. 48911(d)*.)

(3) *Expulsion*. This more drastic measure requires a hearing for the pupil and his or her parent or guardian before the governing board of the school district (*Educ.C. 48918(a)*) or a hearing officer or administrative panel (*Educ.C. 48918(d)*), within 30 school days from the date of the principal's recommendation for expulsion (*Educ.C. 48918(a)*). (See *Garcia v. Los Angeles County Bd. of Education* (1981) 123 C.A.3d 807, 810, 177 C.R. 29 [time provisions are mandatory and jurisdictional; school board's failure to abide by them invalidated its action]; cf. *Board of Education v. Sacramento County Bd. of Education* (2001) 85 C.A.4th 1321, 1329, 102 C.R.2d 872 [disagreeing with *Garcia*; time provisions are merely directory as evidenced by lack of provision for penalty, inclusion of provision for postponement, and stated requirement that matters be pursued with "reasonable diligence"]; on requirement that rules be adopted governing expulsion hearings in cases involving sexual assault, see *Educ.C. 48918.5*.) The hearing is closed unless the pupil or his or her parent or guardian requests that it be open. (*Educ.C. 48918(c)*.)

The pupil and his or her parent or guardian have the rights to notice, to appear in person, to be represented by counsel, to inspect documents, to confront witnesses, and to question and present evidence. (*Educ.C. 48918(b)*.) However, the power of school boards under *Educ.C. 48918(i)* to issue subpoenas for percipient witnesses is discretionary, not mandatory. (*Woodbury v. Brown-Dempsey* (2003) 108 C.A.4th 421, 432, 134 C.R.2d 124.) The technical rules of evidence do not apply, but evidence must be of the kind on "which reasonable persons are accustomed to rely in the conduct of serious affairs." A decision to expel must be supported by substantial evidence. (*Educ.C. 48918(h)*.)

The determination is made by the governing board. (*Educ.C. 48918(c)*.) If the hearing is held before a hearing officer or administrative panel, the officer or panel must recommend for or against expulsion; the governing board must accept a recommendation against expulsion, but may reject a recommendation for expulsion. (*Educ.C. 48918(e)*.) A final action to expel must be taken by the governing board at a public meeting (*Educ.C. 48918(j)*), and may be appealed to the county board of education, which must hold a hearing and render its decision (*Educ.C. 48919*). The governing board's decision whether to expel a pupil ordinarily must be made within 10 school days after the conclusion of the hearing. (*Educ.C. 48918(a)*.)

In *John A. v. San Bernardino City Unified School Dist.* (1982) 33 C.3d 301, 187 C.R. 472, 654 P.2d 242, plaintiff high school student was expelled for participating in a fight in which two boys were injured. At a hearing before a three-person administrative panel, plaintiff denied kicking or striking the victims, but a written report of an investigation conducted by the vice principal contained statements from six witnesses that were in direct conflict with plaintiff's testimony. Neither the victims nor any other witnesses testified at the hearing, and no explanation for their absence was offered. After the panel's recommendation for expulsion was accepted by the school board and affirmed by the county board of education, plaintiff's petition for mandamus compelling his readmission to school was denied. *Held*, reversed; the procedure violated former *Educ.C. 48914* (now *Educ.C. 48918*); hence, due process claims involving denial of rights of confrontation and cross examination were not reached.

(a) The statute requires that the evidence be of the kind on which "reasonable persons are accustomed to rely in the conduct of serious affairs." "[A] reasonable person in the conduct of serious affairs will not rely solely on written statements but will demand that witnesses be produced so that their credibility may be tested and their testimony weighed against conflicting evidence when their testimony appears readily available and there is no substantial reason why their testimony may not be produced." (33 C.3d 307.)

(b) However, where the board finds that revealing witnesses' names and requiring them to testify may subject them to a substantial risk of retaliation, the witnesses are not "readily available," and the board may rely on statements and reports. (33 C.3d 308.)

(c) The following contentions are rejected: (1) that the use of school district employees (teachers from schools other than plaintiff's) to conduct the hearing denied plaintiff his right to an impartial factfinder (perfect impartiality is not required; Legislature may choose to use persons attuned to school problems), and (2) that failure of the notice to inform plaintiff that, if indigent, he was entitled to free legal assistance violated his right to counsel (right to free counsel in

these situations varies throughout the state; the district was unable to determine availability of the right to plaintiff without knowing what matters he would assert at the hearing). (33 C.3d 308, 309.)

A dissent argued that (a) neither the constitutional Due Process Clauses nor the statute giving the accused the right to question witnesses who "testify at the hearing" requires confrontation and cross-examination in a school setting; and (b) if imposed, this requirement will severely erode schools' ability to maintain decorum and impose discipline, e.g., for fear of reprisal, students will refuse to give evidence; school districts will be forced to hire lawyers to prosecute and to conduct hearings; schools will be turned into mini-courthouses. (33 C.3d 316, 317.) (See *T.H. v. San Diego Unified School Dist.* (2004) 122 C.A.4th 1267, 1282, 1286, 19 C.R.3d 532 [school district's "zero tolerance" policy requiring principal to recommend expulsion hearing for students committing specified offenses does not violate due process or state statutes].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General. Educ.C. 48900* was amended in 2008 to add that the statute applies to acts under the jurisdiction of the superintendent "of the school district."

See 45 *San Diego L. Rev.* 353 [*Goss v. Lopez* and its progeny].



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g. Dismissal of Professors and Schoolteachers.

7 *Witkin Sum. Cal. Law Const Law* § 691

[§ 691] Dismissal of Professors and Schoolteachers.

In *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, R, a university teacher hired for a fixed term of one academic year, was informed that he would not be rehired. *Held*, the failure to grant him a hearing or to state reasons for the determination was not a denial of due process.

(a) Where a protected interest is involved, there is a right to some kind of prior hearing before deprivation of that interest. But the interest must be one that comes within the Fourteenth Amendment's protection of "liberty" or "property." (92 S.Ct. 2706, 33 L.Ed.2d 557.)

(b) There was no deprivation of liberty. The state made no charge against his good name as in *Wisconsin v. Constantineau* (1971) 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515, *supra*, §659, nor did it impose a stigma or other disability that would foreclose other employment opportunities. (92 S.Ct. 2707, 33 L.Ed.2d 558.) The record did not show that the decision was improperly based on the exercise of First Amendment rights. (92 S.Ct. 2708, 33 L.Ed.2d 559.) There was merely a termination of employment; and "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." (92 S.Ct. 2708, 33 L.Ed.2d 560.)

(c) There was no deprivation of property. Although property interests protected by procedural due process extend beyond ownership of tangibles, and include some specific benefits (e.g., welfare aid, under *Goldberg* rule, *supra*, §685), there must be a legitimate claim of entitlement to the benefit, not merely an abstract need for it or a unilateral expectation of it. (92 S.Ct. 2709, 33 L.Ed.2d 561.) Here, the statute that created the interest made no provision for reemployment. Hence, R simply had an abstract concern in his being rehired, but no property interest sufficient to require a hearing on the decision not to rehire. (92 S.Ct. 2710, 33 L.Ed.2d 561.) (See 24 *Hastings L. J.* 1253.)

On the other hand, if (1) the employment is under a system of tenure, by express agreement or by implied contract, or (2) the dismissal or refusal to rehire is a retaliation for exercise of First Amendment rights, refusal of a hearing is a denial of due process. (*Perry v. Sindermann* (1972) 408 U.S. 593, 92 S.Ct. 2694, 2698, 2700, 33 L.Ed.2d 570, 579; see *Bekiaris v. Board of Education* (1972) 6 C.3d 575, 586, 100 C.R. 16, 493 P.2d 480; *Zumwalt v. Trustees of Calif. State Colleges* (1973) 33 C.A.3d 665, 678, 109 C.R. 344.) (On adequacy of hearing, see 3 *Summary* (10th), *Agency and*

Employment, §292 et seq.; on discharge of nontenured employees, see 3 *Summary* (10th), *Agency and Employment*, §307 et seq.)

Brown v. State Personnel Bd. (1985) 166 C.A.3d 1151, 213 C.R. 53, holds that extreme delay in instituting a disciplinary proceeding may preclude dismissal of a professor. Four years after discovery of allegations that plaintiff associate professor had been guilty of sexual harassment of female students, formal charges were made, and the administrative proceeding resulted in dismissal. *Held*, plaintiff was entitled to reinstatement.

(a) *Govt.C. 19635* contains a 3-year statute of limitations on punitive action against a state employee for any cause based on any *civil service law* of the state. This section clearly does not apply to the present case. (166 C.A.3d 1157, 1158.)

(b) The doctrine of *laches* does apply to administrative proceedings. (166 C.A.3d 1158, citing *Gates v. Department of Motor Vehicles* (1979) 94 C.A.3d 921, 156 C.R. 791, 9 Cal. Proc. (4th), *Administrative Proceedings*, §97.) Unreasonable delay can be found as a matter of law where the delay is longer than the period of the statute of limitations in analogous cases at law. (166 C.A.3d 1159, citing *In re Marriage of Modnick* (1983) 33 C.3d 897, 909, 191 C.R. 629, 663 P.2d 187, 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §229.) Hence, the 3-year period of *Govt.C. 19635* is relevant. "We borrow this period and hold that unless excused, a delay in the initiation of disciplinary proceedings for more than three years is unreasonable as a matter of law." (166 C.A.3d 1160.)

(c) Prejudice is established by detrimental reliance on the status quo. (166 C.A.3d 1162.) Here, in the absence of contrary proof, it must be assumed that plaintiff's advancement to tenure led him to devote his energies to this college and to forego other employment opportunities. "The loss of four years at the outset of an academic career is a considerable change of position in reliance upon the status quo." (166 C.A.3d 1163.) (See *California Teachers Assn. v. California* (1999) 20 C.4th 327, 338, 84 C.R.2d 425, 975 P.2d 622, *supra*, §661 [*Educ.C. 44944(e)*], requiring dismissed or suspended teachers to pay one-half cost of pretermination hearing, is invalid on its face); *Webster v. Trustees of Calif. State University* (1993) 19 C.A.4th 1456, 1462, 1463, 24 C.R.2d 150 [tenured state university professor over age 70 who applied for continuation of his tenure under 5 Cal. Code Reg. 43662, but who was terminated by university for substandard job performance, had vested right in continuation of his employment]; *Picton v. Anderson Union High School Dist.* (1996) 50 C.A.4th 726, 733, 734, 57 C.R.2d 829 [school district had duty to notify Commission on Teacher Credentialing of teacher's resignation and to provide Committee of Credentials with facts that were cause of disciplinary action; portion of agreement between teacher and district that would foreclose transmission of facts was illegal as matter of public policy].)

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SUPPLEMENT: [This section is current through the latest supplement]
Gates case:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §114.

In re Marriage of Modnick case:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §229.



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h. Punitive Action Against Civil Service Employee.

1. In General.

7 Witkin Sum. Cal. Law Const Law § 692

[§ 692] In General.

(1) *Balancing of Interests*. The statutory procedure for discipline of a civil service employee (*Govt.C. 19570* et seq.) formerly called for a simple notification of the action taken, with an evidentiary hearing after the discipline was imposed. In *Skelly v. State Personnel Bd.* (1975) 15 C.3d 194, 124 C.R. 14, 539 P.2d 774, the procedure was held unconstitutional.

(a) *Property interest*. A permanent civil service employee has a property interest in the continuation of his or her employment, which is protected by due process. (15 C.3d 206, citing *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, supra, §691.)

(b) *Test of procedural due process in disciplinary procedures*. The strict theory of *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, and *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, that in the case of a significant deprivation of a property interest there must be prior notice and hearing except in extraordinary circumstances (see supra, §646) has given way to a less inflexible approach: The timing and content of the notice and the nature of the hearing will depend on an appropriate accommodation of the competing interests involved. (15 C.3d 209, citing *Goss v. Lopez* (1975) 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, supra, §689.) The court in balancing the interests takes into account a number of factors, including: "whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful." (15 C.3d 209.)

(c) *Arnett case controlling*. *Arnett v. Kennedy* (1974) 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15, involving the federal civil service act, is controlling. The several opinions of the justices were in disagreement on a number of matters, but they compel the conclusion that the California statute does not meet constitutional demands. "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these

preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (15 C.3d 215.) Hence, the provision for punitive action in *Govt.C. 19574* violates the due process clauses of the federal and *California Constitutions*. (15 C.3d 215.) (See *Shoemaker v. Los Angeles* (1995) 37 C.A.4th 618, 629, 633, 43 C.R.2d 774 [because physician's reassignment, without reduction in pay, from chief of emergency medicine department to physician specialist did not implicate property right, due process did not require predisciplinary procedural safeguards; reviewing scope of *Skelly* requirements]; *Dobbins v. San Diego County Civil Service Com.* (1999) 75 C.A.4th 125, 131, 89 C.R.2d 39 [reassignments that were not disciplinary did not trigger hearing rights]; on right of public employee to hearing on termination of employment for alleged violation of constitutional or statutory rights, see 3 *Summary* (10th), *Agency and Employment*, §289 et seq.)

(2) *Short Suspension*. The *Skelly* and *Arnett* holdings were distinguished in *Civil Service Assn. v. San Francisco* (1978) 22 C.3d 552, 150 C.R. 129, 586 P.2d 162, dealing with a 4-day disciplinary suspension imposed without prior notice and opportunity for a hearing.

(a) Although a permanent employee has a property interest, due process does not require a *Skelly* type notice and hearing in short-term suspensions of no more than 5 days. (22 C.3d 560.) The flexible approach of *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, supra, §687, should be followed. (22 C.3d 561.)

(b) Although the risk of error may be just as great in a short suspension as in a discharge, the consequences are not, and the interim loss to the employee should not be deemed "substantial" in the absence of special circumstances not shown here. (22 C.3d 562.) *Goss v. Lopez*, supra, is distinguishable because of its emphasis on the permanent effect of suspension on the life of a child. (22 C.3d 563.) Hence, "the employee's interest in continued employment, viewed in the context of the shortness of the suspensions here involved and the city's competing interest in prompt action for the maintenance of discipline, does not demand an accommodation of the nature we required in *Skelly*." (22 C.3d 563.)

(c) The employee is, however, entitled to "some modicum of due process protection," i.e., to a procedure that will apprise him or her of the proposed action and the reasons therefor, will furnish a copy of the charges and materials on which the action is based, and will give him the right to respond "either during the suspension or within a reasonable time thereafter." (22 C.3d 564.) This kind of procedure will provide a meaningful hedge against erroneous action, and an opportunity for the employee to protect his or her reputation and avoid the harmful effects on his or her record of an unwarranted penalty. (22 C.3d 564.)

Three justices dissented, arguing that *Skelly* and *Goss* are not distinguishable, and that they establish a right to prior notice and opportunity for hearing. (22 C.3d 568.)

(3) *Statutory Amendment*. Advance written notice of an adverse action must be given. This notice must include (a) a statement of the nature and effective date of the action, (b) a statement of the reasons for the action "in ordinary language," and (c) a statement of the employees' right to answer and appeal. (*Govt.C. 19574*.)

West's Key Number Digest, Constitutional Law k.278.4

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Balancing of Interests*. See *Gilbert v. Sunnyvale* (2005) 130 C.A.4th 1264, 1280, 31 C.R.3d 297, Supp., infra, §961 [*Skelly v. State Personnel Bd.* (1975) 15 C.3d 194, 124 C.R. 14, 539 P.2d 774, text, p. 1119, does not require that every document listed in case against officer be produced prior to pretermination hearing where materials that are provided adequately explain and give substance of employer's evidence so that officer can adequately respond at pretermination stage; however, city must still provide full and fair posttermination evidentiary hearing].



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X. DUE PROCESS OF LAW

F. Procedural Due Process in Administrative Proceedings.

4. Summary Action Without Prior Hearing.

h. Punitive Action Against Civil Service Employee.

2. Termination Under AWOL Statute.

7 *Witkin Sum. Cal. Law Const Law* § 693

[§ 693] Termination Under AWOL Statute.

Under former Govt.C. 19503 (the "AWOL statute," now *Govt.C. 19996.2*), a civil service employee's absence without leave for 5 days is deemed an abandonment of the job, subjecting the employee to "automatic resignation." As applied to the employee in *Zike v. State Personnel Bd.* (1983) 145 C.A.3d 817, 822, 823, 193 C.R. 766, the court found the statute unconstitutional in failing to provide the preremoval safeguards required by *Skelly v. State Personnel Bd.* (1975) 15 C.3d 194, 124 C.R. 14, 539 P.2d 774, *supra*, §692.

In *Coleman v. Department of Personnel Administration* (1991) 52 C.3d 1102, 1118, 278 C.R. 346, 805 P.2d 300, following the approach of *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, *supra*, §687, the issue was what procedural safeguards must be afforded a permanent civil service employee subject to *Govt.C. 19996.2*. "We base our resolution of this issue on our analyses of the AWOL statute itself and of pertinent decisions of the United States Supreme Court, and on our assessments of the employee's private interest in retaining employment and of the public's interest in promptly removing from the state payroll those employees who are absent without leave. We conclude that before the state invokes the AWOL statute, due process requires that it provide the employee with notice and an opportunity to respond. But because a constructive resignation under the AWOL statute differs significantly from a dismissal for cause, we also conclude that due process does not require that the employee be given a postseverance evidentiary hearing." (52 C.3d 1108.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Federal Constitution.
a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 694

[§ 694] In General.

(1) *Restrictions on State.* The Fourteenth Amendment to the federal Constitution provides that no *state* shall "deny to any person within its jurisdiction the equal protection of the laws." (See 3 Rotunda, Chap. 18; 2 Tribe, Chap. 16; 34 *Stanf. L. Rev.* 453 [congressional power to implement guarantee under §5 of Amendment]; Cal. Civil Practice, 2 Civil Rights Litigation, §8:1 et seq. [text and forms for actions involving equal protection]; 16*B Am.Jur.2d* (1998 ed.), *Constitutional Law* §777 et seq.)

(2) *Restrictions on Federal Government.* There is no Equal Protection Clause applicable to the federal Government. (*La Belle Iron Works v. United States* (1921) 256 U.S. 377, 41 S.Ct. 528, 65 L.Ed. 998; *Hirabayashi v. United States* (1943) 320 U.S. 81, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774, 1786; *Harding v. Harding* (2002) 99 C.A.4th 626, 635, 121 C.R.2d 450, citing the text.)

However, the federal Constitution does require *uniformity* in certain instances, e.g., in the imposition of indirect taxes. (U.S. Const., Art. I, §8; see 9 *Summary* (10th), *Taxation*, §106.) And it is now settled that discrimination may be so arbitrary and injurious as to be deemed a violation of due process. (See *Detroit Bank v. United States* (1943) 317 U.S. 329, 63 S.Ct. 297, 301, 87 L.Ed. 304, 311; *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693, 694, 98 L.Ed. 884, 886, *infra*, §750; *Schneider v. Rusk* (1964) 377 U.S. 163, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218, 222, *supra*, §196; *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600, 619, *infra*, §735 [District of Columbia]; 3 Rotunda, §18.1; 27 *Hastings Const. L. Q.* 243 [Justice Murphy and the Fifth Amendment].)

In *Hampton v. Wong* (1976) 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495, *infra*, §724, the Court said: "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis ... , the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause." (96 S.Ct. 1904,

48 L.Ed.2d 506.) (See *Mathews v. Diaz* (1976) 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478, *infra*, §730; 90 Harv. L. Rev. 105 [Hampton].)

West's Key Number Digest, Constitutional Law k.209 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Restrictions on State*. See 3 Rotunda 4th, Chap. 18; 94 Cal. L. Rev. 945, 969 [symposium on behavioral realism: implicit bias].

(2) *Restrictions on Federal Government*. See 3 Rotunda 4th, §18.1.



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b. Meaning of Equal Protection.

8 *Witkin Sum. Cal. Law Const Law* § 695

[§ 695] Meaning of Equal Protection.

(1) *In General.* The Equal Protection Clause requires that persons under like circumstances be given equal protection and security in the enjoyment of personal and civil rights, the acquisition and enjoyment of property, the enforcement of contracts, and the prevention and redress of wrongs, and that they be subject to similar taxes and penalties.

The Clause creates no new rights. Unlike the Due Process Clause, it does not guarantee any minimum of protection, but merely requires that persons similarly situated receive equal treatment. (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 62 S.Ct. 1110, 1112, 86 L.Ed. 1655, 1659; *In re Kotta* (1921) 187 C. 27, 31, 200 P. 957; but see *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693, 694, 98 L.Ed.2d 884, 886, *infra*, §750.) (On classification of subjects of legislation, see *infra*, §701 et seq.)

(2) *Texts and Law Reviews.* The meaning of equal protection has been discussed extensively. (See 3 Rotunda, §18.2; 74 *Cal. L. Rev.* 1687 [substantive equality and equal opportunity]; 86 *Cal. L. Rev.* 315 [failure of equal protection doctrine to address "nonproxy" discrimination adequately]; 91 *Harv. L. Rev.* 1 [equal citizenship under Fourteenth Amendment]; 96 *Harv. L. Rev.* 828 [perpetuation of past discrimination]; 100 *Harv. L. Rev.* 1146 [Justice Stevens' Equal Protection Jurisprudence]; 6 *Hastings Const. L. Q.* 403 et seq. [Symposium]; 8 *Hastings Const. L. Q.* 29 [effects of invalidating law: extension or curtailment, and problem of retroactivity]; 9 *Hastings Const. L. Q.* 279 [The Judicial Process in Equal Protection Cases]; 19 *Hastings Const. L. Q.* 599 [The Constitution and the Economically Disadvantaged]; 33 *McGeorge L. Rev.* 473 [stereoscopic approach to equal protection and due process]; 22 *San Diego L. Rev.* 499 [suggesting that primary function of Clause is to guarantee right to protection of laws, rather than to outlaw discrimination generally against specific class]; 41 *Stanf. L. Rev.* 1105 [The Myth of Intent in Equal Protection].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Law Reviews.* See 3 Rotunda 4th, §18.2.



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c. Scope of Guarantee.

8 *Witkin Sum. Cal. Law Const Law* § 696

[§ 696] Scope of Guarantee.

(1) *Persons and Entities Protected.* Like the Due Process Clause (*supra*, §618), the equal protection guarantee extends to persons, including aliens (*Wo v. Hopkins* (1886) 118 U.S. 356, 6 S.Ct. 1064, 1070, 30 L.Ed. 220, 226; *infra*, §721) and corporations (*Gulf, Colorado, & Santa Fe Ry. Co. v. Ellis* (1897) 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666). But it is said that the Clause does not require equal treatment of private persons or corporations and the state. (See *Tustin Heights Assn. v. Board of Supervisors of Orange* (1959) 170 C.A.2d 619, 632, 339 P.2d 914, *infra*, §1036; *California Assn. for Safety Education v. Brown* (1994) 30 C.A.4th 1264, 1286, 36 C.R.2d 404 [Driver Training Penalty Assessment Fund is not "person" for purposes of Equal Protection Clause].)

Although discrimination is usually against a class of persons, a single individual may invoke the constitutional protection on a showing of unequal treatment. (See *Gaines v. Canada* (1938) 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208, *infra*, §749; *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 120 S.Ct. 1073, 1074, 145 L.Ed.2d 1060, 1062 [equal protection claim may be brought by "class of one" where plaintiff alleges that he or she has been intentionally treated differently and there is no rational basis for difference in treatment]; *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 C.A.4th 597, 606, 6 C.R.3d 574 [following *Olech*].)

(2) *Rights Protected.* The Clause protects not only property rights (*infra*, §709 et seq.) and personal rights (*infra*, §721 et seq.), but also political rights, such as the right to vote (*supra*, §238 et seq.).

West's Key Number Digest, Civil Rights k.k.108 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Persons and Entities Protected.*

Class-of-one theory: In *Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. ___, 128 S.Ct. 2146, 170 L.Ed.2d 975, plaintiff employee brought a class-of-one equal protection claim alleging that her public employment was terminated for arbitrary, vindictive, and malicious reasons. The Court held that the class-of-one theory of equal protection, recognized in *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060, text, p. 70, does not apply to public employment. (128 S.Ct. 2151, 170 L.Ed.2d 983.)

(a) In constitutional analysis, there is a crucial difference between the government exercising regulatory power as a lawmaker and the government managing its internal operations as an employer. The government as employer has far broader powers than it has as a sovereign. (128 S.Ct. 2151, 170 L.Ed.2d 983.) And the government has far greater leeway in dealing with citizen employees than it does when dealing with citizens at large. (128 S.Ct. 2151, 170 L.Ed.2d 984.) Although employees do not lose their constitutional rights when they are hired by the government, "those rights must be balanced against the realities of the employment context." In striking the appropriate balance, the Court must consider "whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." (128 S.Ct. 2152, 170 L.Ed.2d 985.)

(b) The Equal Protection Clause requires all persons subject to legislation or regulation who are in the same circumstances to be treated alike. Thus, when it appears that an individual is being singled out for different treatment by the government, the specter of arbitrary classification is raised, and equal protection requires the government to show a rational basis for the difference. *Olech* involved the government's regulation of property, and the cases on which it relied involved property assessment and taxation schemes. In those cases, there was a clear standard against which departures could be assessed. "There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations." (128 S.Ct. 2153, 170 L.Ed.2d 986.)

(c) Employment decisions are very "often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." Individual personalities, interpersonal relationships, and the varied needs of the workplace must be considered. (128 S.Ct. 2154, 170 L.Ed.2d 987.) "Thus, the class-of-one theory of equal protection--which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review--is simply a poor fit in the public employment context." (128 S.Ct. 2155, 170 L.Ed.2d 988.) Government offices simply could not function if every employment decision was subject to constitutional review. (128 S.Ct. 2156, 170 L.Ed.2d 989.)

(d) The class-of-one theory of equal protection is contrary to the concept of at-will government employment. Although public employees are now mostly protected by various statutory schemes preventing discharge for impermissible reasons, "a government's decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate." (128 S.Ct. 2156, 170 L.Ed.2d 989.)

Three justices joined in a dissent. (128 S.Ct. 2157, 170 L.Ed.2d 991.)

See 34 *Ecology L. Q.* 493 [*Olech* and its progeny]; 32 *A.L.R.6th* 457 [Application of Class-of-One Theory of Equal Protection to Public Employment].



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d. State Action.
1. General Principle.

8 *Witkin Sum. Cal. Law Const Law* § 697

[§ 697] General Principle.

Like the Due Process Clause, the Equal Protection Clause applies only to *state* action, and not to private discrimination. (See *Civil Rights Cases* (1883) 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835; *Evans v. Newton* (1966) 382 U.S. 296, 86 S.Ct. 486, 488, 15 L.Ed.2d 373, 377, *infra*, §759; *National Collegiate Athletic Assn. v. Tarkanian* (1988) 488 U.S. 179, 109 S.Ct. 454, 463, 102 L.Ed.2d 469, 487, *supra*, §622 [actions of NCAA did not meet state action requirement]; *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001) 531 U.S. 288, 121 S.Ct. 924, 931, 148 L.Ed.2d 807, 818, *supra*, §622 [distinguishing *Tarkanian*; state interscholastic athletic association engaged in state action when it enforced rule against member school]; *Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation* (2003) 538 U.S. 188, 123 S.Ct. 1389, 1394, 155 L.Ed.2d 349, 358 [city's placement of facially neutral citizen's referendum on ballot did not constitute state action]; *Sokol v. Public Util. Com.* (1966) 65 C.2d 247, 252, 53 C.R. 673, 418 P.2d 265, *supra*, §683; *Gabaldon v. United Farm Workers Organizing Committee* (1973) 35 C.A.3d 757, 762, 764, 111 C.R. 203, 3 *Summary* (10th), *Agency and Employment*, §546; 2 *Rotunda*, Chap. 16; 82 *Harv. L. Rev.* 1069 [development of concept]; 115 *Harv. L. Rev.* 437 [*Brentwood Academy*]; 18 *Hastings Const. L. Q.* 587 [state action and Rehnquist Court]; 68 *So. Cal. L. Rev.* 663 [thoughts on state action].)

West's Key Number Digest, Civil Rights k.110 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 2 *Rotunda* 4th, Chap. 16.



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2. State Participation or Involvement.

8 *Witkin Sum. Cal. Law Const Law* § 698

[§ 698] State Participation or Involvement.

Actions of private individuals performing state functions are subject to the Fourteenth Amendment. (See *Smith v. Allwright* (1944) 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, supra, §252 [white primaries]; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* (1968) 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603, 3 Summary (10th), *Agency and Employment*, §648.) The same is true of acts of private persons where there is a significant state participation or involvement.

In *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, the city of Wilmington, Delaware, created a Parking Authority, which leased part of the premises to a private restaurant operator. The restaurant refused service to petitioner, a Black. *Held*, this was state action. The land and building were publicly owned, the relationship of the restaurant to the parking facility was close--it was in fact an integral part of the facility; and the state must be considered a participant. "[W]hat we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they are binding covenants written into the agreement itself." (81 S.Ct. 862, 6 L.Ed.2d 52.) (See 5 *Pepperdine L. Rev.* 95 [narrowing judicial focus as alternative to *Burton*].)

In *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, the Moose Lodge, following its established policy, refused service at the dining room to a black guest of a member. The district court granted an injunction on the ground that issuance of a liquor license was state involvement that would make discrimination a violation of the Amendment. Thereafter, the state liquor control board adopted a regulation requiring club licensees to adhere to their constitutions and bylaws, and the Lodge then amended its bylaws to require racial restrictions on guests as well as members. *Held*, the issuance of the liquor license was not state involvement, but the subsequent regulation was.

(a) A private club, not publicly funded, with well-defined requirements for membership, and open only to members and invited guests, may refuse service on the basis of race without violating the Fourteenth Amendment. The fact that it receives some benefit from the state, by license or utility services, does not destroy its private character. (92 S.Ct. 1971, 32 L.Ed.2d 637.) The "symbiotic relationship between lessor and lessee" in *Burton* was not present here. (92 S.Ct. 1972,

32 L.Ed.2d 638.)

(b) The regulation, however, though neutral in terms, placed state sanctions behind the discriminatory membership rules. "State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action." (92 S.Ct. 1974, 32 L.Ed.2d 641.) (See *Gilmore v. Montgomery* (1974) 417 U.S. 556, 94 S.Ct. 2416, 2426, 41 L.Ed.2d 304, 319 [question whether city's action in allowing exclusive use of recreational facilities by all-white private schools and groups involved state action referred to district court on remand, with strong suggestion that *Burton*, rather than *Moose Lodge*, should control]; *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001) 531 U.S. 288, 121 S.Ct. 924, 933, 148 L.Ed.2d 807, 821, supra, §622 [entwinement of State Board of Education and public schools in state interscholastic athletic association required conclusion that ostensibly private association should be charged with public character and judged by constitutional standards]; 13 Southwestern U. L. Rev. 237 [Challenging the Private Club]; 29 *Hastings L. J.* 417 [Sex Discrimination in Private Clubs]; 7 San Fernando Valley L. Rev. 77 [Private Club Discrimination: The Civil Rights Statutes and the Constitution]; 44 *Stanf. L. Rev.* 1 [public-private distinction]; on private discrimination in housing, see infra, §§851, 945 et seq.; on judicial action in private litigation, see infra, §700.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Acts of State Officers.

8 Witkin Sum. Cal. Law Const Law § 699

[§ 699] Acts of State Officers.

The state action prohibited by the Fourteenth Amendment need not be legislative action. The acts of an executive or judicial officer may also violate the constitutional protection, as where a state judge excludes Blacks from juries. (*Ex parte Virginia* (1879) 100 U.S. 339, 25 L.Ed. 676; see *infra*, §744.) Hence, in addition to cases arising under discriminatory state legislation, the Equal Protection Clause may be invoked in cases where state officials have acted, and sometimes where individuals have acted under the authority of state legislation. (See *McFarland v. American Sugar Refining Co.* (1916) 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899; *Lane v. Wilson* (1939) 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; *Cochran v. Kansas* (1942) 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453 [preventing party from perfecting appeal]; *Cooper v. Aaron* (1958) 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, *infra*, §751 [local school board, under legislative and executive pressure, sought to delay desegregation]; *supra*, §252.)

However, where the statute itself is fair and nondiscriminatory on its face, and the contention is that it is *applied* in a discriminatory manner, proof of discrimination alone is insufficient, because it may merely amount to a showing of disobedience of the state law by the officer. The evidence must show an "intentional or purposeful discrimination" so that the practical effect is equivalent to a discrimination incorporated in the statute. (*Snowden v. Hughes* (1944) 321 U.S. 1, 64 S.Ct. 397, 401, 88 L.Ed. 497, 502 [canvassing board, in alleged violation of state law, excluded plaintiff's certificate of candidacy for state assembly; showing held insufficient]; see *Akins v. Texas* (1945) 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692, *infra*, §744; *People v. Winters* (1959) 171 C.A.2d Supp. 876, 883, 342 P.2d 538; *Cilderman v. Los Angeles* (1998) 67 C.A.4th 1466, 1470, 80 C.R.2d 20 [following *Snowden*]; cf. *People v. Harris* (1960) 182 C.A.2d Supp. 837, 842, 5 C.R. 852 [conviction reversed for refusal to permit evidence of discrimination].)

An interesting application of this principle was given in *Wade v. San Francisco* (1947) 82 C.A.2d 337, 186 P.2d 181. Plaintiffs, seeking an injunction against defendant city and its enforcement officers, alleged that an ordinance prohibiting the solicitation of magazine subscriptions on streets or sidewalks was being enforced against them by arrest and prosecution, while others were allowed to engage in the same activity without molestation by the police. The police had full knowledge of the facts, and deliberately refrained from arresting other violators, with the intent to discriminate against plaintiffs. Holding the pleading good against a general demurrer, the court emphasized three points: (a) Mere laxity in enforcement of a valid law, though it results in unequal application, violates no constitutional rights. (b)

Unequal application of the law to an individual as a result of intentional and purposeful discrimination does violate constitutional rights. (c) If the proof sustains plaintiffs' allegations, an injunction is proper, but it "should be so framed as to permit the future enforcement of the ordinance against all violators without discrimination if the defendants see fit in the proper performance of their duty so to enforce it." (82 C.A.2d 339.) (See *People v. Gordon* (1951) 105 C.A.2d 711, 721, 234 P.2d 287 [no purposeful discriminatory enforcement of Unfair Trade Practices Act].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Nature and Scope of Constitutional Provisions.

1. Federal Constitution.

d. State Action.

4. Judicial Action in Private Litigation.

8 Witkin Sum. Cal. Law Const Law § 700

[§ 700] Judicial Action in Private Litigation.

A new and expanded theory of state action was announced in *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, *infra*, §746. Certain property owners had entered into agreements restricting the occupancy of their lands to Whites. Petitioners, who were black, purchased and occupied parcels in the restricted area. Proceedings were then brought to restrain them from doing so, and the state court granted the requested injunctive relief. *Held*, the state court's judgment was a denial of equal protection.

(a) The rights to own, enjoy, and dispose of property are protected by the Fourteenth Amendment, and racial restrictions could not constitutionally be imposed by state statute or ordinance. (68 S.Ct. 841, 92 L.Ed. 1174.)

(b) The private restrictive covenants, voluntarily adhered to, involve no state action and hence do not conflict with the Constitution. But the restrictions were enforced by court order, and this was *state judicial action*. The state acts, within the scope of the Fourteenth Amendment, not only where its judicial officers deny *procedural* due process or equal protection but where in enforcing a common law rule they deny *substantive* rights guaranteed by the Amendment; the Amendment covers exertions of state power in all forms. (68 S.Ct. 842, 92 L.Ed. 1176.)

(c) Here, the *state* has made available to private individuals "the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." (68 S.Ct. 845, 92 L.Ed. 1183.) (For legislation nullifying racial restrictive covenants, see 12 *Summary* (10th), *Real Property*, §201.)

Shelley sets forth no clear test to determine when private action becomes state action by reason of the use of judicial process to enforce or sanction it. In subsequent decisions, state courts, distinguishing the case, have refused to interfere with other kinds of private discriminatory practices. (See *Newby v. Alto Riviera Apartments* (1976) 60 C.A.3d 288, 295, 131 C.R. 547, 12 *Summary* (10th), *Real Property*, §707 [serving notice to quit, which is not process issued by court,

does not constitute state action].)

In *Evans v. Abney* (1970) 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634, Georgia's Senator Bacon, in 1911, left a will conveying property in trust to his home city of Macon, to be used exclusively as a public park for white persons. The restriction was held unconstitutional in *Evans v. Newton* (1966) 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373, *infra*, §759. Thereafter, petitioners, the same black plaintiffs as in the earlier case, sought to have the *cy pres doctrine* applied by striking the racial restrictions. The Georgia courts concluded that the trust had failed and the property had reverted to the heirs of the Senator. *Held*, affirmed. The application of the *cy pres doctrine* is a matter of state law; and the state court's conclusion that the testator had no general charitable intent and only sought accomplishment of a particular purpose did not violate any constitutional rights. (90 S.Ct. 633, 24 L.Ed.2d 642.) (See dissent, citing *Shelley* and *Reitman v. Mulkey* (1967) 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830, and arguing that enforcement of the reverter was unconstitutional.)

SUPPLEMENT: [This section is current through the latest supplement]
See 95 Cal. L. Rev. 451 [*Shelley v. Kraemer*].



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1. General Principle.

8 Witkin Sum. Cal. Law Const Law § 701

[§ 701] General Principle.

The equality guaranteed by the Equal Protection Clause is equality under the same conditions, and among persons similarly situated. The Legislature may make a reasonable classification of persons and businesses and other activities and pass special legislation applying to certain classes. However, the classification must not be arbitrary; it must be based on some difference in the classes having a substantial relation to a legitimate object to be accomplished. (See *Gulf, Colorado, & Santa Fe Ry. Co. v. Ellis* (1897) 165 U.S. 150, 17 S.Ct. 255, 261, 41 L.Ed. 666, 670; *Morey v. Doud* (1957) 354 U.S. 457, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485, 1490, *infra*, §715; *Reed v. Reed* (1971) 404 U.S. 71, 92 S.Ct. 251, 253, 30 L.Ed.2d 225, 229, *infra*, §771; *Superior Wheeler Cake Corp. v. Superior Court* (1928) 203 C. 384, 389, 264 P. 488; *Pacific Indem. Co. v. Myers* (1931) 211 C. 635, 644, 296 P. 1084; *Hargens v. Alcoholic Bev. Control App. Bd.* (1968) 263 C.A.2d 601, 605, 69 C.R. 868; *People v. Health Laboratories of North America* (2001) 87 C.A.4th 442, 447, 104 C.R.2d 618, citing the text [exemption of enforcement actions by public prosecutors from SLAPP suit special motion to strike procedure (see 5 *Cal. Proc.* (4th), *Pleading*, §962) does not violate equal protection laws]; 36 U.C.L.A. L. Rev. 447 [Overinclusion and Underinclusion: A New Model]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §808 et seq.)

In *Blumenthal v. Board of Med. Examiners* (1962) 57 C.2d 228, 18 C.R. 501, 368 P.2d 101, a statute required of an applicant for license as a dispensing optician either 5 years of experience in the establishment of a licensed dispensing optician or a 5-year period of license in another state. Petitioner, otherwise qualified, challenged the regulation as discriminatory. *Held*, mandamus granted to compel his registration.

Despite its proper objective of protecting the public against incompetent and unethical opticians, the statute is fatally discriminatory, and there is no basis for the legislative classification. "There is a complete absence of any relationship between the experience requirements sought to be imposed and the legislative effort to correct ethical abuses in the profession." (57 C.2d 234.) Further, the effect of the statute would have been to confer on currently licensed dispensing opticians the unlimited and unguided power to exclude persons from the profession, because they were under no duty to employ anyone; and they would have had virtually absolute economic control over employees required to serve under them for 5 years in order to attain professional status. (57 C.2d 235, 236.)

In *McLaughlin v. Florida* (1964) 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, *infra*, §748, the Court rejected the holding of *Pace v. Alabama* (1883) 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207, that where different offenses are involved, and all within a class are treated alike, there is no unconstitutional discrimination. "Judicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose--in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what Pace ignored and which must be faced here." (85 S.Ct. 288, 13 L.Ed.2d 228.)

In *Brown v. Merlo* (1973) 8 C.3d 855, 106 C.R. 388, 506 P.2d 212, *infra*, §795, the court, as a basis for holding the Guest Law unconstitutional, restated the modern approach to the doctrine:

(a) When a statute treats one class differently from another, there must be something more than nondiscriminatory application within the class; there must be "some rationality in the nature of the class singled out." (8 C.3d 861.)

(b) In determining the scope of the class singled out for special burdens or benefits, the court cannot confine its view to the specific statute, but must judge its operation against the background of other legislative, administrative, and judicial directives governing legal rights of similarly situated persons. (8 C.3d 862.)

West's Key Number Digest, Civil Rights k.104.1-

SUPPLEMENT: [This section is current through the latest supplement]

SLAPP suits:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1017.



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8 Witkin Sum. Cal. Law Const Law § 702

[§ 702] Statute Need Not Cover Field.

A regulatory statute is not invalid merely because it does not cover the whole of a permissible field. The Legislature may recognize "degrees of evil," and deal with the more important ones. (*West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578, 585, 81 L.Ed. 703, 713; *Tigner v. Texas* (1940) 310 U.S. 141, 60 S.Ct. 879, 883, 84 L.Ed. 1124, 1129; *United States v. Petrillo* (1947) 332 U.S. 1, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877, 1883; *Heron v. Riley* (1930) 209 C. 507, 518, 289 P. 160; *Powers Farms v. Consolidated Irr. Dist.* (1941) 19 C.2d 123, 131, 119 P.2d 717; *Warner Bros. Pictures v. Brodel* (1948) 31 C.2d 766, 777, 192 P.2d 949; see *Queenside Hills Realty Co. v. Saxl* (1946) 328 U.S. 80, 66 S.Ct. 850, 852, 90 L.Ed. 1096, 1098 ["The legislature is entitled to hit the evil that exists"]; *Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 75 S.Ct. 461, 465, 99 L.Ed. 563, 572; *Werner v. Southern Calif. Associated Newspapers* (1950) 35 C.2d 121, 132, 216 P.2d 825; *Leavenworth Properties v. San Francisco* (1987) 189 C.A.3d 986, 992, 234 C.R. 598.)

In *People v. International Steel Corp.* (1951) 102 C.A.2d Supp. 935, 941, 226 P.2d 587, a statute provided for the formation of air pollution control districts to reduce smog. The law prohibited discharge of an air contaminant for more than 3 minutes in 1 hour, darker in shade than No. 2 on the Ringelmann Chart of the U.S. Bureau of Mines. Defendants were convicted of a violation consisting of discharge of smoke from burning automobile bodies. They objected that the statute unreasonably discriminates in favor of one who puts a contaminant in the air of less than the criminal density, even though he or she continues for a long time and eventually discharges more contaminant than one who goes beyond the permitted density for a mere 3 minutes. But this, said the court, is the old untenable argument that the Legislature drew the line in the wrong place; there can be no classification if the line is not drawn somewhere.

Nor is it necessary that the legislation directly benefit the entire public. It may be deemed of ultimate public benefit even though a particular class is more directly aided. Thus, although slum clearance and low cost housing projects may furnish accommodations for relatively few persons, they are of ultimate benefit to all in their effect on public health and safety. (*Housing Authority of Los Angeles v. Dockweiler* (1939) 14 C.2d 437, 451, 460, 94 P.2d 794.)

SUPPLEMENT: [This section is current through the latest supplement]



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aa. Traditional Rule.

8 Witkin Sum. Cal. Law Const Law § 703

[§ 703] Traditional Rule.

The presumption is in favor of the classification based on legislative experience, and it will not be rejected unless plainly arbitrary. (*Borden's Farm Products Co. v. Baldwin* (1934) 293 U.S. 194, 55 S.Ct. 187, 191, 79 L.Ed. 281, 288; *Asbury Hosp. v. Cass* (1945) 326 U.S. 207, 66 S.Ct. 61, 65, 90 L.Ed. 6, 13 ["Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it"]; *Kotch v. Board of River Port Pilot Commrs. for Port of New Orleans* (1947) 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093, infra, §801 [constitutional command of equal protection sets goal not attainable by invention and application of precise formula; that is impossible task that Court has never attempted]; *Goesaert v. Cleary* (1948) 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, infra, §762; *McGowan v. Maryland* (1961) 366 U.S. 420, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399 [law will be upheld, despite some inequality, "if any state of facts reasonably may be conceived to justify it"]; *United States Railroad Retirement Bd. v. Fritz* (1980) 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368; *Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 108 S.Ct. 2481, 101 L.Ed.2d 399; *Los Angeles v. Southern Calif. Tel. Co.* (1948) 32 C.2d 378, 392, 196 P.2d 773 [rule favoring validity of statutory classifications "has added force when, as here, the statute has been accepted as valid for many years, and vast sums have been invested in reliance upon the rights granted"]; *Department of Mental Hygiene v. McGilvery* (1958) 50 C.2d 742, 760, 329 P.2d 689; *Weber v. City Council of Thousand Oaks* (1973) 9 C.3d 950, 961, 109 C.R. 553, 513 P.2d 601 [annexation statute]; *Ector v. Torrance* (1973) 10 C.3d 129, 134, 109 C.R. 849, 514 P.2d 433, infra, §740; *D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 17, 112 C.R. 786, 520 P.2d 10, infra, §800; *Phillips v. Board of Police Commrs. of Los Angeles* (1966) 240 C.A.2d 410, 412, 49 C.R. 490, infra, §715; *California Chiropractic Assn. v. Board of Administration, Public Employees' Retirement System* (1974) 40 C.A.3d 701, 705, 115 C.R. 286; *Subriar v. Bakersfield* (1976) 59 C.A.3d 175, 201, 130 C.R. 853 [ordinance regulating ambulance business by requirement of certificate of convenience and necessity; no fundamental right involved and strict standard erroneously applied by trial judge]; *Rittenband v. Cory* (1984) 159 C.A.3d 410, 429, 205 C.R. 576, infra, §802; *Roa v. Lodi Med. Group* (1985) 37 C.3d 920, 930, 211 C.R. 77, 695 P.2d 164, 6 Summary (10th), Torts, §943; 3 Rotunda, §18.4; 95 Harv. L. Rev. 152 [Fritz]; 102 Harv. L. Rev. 201 [Kadrmas]; 16 Hastings Const. L. Q. 581 [same].)

In *Railway Express Agency v. New York* (1949) 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533, a city traffic regulation prohibited the use of exterior space on the sides of trucks for commercial advertising, but allowed that space to be used to advertise the owner's own business. *Held*, the regulation was valid, because local authorities may well have concluded that those who advertised their own products did not present so large and serious a traffic problem. "[T]he classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered." (69 S.Ct 465, 93 L.Ed. 539.)

In *People v. Glaze* (1980) 27 C.3d 841, 166 C.R. 859, 614 P.2d 291, the court held unconstitutional an ordinance requiring picture arcades to close between 2 a.m. and 9 a.m. The purpose--to prevent masturbation during hours when law enforcement problems are greatest--did not justify the drastic curtailment of First Amendment freedoms, because less restrictive measures were available to deal with the objectionable conduct. (27 C.3d 847.) (On validity of closing regulations generally, see *infra*, §711.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Rotunda 4th, §18.4.



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bb. Two-Tier Test of Classification.

8 Witkin Sum. Cal. Law Const Law § 704

[§ 704] Two-Tier Test of Classification.

(1) *In General.* The U.S. Supreme Court has adopted a "two-tier" test of classification. (See *McDonald v. Board of Election Commrs. of Chicago* (1969) 394 U.S. 802, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739, 744; *Plyler v. Doe* (1982) 457 U.S. 202, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786, 799; 3 Rotunda, §18.4.) "In ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest, the classification is upheld if it bears a *rational relationship* to a legitimate state purpose. ... But if the statutory scheme imposes a *suspect classification*, such as one based on race ... , or a classification which infringes on a fundamental interest, such as the right to pursue a lawful occupation ... , or the right to vote ... , the classification must be *closely scrutinized* and may be upheld only if it is necessary for the furtherance of a *compelling state interest*." (*Weber v. City Council of Thousand Oaks* (1973) 9 C.3d 950, 958, 109 C.R. 553, 513 P.2d 601; see *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 17, 95 C.R. 329, 485 P.2d 529, *infra*, §765; *Ramirez v. Brown* (1973) 9 C.3d 199, 207, 107 C.R. 137, 507 P.2d 1345, *supra*, §246; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 C.4th 903, 13 C.R.2d 245, 838 P.2d 1198, *supra*, §309 [residence requirements for voting on annexation]; *Long v. State Personnel Bd.* (1974) 41 C.A.3d 1000, 1008, 116 C.R. 562, *infra*, §766; *Independent Roofing Contractors of Calif. Unilateral Apprenticeship Committee v. California Apprenticeship Council* (2003) 114 C.A.4th 1330, 1341, 9 C.R.3d 477 [geographic limitation on operation of business will be upheld if there is rational basis for it]; 8 *Hastings Const. L. Q.* 777 [The Supreme Court's "Intermediate" Equal Protection Decisions]; 20 *Loyola L.A. L. Rev.* 921 [heightened rational basis test]; 50 *So. Cal. L. Rev.* 689, 693; 43 *Stanf. L. Rev.* 1095 [Underclass Review]; 14 *U.S.F. L. Rev.* 525 [Tribe's analysis].)

(2) *Application of Strict Standard.* The strict standard has been applied in a number of cases. (See *Bernal v. Fainter* (1984) 467 U.S. 216, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175, 179; *Grutter v. Bollinger* (2003) 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, *infra*, §970 [race-based considerations for law school admission]; *Johnson v. Hamilton* (1975) 15 C.3d 461, 466, 125 C.R. 129, 541 P.2d 881, *supra*, §260; *People v. Olivas* (1976) 17 C.3d 236, 243, 251, 131 C.R. 55, 551 P.2d 375; *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 C.3d 779, 798, 803, 187 C.R. 398, 654 P.2d 168 [geographical restrictions on voting for creation of new school district]; *Darces v. Woods* (1984) 35 C.3d 871, 885, 891, 201 C.R. 807, 679 P.2d 458; *San Dieguito Union High School Dist. v. Rosander* (1985)

171 C.A.3d 968, 978, 217 C.R. 737 [following *Fullerton*].)

(3) *Application of Rational Basis Standard*. A number of decisions apply the rational basis standard. (See *Warden v. State Bar* (1999) 21 C.4th 628, 643, 88 C.R.2d 283, 982 P.2d 154, 1 Cal. Proc. (4th), Attorneys, Supp., §417 [equal protection challenge to exemptions from MCLE program must be evaluated under traditional rational relationship standard]; *Steffes v. California Interscholastic Federation* (1986) 176 C.A.3d 739, 746, 748, 222 C.R. 355 [participation in interscholastic athletics is not fundamental right; hence, rule restricting eligibility of students transferred from another school is tested by rational basis standard]; *American G.I. Forum v. Miller* (1990) 218 C.A.3d 859, 868, 267 C.R. 371 [because illegal aliens are not suspect class, collection and dissemination of information on arrestee's status as "undocumented person" is judged by rational basis test and is constitutional]; *Daniels v. McMahon* (1992) 4 C.A.4th 48, 59, 60, 61, 5 C.R.2d 404 [challenge to policy of county social service department relating to aid to families with dependent children; review under rational basis test was proper]; *Los Angeles v. Patrick* (1992) 11 C.A.4th 1246, 1253, 14 C.R.2d 665 [no suspect classification involved]; *Landau v. Superior Court* (1998) 81 C.A.4th 191, 210, 97 C.R.2d 657 [physician's right to continue to practice profession is not fundamental right for equal protection purposes; statute limiting review of license revocation decisions to review by extraordinary writ does not violate equal protection because it is rationally related to governmental purpose of reducing delay]; *Flynt v. California Gambling Control Com.* (2002) 104 C.A.4th 1125, 1141, 129 C.R.2d 167, 1 Summary (10th), Contracts, §634 [rational basis test applies to law giving Indian tribes special gambling rights]; 22 U.S.F. L. Rev. 587 [*Steffes*].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 3 Rotunda 4th, §18.4.(3) *Application of Rational Basis Standard*.

Warden case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §406.



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8 Witkin Sum. Cal. Law Const Law § 705

[§ 705] Nature and Effect of Provisions.

(1) *In General.* Cal. Const., Art. I, §7(a), expressly prohibits the denial of equal protection of the laws. (See *Hawkins v. Superior Court* (1978) 22 C.3d 584, 593, 150 C.R. 435, 586 P.2d 916 [denial of postindictment preliminary hearing violates Cal. Const., Art. I, §7(a)]; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 C.3d 458, 468, 156 C.R. 14, 595 P.2d 592, *infra*, §708.) In addition, the California Constitution contains a number of provisions calling for uniformity in legislation. They go further than the Fourteenth Amendment, particularly in invalidating legislation where the basis for classification is wholly unreasonable, although the person raising the challenge does not show direct denial of equal protection as to himself or herself.

These provisions are (a) Cal. Const., Art. I, §7(b), which prevents the granting of special privileges or immunities to particular citizens or classes of citizens that are not granted to all; (b) Cal. Const., Art. IV, §16(a), requiring uniform operation of general laws (see *infra*, §707); and (c) Cal. Const., Art. IV, §16(b), barring local or special laws (see *infra*, §706). (See *Mansur v. Sacramento* (1940) 39 C.A.2d 426, 429, 103 P.2d 221 [city charter provision prohibiting employment of person whose spouse received compensation from tax revenues was void]; *Sagaser v. McCarthy* (1986) 176 C.A.3d 288, 305, 221 C.R. 746 [Cal. Const., Art. IV, §16, and Cal. Const., Art. I, §7, have essentially the same meaning]; *San Francisco v. Flying Dutchman Park* (2004) 122 C.A.4th 74, 87, 18 C.R.3d 532 [Cal. Const., Art. I, §7(b), only applies to "citizens," and not to corporations].)

(2) *Same Test of Constitutionality.* Where the charge is that equal protection is denied, the effect of both Constitutions is the same. "[T]he test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the federal constitution." (*Los Angeles v. Southern Calif. Tel. Co.* (1948) 32 C.2d 378, 389, 196 P.2d 773; see *Werner v. Southern Calif. Associated Newspapers* (1950) 35 C.2d 121, 131, 216 P.2d 825; *Brown v. Merlo* (1973) 8 C.3d 855, 861, 106 C.R. 388, 506 P.2d 212; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1025, 140 C.R. 168, *infra*, §718; *Los Angeles v. Artesia* (1977) 73 C.A.3d 450, 455, 140 C.R. 684; *Sagaser v. McCarthy*, *supra*, 176 C.A.3d 305.)

In *Department of Mental Hygiene v. Kirchner* (1965) 62 C.2d 586, 588, 43 C.R. 329, 400 P.2d 321, after a prior California decision, the U.S. Supreme Court had remanded the cause because of uncertainty on whether the decision

rested on the federal or state Constitution or both. In its clarifying opinion, the California Supreme Court said: "These provisions of our state Constitution have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution. While it is our view that we should reach the same conclusion under the Fourteenth Amendment we were (and we are) in any event independently constrained to the result we reached" by the *California Constitution*. (62 C.2d 588.)

(3) *No Action for Money Damages*. In *Bonner v. Santa Ana* (1996) 45 C.A.4th 1465, 53 C.R.2d 671, plaintiff, a homeless person whose possessions had been thrown away by workers for defendant city, sought money damages for violation of the Equal Protection and Due Process Clauses of the California Constitution. *Held*, following *Gates v. Superior Court* (1995) 32 C.A.4th 481, 38 C.R.2d 489, 5 Summary (10th), *Torts*, §303, money damages are not available for violation of the state *Equal Protection Clause*. (45 C.A.4th 1472.) (On rejection of due process claim, see *supra*, §615.)

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2. California Constitution.
b. Local or Special Laws.

8 Witkin Sum. Cal. Law Const Law § 706

[§ 706] Local or Special Laws.

(1) *Original Provision.* Former Cal. Const., Art. IV, §25, provided that the "Legislature shall not pass local or special laws in any of the following enumerated cases," and listed 33 of these cases, and "in all other cases where a general law can be made applicable." This prohibition applied whenever no reasonable grounds for a local law appeared; i.e., where it was not founded on a natural, intrinsic, or constitutional distinction. (*Marsh v. Hanly* (1896) 111 C. 368, 372, 43 P. 975; *Chitwood v. Hicks* (1933) 219 C. 175, 177, 25 P.2d 406; *Hollman v. Warren* (1948) 32 C.2d 351, 196 P.2d 562, *infra*, §717; see 16B Am.Jur.2d (1998 ed.), *Constitutional Law* §869 et seq.)

But this Clause does not prevent reasonable classification; "an act of the Legislature applicable to one class only, when that class is reasonably the subject of classification, is a general law." (*Rainey v. Michel* (1936) 6 C.2d 259, 270, 57 P.2d 932; see *People v. Western Fruit Growers* (1943) 22 C.2d 494, 506, 140 P.2d 13; *Los Angeles v. Standard Oil Co. of Calif.* (1968) 262 C.A.2d 118, 123, 68 C.R. 512.) The apparent restriction of the Clause was substantially nullified by the judicially approved statutory classification of counties by population in such a manner that there may be only one county in each class. (See *Govt.C. 28020*; *Madera v. Gendron* (1963) 59 C.2d 798, 801, 31 C.R. 302, 382 P.2d 342; *infra*, §§716, 717.)

A similarly liberal treatment was accorded to special districts. In *Corona Unified Hosp. Dist. v. Superior Court* (1964) 61 C.2d 846, 40 C.R. 745, 395 P.2d 817, a statute was enacted in 1963, applicable to hospital districts formed after June 1, 1961, and operative only until June 1, 1964, to enable those districts to use lease-back financing. Upholding the statute, the court said: "[W]e may assume it to be true ... that the Corona district was the motivating force behind the enactment of the subject statute. But it does not follow that the measure is unconstitutional. ... [T]he benefits of this law were made generally available to *any* district formed after June 1, 1961 (and it appears that at least six districts were thus formed) which had not yet operated a hospital or established a capital outlay fund (and it appears that at least three of these six had not done so)." (61 C.2d 853.) (See *infra*, §719.)

(2) *Current Provision.* Former Cal. Const., Art. IV, §25, was repealed in the constitutional revision of 1966, and replaced by Cal. Const., Art. IV, §16. The section deleted the listing of specific cases and substituted "statute" for "law," providing simply: "A local or special statute is invalid in any case if a general statute can be made applicable." But no change in meaning was intended, except that the word "statute" was used in place of "law" to indicate that the

prohibition is directed only at legislative and initiative statutes, and not at local ordinances. (See Constitution Revision Commission 1966 Report, p. 39.)

Cal. Const., Art. IV, §16, was amended in 1974 to add subdivision (a) on uniform operation of general laws (former Cal. Const., Art. I, §11, *infra*, §707). The provision on local or special statutes is in Cal. Const., Art. IV, §16(b). (See *White v. California* (2001) 88 C.A.4th 298, 305, 105 C.R.2d 714 [state laws dealing with Orange County's bankruptcy do not violate Cal. Const., Art. IV, §16(b), because general statute could not be made applicable due to county's unique financial crisis]; *Malibu v. California Coastal Com.* (2004) 121 C.A.4th 989, 994, 18 C.R.3d 40 [statute requiring Coastal Commission to draw up local coastal program (LCP) for plaintiff city, which had neglected to do so for many years leaving burden of processing all of city's development permits on Commission, was not invalid special legislation even though other coastal cities had not implemented LCPs; Legislature can solve problems incrementally, starting with worst offenders].)

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A. Nature and Scope of Constitutional Provisions.

2. California Constitution.

c. Uniform Operation of General Laws.

8 Witkin Sum. Cal. Law Const Law § 707

[§ 707] Uniform Operation of General Laws.

Cal.Const., Art. IV, §16(a) (formerly Art. I, §11), provides that "[a]ll laws of a general nature have uniform operation." (See *Pacific Coast Dairy v. Police Court of San Francisco* (1932) 214 C. 668, 672, 8 P.2d 140; *Department of Mental Hygiene v. McGilvery* (1958) 50 C.2d 742, 754, 329 P.2d 689; *White v. Church* (1986) 185 C.A.3d 627, 630, 231 C.R. 565 [statute governing election to office of sheriff in one county was invalid].) This Clause does not apply to municipal ordinances, but Cal. Const., Art. I, §7(b) (formerly Art. I, §21), does limit the power of the municipality. (*In re Gatsios* (1928) 95 C.A. 762, 273 P. 826; see *Lucchesi v. San Jose* (1980) 104 C.A.3d 323, 332, 163 C.R. 700.)

In *Alta Bldg. Material Co. v. Cameron* (1962) 202 C.A.2d 299, 20 C.R. 713, the constitutionality of a statutory provision requiring a mechanic's lien claimant to give a 15-day (now 20-day) notice to the owner, but excepting those under direct contract with the owner or those performing actual labor for wages, was upheld. The court drew this distinction: A *substantive* discrimination, giving one lien claimant priority over another, might be an unconstitutional impairment of the lien. But here, the difference in treatment relates only to a *procedural* matter--giving notice. There is a logical reason for the provision. The owner usually would be apprised of potential claims of those with whom he or she contracts directly and those who perform actual labor for wages on the property, but is hardly likely to be apprised of those who furnish materials or supply labor of others; as to those the notice gives the owner an opportunity to avoid a cloud on his or her title. (202 C.A.2d 304.)

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2. California Constitution.

d. Discrimination by Public Utility.

8 Witkin Sum. Cal. Law Const Law § 708

[§ 708] Discrimination by Public Utility.

In *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 C.3d 458, 156 C.R. 14, 595 P.2d 592, plaintiffs, individual homosexuals and organizations of homosexuals, brought a class action against PT&T, the principal California public utility furnishing telephone service, and the Fair Employment Practice Commission (see *infra*, §920). The complaint alleged that PT&T practiced discrimination against homosexuals in hiring, firing, and promotion of employees, and plaintiffs sought declaratory relief, injunction, and damages. The complaint further alleged that the FEPC improperly refused to take steps to remedy employment discrimination against homosexuals by PT&T and other employers. Judgment was given for both defendants on demurrer. *Held*, reversed as to PT&T, affirmed as to the FEPC.

(a) *The California constitutional provision against discrimination.* Both state and federal Equal Protection Clauses prohibit state and governmental entities from arbitrarily discriminating in employment against any class of individuals. California and some other jurisdictions have extended this principle to prohibit discrimination against homosexuals. (24 C.3d 467.) The constitutional issue decided here is that the same protection is afforded against discriminatory treatment by "a privately owned monopoly or quasi-monopoly."

(1) Cal. Const., Art. I, §7(a), states that "[a] person may not be ... denied equal protection of the laws." Unlike the Fourteenth Amendment, the California provision contains no explicit "state action" requirement. (24 C.3d 468.) *Kruger v. Wells Fargo Bank* (1974) 11 C.3d 352, 113 C.R. 449, 521 P.2d 441, *supra*, §619, observed that the provision was not intended to cover all purely private conduct; but in both *Kruger* and *Garfinkle v. Superior Court* (1978) 21 C.3d 268, 146 C.R. 208, 578 P.2d 925, *supra*, §621, the court pointed out that federal decisions applying the state action requirement of the Fifth and Fourteenth Amendments are not binding. (24 C.3d 469.)

(2) A California regulated public utility is in many respects more akin to a governmental entity than to a purely private employer. It has powers--like eminent domain--generally enjoyed only by governmental entities. Hence, it may not properly claim prerogatives of "private autonomy." (24 C.3d 470.)

(3) Arbitrary discrimination in employment by a state-protected public utility "particularly flouts constitutional principles": (a) From the point of view of the individual seeking employment, the injury is greater than in the case of an ordinary employer; arbitrary rejection by the only company authorized to perform many telephone communication

services leaves the individual with no alternative employer. (24 C.3d 470.) (b) The general public may disapprove a private employer's discrimination by refusing to patronize that employer; the public cannot do this in the case of a public utility. (24 C.3d 471.) (c) The public utility's monopoly derives directly from the exclusive franchise provided by the state, which frees it from competition and enables it to wield enormous power over employment opportunities. (24 C.3d 471, 472.)

(4) Federal decisions in the field of labor union monopolies, e.g., where a union is chosen as the exclusive bargaining agent under the Railway Labor Act, are consistent with the conclusion reached here; they "establish the proposition that a private entity that, by virtue of state action, is afforded monopoly control over employment opportunities, is not free to exercise its power without regard to constitutional restraints." (24 C.3d 473.)

(b) *The Public Utilities Code provision against discrimination.* *Pub.Util.C. 453(a)* states: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage." The statutory language, the legislative history, the evolution of the common law principle that the section codifies, and the constitutional considerations already discussed, call for an interpretation of the section to prohibit a public utility from engaging in arbitrary employment discrimination. (24 C.3d 478 et seq.) The common law doctrine on which the section is based "is a dynamic one" (24 C.3d 481), and its modern development is illustrated by *James v. Marinship Corp.* (1944) 25 C.2d 721, 155 P.2d 329, 3 Summary (10th), *Agency and Employment*, §627, holding that a union that has attained a monopoly of the supply of labor occupies a quasi-public position similar to that of a public service business, and cannot arbitrarily discriminate in employment opportunities. (24 C.3d 482.) Later California decisions have declared the same principle applicable to professional and business associations and public and private hospitals. (24 C.3d 483.) It is unnecessary to decide whether the common law doctrine, as thus developed, in and of itself prohibits a public utility from engaging in arbitrary employment discrimination; the statute codifying the doctrine has made it applicable "in any respect." (24 C.3d 483.) In light of this interpretation of *Pub.Util.C. 453(a)*, plaintiff's complaint states a cause of action under *Pub.Util.C. 2106*, authorizing a person injured by an illegal public utility practice to recover monetary damages (see *infra*, §1089). (24 C.3d 486.)

(c) *The Labor Code provisions on political freedom.* *Lab.C. 1101* and *1102* prohibit employers from interfering with the political activities of employees (see 3 Summary (10th), *Agency and Employment*, §§255, 348). The term "political activity" covers such actions as participation in litigation, wearing of symbolic armbands, and association with others for the advancement of beliefs and ideas. (24 C.3d 487.) Measured by these standards, the struggle of the homosexual community for equal rights, particularly in the field of employment, is a political activity. "Indeed the subject of the rights of homosexuals incites heated political debate today, and the 'gay liberation movement' encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities." (24 C.3d 488.) The allegations of the complaint can reasonably be construed as charging that PT&T discriminates in particular against persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations; so construed they charge that PT&T has adopted a policy tending to control or direct the political activities of employees in violation of *Lab.C. 1101*, and has attempted to coerce employees to refrain from following a particular course of political activity, in violation of *Lab.C. 1102*. (24 C.3d 488.) Hence, under *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 C.2d 481, 171 P.2d 21, an action for damages may be brought. (24 C.3d 489.)

(d) *The Fair Employment Practice Act.* This statute (now *Govt.C. 12900* et seq., the Fair Employment and Housing Act, *infra*, §915) prohibited discrimination on various grounds, but did not refer to homosexuality or sexual orientation. (24 C.3d 489.) Amendments added several categories, indicating that unlike the Unruh Act (see *infra*, §898), the FEPA was not intended to bar all forms of arbitrary discrimination. (24 C.3d 490.) And the provision against discrimination on the basis of "sex" could not be construed to encompass discrimination on the basis of sexual orientation. (24 C.3d 491.)

(e) *Conclusion*. "If this court were to accede to PT&T's sought sanction for its alleged arbitrary discriminatory practices, we would approve of a rule that would extend beyond the subject of employment discrimination against homosexuals. We would necessarily empower any public utility to engage in an infinity of arbitrary employment practices. To cite only a few examples, the utility could refuse to employ a person because he read books prohibited by the utility, visited countries disapproved by the utility, or simply exhibited irrelevant characteristics of personal appearance or background disliked by the utility. Such possible arbitrary discrimination, casting upon the community the shadow of totalitarianism, becomes crucial when asserted by an institution that exerts the vast powers of a monopoly sanctioned by government itself. We do not believe a public utility can assert such prerogatives in a free society dedicated to the protection of individual rights." (24 C.3d 492.)

Three justices joined in a dissent, challenging the majority opinion on all points. (24 C.3d 493.) The dissent concludes with a strong affirmation of rights of homosexuals, but declares that courts "should not attempt to police general employment practices in the absence of some clear constitutional or statutory authority." (24 C.3d 501.) (See 68 Cal. L. Rev. 680; 20 Santa Clara L. Rev. 263.) (On discrimination against homosexuals, lesbians, and bisexuals as violation of Equal Protection Clause, see *infra*, §798; on prohibition in Fair Employment and Housing Act against discrimination based on sexual orientation, see *infra*, §931.)

Pub.Util.C. 453(a) reflects a public utility's duty to exercise its franchise in the public interest by broadly prohibiting discrimination that may subject a person to prejudice or disadvantage. It is consistent with this purpose to construe the statute as prohibiting retaliatory measures against journalists or newspapers based on the content of their reporting on matters lying within the exercise of a public utility's franchise. (*Savage v. Pacific Gas & Elec. Co.* (1993) 21 C.A.4th 434, 455, 26 C.R.2d 305, citing *Gay Law Students*.)

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B. Illustrations of Valid and Invalid Classifications.

1. Corporations.

a. Individuals and Corporations.

8 *Witkin Sum. Cal. Law Const Law* § 709

[§ 709] Individuals and Corporations.

Individuals and corporations are often treated separately. (See *16B Am.Jur.2d* (1998 ed.), *Constitutional Law* §863.) Thus, a statutory protection may be afforded to individual borrowers and not extended to corporate borrowers (see *Berry Hotels System v. Capitol Properties* (1937) 9 C.2d 12, 14, 68 P.2d 974), and a criminal statute may be made applicable to individuals and not to corporations, or a different punishment may be prescribed (see *People v. Sivin* (1933) 133 C.A. 644, 24 P.2d 860).

In *Los Angeles v. Southern Calif. Tel. Co.* (1948) 32 C.2d 378, 392, 196 P.2d 773, a statute giving telegraph or telephone corporations the right to erect lines and poles on public roads and highways was upheld on the ground that "there are sound purposes to be served in encouraging the corporate operation of telephone systems."

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1. Corporations.

b. Classes of Corporations.

8 Witkin Sum. Cal. Law Const Law § 710

[§ 710] Classes of Corporations.

Different kinds of corporations may be treated differently. (See *16B Am.Jur.2d* (1998 ed.), *Constitutional Law* §§861, 862.) Thus, banking corporations are affected with a public interest, and their stockholders may, for the protection of the depositing public, be subjected to greater liabilities than those of ordinary corporations. (*Rainey v. Michel* (1936) 6 C.2d 259, 271, 57 P.2d 932.)

But the court in *Rainey* said: "It would not be proper at this time to indicate whether the power to classify stockholders of state banks differently from other stockholders includes the power to classify the stockholders, so far as liability is concerned, of all the different types of corporations provided for in the ... Code as to information and powers." (6 C.2d 273.) (See *Asbury Hosp. v. Cass* (1945) 326 U.S. 207, 66 S.Ct. 61, 64, 90 L.Ed. 6, 13 [upholding statute requiring corporations, within 10 years, to dispose of farmlands not used in their business, but exempting corporations whose business was dealing in farmlands].)

Classification of state and national banks is upheld in many situations. But a statute requiring a state bank to obtain a permit for the issuance of securities, and exempting national banks from this requirement, was held void as to the state banks. (*Miller v. Union Bank & Trust Co.* (1936) 7 C.2d 31, 34, 59 P.2d 1024.) And a statute permitting mutual insurance companies to act through salaried agents, and denying the privilege to stock companies, was held unreasonable. (*Hartford Steam Boiler Inspection & Ins. Co. v. Harrison* (1937) 301 U.S. 459, 57 S.Ct. 838, 840, 81 L.Ed. 1223, 1226.) (On valid discrimination in favor of corporations previously engaged in regulated activity, see *infra*, §811; on discrimination against foreign corporations, see *infra*, §812.)

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a. Closing Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 711

[§ 711] Closing Regulations.

Although closing hour ordinances may be valid health measures (see *infra*, §1075), discriminatory municipal regulations will not be sustained. In *Deese v. Lodi* (1937) 21 C.A.2d 631, 69 P.2d 1005, an ordinance required closing on Sundays (or Saturdays, at option), holidays, and evenings. It applied to grocery stores and meat, fruit, and vegetable markets, but excepted tobacco and drug stores, bakeries, restaurants, confectionaries, ice cream parlors, service stations, and places of amusement. The court held it void, finding no sufficient reason for the exceptions. (21 C.A.2d 637.) (See *Gaetano Bocci & Sons Co. v. Lawndale* (1930) 208 C. 720, 723, 284 P. 654 [ordinance prohibiting stone cutting works or monument yards from operating on Sundays, but permitting cemeteries, crematories, and other businesses to operate, was invalid]; *Skaggs v. Oakland* (1936) 6 C.2d 222, 224, 57 P.2d 478 [delivery of bakery goods]; *Justesen's Food Stores v. Tulare* (1938) 12 C.2d 324, 330, 84 P.2d 140 [ordinance similar to one in *Deese v. Lodi*]; 10 A.L.R.2d 813 [sports and games]; 53 A.L.R.3d 942 [restaurants]; 10 A.L.R.4th 246 [modern status of "Sunday closing" or "blue" laws].)

A group of Supreme Court decisions upholding Sunday closing laws against the freedom of religion challenge (*supra*, §553) also rejected the equal protection challenge. In *Gallagher v. Crown Kosher Super Market of Massachusetts* (1961) 366 U.S. 617, 81 S.Ct. 1122, 1125, 6 L.Ed.2d 536, 539, the three-judge lower federal court described the statutory system as an "unbelievable hodgepodge," but the Supreme Court nevertheless upheld the classification on the authority of *McGowan v. Maryland* (1961) 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393. *McGowan* states the principal objections and answers as follows:

(a) On the statutory exemptions for Sunday sale of *particular merchandise*--tobacco, milk, confectionaries, fruits, gas and oil, newspapers, etc.--the Legislature could reasonably find that this was necessary for health or enhancement of the recreational atmosphere of the day. (81 S.Ct. 1105, 6 L.Ed.2d 399.)

(b) On the statutory exemption allowing operators of a beach, dancing saloon, or amusement park in a certain county to sell *merchandise incidental to these businesses*: This is not an unreasonable discrimination against retailers in other counties, because the Equal Protection Clause relates to equality between *persons* rather than *areas*, and territorial uniformity is not required. Nor does this exemption unconstitutionally discriminate against other retailers who sell the same merchandise. The Legislature could find that these commodities should only be sold on Sunday by those vendors

at locations where they are most likely to be put to use immediately. There would be great difficulty in enforcement if large retail establishments were allowed to remain open on Sunday but were restricted to the sale of certain merchandise. (*81 S.Ct. 1106, 6 L.Ed.2d 399.*)

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b. Price Regulations.

8 Witkin Sum. Cal. Law Const Law § 712

[§ 712] Price Regulations.

In *People v. Osborne* (1936) 17 C.A.2d Supp. 771, 775, 59 P.2d 1083, an ordinance prohibiting the display of price lists by barbers was held void, as improper classification of the one calling, and as discrimination between visible display and oral or radio advertising.

In cases dealing with regulation of the price of milk, discrimination in favor of dealers "not having a well advertised trade name" was upheld. (*Borden's Farm Products Co. v. Ten Eyck* (1936) 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669 [these dealers were permitted to sell at 1% less].) But discrimination against newcomers by denying them the right to the price differential was held bad. (*Mayflower Farms v. Ten Eyck* (1936) 297 U.S. 266, 56 S.Ct. 457, 459, 80 L.Ed. 675, 679.)

Price regulation in the sale of liquor has been justified on the distinct ground that it promotes temperance. (See *infra*, §1081.) (On police power to regulate businesses generally, see *infra*, §1071 et seq.)

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c. Other Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 713

[§ 713] Other Regulations.

Many other classifications of businesses have been sustained. (See *Wheeler v. Kraner* (1937) 21 C.A.2d 460, 461, 69 P.2d 881 [classification of mining equipment and machinery, in requiring recordation of conditional sales was valid]; *In re Hartmann* (1938) 25 C.A.2d 55, 59, 76 P.2d 709 [special permit required of agents and canvassers for periodicals and other publications was valid]; *Carlin v. Palm Springs* (1971) 14 C.A.3d 706, 712, 92 C.R. 535, *infra*, §1063; on discrimination against businesses operating outside city or county, see *infra*, §1004; on classification of businesses for purposes of taxation, and discriminatory taxes and license fees, see 9 *Summary* (10th), *Taxation*, §41 et seq.)

In *Fraenkel v. Bank of America* (1953) 40 C.2d 845, 256 P.2d 569, a statutory exemption from the contractor's licensing requirements was made for contractors engaging in construction work incidental to farming or agriculture. *Held*, the classification was valid; the Legislature may have had in mind the fact that in many rural districts licensed contractors are few, and other skilled persons, including farmers themselves, are available for this occasional work. (40 C.2d 850.) (Cf. *Franchise Motor Freight Assn. v. Seavey* (1925) 196 C. 77, 82, 235 P. 1000 [statute regulating auto stage transportation companies, which exempted those engaged exclusively in carrying farm products, was invalid].)

Classification that seems arbitrary may sometimes be supported on the theory that the activity (e.g., the liquor business or gambling) could be wholly prohibited, and that in consequence, almost any legislative method of regulation will be accepted. (See *infra*, §1060.) Horse racing with pari-mutuel betting is a form of legalized gambling that can be wholly prohibited or allowed under stringent regulations. A California statute gave the Corporation Commissioner special authority over the sale of securities for financing racing enterprises, and the Commissioner adopted a regulation that the security should have a par value of at least \$ 1,000. In *Hollywood Turf Club v. Daugherty* (1950) 36 C.2d 352, 224 P.2d 359, petitioner's attack on the statute and regulation, as a discrimination against an investor of small means, was rejected. The Legislature could have determined that a higher par value would result in fewer stockholders and therefore easier scrutiny of activities; also that investors of small means should be discouraged from the risk of investment in this hazardous, highly regulated business. (36 C.2d 358.)

West's Key Number Digest, Constitutional Law k.238 et seq.

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3. Same Types of Business or Activity.

a. Invalid Classifications.

8 Witkin Sum. Cal. Law Const Law § 714

[§ 714] Invalid Classifications.

Unequal treatment of those engaged in the same or substantially similar type of business or activity is obviously suspect, and the court will carefully examine the circumstances to determine whether substantial differences exist between the classified businesses. (See *Looff v. Long Beach* (1957) 153 C.A.2d 174, 183, 314 P.2d 518 [ordinance stringently regulating "games of chance," but exempting 84 listed "games of skill," some substantially similar to regulated games, was invalid]; *People v. Van Wong* (1958) 165 C.A.2d Supp. 821, 824, 332 P.2d 872 [ordinance prohibiting ticket sales within 250 feet of stadium on public street, sidewalk, etc., was not regulation of resale price, and unreasonably discriminated between sales in ticket booths and single sale outside]; *O'Kane v. Catuira* (1963) 212 C.A.2d 131, 139, 27 C.R. 818 [statute allowing partnership or corporation in travel business to become licensed to transmit money to foreign countries, but denying privilege to individual]; *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212, 219, supra, §396 [ordinance banning peaceful picketing near schools except labor picketing; impermissible distinction between labor and other picketing].) (On invalid discrimination against lawyers and brokers in disclosure requirements of Political Reform Act, see *Hays v. Wood* (1979) 25 C.3d 772, 786, 795, 160 C.R. 102, 603 P.2d 19, supra, §283; on invalidity of zoning ordinance allowing public but not private schools in restricted area, see *infra*, §1036.)

B. & P.C. 17564, regulating outside rate advertising of motels but not hotels, was held unconstitutional in *Gawzner Corp. v. Minier* (1975) 46 C.A.3d 777, 785, 120 C.R. 344. The court, relying in part on *Carlin v. Palm Springs* (1971) 14 C.A.3d 706, 92 C.R. 535, *infra*, §1063, concluded that with respect to the purpose of the statute, hotels and motels are similarly situated. (46 C.A.3d 791.) (See 80 A.L.R.3d 740 [note on *Gawzner*].)

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3. Same Types of Business or Activity.
b. Valid Classifications.

8 *Witkin Sum. Cal. Law Const Law* § 715

[§ 715] Valid Classifications.

The following are illustrative of classifications sustained:

(1) *Size*. *Morey v. Doud* (1957) 354 U.S. 457, 77 S.Ct. 1344, 1350, 1 L.Ed.2d 1485, 1491, recognized as appropriate the classification of large and small businesses for a legitimate purpose. Thus, special regulation of small loans, and classification of personal property brokers according to the size of their loans, is valid. (*In re Fuller* (1940) 15 C.2d 425, 428, 102 P.2d 321; *Carter v. Seaboard Finance Co.* (1949) 33 C.2d 564, 587, 203 P.2d 758.) (See *Leavenworth Properties v. San Francisco* (1987) 189 C.A.3d 986, 992, 234 C.R. 598 [moratorium on condominium conversion based on number of units in building was valid].)

(2) *Closed Class: Preference for Prior Activity*. Practical considerations and due process objections may sometimes justify exemption of a closed class of businesses, such as those previously unregulated, from a newly enacted regulation applicable to the same activity. (See *infra*, §811.)

(3) *Exclusive Permit for Taxicab Stand*. The relatively unlimited public control over use of the highways has been held to justify statutes or ordinances that give exclusive rights to one common carrier. (See *infra*, §1080.) *In re Petersen* (1958) 51 C.2d 177, 331 P.2d 24, held that the same principles justified a San Francisco ordinance that gave the chief of police power to designate exclusive taxi stands on public streets with the written consent of the person occupying the ground floor of the building. The result was that Yellow Cab Company, apparently for consideration paid to the owners, received every major hotel, shop, and department store stand. The court saw no unconstitutionality in this practical discrimination against other taxi companies, and also thought the public interest was served by a sole permittee (less traffic obstruction, no aggressive solicitation, better and more constant service). (51 C.2d 182.) (See critical dissent, 51 C.2d 186; 47 Cal. L. Rev. 590; 6 U.C.L.A. L. Rev. 448.)

(4) *Nonprofit Activity*. In *Phillips v. Board of Police Commrs. of Los Angeles* (1966) 240 C.A.2d 410, 415, 49 C.R. 490, the court upheld a Los Angeles ordinance providing that only nonprofit organizations sponsoring youth activities could obtain a permit to conduct or sponsor a teenage dance. The principal factual bases for the legislative determination were (a) opportunities for exploitation by narcotics pushers and purveyors of pornographic material, and (b) the profit motive as limiting willingness to provide adequate supervision or necessary services.

(5) *Business Otherwise Unregulated*. In *Escrow Institute of Calif. v. Pierno* (1972) 24 C.A.3d 361, 366, 100 C.R. 880, the court upheld *Fin.C. 17000* et seq., regulating the business of independent escrow agents, and exempting banks, trust companies, savings and loan associations, attorneys, title insurance companies, and real estate licensees. All of the exempted persons and institutions are subject to extensive regulation under particular statutes, and the Escrow Law was a reasonable method of reaching the formerly unregulated independent agents.

(6) *Assault Weapons*. The failure of the Legislature, in attempting to ban assault weapons, to include certain weapons in the statute that are indistinguishable from the weapons listed, does not violate equal protection. The Legislature may take a step-by-step approach to reform. (*Kasler v. Lockyer* (2000) 23 C.4th 472, 488, 97 C.R.2d 334, 2 P.3d 581, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §163.)

West's Key Number Digest, Constitutional Law k.238 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Size*. See *Hernandez v. Hanford* (2007) 41 C.4th 279, 59 C.R.3d 442, 302, 159 P.3d 33, Supp., infra, §1020 [ordinance permitting only large department stores, but with square footage limitation, to sell furniture in particular district did not violate equal protection; one of purposes of ordinance was to attract and retain large department stores in particular district].



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a. Counties or Cities.

8 *Witkin Sum. Cal. Law Const Law* § 716

[§ 716] Counties or Cities.

The classification of counties or cities by classes, according to population, for various types of legislation appropriate to their distinct needs, is a familiar one. (See *Rauer v. Williams* (1897) 118 C. 401, 403, 50 P. 691; *Ex parte Jackson* (1904) 143 C. 564, 566, 77 P. 457; *Paso Robles War Memorial Hosp. Dist. v. Negley* (1946) 29 C.2d 203, 205, 173 P.2d 813 [Local Hospital District Law for counties with population of 200,000 or less; classification is valid because large counties have many private hospitals while small ones seldom have them]; *Walnut Creek v. Silveira* (1957) 47 C.2d 804, 810, 306 P.2d 453 [Limited Bond Obligation Law for small cities (population 4,000 or less) with large surrounding urban population]; *Madera v. Gendron* (1963) 59 C.2d 798, 801, 31 C.R. 302, 382 P.2d 342.) (On classification of counties by population, see *Govt.C. 28020* et seq.)

The validity of these classifications by population, and the application of different laws to different areas, has been upheld by the U.S. Supreme Court. In *Salsburg v. Maryland* (1954) 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281, the statutes authorized admission of illegally obtained evidence in prosecutions for certain gambling misdemeanors in Arundel County where gambling had increased, but prohibited the use of this evidence in similar prosecutions in other counties, and in prosecutions for other misdemeanors in Arundel County. *Held*: (a) A state has wide discretion in prescribing practice under its police power, and (b) "[t]he Equal Protection Clause relates to equality between persons as such rather than between areas." (74 S.Ct. 283, 98 L.Ed. 287.) Thus, variations in procedure, either by authorized local option or by direct legislation, are not in conflict with the *Constitution*. (74 S.Ct. 284, 98 L.Ed. 288.)

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b. Single County or City and County.

8 Witkin Sum. Cal. Law Const Law § 717

[§ 717] Single County or City and County.

The population test results in the classification of Los Angeles County by itself for certain types of legislation. These statutes are valid where the large population is relevant to the object of the regulation. A former statute, applicable only to counties with a population over 4 million (Los Angeles alone), required the assessor to furnish information on the value of tax-assessed property in the public school district, to facilitate budget-making. The statute, dealing with special problems of a large county, was valid. (*Board of Education of Los Angeles v. Watson* (1966) 63 C.2d 829, 833, 48 C.R. 481, 409 P.2d 481.)

But in *Hollman v. Warren* (1948) 32 C.2d 351, 196 P.2d 562, a long-standing and obviously unwarranted discrimination was nullified. A statute formerly allowed the Governor to appoint as many notaries public as necessary for the public convenience, *except* that, in counties of the *second class*, not more than 222 could be appointed. The only county of that class was San Francisco. *Held*, the statute was void. "The legislation on its face expressly chooses without reason to limit the number of notaries for one county, and one county only, thus leaving no room for the presumption of constitutionality or for the presumption that the Legislature had a conceivably rational basis for the limitation ... or the presumption of constitutionality from the long existence of the statute without attack." (32 C.2d 359.)

Similarly, the classification of a "city and county" is an attempt to single out San Francisco, the only city and county in the state, for special legislation. In *Stout v. Democratic County Cen. Committee of San Francisco* (1952) 40 C.2d 91, 251 P.2d 321, a statute provided that in any city and county the county central committee of a political party could increase its membership by a majority vote of the committee. Everywhere except in San Francisco the committee members were apportioned according to population and chosen by the voters. *Held*, following *Hollman v. Warren*, the provision was invalid. (40 C.2d 95.)

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c. Experimental Program in Specified Counties.

8 Witkin Sum. Cal. Law Const Law § 718

[§ 718] Experimental Program in Specified Counties.

In *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 140 C.R. 168, the court examined constitutional challenges directed at former Veh.C. 13201.5, enacted in 1975 to provide a 2-year demonstration program for alcoholic rehabilitation of persons convicted of driving under the influence, in lieu of suspension of their driver's licenses. The program was limited to four approved counties, and petitioners, convicted in a county not approved (Solano), contended that the statute was unconstitutionally discriminatory. The trial judge agreed and rendered judgment extending the statutory benefits to persons in Solano County. *Held*, reversed.

(a) *Legislative intent*. The Legislature, in establishing the pilot program in specified counties and for a limited period, sought to consider various types of programs to determine how the new procedures would work before applying them statewide. This appears from a letter of the author made a part of the legislative record, and therefore a matter judicially noticed and a proper extrinsic aid to interpretation. (71 C.A.3d 1015, citing the text and *Cal. Evidence*.)

(b) *No denial of equal protection*. *Department of Motor Vehicles v. Superior Court* (1976) 58 C.A.3d 936, 130 C.R. 311, held that no fundamental right was involved and that, applying the traditional test of rational relationship of the classification to the statutory purpose (see *supra*, §703), it was valid. This decision is sound and should be followed. Territorial uniformity is not a constitutional requisite, and the Legislature may properly seek the experience of a limited program before extending it to all counties. (71 C.A.3d 1021.)

(c) *No violation of other California constitutional provisions*. Challenges based on Cal. Const., Art. IV, §16(a) and §16(b) (*supra*, §§706, 707), are equally without substance. "By its nature, the demonstration, as distinguished from the ultimate program, cannot be conducted by a general law with uniform operation." (71 C.A.3d 1024.) Because the California provisions are substantially the equivalent of the federal Equal Protection Clause, the rejection of the equal protection attack calls for a similar rejection of the additional challenge. (71 C.A.3d 1025, 1026.)

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d. District Created by Special Act.

8 *Witkin Sum. Cal. Law Const Law* § 719

[§ 719] District Created by Special Act.

Special laws to create improvement and protection districts are common, despite Cal. Const., Art. IV, §16(b) (*supra*, §706). (See 38 *So. Cal. L. Rev.* 72; 23 *Hastings L. J.* 913.)

In *Solvang Mun. Imp. Dist. v. Jensen* (1952) 111 *C.A.2d* 237, 244 *P.2d* 492, plaintiff public corporation was created by special legislative act, although two general laws--the Public Utility District Act and the Municipal Corporation Act--were available. Upholding the validity of the district, the court pointed out that (a) the improvements were urgently needed, while formation under the general laws would have required petitions and elections; (b) the general laws confer extensive powers, and the people might not have voted favorably for a municipal or utility district. Thus, incorporation under the general law would have given them a form of government they neither needed nor wanted, and the special legislation involved none of the evils against which the Constitution protects. (111 *C.A.2d* 241.) (See *Corona Unified Hosp. Dist. v. Superior Court* (1964) 61 *C.2d* 846, 853, 40 *C.R.* 745, 395 *P.2d* 817, *supra*, §706; *People v. Sun Pac. Farming Co.* (2000) 77 *C.A.4th* 619, 638, 92 *C.R.2d* 115 [citrus growers in neighboring pest control districts that had withdrawn from pest control eradication agency and were therefore not subject to tree removal, were not similarly situated to defendant growers; thus, forcing defendants to remove infected trees did not violate equal protection]; 11 *Hastings L. J.* 110, 246 [discussing validity of special district used in solution of metropolitan problems]; 53 *Cal. L. Rev.* 364 [use of special assessment districts in financing private land development]; 38 *So. Cal. L. Rev.* 72 [same].)

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e. The State and Other Entities.

8 *Witkin Sum. Cal. Law Const Law* § 720

[§ 720] The State and Other Entities.

The Legislature has the power to treat public entities differently than private persons. (See *Flournoy v. California* (1964) 230 C.A.2d 520, 524, 41 C.R. 190 [upholding constitutionality of 1963 governmental tort liability act and its immunities].)

A former statute required a bond of not less than \$ 500 to secure costs and attorneys' fees in an action against the state. In *Vinnicombe v. California* (1959) 172 C.A.2d 54, 341 P.2d 705, an inverse condemnation suit, plaintiffs challenged the statute as improperly singling out the state alone, as distinguished from political subdivisions and private corporations. *Held*, the attack was without substance. Irrigation districts may be classified separately from other political subdivisions, and there is even more justification for putting the state in a class separate from them. (172 C.A.2d 59.) (On unconstitutionality of some former security-for-costs statutes, see 3 *Cal. Proc.* (4th), *Actions*, §326.)

SUPPLEMENT: [This section is current through the latest supplement]
Security-for-costs statutes:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §351.



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8 Witkin Sum. Cal. Law Const Law § 721

[§ 721] In General.

(1) *Invalidity of Classification.* Alienage has long been an improper classification in all but a few special situations. (See *infra*, §730.) Thus, a statute subjecting aliens to a poll tax was held unconstitutional. (*In re Kotta* (1921) 187 C. 27, 29, 200 P. 957.) (For unconstitutionality of poll tax in all cases, see *supra*, §243.) And a statute requiring employers of more than five persons to hire a certain percentage of citizens was likewise held invalid. (*Truax v. Raich* (1915) 239 U.S. 33, 36 S.Ct. 7, 11, 60 L.Ed. 131, 136.)

In *Takahashi v. Fish & Game Com.* (1948) 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478, petitioner, a Japanese alien ineligible for citizenship under the former federal law, had engaged in commercial fishing off the California coast since 1915. In 1945, a California statute was enacted to prohibit issuance of commercial fishing licenses to ineligible aliens. The California court held it constitutional on the theory of the state's power to conserve fish and game in coastal waters. (30 C.2d 719, 185 P.2d 805.) The U.S. Supreme Court reversed. (a) *Truax v. Raich* establishes the general principle that the Fourteenth Amendment protects an alien's right to work in common occupations. (b) The state's argument that the statute simply follows the classification of federal naturalization laws in discriminating against ineligible aliens is unsound, because the state has no powers over immigration and naturalization comparable to those of the federal Government. (c) The chief contention of the state, that it has a "special public interest" to preserve for its citizens the fish swimming in the coastal belt, is likewise untenable. "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." (68 S.Ct. 1143, 92 L.Ed. 1488.) (For rejection of ineligible alien classification, see *infra*, §722.)

The modern view that classification of aliens is inherently suspect and anachronistic is restated in a number of later decisions repudiating early cases that had upheld the classification in special situations. Under today's approach, it is not enough to show that the classification reasonably relates to the purposes of the law. "[T]he state must bear the burden of establishing that the classification constitutes a necessary means of accomplishing a legitimate state interest, and that the law serves to promote a compelling state interest." (*Purdy & Fitzpatrick v. California* (1969) 71 C.2d 566, 579, 79 C.R. 77, 456 P.2d 645, *infra*, §723; see *Graham v. Richardson* (1971) 403 U.S. 365, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534, 541, *infra*, §727; *People v. Rappard* (1972) 28 C.A.3d 302, 304, 104 C.R. 535, *infra*, §726; *Bernal v. Fainter*

(1984) 467 U.S. 216, 104 S.Ct. 2312, 2319, 81 L.Ed.2d 175, 184, *infra*, §725; *Raffaelli v. Committee of Bar Examiners* (1972) 7 C.3d 288, 292, 101 C.R. 896, 496 P.2d 1264, *infra*, §725; *Del Taco v. Work Comp. App. Bd.* (2000) 79 C.A.4th 1437, 1443, 94 C.R.2d 825 [workers' compensation award of vocational rehabilitation services that provided "illegal worker" more extensive and costly services than would have been provided to similarly situated "legal worker" violated equal protection]; on strict scrutiny of suspect classifications, see *supra*, §704.)

(2) *Texts and Law Reviews*. Comment on classifications based on alienage has been extensive. (See 3 Rotunda, §18.11 et seq.; 92 *Harv. L. Rev.* 1516 [dual standard]; 117 *Harv. L. Rev.* 2731 [unconstitutionality of criminal alien detention]; 9 Cal. Western L. Rev. 1 [The Alien and the Constitution]; 11 Cal. Western L. Rev. 117 [unconstitutionality of California statutes excluding aliens from public office]; 31 *Loyola L.A. L. Rev.* 1033 [Alienation: Congressional Authorization of State Discrimination Against Immigrants]; 17 *San Diego L. Rev.* 201 [constitutional hurdles in employment, education, and aid programs]; 20 *San Diego L. Rev.* 265 [Constitutional Adjudication in State Alienage Case]; 33 *San Diego L. Rev.* 755 [Trusts Betrayed: The Absent Federal Partner in Immigration Policy]; 31 *Stanf. L. Rev.* 1069 [The Equal Treatment of Aliens: Preemption or Equal Protection?]; 54 *Stanf. L. Rev.* 319 [argument for greater judicial scrutiny of federal alienage classifications]; 8 *U.C. Davis L. Rev.* 1 [Aliens and the Federal Government: A Newer Equal Protection]; 42 *U.C.L.A. L. Rev.* 1425 [symposium on immigration and right of aliens to public benefits]; Cal. Civil Practice, 2 Civil Rights Litigation, §9:1 et seq. [text and forms for actions involving discrimination based on race or national origin].)

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(2) *Texts and Law Reviews*. See 3 Rotunda 4th, §18.11 et seq.



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b. Alien Land Laws.

8 *Witkin Sum. Cal. Law Const Law* § 722

[§ 722] Alien Land Laws.

The California Alien Land Law, which limited the right of aliens then ineligible for citizenship to acquire real property, was originally upheld on the theory of safeguarding the security of the state by keeping ownership of the land in citizens and persons eligible to citizenship. (See *Terrace v. Thompson* (1923) 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Webb v. O'Brien* (1923) 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318; *Mott v. Cline* (1927) 200 C. 434, 447, 253 P. 718.) The legislation was nevertheless strongly attacked, and later U.S. Supreme Court decisions avoided any square declaration of approval of this constitutional theory. (See *Oyama v. California* (1948) 332 U.S. 633, 68 S.Ct. 269, 275, 92 L.Ed. 249, 259 [validity of Act assumed "for purposes of argument only," though unnecessary to decide; four concurring justices would hold it unconstitutional]; *Takahashi v. Fish & Game Com.* (1948) 334 U.S. 410, 68 S.Ct. 1138, 1144, 92 L.Ed. 1478, 1488, supra, §721 [assuming continued validity of cases upholding Act].)

The California statute was finally held unconstitutional in *Fujii v. California* (1952) 38 C.2d 718, 242 P.2d 617. The court first observed that, although the classification was ostensibly based on eligibility for citizenship, the actual basis was race or nationality; i.e., Japanese, though not named, were excluded by reference to the then federal naturalization statute. (38 C.2d 729.) A classification by race will be subjected to the most rigid scrutiny because the Fourteenth Amendment was designed to prevent discrimination on that basis. (38 C.2d 730.)

The court next examined and rejected all of the supposed justifications for the law; e.g., that it promoted loyalty (no connection between eligibility to citizenship and loyalty); that ownership of farm lands may be specially treated (farming is an ancient and common occupation). (38 C.2d 732 et seq.) The opinion concludes: "The California Alien Land Law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare." (38 C.2d 737.) (See 9 Cal. Western L. Rev. 18; 32 *Hastings L. J.* 251 [Alien Land Laws: Constitutional Limitations on State Power to Regulate]; on elimination of Japanese ineligibility to citizenship under Naturalization Act, see supra, §190.)

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c. Public Works Employment.

8 *Witkin Sum. Cal. Law Const Law* § 723

[§ 723] Public Works Employment.

It was formerly held that the state had the same power as a private employer to prescribe the conditions under which it would permit public works to be done, and could favor its own citizens and exclude aliens from employment on these projects. (See *Heim v. McCall* (1915) 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206; *Pasadena v. Charleville* (1932) 215 C. 384, 398, 10 P.2d 745.)

This exception to the general rule of invalidity of classifications based on alienage was repudiated in *Purdy & Fitzpatrick v. California* (1969) 71 C.2d 566, 79 C.R. 77, 456 P.2d 645, where contractors on public works were subjected to penalties for violating the prohibitory statute (former Lab.C. 1850). The statute was held invalid on two grounds: (a) as an encroachment on the congressional scheme for immigration and naturalization (see *supra*, §183); and (b) as a denial of equal protection.

On the equal protection point, the court observed that *Takahashi v. Fish & Game Com.* (1948) 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478, *supra*, §721, "dealt a death blow to the 'proprietary' rationale" as a justification for exclusion of aliens from occupations, and called for the overruling of *Pasadena v. Charleville*. (71 C.2d 586.) The statute was then condemned in the following language: "The classification ... operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens of other countries. This latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination." (71 C.2d 585.) (See 58 Cal. L. Rev. 184; 9 Cal. Western L. Rev. 15 [right to employment]; 4 Pacific L. J. 275 [legislative response to *Purdy*].)

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d. Federal Civil Service.

8 *Witkin Sum. Cal. Law Const Law* § 724

[§ 724] Federal Civil Service.

In *Hampton v. Wong* (1976) 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495, plaintiffs were aliens lawfully and permanently residing in the U.S. They sued to challenge the constitutionality of regulations of the federal Civil Service Commission and other federal agencies excluding all except American citizens (and natives of Samoa) from employment in most federal civil service positions. Each plaintiff adequately alleged his qualifications for the job sought. *Held*, the regulations were unconstitutional.

(a) *Equal protection implied in due process*. In federal territory, where no special national interest is involved, the Due Process Clause has the same significance as the *Equal Protection Clause*. (96 S.Ct. 1904, 48 L.Ed.2d 507; see *supra*, §694.)

(b) *Federal power over immigration and naturalization*. Plaintiffs relied mainly on *Sugarman v. Dougall* (1973) 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853, *infra*, §725, and *In re Griffiths* (1973) 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910, *infra*, §725, holding invalid state laws restricting employment to citizens. But the paramount federal power over immigration and naturalization calls for a distinction. "[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State." (96 S.Ct. 1904, 48 L.Ed.2d 507.) On the other hand, the Commission's contention that the federal power is so plenary as to permit arbitrary discrimination against resident aliens cannot be accepted. (96 S.Ct. 1904, 48 L.Ed.2d 507.)

(c) *Application of test*.

(1) The Commission's rule has its impact on "an identifiable class of persons" already subject to disadvantages; the added disadvantage of ineligibility for employment in a major section of the economy "is of sufficient significance to be characterized as a deprivation of an interest in liberty." By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. (96 S.Ct. 1905, 48 L.Ed.2d 508.) "Respondents argue that this scrutiny requires invalidation of the Commission rule under traditional equal protection analysis. It is true that our cases establish that the Due Process Clause of the Fifth Amendment authorizes that type of analysis of federal rules and therefore that the Clause has a substantive as well as a procedural aspect. However, it is not necessary to resolve respondents' substantive claim, if a narrower inquiry discloses that essential procedures have not been followed." (96 S.Ct. 1905, 48 L.Ed.2d

508.)

(2) When the federal Government asserts an overriding national interest as justification for a discriminatory rule that would violate the Equal Protection Clause if adopted by a state, due process requires a legitimate basis for presuming that the rule was actually intended to serve that interest. (96 S.Ct. 1905, 48 L.Ed.2d 508.) Here, it may be assumed that if Congress or the President had expressly imposed the citizenship requirement, it would be justified. (96 S.Ct. 1906, 48 L.Ed.2d 509.) But they have not done so; and the Civil Service Commission, with authority to promote the efficiency of the federal civil service, has no authority to carry out the important national interests justifying a citizenship requirement for federal employment. (96 S.Ct. 1906, 1910, 48 L.Ed.2d 510, 515.) "That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies." (96 S.Ct. 1910, 48 L.Ed.2d 515.) Administrative convenience--the desirability of having one simple rule excluding all noncitizens when citizenship is a legitimate requirement for some important and sensitive positions--is not a justification for wholesale deprivation of employment opportunities. (96 S.Ct. 1911, 48 L.Ed.2d 515.)

(d) *Conclusion.* "In sum, assuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission. The impact of the rule on the millions of lawfully admitted resident aliens is precisely the same as the aggregate impact of comparable state rules which were invalidated by our decision in *Sugarman*. By broadly denying this class substantial opportunities for employment, the Civil Service Commission rule deprives its members of an aspect of liberty. Since these residents were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States, due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency. We hold that §338.101(a) of the Civil Service Commission Regulations has deprived these respondents of liberty without due process of law and is therefore invalid." (96 S.Ct. 1912, 48 L.Ed.2d 516.)

Two concurring justices reserved the equal protection questions for a congressional or presidential enactment. (96 S.Ct. 1912, 48 L.Ed.2d 516.) Four dissenting justices vigorously attacked the "novel conception of the procedural due process guaranteed by the Fifth Amendment" and the doctrine evolved from it of "delegation of legislative authority." While the majority agree that the Equal Protection Clause does not provide a basis for invalidating a denial of federal employment, "[t]he Court instead inexplicably melds together the concepts of equal protection, procedural and substantive due process" to produce its holding. (96 S.Ct. 1913, 48 L.Ed.2d 518.) And because Congress could have excluded aliens from Civil Service, the fact that it chose to allow the Commission to do so does not render the governmental policy any less political or more subject to judicial scrutiny. (96 S.Ct. 1916, 1917, 48 L.Ed.2d 522.) (See 90 Harv. L. Rev. 105; 15 San Diego L. Rev. 171.)

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e. Profession, Business, or Employment.

8 *Witkin Sum. Cal. Law Const Law* § 725

[§ 725] Profession, Business, or Employment.

It was formerly held that the state may restrict membership in the licensed professions, such as law, to citizens. (See *Large v. State Bar* (1933) 218 C. 334, 335, 23 P.2d 288.) *Large* was overruled in *Raffaelli v. Committee of Bar Examiners* (1972) 7 C.3d 288, 301, 101 C.R. 896, 496 P.2d 1264, and the California statute requiring citizenship for admission to the Bar was held unconstitutional. (See 1 *Cal. Proc.* (4th), *Attorneys*, §375; 53 A.L.R.3d 1163 [validity of citizenship requirement for right to practice law].) The U.S. Supreme Court came to the same conclusion. (*In re Griffiths* (1973) 413 U.S. 717, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910, 916.)

Raffaelli appears to eliminate any justification for a citizenship requirement for other professions or businesses (see 7 C.3d 303), and the 1972 Legislature promptly amended a number of statutes licensing businesses and professions to delete the requirement. (See *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero* (1976) 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 [engineer or architect]; on prohibition against discrimination in employment generally, see Cal. Const., Art. I, §8, *infra*, §762.)

In *Sugarman v. Dougall* (1973) 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853, the U.S. Supreme Court took the further step of holding unconstitutional a citizenship requirement for classified civil service positions. (See *Ruiz-Cano v. San Diego* (1979) 98 C.A.3d 803, 806, 807, 159 C.R. 602 [following *Sugarman*; charter provision with indiscriminate bar on employment of aliens was invalid].)

In *Bernal v. Fainter* (1984) 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed.2d 175, the Court, holding unconstitutional a Texas statute requiring *notaries public* to be citizens, analyzed the "political function" exception, which allows exclusion of aliens from positions intimately related to the process of democratic self-government. (104 S.Ct. 2316, 81 L.Ed.2d 180, discussing *Foley v. Connelie* (1978) 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287, *infra*, §732, *Ambach v. Norwick* (1979) 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49, *infra*, §733, and *Cabell v. Chavez-Salido* (1982) 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677, *infra*, §732.) Applying the *Cabell* test, the Court found the exception inapplicable to a notary. A notary's duties are essentially clerical and ministerial; a notary does not exercise the wide discretion of public school teachers. Although considerable damage could result from negligent or dishonest performance, the same is true of duties performed by cashiers, building inspectors, janitors who clean offices of public officials, and many other categories of personnel. "What distinguishes such personnel from those to which the political function exception

is properly applied is that the latter are either invested with policy-making responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals." (104 S.Ct. 2319, 81 L.Ed.2d 184.) (On validity of requirement that law enforcement officers and teachers be citizens, see *infra*, §§732, 733.)

SUPPLEMENT: [This section is current through the latest supplement]

See 54 U.C.L.A. L. Rev. 1963 [immigration status discrimination and exploitation in low-wage workplace].

Citizenship requirement for Bar admission:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §358.



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8 *Witkin Sum. Cal. Law Const Law* § 726

[§ 726] Alien Gun Laws.

P.C. 12021(a) formerly made it a crime for an alien to own or possess a concealable firearm. The statute was upheld in 1924 (*In re Rameriz* (1924) 193 C. 633, 650, 226 P. 914) on the theory that it was a proper means of promoting the state's interest in public safety. But the assumption that aliens with these weapons are more dangerous than citizens is no longer supportable in light of *Raffaelli v. Committee of Bar Examiners* (1972) 7 C.3d 288, 101 C.R. 896, 496 P.2d 1264, supra, §725. Accordingly, in *People v. Rappard* (1972) 28 C.A.3d 302, 305, 104 C.R. 535, the court concluded that *Rameriz* was no longer controlling, and that the statute was unconstitutional. Language pertaining to aliens was deleted from the statute in 1974. (See 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §174 et seq.)

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g. Welfare Benefits.

8 *Witkin Sum. Cal. Law Const Law* § 727

[§ 727] Welfare Benefits.

In *Graham v. Richardson* (1971) 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534, Arizona and Pennsylvania statutes restricting welfare benefits to citizens or aliens with a long period of residence (15 years), were held unconstitutional. The states relied on the subsequently repudiated "special interest doctrine," that a state may restrict the right of noncitizens to exploit resources. The Court pointed out that this doctrine was heavily grounded on the discredited distinction between right and privilege (91 S.Ct. 1853, 29 L.Ed.2d 543), and that *Takahashi v. Fish & Game Com.* (1948) 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478, supra, §721, cast doubt on its continuing validity. "Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi*, we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens." (91 S.Ct. 1853, 29 L.Ed.2d 543.) (See 9 Cal. Western L. Rev. 17; 42 U.C.L.A. L. Rev. 1425 [symposium on immigration and right of aliens to public benefits]; 45 U.C.L.A. L. Rev. 205 [immigrants under new welfare law]; 113 A.L.R.5th 95 [state statutes limiting or barring public health care to indigent aliens]; on validity of denial of benefits to applicants for political asylum, see *infra*, §731.)

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h. Financial Assistance for Higher Education.

8 Witkin Sum. Cal. Law Const Law § 728

[§ 728] Financial Assistance for Higher Education.

In *Nyquist v. Mauclet* (1977) 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63, New York, by statute, provided financial assistance to students pursuing higher education. In addition to a modest residence requirement, the following restrictions were made on eligibility: The applicant must be a citizen, or must have made application for citizenship, or if not qualified must affirm his or her intent to apply when qualified and must apply as soon as eligible, or must be a member of the class of refugees paroled by the Attorney General. Mauclet was a citizen of France, a permanent resident of the United States, married to an American citizen and with a citizen child. Rabinovitch was a citizen of Canada, also a permanent resident, who registered with Selective Service on his 18th birthday. Both, however, declared their intention to retain their original citizenship and not become naturalized. They challenged the statutory restrictions as a denial of equal protection. *Held*, the restrictions were invalid.

(a) *Suspect classification*. The contention that the statute does not discriminate against aliens who intend to become citizens is answered by *Graham v. Richardson* (1971) 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534, *supra*, §727: "The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." (97 S.Ct. 2125, 53 L.Ed.2d 70.) Hence, the strict scrutiny test applies (see *supra*, §704). (97 S.Ct. 2124, 53 L.Ed.2d 69.)

(b) *Incentive to naturalization is insufficient state interest*. The statute is said to offer an incentive to aliens to become naturalized; but this is not a permissible state interest, for control over immigration and naturalization is exclusively in the federal *Government*. (97 S.Ct. 2126, 53 L.Ed.2d 71.) "If the encouragement of naturalization through these programs were seen as adequate, then every discrimination against aliens could be similarly justified." (97 S.Ct. 2127, 53 L.Ed.2d 72.)

(c) *Enhancing educational level of electorate is insufficient state interest*. The other purpose, to offer assistance to prospective voters, is likewise insufficient. Although this education is a laudable objective, it would not be frustrated by including resident aliens in the program. (97 S.Ct. 2127, 53 L.Ed.2d 72.)

(d) *No harm to State*. "Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis. And although an alien may be barred from full involvement in the political arena, he

may play a role--perhaps even a leadership role--in other areas of import to the community. The State surely is not harmed by providing resident aliens the same educational opportunity it offers to others." (97 S.Ct. 2127, 53 L.Ed.2d 72.)

Four dissenting justices, in three opinions, made these main points: (a) With the exception of *Graham v. Richardson*, all the prior cases relied on prohibited aliens from engaging in certain occupations or professions, thereby impairing their ability to earn a livelihood. (b) *Graham v. Richardson* involved denial of welfare benefits essential to sustain life. (c) Here, the state is not preventing aliens from obtaining an education, but is providing economic incentives to its own citizens, and to those who intend to become citizens, to induce them to pursue higher studies which in the long run will benefit the state. (97 S.Ct. 2127, 2128, 53 L.Ed.2d 73.) (d) Offering incentives to resident alien scholars to become naturalized is a permissible purpose for a state. (97 S.Ct. 2129, 53 L.Ed.2d 75.) (See 5 *Hastings Const. L. Q.* 128; 14 Cal. Western L. Rev. 514.)

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i. Education for Illegal Alien Children.

8 Witkin Sum. Cal. Law Const Law § 729

[§ 729] Education for Illegal Alien Children.

(1) *In General.* In *Plyler v. Doe* (1982) 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786, a state statute withholding state funds from local school districts for the education of children of illegal aliens was held a violation of the Equal Protection Clause. The Court declared that lack of enforcement of the laws barring entry has resulted in the creation of a substantial "shadow population" of illegal migrants (102 S.Ct. 2395, 72 L.Ed.2d 800), and it found no substantial state interest in depriving their innocent children of the benefits of free public education offered to other children (102 S.Ct. 2400, 72 L.Ed.2d 805, 807).

Four justices joined in a dissent asserting that the Court's holding "manifests the justly criticized judicial tendency to attempt speedy and wholesale formulation of 'remedies' for the failures--or simply the laggard pace--of the political process of our system of government." (102 S.Ct. 2408, 72 L.Ed.2d 816.) (See 96 Harv. L. Rev. 130; 11 Hastings Const. L. Q. 599; 23 J. Juvenile Law 41 [California's attempt to legislate undocumented children out of public education]; 16 Pacific L. J. 1101; on valid classifications of illegal aliens generally, see *infra*, §731.)

(2) *Residence for Tuition Purposes.* *American Assn. of Women v. Board of Trustees* (1995) 31 C.A.4th 702, 38 C.R.2d 15, was a taxpayer suit to compel defendant board of trustees of the California State University to follow *Educ.C. 68050* and *68062(h)*, insofar as they apply to undocumented aliens establishing residence for purposes of resident or nonresident tuition. *Educ.C. 68050* requires persons classified as nonresidents to pay nonresident tuition; *Educ.C. 68062(h)* allows an alien to establish residence, unless the Immigration and Nationality Act precludes him or her from establishing domicile in the United States.

An unappealed Alameda County superior court case had found that *Educ.C. 68062(h)* was unconstitutional, insofar as it permitted the determination of residence for undocumented aliens to be made on terms other than those applied to U.S. citizens, and had enjoined the California State University from establishing California residence for these aliens on terms different from that of U.S. citizens. A later decision, *Regents of Univ. of Calif. v. Superior Court* (1990) 225 C.A.3d 972, 276 C.R. 197, better known as the *Bradford* decision, had held that *Educ.C. 68062(h)* was constitutional on its face and as applied, and that it precluded undocumented aliens from qualifying as California residents for tuition purposes. The issue in the present case was which decision prevailed--the Alameda County superior court case or the *Bradford* decision. The trial judge granted mandamus, compelling defendant to comply with the two statutes and

enjoining it from violating them. *Held*, affirmed.

(a) *Bradford*, as an appellate decision determining that *Educ.C. 68062(h)* is constitutional, controls. Nothing in *Bradford* says that it is not binding on the California State University system, and *Educ.C. 68062(h)* in fact applies to that system (*Educ.C. 68000, 68011, 68012*). (*31 C.A.4th 706*.)

(b) However, *Bradford's* conclusion that *Educ.C. 68062(h)* precludes undocumented aliens from qualifying as residents for tuition purposes goes beyond the relief sought by plaintiffs. *Educ.C. 68062(h)* "does not, itself, make a blanket preclusion of undocumented alien students from qualifying as California residents for tuition purposes. That section clearly establishes the preclusionary standard as the domiciliary provisions of the Immigration and Nationality Act (*8 U.S.C. §1101 et seq.*).\" (*31 C.A.4th 707*.)

Educ.C. 68130.5, added in 2001, provides that students, other than nonimmigrant aliens as defined by *8 U.S.C., §1101(a)*, are exempt from paying nonresident tuition at California state universities and community colleges if they meet all the following requirements:

(1) Attendance at a California high school for 3 or more years. (*Educ.C. 68130.5(a)(1)*.)

(2) Graduation from a California high school or attainment of its equivalency. (*Educ.C. 68130.5(a)(2)*.)

(3) "Registration as an entering student at, or current enrollment at, an accredited institution of higher learning in California not earlier than the fall semester or quarter of the 2001-02 academic year." (*Educ.C. 68130.5(a)(3)*.)

(4) When a person is *without lawful immigration status*, the filing of an affidavit with the college or university "stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so." (*Educ.C. 68130.5(a)(4)*.)

"Student information obtained in the implementation of this section is confidential." (*Educ.C. 68130.5(d)*.) (See *115 Harv. L. Rev. 1548* [California's tuition benefits for undocumented aliens]; on denial of public benefits under Proposition 187, see *infra*, §731.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *42 U.S.F. L. Rev. 1045* [new look at *Plyler v. Doe*].



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j. Valid Classifications.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 730

[§ 730] In General.

The dwindling list of permissible discriminations against aliens includes the following:

(1) *Voting*. Citizenship is a reasonable condition on the right to vote, and this classification of aliens is valid. (*People v. Rodriguez* (1973) 35 C.A.3d 900, 902, 111 C.R. 238; *Padilla v. Allison* (1974) 38 C.A.3d 784, 786, 113 C.R. 582.)

(2) *Medicare Program*. In *Mathews v. Diaz* (1976) 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478, a class action, resident aliens challenged the constitutionality of the federal statute limiting an alien's eligibility for participation in the Medicare program by two conditions: a 5-year period of residence, and admission for permanent residence. *Held*, both conditions were valid.

(a) *Distinction between rights of citizens and aliens*. "The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other, and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." (96 S.Ct. 1890, 48 L.Ed.2d 489.)

(b) *Resolution of issue in this case*. The precise issue is whether the statutory discrimination *within* the class of aliens is permissible; and a narrow standard of judicial review must be employed where the decision is by Congress or the President in the area of immigration and naturalization. (96 S.Ct. 1892, 48 L.Ed.2d 491.) Congress may reasonably make an alien's eligibility depend on both the character and duration of his or her residence, and individual hardship suffered by drawing the line does not affect the validity of the statute. (96 S.Ct. 1893, 48 L.Ed.2d 492.) *Graham v. Richardson* (1971) 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534, *supra*, §727, involving state statutes, is distinguishable. "[T]he Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." (96 S.Ct. 1895, 48 L.Ed.2d 494.) (See 5 *Hastings*

Const. L. Q. 561.)

(3) *Policemen and Schoolteachers.* A citizenship requirement for the positions of police officer or public school teacher is valid. (See *infra*, §§732, 733.)

(4) *Applicants for Political Asylum.* A county's denial of welfare benefits to aliens who have requested but not yet been granted political asylum, on the ground that the aliens are not "lawfully resident" in the county, does not deny equal protection. (*Khasminskaya v. Lum* (1996) 47 C.A.4th 537, 544, 54 C.R.2d 915.)

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2. Illegal Aliens.

8 Witkin Sum. Cal. Law Const Law § 731

[§ 731] Illegal Aliens.

(1) *In General.* Denial of employment and unemployment benefits to illegal aliens has been upheld. (See *De Canas v. Bica* (1976) 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43, supra, §20 [prohibition of employment is valid exercise of police power and not infringement of federal power over immigration]; *Alonso v. California* (1975) 50 C.A.3d 242, 251, 123 C.R. 536 [valid denial of unemployment benefits to illegal alien who is not entitled to employment].) And, because undocumented aliens lack community ties and may be poor risks to comply with probation terms, illegal alien status is a factor that may be considered by a sentencing court in determining whether to grant probation. (*People v. Sanchez* (1987) 190 C.A.3d 224, 230, 231, 235 C.R. 264.) (See *American G.I. Forum v. Miller* (1990) 218 C.A.3d 859, 868, 267 C.R. 371 [because illegal aliens are not suspect class, collecting and disseminating information on arrestee's status as "undocumented person" does not violate equal protection]; on education of children of illegal aliens, see supra, §729.)

(2) *Proposition 187.* Proposition 187, approved by the voters in the November 1994 general election, provided that only U.S. citizens or lawfully admitted aliens could receive *public* benefits. Further, when public entities reasonably suspected that an applicant for services was an illegal alien, the entity was required to report that suspicion to the applicant and to designated authorities. (See 16 J. Juvenile Law 210 [application of *Plyler v. Doe* (1982) 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786, supra, §729, to denial of benefits to undocumented alien children under Proposition 187]; 31 U.S.F. L. Rev. 345 [same]; 26 *Pacific L. J.* 989 [Proposition 187].)

Most of Proposition 187 was preempted by the Immigration and Nationality Act, 8 U.S.C., §1101 et seq. (*League of United Latin Amer. Citizens v. Wilson* (1995) 908 F.Supp. 755, 768.) The remaining benefit denial provisions were preempted by the 1996 adoption of the Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C., §1601 et seq. (*League of United Latin Amer. Citizens v. Wilson* (1997) 997 F.Supp. 1244, 1252.) However, P.C. 114, making it a felony to conceal one's true citizenship or resident alien status through the use of false documents, is severable from the unconstitutional portions of Proposition 187, and is not preempted by federal law. (*People v. Salazar-Merino* (2001) 89 C.A.4th 590, 597, 107 C.R.2d 313.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* Noncitizen victims of human trafficking, domestic violence, and other specified crimes are eligible for

public social services and health care to the same extent as individuals who are admitted to the United States as refugees under 8 U.S.C., §1157. These services terminate if there is a final administrative denial of a visa application. (Welf.C. 18945, added in 2006.)

See 16 A.L.R.6th 131 [Validity of State Statutes, Regulations, or other Identification Requirements Restricting or Denying Driver's Licenses to Illegal Aliens].



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3. Law Enforcement Officers.

8 Witkin Sum. Cal. Law Const Law § 732

[§ 732] Law Enforcement Officers.

In *Foley v. Connelie* (1978) 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287, plaintiff, an alien eligible for naturalization in due course, applied for appointment as a New York State Trooper, and was denied the right to take the examination. In this action, he challenged the constitutionality of the New York requirement, similar to that in most other states, of citizenship as a condition of appointment to the police force. *Held*, the statute was valid.

(a) Recent decisions have required close scrutiny of state action to exclude aliens from various benefits. However, "[t]he essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens." (98 S.Ct. 1071, 55 L.Ed.2d 293.)

(b) The office of a policeman is not a common occupation. The police function fulfills a fundamental obligation of government, and police officers are clothed with authority to exercise a variety of discretionary powers with serious impact on individuals. (98 S.Ct. 1071, 1072, 55 L.Ed.2d 293, 294.) "[I]t would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens." (98 S.Ct. 1072, 55 L.Ed.2d 294.) Hence, citizenship bears a rational relationship to the special demands of the position. (98 S.Ct. 1073, 55 L.Ed.2d 295.)

Three justices dissented, arguing that no valid distinction can be made between alien attorneys and alien police officers. (98 S.Ct. 1076, 1077, 55 L.Ed.2d 299.) (See 32 *Hastings L. J.* 163; 6 *Hastings Const. L. Q.* 180; 4 *A.L.R.4th* 380 [validity, construction, and application of residence requirement for policemen or firemen].)

In *Cabell v. Chavez-Salido* (1982) 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677, the reasoning of *Foley* was applied to uphold the validity of California's requirement that *probation officers* be citizens. (102 S.Ct. 742, 743, 70 L.Ed.2d 688, 689.) Four dissenting justices thought that the exclusion of resident aliens "stems solely from state parochialism and hostility toward foreigners who have come to this country lawfully." (102 S.Ct. 751, 70 L.Ed.2d 699.) (See 23 *Santa Clara L. Rev.* 691.)

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8 *Witkin Sum. Cal. Law Const Law* § 733

[§ 733] Public Schoolteachers.

In *Ambach v. Norwick* (1979) 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49, a New York statute forbade certification as a public schoolteacher of aliens unless they had manifested an intention to apply for citizenship. *Held*, the restriction did not violate the Equal Protection Clause.

(a) *Development of law on discrimination against aliens.* Although the early cases, such as *Truax v. Raich* (1915) 239 U.S. 33, 36 S.Ct. 7, 11, 60 L.Ed. 131, 136, *supra*, §721, recognized some state power to exclude aliens from public employment, later cases departed from this public interest doctrine. But it is still a general principle that some state functions are so bound up with the operation of the state as a governmental entity as to permit the exclusion from those functions of persons who have not become part of the process of self-government. (99 S.Ct. 1592, 1593, 60 L.Ed.2d 54, 55.) Thus, applying the rational basis standard, exclusion of aliens from the police force was upheld in *Foley v. Connelie* (1978) 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287, *supra*, §732. (99 S.Ct. 1593, 60 L.Ed.2d 55.)

(b) *The governmental function exception.* "The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." (99 S.Ct. 1593, 60 L.Ed.2d 55.) The assumption of the status of citizenship "denotes an association with the polity which, in a democratic republic, exercises the powers of governance." (99 S.Ct. 1594, 60 L.Ed.2d 55.)

(c) *Teaching as a governmental function.* Public education fulfills a fundamental obligation of government, because teachers play a critical part in developing students' attitudes toward government and understanding of the role of citizens. (99 S.Ct. 1595, 60 L.Ed.2d 57.) The teacher also serves as a role model for students, and has an obligation to promote civic virtues and understanding. (99 S.Ct. 1596, 60 L.Ed.2d 58.) Hence, public schoolteachers come within the governmental function exception, and the statute is valid if a citizenship requirement bears a rational relationship to a legitimate state interest. (99 S.Ct. 1596, 60 L.Ed.2d 59.)

(d) *Legitimate state interest.* The statute bars from teaching only those aliens who have shown unwillingness to become citizens; they have in effect classified themselves. "They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty. They have rejected the open invitation extended to qualify for

eligibility to teach by applying for citizenship in this country." (99 S.Ct. 1596, 60 L.Ed.2d 59.) The statute furthers the judgment of New York that citizenship should be a qualification for teaching the young. (99 S.Ct. 1597, 60 L.Ed.2d 59.)

Four dissenting justices saw no distinction between this and other cases invalidating discrimination against aliens, particularly *In re Griffiths* (1973) 413 U.S. 717, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910, 916, supra, §725, on the practice of law. (See 92 Harv. L. Rev. 1516; 32 Hastings L. J. 163; 7 Hastings Const. L. Q. 484.)

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a. In General.

8 Witkin Sum. Cal. Law Const Law § 734

[§ 734] In General.

Because the Equal Protection Clause applies to all "persons" (supra, §696), discrimination against nonresidents of a state in such matters as the right to engage in employment or business is unconstitutional. (See *Abe v. Fish & Game Com. of Calif.* (1935) 9 C.A.2d 300, 306, 49 P.2d 608 [statute authorizing commercial fishing license only to residents]; cf. *Toomer v. Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460, 1464, supra, §610 [Privileges and Immunities Clause invoked to protect against discrimination]; *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 105 S.Ct. 1272, 1277, 84 L.Ed.2d 205, 212, supra, §614 [same]; 53 A.L.R.3d 1163 [residence requirements for right to practice law].)

C.C.P. 526a, providing for a taxpayer's suit to enjoin expenditures for a public improvement (see 4 Cal. Proc. (4th), Pleading, §144), gives the right to citizen residents, and to corporations whether residents or not. In *Irwin v. Manhattan Beach* (1966) 65 C.2d 13, 19, 51 C.R. 881, 415 P.2d 769, the court held that a taxpayer of the city, though not a resident, could sue; the discrimination against a nonresident individual was obviously unconstitutional.

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See *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 C.A.4th 11, 26, 69 C.R.3d 678 [exclusion of general partner of limited partnership that owned real property in district from voting on school bond did not violate equal protection even though he would be indirectly liable for new taxes approved by vote; partner did not reside in district and was not registered to vote there].

Taxpayer's action:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §162.



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8 *Witkin Sum. Cal. Law Const Law* § 735

[§ 735] Welfare Benefits.

The common requirement of 1 year's residence in a state before welfare may be sought by an indigent was declared unconstitutional in *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600. The majority reasoned as follows:

(a) The principal justification for the legislation--preservation of the fiscal integrity of state programs by discouraging an influx of poor families--is an unconstitutional object, violating the fundamental right to travel. (89 S.Ct. 1328, 22 L.Ed.2d 611; see *supra*, §403.)

(b) Even though indigents might enter the state solely to obtain larger benefits than in their home state, they cannot be fenced out, any more than indigents generally can be excluded, or those who move to a state to take advantage of better educational facilities can be excluded. (89 S.Ct. 1330, 22 L.Ed.2d 613.)

(c) The distinction cannot be made on the basis of contributions to the community through payment of taxes; this could logically be used to bar new residents from schools and parks, or to deprive them of police protection. (89 S.Ct. 1330, 22 L.Ed.2d 614.)

(d) Administrative objectives cannot support the legislation. Because the classification touches on the fundamental right of interstate movement (see *supra*, §403), "its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." (89 S.Ct. 1333, 22 L.Ed.2d 617.)

(e) The Social Security Act of 1935 did not expressly approve this requirement; but, even if it did, Congress may not authorize states to violate the *Equal Protection Clause*. (89 S.Ct. 1335, 22 L.Ed.2d 619.)

Three dissenting justices took violent issue with the decision. They contended that Congress did approve, and could constitutionally approve, the residence requirement; and they warned of dangerous implications in the numerous situations involving residence requirements. (89 S.Ct. 1342, 1346, 22 L.Ed.2d 621, 627.) (See *Saenz v. Roe* (1999) 526 U.S. 489, 119 S.Ct. 1518, 1525, 1528, 143 L.Ed.2d 689, 702, 703 [following *Shapiro*; *Welf.C.* 11950.03, providing reduced welfare benefits for new residents based on lesser amount they would have received in former state, violated

Privileges and Immunities and Citizenship Clauses of federal Constitution; state's interest in saving money did not justify discriminating among equally eligible citizens]; 83 *Harv. L. Rev.* 118 [*Shapiro*]; 113 *Harv. L. Rev.* 110 [*Saenz*]; 6 *Cal. Western L. Rev.* 179 [*Shapiro*]; 27 *Loyola L.A. L. Rev.* 305 [resurgence of residence requirements for receipt of welfare]; 7 *San Diego L. Rev.* 120 [*Shapiro*]; 52 *Stanford L. Rev.* 709 [*Saenz*]; 48 *U.C.L.A. L. Rev.* 221 [same]; 7 *U.S.F. L. Rev.* 515 [*Shapiro*].)

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c. Hospitalization and Medical Care.

8 *Witkin Sum. Cal. Law Const Law* § 736

[§ 736] Hospitalization and Medical Care.

In *Memorial Hosp. v. Maricopa County* (1974) 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306, the Court held invalid an Arizona statute requiring a year's residence in a county as a condition to receiving nonemergency hospitalization or medical care at the county's expense. The opinion relied on *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, *supra*, §735, and *Dunn v. Blumstein* (1972) 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274, declaring that medical care is as much a basic necessity of life as welfare assistance. (94 S.Ct. 1082, 39 L.Ed.2d 315.) A number of theories of compelling state interest were examined and rejected. (94 S.Ct. 1084 et seq., 39 L.Ed.2d 317 et seq.) (See 88 *Harv. L. Rev.* 112; 93 *Harv. L. Rev.* 1585.)

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d. Greater Benefits to Established Residents.

8 *Witkin Sum. Cal. Law Const Law* § 737

[§ 737] Greater Benefits to Established Residents.

Zobel v. Williams (1982) 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672, invalidated an Alaska statutory dividend program under which income from its natural resources (state-owned oil land) was distributed to adult citizens. The amount of the dividend was dependent on the length of the citizen's residence, so that a 1-year resident received \$ 50, and a resident since Alaska became a state received \$ 1,050. Thus, the statute created fixed and permanent distinctions between an ever increasing number of perpetual classes of concededly *bona fide* residents, in violation of the Equal Protection Clause.

"If the States can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence--or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could States impose different taxes based on length of residence? Alaska's reasoning would open the door to state apportionment of other rights, benefits and services according to length of residence. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible." (102 S.Ct. 2314, 72 L.Ed.2d 680.)

In *Del Monte v. Wilson* (1992) 1 C.4th 1009, 1011, 4 C.R.2d 826, 824 P.2d 632, the question was whether "the distribution of veterans' benefits conditioned on California residence at a fixed point in the past violates the federal constitutional right to equal protection of the laws." *Held*, following recent decisions of the U.S. Supreme Court, "the statutes providing for such a distribution are unconstitutional."

The opinion discusses *Zobel v. Williams* and a number of other *Supreme Court* cases. (1 C.4th 1015 et seq.) The court followed *Califano v. Westcott* (1979) 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382, *infra*, §768, in choosing the remedy of extension of coverage to include the parties aggrieved, where the statute is defective because of underinclusiveness. (1 C.4th 1026.) (See 20 *Pepperdine L. Rev.* 280.)

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e. Long Residency for Appointed Officers.

8 *Witkin Sum. Cal. Law Const Law* § 738

[§ 738] Long Residency for Appointed Officers.

In *Bay Area Women's Coalition v. San Francisco* (1978) 78 C.A.3d 961, 144 C.R. 591, defendant's charter required 5 years' residence for persons appointed to city boards and commissions. *Held*, the provision was unconstitutional.

(a) Although these restrictions on eligibility for appointive office do not have the same impact as restrictions on eligibility for elective office (see *supra*, §259), all residence restrictions penalize the fundamental right to travel, and are therefore subject to the strict scrutiny test. (78 C.A.3d 967, 968.)

(b) The city has failed to sustain its burden of showing a compelling governmental interest. The contention that the durational residence requirement is necessary to insure a knowledge and understanding of local issues has been repeatedly rejected (see *supra*, §259); and the appointee's "vested interest" in the performance of his or her job can be assured by the requirement of continuing residence. (78 C.A.3d 970, 971.) (On residence requirement for municipal employees, see *infra*, §740.)

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f. Valid Classifications.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 739

[§ 739] In General.

(1) *Nonresident Attachment*. The classification of nonresidents for special treatment in the attachment statute has two rational and proper purposes: (a) It gives the court jurisdiction quasi in rem, and (b) it is a substitute for supplemental proceedings in aid of execution, which are not likely to be effective against nonresidents. (See *National General Corp. v. Dutch Inns of America* (1971) 15 C.A.3d 490, 496, 93 C.R. 343; *Property Research Financial Corp. v. Superior Court* (1972) 23 C.A.3d 413, 422, 100 C.R. 233; 6 Cal. Proc. (4th), *Provisional Remedies*, §§237, 238.)

(2) *Local Recreation Facilities for Residents*. In the field of local legislation, a deliberate discrimination against nonresidents of a city may be justified by legitimate concern for the interest of residents. In *McClain v. South Pasadena* (1957) 155 C.A.2d 423, 318 P.2d 199, use of defendant city's municipal pool was by regulation limited to residents of the city. Plaintiff, a black child, challenged her exclusion, contending that white nonresidents were often admitted; but the trial judge found that the regulation was applicable without racial distinctions, despite the alleged lack of uniform enforcement. Hence, the restriction was justified under the municipal police power, because of the limited size and capacity of the pool and the population of the city. "The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness and interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits." (155 C.A.2d 438.) (See 57 A.L.R.3d 998 [Power of Municipality To Charge Nonresidents Higher Fees Than Residents for Use of Municipal Facilities].)

(3) *Residence Requirement for Jurors*. The 1-year residence requirement of a former version of C.C.P. 198 for prospective trial jurors was upheld in *Adams v. Superior Court* (1974) 12 C.3d 55, 115 C.R. 247, 524 P.2d 375, on the grounds that (a) newcomers are not a cognizable class; (b) the constitutional guarantee is for the benefit of the litigant, and does not create a fundamental right to serve on a jury; and (c) the historic "vicinage" requirement supports the view that there is a rational basis for seeking jurors acquainted with local conditions, customs, and mores. (12 C.3d 60, 61, 62.)

(4) *Residence Requirement for Divorce*. (See *Sosna v. Iowa* (1975) 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532, 11 Summary (10th), *Husband and Wife*, §73; 89 Harv. L. Rev. 88.)

(5) *Residence Requirement for Municipal Employees.* (See *infra*, §740.)

(6) *Preferential Parking for Local Residents.* (See *infra*, §741.)

(7) *Nonresident Student Fees.* (See *infra*, §742.)

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(1) *Nonresident Attachment.*

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§235, 236.



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f. Valid Classifications.

2. Residence Requirement for Municipal Employees.

8 Witkin Sum. Cal. Law Const Law § 740

[§ 740] Residence Requirement for Municipal Employees.

A charter requirement that, except for special waiver, all city officers and employees must be or become residents within 6 months after their appointment or employment, was upheld in *Ector v. Torrance* (1973) 10 C.3d 129, 109 C.R. 849, 514 P.2d 433.

(a) The traditional equal protection test (see supra, §703) applies, and a number of state and federal decisions have held that the requirement bears a rational relationship to one or more legitimate state purposes. (10 C.3d 134.) "Among the governmental purposes ... are the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress; diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries." (10 C.3d 135.)

(b) Asserted fundamental rights, as a basis for invoking the "strict" equal protection test (see supra, §704), are not involved here:

(1) The "right to travel" (see supra, §403) has been declared in connection with international travel and movement between states; none of the benefits are reaped from routine daily trips from home to work, and no "right to commute" has been recognized. (10 C.3d 135.) The right to move within a state has been declared in cases invalidating durational residence requirements (see supra, §§245, 259), but no such waiting period is involved here. (10 C.3d 135.)

(2) No authority supports the claim that limiting the place of residence is a violation of the right to marry and the right of privacy. "The critical question whether a legislative act is to be denied the presumption of validity and subjected to strict judicial scrutiny does not turn on the ingenuity of counsel in conceiving remotely possible ways in which the act might affect those rights. Appellant need not necessarily prove he was wholly denied the rights he now invokes, but he must at least show that his exercise of those rights was actually and significantly impaired." (10 C.3d 136.)

(3) There is no recognized fundamental right to be "let alone" in the choice of a place of residence, "and it is not the province of the courts to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." (10 C.3d 137.) (See 62 Cal. L. Rev. 434; 67 Cal. L. Rev. 386 [Durational Residence Requirements for Public Employment]; 23 Cal. Western L. Rev. 24 [constitutionality of continuing residence requirements for local government employees].)

Cal. Const., Art. XI, §10(b), was added in 1976 in response to *Ector v. Torrance*. It provides that a city, county, or public district may not require its employees to be residents of the city, county, or district, but may require employees "to reside within a reasonable and specific distance of their places of employment or other designated location." The provision does not apply to residence requirements imposed by state law, and does not create a fundamental constitutional right invoking strict scrutiny of residence requirements. Thus the rational basis test continues to apply in cases challenging employment residence restrictions on equal protection grounds. (See *Wall v. Municipal Court* (1990) 223 C.A.3d 247, 250, 272 C.R. 702 [municipal court traffic trial commissioners: possibility either that commissioners who are familiar with locality are more efficient or that citizens have greater confidence when local residents adjudicate traffic cases was sufficient justification for state requirement that they live in judicial district of employment]; *Graham v. Kirkwood Meadows Public Util. Dist.* (1994) 21 C.A.4th 1631, 1644, 26 C.R.2d 793 [public utility district's requirement that employees live within three miles of work violated neither Govt.C. 50083, prohibiting local districts from requiring employees to reside within district, nor equal protection guarantees].)

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f. Valid Classifications.

3. Preferential Parking for Local Residents.

8 Witkin Sum. Cal. Law Const Law § 741

[§ 741] Preferential Parking for Local Residents.

To stem the flow of commuter traffic from commercial and industrial districts into adjoining residential neighborhoods, municipalities have adopted ordinances giving local residents the preferred right to park in their areas. The U.S. Supreme Court, in *County Bd. of Arlington v. Richards* (1977) 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4, upheld the validity of these regulations. "To reduce air pollution and other environmental effects of automobile commuting, a community reasonably may restrict on-street parking available to commuters, thus encouraging reliance on car pools and mass transit. The same goal is served by assuring convenient parking to residents who leave their cars at home during the day. A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter. ... The Constitution does not outlaw these social and environmental objectives, nor does it presume distinctions between residents and nonresidents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington's rationally promote the regulation's objectives." (98 S.Ct. 26, 54 L.Ed.2d 7.)

In *People v. Housman* (1984) 163 C.A.3d Supp. 43, 210 C.R. 186, the court, following *County Bd. of Arlington* and *Ector v. Torrance* (1973) 10 C.3d 129, 109 C.R. 849, 514 P.2d 433, supra, §740, rejected the contention that there was a fundamental "right to commute," i.e., a right to travel between home and place of employment, and upheld a Beverly Hills preferential parking ordinance, with elaborate findings of necessity. (163 C.A.3d Supp. 49, 50, 52.)

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f. Valid Classifications.

4. Nonresident Student Fees.

8 Witkin Sum. Cal. Law Const Law § 742

[§ 742] Nonresident Student Fees.

(1) *University Student.* The validity of nonresident university fees was upheld in *Kirk v. The Board Regents of Univ. of Calif.* (1969) 273 C.A.2d 430, 78 C.R. 260. Petitioner, a resident of Ohio, married a California resident and moved to this state in July 1967. That fall, she enrolled at the University, was classified as a nonresident, and sought mandamus to compel reclassification as a resident. *Held*, judgment dismissing writ affirmed.

(a) The theory of *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, *supra*, §735, does not apply: "While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro* involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children. Thus, the residence requirements in *Shapiro* would cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning do not involve similar risks. Nor was petitioner ... precluded from the benefit of higher education. Charging higher tuition fees to nonresident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents." (273 C.A.2d 440.)

(b) The residence requirement is not an absolute, permanent classification; petitioner can be reclassified as a resident on proof of her permanent residence here. (273 C.A.2d 443.) The state "has a valid interest in providing tuition-free education to those who have demonstrated by a year's residence a bona fide intention of remaining here and who, by reason of that education, will be prepared to make a greater contribution to the state's economy and future." (273 C.A.2d 444.) (See *Gurfinkel v. Los Angeles Community College Dist.* (1981) 121 C.A.3d 1, 6, 9, 175 C.R. 201 [following *Kirk*]; 53 *Hastings L. J.* 1389 [durational residence requirements for in-state tuition]; 13 *Pacific L. J.* 1093 [current residence requirements]; 56 *A.L.R.3d* 641 [provisions governing determination of residence for fixing out-of-state tuition].)

(2) *Public School Student.* In *Martinez v. Bynum* (1983) 461 U.S. 321, 103 S.Ct. 1838, 75 L.Ed.2d 879, the Court upheld a Texas law denying tuition-free admission to public schools for a minor who lived apart from a parent or guardian, if his or her presence in the school district was for the primary purpose of attending the public free schools. "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest

in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and establish residence there. A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents." (103 S.Ct. 1842, 75 L.Ed.2d 887.)

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7. Race or National Origin.

a. In General.

8 Witkin Sum. Cal. Law Const Law § 743

[§ 743] In General.

(1) *Nature of Prohibition.* Except for unusual statutes, e.g., the alien land laws (directed against Japanese; supra, §722) and the anti-miscegenation laws (directed against any racial intermarriage; infra, §747), most of the measures of racial discrimination were directed at Blacks. And although discrimination against Blacks in respect of voting rights is expressly prohibited by the Fifteenth Amendment (see supra, §227), discrimination is also prohibited by the Fourteenth Amendment; i.e., classification on the basis of race, color, or national origin is improper. (See supra, §§252, 697; infra, §744 et seq.) The California Constitution also protects the rights of person from being disqualified from entering or pursuing any "business, profession, vocation, or employment" based on race, color, or national origin. (Cal. Const., Art. I, §8.) (See *Flynt v. California Gambling Control Com.* (2002) 104 C.A.4th 1125, 1141, 129 C.R.2d 167, 1 Summary (10th), *Contracts*, §634 [although federal legislation affecting Indian gambling rights relates to Indians as such, it is not based on impermissible racial classifications; tribal Indians belong to political group that is specially recognized as sovereign nation; thus, rational basis test applies to law giving tribes special gambling rights]; on proscriptions against racial discrimination in federal Civil Rights Act, see infra, §§814 et seq., 869; in Unruh Civil Rights Act, see infra, §905; in California Fair Employment and Housing Act, see infra, §921.)

(2) *Proof of Racially Discriminatory Intent.* *Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) 429 U.S. 252, 97 S.Ct. 555, 563, 50 L.Ed.2d 450, 464, stated that official action will not be held unconstitutional solely because it results in a racially disproportionate *impact*; proof of a racially discriminatory intent or purpose is required. (97 S.Ct. 563, 50 L.Ed.2d 464.) However, cases involving a clear pattern, unexplainable on grounds other than race, are rare. Usually, a court must look to other evidence; e.g., the background of the challenged decision, the specific sequence of events leading up to it, and the legislative or administrative history. (97 S.Ct. 564, 50 L.Ed.2d 465.) (See 91 *Harv. L. Rev.* 163; 5 *Hastings Const. L. Q.* 92 [Arlington Heights].)

(3) *Texts and Law Reviews.* This subject has engaged the attention of many commentators. (See 3 Rotunda, §18.5 et seq.; 82 *Harv. L. Rev.* 1763 [statute prohibiting interracial adoptions]; 90 *Harv. L. Rev.* 1 [defense of antidiscrimination principle]; 101 *Harv. L. Rev.* 1472 [Developments in the Law--Race and the Criminal Process]; 108 *Harv. L. Rev.* 1008 [economics of group status production and race discrimination]; 108 *Harv. L. Rev.* 1145 [Forty Megahertz and a Mule: Ensuring Minority Ownership of the Electromagnetic Spectrum]; 108 *Harv. L. Rev.* 1607 [discussing realism and race relations]; 88 *Cal. L. Rev.* 1923 [20th century race law]; 16 *Hastings L. J.* 430 [permissible classification by race]; 90

Cal. L. Rev. 2047 [racial disparities in health care]; 34 *Hastings L. J.* 553 [relevance of statistics to prove discrimination]; 46 *Hastings L. J.* 1339 [special issue on priorities, strategies, and themes for next generation of civil rights]; 6 *Hastings Const. L. Q.* 853 [Justice Stewart on Racial Equality]; 31 *Hastings Const. L. Q.* 573 [The Benign-Invidious Asymmetry in Equal Protection Analysis]; 33 *McGeorge L. Rev.* 459 [Rethinking the Integrative Ideal: Housing]; 22 *Pepperdine L. Rev.* 1 [The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?]; 9 *San Diego L. Rev.* 190 [Use of Racial and Ethnic Criteria in Decision-Making (a critique)]; 15 *San Diego L. Rev.* 1041 [motivation theory of constitutional ban against racial discrimination]; 33 *San Diego L. Rev.* 583 [discriminatory access to loans, credit, and insurance]; 43 *Santa Clara L. Rev.* 131 [disparate impact of Scholastic Aptitude Test]; 67 *So. Cal. L. Rev.* 15 [racial and economic aspects of violent discourse between Korean and African Americans]; 32 *Southwestern U. L. Rev.* 201 [why racial diversity cannot be legally compelling interest in elementary and secondary education]; 43 *Stanf. L. Rev.* 1175 [symposium on issues facing women of color]; 47 *Stanf. L. Rev.* 161 [historical review of African American lawyers and their importance in shaping civil rights law]; 47 *Stanf. L. Rev.* 781 [Race Ipsa Loquitur: of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes]; 47 *Stanf. L. Rev.* 819 [race and remedy in a multicultural society; symposium on issues raised by country's increasing racial diversity]; 47 *Stanf. L. Rev.* 1283 [cocaine, race, and equal protection]; 27 *U.C. Davis L. Rev.* 555 [Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience]; 40 *U.C.L.A. L. Rev.* 199 [racially exclusionary real estate advertisements]; 43 *U.C.L.A. L. Rev.* 263 [Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation]; 48 *U.C.L.A. L. Rev.* 1075 [Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse]; 29 *U.S.F. L. Rev.* 630 [dreams versus reality after 30 years of civil rights]; 172 *A.L.R. Fed* 1 [Equal Protection and Due Process Clause Challenges Based on Racial Discrimination--Supreme Court Cases]; Cal. Civil Practice, 2 Civil Rights Litigation, §9:1 et seq. [actions involving discrimination based on race or national origin].)

West's Key Number Digest, Civil Rights k.129, Constitutional Law k.214 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Texts and Law Reviews.* See 3 Rotunda 4th, §18.5 et seq.; 94 *Cal. L. Rev.* 1 [limits of antidiscrimination law]; 94 *Cal. L. Rev.* 101 [concentrated subprime lending as housing discrimination]; 79 *So. Cal. L. Rev.* 1231 [race preference discourse]; 59 *Stanf. L. Rev.* 985 [race, ethnicity, and reactionary color blindness]; 52 *U.C.L.A. L. Rev.* 1279 [Unequal Protection and the Racial Privacy Initiative]; 42 *U.S.F. L. Rev.* 1077 [examining race in San Francisco Unified School District].



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b. Jury Selection.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 744

[§ 744] In General.

(1) *Intentional Discrimination Shown*. The intentional exclusion of Blacks from service on grand or trial juries solely because of race, whether by state legislation or acts of administrative officers, is a denial of equal protection to a black defendant in a criminal case. (*Norris v. Alabama* (1935) 294 U.S. 587, 55 S.Ct. 579, 580, 79 L.Ed. 1074, 1076 [trial jury]; *People v. Hines* (1939) 12 C.2d 535, 538, 86 P.2d 92 [same]; *Hill v. Texas* (1942) 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 [grand jury]; *Cassell v. Texas* (1950) 339 U.S. 282, 70 S.Ct. 629, 632, 94 L.Ed. 839, 845 [same]; *Reece v. Georgia* (1955) 350 U.S. 85, 76 S.Ct. 167, 169, 100 L.Ed. 77, 81 [same].)

The discrimination is, of course, seldom made express by statute; instead, systems have been devised that indirectly result in the exclusion of Blacks. But all these schemes were held violative of the constitutional guarantee where *intentional discrimination was shown* (supra, §699). Thus, in *Patton v. Mississippi* (1947) 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, it was proved that in a county with a substantial black population no Black had served as a juror in the criminal courts for 30 years. The Court declared that the principle applies "regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.'" (68 S.Ct. 185, 92 L.Ed. 78.) (See *Avery v. Georgia* (1953) 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 [jury commissioners used system of white and yellow tickets, and no Black was selected on panel of 60]; *Eubanks v. Louisiana* (1958) 356 U.S. 584, 78 S.Ct. 970, 973, 2 L.Ed.2d 991, 994; *Alexander v. Louisiana* (1972) 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 [grand jury, all white]; 101 Harv. L. Rev. 1557 [Race and the Criminal Jury]; 20 U.C.L.A. L. Rev. 581 [statistical method of showing discrimination in jury selection].)

The same view was taken of discrimination against Mexicans in *Hernandez v. Texas* (1954) 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866. Petitioner, convicted of murder, contended that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors, in Jackson County, Texas. The Texas system appeared fair on its face, but the state stipulated that, despite a substantial Mexican population, for the last 25 years there was no record of a person with a Mexican or Latin American name having served. The Court declared that it "taxes our credulity" to say that mere chance brought about this result; it "bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." (74 S.Ct. 672, 98 L.Ed. 872.)

(2) *Intentional Discrimination Not Shown.* In *Akins v. Texas* (1945) 325 U.S. 398, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692, 1696, where the jury commissioners selected only one Black for a 12-man grand jury, though the black population amounted to 15 1/2%, the Court found no denial of equal protection. "Fairness in selection has never been held to require proportional representation of races upon a jury. ... Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals." (See *Brown v. Allen* (1953) 344 U.S. 443, 73 S.Ct. 397, 416, 97 L.Ed. 469, 498 [no purposeful discrimination in statute providing for use of property and poll tax lists, although they contained higher proportion of Caucasians than Blacks].)

(3) *Waiver of Objection.* The right to raise an objection to a jury may be waived by failure to comply with reasonable state procedures. In *Michel v. Louisiana* (1955) 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83, a Louisiana statute required raising of objections to a grand jury before the third day after the court term ended or before trial, whichever was earlier. *Held*, the time allowed was reasonable; hence, the requirement was valid, and barred a belated challenge by black defendants to an all-white grand jury. (Cf. *Williams v. Georgia* (1955) 349 U.S. 375, 75 S.Ct. 814, 822, 99 L.Ed. 1161, 1173 [belated raising of issue allowed in capital case].)

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b. Jury Selection.

2. Exclusionary Use of Peremptory Challenge.

8 Witkin Sum. Cal. Law Const Law § 745

[§ 745] Exclusionary Use of Peremptory Challenge.

(1) *Former View.* In *Swain v. Alabama* (1965) 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, petitioner, convicted of rape and sentenced to death, challenged the Alabama system of the "struck jury," in which the defense and prosecution strike jurors alternately from a venire until 12 are left. By this means the prosecutor eliminated all six Blacks on the venire, and petitioner contended that this practice had been so consistently followed that no Black had ever served on a jury in the county. Although the Court found nothing inherently unconstitutional in this kind of peremptory challenge, it did declare, in a strong dictum, that systematic exclusion by this method, *if proved*, would violate the Equal Protection Clause.

(a) *If systematic striking had been proved.* "[W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. ... In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecution may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify." (85 S.Ct. 837, 838, 13 L.Ed.2d 774.)

(b) *Burden of proof not met.* The record showed that often the prosecution and defense agreed on striking, and that many black defendants do not want a mixed jury. The fact that no Black had served on a jury in the county was not enough to support the inference of discrimination in this type of case, i.e., where the elimination resulted from the exercise of peremptory challenges in which defense counsel participated. (85 S.Ct. 839, 13 L.Ed.2d 775.)

The dissenting opinion argued that (1) because only about 10-15% of the venires were Blacks, the striking system

made it possible to exclude all of them; (2) that when it was shown that no Black had ever been on a jury, the burden of going forward shifted to the state to show a proper basis for exclusion. (85 S.Ct. 845, 13 L.Ed.2d 783.) (See 79 Harv. L. Rev. 135.)

(2) *Modern View*. The *Swain* view was rejected for California criminal trials in *People v. Wheeler* (1978) 22 C.3d 258, 287, footnotes 35, 36, 148 C.R. 890, 583 P.2d 748, 5 Cal. Crim. Law (3d), *Criminal Trial*, §495. The court, relying on the independent grounds doctrine (see supra, §109), said that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community" under Cal. Const., Art. I, §16. (22 C.3d 277.) (See 92 Harv. L. Rev. 1770 [proposal that Sixth Amendment regulate exercise of peremptory Challenge]; 97 Harv. L. Rev. 193 [use of peremptory challenge to exclude racial group from jury]; 101 Harv. L. Rev. 1557 [Race and the Criminal Jury]; 12 Loyola L.A. L. Rev. 747 [Wheeler and Swain]; 16 San Diego L. Rev. 897 [Wheeler]; 32 Stanf. L. Rev. 189 [same]; 79 A.L.R.3d 14 [use of peremptory challenge to exclude from jury persons belonging to class or race].)

The U.S. Supreme Court rejected *Swain* in *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, which has been followed and construed in a number of subsequent cases. (See 5 Cal. Crim. Law (3d), *Criminal Trial*, §496.)

The 2000 Legislature added a statutory prohibition. Peremptory challenges may not be used "to remove a prospective juror on the basis of an assumption that the prospective juror is biased" merely because of race, color, or national origin. (C.C.P. 231.5.)

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c. Racial Restrictive Covenants.

8 Witkin Sum. Cal. Law Const Law § 746

[§ 746] Racial Restrictive Covenants.

In *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, supra, §700, the U.S. Supreme Court practically invalidated racial covenants restricting occupancy of real property by holding that equitable enforcement of the covenants was a denial of equal protection. One of the arguments for enforceability was that Blacks were free to make covenants excluding white persons, and that the formerly accepted principle of the segregation laws relating to schools (equal facilities and treatment) should apply. The Court summarily rejected this argument, declaring that the rights created by the Amendment are *personal* and guaranteed to the *individual*, and that equal protection "is not achieved through indiscriminate imposition of inequalities." (68 S.Ct. 846, 92 L.Ed. 1185.) (See *Cumings v. Hokr* (1948) 31 C.2d 844, 846, 193 P.2d 742 [changing former California rule in accordance with holding of *Shelley*]; *Claremont Imp. Club v. Buckingham* (1948) 89 C.A.2d 32, 33, 200 P.2d 47 [following *Shelley* where constitutional question was raised for first time on appeal]; 3 A.L.R.2d 466 [restrictive covenants, etc., discriminating against persons on account of race, color, or religion].)

In *Shelley*, the Court observed that the agreements standing alone and voluntarily adhered to did not involve state action or a denial of constitutional rights. The question then arose whether an action for damages for breach of the covenant could still be maintained. This question was answered in *Barrows v. Jackson* (1953) 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (affirming 112 C.A.2d 534, 247 P.2d 99). The opinion declared that state action is involved in a damage suit as well as in an equitable action to enforce the covenant, and that non-Whites are deprived of equal protection because they will either be unable to buy or will be required to pay a higher price to meet the damages the seller may incur. "This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity ... or that this Court would deny California the right to incorporate in a statute ... or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy." (73 S.Ct. 1036, 97 L.Ed. 1596.) (For discussion of standing of defendant to raise constitutional issue, see supra, §85; on legislation nullifying racial restrictive covenants, see 12 Summary (10th), *Real Property*, §201.)

In *Hurd v. Hodge* (1948) 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187, racial restrictive covenants were held unenforceable against a U.S. citizen residing in the District of Columbia, on the theory that the Civil Rights Act should be given a construction and application similar to that given to the Fourteenth Amendment itself. An additional,

broader, though somewhat less clear ground of the decision was stated as follows: "It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States." (68 S.Ct. 852, 92 L.Ed. 1195.) (For proscriptions against discrimination in housing under federal Civil Rights Act, see *infra*, §851; under Unruh Civil Rights Act, see *infra*, §908; and under California Fair Employment and Housing Act, see *infra* §945 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See 95 Cal. L. Rev. 451 [*Shelley v. Kraemer*].



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d. Anti-Miscegenation Law.

8 Witkin Sum. Cal. Law Const Law § 747

[§ 747] Anti-Miscegenation Law.

In *Perez v. Sharp* (1948) 32 C.2d 711, 198 P.2d 17, petitioners, a white woman and a black man, were denied a marriage license by respondent county clerk. Respondent relied on former C.C. 60 (repealed in 1959) prohibiting marriages between white and black persons. *Held*, mandamus granted to compel issuance of the license. The first opinion (of three justices) reasons as follows:

(a) There is a fundamental right to *marry the person of one's choice*, which is protected by the Fourteenth Amendment. "Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means." (32 C.2d 714.) Hence, discrimination on the basis of race alone can be justified only if the differences between the racial groups bear a substantial relation to a legitimate legislative objective. (32 C.2d 714, 718.)

(b) The assumption made in support of these statutes, that the black race is inferior, has no modern scientific support. (32 C.2d 722.)

(c) The theory of segregation in common carriers and schools (equal facilities for each group) cannot justify denial of the right to marry an "irreplaceable" person. "Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." (32 C.2d 725.)

(d) To say that mixed marriages should be prevented because they create social tensions is to argue for the perpetuation of the racial prejudices causing the social tensions. (32 C.2d 727.)

A fourth justice concurred on the ground that the statute violated the guarantee of religious freedom because there was no "clear and present danger" justifying the prohibition. (32 C.2d 740.)

The unconstitutionality of these laws was finally declared by the U.S. Supreme Court in *Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. A black woman and a white man, Virginia residents, were married in the District of Columbia. On their return to Virginia they were convicted of violating its statutes prohibiting marriage between white and black persons. *Held*, these laws violate both the Equal Protection and Due Process Clauses.

(a) *Equal protection*. The State's justification--white and black persons are equally subject to prosecution--is insufficient. The statutes rest solely on distinctions drawn according to race, and there is no legitimate purpose that justifies it. "There can be no doubt that restricting the freedom to marry solely because of racial classification violates the central meaning of the Equal Protection Clause." (87 S.Ct. 1823, 18 L.Ed.2d 1018.)

(b) *Due process*. The "freedom to marry" is a vital personal right. "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race, resides with the individual and cannot be infringed by the State." (87 S.Ct. 1824, 18 L.Ed.2d 1018.)

A concurring justice repeated his sweeping assertion in *McLaughlin v. Florida* (1964) 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, *infra*, §748, that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." (87 S.Ct. 1824, 18 L.Ed.2d 1018.)

In *Stokes v. County Clerk of Los Angeles* (1953) 122 C.A.2d 229, 264 P.2d 959, petitioners sought mandamus to compel the issuance of a marriage license without disclosing the *information* on race and color required by former C.C. 69, 69a and *Health & Saf.C. 10526. Held*, writ denied; the requirement was a reasonable regulation that placed no limitation on the right to marry and did not discriminate between races. The court relied mainly on the argument of Health Department officials that this was part of a comprehensive system of identification and statistics, required in marriage, birth, and death certificates, and designed to obtain information as to population, birth, and death rates, the relationship of color or race to factors of mortality, morbidity, fecundity, and public health. (122 C.A.2d 233.)

The challenged provision was, however, repealed in 1959, and statutes now prohibit recording the parties' race or color. (See *Family C. 354(d)* [application for marriage license]; *Health & Saf.C. 103175* [marriage certificate].)

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e. Interracial Cohabitation Law.

8 *Witkin Sum. Cal. Law Const Law* § 748

[§ 748] Interracial Cohabitation Law.

A Florida statute made it a crime for a black person and a white person of the opposite sex, unmarried, to habitually occupy the same room at night. It was enacted to serve the same general purpose as the state's interracial marriage prohibition. In *McLaughlin v. Florida* (1964) 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, the Court held the cohabitation law invalid.

(a) Because the central purpose of the Fourteenth Amendment is to eliminate racial discrimination, racial classifications are "constitutionally suspect" and subject to the "most rigid scrutiny." (85 S.Ct. 288, 13 L.Ed.2d 228.)

(b) There was no overriding statutory purpose to justify this classification. There was no suggestion that a White and a Black are more likely to engage in illicit intercourse than all-white or all-black couples, and the proper legislative purpose of dealing with illicit promiscuity was fully served by the general statutes punishing adultery and fornication. (85 S.Ct. 289, 13 L.Ed.2d 229.)

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f. Segregation.

1. Former Separate but Equal Doctrine.

8 Witkin Sum. Cal. Law Const Law § 749

[§ 749] Former Separate but Equal Doctrine.

(1) *Facilities Equal*. The theory was early declared and long followed that state laws requiring segregation of racial groups in schools or conveyances, etc., were valid; i.e., that the mere separation itself did not constitute a discrimination against any race. (See *Plessy v. Ferguson* (1896) 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256; *Gong Lum v. Rice* (1927) 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172.)

(2) *Facilities Unequal*. Segregation was held unconstitutional where the facilities and treatment furnished to each racial group within the state were unequal in fact. (See *Gaines v. Canada* (1938) 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 [state required to admit Black to white law school where there was no black law school; payment of tuition for out-of-state school was insufficient]; *Sipuel v. Board of Regents of University of Oklahoma* (1948) 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; *McLaurin v. Oklahoma State Regents for Higher Education* (1950) 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 [placing black graduate student in segregated parts of classroom, library, and cafeteria constituted impairment of his ability to study and denial of equal protection]; *Sweatt v. Painter* (1950) 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 [separate Texas law school for Blacks was unequal in facilities to University of Texas Law School].)

(3) *Segregation in Interstate Carrier*. The denial of equal facilities by segregation on an interstate carrier was condemned as a violation of the Interstate Commerce Act provision against discrimination. (*Mitchell v. United States* (1941) 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201; *Henderson v. United States* (1950) 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302; *Boynton v. Virginia* (1960) 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed.2d 206 [segregation in bus terminal restaurant].)

(4) *Doctrine Repudiated*. In *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, *infra*, §750, the separate but equal doctrine was repudiated for school segregation cases, and later decisions applied the holding to other public facilities. (See *infra*, §759 et seq.)

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2. Public Schools Generally.

aa. Segregation Unconstitutional.

8 Witkin Sum. Cal. Law Const Law § 750

[§ 750] Segregation Unconstitutional.

(1) *In General.* The major issue in racial segregation involving the public schools was settled in *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. In consolidated cases from Kansas, South Carolina, Virginia, and Delaware, black minors sought admission to public schools on a nonsegregated basis, contrary to state laws requiring or permitting segregation according to race. *Held*, relief granted.

(a) The issue of the present validity of the separate but equal doctrine is squarely presented by findings that the black and white schools are being equalized with respect to buildings, teachers, curricula, and other *tangible factors*. (74 S.Ct. 691, 98 L.Ed. 880.)

(b) Education today is perhaps the most important function of state and local governments--the foundation of good citizenship, an instrument for awakening the child to cultural values and preparing the child for life. The opportunity for an education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (74 S.Ct. 691, 98 L.Ed. 880.)

(c) The intangible factors relied on in *Sweatt v. Painter* (1950) 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, and *McLaurin v. Oklahoma State Regents for Higher Education* (1950) 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149, in finding a denial of equal protection, i.e., the ability to study with and engage in discussion and exchange of views with other students, apply with added force to children in grade and high schools. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (74 S.Ct. 691, 98 L.Ed. 880.)

(d) The doctrine of *Plessy v. Ferguson* (1896) 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, is rejected. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws." (74 S.Ct. 692, 98 L.Ed. 881.) (See 38 A.L.R.2d 1188 [note on racial segregation]; 5 *Am.Jur.2d* (2000 ed.), *Civil Rights* §281 et seq.)

The same conclusion was reached in an attack on segregation in the District of Columbia, which is not a state and hence not subject to the Equal Protection Clause. In *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, the Court relied on the Due Process Clause of the Fifth Amendment: "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." (74 S.Ct. 694, 98 L.Ed. 886.) "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." (74 S.Ct. 694, 98 L.Ed. 887.)

(2) *Texts and Commentary.* Commentary on *Brown* and its implications has been extensive. (See 3 Rotunda, §18.8; 79 Harv. L. Rev. 841 [state tuition payments to students attending segregated schools]; 80 Harv. L. Rev. 1789 ["Free Choice" desegregation plan]; 93 Harv. L. Rev. 518 [*Brown* and "the interest-convergence dilemma"]; 117 Harv. L. Rev. 1301 [Symposium: *Brown* at Fifty]; 80 Cal. L. Rev. 673 [*Brown*]; 17 Hastings L. J. 625 [neighborhood school and racial imbalance]; 4 Hastings Const. L. Q. 605 [struggle of Blacks for equal educational opportunity]; 14 Hastings Const. L. Q. 43 [Separate But Equal: The Low Road Reconsidered]; 20 Hastings Const. L. Q. 521 [Symposium: legacy of *Brown*; series of articles covering desegregation, Afrocentric movements in education, affirmative action, and other issues]; 28 Hastings Const. L. Q. 629 [The End of School Desegregation and the Achievement Gap]; 28 Hastings Const. L. Q. 771 [consequences of school desegregation]; 43 So. Cal. L. Rev. 265 [Judicial Supervision of Public Education]; 70 So. Cal. L. Rev. 1641 [Little Rock crisis and foreign affairs]; 10 Southwestern U. L. Rev. 487 et seq. [Panel on Desegregation]; 15 Southwestern U. L. Rev. 155 [racial inequities resulting from special education placement]; 20 Stanf. L. Rev. 1264 ["track" system: ability grouping]; 46 Stanf. L. Rev. 147 [Killing *Brown* Softly: The Subtle Undermining of Effective Desegregation in *Freeman v. Pitts*]; 54 Stanf. L. Rev. 793 [*Brown*]; 13 U.C.L.A. L. Rev. 1147 ["Unseparate but Unequal"--quality of education]; 16 U.C.L.A. L. Rev. 255 [criteria of equality].)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Commentary.* See 3 Rotunda 4th, §18.8; 35 *Golden Gate L. Rev.* 51 [school segregation in Seattle today]; 41 *San Diego L. Rev.* 1575 [constitutional injunction as school desegregation remedy]; 41 *San Diego L. Rev.* 1695 [Comparing Remedies for School Desegregation and Employment Discrimination: Can Employers Now Help Schools?]; 36 *Southwestern U. L. Rev.* 257 [Pasadena Unified School District's federally mandated desegregation].



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[§ 751] Initial Implementation of Brown Decision.

Early resistance to *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, supra, §750, passive and active, produced several important pronouncements from the Supreme Court.

In *Brown v. Board of Education* (1955) 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the Court considered the manner in which the first *Brown* decision was to be given effect. Recognizing the complexity of the problems arising from the required transition, and the differences in local conditions, the Court determined that implementing orders should be made by the lower federal courts in accordance with equitable principles and practices, and accordingly remanded the cases. But the opinion, while envisaging the need for additional time to put the decision into full effect, declares that "a prompt and reasonable start toward full compliance" must be made, and that "[t]he burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." (75 S.Ct. 756, 99 L.Ed. 1106.) (See 3 Rotunda, §18.9.)

In *Cooper v. Aaron* (1958) 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, the federal district Court had approved a postponement by Arkansas of a desegregation plan, brought about by legislative and executive opposition to the decision. Citing the Supremacy Clause (supra, §8), the Court emphatically declared that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color ... can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation." (78 S.Ct. 1409, 3 L.Ed.2d 116.) And the basic *Brown* principle was unanimously reaffirmed by the Court (with three new justices): "The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth." (79 S.Ct. 1410, 3 L.Ed.2d 18.) (See *McNeese v. Board of Education for Community Unit School Dist. 187, Cahokia, Illinois* (1963) 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 [federal Civil Rights Act may be invoked by black student forced to attend segregated school]; *Griffin v. County School Bd. of Prince Edward* (1964) 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256, infra, §752; *United States v. Montgomery County Bd. of Education* (1969) 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263.)

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See 3 Rotunda 4th, §18.9.



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8 Witkin Sum. Cal. Law Const Law § 752

[§ 752] Unconstitutional Methods of Segregation.

(1) *Transfer System*. In *Goss v. Board of Education of Knoxville, Tennessee* (1963) 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632, the desegregation plan adopted by the Board of Education of Knoxville, Tennessee, included a transfer system. Under it a white or black student could, on request, obtain a transfer from a school in his or her zone to a school in an outside zone in which his or her race was in the majority, but not where it was in the minority. In other words, the student had free choice of segregation but not of integration outside his or her zone. The effect would be to promote segregation, and it was accordingly held unconstitutional.

(2) *District Zoning*. In *Jackson v. Pasadena City School Dist.* (1963) 59 C.2d 876, 31 C.R. 606, 382 P.2d 878, the complaint of a black junior high school pupil alleged that, by intentional gerrymandering of zones, defendant board kept junior high schools predominantly black or predominantly white; and that in consequence, he was forced to attend an inherently inferior school. *Held*, reversing a judgment on demurrer, a cause of action was stated. Three points stand out in the opinion:

(a) Although the federal cases were usually concerned with complete segregation, the same unconstitutional discrimination is involved where black children are forced to attend a predominantly black school. (59 C.2d 880.)

(b) The unconstitutional racial imbalance may be brought about not only by compelling Blacks to attend a predominantly black school, but also by providing different schools in which white students are naturally placed because of proximity and convenience. (59 C.2d 881.)

(c) Even in the absence of proof of intentional discriminatory action as alleged, it may be the constitutional duty of school authorities to take affirmative steps to prevent racial imbalance resulting from residential segregation. "Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity

for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." (59 C.2d 881.) (See 11 A.L.R.3d 780 [de facto segregation in public schools]; for restatement of *Jackson* principle, see *infra*, §754.)

(3) *Closing Schools*. The segregationists of Prince Edward County, Virginia, devised a plan to overcome the effect of *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, *supra*, §750. A constitutional amendment authorized the use of public funds to assist students attending private schools, legislation closed the public schools, and local officials refused to levy taxes for integrated schools. As a result, the public schools remained closed in this county, and black children were without formal education from 1959 to 1963.

In *Griffin v. County School Bd. of Prince Edward* (1964) 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256, black children sued in the federal district court to enjoin defendant officials from paying public funds to support segregated private schools. The district court enjoined payment so long as the public schools remained closed. *Held*, affirmed. The Virginia statute allowing each county the option to operate public schools or not, as applied in this case, meant that children in Prince Edward County had to go to private schools or none at all, while in other counties they could go to public schools. The reason for the law was solely to prevent white and black children from attending the same school. "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." (84 S.Ct. 1233, 12 L.Ed.2d 265.) (On challenges to tuition grants under Establishment of Religion Clause, see *supra*, §546.)

(4) *Freedom of Choice Plan*. In *Green v. County School Bd. of New Kent, Virginia* (1968) 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716, New Kent County, Virginia, had two segregated schools. In 1965, the School Board adopted a plan under which a pupil was free to choose his or her school. Not a single white child chose the predominantly black school, and 85% of the black children continued to attend the all-black school. *Held*, this plan was not a satisfactory implementation of *Brown*. Freedom of choice is not in itself unconstitutional, but it can be accepted only if effective in desegregation. The burden is on the Board to produce a plan that promises realistically to work now. (88 S.Ct. 1694, 20 L.Ed.2d 725.) (See *Monroe v. Board of Commrs. of Jackson, Tennessee* (1968) 391 U.S. 450, 88 S.Ct. 1700, 1703, 20 L.Ed.2d 733, 738 ["free transfer" plan, permitting choice after initial assignment; same test applies, whether it accomplishes effective desegregation, and plan failed to meet it]; 82 Harv. L. Rev. 111 [*Green*; commenting on lack of guidance in opinion on what should be done]; 81 Cal. L. Rev. 1029 [School Choice as Method for Desegregating an Inner-City School District].)

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[§ 753] Duty To Desegregate and Guidelines.

(1) *Duty To Desegregate*. The standard of "all deliberate speed" laid down in *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, supra, §750, is no longer acceptable. "[T]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." (*Alexander v. Holmes County Bd. of Education* (1969) 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19; see *Dayton Bd. of Education v. Brinkman* (1979) 443 U.S. 526, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720, 734; *Columbus Bd. of Education v. Penick* (1979) 443 U.S. 449, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666, 678; *People v. San Diego Unified School Dist.* (1971) 19 C.A.3d 252, 265, 96 C.R. 658; *Pena v. Superior Court* (1975) 50 C.A.3d 694, 700, 123 C.R. 500; 84 Harv. L. Rev. 32 [Alexander]; 93 Harv. L. Rev. 119 [Dayton and Columbus]; 100 Harv. L. Rev. 653 [argument that school system should bear burden of justifying actions that reintroduce segregation after finding of unitariness]; 7 *Hastings Const. L. Q.* 505 [Dayton and Columbus]; 41 *Stanf. L. Rev.* 61 [desegregation as Cold War imperative]; 50 *U.C.L.A. L. Rev.* 1547 [vestiges of segregation]; on integration under Civil Rights Act of 1964, see 42 U.S.C., §2000c et seq.)

(2) *Guidelines*. In *Swann v. Charlotte-Mecklenburg Bd. of Education* (1971) 402 U.S. 1, 91 S.Ct. 1267, 1279, 28 L.Ed.2d 554, 570, the Court offered guidelines for eliminating segregation, considering four problem areas:

(a) *Racial balances or racial quotas*. It is not essential that every school must reflect the racial composition of the school system as a whole, but a limited use of mathematical ratios is an appropriate starting point. (91 S.Ct. 1280, 28 L.Ed.2d 571.)

(b) *One-race schools*. The existence of some virtually one-race schools is not itself proof that segregation is being practiced; but where there is a history of segregation, school officials have the burden of showing that the schools are genuinely nondiscriminatory. (91 S.Ct. 1281, 28 L.Ed.2d 572.)

(c) *Remedial altering of attendance zones*. "Racially neutral" plans may be inadequate to counteract the effects of past segregation resulting from discriminatory location of school sites or distortion of school size; it may be necessary

to pair and group noncontiguous school zones. (91 S.Ct. 1283, 28 L.Ed.2d 573.)

(d) *Transportation of students.* Bus transportation has been an integral part of the public education system for years, and may be a necessary tool of school desegregation. "Desegregation plans cannot be limited to the walk-in school." (91 S.Ct. 1283, 28 L.Ed.2d 575.) (See *Wright v. Council of Emporia* (1972) 407 U.S. 451, 92 S.Ct. 2196, 2204, 33 L.Ed.2d 51, 62 [desegregation was not achieved by splitting dual system into two unitary but essentially segregated systems]; *United States v. Scotland Neck City Bd. of Education* (1972) 407 U.S. 484, 92 S.Ct. 2214, 33 L.Ed.2d 75; *Keyes v. School Dist. No. 1, Denver, Colorado* (1973) 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548; 83 Harv. L. Rev. 1434 [Swann]; 85 Harv. L. Rev. 74 [same]; 86 Harv. L. Rev. 62 [Wright]; 61 Cal. L. Rev. 858 [alternative schools for minority students]; 4 Lincoln L. Rev. 156 [Swann].)

Federal courts cannot impose a multidistrict, areawide remedy to a single district *de jure* segregation problem, without proof that other included districts had committed acts effecting segregation, and without an opportunity for the included districts to be heard on the propriety of the remedy. (*Milliken v. Bradley* (1974) 418 U.S. 717, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069, 1091.) (See 88 Harv. L. Rev. 61; 28 Stanf. L. Rev. 521; 2 Hastings Const. L. Q. 349.)

In the second *Milliken* case, *Milliken v. Bradley* (1977) 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745, the Court upheld a desegregation decree ordering compensatory or remedial educational programs for schoolchildren who had been subjected to past acts of *de jure* segregation. (See 9 Southwestern U. L. Rev. 815; 12 U.S.F. L. Rev. 15.)

In *United States v. Fordice* (1992) 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575, the court said: "Because the former *de jure* segregated system of public universities in Mississippi impeded the free choice of prospective students, the State in dismantling that system must take the necessary steps to ensure that the choice now is truly free. The full range of policies and practices must be examined with this duty in mind. That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely the State may not leave in place policies rooted in its prior officially-segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies." (112 S.Ct. 2745, 120 L.Ed.2d 602.) (See 106 Harv. L. Rev. 230.)

Missouri v. Jenkins (1995) 515 U.S. 70, 115 S.Ct. 2038, 132 L.Ed.2d 63, discussed the proper scope of a district court's remedial authority. If an *intradistrict* violation is involved, the court cannot order a remedy directed at an *interdistrict* goal. (115 S.Ct. 2049, 132 L.Ed.2d 81.) Hence, an order designed to improve the "desegregative attractiveness" of the district and to reverse "white flight" to the suburbs is beyond the court's authority, because the remedy is designed to accomplish indirectly what the court lacks the authority to mandate directly: the *interdistrict* transfer of students. (115 S.Ct. 2051, 2055, 132 L.Ed.2d 83, 87.) (See 109 Harv. L. Rev. 239 [Missouri v. Jenkins]; 50 Hastings L. J. 475 [same]; 28 Hastings Const. L. Q. 655 [tensions between integration and school reform]; 28 Hastings Const. L. Q. 699 [tracking students by academic ability]; 28 Hastings Const. L. Q. 739 [return to neighborhood schools]; 45 Stanf. L. Rev. 1099 [all-male African American public schools].)

(3) *Court Order To Increase Taxes.* "However wide the discretion of local authorities in fashioning desegregation remedies may be, 'if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.'" Thus, "a local government with taxing authority may be ordered to levy taxes in excess of the limit set by the state statute where there is reason based on the Constitution for not observing the statutory limitation. ... To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them." (*Missouri v. Jenkins* (1990) 495 U.S. 33, 110 S.Ct. 1651, 1666, 109 L.Ed.2d 31, 58.) (See 104 Harv. L. Rev. 296 [federal court's power to compel state legislative action; discussing *Jenkins* and *Spallone v. United States* (1990) 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644, *supra*, §148].)

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[§ 754] Elimination of De Facto Segregation.

In *Crawford v. Board of Education* (1976) 17 C.3d 280, 130 C.R. 724, 551 P.2d 28, defendant school board conceded that the schools were substantially segregated, but contended that it had no duty to take remedial action because the segregation was de facto in origin. After describing *Jackson v. Pasadena City School Dist.* (1963) 59 C.2d 876, 31 C.R. 606, 382 P.2d 878, supra, §752, as "the seminal decision in this line of cases" (17 C.3d 290), the Court said: "[S]ince *Jackson* this court has consistently reiterated the principle that the constitutional obligations of school boards in California include an obligation to undertake reasonably feasible steps to alleviate school segregation, regardless of its cause." (17 C.3d 292.) The school district's argument that this view should be abandoned and the de facto-de jure distinction be adopted was rejected not only on constitutional grounds but on an extended recital of the practical difficulties in applying the distinction. (17 C.3d 298 et seq.) The court then proceeded to clarify both the scope of the school board's obligations and the proper role of the judiciary in implementing the constitutional principle:

(a) The requirement is only that steps be taken to eliminate segregated schools--those in which the minority student enrollment is so disproportionate as to isolate them from others. (17 C.3d 303.) Set racial or ethnic percentages cannot be established. "[W]e see nothing inherently invalid in the fact that percentages of various racial or ethnic groups may vary, even significantly, in different schools throughout a school district, or even that a particular minority group may be completely unrepresented in a particular school." (17 C.3d 304.)

(b) The practical problems confronting school boards are difficult, and many administrative techniques for desegregating have been devised; e.g., redrawing neighborhood attendance zones, pairing or clustering of schools, establishment of "magnet schools," and "satellite zoning." "Under these circumstances, local school boards should clearly have the initial and primary responsibility for choosing between these alternative methods." (17 C.3d 305.)

(c) Although the court should defer to the judgment of a school district that demonstrates a commitment to the necessity of immediately instituting reasonable and feasible steps toward desegregation, the court should intervene where the school board has not implemented this course of action. "Faced with a recalcitrant or intractable school board, a trial court may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure

meaningful progress to alleviate the harmful consequences of school segregation in the district." (17 C.3d 307.)

Here, the trial judge's finding that the board had failed to act was sustained by the record (17 C.3d 307), and the judgment ordering preparation and implementation of a plan was affirmed (17 C.3d 310). (See *N.A.A.C.P. v. San Bernardino City Unified School Dist.* (1976) 17 C.3d 311, 314, 130 C.R. 744, 551 P.2d 48 [following *Crawford*]; *McKinny v. Board of Trustees of the Oxnard Union High School Dist.* (1982) 31 C.3d 79, 92, 181 C.R. 549, 642 P.2d 460, *infra*, §758 [following *Crawford*]; *N.A.A.C.P. v. San Bernardino City Unified School Dist.* (1982) 138 C.A.3d 70, 76, 187 C.R. 646 [judgment reversed for failure to apply *Crawford* criteria, with recommendation that trial judge use methodology approved in *McKinny*]; 65 Cal. L. Rev. 319 [*Crawford*]; 10 Southwestern U. L. Rev. 499, 565 [same]; 26 U.C.L.A. L. Rev. 1183 [same].) (On assignment of pupils outside school district, see *Tinsley v. Palo Alto Unified School Dist.* (1979) 91 C.A.3d 871, 891, 894, 907, 154 C.R. 591.)

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In *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508, parents in school districts in two different states challenged, on equal protection grounds, student assignment plans that used race to determine placement in certain schools. In seeking to racially balance Seattle high schools, the district classified children as white or nonwhite. In Louisville, students in elementary schools were designated as black or "other" for placement purposes. Both Courts of Appeal upheld the plans. *Held*, reversed and remanded. Assigning students to different public schools on the basis of race when the districts had never operated legally segregated schools (Seattle) or had achieved unitary status (Louisville) violated the Fourteenth Amendment guarantee of equal protection.

(a) *No compelling interest shown.* Because of the racial classifications involved here, the action must be reviewed under a strict scrutiny standard. (127 S.Ct. 2751, 168 L.Ed.2d 523.) Hence, the school districts must demonstrate that the classifications used in the assignment plans were narrowly tailored to achieve a compelling government interest. Remedying the effects of past intentional discrimination is a compelling interest, but Seattle failed to show that it was ever segregated by law, and Louisville, which had operated under a desegregation decree, had eliminated the vestiges of segregation and had achieved unitary status. (127 S.Ct. 2752, 168 L.Ed.2d 523.) *Grutter v. Bollinger* (2003) 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 280, text, §970, recognized the government's compelling interest in using racial classifications to further its interest in diversity in higher education. (127 S.Ct. 2753, 168 L.Ed.2d 524.) However, these cases did not involve higher education, and race was not used here to broaden students' exposure to diverse cultures and ideas. Instead, the plans viewed race exclusively in terms of white/nonwhite or black/other. (127 S.Ct. 2753, 2754, 168 L.Ed.2d 525.)

(b) *No necessity for racial classification.* The classifications had little effect in either district on student assignments. In Seattle, of the 307 assignments affected by the use of race, only 52 students were assigned to schools that they had not listed as a preference and to which they would not otherwise have been assigned. (127 S.Ct. 2759, 2760, 168 L.Ed.2d 531.) In Louisville, racial guidelines accounted for only 3% of assignments. Further, the districts failed to show that they seriously considered race-neutral alternatives to meet their goals. (127 S.Ct. 2760, 168 L.Ed.2d 532.)

One justice concurred in part and concurred in the judgment. (127 S.Ct. 2788, 168 L.Ed.2d 562.) One justice dissented in a separate opinion and joined with three other justices in a strong dissent. (127 S.Ct. 2797, 2800, 168 L.Ed.2d 572, 575.) (See 95 Cal. L. Rev. 277 [*Seattle School*]; 121 Harv. L. Rev. 98 [same]; 35 Hastings Const. L. Q. 1 [same].)



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[§ 755] No Requirement of Annual Readjustment.

The guidelines set forth in *Swann v. Charlotte-Mecklenburg Bd. of Education* (1971) 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, supra, §753, were interpreted in *Pasadena City Bd. of Education v. Spangler* (1976) 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599. The federal district court in 1970 ordered the Pasadena Unified School District to institute a plan for desegregation, which would have no school with a majority of minority students, and the court retained jurisdiction to continue to evaluate the plan and its execution. The school district submitted a plan which the court approved, and it was promptly implemented. Subsequently, normal residence changes resulted in a black student enrollment exceeding 50% in 5 of the 32 schools. The Court said: "[T]he District Court was not entitled to require the School District to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." (96 S.Ct. 2705, 49 L.Ed.2d 609.) (See 90 Harv. L. Rev. 221; 52 So. Cal. L. Rev. 195.)

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2. Public Schools Generally.

gg. Dissolution of Desegregation Decree.

8 Witkin Sum. Cal. Law Const Law § 756

[§ 756] Dissolution of Desegregation Decree.

In *Board of Education of Oklahoma City Public Schools, Independent School Dist. No. 89, Oklahoma County, Oklahoma v. Dowell* (1991) 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715, petitioner Board of Education of Oklahoma City sought dissolution of a federal district court decree imposing a school desegregation plan, on the ground that it had complied for a substantial period of time. The district court granted relief, but the Court of Appeals held that relief was dependent on "a clear showing of grievous wrong evoked by new and unforeseen conditions." *Held*, reversed; this test is too stringent.

"A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders is obviously relevant. In this case the original finding of *de jure* segregation was entered in 1961, the injunctive decree from which the Board seeks relief was entered in 1972, and the Board complied with the decree in good faith until 1985. Not only do the personnel of school boards change over time, but the same passage of time enables the District Court to observe the good faith of the school board in complying with the decree. The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result." (111 S.Ct. 637, 112 L.Ed.2d 729.) (See 105 Harv. L. Rev. 266.)

In *Freeman v. Pitts* (1992) 503 U.S. 467, 112 S.Ct. 1430, 118 L.Ed.2d 108, the Court cited *Dowell* and *Pasadena City Bd. of Education v. Spangler* (1976) 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599, *supra*, §755, in support of its conclusions on relinquishment of judicial control: "We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. While retaining jurisdiction over the case, the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree. That is to say, upon a finding that a school system subject to a court-supervised desegregation plan is in

compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations." (112 S.Ct. 1445, 118 L.Ed.2d 134.) (See *Board of Education of the San Diego Unified School Dist. v. Superior Court* (1998) 61 C.A.4th 411, 422, 71 C.R.2d 562 [trial court did not abuse discretion in accelerating end of court supervision where continued supervision was no longer necessary to compel compliance with constitutional obligations, and control over schools should be restored to school district]; 106 Harv. L. Rev. 249 [*Freeman v. Pitts*]; 20 Hastings Const. L. Q. 521 [*Brown in State Hands: State Policymaking and Educational Equality After Freeman v. Pitts*]; 46 Stanf. L. Rev. 147 [Killing Brown Softly: The Subtle Undermining of Effective Desegregation in *Freeman v. Pitts*].)

In determining whether a school district has achieved partially unitary status, the issue is whether a reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable; whether student achievement levels are at or below the national norm is not the appropriate test. (*Missouri v. Jenkins* (1995) 515 U.S. 70, 115 S.Ct. 2038, 2055, 132 L.Ed.2d 63, 88, supra, §753.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hernandez v. Board of Education of Stockton Unified School Dist.* (2004) 126 C.A.4th 1161, 1174, 25 C.R.3d 1 [following *Freeman v. Pitts* (1992) 503 U.S. 467, 112 S.Ct. 1430, 118 L.Ed.2d 108, text, p. 140; trial court did not abuse its discretion in retaining jurisdiction for 2-year period to enforce provisions of settlement agreement relating to transition of full control to governing board; court had terminated its active supervision of school district and returned control to district's governing board].



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aa. In General.

8 *Witkin Sum. Cal. Law Const Law § 757*

[§ 757] In General.

(1) *Invalid Prohibition.* North Carolina enacted a law providing that no student should be assigned or compelled to attend a school on account of race, etc., or for the purpose of creating a racial balance; and involuntary busing in contravention of the article was prohibited. In *North Carolina State Bd. of Education v. Swann* (1971) 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586, the law was held unconstitutional. (a) The absolute prohibition of assignment would obstruct the remedies granted in *Swann v. Charlotte-Mecklenburg Bd. of Education* (1971) 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, supra, §753. (b) The statute "exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind' "; against the background of segregation, this violates *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, supra, §750. (c) The prohibition would also hamper the ability of local authorities to remedy constitutional violations. (91 S.Ct. 1286, 28 L.Ed.2d 589.) (See 50 A.L.R.3d 1089 [judicial relief against busing plan].)

(2) *California Statute.* In San Francisco in 1969, the elementary schools had a serious racial imbalance. To remedy it, the Board of Education established two elementary school complexes, assigning many pupils to schools not within walking distance from home, and providing voluntary bus transportation for them. In 1970, Educ.C. 1009.5 was adopted, providing that "no governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." To implement its assignment program, the board requested its planning officer to execute a requisition for a computer study, and he refused, relying on Educ.C. 1009.5. In *San Francisco Unified School Dist. v. Johnson* (1971) 3 C.3d 937, 92 C.R. 309, 479 P.2d 669, the board sought mandamus. *Held*, writ granted.

(a) *Prohibition of assignment is invalid.* It is permissible to prohibit busing as a means of transportation, but not permissible to restrict authority to assign pupils. Although the U.S. Supreme Court has not yet ruled on the point, a majority of courts have held that assignment for the objective of racial integration is constitutional; i.e., although racial classifications are constitutionally suspect, and in a society free from past discrimination any attempt at racial classification might be bad, at the present time nondiscrimination may be attained only by taking color into consideration. "We conclude that the racial classification involved in the effective integration of public schools, does

not deny, but secures, the equal protection of the laws." (3 C.3d 951.)

(b) *Parental control as state action.* Educ.C. 1009.5, if applied to pupil assignments, would constitute state action contrary to the Fourteenth Amendment, because school boards exercise a state function; and state authorization to parents to control assignments (i.e., to discriminate) is no less state action than state imposed discrimination. (3 C.3d 953, citing *Mulkey v. Reitman* (1966) 64 C.2d 529, 50 C.R. 881, 413 P.2d 825, and *Reitman v. Mulkey* (1967) 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830.)

(c) *Busing as only effective device.* The U.S. Supreme Court has required school boards to make plans to affirmatively eliminate segregation (see *supra*, §753), and pupil assignment to distant schools requiring bus transportation will often be the only effective device to eliminate de facto segregation. (3 C.3d 956.)

(d) *Conclusion.* The statute "must be construed to avoid any limitation on the authority of school boards in the assignment of pupils to their respective schools." It "limits only the power of school districts to compel students to utilize any particular mode of transportation without parental consent." (3 C.3d 960.) (See 2 *Pacific L. J.* 451 [Educ.C. 1009.5].)

Educ.C. 1009.5 was amended in 1972 to exempt emergency transportation, and was renumbered as *Educ.C. 35350* in 1976.

Educ.C. 1009.6, an initiative measure adopted in 1972 after *Johnson*, and renumbered *Educ.C. 35351* in 1976, provides that "[n]o public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." This statute was held unconstitutional in *Santa Barbara School Dist. v. Superior Court* (1975) 13 C.3d 315, 324, 327, 118 C.R. 637, 530 P.2d 605, for the reasons set forth in *Johnson, Swann, and Keyes v. School Dist. No. 1, Denver, Colorado* (1973) 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *California Statute.* *Educ.C. 35351*, as amended in 2007, provides that no public school pupil can be assigned or required to attend a particular school because of the characteristics listed in *Educ.C. 220* (see Supp., *infra*, §893).



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bb. Constitutional Amendment.

8 Witkin Sum. Cal. Law Const Law § 758

[§ 758] Constitutional Amendment.

In 1979, Cal. Const., Art. I, §7(a), was amended by "Proposition 1" to provide that "nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation." The amendment also required modification of existing judgments or orders to conform to its provisions. (See *10 Golden Gate L. Rev.* 611.)

(1) *Proposition 1 and the California Constitution.* In *McKinny v. Board of Trustees of the Oxnard Union High School Dist.* (1982) 31 C.3d 79, 181 C.R. 549, 642 P.2d 460, the court, upholding a school district's voluntary desegregation plan, summarized the effects of the amendment as follows: "Proposition 1 conforms a school board's obligations with respect to 'pupil school assignment' and 'pupil transportation' to those duties imposed by the federal equal protection clause; it prohibits California courts from ordering changes in 'pupil school assignment' or 'pupil transportation' unless there has been a federal constitutional violation and federal case law would permit such a remedy. However, the amendment neither releases school districts from their state constitutional obligation to take reasonably feasible steps to alleviate segregation regardless of its cause, nor divests California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation When a school district fails to fulfill its state constitutional obligations, we retain our power to compel, for example, school closure, school site selection, creation of special 'magnet schools,' curriculum changes, or other steps to overcome the adverse effects of school segregation." (31 C.3d 93.)

(2) *Proposition 1 Does Not Violate Federal Constitution.* In *Crawford v. Board of Education* (1980) 113 C.A.3d 633, 170 C.R. 495 (*Crawford II*), the court held that the amendment did not violate the Equal Protection Clause.

(a) As pointed out in *Crawford v. Board of Education* (1976) 17 C.3d 280, 130 C.R. 724, 551 P.2d 28, *supra*, §754 (*Crawford I*), busing is merely one of the many techniques that might be used to achieve desegregation; and the effect of the constitutional amendment is merely to withdraw that one technique, leaving all others intact. (113 C.A.3d 651,

652.)

(b) This does not amount to removal of a previously given state right, for the amendment does not create a right to discriminate or change any substantive law of rights. "[I]t merely removes court-ordered pupil school assignment and transportation as a remedy available to cure state-proscribed racial imbalance in public schools." (113 C.A.3d 653.) If a state is not under a federal duty to adopt a particular act in the first place (e.g., rectification of racial imbalance resulting from population shifts), rescission of the act cannot be unconstitutional. (113 C.A.3d 653.) Thus, "California can conform its constitutional protection of rights in this and other areas to those given under the United States Constitution, even though the specific protection under the California Constitution might have previously exceeded that under the federal Constitution." (113 C.A.3d 654.)

(c) The amendment was not adopted with a discriminatory purpose. It declares that it "is necessary to make most effective use of the limited resources available for public education, to maximize educational opportunities, to protect the health and safety of pupils, to enhance the ability of parents to participate in the educational process, and to prevent the waste of scarce fuel resources." (113 C.A.3d 654.)

(d) The amendment does not deprive minority children of a vested right. "The sole vested right involved, if that is the proper phrase, is the right of a pupil to receive an education which is not intentionally segregated and to attend a school where the school board has performed its duty to take all reasonable steps to alleviate segregation, regardless of cause." This right, recognized in *Crawford I*, "has not been removed by Proposition 1, which does not purport to change the duty imposed on a school board by California law to take all reasonably feasible steps to alleviate racial segregation in its schools regardless of cause." (113 C.A.3d 655.) Prior to the amendment, no particular remedy had been mandated. (113 C.A.3d 656.)

Crawford II was affirmed in *Crawford v. Board of Education of Los Angeles* (1982) 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (*Crawford III*).

(a) "Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation. It would be paradoxical to conclude that, by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it. Moreover, even after Proposition I, the California Constitution still imposes a greater duty of desegregation than does the Federal Constitution. The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation. The school districts themselves retain a state law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation." (102 S.Ct. 3217, 73 L.Ed.2d 955.)

(b) "Were we to hold that the mere repeal of race related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proven unsuccessful or even harmful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities. Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects. Yet these would be the results of requiring a State to maintain legislation that has proven unworkable or harmful when the State was under no obligation to adopt that legislation in the first place. Moreover, and relevant to this case, we would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." (102 S.Ct. 3219, 73 L.Ed.2d 957.) (See *Tinsley v. Superior Court* (1983) 150 C.A.3d 90, 100, 197 C.R. 643 [*Crawford* is dispositive of equal protection issue]; cf. *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 [initiative measure having effect of permitting busing only for nonracial reasons was violative of Equal Protection Clause].)

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8 *Witkin Sum. Cal. Law Const Law* § 759

[§ 759] Public Facilities.

Many decisions have made it clear that state action compelling segregation in public facilities violates the Fourteenth Amendment. (See *Turner v. Memphis* (1962) 369 U.S. 350, 82 S.Ct. 805, 807, 7 L.Ed.2d 762, 765 [injunction against operating segregated eating and restroom facilities in airport restaurant operating under lease from city, where statute called for segregation]; *Johnson v. Virginia* (1963) 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 [reversing conviction of black person of contempt for failure to sit in black section of Richmond traffic court]; *Watson v. Memphis* (1963) 373 U.S. 526, 83 S.Ct. 1314, 1321, 10 L.Ed.2d 529, 539 [no justification for delay in desegregating public parks and recreational facilities]; *Griffin v. Maryland* (1964) 378 U.S. 130, 84 S.Ct. 1770, 12 L.Ed.2d 754 [private amusement park].)

The theory of these decisions was greatly extended in *Evans v. Newton* (1966) 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373. A testator in 1911 devised land to the city of Macon, Georgia, to be used as a park for white people only. Later, the city allowed some black people to use it. In litigation by the city and heirs of the testator, the city resigned as trustee and the trial court appointed three private individuals. Held, segregation in this public facility was unconstitutional. The testator could validly have left his land for use as a private club, school, or center, without any governmental control. But a park is traditionally maintained by the municipality and has a governmental character. The substitution of private trustees did not make constitutional the continuance of segregation. (86 S.Ct. 490, 15 L.Ed.2d 379.)

Four justices dissented in three opinions. (86 S.Ct. 490, 495, 496, 15 L.Ed.2d 379, 384, 386.) Two of the justices saw grave dangers in the loose language and vague holding of the majority, saying that this "public function" theory of state action "substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concerns whose regulation has wisely been left by the Constitution to the States." (86 S.Ct. 500, 15 L.Ed.2d 390.) (See 80 Harv. L. Rev. 160.)

A different approach was taken in *Palmer v. Thompson* (1971) 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438, holding that there was no affirmative duty to maintain public swimming pools after a desegregation order. The alleged

motive to avoid segregation was irrelevant, where the closing affected white and black people equally. (91 S.Ct. 1945, 29 L.Ed.2d 445.) Two justices concurred (91 S.Ct. 1946, 29 L.Ed.2d 446, 447), and four justices dissented in three separate opinions (91 S.Ct. 1948, 1952, 1968, 29 L.Ed.2d 448, 453, 471). (See 85 Harv. L. Rev. 86; 23 Hastings L. J. 889.)

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5. Restaurants.

8 Witkin Sum. Cal. Law Const Law § 760

[§ 760] Restaurants.

A number of "sit-in" cases were decided in favor of the civil right.

In *Peterson v. Greenville* (1963) 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323, petitioners, 10 black persons, seated themselves at the lunch counter of the Kress store in Greenville, South Carolina, and refused to leave when the manager announced that the counter was closed and asked everyone to leave. Their conduct was inoffensive, and black patronage was welcomed at all departments of the store except the lunch counter. They were convicted and sentenced for violation of a local ordinance requiring racial separation in restaurants. *Held*, the convictions were contrary to the Fourteenth Amendment, for the state's criminal process was employed to enforce the unconstitutional discrimination. (83 S.Ct. 1121, 10 L.Ed.2d 326.)

In *Lombard v. Louisiana* (1963) 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338, the facts were similar to those in *Peterson* except for the absence of a segregation ordinance. But city officials, including the mayor and superintendent of police, had issued public statements denouncing sit-ins and unequivocally stating their intention to prohibit them. The convictions for trespass were therefore reversed, the Court holding that the state may act as authoritatively through its executive as its legislative body, and that the official declarations had the same coercive effect in directing segregated service as the ordinance in *Peterson*. (83 S.Ct. 1125, 10 L.Ed.2d 342.)

In *Shuttlesworth v. Birmingham* (1963) 373 U.S. 262, 83 S.Ct. 1130, 10 L.Ed.2d 335, defendants, black ministers, were convicted of aiding and abetting violation of a criminal trespass ordinance. The evidence was that they asked for volunteers to participate in sit-down demonstrations, and that G and D volunteered and participated in a demonstration. However, the convictions of G and D were held unconstitutional under *Peterson*, and accordingly the convictions of defendants were reversed under the established rule that there can be no conviction for aiding and abetting another to do a noncriminal act. (83 S.Ct. 1132, 10 L.Ed.2d 337.)

In *Bell v. Maryland* (1964) 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2d 822, black students who refused to leave a restaurant were convicted of criminal trespass. After affirmance of their conviction in the highest state court, the Supreme Court granted certiorari, and then Maryland passed a Civil Rights Act making it unlawful to deny

accommodations on the basis of color, etc. *Held*, repeal of a criminal statute before final disposition of the case ordinarily requires dismissal of the proceeding; accordingly, the case was remanded to the Maryland courts to consider the effect of the supervening change in the law in connection with its general savings clause, and the constitutional issue was not reached. (84 S.Ct. 1821, 12 L.Ed.2d 830.) (See *Robinson v. Florida* (1964) 378 U.S. 153, 84 S.Ct. 1693, 12 L.Ed.2d 771 [following *Peterson* and *Lombard*]; on access to public accommodations under 1964 Civil Rights Act, see *infra*, §850.)

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8 Witkin Sum. Cal. Law Const Law § 761

[§ 761] Public Housing.

In *Banks v. Housing Authority of San Francisco* (1953) 120 C.A.2d 1, 260 P.2d 668, the San Francisco Housing Authority, a state agency created by *Health & Saf.C. 34200* et seq. pursuant to the federal Housing Act (42 U.S.C., §1437 et seq.), constructed low rent housing. In renting, it followed a "neighborhood pattern" policy, the essence of which was that Blacks, Chinese, and Whites were segregated. The Authority asserted that its plan called for enough units to meet needs in proportion to population (70% White, 30% Black), but actual construction for black occupation was not up to schedule. *Held*, mandamus properly issued to compel certification of petitioner without regard to race or color, and to adopt a policy of rental without regard to color.

(a) The Equal Protection Clause protects individuals, not racial groups (120 C.A.2d 8); hence, distribution on the basis of proportionate needs of the groups, ignoring eligibility of the individuals, does not meet the constitutional test (120 C.A.2d 9).

(b) The neighborhood pattern policy has the same objective as the racial restrictive covenants that the state is prohibited from enforcing (supra, §746). "What sort of a 14th Amendment might it be that would, at the same time, countenance active sponsorship and fostering of such restrictions by the executive branch of the state or local government?" (120 C.A.2d 17.) (See 92 Cal. L. Rev. 841 [equal protection as bar to neighborhood integration]; 14 A.L.R.2d 153 [race as permissible consideration in choosing tenants or purchasers of real estate]; 28 Am.Jur. Trials 1 [Housing Discrimination Litigation].)

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a. In General.

1. Constitutional Provisions and Early Cases.

8 Witkin Sum. Cal. Law Const Law § 762

[§ 762] Constitutional Provisions and Early Cases.

(1) *Constitutional Provisions.* The California Constitution states that a "person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." (Cal. Const., Art. I, §8.) And the Fourteenth Amendment, applicable to all "persons," protects women against discriminatory legislation.

(2) *Early Cases.* The traditional view was that the Fourteenth Amendment did not create a "fictitious equality" between men and women, and that classification on the basis of sex may sometimes be proper. Thus, it was believed that the physical disadvantages of women in industry called for greater protection, as in special regulation of maximum hours of labor and minimum wages. (*West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 [minimum wage]; *Muller v. Oregon* (1908) 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 [hours of labor]; see 39 A.L.R.2d 740 [minimum wage laws].) It was also held that a state could confine jury service to men, and therefore could exempt women who did not expressly seek to serve. (*Hoyt v. Florida* (1961) 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118; on unconstitutionality of exclusion, see *infra*, §765.)

In *Goesaert v. Cleary* (1948) 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, a Michigan statute provided that in cities of over 50,000 population, no female could be licensed as a bartender unless she was the "wife or daughter of the male owner." *Held*, the statute was valid. (a) The state could forbid all women from working behind a bar; their modern social and legal position "does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic." (69 S.Ct. 199, 93 L.Ed. 165.) (b) The legislators could reasonably conclude that the moral and social hazards were minimized in the case of the barmaid whose husband or father was the owner of the business; accordingly, the exemption of this class of women was a proper classification. Because "the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." (69 S.Ct. 200, 93 L.Ed. 166.) (See *People v. Jemnez* (1942) 49 C.A.2d Supp. 739, 742, 121 P.2d 543 [statute prohibiting women bartenders held valid on grounds that liquor business is matter of privilege, not right, and classification had reasonable purpose]; *Hargens v. Alcoholic Bev. Control App. Bd.* (1968) 263 C.A.2d 601, 608, 69 C.R. 868 [statute prohibiting liquor licensee from using woman not his wife to dispense liquor for consumption on premises was valid]; 46 A.L.R.3d 369 [employment of

women where liquor is sold]; on prohibition of female bartenders as invalid discrimination, see *infra*, §765.)

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8 Witkin Sum. Cal. Law Const Law § 763

[§ 763] Modern View.

(1) *Strict Scrutiny of Gender Classification.* There has been a radical change in the judicial attitude toward special statutory treatment of women. "[C]lassifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." (*Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583, 589, *infra*, §771; see *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 17, 95 C.R. 329, 485 P.2d 529, *infra*, §765; *Bobb v. Municipal Court* (1983) 143 C.A.3d 860, 866, 192 C.R. 270 [alleged discrimination by judge in asking prospective female jurors about their marital status, without directing same questions to men; lead opinion of single justice, strict scrutiny applied]; 12 *Hastings Const. L. Q.* 315 [*Bobb*]; *infra*, §§765, 767 et seq.)

(2) *Distinction: Denial of Liquor License to Spouse.* In *Reece v. Alcoholic Bev. Control App. Bd.* (1976) 64 C.A.3d 675, 134 C.R. 698, the unique character of liquor regulation was held to justify denial of a liquor license to the spouse of a law enforcement officer. The regulations disqualified (a) any person employed by an agency with duties including enforcement of the Alcoholic Beverage Control Act, and (b) the spouse of a person so disqualified. S, wife of a sheriff's detective, bought a grocery store to operate as her separate property business, with no control by her husband. *Held*, nevertheless, an off-sale beer and wine license was properly denied. (a) There was no discrimination on the basis of sex, for the regulation applied to many male and female employees and to their male and female spouses. (64 C.A.3d 680.) (b) The conflict of interest of persons employed in law enforcement is clear. That of the spouse is less clear, but it cannot be assumed that the husband has no concern about her separate property, and the disqualifying regulation is rationally related to the governmental interest in vigilant and fair enforcement of liquor laws. (64 C.A.3d 683, 684.)

(3) *Distinction: Commission on Status of Women.* Govt.C. 8246, authorizing communication between the California Commission on Status of Women and the Legislature, is constitutional. "[T]he use of gender-framed measures, supported by public resources, to remedy gender bias serves the interests of equality protected by our Constitution." And "[t]he use of public resources for the establishment of a commission to develop and advocate measures to foster the economic and social equality of women is not a preference of women over men in the application of public resources." (*Miller v. California Com. on Status of Women* (1984) 151 C.A.3d 693, 699, 198 C.R. 877, *supra*, §339.)

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B. Illustrations of Valid and Invalid Classifications.

8. Women.

a. In General.

3. Texts and Commentary.

8 Witkin Sum. Cal. Law Const Law § 764

[§ 764] Texts and Commentary.

(1) *In General.* Discrimination against women has elicited much commentary. (See 82 *Harv. L. Rev.* 921 [longer sentences for females deny equal protection]; 110 *Harv. L. Rev.* 1627 [using Title IX to fight gender role oppression]; 62 *Cal. L. Rev.* 789 [Sex-Based Discrimination in the Mental Institutionalization of Women]; 62 *Cal. L. Rev.* 1534 [pregnancy and the Constitution]; 88 *Cal. L. Rev.* 2017 [overview of women's rights and family law in 20th century]; 90 *Cal. L. Rev.* 733 [Symposium on women's equality under Constitution]; 90 *Cal. L. Rev.* 997 [Disestablishing Sex and Gender]; 23 *Hastings L. J.* 1 et seq. [several articles on discrimination against women]; 24 *Hastings L. J.* 1191 [role of public education in development of sex roles]; 9 *Hastings Const. L. Q.* 919 [Gender Equality and Judicial Federalism: The Role of State Appellate Courts]; 10 *Loyola L.A. L. Rev.* 1 [International Agreements Providing Rights for Women]; 23 *Pacific L. J.* 1493 [Mainstreaming Feminist Legal Theory]; 20 *Pepperdine L. Rev.* 905 [Symposium issue on Women and the Law]; 30 *Pepperdine L. Rev.* 185 [application of intermediate scrutiny to gender classifications]; 33 *San Diego L. Rev.* 583 [discriminatory access to loans, credit, and insurance]; 18 *Santa Clara L. Rev.* 453 [Constitutional Rights of Women Under National and International Law]; 23 *Santa Clara L. Rev.* 237 [Refocusing the Craig Test in Evaluating Gender-Based Discrimination]; 58 *So. Cal. L. Rev.* 1425 [equality in school sports]; 67 *So. Cal. L. Rev.* 727 [Ninth Circuit task force report on effects of gender in federal courts]; 43 *Stanf. L. Rev.* 1175 [symposium on issues facing women of color]; 26 *Thomas Jefferson L. Rev.* 1 [Symposium issue on Women and the Law]; 8 *U.S.F. L. Rev.* 639 [Academic High Schools: The Need for Equal Protection for Girls]; 66 *A.L.R.3d* 1237 [discrimination in employment advertising]; 66 *A.L.R.3d* 1262 [discrimination in sports]; 67 *A.L.R.5th* 431 [Regulation of Exposure of Female, But Not Male, Breasts]; *Cal. Civil Practice*, 2 *Civil Rights Litigation*, §10:1 et seq. [actions involving gender-based discrimination]; 53 *Am.Jur. Trials* 299 [sex discrimination based on sexual stereotyping]; 28 *Proof of Facts* 3d 1 [proof of equal protection violation by municipal police department in failing to protect victims of domestic violence].)

(2) *Proposed Equal Rights Amendment.* This topic has been the subject of much comment. (See 84 *Harv. L. Rev.* 1499 [Do We Need a Constitutional Amendment?]; 65 *Cal. L. Rev.* 1076 [experience under similar provisions of state Constitutions]; 9 *Golden Gate L. Rev.* 609 [Women State Legislators, Lobbyists, and the Equal Rights Amendment]; 28 *Hastings L. J.* 979 [validity of attempts to rescind ratification]; 6 *Hastings Const. L. Q.* 637 [The Task Ahead]; 6 *Loyola L.A. L. Rev.* 66 [Equal Rights Amendment and California community property system]; 1 *Pepperdine L. Rev.* 327 [The

Contribution of Our Generation of Americans]; 3 *Pepperdine L. Rev.* 26 [Impact on Married Women's Financial Individual Rights]; 3 *Pepperdine L. Rev.* 42 [Equal Rights Amendment and the Courts; see Appendix A, p. 69 et seq., bibliographies prepared by California Commission on the Status of Women]; 2 *Stanf. L. Rev.* 691 [discrimination in American states and proposed Equal Rights Amendment]; 8 *West L.A. L. Rev.* 1 [validity of attempts to rescind ratification of Amendment]; 30 *Western State L. Rev.* 205 [merging of jurisprudence and social acceptance].)

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(1) *In General.* See 42 *U.S.F. L. Rev.* 1115 [why laws that protect women with health insurance deepen institutional discrimination]. (2) *Proposed Equal Rights Amendment.* See 94 *Cal. L. Rev.* 1323 [Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA].



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b. Employment.

1. Invalid Discrimination.

8 Witkin Sum. Cal. Law Const Law § 765

[§ 765] Invalid Discrimination.

(1) *Employment in Connection With Sale of Liquor.* Former B. & P.C. 25656 prohibited a woman from tending bar unless she was the liquor licensee, wife of the licensee, or singly or with her husband the sole shareholder of a corporation licensee. The statute was upheld in *People v. Jemnez* (1942) 49 C.A.2d Supp. 739, 121 P.2d 543, and *Hargens v. Alcoholic Bev. Control App. Bd.* (1968) 263 C.A.2d 601, 69 C.R. 868, on reasoning similar to that set forth in *Goesaert v. Cleary* (1948) 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, supra, §762. In *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 95 C.R. 329, 485 P.2d 529, *Jemnez* and *Hargens* were disapproved, and *Goesaert* was disparaged and distinguished. (5 C.3d 21, 22.)

(a) *California Constitution.* The protection of former Cal. Const., Art. XX, §18 (now Cal. Const., Art. I, §8; see supra, §762), was invoked by *In re Maguire* (1881) 57 C. 604, to invalidate an ordinance prohibiting women from waiting on customers at night in a place where liquor was sold. Under the reasoning of this case, only inability to perform the tasks of an occupation justifies discrimination against women. And the old arguments that a liquor establishment requires a man to preserve order, and that women might be injured by inebriated customers, no longer can be made. Bars are not more dangerous than other establishments; cocktail waitresses are permitted to work among customers; and, even if it be assumed that bartending is more dangerous than waiting on tables, women must be permitted to take their chances if qualified. "Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women." (5 C.3d 10.)

(b) *Federal Civil Rights Act.* The statute is also invalid under the Federal Civil Rights Act of 1964 (42 U.S.C., §2000e-2(a), infra, §855); the federal Act is controlling under the *Supremacy Clause*. (5 C.3d 10.) The Act permits an exception only where there is a bona fide occupational classification reasonably necessary to the normal operation of the business. (42 U.S.C., §2000e-2(e).) Guidelines of the Equal Employment Opportunity Commission call for "an individual inquiry into a particular woman applicant's qualifications, or, at most, a clearly justifiable general classification with respect to a particular job category." (5 C.3d 14.) Federal decisions have invalidated weight-lifting restrictions, hours limitations, and exclusionary job categories. (5 C.3d 14.) Applying these standards, the statute is not based on a bona fide occupational qualification. The Legislature concedes this by exempting women licensees and wives of licensees; and the state has made no showing that bartenders are endangered by their work and require physical

strength not possessed by women for self-defense and to maintain order; "the saloon days of the Wild West are long gone." (5 C.3d 15.)

(c) *Equal Protection*. The Equal Protection Clauses of the federal and California Constitutions also invalidate the legislation. A fundamental interest--the right to work--is involved, and the classification is strictly scrutinized. (5 C.3d 17; see supra, §704.) The status of sex, like race and lineage, frequently bears no relation to the ability to perform or contribute to society. And the state has shown no compelling interest. The theory that women without a proprietary right in the license will commit improper acts, or will be an unwholesome influence on the public, is wholly without support in logic or experience. (5 C.3d 20, 21.) (See 60 Cal. L. Rev. 833; 23 *Hastings L. J.* 311; on federal and state civil rights legislation prohibiting sex discrimination, see infra, §§861 et seq., 925 et seq.)

Sail'er Inn recognized the legislative power to prevent "improprieties" in connection with the sale of liquor (e.g., employment of a person to encourage purchase). This was the basis of the holding in *Locker v. Kirby* (1973) 31 C.A.3d 520, 525, 107 C.R. 446, that a rule of the Department of Alcoholic Beverage Control prohibiting the use of topless waitresses was valid. The court pointed out that the rule did not prevent a woman from working as a waitress in an establishment selling liquor, nor prevent her from doing so in topless dress in an establishment not selling liquor. The contention that the regulation was unconstitutionally discriminatory in its application to females alone was given a short answer: "[T]he naked female breast has for centuries been a symbol of sexuality" and the male chest has not. (31 C.A.3d 526.) (See 67 A.L.R.5th 431 [Regulation of Exposure of Female, But Not Male, Breasts].)

(2) *Height and Weight Requirements*. In *Hardy v. Stumpf* (1974) 37 C.A.3d 958, 112 C.R. 739, a city police department's minimum height and weight requirements were held discriminatory against women seeking positions as police officers. The court pointed out that a seemingly neutral job requirement, which has the practical effect of disqualifying a disproportionate number of one sex, is discriminatory (37 C.A.3d 962), and it found no substantial evidence establishing a rational relationship between the requirement and the job (37 C.A.3d 963).

After the decision in *Hardy*, the city devised a physical performance test, including a requirement that the applicant scale a six-foot wall. Plaintiff Hardy failed the test, and challenged this requirement. In *Hardy v. Stumpf* (1978) 21 C.3d 1, 8, 9, 145 C.R. 176, 576 P.2d 1342, the court held that the test was reasonably related to the job, and did not violate either the Equal Protection Clause or the Civil Rights Act. (See 67 Cal. L. Rev. 703.) (On valid discrimination in employment, see infra, §766; on discrimination on basis of weight under Fair Employment and Housing Act, see infra, §938.)

(3) *Pregnancy*. Discrimination based on a woman's pregnancy is prohibited by Cal. Const., Art. I, §8. (*Badih v. Myers* (1995) 36 C.A.4th 1289, 1292, 43 C.R.2d 229; on federal and state civil rights legislation prohibiting discrimination on basis of pregnancy, see infra, §§877, 926.)

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b. Employment.

2. Valid Discrimination.

8 Witkin Sum. Cal. Law Const Law § 766

[§ 766] Valid Discrimination.

In *Long v. State Personnel Bd.* (1974) 41 C.A.3d 1000, 116 C.R. 562, plaintiff woman, an ordained Methodist minister, had been employed as a Protestant chaplain at three California state hospitals. She applied for that position at a facility of the California Youth Authority. Her request was denied because of a "male-only certification" of the position by defendant board. At her hearing, it was shown that the inmate population at the facility consisted of about 400 young males of an average age of 19 1/2 years, all committed by criminal courts, for a broad range of criminal offenses including sex crimes; that the setting is dangerous for all employees; that about a dozen females are employed in clerical and correctional capacities, in an effort to "normalize" the institution for the benefit of the inmates, but their contact with the wards--as distinguished from the contact of a chaplain--is limited; and that complete security for the chaplain cannot be provided. The board upheld the classification and the trial court denied mandamus. *Held*, affirmed.

(a) *California Constitution.* Former Cal. Const., Art. XX, §18 (now Cal. Const., Art. I, §8; see *supra*, §762), prohibits disqualification of women from pursuing a vocation or profession, but the regulation in question does not do that. Plaintiff is free to pursue her occupation of minister or chaplain; she is merely precluded from doing so at the particular facility because of the particular circumstances. (41 C.A.3d 1007.)

(b) *Equal protection.* Although the "strict scrutiny" test applies to sex discrimination (see *supra*, §704), the statute meets the test of a compelling state interest. The work involves intimate contact with the male wards, interfering with their personal privacy; there is also the danger of escape or altercation, which a woman would be less able to handle than a man; and there would be the further danger of sexual or physical attack on her. (41 C.A.3d 1011, 1012.) Accordingly, plaintiff's interest in the position must yield to the interests of the inmates and the public. (41 C.A.3d 1014.)

(c) *Federal Civil Rights Act.* The approach under the Civil Rights Act is substantially the same as that under the Equal Protection Clause. The burden is on the employer to prove a bona fide occupational classification reasonably necessary to the normal operation of the business or enterprise. (41 C.A.3d 1016, 1018.) The burden was met here, as it was in a recent Pennsylvania case in which it was held that Youth Center supervisors and superintendents for a juvenile detention home could be restricted to men. (41 C.A.3d 1016.) (See 92 Cal. L. Rev. 147 [permissible sex

discrimination].)

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c. Exclusion From Juries.

8 Witkin Sum. Cal. Law Const Law § 767

[§ 767] Exclusion From Juries.

The Louisiana Constitution formerly provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to serve. In *Taylor v. Louisiana* (1975) 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690, defendant, a man convicted of aggravated kidnaping, contended on appeal that the resulting systematic exclusion of women deprived him of his federal constitutional right to a representative jury (see supra, §215). *Held*, he had standing to raise the issue although not a member of the excluded class (see supra, §85), and the statute was unconstitutional.

(a) The "fair cross section of the community" requirement (see supra, §215) was violated by the systematic exclusion of women under the challenged state constitutional provision. (95 S.Ct. 698, 42 L.Ed.2d 698.)

(b) The reasoning and implications of *Hoyt v. Florida* (1961) 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118, supra, §762, are no longer acceptable. "If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place. Nothing persuasive has been presented to us in this case suggesting that all-male venires in the parishes involved here are fairly representative of the local population otherwise eligible for jury service." (95 S.Ct. 701, 42 L.Ed.2d 702.) (See 89 Harv. L. Rev. 95; 23 U.C.L.A. L. Rev. 344; 70 A.L.R.5th 587 [state cases on exclusion of women from juries in criminal case as violation of accused's constitutional rights or as ground for reversal of conviction].)

The *Taylor* rule was declared prospectively; hence, it was held inapplicable to a conviction obtained by a jury empanelled prior to the decision. (*Daniel v. Louisiana* (1975) 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790.) (See 9 Southwestern U. L. Rev. 801.)

In *Duren v. Missouri* (1979) 439 U.S. 357, 99 S.Ct. 664, 666, 671, 58 L.Ed.2d 579, 584, 589, the Court applied the *Taylor* approach to hold unconstitutional a statute providing for an automatic exemption from jury service for a woman requesting that she be excused. (See *J.E.B. v. Alabama* (1994) 511 U.S. 127, 114 S.Ct. 1419, 128 L. Ed. 2d 89 [applying

equal protection scrutiny to sex-based peremptory challenges of jurors]; *108 Harv. L. Rev. 240* [J.E.B.]; *19 Santa Clara L. Rev. 1113* [Duren].)

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d. Social Security Benefits.

8 Witkin Sum. Cal. Law Const Law § 768

[§ 768] Social Security Benefits.

In *Califano v. Westcott* (1979) 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382, the Court examined the AFDC program, which provides benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but does not provide these benefits when the mother becomes unemployed. The federal district court held that this distinction violates the Fifth Amendment Due Process Clause, and ordered that payments be made to families deprived of support because of the unemployment of the mother. *Held*, affirmed.

(a) *Unconstitutional gender-based qualification.* The gender classification is unconstitutional under *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, *infra*, §771, *Weinberger v. Wiesenfeld* (1975) 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514, *infra*, §772, and *Califano v. Goldfarb* (1977) 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270, *infra*, §772. Although in those cases the benefits were a form of compensation earned by a woman, or were directly related, the argument for this distinction "invites a return to the discredited view that welfare benefits are a 'privilege' not subject to the guarantee of equal protection." (99 S.Ct. 2661, 61 L.Ed.2d 390, 391.) The classification is not substantially related to the attainment of important and valid statutory goals. "It is, rather, part of the 'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of home and family life.' ... Legislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment." (99 S.Ct. 2663, 61 L.Ed.2d 393.)

(b) *Extension of coverage where statute is defective because of underinclusiveness.* The court may either declare the statute a nullity and thus deny benefits to the class the Legislature intended to benefit, or may extend the coverage of the statute to include those who are aggrieved by the exclusion. In several previous cases involving federal benefits, this Court has suggested that extension rather than nullification is the proper course (see *Frontiero v. Richardson*; *Jimenez v. Weinberger* (1974) 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363, *infra*, §781), and has affirmed district court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class. (99 S.Ct. 2663, 61 L.Ed.2d 393.)

Four justices joined in a brief opinion concurring in the declaration of unconstitutionality, but asserting that the relief given was exactly what Congress wished to prevent, and contending that Congress should have freedom to rewrite the statute. (99 S.Ct. 2666, 61 L.Ed.2d 395.) (See 93 Harv. L. Rev. 130; on discriminatory disqualification for

unemployment compensation, see *Boren v. Department of Emp. Dev.* (1976) 59 C.A.3d 250, 255, 256, 130 C.R. 683.)

A distinct issue arises where the statute provides for different treatment of women of different marital status. (See *Califano v. Boles* (1979) 443 U.S. 282, 99 S.Ct. 2767, 61 L.Ed.2d 541 [Social Security Act provision restricting "mother's insurance benefits" to widow and divorced wives of wage earners was not denial of equal protection to unmarried mother of illegitimate child]; *Bowen v. Owens* (1986) 476 U.S. 340, 106 S.Ct. 1881, 90 L.Ed.2d 316 [upholding provision granting survivor's benefits to remarried widowed spouse, and not to divorced widowed spouse].)

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e. Crimes.

8 *Witkin Sum. Cal. Law Const Law* § 769

[§ 769] Crimes.

(1) *Crime of Wife-Beating*. P.C. 273d, which prior to amendment made it a felony for a husband to inflict corporal injury on his wife, was challenged in *People v. Cameron* (1975) 53 C.A.3d 786, 126 C.R. 44. Defendant contended that he was denied equal protection because the law did not apply to unmarried men who assaulted their paramours or to wives who assaulted their husbands. *Held*, the classification was valid; wives as an object of abuse by their spouses are a class distinctly set apart by the conditions under which their abuse customarily occurs.

(a) Women are physically less able to defend themselves than men. (53 C.A.3d 791.)

(b) The existence of the crime of assault under P.C. 245(a), either a felony or a misdemeanor (see 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §35), does not make P.C. 273d unnecessary. The offense against the wife usually occurs at night, without witnesses, and often in the presence of a helpless child; an officer cannot easily determine whether a felony has been committed and cannot arrest for a misdemeanor not committed in his presence, hence the officer may leave the wife in the home, subject to the danger of additional abuse; and the wife's choice of leaving may involve the problem of what to do with the children, and the difficulty of finding a hospitable place to go. (53 C.A.3d 792, 793.)

(c) The state's interest in preserving a marriage (see 11 *Summary* (10th), *Husband and Wife*, §15) supports the legislative deterrent of a felony prosecution to deter male aggressiveness. (53 C.A.3d 793.)

(d) Although the number of civil and criminal laws in which sex is a significant factor is decreasing, a rational basis may still be found (53 C.A.3d 793), and is present here. The number of wives who assault their husbands is far less than that of husbands who assault their wives, and the Legislature may properly recognize degrees of evil and confine regulation to classes of cases in which the need is most evident. (53 C.A.3d 795; see *supra*, §702.) However, "we do not wish to be understood as saying that section 273d could not with justification be made applicable to the reverse situation, namely assaults by wives upon husbands." (53 C.A.3d 797.) (See 5 *A.L.R.4th* 708 [constitutionality of assault and battery laws limited to protection of females or providing greater penalties for males than for females].)

In 1977, P.C. 273d was amended to apply only to cruel or inhuman corporal punishment of children. And it is now

a felony for either "spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child," to wilfully inflict "corporal injury, resulting in a traumatic condition," on the other spouse or cohabitee. (P.C. 273.5.)

(2) *Statutory Rape*. In *Michael M. v. Superior Court* (1979) 25 C.3d 608, 159 C.R. 340, 601 P.2d 572, a 4-3 decision, the court rejected a constitutional challenge to P.C. 261.5, which defined the offense of "unlawful sexual intercourse" as intercourse "with a female not the wife of the perpetrator, where the female is under the age of 18 years."

(a) The statute discriminates on the basis of sex because only females may be victims and only males may violate it. But the classification is justified by an important state interest. "[T]he law herein challenged is supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant. ... Accordingly, the Legislature is amply justified in retaining its historic statutory rape law because of the potentially devastating social and economic results which may follow its violation." (25 C.3d 611.)

(b) The argument that the classification is overbroad, and that the state's interest in preventing pregnancy could be served by excluding from the statute's coverage those who use birth control techniques or are incapable of procreation, is not persuasive. Legislators would be reluctant to subject an underage victim to cross-examination on this issue, or to rely on the doubtful efficacy of contraceptives or the claim of nonemission. (25 C.3d 613.)

(c) The argument that the statute is impermissibly underinclusive in not holding the female equally culpable is likewise unpersuasive. The Legislature may reasonably have concluded that the female is subjected to far greater risks than the male (25 C.3d 613), and that criminal prosecution of a minor female would practically eliminate the possibility of enforcement of a statute designed to protect minor female victims. The Legislature could adopt a gender-neutral statute but is not constitutionally compelled to do so. (25 C.3d 614.)

The dissenting opinion disagrees with the majority's historical analysis, calls attention to the gender-neutral laws of 31 jurisdictions, and finds no justification for the statute in the reasons set forth by the majority. (25 C.3d 615.)

The U.S. Supreme Court came to the same conclusion as the majority opinion. (*Michael M. v. Superior Court* (1981) 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437.) (See 95 Harv. L. Rev. 171 [*Michael M.*]; 16 Loyola L.A. L. Rev. 943 [same]; 22 Santa Clara L. Rev. 943 [same]; 99 A.L.R.3d 129 [Constitutionality of Rape Laws Limited to Protection of Females Only].)

P.C. 261.5 was amended in 1993 to define "unlawful sexual intercourse" as intercourse "with a person who is not the spouse of the perpetrator, if the person is a minor." (P.C. 261.5(a); see 15 J. Juvenile Law 197 [Teenage Sex in California: Thirteen Years After *Michael M.*]; on unlawful sexual intercourse, see 2 Cal. Crim. Law (3d), Sex Offenses and Crimes Against Decency, §20 et seq.)

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f. Educational Opportunities.

8 Witkin Sum. Cal. Law Const Law § 770

[§ 770] Educational Opportunities.

United States v. Virginia (1996) 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735, held that Virginia's exclusion of women from Virginia Military Institute (VMI) denies equal protection to women.

(a) Admission of women would require modifications of VMI's "adversative method" of training. However, VMI's goal of producing "citizen-soldiers" is not inherently unsuitable to women, and gender classifications cannot be justified on the basis of generalizations about the roles and abilities of men and women. (116 S.Ct. 2279, 2282, 135 L.Ed.2d 756, 759.) "Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The State's justification for excluding all women from 'citizen-soldier' training for which some are qualified, in any event, cannot rank as 'exceedingly persuasive,' as we have explained and applied that standard." (116 S.Ct. 2281, 135 L.Ed.2d 758, 759.)

(b) Virginia's proposed remedy of establishing a parallel program for women--Virginia Women's Institute for Leadership (VWIL)--does not cure the constitutional violation. The VWIL program is a "pale shadow" of VMI, and the VWIL solution is reminiscent of *Sweatt v. Painter* (1950) 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, where Texas proposed a separate law school for Blacks. (116 S.Ct. 2282, 2285, 135 L.Ed.2d 759, 763.) "In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the State supports at VWIL and VMI." (116 S.Ct. 2286, 135 L.Ed.2d 764.) (See 110 Harv. L. Rev. 175 [*United States v. Virginia*]; 110 Harv. L. Rev. 1627 [using Title IX to fight gender role oppression]; 75 Cal. L. Rev. 2117 [single-sex college social organizations]; 86 Cal. L. Rev. 1169 [*United States v. Virginia*]; 33 Cal. Western L. Rev. 249 [same]; 30 Loyola L.A. L. Rev. 1333 [same]; 24 Pepperdine L. Rev. 1353 [same]; 38 Santa Clara L. Rev. 1183 [same]; 72 So. Cal. L. Rev. 1401 [California Single-Gender Academies Pilot Program: Separate But Really Equal]; 19 Thomas Jefferson L. Rev. 177 [*United States v. Virginia*]; 25 Thomas Jefferson L. Rev. 53 [admitting that women-only public education is unconstitutional and advancing equality of sexes]; 25 Western State L. Rev. 179 [same].)

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8. Women.

g. Other Discriminatory Treatment.

8 Witkin Sum. Cal. Law Const Law § 771

[§ 771] Other Discriminatory Treatment.

(1) *Unequal Right to Letters of Administration*. In *Reed v. Reed* (1971) 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225, an Idaho statute listing the class of persons entitled to priority in letters of administration of an intestate, contained a provision that where several persons are equally entitled, "males must be preferred to females." In this case, an adopted child died and his mother and father sought letters. The judge, deeming himself bound by the statute, appointed the father with no inquiry into relative capabilities, and the Idaho Supreme Court affirmed. *Held*, reversed. The object of the statute was to reduce the area of controversy in probate courts, but the method was inconsistent with equal protection. "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." (92 S.Ct. 254, 30 L.Ed.2d 230.)

(2) *Unequal Rights of Servicewoman*. In *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, the Court considered a challenge to the statute dealing with dependents of a servicewoman. A serviceman may claim his wife as a dependent regardless of whether she is in fact dependent on him for support; a servicewoman may claim her husband as a dependent only if he is in fact dependent on her for more than one-half of his support. *Held*, the statute was an invalid discrimination on the basis of sex. Four justices, applying the strict test (see *supra*, §763), found that the sole basis for the classification was administrative convenience in avoiding the determination of actual dependency of wives, and that this was insufficient to justify the dissimilar treatment of men and women similarly situated. (93 S.Ct. 1772, 36 L.Ed.2d 594.) The concurring opinions, although rejecting the strict test, found the classification discriminatory. (See 87 Harv. L. Rev. 116 [*Frontiero*]; 23 *Hastings L. J.* 199 [*Women and the Draft*].)

(3) *Control of Community Property*. In *Kirchberg v. Feenstra* (1981) 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428, a Louisiana statute allowing husbands but not wives to execute mortgages on jointly owned property without spousal consent was held unconstitutional.

(4) *Unequal Treatment of Female Jail Inmates*. In *Molar v. Gates* (1979) 98 C.A.3d 1, 12, 17, 21, 159 C.R. 239, minimum security jail facilities--providing special privileges for male but not for female inmates--were held to violate the state and federal Constitutions. (See 38 *Santa Clara L. Rev.* 555 [*Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C., §1983*]; 47 *So. Cal. L. Rev.* 1453 [*Denial of Work Release Programs to*

Women].)

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a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 772

[§ 772] In General.

Challenges to sex discrimination against men have had mixed results. (See 90 *Cal. L. Rev.* 997 [Disestablishing Sex and Gender]; 92 *Cal. L. Rev.* 147 [permissible sex discrimination].)

(1) *Tax Exemption of Widow but Not Widower: Valid.* In *Kahn v. Shevin* (1974) 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189, a Florida statute giving widows an annual \$ 500 tax exemption was challenged by plaintiff widower. *Held*, the classification was valid. Despite recent federal statutes seeking to provide equal job opportunities for women, they still suffer discrimination in employment; and while a widower can usually continue in his occupation on the death of his wife, a widow in many cases is suddenly forced into the unfamiliar job market with fewer skills. Hence, the law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." (94 S.Ct. 1737, 40 L.Ed.2d 193.) (See 88 *Harv. L. Rev.* 129; 31 *Hastings L. J.* 1379.)

(2) *Social Security Benefits Denied to Widower: Invalid.* In *Weinberger v. Wiesenfeld* (1975) 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514, the statute involved was a Social Security Act provision (former 42 U.S.C., §402(g)) that on the death of a husband and father, benefits are payable to the widow and children, but on the death of a wife and mother, they are payable only to the children. On the death of his working wife (whose earnings had been the family's main support), plaintiff sought benefits for himself as well as his child, and on denial of his claim, brought this action. *Held*, the "gender-based distinction" was invalid for the reasons set forth in *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, *supra*, §771.

(a) The purpose of the statute was to afford protection for the family, and its framers proceeded on the presumption that men are more likely than women to be the primary supporters of their spouses and children. But this generalization cannot justify the denigration of efforts of women who do work. (95 S.Ct. 1231, 1232, 43 L.Ed.2d 522, 523.)

(b) The statute, like that in *Frontiero*, operates to deprive women of protection for their families that men receive as a result of their employment. The husband here was not given the opportunity to show that he was dependent on his wife for support; and the Social Security taxes the wife paid afforded her less protection than those paid by employed men. (95 S.Ct. 1232, 43 L.Ed.2d 523.) (See 89 *Harv. L. Rev.* 95; 23 *U.C.L.A. L. Rev.* 249.)

Califano v. Goldfarb (1977) 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270, involved the Social Security Act provision that (a) on the death of a husband, survivors' benefits are paid to his widow; but (b) on the death of a wife, the benefits are payable to her widower only if he had received at least one-half of his support from her. *Held*, this gender-based distinction was a denial of equal protection under the reasoning of *Weinberger v. Wiesenfeld* and *Frontiero v. Richardson*. (See 5 *Hastings Const. L. Q.* 74; 10 *West L.A. L. Rev.* 67.)

(3) *Unequal Promotion Rights of Naval Officer: Valid*. In *Schlesinger v. Ballard* (1975) 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610, B, a Navy lieutenant, was passed over for promotion after 9 years of service, and under the statutory scheme, was subject to mandatory discharge. He claimed a denial of equal protection because the statutes governing female naval officers gave a 13-year tenure before mandatory discharge for want of promotion. *Held*, the statutory system, in light of its history and objectives, was not unconstitutionally discriminatory. *Reed v. Reed* (1971) 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225, *supra*, §771, and *Frontiero v. Richardson* were distinguished as dealing with classifications based on administrative convenience alone. Here, they were based on the Navy's needs; in particular, furnishing motivation to qualified officers to seek higher levels of command. (95 S.Ct. 578, 42 L.Ed.2d 618.) (See 89 *Harv. L. Rev.* 95; 13 *Cal. Western L. Rev.* 317; 23 *U.C.L.A. L. Rev.* 236.)

(4) *Discrimination in Educational Opportunity: Invalid*. In *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090, the Court held (5-4) that a statute excluding males from enrollment in a state-supported professional nursing school was unconstitutional. A strong dissenting opinion pointed out that of the state's 8 universities and 16 junior colleges, all except MUW are coeducational, and that at least two other Mississippi universities would have provided the male applicant with the nursing curriculum he wanted. "The Court in effect holds today that no State may now provide even a single institution of higher learning open only to women students." (102 S.Ct. 3342, 73 L.Ed.2d 1105.) (See 96 *Harv. L. Rev.* 110; 105 *Harv. L. Rev.* 1741 [Inter-City Single Sex Schools: Educational Reform or Invidious Discrimination?].)

(5) *Discrimination Against Males Under 21: Invalid*. In *Craig v. Boren* (1976) 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397, an Oklahoma statute prohibited the sale of beer to males under 21 and to females under 18. *Held*, the gender-based differential was a denial of equal protection to males 18 to 21 years of age, under the principles of *Reed v. Reed*, *supra*, and cases following it. (97 S.Ct. 457, 50 L.Ed.2d 408.) The Court also held that the Twenty-First Amendment, which created an exception to the normal operation of the Commerce Clause (see *infra*, §1311), could not support a gender-based discrimination in liquor regulation. (97 S.Ct. 462, 50 L.Ed.2d 413.) Two justices dissented. (See 91 *Harv. L. Rev.* 177; 5 *Hastings Const. L. Q.* 63; 50 *So. Cal. L. Rev.* 702.)

(6) *Miscellaneous Challenges*. Challenges to discrimination against males have arisen in a variety of other situations. (See 10 *Pacific L. J.* 201 [sex discrimination against males in setting automobile insurance rates]; 18 *A.L.R.4th* 910 [statutory or constitutional provision allowing widow but not widower to take against will or receive dower, allowances, homestead rights, or the like]; 88 *A.L.R.5th* 67 [voir dire exclusion of men from state jury or jury panel]; 166 *A.L.R. Fed* 1 [What Constitutes Reverse or Gender Discrimination Against Males Violative of Federal Constitution or Statutes--Nonemployment Cases]; on discriminatory presumption of dependency in workers' compensation, see *infra*, §773; on statutes allowing alimony to wife but not to husband, see *infra*, §774.)

SUPPLEMENT: [This section is current through the latest supplement]

(5a) *(New) Domestic Violence and Inmate Programs Serving Women Only*. In *Woods v. Horton* (2008) 167 C.A.4th 658, 84 C.R.3d 332, plaintiffs challenged, on equal protection grounds, several statutes administered by defendants relating to domestic violence programs and programs for inmate mothers. *Held*, the gender-based domestic violence classifications violate equal protection and the statutes must be reformed to provide funding for victims of domestic violence regardless of gender; the programs for inmate mothers do not violate equal protection. The greater need for services by female victims of domestic violence does not provide a compelling state interest for the gender-based classification in the domestic violence statutes. (167 C.A.4th 675.) However, the programs for inmate mothers are based on considerations of the differences between male and female inmates. Plaintiffs failed to show that the needs of inmate fathers were not being met, or that any inmate father who would qualify for one of the programs was denied its benefits.

(167 C.A.4th 673.)



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8 Witkin Sum. Cal. Law Const Law § 773

[§ 773] Workers' Compensation.

In *Arp v. Work. Comp. App. Bd.* (1977) 19 C.3d 395, 138 C.R. 293, 563 P.2d 849, Mrs. A was an employee of a company wholly owned by Mr. A, earning \$ 6,000 per year. She was fatally injured in an industrial accident, and Mr. A applied for death benefits. Former Lab.C. 3501(a) established a conclusive presumption of total dependency of a surviving wife. Mr. A contended that this provision was an unconstitutional discrimination against a surviving husband, and that the benefits of the section should be extended to him. *Held*, the statute is unconstitutional, and all applicants must prove actual dependency under Lab.C. 3502 (see 2 Summary (10th), *Workers' Compensation*, §313).

(a) *Standards by which classification must be tested.* The federal decisions invalidating and upholding classifications based on sex have been unclear, but the most recent pronouncement is that these classifications are acceptable only when they further "important governmental objectives" and are "substantially related to achievement of those objectives." (19 C.3d 400, citing *Craig v. Boren* (1976) 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397, *supra*, §772.) California, applying Cal. Const., Art. I, §7, has adopted the strict scrutiny/compelling state interest test. (19 C.3d 400, citing *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 95 C.R. 329, 485 P.2d 529, *supra*, §765.)

(b) *Federal decisions.*

Califano v. Goldfarb (1977) 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270, *supra*, §772, and *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, *supra*, §771, invalidated gender-based distinctions; *Kahn v. Shevin* (1974) 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189, *supra*, §772, and *Schlesinger v. Ballard* (1975) 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610, *supra*, §772, upheld the classifications. In both of the latter cases, the Supreme Court held that males and females were not similarly situated with respect to matters governed by the challenged statutes, and that the practices designed to compensate for real disabilities imposed on one sex were constitutionally permissible. (19 C.3d 403.)

(c) *Kahn and Ballard reasoning is inapplicable.* The argument for upholding the conclusive presumption of Lab.C. 3501(a) is that after centuries of economic discrimination against females, men and women are not similarly situated with respect to economic factors; hence, a provision designed to mitigate the continuing consequences of past economic abuse is not only an appropriate legislative goal but also meets the more stringent compelling state interest test. Also,

conferring a benefit on widows does not per se deprive widowers of substantial benefits to which they are otherwise entitled. (19 C.3d 403, 404.) This "ameliorative classification" argument is nevertheless unpersuasive because:

(1) It is based on "role stereotypes." (19 C.3d 405.) The underlying assumption that married men support their families and married women do not "is outmoded in a society where more often than not a family's standard of living depends upon the financial contributions of both marital partners." (19 C.3d 406.)

(2) Even if this "benign" legislative purpose were to be accepted, the method chosen by the Legislature must, under the federal standard, be "substantially related" to the ameliorative goal; and under the California standard, it must represent the narrowest and least restrictive means by which the objective can be achieved. (19 C.3d 406.)

(3) *Lab.C. 3501(a)* does not meet either test. "[W]hen a statute is sexually discriminatory on its face, and is unsupported by any clear indication of ameliorative purpose, when it potentially disadvantages large numbers of the very sex it purports to aid, and does so by perpetuating the paternalistic notion that a woman's financial contribution is unlikely to be of substantial importance to the family unit," it cannot be said either to be necessary to the realization of a compelling state goal, or to rest on some ground of difference having a fair and substantial relation to the legislative object. (19 C.3d 407.)

(d) *Statute is invalidated, not extended to cover men.* The decisions in *Califano v. Goldfarb*, *Weinberger v. Wiesenfeld* (1975) 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514, supra, §772, and *Frontiero v. Richardson* extended the statutory benefits to males and females alike. But remedying a constitutional defect by rewriting statutory language "is a comparatively drastic alternative, to be invoked sparingly, and only when the result achieved by such a course is more consistent with legislative intent than the result that would attend outright invalidation." (19 C.3d 407.) This is not the case here:

(1) The legislative intent to exclude widowers appears in the 1917 repeal of the original limited presumption in their favor. (19 C.3d 408.)

(2) The statute probably was intended merely to promote administrative convenience in granting automatic death benefits to all widows, eliminating the expense and inconvenience of case-by-case hearings. (19 C.3d 409.)

(3) A determination that the public interest would best be served by extending the presumption to widowers should be made by the Legislature. This action would have some impact on workers' compensation insurance rates, and the Legislature can evaluate the competing policies, obtain statistical information, and exercise an informed and practical judgment. (19 C.3d 409.)

(4) The invalidation of *Lab.C. 3501(a)* will not result in unfair hardship to an employee's survivors. An unemployed spouse can easily establish total dependency, and even an employed spouse may be able to show partial dependency. Moreover, the conclusive presumption in favor of minor children (see 2 *Summary* (10th), *Workers' Compensation*, §312) remains in effect; hence, though a fully employed widow with a minor child may receive nothing herself, the family unit loses nothing because the full death benefit will go to the child. "The only persons who will suffer substantial loss of benefits by reason of the invalidation of the widow's presumption are childless, financially self-sufficient wives. If the Legislature elects to extend the conclusive presumption to such persons it may easily do so, affording equal treatment to widowers." (19 C.3d 410.) (See 66 *Cal. L. Rev.* 447.) (See *Wengler v. Druggists Mut. Ins. Co.* (1980) 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 [similar Missouri statute was unconstitutional].)

As amended in 1989 and 2002, *Lab.C. 3501* provides that a spouse to whom a deceased employee is married at the time of death is conclusively presumed to be wholly dependent for support on the deceased employee if the surviving spouse earned \$ 30,000 or less in the 12 months preceding the death. (*Lab.C. 3501(b)*.) A child under the age of 18, or a child of any age found to be physically or mentally incapacitated from earning, is presumed to be wholly dependent. (*Lab.C. 3501(a)*.) (On proof of actual dependency, see 2 *Summary* (10th), *Workers' Compensation*, §313.)

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c. Alimony.

8 *Witkin Sum. Cal. Law Const Law* § 774

[§ 774] Alimony.

Orr v. Orr (1979) 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306, invalidated the Alabama statutes requiring husbands but not wives to pay alimony on divorce.

(a) Classification on the basis of sex--women or men--is subject to strict scrutiny, and the justifications advanced by the state are insufficient. Needy males could be helped along with needy females with little additional burden on the state; and individualized hearings can determine which women were discriminated against during their marriage so as to leave them unprepared to fend for themselves. (99 S.Ct. 1112, 1113, 59 L.Ed.2d 320; see *Craig v. Boren* (1976) 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397, *supra*, §772, and *Stanton v. Stanton* (1975) 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688, *infra*, §779.)

(b) "Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound--if only indirectly--to the benefit of those without need for special solicitude." (99 S.Ct. 1113, 59 L.Ed.2d 321.) (See *In re Marriage of Flaherty* (1982) 31 C.3d 637, 643, 183 C.R. 508, 646 P.2d 179 [child support duty of mother; footnote 2 quotes *Orr* and adds that under California Constitution, sex-based distinctions are subject to strict scrutiny and higher standard of review than that required by federal Constitution]; 93 *Harv. L. Rev.* 130 [*Orr*]; 7 *Hastings Const. L. Q.* 419 [same]; 85 *A.L.R.3d* 940 [statute allowing alimony to wife, but not to husband, as unconstitutional sex discrimination].)

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d. Father of Illegitimate Child.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 775

[§ 775] In General.

(1) *Denial of Right To Sue for Wrongful Death.* In *Parham v. Hughes* (1979) 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269, a Georgia statute permitted the mother of an illegitimate child to sue for wrongful death of the child, but denied the right to a father who had not legitimated the child. *Held*, 5-4, the statute was constitutional. The plurality opinion of four justices reasons as follows:

(a) The discrimination against illegitimate children, which invalidated statutes in *Trimble v. Gordon* (1977) 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31, *infra*, §784, and *Weber v. Aetna Cas. & Surety Co.* (1972) 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768, *infra*, §781, is not present here. The statute denies the right of the natural father who is responsible for fostering an illegitimate child and failing to change its status. (99 S.Ct. 1746, 60 L.Ed.2d 276.)

(b) The distinction based on sex is justifiable where it is realistically based on differences in the situations of men and women, as in *Schlesinger v. Ballard* (1975) 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610, *supra*, §772. (99 S.Ct. 1747, 60 L.Ed.2d 276.) Under the Georgia statute, only the father can by unilateral action legitimate a child, and the conferral of the right to sue if he does is reasonable. (99 S.Ct. 1748, 60 L.Ed.2d 278.)

(c) The classification is rationally related to a permissible state objective: creating a mechanism for dealing with the often difficult problem of proving the paternity of illegitimate children, and the related danger of spurious claims. If paternity has not been established before the commencement of a wrongful death action, a defendant may be faced with the possibility of multiple suits, and settlement of actions may be difficult. (99 S.Ct. 1748, 60 L.Ed.2d 278.) (See 7 *Hastings Const. L. Q.* 459.)

(2) *Right to Hearing on Fitness for Custody.* The father of an illegitimate child, on the death of the mother, is entitled to the same hearing on fitness for custody as the father of a legitimate child. (See *Stanley v. Illinois* (1972) 405 U.S. 645, 92 S.Ct. 1208, 1216, 31 L.Ed.2d 551, 562, *supra*, §650 [main opinion rests on due process, four justices thought equal protection was also denied]; cf. *Quilloin v. Walcott* (1978) 434 U.S. 246, 98 S.Ct. 549, 555, 54 L.Ed.2d 511, 520, *supra*, §650 [distinguishing *Stanley*]; 25 Cal. Western L. Rev. 123; 19 Southwestern U. L. Rev. 1087.)

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2. Right To Withhold Consent to Adoption.

8 Witkin Sum. Cal. Law Const Law § 776

[§ 776] Right To Withhold Consent to Adoption.

(1) *In General. Caban v. Mohammed (1979) 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297*, dealt with the New York adoption statute, which permits an unwed mother to prevent adoption of an illegitimate child by withholding consent, but does not give this right to the natural father. He can only object on the ground of the best interests of the child. In this case, the mother and the father lived together after the children's birth, and the father maintained contact with them after the mother's remarriage and also contrived to obtain their custody. The mother sought adoption, the father appeared in the proceedings in opposition, and the Court granted the decree. *Held*, reversed; the statute was unconstitutional. It met the due process requirements of *Stanley v. Illinois (1972) 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551*, *supra*, §650, but its gender-based distinction was a denial of equal protection.

(a) Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this may not be true as the age of the children increases. (*99 S.Ct. 1765, 60 L.Ed.2d 305.*)

(b) The state's interest in promoting adoption of illegitimate children is important, but is not a sufficient justification. There was no showing that unwed fathers are more likely to object to adoption than are unwed mothers, nor is there any self-evident reason why they would be. (*99 S.Ct. 1767, 1768, 60 L.Ed.2d 306, 307.*)

(c) The suggestion that adoption may be impeded because it is often impossible to locate unwed fathers is not persuasive. These difficulties need not persist past infancy; and where adoption of an older child is sought, the state may properly deny the privilege of veto to a father who has never participated in the rearing of the child or has abandoned the child. In the present case, the father had established a substantial relationship with the child and had admitted his paternity. (*99 S.Ct. 1768, 1769, 60 L.Ed.2d 307, 308.*)

(d) The statute "both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers." This undifferentiated distinction does not bear a substantial relationship to the state's interests. (*99 S.Ct. 1769, 60 L.Ed.2d 308.*) (See *W.E.J. v. Superior Court (1979) 100 C.A.3d 303, 160 C.R. 862, 10 Summary (10th), Parent and Child*, §68 [distinguishing *Caban* on ground that statute denies veto right only to fathers who have neither gone through

marriage ceremony nor lived with child as parent]; 7 *Hastings Const. L. Q.* 445 [*Caban*]; 23 *Santa Clara L. Rev.* 899 [*Caban and W.E.J.*]; 40 *U.C.L.A. L. Rev.* 637 [Judicial Assumptions About Parenthood; discussing *Stanley* and *Caban*].)

(2) *Right To Withhold Consent Absent Showing of Father's Unfitness.* In *Adoption of Kelsey S.* (1992) 1 *C.4th* 816, 4 *C.R.2d* 615, 823 *P.2d* 1216, the primary question was "whether the father of a child born out of wedlock may properly be denied the right to withhold his consent to his child's adoption despite his diligent and legal attempts to obtain custody of his child and to rear it himself, and absent any showing of the father's unfitness as a parent." The court concluded that, "under these circumstances, the federal constitutional guarantees of equal protection and due process require that the father be allowed to withhold his consent to his child's adoption and therefore that his parental rights cannot be terminated absent a showing of his unfitness" under former C.C. 221.20. (1 *C.4th* 821.)

(a) *The statutory framework.* The relevant statutes are former C.C. 7004 (now *Family C.* 7611, 7611.5, 7612; see 10 *Summary* (10th), *Parent and Child*, §17 et seq.), former C.C. 7017 (now *Family C.* 7660 et seq.; see 10 *Summary* (10th), *Parent and Child*, §61 et seq.), and former C.C. 221.20 (now *Family C.* 8604; see 10 *Summary* (10th), *Parent and Child*, §98 et seq.). "This statutory scheme creates three classifications of parents: Mothers, biological fathers who are presumed fathers, and biological fathers who are *not* presumed fathers (i.e., natural fathers). A natural father's consent to an adoption of his child by third parties is not required unless the father makes the required showing that retention of his parental rights is in the child's best interest. Consent, however, is required of a mother and a presumed father regardless of the child's best interest. The natural father is therefore treated differently from both mothers and presumed fathers." (1 *C.4th* 825.)

(b) *Acquiring presumed father status by obtaining constructive receipt of the child: no statutory basis.* A man becomes a "presumed father" under former C.C. 7004(a)(4) if he receives the child into his home and openly holds out the child as his natural child. Here, petitioner openly held out the child as his own, but did not physically receive the child into his home. He was prevented from doing so by the mother, by court order, and allegedly also by the prospective adoptive parents. (1 *C.4th* 823.) He contends that the statute should not be construed in a way that the mother can unilaterally bar the father from receiving their child into his home and thereby deprive him of presumed father status. Nothing in the language or legislative history of the statute supports the claim of constructive receipt, and the decisions either provide little guidance or cast doubt on the notion. (1 *C.4th* 829.)

(c) *Natural father's federal constitutional rights: U.S. Supreme Court decisions.* The precise question in the present case has not been addressed by the U.S. Supreme Court. "We are guided, however, by a series of high court decisions dealing with the rights of unwed fathers." (1 *C.4th* 830 et seq., discussing *Stanley v. Illinois*, *supra*; *Quilloin v. Walcott* (1978) 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511, *supra*, §650; *Caban v. Mohammed*, *supra*; *Lehr v. Robertson* (1983) 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614, *supra*, §650; and *Michael H. v. Gerald D.* (1989) 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91, 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §166.) "Although the foregoing court decisions do not provide a comprehensive rule for all situations involving unwed fathers, one unifying and transcendent theme emerges. The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship." (1 *C.4th* 838.)

(d) *Natural father's constitutional rights: California decisions.* State decisions do not squarely answer the exact question before this court, but they "at least reflect an acknowledgment of some degree of federal constitutional protection for natural fathers." (1 *C.4th* 839, discussing *In re Baby Girl M.* (1984) 37 *C.3d* 65, 207 *C.R.* 309, 688 *P.2d* 918, 10 *Summary* (10th), *Parent and Child*, §65, *Michael U. v. Jamie B.* (1985) 39 *C.3d* 787, 218 *C.R.* 39, 705 *P.2d* 362, 10 *Summary* (10th), *Parent and Child*, §65, *W.E.J. v. Superior Court*, *supra*, and *Jermstad v. McNelis* (1989) 210 *C.A.3d* 528, 258 *C.R.* 519, 10 *Summary* (10th), *Parent and Child*, §68.) "We agree with the *Jermstad* court that a biological father has a constitutionally cognizable opportunity interest in developing a relationship with his child. However, in light of the Legislature's prompt and unequivocal amendment to section 4600 to supersede our decision in *Baby Girl M.* ... , we cannot conclude that the Legislature intended to preserve the detriment standard. To the contrary, it is clear that the Legislature meant to provide natural fathers with far less rights than both mothers and presumed

fathers have under California's statutory system. The question is whether that distinction is constitutionally tenable." (1 C.4th 844.)

(e) *The constitutionally protected interest of an unwed, natural father.* "Does the mother's ability to determine the father's rights substantially serve an important governmental interest? The question is the same 'whether the analysis [is] undertaken as a matter of due process or equal protection.' " (1 C.4th 844.) The state has an important and valid interest in the well-being of children born out of wedlock; but "[i]s the state's important interest ... substantially furthered by allowing the mother to deny the child's biological father an opportunity to form a relationship with the child that would give the father the same statutory rights as the mother (or a presumed father) in deciding whether the child will be adopted by third parties?" (1 C.4th 844.) Respondents' position is that allowing the biological father to have the same rights as the mother would make adoptions more difficult because the consent of both parties is more difficult to obtain than the consent of the mother alone. "This reasoning is flawed in several respects." (1 C.4th 845.)

(1) "Respondents' view too narrowly assumes that the proper governmental objective is adoption. ... We cannot conclude in the abstract that *adoption* is itself a sufficient objective to allow the state to take whatever measures it deems appropriate. Nor can we merely assume, either as a policy or factual matter, that adoption is necessarily in a child's best interest. This assumption is especially untenable in light of the rapidly changing concept of family." (1 C.4th 845.)

(2) "If the possible benefit of adoption were by itself sufficient to justify terminating a parent's rights, the state could terminate an unwed *mother's* rights based on nothing more than a showing that her child's best interest would be served by adoption. Of course, that is not the law. ... We simply do not in our society take children away from their mothers--married or otherwise--because a 'better' adoptive parent can be found. We see no valid reason why we should be less solicitous of a father's efforts to establish a parental relationship with his child." (1 C.4th 846.)

(3) "Nor is there evidence before us that the statutory provisions allowing the mother to determine the father's rights are, in general, *substantially* related to protecting the child's best interest. As a matter of cold efficiency, we cannot disagree that eliminating a natural father's rights would make adoption easier in some cases. ... That, however, begs the question because it assumes that an unwed mother's decision to permit an immediate adoption of her newborn is always preferable to custody by the natural father, even when he is a demonstrably fit parent. We have no evidence to support that assumption. Moreover, the assumption has already been rejected" by the *U.S. Supreme Court*. (1 C.4th 846, citing and quoting *Caban, supra*.)

(4) The lack of a substantial relationship between the state's interest in protecting a child and in allowing the mother sole control is best demonstrated by the results of a mother preventing the father from obtaining presumed status. "Under the statute, the father has basically two ways in which to achieve that status: he can either marry the mother, or he can receive the child into his home and hold it out as his natural child. Of course, the first alternative is entirely within the mother's control. She cannot be forced to marry the father. The second alternative is, for the most part, also within her control. She can deny the father the right to come into her home. She can also deny him the right to take the child into his home. Faced with the mother's denial, the father has only one recourse aside from illegal self-help. He must seek a court order granting him custody so that he can take the child into his home and thereby gain presumed father status. As in this case, however, the trial court may deny him custody based on its view that the child is better served by remaining with the mother or third parties, e.g., prospective adoptive parents. Similarly, he may (as apparently initially occurred in this case) obtain a court order granting him custody, but enforcement of the order may be thwarted by third parties." (1 C.4th 847.)

(5) "The anomalies under this statutory scheme become readily apparent." (a) A father who is willing and able to exercise his parental responsibilities can have his rights terminated merely on a showing that his child's best interest would be served by adoption. If the mother were equally of the opposite character--unwilling and unable--her rights could be terminated only under the much more protective standards of former C.C. 221.20. (1 C.4th 847.) (b) The system also leads to irrational distinctions between fathers. A model father can be denied presumed father status, but a

father of dubious ability and intent can achieve it by the fortuitous circumstance of the mother allowing him to come into her home if only briefly--perhaps a single day. (1 C.4th 847.)

(6) Former C.C. 7004(a) and "the related statutory scheme violates the federal constitutional guarantees of equal protection and due process for unwed fathers *to the extent that* the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child's best interest. If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities--emotional, financial, and otherwise--his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (1 C.4th 849, disapproving *W.E.J.*, *supra*.)

(7) A court should consider all factors relevant to that determination, including his conduct before and after the child's birth, his public acknowledgment of paternity payment of pregnancy and birth expenses, and prompt legal action to seek custody of the child. (1 C.4th 849.) But "we caution that our decision affords no protection, constitutional or otherwise, to a male who impregnates a female as a result of nonconsensual sexual intercourse. ... The sexual intercourse is voluntary only for the father." (1 C.4th 849, footnote 14.)

(f) *Application of the correct standard to this case.*

(1) Petitioner and the prospective adoptive parents sharply disagree on the threshold constitutional question whether petitioner demonstrated a sufficient commitment to his parental responsibilities. The case is therefore remanded to the trial court to make the determination in the first instance. (1 C.4th 850.)

(2) If the required commitment is found, a further question will arise: whether he can be deprived of the right to withhold his consent to the adoption because of unfitness. "As with the threshold question of whether petitioner did all he could reasonably do to act like a father, we cannot fairly decide in the first instance whether he was unfit and could thus be deprived of his right to withhold consent. We leave it to the trial court to decide this question, if necessary." (1 C.4th 851.) The proper standard is whether he is *now* fit or unfit; and a finding of unfitness must be supported by clear and convincing evidence. (1 C.4th 851.)

(3) If the trial court concludes that petitioner has a right to withhold consent, that decision will bear only on the question of whether the adoption will proceed. "Even if petitioner has a right to withhold his consent (and chooses to prevent the adoption), there will remain the question of the child's custody. That question is not before us, and we express no view on it." (1 C.4th 851.)

(g) *Application of decision to other cases.* No reasons are present for exceptions to the general rule of retroactivity of judicial decisions; hence, this decision "shall be given retroactive effect as to all cases not yet final as of the date this decision is filed." (1 C.4th 851.) In proceedings in which a final judgment has been entered, the judgment "cannot be challenged either directly or collaterally." (1 C.4th 852.)

One justice, concurring only in the result, took the position that the constitutional holding was unnecessary; if a preponderance of the evidence supported the allegations of the majority, the mother and proposed adoptive parents would be estopped from denying that the biological father had assumed the status of a presumed father. (1 C.4th 852, 853.) (See *Adoption of Michael H.* (1995) 10 C.4th 1043, 1050, 43 C.R.2d 445, 898 P.2d 891 [under *Kelsey S.*, biological father did not have constitutional right to refuse consent to adoption, where he did not promptly show full commitment to his parental responsibilities after learning of pregnancy; fact that he did so after child was born was too late]; *Adoption of Alexander M.* (2001) 94 C.A.4th 430, 438, 114 C.R.2d 218 [following *Kelsey S.*]; *In re Jerry P.* (2002) 95 C.A.4th 793, 803, 815, 116 C.R.2d 123, 10 Summary (10th), *Parent and Child*, §603 [extending holding in *Kelsey S.* to dependency proceeding and to man who was not biological father]; *In re Kyle F.* (2003) 112 C.A.4th 538,

544, 5 C.R.3d 190 [neither *Kelsey S.* nor *Family C. 7611.5* preclude 18-year-old unwed father who impregnated 16-year-old mother through unlawful sexual intercourse from establishing constitutional right to block adoption of child]; 28 *Loyola L.A. L. Rev.* 741 [criticizing *Kelsey S.* as raising rights of unwed fathers above best interests of child]; 23 *Pepperdine L. Rev.* 1011 [*Michael H.*]; 35 *Santa Clara L. Rev.* 907 [arguing that child's interests should prevail in custody battles between biological fathers and adoptive parents]; 24 *Western State L. Rev.* 283 [*Michael H.*]; 61 *A.L.R.5th* 151 [Rights of Unwed Father To Obstruct Adoption of His Child by Withholding Consent].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Right To Withhold Consent Absent Showing of Father's Unfitness. Family C. 8604*, as amended in 2005, provides that a presumed father's consent is not required unless he became a presumed father "before the mother's relinquishment or consent becomes irrevocable or before the mother's parental rights have been terminated." *Correction:* Page 170, lines 5 and 6 of paragraph (a), reference to 10 *Summary* (10th), *Parent and Child*, §98 et seq. should be to 10 *Summary* (10th), *Parent and Child*, §100 et seq.



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CHAPTER X - Constitutional Law

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XI. EQUAL PROTECTION OF THE LAWS

B. Illustrations of Valid and Invalid Classifications.

9. Men.

d. Father of Illegitimate Child.

3. Standing Where Presumed Father Exists.

8 Witkin Sum. Cal. Law Const Law § 777

[§ 777] Standing Where Presumed Father Exists.

In *Michael M. v. Giovanna F.* (1992) 5 C.A.4th 1272, 7 C.R.2d 460, plaintiff Michael and defendant Giovanna, both single, lived together and became engaged. During their engagement a child, later named Brian, was conceived. Subsequently Giovanna broke off the engagement and married defendant Matthew. Michael, after repeated unsuccessful attempts to establish his relationship with the child, filed this action against Giovanna and Matthew for a declaration of paternity under the Uniform Parentage Act (see 10 *Summary* (10th), *Parent and Child*, §17 et seq.). The trial court sustained defendants' demurrer on the ground that a biological father has no standing to sue so long as a different presumed father exists (see 10 *Summary* (10th), *Parent and Child*, §46 et seq.), and that, because Matthew and Giovanna were married when Brian was born, Matthew was the presumed father. *Held*, as applied to plaintiff Michael, the standing provisions of the Uniform Parentage Act constituted a denial of due process.

(a) Michael's complaint invokes both procedural and substantive due process. First, because he has been denied standing to sue he has been deprived of a hearing to assert his claimed right to form a parental relationship with Brian. Second, his claim is based on a recognized substantive due process right to be free of state interference with personal relations between family members. (5 C.A.4th 1279.)

(b) Michael's claim depends on the existence of a constitutionally protected interest in a biological father's parental relation with his offspring. "Though there is no clear agreement on the exact boundaries of such a right, the extremes are well defined. First, there is no constitutionally protected interest in a parental relation where the basis for that relation is the genetic or biological connection created by impregnation alone. ... Where an unwed father fails to demonstrate any interest in forming a relationship with a child from the beginning, any rights conferred by the biological connection are lost. ... At the other end of the spectrum, an existing parental relationship established between an unwed biological father and his child or children is entitled to the same constitutional protections as a parent-child relationship formed within a marriage." (5 C.A.4th 1279.)

(c) The issue in *Adoption of Kelsey S.* (1992) 1 C.4th 816, 4 C.R.2d 615, 823 P.2d 1216, supra, §776, is closely related to the problem here. "Like the biological father in *Kelsey S.*, Michael has promptly taken every step open to him to form a relationship with his child. Under the reasoning of *Kelsey S.* and the federal precedents it discusses, his actions

have preserved his 'opportunity interest' in being a parent. That interest is protected as a matter of due process." (5 C.A.4th 1280.)

(d) *Kelsey S.* and the line of cases on which it relies arise out of adoption proceedings initiated by a biological mother, in which a biological father raises objections to the termination of his parental rights. Because the placement for adoption is itself an acknowledgment that any then-existing family unit has dissolved, courts considering a biological father's right to withhold consent have not considered the balance between those rights and the state's interest in preserving the integrity of existing families. "Here, in contrast, Brian has not been placed for adoption. Rather, the mother and her husband have, like Michael, done everything in their power to establish a stable traditional family unit. Thus, our consideration of Michael's challenge to the statutory scheme which denies him standing to establish his paternity does not occur in a vacuum. We must balance his acknowledged due process interest in the opportunity to form a parental relationship against the countervailing interests of Matthew and Giovanna, and those of the state, in preserving family integrity." (5 C.A.4th 1281.)

(e) "Where a child is conceived during and born into an existing marriage, but has been fathered by a man outside the marriage, the application of both traditional common law and modern constitutional principle have almost universally produced the same result; the biological father may be barred by the state from developing a relationship with the child against the married parents' wishes. The traditional method of achieving this result was the conclusive presumption of paternity, which no one could challenge, least of all the biological father." (5 C.A.4th 1282.) Though the conclusive presumption does not apply where the child, as here, is conceived out of wedlock, the UPA provisions operate in the same manner. (5 C.A.4th 1282.)

(f) The interests of the state and biological father are well defined. First, under *Stanley v. Illinois* (1972) 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551, supra, §650, a biological father has a substantive due process right to a parental relationship with his offspring; and where state law impinges on that right, the father's interest must be balanced against those of the state. (5 C.A.4th 1282.) Second, the state has a continuing interest in the welfare of the child, and in "familial stability." (5 C.A.4th 1283.)

(g) "[T]here is a significant difference between this case and those in which the conclusive presumption of paternity applies. Here, Giovanna's marriage to Matthew occurred after Brian was conceived, and after both Giovanna and Michael were aware they had conceived a child. Under these circumstances, we believe the state's interest in preserving family integrity is significantly reduced, since the marriage family did not exist when the child was conceived. Where the marriage partners are joined, both knowing that the child is in utero and there is a different biological father in existence, we find no tenable basis on which to find a threat to the unity of the family flowing from the biological father's prompt attempt to establish a relationship with the child. ... Indeed, we find the situation analogous to that in which a divorced parent retains joint custody or visitation rights after the remarriage of his or her former partner, a situation in which the state has determined any threat to family integrity is outweighed by other considerations. ... That common situation offends no public policy which would protect the second marriage from interference by the divorced parent. Similarly here, allowing Michael to exercise the opportunity interest he has secured by his prompt action does not offend the state's interest in preserving the integrity of an existing family against challenge by third persons." (5 C.A.4th 1284.)

(h) "We therefore hold that where unwed parents conceive, and the mother marries another before the birth of the child, the biological father's substantive due process right to a relationship with his child requires that he be allowed standing under the UPA to attempt to establish the paternity of the child, so long as he has promptly taken sufficient steps to preserve that interest. ... In view of our conclusion, we do not reach Michael's claims based on equal protection, or those based on the California Constitution." (5 C.A.4th 1285.)

SUPPLEMENT: [This section is current through the latest supplement]



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XI. EQUAL PROTECTION OF THE LAWS

B. Illustrations of Valid and Invalid Classifications.

10. Minors.

a. In General.

1. Valid Classification.

8 Witkin Sum. Cal. Law Const Law § 778

[§ 778] Valid Classification.

The classification of minors is common and almost invariably upheld in such fields as compulsory education, employment, etc. (See *In re Spencer* (1906) 149 C. 396, 401, 86 P. 896; *People v. Walton* (1945) 70 C.A.2d Supp. 862, 867, 161 P.2d 498; 39 A.L.R.2d 740 [minimum wage statutes].) Other examples of valid classification include:

(1) *Protection Against Obscenity*. (See *supra*, §§439, 440.)

(2) *Illegitimate Children*. (See *infra*, §780 et seq.)

(3) *Curfew*. A curfew ordinance restricting minors on the streets or public places of a city in the nighttime is valid if reasonable in terms. A prohibition against *presence* alone ("being in" a particular place) is unconstitutionally overbroad; a prohibition against *loitering or remaining* is usually upheld. (See *People v. Walton*, *supra*, 70 C.A.2d Supp. 866 [remaining or loitering on public street or place between 9 p.m. and 4 a.m.; no restriction on right to use streets in going to places of business or amusement or for other purposes]; *In re Nancy C.* (1972) 28 C.A.3d 747, 755, 105 C.R. 113 [loitering, etc., on public streets after 10 p.m., with reasonable exceptions]; 97 Harv. L. Rev. 1163 [assessing scope of minors' fundamental rights: juvenile curfews and Constitution]; 107 Harv. L. Rev. 1693 [juvenile curfews as response to gang violence]; 24 Hastings Const. L. Q. 219 [juvenile curfew ordinances in California]; 16 J. Juvenile Law 188 [issues raised by juvenile curfews]; 19 J. Juvenile Law 84 [future of nocturnal juvenile curfew ordinances]; 83 A.L.R.4th 1056 [juvenile curfew regulations].) (For constitutionality of limitations on associational rights of gang members under First Amendment, see *supra*, §408.)

(4) *Restrictions on Admission to Dance Halls*. In *Dallas v. Stanglin* (1989) 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18, a city ordinance restricted admission of persons between 14 and 18 years of age to certain dance halls. *Held*, the restriction was valid. The city could reasonably conclude that teenagers might be susceptible to corrupting influences if permitted, unaccompanied by their parents, to frequent a dance hall with older persons. Hence, a rational relationship existed between the age restriction and the city's interest in promoting the welfare of teenagers. (109 S.Ct. 1596, 1597, 104 L.Ed.2d 27, 28.)

Answering the argument that the ordinance violated the associational rights of patrons, the Court distinguished *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, supra, §389. Limiting the right of minors to dance with adults, and the right of adults to dance with minors, does not involve "the sort of expressive association that the First Amendment has been held to protect. The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons 'take positions on public questions,' or perform any of the other similar activities described in *Board of Directors of Rotary Int. v. Rotary Club of Duarte*." (109 S.Ct. 1595, 104 L.Ed.2d 26; on *Rotary Club* cases, see *infra*, §902.) (See *Burnett v. San Francisco Police Dept.* (1995) 36 C.A.4th 1177, 1188, 1190, 42 C.R.2d 879 [city ordinance excluding persons under 21 years of age from after-hours clubs does not violate equal protection].)

(5) *Dangerous Minors*. The extended detention of dangerous minors committed to the Youth Authority, pursuant to Welf.C. 1800 et seq., is valid. (See *In re Cavanaugh* (1965) 234 C.A.2d 316, 322, 44 C.R. 422; *In re J.F.* (1969) 268 C.A.2d 761, 772, 74 C.R. 464; 10 *Summary* (10th), *Parent and Child*, §965 et seq.)

(6) *Unsupervised Minors*. In *Ames v. Hermosa Beach* (1971) 16 C.A.3d 146, 153, 93 C.R. 786, a local ordinance making it unlawful to lease rooms to persons under 18 without a "responsible adult" as a cotenant was upheld as a reasonable means of meeting the problems of unsupervised minors at a beach resort community.

(7) *Counsel Fees in Juvenile Court*. Welf.C. 903.1, making parents of minors liable for the cost of counsel appointed in juvenile court proceedings, is valid. In imposing the obligation on parents of indigent minors and not on indigent adults, the Legislature may have considered the likelihood of reimbursement from indigent adults minimal; also, reimbursement assists counties in meeting the increasing cost of counsel for indigent minors and encourages parents and children alike to avoid acts of delinquency. (*In re Ricky H.* (1970) 2 C.3d 513, 522, 86 C.R. 76, 468 P.2d 204.)

(8) *Sealing Records of Juvenile Court*. Welf.C. 781, requiring a 5-year waiting period before a petition may be filed by a minor to seal juvenile court records, is valid. The policy of the statute is to keep the past record of juvenile behavior for individualized guidance and rehabilitation. (*T.N.G. v. Superior Court* (1971) 4 C.3d 767, 783, 94 C.R. 813, 484 P.2d 981; see 10 *Summary* (10th), *Parent and Child*, §501.) (On sealing and destruction of juvenile court records on determination of factual innocence, see Welf.C. 781.5, 10 *Summary* (10th), *Parent and Child*, §504 et seq.)

(9) *Revocation of Minor's Driving License*. Veh.C. 13352.3 provides that on conviction or adjudication of wardship of a minor for driving under the influence of alcohol or drugs, the minor's license must be revoked until he or she reaches 18, or for 1 year, whichever is longer. *In re Arthur W.* (1985) 171 C.A.3d 179, 217 C.R. 183, involved a minor who received a 1-year revocation for an offense committed shortly before his 18th birthday. He challenged the provision on the ground that if the offense had been committed after his 18th birthday, revocation would be limited to 6 months, and he might be granted probation. *Held*, the statute was valid.

(a) Age is not a suspect classification (see *infra*, §802), and the right to drive is not a specific constitutional guarantee; hence, the rational basis test is applied. (171 C.A.3d 186.) As shown by statistics, the classification bears a rational relationship to the interest in preventing injury and death on the highways. (171 C.A.3d 188.)

(b) The rights of minors in this activity are not coextensive with those of adults; other statutes dealing with driving represent a legislative determination that minors do not have the discretion and judgment entitling them to unrestrained permission to operate motor vehicles. (171 C.A.3d 190.) The license revocation consequences of Veh.C. 13352.3 are imposed only on a finding that the minor has violated the criminal laws against driving while intoxicated. The longer period of license revocation thus serves an additional state interest in protection and safety of the minor and the public, by removing from the highways children who have clearly demonstrated the lack of judgment necessary to safely operate a motor vehicle. (171 C.A.3d 190.)

West's Key Number Digest, Civil Rights k.106

SUPPLEMENT: [This section is current through the latest supplement]

Education: See *Levi v. O'Connell* (2006) 144 C.A.4th 700, 710, 50 C.R.3d 691 [gifted student under age 16 did not have right to free college education under California constitutional free school guarantee, which applies only to grades K through 12].

(3) *Curfew.* See 118 Harv. L. Rev. 2400 [Juvenile Curfews and the Major Confusion over Minor Rights].



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10. Minors.
a. In General.
2. Invalid Classification.

8 Witkin Sum. Cal. Law Const Law § 779

[§ 779] Invalid Classification.

Examples of invalid classification of minors include the following:

(1) *Extended Incarceration of Youthful Misdemeanants*. Statutes that authorize commitment of a misdemeanor between the ages of 16 and 21 for a term longer than the maximum that can be imposed on an adult for the same offense (former Welf.C. 1731.5, 1770) are unconstitutional; the discriminatory sentencing scheme is not necessary to achieve a compelling state interest. (*People v. Olivas* (1976) 17 C.3d 236, 257, 131 C.R. 55, 551 P.2d 375; see 10 Summary (10th), *Parent and Child*, §960 et seq.; 3 Cal. Crim. Law (3d), *Punishment*, §76 et seq.) (See 4 Hastings Const. L. Q. 757.)

(2) *Statute of Limitations for Malpractice Actions*. Malpractice actions by adults must be brought within 3 years of the date of *injury*, but malpractice actions by minors must be brought within 3 years of the date of the *wrongful act*. (C.C.P. 340.5; see 3 Cal. Proc. (4th), *Actions*, §§536, 540.) In *Photias v. Doerfler* (1996) 45 C.A.4th 1014, 53 C.R.2d 202, 3 Cal. Proc. (4th), *Actions*, Supp., §540, the court held that the statute does nothing to curb the problem of "long-tail" claims, and thus that there is no rational basis for the classification. (45 C.A.4th 1017, 1020.)

(3) *Youth Group Fees at Public Recreation Areas*. State and local agencies are prohibited from charging an excess fee to a youth group, or requiring a permit, that is not required of a similar number of persons, for the use of, or access to, a public beach or recreation area. (Govt.C. 53077.5.)

(4) *Male and Female Distinctions*. Utah and Arkansas had statutes fixing the age of majority for females at 18 and for males at 21. In *Stanton v. Stanton* (1975) 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688, the Utah statute was challenged by a divorced mother with custody of a boy and a girl, when the father refused to pay child support required by the divorce decree after the girl became 18. *Held*, the statute was an unconstitutional discrimination based on sex. Applying the principles of *Reed v. Reed* (1971) 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225, *supra*, §771, there was no compelling state interest or rational basis for the distinction between male and female minors.

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SUPPLEMENT: [This section is current through the latest supplement]
(2) *Statute of Limitations for Malpractice Actions.*

C.C.P. 340.5:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §§581, 586.

Photias case:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §587.



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b. Illegitimate Children.

1. Action for Wrongful Death of Parent.

8 Witkin Sum. Cal. Law Const Law § 780

[§ 780] Action for Wrongful Death of Parent.

In *Levy v. Louisiana* (1968) 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, a Louisiana statute was construed by the state court as giving the right of action for wrongful death only to legitimate children. *Held*, this was a denial of equal protection to illegitimates suing for wrongful death of their mother, who had raised them. No authority in point was found, but the court declared that (a) an illegitimate child is a person, with responsibilities of a citizen and correlative rights; and (b) illegitimacy has no relation to the nature of the wrong, for they suffer the same loss as any other dependent children.

Three dissenting justices referred to the "constitutional curiosities" of the main opinion, and described the process of decision as "brute force." The dissenters pointed out that there is no common law action for wrongful death, and that Louisiana, like other states, created the statutory right in favor of a certain class of persons, based on family relationship, and excluding as irrelevant issues of actual affection, nurture, and dependence. They concluded that the Constitution does not command a classification based on biological rather than legal relationships. (88 S.Ct. 1512 et seq., 20 L.Ed.2d 444 et seq.) (See *Glon v. American Guarantee & Liab. Ins. Co.* (1968) 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 [following *Levy*]; 82 Harv. L. Rev. 294, footnote 27 [suggesting that *Levy* and *Glon* cast doubt on validity of discrimination against illegitimates in relationship to fathers]; 12 U.C. Davis L. Rev. 383 [*Levy* and subsequent cases]; 38 A.L.R.3d 613 [discrimination on basis of illegitimacy].) (On abolition of distinction between "legitimate" and "illegitimate" children by Uniform Parentage Act (*Family C. 7600* et seq.), see 10 *Summary* (10th), *Parent and Child*, §17.)

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2. Workers' Compensation and Other Benefits.

8 Witkin Sum. Cal. Law Const Law § 781

[§ 781] Workers' Compensation and Other Benefits.

(1) *Workers' Compensation Death Benefit.* In *Weber v. Aetna Cas. & Surety Co.* (1972) 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768, the Louisiana's workers' compensation statute, which relegated dependent unacknowledged illegitimate children to the status of "other dependents," was held unconstitutional. Their loss of support was equal to that of dependent legitimate and acknowledged illegitimate children; and it made no difference that illegitimates were not so broadly barred as in *Levy v. Louisiana* (1968) 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, supra, §780, because the discrimination was clear. (92 S.Ct. 1405, 31 L.Ed.2d 775.)

(2) *Disability Benefits.* In *Jimenez v. Weinberger* (1974) 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363, the Court, following the *Weber* approach, held unconstitutional a provision of the Social Security Act distinguishing between classes of illegitimates for the purpose of preventing spurious claims. Disability insurance benefits were given without a showing of dependency to those entitled to inherit, or legitimated, or illegitimate only because of a formal defect in their parents' ceremonial marriage; benefits were denied to illegitimate children born after the disability who were not in these categories. "Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of after-born illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses." (94 S.Ct. 2501, 41 L.Ed.2d 370.)

(3) *Survivorship Benefits.* *Mathews v. Lucas* (1976) 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651, dealing with a surviving child's insurance benefits under the Social Security Act, reaches a conclusion opposite to that of *Jimenez v. Weinberger*. The Act conditions the eligibility of an illegitimate child on a showing that the deceased wage earner was the child's parent, who was living with the child or contributing to his or her support. *Held*, the condition was valid. (a) Congress was able to avoid the burden and expense of specific case-by-case determination by the use of these presumptions of dependency; and the statutory classification is a reasonable empirical judgment consistent with a design to qualify entitlement to benefits on a child's dependency at the time of the parent's death. (96 S.Ct. 2764, 2765, 49 L.Ed.2d 663.) (b) *Jimenez* is distinguishable because the statute involved in that case conclusively denied benefits to some classes of illegitimate children. (96 S.Ct. 2765, 49 L.Ed.2d 664.) (c) Although the statutory criteria do not compel the presumption of dependency, it is permissible. "Drawing upon its own practical experience, Congress has tailored

statutory classifications in accord with its calculations of the likelihood of actual support suggested by a narrow set of objective and apparently reasonable indicators." (96 S.Ct. 2767, 49 L.Ed.2d 667.)

Three justices dissented, contending that *Jimenez* was controlling. (96 S.Ct. 2767, 49 L.Ed.2d 667.) (See 90 Harv. L. Rev. 123.)

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3. Support by Father.

8 Witkin Sum. Cal. Law Const Law § 782

[§ 782] Support by Father.

The principle of *Levy v. Louisiana* (1968) 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, supra, §780, and *Weber v. Aetna Cas. & Surety Co.* (1972) 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768, supra, §781, was extended in *Gomez v. Perez* (1973) 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56. A Texas court decided that an illegitimate child had no right to support from his or her natural father in the absence of a statute. *Held*, reversed; a state may not deny substantial benefits to illegitimate children that are accorded to children generally. "[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother." (93 S.Ct. 875, 35 L.Ed.2d 60.) (See 38 A.L.R.3d 628.)

The Texas Legislature in response to *Gomez* authorized an action by an illegitimate child to establish paternity and obtain support, but the statute provided that the action had to be brought before the child was 1 year old. In *Mills v. Habluetzel* (1982) 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770, the Court held that the short limitation denied illegitimate children the equal protection of the law. "The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock. It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." (102 S.Ct. 1553, 71 L.Ed.2d 776.)

In *Clark v. Jeter* (1988) 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465, a Pennsylvania 6-year statute of limitations on an illegitimate's suit to establish paternity was held invalid.

(a) Between the extremes of rational basis review and strict scrutiny "lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." (108 S.Ct. 1914, 100 L.Ed.2d 471.) A concurring opinion in *Mills* explained why statutes of limitation longer than 1 year may be unconstitutional: "First, the State has a countervailing interest in ensuring that genuine claims for child support are satisfied. Second, the fact that Texas tolled most other causes of action during a child's minority suggested that proof problems do not become

overwhelming during this period. Finally, the practical obstacles to filing a claim for support are likely to continue after the first year of the child's life." (*108 S.Ct. 1915, 100 L.Ed.2d 472.*)

(b) "[T]he 6-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims." In a number of instances, Pennsylvania permits the issue of paternity to be litigated more than 6 years after the birth of an illegitimate child (e.g., within 2 years of a support payment made by the father); and these tolling provisions cast doubt on the state's purported interest in avoiding litigation of stale or fraudulent claims. (*108 S.Ct. 1917, 100 L.Ed.2d 473, 474.*)

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8 Witkin Sum. Cal. Law Const Law § 783

[§ 783] Public Aid.

The same insistence on equal treatment of illegitimate children underlies the decision in *King v. Smith* (1968) 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118. The Social Security Act provides federal aid to families with dependent children. A needy child is one whose parent is continuously absent. Alabama had a regulation, however, that denied aid to the children of a mother who "cohabits," i.e., has frequent sexual relations, with an able-bodied man--a "substitute father." *Held*, the regulation was invalid. Alabama's interest in discouraging illicit sexual behavior and illegitimacy may be protected by other means; its interest in economically allocating its aid funds may be protected by its power to set the level of benefits and the standard of need. Regarding social ills caused by poverty, and causes and cures for poverty, the Court said: "[D]estitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father." (88 S.Ct. 2142, 20 L.Ed.2d 1135.)

Thus, the majority decided the case on statutory interpretation, but a concurring opinion reached the same result on constitutional grounds, citing *Levy v. Louisiana* (1968) 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, *supra*, §780. (88 S.Ct. 2143, 20 L.Ed.2d 1136.) (See *New Jersey Welfare Rights Organization v. Cahill* (1973) 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 [statute authorizing aid only to married couple with legitimate or adopted child was denial of equal protection to illegitimate children]; 82 Harv. L. Rev. 291 [King]; 38 A.L.R.3d 613 [discrimination on basis of illegitimacy].)

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5. Right To Inherit.

8 Witkin Sum. Cal. Law Const Law § 784

[§ 784] Right To Inherit.

(1) *Labine v. Vincent Case. The Court in Levy v. Louisiana* (1968) 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, supra, §780, "did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring." (*Labine v. Vincent* (1971) 401 U.S. 532, 91 S.Ct. 1017, 1019, 28 L.Ed.2d 288, 292.) In *Labine*, the guardian of an *acknowledged* illegitimate girl attacked a Louisiana statute providing that such a child could take by will from his or her father but not as an heir if the father died intestate. *Held*, the law was valid. Here, unlike in *Levy*, there was no absolute bar to inheritance. The child could inherit if the father had *legitimated* her (by marrying the mother, by so stating in writing in his acknowledgment of paternity), or if he had executed a will in her favor. The discrimination made by the statute is similar to that against concubines and in favor of a wife. One relationship is socially sanctioned and legally recognized, the other is illicit. (91 S.Ct. 1021, 28 L.Ed.2d 294.) The dissent of four justices asserts that "only a moral prejudice, prevalent in 1825 when the Louisiana statutes under consideration were adopted, can support Louisiana's discrimination against illegitimate children." (91 S.Ct. 1031, 28 L.Ed.2d 305.) (See 38 A.L.R.3d 613 [discrimination on basis of illegitimacy].)

In *Estate of Ginochio* (1974) 43 C.A.3d 412, 112 C.R. 565, the court, following *Labine*, rejected a constitutional challenge to former Prob.C. 255 (14 Summary (10th), *Wills and Probate*, §90). The court said: "There are several grounds indeed upon which the classification of the Legislature distinguishing between legitimate and illegitimate children may be upheld. First, since there is no vested right to succession, it is subject to such conditions and limitations as the Legislature may prescribe Second, the state indisputably has a paramount interest in encouraging the institution of marriage and discouraging the birth of illegitimate children. That it chooses to use its inheritance laws as one of its methods in that effort is entirely within its constitutional province. ... Third, statutes which provide that the illegitimate child takes only from and through his mother in the absence of an acknowledgment of his intestate father embody nothing more than the presumed intent of the deceased. Since each person is constitutionally free to dispose of his property in an unfettered manner, it cannot be said that statutes reflecting the probable intent of individuals are unreasonable." (43 C.A.3d 418.)

(2) *Trimble v. Gordon*. The U.S. Supreme Court came to the opposite conclusion in *Trimble v. Gordon* (1977) 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31, holding the Illinois law invalid. *Labine v. Vincent* was disparaged (97 S.Ct.

1464, 52 L.Ed.2d 37, footnote 12), and although the Illinois and Louisiana statutes were found to be different, the Court indicated that the *Labine* analysis was no longer acceptable. (97 S.Ct. 1468, 52 L.Ed.2d 43, footnote 17.) Four justices dissented, finding *Labine* constitutionally indistinguishable. (97 S.Ct. 1468, 52 L.Ed.2d 43.) (See 91 Harv. L. Rev. 177; 5 Hastings Const. L. Q. 114; 5 Pepperdine L. Rev. 609.)

(3) *Lalli v. Lalli*. *Trimble v. Gordon* was distinguished in *Lalli v. Lalli* (1978) 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503, upholding a New York statute that required illegitimate children who would inherit from their fathers to bring a filiation suit during the lifetime of the father and obtain an order determining paternity.

(a) The statute in *Trimble*, requiring marriage of the parents, excluded significant categories of illegitimate children whose inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles. (99 S.Ct. 523, 58 L.Ed.2d 510.) The New York statute makes a single procedural requirement. This requirement bears a substantial relation to the state interests: Paternity of an illegitimate child presents peculiar problems of proof, and spurious claims are difficult to expose. (99 S.Ct. 525, 58 L.Ed.2d 513.)

(b) The means adopted by the state to further these interests are reasonable. An accurate resolution of claims is enhanced by placing paternity disputes in a judicial forum while the father is alive; a man will be able to defend his reputation against unjust claims of paternity; and delay and uncertainty in estate administration will be minimized where the entitlement of an illegitimate child is a matter of judicial record. (99 S.Ct. 526, 58 L.Ed.2d 513.) The law may appear to operate unfairly as to some illegitimate children who would be able to establish their relationship without serious disruption of the administration of estates, but occasional inequitable results do not condemn the law. The reach of the statute in *Trimble* was far in excess of its justifiable purpose; that of the New York statute, liberally interpreted by New York courts, is not. (99 S.Ct. 527, 58 L.Ed.2d 514.)

One justice, concurring in the judgment, thought that *Trimble* was now "a derelict," and that the Court had "gratifyingly" reverted to the principles of *Labine*. (99 S.Ct. 529, 58 L.Ed.2d 516.) Four dissenting justices thought *Trimble* was controlling and that the statute should have been held invalid. (99 S.Ct. 529, 58 L.Ed.2d 517.) (See 12 U.C. Davis L. Rev. 389; 7 Hastings Const. L. Q. 470.)

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11. Married and Unmarried Persons.

8 Witkin Sum. Cal. Law Const Law § 785

[§ 785] Married and Unmarried Persons.

(1) *In General.* In *Eisenstadt v. Baird* (1972) 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349, supra, §560, Massachusetts laws (a) permitted married persons to obtain contraceptives to prevent pregnancy, but only on prescription; (b) prohibited unmarried persons from obtaining them from anyone to prevent pregnancy; and (c) allowed both married and unmarried persons to obtain them from anyone to prevent the spread of disease. Defendant gave a contraceptive to an unmarried woman after a lecture, and was convicted. *Held*, the laws denied equal protection. The discrimination could not be justified as a deterrence to fornication and a promotion of community health; if distribution of contraceptives to married persons cannot be prohibited (see *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, supra, §560), a ban on distribution to unmarried persons is equally impermissible. (92 S.Ct. 1038, 31 L.Ed.2d 362.) (See 86 Harv. L. Rev. 116 [*Eisenstadt*]; 18 Hastings Const. L. Q. 487 [constitutional issues in Uniform Status of Children of Assisted Conception Act's restriction of surrogacy to married couples].)

(2) *Nonmarital Cohabitants.* In *Atkisson v. Kern County Housing Authority* (1976) 59 C.A.3d 89, 130 C.R. 375, plaintiff, a 33-year-old divorcee with six children, leased living quarters in a low income public housing unit operated by defendant Housing Authority. Defendant adopted a policy forbidding a tenant to live with a person of the opposite sex to whom the tenant was not related by blood, marriage, or adoption. Plaintiff lived with a man in violation of the policy and defendant found her in violation of the lease. *Held*, the policy was unconstitutional.

(a) It established a conclusive presumption of immorality, irresponsibility, and the demoralization of tenant relations from the fact of unmarried cohabitation; this was a denial of due process under such cases as *Vlandis v. Kline* (1973) 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63, supra, §659, and *United States Dept. of Agriculture v. Murry* (1973) 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767. (59 C.A.3d 96.)

(b) The classification of cohabiting unrelated adults could not be justified under the applicable statutory purposes. This "classification improperly assumes a connection with undesirable conduct associated with the class (e.g., demoralizing tenancy relations) and the conduct of the individual." (59 C.A.3d 98.) And the total ban would apply to an unmarried couple with children of their own, thereby violating the right of privacy as well as denying equal protection. (59 C.A.3d 98.)

In *Hinman v. Department of Personnel Administration* (1985) 167 C.A.3d 516, 213 C.R. 410, the State Employees

Dental Care Act was interpreted by the administration to limit benefits to employees and their family members including spouses. Plaintiffs challenged the denial of coverage to unmarried partners of homosexual employees. *Held*, there was no discrimination against homosexuals because the classification was based on *marriage* and is justified by the state's interest in promoting marriage. (167 C.A.3d 527, citing *Norman v. Unemp. Ins. App. Bd.* (1983) 34 C.3d 1, 9, 192 C.R. 134, 663 P.2d 904, 3 Summary (10th), *Agency and Employment*, §503.) (See 14 *Hastings Const. L. Q.* 111; on discrimination against homosexuals, lesbians, and bisexuals, see *infra*, §798.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 187, line 11 of first paragraph of section, "*Connecticut*" should read "*Connecticut*".



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a. Insanity Commitments.

8 *Witkin Sum. Cal. Law Const Law* § 786

[§ 786] Insanity Commitments.

In *Baxstrom v. Herold* (1966) 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620, a New York statute provided that where a convicted person is serving a term in a state institution for the criminally insane, and is certified to be still mentally ill at the time of termination of his or her sentence, the person may be civilly committed to an institution without a judicial trial of the issue of his or her present sanity. *Held*, this was a denial of equal protection.

(a) Persons civilly committed are given the right to a jury trial on the question of their sanity; only those committed at the expiration of a prison term are denied the right. This is not a reasonable classification of civilly insane and criminally insane. The issue is whether the person is mentally ill at all, and on that issue, there is no basis for the distinction made. (86 S.Ct. 762, 15 L.Ed.2d 622.)

(b) Capriciousness is particularly shown by the fact that a person with a past criminal record is entitled to a jury trial on a civil commitment if he or she is not in prison at the time the proceedings are instituted. This disposes of any semblance of rationality of the classification based on criminal propensities. (86 S.Ct. 764, 15 L.Ed.2d 624.) (See *People v. Gibson* (1988) 204 C.A.3d 1425, 1437, 1440, 1442, 252 C.R. 56 [citing *Baxstrom*; statute permitting commitment of convicted defendant on completion of prison term on basis of more lenient standard than is used for other involuntary commitments violates equal protection]; *Heller v. Doe by Doe* (1993) 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 [state statute requiring higher standard of proof for involuntary commitment of mentally ill persons had rational basis and therefore did not violate equal protection]; 87 *Harv. L. Rev.* 1190 [Developments in the Law--Civil Commitment of the Mentally Ill]; 41 *San Diego L. Rev.* 1177 [Mental Disorder and the Civil/Criminal Distinction]; 44 Am.Jur. Proof of Facts 3d 217 [Wrongful Confinement to a Mental Health or Developmental Disabilities Facility].)

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b. Mentally Defective Parents.

8 *Witkin Sum. Cal. Law Const Law* § 787

[§ 787] Mentally Defective Parents.

California statutes permit freeing a child from his or her parent when the parent is incapable of supporting or controlling the child due to the parent's developmental or mental disability or mental illness. (*Family C.* 7826, 7827; see 10 *Summary* (10th), *Parent and Child*, §323 et seq.)

In re Eugene W. (1972) 29 C.A.3d 623, 105 C.R. 736, held a former version of these statutes constitutional. The statute (a) does not discriminate against the poor; the parent must also be incapable of control, and (b) does not discriminate against the mentally disabled by not covering the physically disabled; physically handicapped persons have demonstrated ability to support and control children, but soundness of mind is essential to performance of these functions. (29 C.A.3d 628, 629.)

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c. Insane Person's Relatives.

8 Witkin Sum. Cal. Law Const Law § 788

[§ 788] Insane Person's Relatives.

Former Welf.C. 6650 (now Welf.C. 7275 with slight changes) provided that the husband, wife, father, mother, or children of a mentally ill person in a state institution were liable for his or her care. In *Department of Mental Hygiene v. Kirchner* (1964) 60 C.2d 716, 36 C.R. 488, 388 P.2d 720, S was adjudged mentally ill and committed, and plaintiff sued her daughter under the statute. *Held*, the statute was invalid. (a) "[T]he purposes of confinement and treatment or care ... encompass the protection of society from the confined person, and his own protection and possible reclamation as a productive member of the body politic. Hence the cost of maintaining the state institution, including provision of adequate care for its inmates, cannot be arbitrarily charged to one class in the society." (60 C.2d 720.) (b) The statute imposed an absolute liability on the relatives without the right to recoupment from the assets of the patient; thus it selected a particular class for "a species of taxation," without rational basis. (60 C.2d 722.)

The court disapproved contrary expressions in such cases as *Department of Mental Hygiene v. McGilver* (1958) 50 C.2d 742, 755, 329 P.2d 689 (60 C.2d 723), and added a dictum concerning the modern welfare programs under which all citizens contribute through taxes: "From all of this it appears that former concepts which have been suggested to uphold the imposition of support liability upon a person selected by an administrative agent from classes of relatives designed by the Legislature may well be reexamined." (60 C.2d 722.) (See *Department of Mental Hygiene v. Kirchner* (1965) 62 C.2d 586, 588, 43 C.R. 329, 400 P.2d 321 [on remand from U.S. Supreme Court, stating that holding rests not only on Fourteenth Amendment equal protection but also on California Constitution's equivalent provisions, see *supra*, §705]; *Department of Mental Hygiene v. Bank of America* (1970) 3 C.A.3d 949, 952, 83 C.R. 559 [following *Kirchner*].)

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d. Developmentally Disabled Persons.

8 Witkin Sum. Cal. Law Const Law § 789

[§ 789] Developmentally Disabled Persons.

In *Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313, the city of Cleburne, Texas, had a zoning ordinance that permitted various multiple dwellings in an apartment house district but required a special use permit for a hospital for the feeble-minded. Cleburne Living Center, seeking to operate a group home for the developmentally disabled, was denied a permit on the ground that the home would come within the hospital exclusion. The Court of Appeals, applying the quasi-suspect classification calling for heightened judicial scrutiny, concluded that the ordinance was unconstitutional both on its face and as applied. *Held*, reversed in part and affirmed in part.

(a) *Nature of heightened scrutiny test.* The general rule that legislation will be sustained if the classification is rationally related to a legitimate state interest gives way when a statute deals with a suspect classification such as race, alienage or national origin, gender, or illegitimacy. In these cases, the laws are subjected to strict scrutiny and will be sustained only if suitably tailored to serve a compelling state interest. (105 S.Ct. 3255, 87 L.Ed.2d 320.) But as pointed out in *Massachusetts Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520, *infra*, §802, differential treatment based on *age* does not call for strict scrutiny because the aged have not experienced a history of purposeful unequal treatment. (105 S.Ct. 3255, 87 L.Ed.2d 321.) "The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." (105 S.Ct. 3255, 87 L.Ed.2d 321.)

(b) *Developmental disability is not quasi-suspect classification.* For a number of reasons, the strict scrutiny standard is inapplicable to this classification:

(1) The developmentally disabled range from those whose disability is not immediately evident to those requiring constant care; and how this large and diversified group is to be treated is a task for legislators guided by qualified professionals, and not by "the perhaps ill-informed opinions of the judiciary." (105 S.Ct. 3256, 87 L.Ed.2d 321.)

(2) The legislative response, national and state, to the plight of the developmentally disabled reflects the differences

between the developmentally disabled and others, and the need of governmental bodies for flexibility and freedom from judicial oversight in shaping their remedial efforts. (105 S.Ct. 3256, 3257, 87 L.Ed.2d 322, 323.)

(3) If the developmentally disabled were deemed quasi-suspect, it would be difficult to find a principled way to distinguish other groups who have perhaps immutable difficulties setting themselves off from others who can claim some degree of prejudice from at least part of the public; e.g., the aging, the disabled, the mentally ill, and the infirm. (105 S.Ct. 3257, 87 L.Ed.2d 324.) The appropriate method of reaching instances of discrimination against the developmentally disabled is not to create a new quasi-suspect classification. Because developmental disability "is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both state and federal governments have recently committed themselves to assisting" the developmentally disabled, "we will not presume that any given legislative action, even one that disadvantages" the developmentally disabled, "is rooted in considerations that the Constitution will not tolerate." (105 S.Ct. 3258, 87 L.Ed.2d 324.)

(4) The standard of rational relation to a legitimate governmental purpose "affords government the latitude necessary both to pursue policies designed to assist" the developmentally disabled "in realizing their full potential, and to freely and efficiently engage in activities that burden" the developmentally disabled "in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." (105 S.Ct. 3258, 87 L.Ed.2d 324.)

(c) *Ordinance is unconstitutional as applied in this case.* The city does not require a special permit in the zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged, private clubs or fraternal orders, and other specified uses. The record does not reveal a rational basis for believing that a facility for the developmentally disabled would pose any special threat to the city's legitimate interests. (105 S.Ct. 3257, 3258, 87 L.Ed.2d 325, 326.) Thus, it appears that requiring a permit in this case would rest on an irrational prejudice against the developmentally disabled, "including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law." (105 S.Ct. 3260, 87 L.Ed.2d 327.)

Two separate opinions were filed, one concurring and one concurring and dissenting in part. (105 S.Ct. 3260, 3262, 87 L.Ed.2d 327, 330.) (See *Adoption of Kay C.* (1991) 228 C.A.3d 741, 752, 756, 278 C.R. 907 [rejecting claims that former C.C. 227b (now *Family C.* 9100; see 10 *Summary* (10th), *Parent and Child*, §§145, 148), authorizing adoption decree to be set aside within 5 years where child manifests developmental disability or mental illness, violates equal protection and due process]; 99 *Harv. L. Rev.* 161 [*Cleburne*]; 20 *Loyola L.A. L. Rev.* 921 [same].)

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13. Indigent Criminal Defendant.

8 Witkin Sum. Cal. Law Const Law § 790

[§ 790] Indigent Criminal Defendant.

(1) *In General.* A state cannot constitutionally require a criminal defendant to pay court costs in order to plead not guilty and defend; i.e., there can be no discrimination on account of poverty. In *Griffin v. Illinois* (1956) 351 U.S. 12, 76 S.Ct. 585, 589, 100 L.Ed. 891, 898, Illinois law provided a free reporter's transcript for appeals only in death cases. Petitioners, convicted of robbery, were unable to obtain an adequate review because of inability to pay for a transcript. *Held*, conviction reversed; the statute denied equal protection. Although due process does not guarantee appellate review of a lower court decision, if the right of appeal is given, the statute must not discriminate on grounds of poverty. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (76 S.Ct. 590, 100 L.Ed. 899.) (See 55 A.L.R.2d 1072 [right of indigent defendant in criminal case to state aid regarding new trial or appeal].)

In *Burns v. Ohio* (1959) 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209, petitioner, sentenced to life imprisonment for burglary, had one appellate review *in forma pauperis*, and later sought leave to file a discretionary appeal to the Ohio Supreme Court pursuant to a statute authorizing it. The clerk, following a court directive, refused to docket the appeal because of failure to pay the \$ 20 filing fee. The state contended that *Griffin* was distinguishable because petitioner had already had one appeal and the additional review sought was a matter of discretion and not of right. *Held*, *Griffin* applied; regardless of the nature of review, it cannot be denied solely for reasons of indigency.

Rinaldi v. Yeager (1966) 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577, involved a New Jersey statute enacted after *Griffin*. It provided that persons furnished transcripts who were convicted and imprisoned must reimburse the county out of their institutional earnings. Rinaldi, in state prison, earned 20 cents a day for a 5-day week, and this amount was withheld. He sued for an injunction, contending that the duty to reimburse would discourage appeals by indigents. This contention was not reached, but the statute was nevertheless held invalid as a denial of equal protection.

(a) The Equal Protection Clause requires more than nondiscriminatory application within the class it establishes; there must be some rationality in the nature of the class. (86 S.Ct. 1499, 16 L.Ed.2d 580.) There was no rational classification here. Reimbursement was required only from one class of unsuccessful criminal appellants--those confined in state institutions. Those sentenced to pay fines, or given probation, having equally benefited from free transcripts on appeal, were not required to reimburse. (86 S.Ct. 1500, 16 L.Ed.2d 580.)

(b) "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (86 S.Ct. 1500, 16 L.Ed.2d 581.)

(c) However, the implication that reimbursement can never be required was dispelled by two observations: "We may assume that a State can validly provide for recoupment of the costs of appeals from those who later become financially able to pay." (86 S.Ct. 1501, 16 L.Ed.2d 581.) And "repayment could easily be made a condition of probation or parole." (86 S.Ct. 1500, 16 L.Ed.2d 581.)

(2) *Fee for Writ of Habeas Corpus*. The principle underlying *Burns* and *Griffin* was followed in *Smith v. Bennett* (1961) 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39. Iowa required a \$ 4 filing fee for a writ of habeas corpus. Petitioner, an indigent, sought to file *in forma pauperis* and was refused permission. *Held*, this was a denial of equal protection, despite the state's contention that it may limit its writ because the petitioner may get one without fee in the federal courts. "Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained. Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each. In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws." (81 S.Ct. 898, 6 L.Ed.2d 43.)

(3) *Right to Law Library or Alternative Sources*. *Bounds v. Smith* (1977) 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72, held that the fundamental constitutional right of access to the courts "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." (97 S.Ct. 1498, 52 L.Ed.2d 83.)

However, in *Lewis v. Casey* (1996) 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606, a class action brought by inmates of various Arizona prisons, the Court stressed that *Bounds* involved the right of access to the courts, not a right to a law library or to legal assistance, and disclaimed statements in *Bounds* suggesting that the state must enable a prisoner to discover grievances and litigate effectively once in court. (116 S.Ct. 2179, 2181, 135 L.Ed.2d 617, 619; see 3 Cal. Crim. Law (3d), *Punishment*, §47 et seq.)

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14. Persons Convicted of Crimes.

8 Witkin Sum. Cal. Law Const Law § 791

[§ 791] Persons Convicted of Crimes.

Separate treatment of persons convicted of crimes has been upheld in a number of situations:

(1) *Habitual Criminal Statutes*. Statutes permitting increased sentences for habitual criminals do not deny equal protection. (See *People v. Richardson* (1946) 74 C.A.2d 528, 542, 169 P.2d 44; 89 Harv. L. Rev. 356; 3 Cal. Crim. Law (3d), Punishment, §333.)

(2) *Escaped Convicts*. Classification of convicts escaping from prison on the basis of their original sentences, making the escape punishable by additional imprisonment for this period, has been upheld. (*Sullivan v. Ashe* (1937) 302 U.S. 51, 58 S.Ct. 59, 82 L.Ed. 43.)

(3) *Drug Rehabilitation Programs*. Exclusion from a drug rehabilitation program of persons convicted of aggravated crimes of violence (Welf.C. 3052) is proper. "It was not unreasonable for the Legislature, in an attempt to stress the nonpunitive nature of the program, to exclude, because of a rational fear of custodial problems, addicts with a history of a propensity for committing crimes of violence." (*People v. Harris* (1971) 17 C.A.3d 388, 393, 95 C.R. 80.) (See *Marshall v. United States* (1974) 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 [provision of federal Narcotic Addict Rehabilitation Act, excluding from its discretionary commitment addicts with two or more felony convictions, is valid].)

(4) *Exclusion From Jury Service*. Excluding ex-felons from jury service does not deny equal protection. (*Rubio v. Superior Court* (1979) 24 C.3d 93, 101, 105, 154 C.R. 734, 593 P.2d 595.)

(5) *Employment Discrimination*. Govt.C. 1029, which prohibits employment of an ex-felon as a peace officer, is constitutional. (*Hetherington v. State Personnel Bd.* (1978) 82 C.A.3d 582, 590, 147 C.R. 300; see 26 *Hastings L. J.* 1403 [effect of employment discrimination against ex-prisoners]; 56 *Stanf. L. Rev.* 1597 [challenging ex-felon's employment discrimination]; 38 *U.S.F. L. Rev.* 193 [removing barriers to employment].)

(6) *Disenfranchisement*. The U.S. Supreme Court has upheld disenfranchisement of persons convicted of felonies, but this is no longer authorized by the California Constitution. (See supra, §§246, 247.)

(7) *Registration of Sex Offenders*. Sex offenders convicted of specified offenses must register with local authorities on release from prison, and information about them is subject to public disclosure. (See P.C. 290 et seq.; 3 *Cal. Crim.*

Law (3d), Punishment, §183 et seq.)

(8) *Person Residing With Convicted Felon.* In *Lopez v. McMahon* (1988) 205 C.A.3d 1510, 253 C.R. 321, the court upheld the constitutionality of *Health & Saf.C. 1596.871*, requiring denial of an application for a children's day care facility license if the applicant resides with a person convicted of a violent felony. Plaintiff's application was denied on the ground that her husband had been convicted of armed robbery. The court concluded that the statutory provision was rationally related to the legitimate purpose of protecting children from the risk of harm. (205 C.A.3d 1516.) Plaintiff's additional contention that the statute abridged her constitutional right of privacy by interfering with her right to live with her husband was rejected. The restriction is imposed only on an applicant for a day care license, and the adverse effect of the disqualification was incidental, unintended, and not an unconstitutional intrusion on the right of privacy. (205 C.A.3d 1520.)

(9) *Clothing Restrictions.* Prison regulations restricting the right of prisoners to wear and possess certain items of civilian clothing have been upheld. (See *In re Alcala* (1990) 222 C.A.3d 345, 271 C.R. 674, 3 Cal. Crim. Law (3d), *Punishment, §66.*)

SUPPLEMENT: [This section is current through the latest supplement]
See 94 Cal. L. Rev. 1191 [The Case for Treating Ex-Offenders as a Suspect Class].



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a. Vexatious Litigant in Pro. Per.

8 *Witkin Sum. Cal. Law Const Law* § 792

[§ 792] Vexatious Litigant in Pro. Per.

The vexatious litigant statute (*C.C.P.* 391 et seq.; see 3 *Cal. Proc.* (4th), *Actions*, §339 et seq.) requires security for costs from one who has repeatedly brought unsuccessful actions in pro. per., on a showing that there is no reasonable probability that he or she will prevail in the particular action. In *Taliaferro v. Hoogs* (1965) 236 *C.A.2d* 521, 46 *C.R.* 147, the court upheld the classification of persons proceeding in pro. per. as distinguished from those represented by lawyers. "Attorneys are governed by prescribed rules of ethics and professional conduct, and, as officers of the court, are subject to disbarment, suspension, and other disciplinary sanctions not applicable to litigants in propria persona." (236 *C.A.2d* 527.)

West's Key Number Digest, Civil Rights k.114

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §365 et seq.



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b. Penalty on Unsuccessful Appellant.

8 *Witkin Sum. Cal. Law Const Law* § 793

[§ 793] Penalty on Unsuccessful Appellant.

Bankers Life & Cas. Co. v. Crenshaw (1988) 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62, upheld a Mississippi statute that imposed a 15% penalty on parties who appeal unsuccessfully from a money judgment. The Court distinguished *Lindsey v. Normet* (1972) 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36, supra, §647, which held that to require an appealing tenant to post a bond twice the amount of rent expected to accrue pending appeal violated the Equal Protection Clause.

(a) Unlike the statute in *Lindsey*, Mississippi's penalty does not single out a class of appellants in an arbitrary fashion; it applies both to plaintiffs and defendants, and to all money judgments as well as to many judgments whose money value may readily be determined. (108 S.Ct. 1653, 100 L.Ed.2d 75.)

(b) Because the penalty operates only after judgment has been affirmed without modification, there is less risk than in *Lindsey* of discouraging appellants who believe they have meritorious appeals but lack funds to post a bond. (108 S.Ct. 1653, 100 L.Ed.2d 76.)

(c) "In short, unlike the double-bond provision condemned in *Lindsey*, the means chosen ... are reasonably related to the achievement of the State's objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources." (108 S.Ct. 1654, 100 L.Ed.2d 76.)

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c. Attorneys' Fees to Particular Litigants.

8 *Witkin Sum. Cal. Law Const Law* § 794

[§ 794] Attorneys' Fees to Particular Litigants.

(1) *Invalid Provisions.* A statute that authorizes the award of attorneys' fees to a single class of litigants or in a single class of cases may violate the Equal Protection Clause. (See *Gulf, Colorado, & Santa Fe Ry. Co. v. Ellis* (1897) 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666 [recovery only where railroad company defendant]; cf. *Cassel v. Gregori* (1937) 28 C.A.2d Supp. 769, 772, 70 P.2d 721 [statute giving court power to fix compensation on discharge of attorney with contingent fee agreement was invalid special legislation]; *Echlin v. Superior Court* (1939) 13 C.2d 368, 374, 90 P.2d 63 [same].)

(2) *Valid Provisions.* Reasonable attorneys' fees may properly be allowed the plaintiff, and denied the defendant, by a statute applicable generally to a broad class of cases. (See *Missouri, Kansas & Texas Ry. Co. of Texas v. Cade* (1914) 233 U.S. 642, 34 S.Ct. 678, 58 L.Ed. 1135 [action by plaintiff on rejected claim for labor, services, overcharge, etc.; statute is applicable to many classes of cases, and is designed, like costs, to reimburse successful plaintiff for necessary expenses in enforcing just claim]; *Life & Cas. Ins. Co. of Tennessee v. McCray* (1934) 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987 [attorneys' fees are allowed in suits against insurance companies for recovery on claim]; *Alturas v. Superior Court* (1940) 36 C.A.2d 457, 461, 97 P.2d 816 [attorneys' fees to plaintiff where defendant appeals from judgment of small claims court]; *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.* (1942) 20 C.2d 684, 693, 128 P.2d 529 [attorneys' fees against plaintiff in unsuccessful action to enjoin sale of public bonds]; cf. *Beyerbach v. Juno Oil Co.* (1954) 42 C.2d 11, 22, 265 P.2d 1 [deposit of security for attorneys' fees in shareholder's derivative suit; see 9 *Summary* (10th), *Corporations*, §176]; for illustrations of statutory provisions, see 7 *Cal. Proc.* (4th), *Judgment*, §190 et seq.)

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(2) *Valid Provisions.*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §219 et seq.



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d. Tort Action by Guest.

8 Witkin Sum. Cal. Law Const Law § 795

[§ 795] Tort Action by Guest.

The former Guest Law (*Veh.C. 17158*), denying liability of a host to a guest for ordinary negligence in operating a motor vehicle, was held unconstitutional in *Brown v. Merlo* (1973) *8 C.3d 855, 106 C.R. 388, 506 P.2d 212*.

(a) *Classifications of statute.* The guest law, in force in about half of the states (*8 C.3d 858*, footnote 1), established three levels of classification: (1) automobile guests differently from paying passengers; (2) automobile guests differently from other social guests; and (3) subclasses of automobile guests: those injured in a vehicle, during a ride, on a public highway. (*8 C.3d 863*.)

(b) *Constitutional issue.* *Silver v. Silver* (1929) *280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221*, upheld the Connecticut Act. But the challenge there was based on the distinction made between automobile guests and guests in other conveyances, and the *Silver* court saw the statute as merely one of many new regulatory measures dealing with automobiles. Moreover, the case was decided before the development of almost universal liability insurance. Subsequent California cases assumed constitutionality of the law and never directly passed on the issue. (*8 C.3d 863*, footnote 4.)

(c) *First justification: protection of hospitality.* The Act has been mainly justified on the ground that it promotes hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests. This is not a sufficient basis for the classification:

(1) Liability insurance has eliminated this notion; the insurer, not the generous host, is protected by the law. Hence, under the basic tenet of the common law (equally a guide to constitutional adjudication), the rule should cease because the reason for it has ceased; i.e., constitutionality predicated on the existence of a particular state of facts may be challenged when they no longer exist. (*8 C.3d 869*.)

(2) The purpose of fostering hospitality cannot rationally justify lowering protection for one class of guests (automobile, airplane, or motorboat) while late common law decisions relevant to constitutional adjudication, like *Rowland v. Christian* (1968) *69 C.2d 108, 70 C.R. 97, 443 P.2d 561, 6 Summary* (10th), *Torts*, §1086, on licensee-trespasser, and *Malloy v. Fong* (1951) *37 C.2d 356, 232 P.2d 241, 5 Summary* (10th), *Torts*, §43, and *Silva v.*

Providence Hosp. of Oakland (1939) 14 C.2d 762, 97 P.2d 798, 5 Summary (10th), Torts, §43, on abolition of charitable immunity, have recognized negligence liability of hosts to all other guests. (8 C.3d 865, 870, 871.)

(3) Characterization of a guest's suit as an act of ingratitude is inconsistent with the state's overriding policy to insure compensation for all innocent victims of automobile accidents, which underlies the Financial Responsibility Law (see 2 *Summary* (10th), *Insurance*, §14). (8 C.3d 872, footnote 13.)

(d) *Second justification: prevention of collusion.* The other justification for the Act has been the elimination of the possibility of collusive suits in which the host fraudulently confesses negligence to permit a friend or relative to collect from the insurer. (8 C.3d 864, 873.) This type of rule--eliminating causes of action for an entire class because some members may bring collusive suits--has been rejected in the cases abolishing family immunity (*Emery v. Emery (1955) 45 C.2d 421, 289 P.2d 218, 5 Summary (10th), Torts, §29, Klein v. Klein (1962) 58 C.2d 692, 26 C.R. 102, 376 P.2d 70, 5 Summary (10th), Torts, §27, and Gibson v. Gibson (1971) 3 C.3d 914, 92 C.R. 288, 479 P.2d 648, 5 Summary (10th), Torts, §28).* (8 C.3d 875.) The guest law classification is even less rational: (1) The paying-nonpaying distinction is "a far grosser indicant of the likelihood of collusion"; e.g., paying passengers are allowed to recover even though they are close friends or relatives sharing expenses in a car pool. (8 C.3d 875.) (2) The collusion rationale assumes that parties are willing to perjure themselves on the negligence issue; but they can escape the statutory bar by colluding on the issue of compensation for the ride. (8 C.3d 875.) "In short, 'compensation' is not a factor that assures dishonesty in its absence, or that guarantees honesty in its presence; in basing its classification scheme on this factor the guest statute fails to accord equal treatment to those who are similarly situated with respect to its goal of the prevention of collusion." (8 C.3d 878.)

(e) *Fortuitous statutory exceptions.* The final element of irrationality in the statute appears from its loopholes, totally unrelated to either the hospitality or anticollusion themes: (1) the "during the ride" limitation, allowing recovery when the ride is momentarily interrupted; (2) the "in the vehicle" condition, allowing recovery to a guest with one foot on the ground; and (3) the "on the highway" condition, allowing recovery for an accident on a private road. (8 C.3d 879.)

(f) *Conclusion.* The classifications that "the guest statute creates between those denied and those permitted recovery for negligently inflicted injuries do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host-driver and of preventing collusive lawsuits. We therefore hold that, as applied to a negligently injured guest, the guest statute violates the equal protection guarantees of the California and United States Constitutions." (8 C.3d 882.)

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e. Defamation Action Against Newspaper or Broadcaster.

8 *Witkin Sum. Cal. Law Const Law* § 796

[§ 796] Defamation Action Against Newspaper or Broadcaster.

In *Werner v. Southern Calif. Associated Newspapers* (1950) 35 C.2d 121, 216 P.2d 825, C.C. 48a, permitting newspapers and radio broadcasters, under certain circumstances, to avoid general damages for libel by publishing a retraction, was upheld as a valid classification.

(a) The Legislature could reasonably conclude that defamation actions against newspapers and radio stations constituted the most conspicuous example of the danger of excessive recoveries. (35 C.2d 132.)

(b) It could consider the fact that a retraction widely circulated by a newspaper or radio station would have greater effectiveness than a retraction by an individual, and could thus stop short of substituting a retraction for general damages in all cases. (35 C.2d 133, 134.)

(c) The classification is further justifiable on the theory that it encourages the dissemination of news by protecting those who inadvertently publish defamatory statements; the Legislature may, either by imposing strict liability or granting broad immunity, protect one of two important conflicting interests. (35 C.2d 134, 136.) (See 13 A.L.R.2d 277 [statutes limiting damages recoverable for defamation].)

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16. Veterans.

8 *Witkin Sum. Cal. Law Const Law* § 797

[§ 797] Veterans.

Unsuccessful challenges have been made to legislative classifications giving preference, such as priority in employment, to veterans. (See *Cook v. Mason* (1929) 103 C.A. 6, 11, 283 P. 891 [charter provision creating priority on civil service lists for positions as firemen].)

Personnel Administrator of Massachusetts v. Feeney (1979) 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870, involved the Massachusetts "absolute lifetime" preference law for veterans who qualify for state civil service positions. They must be considered for appointment ahead of qualifying nonveterans. Plaintiff woman, not a veteran, passed a number of civil service examinations with high scores, but was outranked by male veterans. She brought this civil rights action (under 42 U.S.C., §1983, *infra*, §816 et seq.) challenging the statute as an unconstitutional discrimination against women. *Held*, the statute was not subject to equal protection attack.

(a) Some classifications, such as race and gender, are presumptively invalid. But a neutral law, though it may have a disproportionately adverse effect on a racial minority, will be held unconstitutional only if that impact can be traced to a discriminatory purpose. (99 S.Ct. 2292, 2293, 60 L.Ed.2d 883.)

(b) The statute is neutral as to gender. There are some women veterans and significant numbers of male nonveterans; the distinction made is simply between veterans and nonveterans, not between men and women. (99 S.Ct. 2294, 60 L.Ed.2d 885.)

(c) There was no gender-based discriminatory purpose. The law is not neutral--it overtly prefers veterans, but this legislative choice has been found legitimate. The Legislature was aware of its adverse impact on women, but discriminatory purpose implies more than awareness of consequences; it implies that the Legislature took a particular course of action at least in part "because of," not merely "in spite of," its adverse effects on a group. Nothing in the record shows that the preference for veterans was originally devised or subsequently reenacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the civil service. (99 S.Ct. 2295, 2296, 60 L.Ed.2d 887, 888.)

Two justices dissented. (See 7 *Hastings Const. L. Q.* 429.)

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SUPPLEMENT: [This section is current through the latest supplement]



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XI. EQUAL PROTECTION OF THE LAWS
B. Illustrations of Valid and Invalid Classifications.
17. Sexual Orientation.

8 Witkin Sum. Cal. Law Const Law § 798

[§ 798] Sexual Orientation.

(1) *In General.* In *Romer v. Evans* (1996) 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855, Colorado voters adopted a referendum measure, known as Amendment 2, repealing local ordinances to the extent that they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships," and prohibiting the state, its agencies, or subdivisions from adopting a "statute, regulation, ordinance or policy" protecting homosexual orientation, conduct, practices, or relationships. In an action brought by various individuals and governmental entities, the trial court enjoined enforcement of Amendment 2, and the Colorado Supreme Court affirmed the ruling. *Held*, affirmed.

(a) *Effect of Amendment 2.*

(1) As authoritatively construed by the Colorado Supreme Court, the immediate objective of Amendment 2 is to repeal existing statutes, regulations, ordinances, and policies that bar discrimination on the basis of sexual orientation, and its ultimate effect is to prohibit the adoption of those measures or policies in the future. (116 S.Ct. 1624, 134 L.Ed.2d 862.) "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." (116 S.Ct. 1625, 134 L.Ed.2d 863.)

(2) The view that the measure does no more than deprive homosexuals of special rights cannot be accepted. "To the contrary, the Amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. ... This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." (116 S.Ct. 1626, 134 L.Ed.2d 865.)

(b) *Amendment 2 Violates Equal Protection.*

(1) Amendment 2 fails even the conventional rational relationship test. "First, the amendment has the peculiar

property of imposing a broad and undifferentiated disability on a single named group, an exceptional and ... invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects." (116 S.Ct. 1627, 134 L.Ed.2d 865.)

(2) Even when applying the most deferential of standards, there must be some relation between the classification adopted and the objective sought. Amendment 2 "is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. ... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." (116 S.Ct. 1627, 134 L.Ed.2d 866.)

(3) "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Amendment 2 inflicts on gays and lesbians "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." (116 S.Ct. 1628, 134 L.Ed.2d 867.)

(4) The state proffers the freedom of association of other citizens, particularly landlords and employers, and the need to conserve resources to fight discrimination against other groups, as justifications for the amendment. "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." (116 S.Ct. 1629, 134 L.Ed.2d 868.)

(5) "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." (116 S.Ct. 1629, 134 L.Ed.2d 868.)

A strong dissent joined by three justices argued that Amendment 2 was an attempt "to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores," that "the amendment prohibits *special treatment* of homosexuals, and nothing more," that both the objective and the means chosen were "unimpeachable under any constitutional doctrine hitherto pronounced," and that the Court's holding contradicted *Bowers v. Hardwick* (1986) 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140, which had upheld a criminal sodomy law as applied to consenting adults. (116 S.Ct. 1629, 134 L.Ed.2d 868.) (See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 C.3d 458, 156 C.R. 14, 595 P.2d 592, supra, §708 [discrimination against homosexuals by public utility employer]; *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508, supra, §573 [overruling *Bowers*]; on liability for sexual orientation discrimination under Fair Employment and Housing Act, see *infra*, §931.) (On exclusion of homosexuals from military service, see *Holmes v. California Nat. Guard* (2001) 90 C.A.4th 297, 319, 109 C.R.2d 154 [homosexual discharged from U.S. National Guard because of sexual orientation still has right under California law to serve in state Guard in active duty positions not requiring federal recognition]; 26 *Loyola L.A. L. Rev.* 151 [analyzing military's justification for exclusionary policy: 50 years without rational basis]; 28 *U.S.F. L. Rev.* 919 [legal issues involving gays in military].)

(2) *Texts and Commentary.* The commentary on *Romer* and discrimination based on sexual orientation is extensive. (See 98 *Harv. L. Rev.* 1285 [homosexuality as suspect classification]; 102 *Harv. L. Rev.* 1519, 1554, 1603, 1648 [sexual orientation and the law]; 106 *Harv. L. Rev.* 1905 [argument that anti-gay rights initiatives violate Equal Protection and Free Speech Clauses]; 108 *Harv. L. Rev.* 1779 [federal case note: military discharge based on statement of homosexual orientation]; 109 *Harv. L. Rev.* 1625 [statutory protection for gays and lesbians in private employment; developments in law]; 109 *Harv. L. Rev.* 2038 [conflict of laws and recognition of same-sex marriages]; 110 *Harv. L. Rev.* 155 [*Romer*]; 83 *Cal. L. Rev.* 1 [Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society]; 33 *Cal. Western L. Rev.* 169 [*Romer*]; 35 *Cal. Western L. Rev.* 271 [same]; 38 *Cal. Western L. Rev.* 1 [criticizing incremental extension of rights]; 6 *Hastings Const. L. Q.* 663 [gay teachers]; 19 *Hastings Const. L. Q.* 495 [state constitutional challenges to sodomy laws]; 28 *Hastings Const. L. Q.* 461 [exclusion of homosexuals and bisexuals from military after *Romer*]; 48 *Hastings L. J.* 175 [*Romer*]; 48 *Hastings L.*

J. 1343 [same]; 23 *Loyola L.A. L. Rev.* 1055 [family commitments of same-sex couples]; 30 *Loyola L.A. L. Rev.* 1277 [Romer]; 23 *Pacific L. J.* 1543 [Moving Toward Equal Treatment of Homosexuals]; 24 *Pepperdine L. Rev.* 991 [Romer]; 15 *San Diego L. Rev.* 331 [constitutionality of use of chromosome test to determine transsexual's sex]; 22 *Santa Clara L. Rev.* 491 [homosexuality and military fitness]; 38 *Santa Clara L. Rev.* 65 [Romer]; 57 *So. Cal. L. Rev.* 797 [argument that heightened scrutiny be applied to classifications based on homosexuality]; 68 *So. Cal. L. Rev.* 745 [competitive federalism and legislative incentives to recognize same-sex marriage]; 71 *So. Cal. L. Rev.* 1 [Romer]; 74 *So. Cal. L. Rev.* 925 ["Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource]; 46 *Stanf. L. Rev.* 503 [criticizing reliance in pro-gay litigation on argument that homosexuality is biological and thus immutable]; 46 *Stanf. L. Rev.* 607 [value of storytelling and gay legal narratives in expanding legal debate]; 46 *Stanf. L. Rev.* 647 [critical analysis of legal storytelling movement]; 47 *Stanf. L. Rev.* 499 [constitutional and choice of law arguments for recognition of same-sex marriages]; 49 *Stanf. L. Rev.* 45 [Romer]; 19 *Thomas Jefferson L. Rev.* 99 [The Defense of Marriage Act: A "Bare Desire To Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest]; 24 *Thomas Jefferson L. Rev.* 149 [protection for transsexuals, intersexuals, gays, and lesbians]; 25 *Thomas Jefferson L. Rev.* 247 [ban on gays in military]; 26 *Thomas Jefferson L. Rev.* 447 [Does the Equal Protection Analysis in *Lawrence* Make Bans on Same-Sex Marriage Unconstitutional?]; 26 *U.C. Davis L. Rev.* 425 [Sexual Orientation Rights in the Workplace]; 28 *U.C. Davis L. Rev.* 445 [discussing restraints on homosexual rights legislation and whether fundamental right exists to participate in political process]; 41 *U.C.L.A. L. Rev.* 153 [Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny]; 43 *U.C.L.A. L. Rev.* 263 [Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation]; 45 *U.C.L.A. L. Rev.* 453 [Romer]; 49 *U.C.L.A. L. Rev.* 471 [Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights]; 49 *U.C.L.A. L. Rev.* 519 [reply: Defending the Sex Discrimination Argument for Lesbian and Gay Rights]; 51 *U.C.L.A. L. Rev.* 313 [stating Title VII claim for sexual orientation discrimination in workplace]; 25 *U.S.F. L. Rev.* 153 [Congressional act requiring District of Columbia to exempt religious institutions from law prohibiting discrimination against homosexuals]; 25 *U.S.F. L. Rev.* 429 [High Tech Gays v. Defense Industrial Clearance Office (U.S. Ct. of Appeals)]; 96 *A.L.R.5th* 391 [Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct]; Cal. Civil Practice, 2 Civil Rights Litigation, §11:1 et seq. [actions involving discrimination on basis of sexual orientation]; 25 *Proof of Facts* 3d 415 [employment handicap discrimination based on gender dysphoria].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* On marriage between persons of same sex, see Supp., supra, §226A.(2) *Texts and Commentary.* See 94 *Cal. L. Rev.* 1271 [providing goods and services only to opposite-sex couples]; 96 *Cal. L. Rev.* 505 [What *Lawrence* Should Have Said: Reconstructing an Equality Approach]; 44 *Cal. Western L. Rev.* 413 ["don't ask, don't tell" policy on precipice]; 35 *Golden Gate L. Rev.* 111 [gay rights and American nationalism]; 39 *U.S.F. L. Rev.* 617 [reevaluation of Ninth Circuit's treatment of gays under Equal Protection Clause following *Lawrence v. Texas*]; 8 *A.L.R.6th* 667 [validity of statute or order prohibiting discrimination by governmental contractors on basis of sexual orientation]; 1 *A.L.R. Fed* 2d 1 [Marriage Between Persons of Same Sex--United States and Canadian Cases].



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18. Other Classes of Persons.
a. Valid Classifications.

8 *Witkin Sum. Cal. Law Const Law* § 799

[§ 799] Valid Classifications.

Unsuccessful challenges have been made to the following legislative classifications:

(1) *Exclusion From Race Tracks*. Exclusion of known bookmakers, touts, and persons convicted of illegal wagering from race tracks. (*Flores v. Los Angeles Turf Club* (1961) 55 C.2d 736, 744, 13 C.R. 201, 361 P.2d 921; see 64 A.L.R.5th 769 [Propriety of Exclusion of Persons From Horseracing Tracks for Reasons Other Than Color or Race].)

(2) *Intoxicated Persons*. Exclusion of intoxicated persons from nude model studios. (*Cristmat v. Los Angeles* (1971) 15 C.A.3d 590, 598, 93 C.R. 325.)

(3) *Reporters*. Exclusion of reporters for weekly newspapers (by denial of press passes) from immediate scenes of crimes and fires, while admitting reporters of daily papers; regular reporting of this kind of news, as distinguished from weekly coverage, is a reasonable basis for classification of persons seeking the privilege of crossing police lines. (*Los Angeles Free Press v. Los Angeles* (1970) 9 C.A.3d 448, 456, 88 C.R. 605.)

(4) *Limitations on Amount of Methadone*. Limiting use of methadone in treatment of narcotic addiction to maximum amounts, but allowing unrestricted use in treatment of other diseases; narcotic addiction has effects that make special regulation proper. (*Blinder v. Division of Narcotic Enforcement* (1972) 25 C.A.3d 174, 185, 101 C.R. 635.)

(5) *Exempting Activities From Workers' Compensation Act*. Exempting certain specialized activities from Workers' Compensation Act provisions governing employees as defined in the Act. (*Mathews v. Work. Comp. App. Bd.* (1972) 6 C.3d 719, 739, 100 C.R. 301, 493 P.2d 1165, 2 Summary (10th), *Workers' Compensation*, §250.)

(6) *Terminally Ill People*. Distinguishing between terminally ill people who are not on life support and those who are on life support systems, for purposes of ban on assisted suicide. (See *Vacco v. Quill* (1997) 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834, supra, §572.)

(7) *Prohibition on Damages of Uninsured Motorists and Drunk Drivers*. Prohibiting uninsured motorists and drunk drivers from collecting noneconomic damages in actions arising out of motor vehicle accidents. (See *Yoshioka v. Superior Court* (1997) 58 C.A.4th 972, 990, 68 C.R.2d 553 [upholding constitutionality of Proposition 213 (C.C.

3333.4)].)

(8) *Bilingual Education*. Replacing bilingual education with English immersion education. (See *Valeria G. v. Wilson* (1998) 12 F.Supp.2d 1007 [upholding constitutionality of Proposition 227 (*Educ.C. 300 et seq.*)]; 19 J. *Juvenile L.* 158 [should bilingual education be replaced by English immersion?]; 34 U.S.F. L. Rev. 169 [*Valeria G.*]; 37 U.S.F. L. Rev. 493 [teacher liability under Proposition 227]; 27 Western State L. Rev. 215 [revealing "intent to discriminate" in Proposition 227].)

SUPPLEMENT: [This section is current through the latest supplement]

An unsuccessful challenge has been made to the following legislative classification:

(9) *(New) Restrictions on Free City Services*. Requiring a group affiliated with the Boy Scouts of America to make a clear, written assurance that it would not discriminate against homosexuals and atheists in its use of free berths in city's marina. (See *Evans v. Berkeley* (2006) 38 C.4th 1, 40 C.R.3d 205, 129 P.3d 394, Supp., supra, §391A.)



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18. Other Classes of Persons.

b. Invalid Classifications.

8 Witkin Sum. Cal. Law Const Law § 800

[§ 800] Invalid Classifications.

Most of the discriminatory classifications of persons have already been considered. (See *supra*, §244 [military personnel]; §721 [aliens]; §734 [nonresidents]; §743 et seq. [Blacks]; §762 et seq. [women]; §772 et seq. [men]; §780 et seq. [illegitimate children]; §798 [sexual orientation].) Other discriminatory acts against particular persons have been questioned by commentators and courts. Thus, for example:

(1) *Special Regulations Governing American Indians*. (See 81 *Harv. L. Rev.* 1818; 82 *Harv. L. Rev.* 1343; 82 *Harv. L. Rev.* 697 [criticizing statute prescribing lighter penalties for rape cases involving Indians only]; 22 *Pepperdine L. Rev.* 1 [The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?]; 42 *So. Cal. L. Rev.* 101; 21 *Stanf. L. Rev.* 1236 [rape cases involving Indians]; 38 *U.C.L.A. L. Rev.* 759; 39 *U.C.L.A. L. Rev.* 169.)

(2) *Undesirable Visitors*. In *Parr v. Municipal Court* (1971) 3 *C.3d* 861, 92 *C.R.* 153, 479 *P.2d* 353, the city of Carmel-by-the-Sea adopted an ordinance making it unlawful for persons to climb trees, walk, stand, or sit on monuments or planted areas, sit on sidewalks or steps, or lie or sit on lawns, etc. The Urgency Clause stated that it was necessary because of the extraordinary influx of "undesirable and unsanitary visitors" ("hippies") who jeopardized the use and enjoyment of public property. *Held*, the ordinance was invalid; though neutral on its face, its declared purpose and inevitable effect would be to single out for discriminatory treatment "a social group of unsanitary transients" whose presence was deemed undesirable. (3 *C.3d* 865.) The court observed that "there is an added dimension to equal protection which requires that statutory classifications be related to *permissible* purposes" (3 *C.3d* 863), and that "[l]aws are discriminatory if they are expressions of hostility to groups of individuals." (3 *C.3d* 864.)

(3) *Out-of-State Medical Training*. The California medical practice statute barred graduates of out-of-state colleges of osteopathy (former B. & P.C. 2310). In *D'Amico v. Board of Med. Examiners* (1974) 11 *C.3d* 1, 112 *C.R.* 786, 520 *P.2d* 10, the court held that there was no rational relationship between the protection of public health and the exclusionary provision. The record showed that (a) osteopathy, like allopathy, is a complete school of medicine and surgery whose practitioners successfully engage in the full range of activities of medical science; and (b) there are examining boards with technical capacity to screen osteopathic applicants. (11 *C.3d* 23.)

(4) *Appointment of Attorney Without Compensation*. (See *Cunningham v. Superior Court* (1986) 177 C.A.3d 336, 351, 222 C.R. 854, 1 Cal. Proc. (4th), Attorneys, §79 [forced pro bono representation was denial of equal protection].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Appointment of Attorney Without Compensation*.

Cunningham case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §53.



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B. Illustrations of Valid and Invalid Classifications.

19. Public Employment.

8 Witkin Sum. Cal. Law Const Law § 801

[§ 801] Public Employment.

(1) *In General.* Loyalty and security tests for public employees have generally been upheld. (See *supra*, §479 et seq.) And local governmental agencies and those in charge of the administration of governmental civil service may make reasonable regulations for the purpose of securing qualified persons. (See *Acton v. Henderson* (1957) 150 C.A.2d 1, 20, 309 P.2d 481.) But arbitrary rules of convenience, which discriminate against qualified applicants, constitute a denial of equal protection. (*Terry v. Civil Service Com.* (1952) 108 C.A.2d 861, 868, 240 P.2d 691 [rule limiting accreditation to certain educational institutions and excluding graduates of others equally qualified].) (On preference for veterans, see *supra*, §797.)

A questionable result, inconsistent with the modern approach, was reached in *Kotch v. Board of River Port Pilot Commrs. for Port of New Orleans* (1947) 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093. A Louisiana statute provided that seagoing vessels moving between New Orleans and foreign ports had to be navigated to the port of New Orleans by pilots who were state officers. As a prerequisite to appointment, an applicant was required to serve a 6-month apprenticeship under an incumbent pilot. Appellants, otherwise qualified, could not become apprentices because incumbent pilots almost invariably selected their relatives and friends. *Held*, the statute as administered did not deny equal protection.

The Court reasoned that the history of pilotage reveals that it is a unique and highly personalized calling; young men in certain communities have the ambition to follow in the traditions of their fathers, relatives, and neighbors; it has long been recognized in the state that competition for appointment adversely affected the public interest in efficient work, and the practice of confining the opportunity to families and friends could be justified as a means of obtaining friendly supervision and training of new pilots. The opinion stressed the power of the state to select its own agents and officers, pointed out that there is no decision requiring a state executive to select public servants by competitive tests or other particular methods, and found no general prohibition or policy against the practice of nepotism in appointing public servants. (67 S.Ct. 913, 91 L.Ed. 1097.) But the question whether this method of selection could be validly applied to other businesses or professions regulated by the state was left open. (67 S.Ct. 916, 91 L.Ed. 1101.)

Four justices dissented, attacking the classification as turning finally "on consanguinity," and contending that whether the occupation is regarded as that of a public officer or a highly regulated private calling, the Legislature could not establish this criterion. (67 S.Ct. 916, 91 L.Ed. 1101.) (See *Brown v. Merlo* (1973) 8 C.3d 855, 865, footnote 7, 106

C.R. 388, 506 P.2d 212, supra, §795 [referring to the "excessively artificial analysis" in applying traditional test, and pointing out that later U.S. Supreme Court decisions do not support reasoning of *Kotch*.]

(2) *Academic Employees*. Separate classification of academic public employees from other state employees, for employment and compensation, is valid. (*California State Employees' Assn. v. Flournoy* (1973) 32 C.A.3d 219, 238, 108 C.R. 251.)

(3) *Public Safety Officers vs. Other Public Employees*. In *Long Beach City Employees Assn. v. Long Beach* (1986) 41 C.3d 937, 227 C.R. 90, 719 P.2d 660, legislation requiring a polygraph examination as a condition of employment was applicable only to public employees who were not "public safety officers" (see *supra*, §591, on the invasion of privacy challenge). *Held*, the statutory classification was a denial of equal protection. "We find no compelling state interest that justifies the unequal treatment of 'public safety officers,' as currently defined, and all other public employees in a manner that intrudes on the latter group's constitutional right of privacy. Nor do we find a compelling state interest that justifies the unequal treatment of private employees and the broad class of public employees who remain subject to involuntary polygraph testing. Moreover, the distinctions currently drawn are not necessary to further any compelling governmental interest in the provision of critical public health and safety services. Neither classification serves a compelling governmental interest and therefore both deny unprotected employees equal protection of the law." (41 C.3d 956.) (See *Burrell v. Los Angeles* (1989) 209 C.A.3d 568, 585, 586, 257 C.R. 427, *supra*, §666 [distinction between police and firefighters and other civil service employees in procedures for review of discipline was valid].)

(4) *Property Ownership Requirement for Appointment to Public Board*. *Quinn v. Millsap* (1989) 491 U.S. 95, 109 S.Ct. 2324, 105 L.Ed.2d 74, involved a property qualification for members of a board of freeholders organized to consider reorganization of the governmental structures of the City of St. Louis and St. Louis County. *Held*, the land ownership requirement violated the Equal Protection Clause.

(a) The Missouri Supreme Court, relying on cases upholding land ownership requirements for water district elections (see *supra*, §305), concluded that the Equal Protection Clause had no relevance because the board does not exercise general governmental powers. However, those cases did apply equal protection analysis to uphold the voting qualifications. (109 S.Ct. 2330, 105 L.Ed.2d 87.)

(b) *Turner v. Fouche* (1970) 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567, and *Chappelle v. Greater Baton Rouge Airport Dist.* (1977) 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223, both struck down property ownership requirements for membership on local government bodies. (109 S.Ct. 2330, 105 L.Ed.2d 87.) Here, membership on the board of freeholders is a form of public service, and appellants have the right to be considered for appointment without invidiously discriminatory qualifications. (109 S.Ct. 2331, 105 L.Ed.2d 88.) The board, although it does not enact laws, does have a broad mandate to recommend governmental reorganization, and this will affect all citizens regardless of land ownership. (109 S.Ct. 2332, 2333, 105 L.Ed.2d 89, 90.)

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SUPPLEMENT: [This section is current through the latest supplement]



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20. Mandatory Retirement.

8 Witkin Sum. Cal. Law Const Law § 802

[§ 802] Mandatory Retirement.

In *Townsend v. Los Angeles* (1975) 49 C.A.3d 263, 122 C.R. 500, the court sustained the constitutionality of former Govt.C. 31671.01, authorizing counties to provide for mandatory retirement of employees at age 65 if an increased and accelerated pension program is adopted. The statute was challenged by a deputy public defender claiming a vested right in the pursuit of his calling. *Held*, the fundamental right to pursue a lawful occupation did not embrace the right to continue in a particular employment; and a mandatory retirement age for public employees is neither arbitrary nor discriminatory. (49 C.A.3d 268, 270.) (See *American Federation of Teachers College Guild v. Board of Trustees* (1976) 63 C.A.3d 800, 134 C.R. 111 [following *Townsend*]; *Miller v. California* (1977) 18 C.3d 808, 813, 135 C.R. 386, 557 P.2d 970; 81 A.L.R.3d 811 [mandatory retirement of public officer or employee based on age].)

Massachusetts Bd. of Retirement v. Murgia (1976) 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520, upheld a Massachusetts statute providing that uniformed state police officers must be retired at age 50. (a) The strict scrutiny test (see *supra*, §704) was not proper, because the right of governmental employment is not fundamental and the class was not suspect. (96 S.Ct. 2566, 49 L.Ed.2d 525.) (b) Applying the rational basis test: "Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective." (96 S.Ct. 2567, 49 L.Ed.2d 525.) (See *Vance v. Bradley* (1979) 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 [upholding mandatory retirement at age 60 of federal employees under Foreign Service Act]; *Kubik v. Scripps College* (1981) 118 C.A.3d 544, 552, 173 C.R. 539 [following *Townsend* and *Murgia*; upholding former Govt.C. 12942(a), similar to provisions of Federal Age Discrimination Act, *infra*, §873, exempting employees of institutions of higher education from prohibition against mandatory retirement]; 90 Harv. L. Rev. 384 [Age Discrimination in Employment Act of 1967]; 48 *Hastings L. J.* 511 [age and pension discrimination through downsizing]; 4 *Pepperdine L. Rev.* 369 [*Murgia*].) (On statutory prohibition against mandatory retirement, see 3 *Summary* (10th), *Agency and Employment*, §343.)

The provision of the California Judges' Retirement Law, using age as a classification by providing reduced retirement benefits to judges retiring after age 70 (see 2 *Cal. Proc.* (4th), *Courts*, §18), is constitutional under the rational basis test. (*Rittenband v. Cory* (1984) 159 C.A.3d 410, 417, 421, 423, 424, 205 C.R. 576.) (On age discrimination violating federal and state civil rights laws, see *infra*, §§873 et seq., 932 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Reduced benefits under Judges' Retirement Law:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §15.



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21. Financial Ability.

a. Invalid Classifications.

8 *Witkin Sum. Cal. Law Const Law* § 803

[§ 803] Invalid Classifications.

Statutes that have the effect of denying rights to indigents, or otherwise discriminating against persons of limited financial ability, are suspect, either on due process or equal protection grounds. (On due process, see *Boddie v. Connecticut* (1971) 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, supra, §648 [unconstitutional denial of access to court for dissolution of marriage where party is unable to pay filing fees or costs of service]; 20 *Stanf. L. Rev.* 766 [effect of bond and fee requirements on access of poor to courts].)

It is unnecessary to show purposeful or intentional discrimination; classifications that had a heavier impact on the poor than the well-to-do have been held unconstitutional despite the absence of discriminatory motivation. (See *Serrano v. Priest* (1971) 5 C.3d 584, 602, 96 C.R. 601, 487 P.2d 1241, infra, §805; 82 *Harv. L. Rev.* 1333 [ability to pay as classification for specialized hospital treatment such as artificial organs and transplants]; 19 *Hastings Const. L. Q.* 599 [Constitution and economically disadvantaged]; 24 *San Diego L. Rev.* 1117 [Equal Protection for the Poor]; 21 *Stanf. L. Rev.* 767 [exclusionary zoning--ordinances prescribing minimum floor area or lot size for residential dwellings].)

The following are illustrative:

(1) Indigent defendants in criminal cases. They are entitled to appointed counsel at trial, to free transcripts on appeal, to appellate counsel, and to exemption from filing fees. (See supra, §§220, 790.)

(2) Imprisonment of a convicted indigent defendant because of his or her inability to pay a fine. (*In re Antazo* (1970) 3 C.3d 100, 115, 89 C.R. 255, 473 P.2d 999; see *Williams v. Illinois* (1970) 399 U.S. 235, 90 S.Ct. 2018, 2022, 26 L.Ed.2d 586, 593 [imprisonment in default of payment is unconstitutional where it continues beyond maximum imposed by statute for substantive offense]; *Tate v. Short* (1971) 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 [following *Williams*].)

(3) A poll tax on the right to vote. (See supra, §243.)

(4) An unreasonably large filing fee for candidates for public office. (See supra, §261.)

Taxing systems that indirectly discriminate against the poor in the quality of education have been the subject of

conflicting decisions of the California Supreme Court and the U.S. Supreme Court. (See *infra*, §§805, 806.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Illustrations of Valid and Invalid Classifications.

21. Financial Ability.

b. Valid Classifications.

8 Witkin Sum. Cal. Law Const Law § 804

[§ 804] Valid Classifications.

(1) *Credit Requirement or Deposit for Public Utility Services.* In *Wood v. Public Util. Com.* (1971) 4 C.3d 288, 93 C.R. 455, 481 P.2d 823, defendant telephone and gas and electric companies adopted rules requiring applicants for service to establish credit (by land ownership, continuous employment, or other means), or else to make a deposit. The Public Utilities Commission approved the rule. *Held*, there was no denial of equal protection; the Commission could determine that it was preferable to reduce bad debt losses by credit rules rather than by increased rates. (4 C.3d 295.) (See 53 A.L.R.3d 1027 [claim of racial discrimination in security deposits and termination of service for delinquency].)

(2) *Bankruptcy Fees.* In *United States v. Kras* (1973) 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626, an indigent, invoking *Boddie v. Connecticut* (1971) 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, *supra*, §648, sought a discharge in bankruptcy without payment of \$ 50 in fees. *Held*, the fee requirement was valid.

(a) *Boddie* dealt with fundamental rights involved in the marital relationship; bankruptcy is not a constitutional right. (93 S.Ct. 638, 34 L.Ed.2d 635.)

(b) Bankruptcy legislation is in the area of economics and social welfare, and the applicable standard is not the strict one for suspect classifications but rather that of "rational justification." (93 S.Ct. 638, 34 L.Ed.2d 636.)

(c) The rational basis for the fee requirement is clear; it makes the system self-sustaining. The bankrupt suffers no undue hardship. He or she may seek immediate relief without prepayment of the fee, and may pay it in installments over a period of months. (93 S.Ct. 640, 34 L.Ed.2d 637.) (Four dissenting justices thought *Boddie* controlling and two thought there was invidious discrimination.) (See 87 Harv. L. Rev. 57.)

(3) *Court Fees for Judicial Review of Administrative Denial of Welfare Aid.* After a recipient of welfare aid has had an administrative hearing on termination, there is no denial of due process or equal protection in requiring payment of the usual filing fees for court proceedings attacking the administrative decision. (*Ortwein v. Schwab* (1973) 410 U.S. 656, 93 S.Ct. 1172, 1175, 35 L.Ed.2d 572, 576 [following *Kras*; applying standard of rational justification]; on due process, see *supra*, §648.)

(4) *Ordinance Prohibiting Use of Motor Home as Residence*. In *Vehicular Residents Assn. v. Agnos* (1990) 222 C.A.3d 996, 1001, 272 C.R. 216, the court held that an ordinance prohibiting the use of motor homes for human habitation at specified places and times did not discriminate between poor and nonpoor and hence, did not infringe on equal protection guarantees. (See 19 *Hastings Const. L. Q.* 599 [Constitution and economically disadvantaged].)

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c. School Financing System.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 805

[§ 805] In General.

(1) *California Decision*. In *Serrano v. Priest* (1971) 5 C.3d 584, 96 C.R. 601, 487 P.2d 1241, plaintiffs, school children and parents in Los Angeles County, brought a class action against defendant state school officials and others, challenging the financing of the public school system by local property taxes as a denial of equal protection. *Held*, the complaint stated a cause of action; the system is unconstitutional.

(a) The classification is improperly based on wealth. Nearly all of the funds for schools come from local district taxes, and the revenue, dependent on the tax base, differs widely in poor and wealthy districts. Thus, as a practical matter, the public school system classification is on the basis of district wealth (5 C.3d 591, 598), which is as bad as the classification of individuals by wealth. (5 C.3d 601.) This is not a mere de facto discrimination; governmental action is involved in drawing school district lines and in establishing the school funding system. (5 C.3d 603.)

(b) Education is a fundamental interest, "the lifeline of both the individual and society." (5 C.3d 605.) Thus, it is entitled to the same protection against improper wealth classifications as the right to vote. (5 C.3d 607.)

(c) The traditional financing system is not necessary to accomplish a compelling state interest: (1) Decisionmaking can still be left in local districts no matter how the state decides to finance the system. (5 C.3d 610.) (2) The asserted policy interest of allowing a local district to choose how much it wishes to spend on education of its children is illusory. So long as assessed valuation is a major determinant, a poor district cannot freely choose to tax itself into an excellence that its tax rolls cannot provide. (5 C.3d 611.)

(d) The California public school financing system, because "it deals intimately with education, obviously touches upon a fundamental interest." It "conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents." It "is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite 'strict scrutiny,' it denies to the plaintiffs and others similarly situated the equal protection of the laws. If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional." (5 C.3d 614.) (See 85 Harv. L. Rev. 1049; 60 Cal. L. Rev. 720; 8

Cal. Western L. Rev. 547; 23 *Hastings L. J.* 365; 5 *Loyola L.A. L. Rev.* 162; 4 *Pacific L. J.* 28 [Legislature's Response]; 9 *San Diego L. Rev.* 892 [financing impact of *Serrano*]; 25 *Stanf. L. Rev.* 353; 8 *U.S.F. L. Rev.* 90; 10 *U.S.F. L. Rev.* 697; 41 *A.L.R.3d* 1220 [validity of basing public school financing on local property taxes]; on *Serrano II*, see *infra*, §806.)

(2) *U.S. Supreme Court Decision.* The U.S. Supreme Court came to the opposite conclusion in *San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16. Texas public schools are financed by a combination of state and local funding, with almost 50% from the state to provide an educational floor. But local district supplementation by ad valorem taxes results in disparities because of differences in the value of assessable property. *Held*, the system did not deny equal protection.

(a) *No suspect classification.* (1) There is no clearly defined class of "poor." The class cannot be identified in traditional terms, whether it is defined as those who fall below a specified income level, as those relatively poorer than others, or as those residing in poorer districts. (93 S.Ct. 1289, 1292, 36 L.Ed.2d 34, 38.) (2) No one is absolutely barred from an education, as distinguished from prior situations in which indigents were totally deprived of a benefit. (93 S.Ct. 1290, 1291, 36 L.Ed.2d 37.) (3) Viewed as district discrimination, "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." (93 S.Ct. 1294, 36 L.Ed.2d 40.)

(b) *Strict test is inapplicable.* There is no right to education explicitly or implicitly guaranteed by the federal Constitution; the fact that it is important to the exercise of the constitutional rights of speech and the franchise does not make it a fundamental right. Hence, the strict scrutiny test of equal protection should not be employed. (93 S.Ct. 1298, 1299, 36 L.Ed.2d 44, 47.)

(c) *Traditional rationality test is met.* State and local taxation are areas in which the court defers to the states, and a court has no expertise on the questions of fiscal and educational policy involved. The Texas system is designed to provide a basic minimum program with the maximum degree of local participation and control; and Texas could reasonably conclude that greater equality in financing through the state would defeat local control. Hence, the means of funding chosen is not invidiously discriminatory. (93 S.Ct. 1308, 36 L.Ed.2d 55.)

(d) *Judicial and legislative functions.* The problems are complex, the effect of a massive change in the financing and control of public education is unpredictable, and there is no clear consensus on the desirability of the innovation. These practical considerations "serve to highlight the wisdom of the traditional limitations" on the Supreme Court's function. Fundamental reforms in state taxation and education "are matters reserved for the legislative processes of the various States." (93 S.Ct. 1309, 36 L.Ed.2d 56.)

Three dissenting opinions argue that the right is fundamental, that the Texas system is irrational, and that the majority's test of equal protection is unsound. (See 87 *Harv. L. Rev.* 105; 20 *Santa Clara L. Rev.* 75; 9 *Southwestern U. L. Rev.* 217; 8 *U.S.F. L. Rev.* 90 [alternatives open to state courts in light of *Rodriguez*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *California Decision.* See 57 *Hastings L. J.* 385 [education finance litigation in California]; 48 *Santa Clara L. Rev.* 709 [disappointments in California's education finance policy and benefits of human rights approach].



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2. California Law.

8 Witkin Sum. Cal. Law Const Law § 806

[§ 806] California Law.

After the reversal of *Serrano v. Priest* (1971) 5 C.3d 584, 96 C.R. 601, 487 P.2d 1241, supra, §805 (*Serrano I*), the case was tried in *Serrano v. Priest* (1976) 18 C.3d 728, 135 C.R. 345, 557 P.2d 929 (*Serrano II*). The trial court made voluminous findings of fact and conclusions of law (18 C.3d 744 et seq.), and rendered judgment for plaintiffs on the merits (18 C.3d 748). *Held*, affirmed.

(a) *Legislative changes during pendency of trial.* The Legislature, in response to *Serrano I*, made a number of changes in the financing system. By stipulation, these were considered in reaching the decision at the trial and on appeal. (18 C.3d 736.) The changes, however, did not alter the basic concept (the "foundation approach"). (18 C.3d 741 et seq.)

(b) *Decision is based on California Constitution.* *San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, supra, ***§695, eliminated the federal Equal Protection Clause as the basis for the decision, and the trial court rested its judgment on the equal protection provisions of the California Constitution (Cal. Const., Art. IV, §16, and Art. I, §7; see supra, §705 et seq.). (18 C.3d 748.) This was proper, for *Serrano I* also cited these provisions. (18 C.3d 762.) "[O]ur state equal protection provisions, while 'substantially the equivalent of' the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable." (18 C.3d 764.) "The constraints of federalism, so necessary to the proper functioning of our unique system of national government, are not applicable to this court in its determination of whether our own state's public school financing system runs afoul of state constitutional provisions." (18 C.3d 766.)

(c) *Strict scrutiny is necessary.* "For these reasons then, we now adhere to our determinations, made in *Serrano I*, that for the reasons there stated and for purposes of assessing our state public school financing system in light of our state constitutional provisions guaranteeing equal protection of the laws (1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest. Because the school financing system here in question has been shown by substantial and convincing evidence produced at trial to involve a suspect classification (insofar as this system, like the former one, draws distinctions on the basis of district

wealth), and because that classification affects the fundamental interest of the students of this state in education, we have no difficulty in concluding today, as we concluded in *Serrano I*, that the school financing system before us must be examined under our state constitutional provisions with that strict and searching scrutiny appropriate to such a case." (18 C.3d 765.) Under this approach, the state failed to bear the burden of establishing that the classification is necessary to achieve a compelling state interest. The interest advanced--local control of fiscal and educational matters--was properly found by the trial court "to be chimerical from the standpoint of those districts which are less favored in terms of taxable wealth per pupil." (18 C.3d 768.)

(d) *Other California constitutional provisions are not controlling.* Defendants contended that Cal. Const., Art. XIII, §21, and its predecessor, authorizing county levies for school district taxes, operated "to insulate distinctions based on district wealth disparities from state equal protection requirements." (18 C.3d 770.) This is unsound. "Nothing in the constitutional provision establishing that power, however, indicates that its exercise is to be freed from the general constitutional limitations applicable to all legislation. Accordingly the Legislature, in its exercise of the subject power in conjunction with other powers possessed by it, was obliged to act in a manner consistent with such limitations. This it has not done. Instead it has undertaken to create a school financing system which, by making the quality of educational opportunity available to a student dependent upon the wealth of the district in which he lives, is manifestly inconsistent with fundamental constitutional provisions guaranteeing the equal protection of the laws to all citizens of this state. That system, we hold today, can no longer endure." (18 C.3d 774.)

Three justices dissented in two opinions. (18 C.3d 777, 785.) (See 90 Harv. L. Rev. 1528 [State Constitutional Restrictions on School Finance Reform]; 104 Harv. L. Rev. 1072 [Unfulfilled Promises: School Finance Remedies and State Courts]; 108 Harv. L. Rev. 781 [New Jersey school funding case]; 65 Cal. L. Rev. 523 [Serrano]; 4 Hastings Const. L. Q. 421 et seq. [Symposium]; 32 Loyola L.A. L. Rev. 583 [undermining of Serrano cases and need for minimum standards system of education]; 10 Pacific L. J. 991 [right to meaningful education]; 43 Santa Clara L. Rev. 1185 [history of educational finance reform legislation]; 10 West L.A. L. Rev. 87 [Serrano] 110 A.L.R.5th 293 [Validity of Public School Funding Systems].)

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3. State's Duty To Insure Funds.

8 Witkin Sum. Cal. Law Const Law § 807

[§ 807] State's Duty To Insure Funds.

In *Butt v. California* (1992) 4 C.4th 668, 15 C.R.2d 480, 842 P.2d 1240, the Richmond Unified School District of Contra Costa County proposed to close its doors on May 1, 1991, for lack of funds to complete the final 6 weeks of its 1990-1991 school term. The superior court issued a preliminary injunction directing the state, the Controller, and the Superintendent of Public Instruction (SPI), to ensure that the district's students would receive a full school term or its equivalent. The court approved the Superintendent's plan for an emergency state loan, and for appointment of an administrator to take temporary charge of the district's operation. Defendant state appealed to the Court of Appeal, and the Supreme Court transferred the appeal to itself to decide an important issue of first impression: "Whether the State has a constitutional duty, aside from the equal allocation of educational funds, to prevent the budgetary problems of a particular school district from depriving its students of 'basic' educational equality." (4 C.4th 674.)

The Supreme Court affirmed the trial court's determination that this duty exists, and that the circumstances demanded immediate state intervention. However, the trial court exceeded its judicial powers in approving the diversion of emergency loan funds from appropriations clearly intended by the Legislature for other purposes.

(a) *Merits of plaintiffs' claims.*

(1) "Public education is an obligation which the State assumed by the adoption of the Constitution. ... The system of public schools, although administered through local districts created by the Legislature, is 'one' system ... applicable to all the common schools. ... In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis. ... Local districts are the State's agents for local operation of the common school system ... , and the State's ultimate responsibility for public education cannot be delegated to any other entity." (4 C.4th 680.)

(2) "[T]he existence of this local-district system has not prevented recognition that the State itself has broad responsibility to ensure basic educational equality under the California Constitution. Because access to a public education is a uniquely fundamental personal interest in California, our courts have consistently found that the State charter accords broader rights against State-maintained educational discrimination than does federal law. Despite

contrary federal authority, California constitutional principles require State assistance to correct basic 'interdistrict' disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents." (4 C.4th 681.)

(3) Under *Serrano v. Priest* (1971) 5 C.3d 584, 96 C.R. 601, 487 P.2d 1241, supra, §§805, 806, and subsequent decisions (4 C.4th 683, 684), it "appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that the district-based system of common schools provides basic equality of educational opportunity." (4 C.4th 685.)

(4) Plaintiffs' showing supported the trial court's conclusion that the proposed closure would have a real and appreciable impact on the affected students' fundamental California right to basic educational equality. (4 C.4th 687, 688.) "And denials of basic educational equality on the basis of district residence are subject to strict scrutiny." (4 C.4th 692.)

(b) *Separation of powers.*

(1) Principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials; and a judicial remedy must be tailored to the harm at issue. (4 C.4th 695.)

(2) The trial court's remedial order fell within proper boundaries. "Given the emergency circumstances, and under the extreme and aggravated conditions disclosed by the evidence, the court below could properly conclude that orderly completion of the District's 1990-1991 school term, and the sound financing essential to achieve that end, required temporary displacement of the sitting Board and the operation of the District by the SPI's designee for the purpose of stabilizing its financial affairs. We conclude that the order approving temporary takeover of the District by the SPI was within the court's inherent equitable power to remedy the constitutional crisis." (4 C.4th 697.)

(c) *Source of loan funds.* *Mandel v. Myers* (1981) 29 C.3d 531, 174 C.R. 841, 629 P.2d 935, supra, §141, established the principle that the Legislature may not impose specific restrictions that are unconstitutionally discriminatory, or that constitute an impermissible legislative attempt to readjudicate the merits of a final court judgment. (4 C.4th 699.) But the trial court misapplied *Mandel* when it authorized the diversion of appropriated funds from the specific purposes and programs for which the Legislature had validly earmarked them. (4 C.4th 700.) "When it makes an appropriation to a specific district, under specific conditions addressed to the problems of that district, the Legislature clearly intends and contemplates that the appropriation will only be used for that purpose, and under those conditions. Hence, the appropriation is not reasonably available for court-ordered diversion to another district under different conditions." (4 C.4th 701.)

(d) *Conclusion.* "The trial court thus properly ordered the State and its officials to protect the students' rights. The court also acted within its remedial powers by authorizing the SPI to assume control of the District's affairs, relieve the Board of its duties, and supervise the District's financial recovery. However, the court invaded the exclusive legislative power of appropriation by approving the diversion of appropriations for" other purposes "to an emergency loan for the District." (4 C.4th 704.)

Four justices joined in the majority opinion. Three separate concurring and dissenting opinions were filed. (4 C.4th 704, 705, 706.) (See 15 J. Juvenile Law 343; 21 *Pepperdine L. Rev.* 277.)

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22. Motor Vehicles.

8 Witkin Sum. Cal. Law Const Law § 808

[§ 808] Motor Vehicles.

Classification of motor vehicles and drivers is often made and sustained in view of the special problems presented. (See *In re Cardinal* (1915) 170 C. 519, 521, 150 P. 348 [ordinance regulating "jitney busses" that did not apply to other automobiles or carriers]; *Hodge Drive-It-Yourself Co. v. Cincinnati* (1932) 284 U.S. 335, 52 S.Ct. 144, 76 L.Ed. 323 [requirement of bond or insurance policy from persons in business of renting automobiles]; *Peretto v. Department of Motor Vehicles* (1991) 235 C.A.3d 449, 455, 459, 1 C.R.2d 392 [*Veh.C.* 13353.6, under which specified commercial licensees are given shorter suspension than other licensees for driving under influence, is valid]; *Billester v. Corona* (1994) 26 C.A.4th 1107, 1123, 1124, 32 C.R.2d 121, 5 Summary (10th), Torts, §337 [classifications of *Veh.C.* 17004.7, immunizing public entities that adopt vehicle pursuit policies, are not invalid, even though statute distinguishes between persons injured in pursuits by collisions with suspects' vehicles and persons injured in pursuits by collisions with other vehicles or objects]; 72 A.L.R.5th 607 [validity of traffic regulations requiring motorcyclist to wear safety helmet or other protective gear].)

Similarly, the financial responsibility acts, providing for suspension of the license of a motorist who fails to furnish security after an accident causing damage, are valid. (See *Sheehan v. Division of Motor Vehicles of Calif.* (1934) 140 C.A. 200, 202, 35 P.2d 359; *Escobedo v. Department of Motor Vehicles* (1950) 35 C.2d 870, 878, 222 P.2d 1; 35 A.L.R.2d 1011 [Validity of Motor Vehicle Financial Responsibility Act]; 2 A.L.R.5th 725 [validity, construction, and effect of statute requiring conditions, in addition to expiration of time, for reinstatement of license]; for revised law providing for suspension on failure to prove financial responsibility, see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §408 et seq.) (On invalidity of Guest Law, see *supra*, §795.)

West's Key Number Digest, Constitutional Law k.230.5

SUPPLEMENT: [This section is current through the latest supplement]
Financial responsibility law:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgments*, §438 et seq.



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a. Valid Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 809

[§ 809] Valid Regulations.

(1) *Limit on Amount of Assistance.* Under the program of Federal Aid to Families with Dependent Children (AFDC, 42 U.S.C., §601 et seq.), the states, which participate in financing, follow different methods of providing aid. In *Dandridge v. Williams* (1970) 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, Maryland, pursuant to authorization in the statute, imposed a maximum limit (\$ 250 per month in Baltimore, \$ 240 elsewhere). Plaintiffs, whose large families had needs substantially in excess of the maximum, challenged the regulation. *Held*, it was valid. The argument that the regulation was too broad in its application to eligibles is one that may properly be made to First Amendment rights; but it has no place in the economic and social field. "It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor. By combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner." (90 S.Ct. 1162, 25 L.Ed.2d 502.) (See *Mitchell v. Swoap* (1973) 35 C.A.3d 879, 886, 113 C.R. 75 [upholding California regulation on *Dandridge* approach]; *Sneed v. Saenz* (2004) 120 C.A.4th 1220, 1250, 16 C.R.3d 563 [statute denying increased cash aid for children born to family that has been on welfare for previous 10 months and excluding child support income from grant calculation is rationally related to state purpose of encouraging families to participate in work force, thereby ending cycle of welfare dependence]; 84 Harv. L. Rev. 60 [*Dandridge*]; 84 Harv. L. Rev. 1856 [*Dandridge* and problem of coercion for population control]; 58 Cal. L. Rev. 555 [*Dandridge* and Judicial Retrenchment in Welfare Adjudication].)

(2) *Reduction of Benefits.* In *Jefferson v. Hackney* (1972) 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285, Texas, without sufficient funds to meet all welfare needs, adopted a system of percentage reductions for four categories of eligible persons: (a) The aged still received 100% of their needs, and the disabled and blind 95%; but (b) AFDC recipients received only 75%. AFDC recipients challenged the system as racial discrimination, on a showing that there were more members of minority groups in the AFDC program than in the other categories. *Held*, the system was constitutional. There was no evidence of discriminatory motive, and the state could reasonably conclude that the aged and infirm are less able to bear the hardships of an inadequate grant. (92 S.Ct. 1731, 1733, 32 L.Ed.2d 295, 297.)

In *Richardson v. Belcher* (1971) 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231, the Court upheld the "offset" provision of the Social Security Act (42 U.S.C., §424a). Under this section, state workers' compensation payments for industrial injuries are deducted from federal Social Security benefits, and there is a rational basis for the regulation. "The original purpose of state workmen's compensation laws was to satisfy a need inadequately met by private insurance or tort claim awards. Congress could rationally conclude that this need should continue to be met primarily by the States, and that a federal program that began to duplicate the efforts of the States might lead to the gradual weakening or atrophy of the state programs." (92 S.Ct. 258, 30 L.Ed.2d 236.)

(3) *Duration of Relationship Requirement.* The Social Security Act, in providing benefits for widows and children, excludes surviving wives and stepchildren who had their relationships to the deceased wage earner for less than 9 months prior to his death. In *Weinberger v. Salfi* (1975) 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522, plaintiff widow, who had been married to the deceased wage earner less than 6 months, challenged the statute in this class action. *Held*, the statute was valid.

(a) The object of the provision--to prevent exploitation of the fund by persons who married solely to enjoy its benefits--was entirely proper. The method used--fixed rules to protect against abuses--was similar to that used by private insurers in limiting the scope of coverage. (95 S.Ct. 2472, 45 L.Ed.2d 546.) Individualized determinations would involve delays and uncertainties in meeting the valid claims of large numbers of persons who satisfy the conditions of the rule, and might also be ineffective in filtering out sham arrangements. (95 S.Ct. 2475, 45 L.Ed.2d 549.)

(b) The "administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. In this sense, the duration-of-relationship requirement represents not merely a substantive policy determination that benefits should be awarded only on the basis of genuine marital relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determinations. It is an expression of Congress' policy choice that the Social Security system, and its millions of beneficiaries, would be best served by a prophylactic rule which bars claims arising from the bulk of sham marriages which are actually entered, which discourages such marriages from ever taking place, and which is also objective and easily administered." (95 S.Ct. 2476, 45 L.Ed.2d 550.)

(4) *Married and Divorced Women With Dependent Children.* The Social Security Act deals with two situations arising on a man's retirement or disability: (a) A *married woman* whose husband retires, and who has a minor or dependent child in her care, is entitled to benefits. (b) A *divorced woman* whose former husband retires or becomes disabled and who has such a child is not entitled to benefits if the former husband is under 62 years of age. In *Mathews v. De Castro* (1976) 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389, the Court held the classification proper in carrying out the legislative purpose--to provide workers and their families with protection. (97 S.Ct. 434, 50 L.Ed.2d 394.) "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." (97 S.Ct. 436, 50 L.Ed.2d 396.)

(5) *Limited Aid to Foster Children Living With Relatives.* In *King v. McMahon* (1986) 186 C.A.3d 648, 230 C.R. 911, the Department of Social Services, pursuant to Welf.C. 11402(a), denied state foster care benefits to foster children living with relatives, but granted benefits to foster children living with nonrelatives. *Held*, the classification was reasonable. "A rationale that justifies this legislative treatment involves the judgments that more children in this state are in need of foster care than are now receiving it; that persons having a family tie to a child in need of foster care will often provide such assistance without any financial incentive to do so; that persons having no family tie to such a child ordinarily will not provide foster care unless financially induced to do so; and that if the savings resulting from the denial of benefits to related foster parents were instead used to increase the benefits to unrelated foster parents, more foster care would be provided to all children in need thereof." (186 C.A.3d 665.)

(6) *Funding of County Mental Health Programs.* In *San Diego v. Brown* (1993) 19 C.A.4th 1054, 23 C.R.2d 819, the court held that the state's allocation of mental health funds and state hospital beds among the counties did not violate

equal protection guaranties. Past allocation methods had created inequities that the state was properly attempting to remedy through allocation of new funds as they became available. (19 C.A.4th 1085.)

(7) *Calculation of Support Obligation Where Child Is Receiving Aid.* The rational basis test was used to uphold the constitutionality of a former statute that prohibited a hardship deduction if public aid payments were being made. (See *San Francisco v. Garnett* (1999) 70 C.A.4th 845, 851, 82 C.R.2d 924 [following *King v. McMahon*]; *Moreno v. Draper* (1999) 70 C.A.4th 886, 896, 83 C.R.2d 82; on hardship deductions, see 10 *Summary* (10th), *Parent and Child*, §404 et seq.)

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B. Illustrations of Valid and Invalid Classifications.

23. Welfare Regulations.

b. Invalid Regulations.

8 Witkin Sum. Cal. Law Const Law § 810

[§ 810] Invalid Regulations.

In *Vincent v. California* (1971) 22 C.A.3d 566, 99 C.R. 410, a regulation made allowances for attendant services under the aid to the blind (AB) and old age security (OAS) programs even though the services were rendered by a responsible relative with whom the recipient was living, e.g., a spouse. The regulation was challenged by recipients of aid to the needy disabled (ATD), who originally received these allowances but lost them by a new regulation in 1970. They alleged that their wives gave up outside employment to serve as attendants for their husbands, and that termination of the payments was a denial of equal protection. *Held*, the challenge was good; the ATD recipients and OAS and AB recipients were similarly situated and could not be differently treated. (22 C.A.3d 572.)

In *United States Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782, an amendment to the federal Food Stamp Act was adopted, excluding a household with "an individual who is unrelated to any other member of the household." *Held*, the classification, apparently aimed at "hippie communes," was without any rational basis. (93 S.Ct. 2827, 37 L.Ed.2d 790.)

Hypolite v. Carleson (1973) 32 C.A.3d 979, 108 C.R. 751, involved a statutory provision giving aid to families with related children in need because of "continued absence" of a parent. The regulation defined the term to exclude the situation where both parents maintain a home but the child lives elsewhere. *Held*, the regulation "has arbitrarily and unreasonably created a dissimilar classification of children who are similarly situated with other children to whom aid has been extended. The children in the present case share with the eligible class the necessary relevant characteristics, i.e., deprivation of parental support and care by reason of the absence of the parents." (32 C.A.3d 987.)

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B. Illustrations of Valid and Invalid Classifications.

24. Preference in Favor of Prior Activity ("Grandfather Clause").

8 Witkin Sum. Cal. Law Const Law § 811

[§ 811] Preference in Favor of Prior Activity ("Grandfather Clause").

Comprehensive zoning laws exclude certain businesses and structures from specified districts. To avoid hardship and possible objections on grounds of due process, it has been customary to permit existing structures to remain, at least for a reasonable period of time, and merely to prevent repair or rebuilding. This exemption of "existing nonconforming uses" has been upheld as a reasonable classification. (See *Jones v. Los Angeles* (1930) 211 C. 304, 309, 295 P. 14; *Forest Lawn Memorial Park Assn. v. State Bd. of Embalmers & Funeral Directors* (1933) 134 C.A. 73, 79, 24 P.2d 887; *Rehfeld v. San Francisco* (1933) 218 C. 83, 85, 21 P.2d 419; *infra*, §1041.)

Likewise, in imposing new regulations on business or professional activities, it may be proper to give preferences to, or continue licenses of, those previously engaged in the work. (See *People v. Western Fruit Growers* (1943) 22 C.2d 494, 508, 140 P.2d 13; *Hunter v. Justice's Court* (1950) 36 C.2d 315, 320, 223 P.2d 465 [oil well spacing law exempting fields previously in production]; 4 A.L.R.2d 667 [construction of "grandfather clause" regulating or licensing business or occupation]; *infra*, §1098.)

In re Norwalk Call (1964) 62 C.2d 185, 41 C.R. 666, 397 P.2d 426, presented a close issue of validity of a "grandfather clause." Prior to 1923, a newspaper seeking a decree of "general circulation" could qualify as "printed and published" in a city even though not physically printed there. Legislation in 1923 required at least 50% of typesetting and presswork to be done there. Petitioner, unable to qualify under the new law, relied on an exemption in *Govt.C. 6006* for an established newspaper of general circulation. *Held*, citing the text, the exemption was valid. Three justices dissented on the ground that both the petitioner and contestant were established businesses, and that the exemption "would not preserve a distinction between established and new newspapers but would create an inequity by favoring one established newspaper over another." (62 C.2d 192.)

A "grandfather clause" was upheld in *New Orleans v. Dukes* (1976) 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511. The New Orleans charter gives the city council power to enact ordinances designed to preserve the character of the "French Quarter," the heart of its tourist industry. The council adopted ordinances prohibiting pushcart food vendors from operating in the area, but exempting vendors who had operated for 8 years. The Court of Appeals, relying on *Morey v. Doud* (1957) 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485, decided that the exemption was a violation of the Equal Protection Clause in its creation of a monopoly for the favored class member. *Held*, the ordinances met the rational basis test of validity. "[R]ather than proceeding by the immediate and absolute abolition of all pushcart food

vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible." (96 S.Ct. 2517, 49 L.Ed.2d 518.) "Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and ... it should be, and it is, overruled." (96 S.Ct. 2518, 49 L.Ed.2d 518.) (See 90 Harv. L. Rev. 132.)

The preferred treatment of existing businesses must, however, have some reasonable basis. In *Accounting Corp. of America v. State Bd. of Accountancy* (1949) 34 C.2d 186, 208 P.2d 984, changes were made in the statute regulating the practice of "public accountancy" by persons not certified public accountants. Under the new act, corporations were forbidden to practice public accounting, except that corporations engaged in the business for 3 years prior to the act were allowed to continue. *Held*, the statute was unconstitutional. (a) The work of an accountant, like that of members of the learned professions, requires a high degree of skill and integrity, and the Legislature might therefore have excluded corporations entirely from the practice. (b) Allowing some corporations to continue in the practice solely because they had been so engaged for 3 prior years would accomplish no legitimate purpose; the skill and other qualifications of those who may be employed by the corporation to do the work does not depend in any way on the period of time the corporation has been in the field. "Where a statute discriminates against individuals or corporations solely because they are new to the field and such discrimination does not appear to have any relation to the public interest" it is invalid. (34 C.2d 190.) The judgment was that the 3-year proviso was void and a corporation engaged in the practice at the effective date of the statute could continue, but the rest of the act was valid prospectively, so that no corporation thereafter could enter the field. (34 C.2d 192.)

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1. Theory and Development of Doctrine.

8 Witkin Sum. Cal. Law Const Law § 812

[§ 812] Theory and Development of Doctrine.

The doctrine of unconstitutional conditions developed as a result of legislative discrimination against *foreign corporations*. A state has power to exclude foreign corporations altogether, and it follows that it may admit them subject to conditions. On this theory, statutes were passed in various states providing that, if a foreign corporation attempted to sue a citizen in the federal courts or removed a suit to the federal courts, its license would be revoked. It was eventually held that because the right to resort to the federal courts is guaranteed by the federal Constitution, a statute cannot require the waiver of this specific constitutional right as a condition to doing business in the state. (*Terral v. Burke Const. Co. (1922) 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352.*)

The doctrine was subsequently extended to afford certain protection to foreign corporations or other persons, not only against interference with specific federal rights, but generally from conditions that violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Thus, a venue statute permitting actions against foreign corporations to be brought in any county, but those against domestic corporations only in the county of the place of business, is invalid. (*Power Mfg. Co. v. Saunders (1927) 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165*; see *Bohn v. Better Biscuits (1938) 26 C.A.2d 61, 67, 78 P.2d 1177*; *Burlington Northern R. Co. v. Ford (1992) 504 U.S. 648, 112 S.Ct. 2184, 2187, 119 L.Ed.2d 432, 438* [distinguishing *Power Mfg.*]; *102 Harv. L. Rev. 1413* [Unconstitutional Conditions]; *26 San Diego L. Rev. 175* [Symposium on unconstitutional conditions]; *27 San Diego L. Rev. 359, 395* [analyses of doctrine]; *43 Stanf. L. Rev. 1369* [Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection]; *3 Cal. Proc. (4th), Actions, §771.*)

In *Wheeling Steel Corp. v. Glander (1949) 337 U.S. 562, 69 S.Ct. 1291, 1296, 93 L.Ed. 1544, 1551, 9 Summary (10th), Taxation, §44*, the Court restated the doctrine as follows: "The State may arbitrarily exclude them or may license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. ... After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis." (Cf. *Watson v. Employers Liab. Assur. Corp. (1954) 348 U.S. 66, 75 S.Ct. 166, 173, 99 L.Ed. 74, 83* [concurring opinion].)

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Cross-Reference: *3 Cal. Proc. (5th), Actions, §853.*



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2. Application Outside Field of Foreign Corporations.

8 Witkin Sum. Cal. Law Const Law § 813

[§ 813] Application Outside Field of Foreign Corporations.

The underlying principle of the doctrine of unconstitutional conditions is not confined to the regulation of activities of foreign corporations, but applies to other situations in which the state seeks to deny a constitutional right. Thus, while a state has control over its highways, it may not compel a private carrier to become a common carrier as a condition to use of the highways. (*Frost & Frost Trucking Co. v. Railroad Com. of Calif.* (1926) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, *infra*, §1097.)

In *Danskin v. San Diego Unified School Dist.* (1946) 28 C.2d 536, 171 P.2d 885, a statute requiring denial of the use of school buildings for meetings of subversive organizations was held unconstitutional. The court reasoned that: (a) The state need not make school buildings or other public property available for public meetings. (b) If it elects to do so, however, it cannot make the privilege of holding these meetings dependent on conditions depriving any members of the public of constitutional rights. (c) Because "the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building." (28 C.2d 546.) The "convictions or affiliations of one who requests the use of a school building as a forum are of no more concern to the school administrators than to a superintendent of parks or streets if the forum is the green or the market place." (28 C.2d 547.) (See *supra*, §394.)

The doctrine has been restated as follows: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. ... Resort to the federal courts in diversity of citizenship cases is another. ... Assertion of a First Amendment freedom is still another. ... The imposition of a burden on the exercise of a Twenty-Fourth Amendment right is also banned. ... We now hold the protection of the individual under the Fourteenth Amendment prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." (*Garrity v. New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 620, 17 L.Ed.2d 562, 567, 2 Cal. Evidence (4th), Witnesses §361; see *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 81 S.Ct. 125, 130, 5 L.Ed.2d 110, 117, *supra*, §238; *Syrek v. Unemp. Ins. App. Bd.* (1960) 54 C.2d 519, 532, 7 C.R. 97, 354 P.2d 625, 3 Summary (10th), Agency and Employment, §523; *Bagley v. Washington Township Hosp. Dist.* (1966) 65 C.2d 499, 503, 55 C.R. 401, 421 P.2d 409, *supra*, §255; *Parrish v. Civil Service Com. of Alameda County* (1967) 66 C.2d 260, 271, 57 C.R. 623, 425 P.2d 223; *Committee To Defend Reproductive Rights v. Myers* (1981) 29 C.3d 252, 293, 172 C.R. 866, 625 P.2d 779, *supra*, §578; *Planned Parenthood v. Santa Maria* (1993) 16 C.A.4th 685, 693, 20 C.R.2d 391 [city may not condition grant of public funds on

waiver of privacy right guaranteed by California Constitution; hence, city could not lawfully approve grant for construction of clinic on condition that no abortions be performed there]; 60 *So. Cal. L. Rev.* 815 [college athlete drug testing and unconstitutional condition doctrine]; 41 *Stanf. L. Rev.* 401 [The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?]; 43 *Stanf. L. Rev.* 1369 [Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection]; 43 *U.C.L.A. L. Rev.* 371 [Unconstitutional Conditions and Greater Powers: A Separability Approach].)

In *Binet-Montessori v. San Francisco Unified School Dist.* (1979) 98 C.A.3d 991, 160 C.R. 38, defendant school district's board of education adopted a resolution prohibiting leasing surplus school district property to private educational agencies. *Held*, the resolution was unconstitutional, and petitioner, a private school for young children, was entitled to bid on a proposed lease of a vacant elementary school.

(a) The constitutional right to send children to private schools (see *infra*, §1071) includes the right of a private school to operate. (98 C.A.3d 996.)

(b) The public entity may not condition acceptance of a benefit on waiver of a fundamental right, unless it shows a proper justification for the restriction. (98 C.A.3d 995.) The argument that leasing to private schools would tend to decrease public school enrollment with resulting loss of state revenues is patently insufficient; private schools are a beneficial competitive force. (98 C.A.3d 996.) The argument that this leasing would jeopardize the district's desegregation plans is likewise untenable. The district could achieve integration objectives by alternative means, e.g., setting guidelines for private school bidders to insure that the leases would have no adverse impact on desegregation. (98 C.A.3d 997.)

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8 Witkin Sum. Cal. Law Const Law § 814

[§ 814] In General.

(1) *Constitutional Provisions.* The Thirteenth Amendment, §2, and the Fourteenth Amendment, §5, authorize Congress to enact legislation to enforce their protections. The basic distinction between the two provisions was enunciated in an early case: "Under the 13th Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the *acts of individuals*, whether sanctioned by state legislation or not; under the 14th, ... it must necessarily be and can only be corrective in its character, addressed to counteract and afford relief against *state regulations or proceedings*." (*Civil Rights Cases* (1883) 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835; 47 *Stanf. L. Rev.* 161 [historical review of African American lawyers and their importance in shaping civil rights law].)

(2) *Legislation.* Exercising this newly granted authority, Congress enacted five Civil Rights Acts in the aftermath of the Civil War. (See 4 Rotunda, §19.1; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §26 et seq.; on statute permitting removal of civil or criminal case from state to federal court where civil rights cannot be enforced in state (28 U.S.C., §1443), see *Georgia v. Rachel* (1966) 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925; *Greenwood v. Peacock* (1966) 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944; *Johnson v. Mississippi* (1975) 421 U.S. 213, 95 S.Ct. 1591, 44 L.Ed.2d 121.)

Under 42 U.S.C., §1981, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (See *Runyon v. McCrary* (1976) 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415, *infra*, §879; *Goodman v. Lukens Steel Co.* (1987) 482 U.S. 656, 107 S.Ct. 2617, 2626, 96 L.Ed.2d 572, 582 [applying *Wilson v. Garcia* (1985) 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254, *infra*, §841, in characterizing 1981 claims as ones for personal injury for purpose of selecting appropriate state statute of limitations]; *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132, 147, *infra*, §§872, 879; *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 109 S.Ct. 2702, 2722, 105 L.Ed.2d 598, 624 [action under §1983 (*infra*, §816) is exclusive federal damages remedy for violation of §1981 by state actor]; 103 *Harv. L. Rev.* 320 [Jett]; 164 *A.L.R. Fed* 483 [Actions Brought Under 42 U.S.C., §§1981-1983 for Racial Discrimination--Supreme Court Cases]; 4 Rotunda, §19.10; 15 *Am.Jur.2d* (2000 ed.), *Civil*

Rights §27 et seq.; on amendment of 42 U.S.C., §1981 by Civil Rights Act of 1991, see *infra*, §849.)

Under 42 U.S.C., §1982, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." (See *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189, *infra*, §851; 4 Rotunda, §19.8; 15 Am.Jur.2d (2000 ed.), *Civil Rights* §43 et seq.)

These original Acts were almost entirely neglected until the 1960s, when by reason of judicial decisions and additional legislation, federal enforcement took on a new significance. (See 4 Rotunda, §19.1 et seq.; 48 *Hastings L. J.* 197 [federal civil rights practice in the 1990s]; 22 *San Diego L. Rev.* 453; 25 *San Diego L. Rev.* 879 [Civil Rights Symposium]; 15 Am.Jur.2d (2000 ed.), *Civil Rights* §26 et seq.)

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(1) *Constitutional Provisions*. See 39 U.C. Davis L. Rev 1773 [achieving revolutionary abolitionism through Thirteenth Amendment]. (2) *Legislation*. See 4 Rotunda 4th, §19.10.

42 U.S.C., §1981 is not "an omnibus remedy for *all* racial injustice." To state a claim under the statute, a plaintiff must have rights under an existing or proposed contract that he or she wishes "to make or enforce." The plaintiff must identify an injury flowing from a racially motivated breach of his or her own contractual relationship, not that of someone else. (*Domino's Pizza v. McDonald* (2006) 546 U.S. 470, 126 S.Ct. 1246, 1252, 163 L.Ed.2d 1069, 1078 [where corporation owned by plaintiff contracted with defendant and later settled breach of contract claim against defendant, plaintiff could not bring action for violation of §1981 against same defendant in plaintiff's personal capacity].)

(*New*) *Retaliation*: 42 U.S.C., §1981 encompasses claims for retaliation. (*CBOCS West v. Humphries* (2008) 553 U.S. ___, 128 S.Ct. 1951, 1955, 1957, 170 L.Ed.2d 864, 867, 872 [following reasoning of *Sullivan v. Little Hunting Park* (1969) 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386, text, §851, and noting long line of cases construing 42 U.S.C., §1982, which permits retaliation actions, and 42 U.S.C., §1981, similarly; 1991 addition of 42 U.S.C., §1981(b) explicitly defined scope of statute to include conduct occurring after contract was formed].)



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8 Witkin Sum. Cal. Law Const Law § 815

[§ 815] Criminal Liability.

(1) *Statute*. "Whoever, under color of any law, statute, ordinance, regulation, or custom," wilfully subjects a person to the deprivation of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" is criminally liable. (18 U.S.C., §242; see *United States v. Classic* (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *Screws v. United States* (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; *United States v. Williams* (1951) 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758; *Williams v. United States* (1951) 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774; *United States v. Lanier* (1997) 520 U.S. 259, 117 S.Ct. 1219, 1226, 137 L.Ed.2d 432, 444 [criminal liability under 18 U.S.C., §242 may be imposed if, in light of preexisting law, unlawfulness is apparent; "preexisting law" is not limited to Supreme Court decisions or to precedents arising under factually similar circumstances]; 34 Cal. Western L. Rev. 591 [Lanier]; 38 U.C.L.A. L. Rev. 163 [vagueness of Reconstruction criminal civil rights laws]; 15 Am.Jur.2d (2000 ed.), *Civil Rights* §205 et seq.)

(2) *Color of Law*. The phrase "under color of law" was intended to cover illegal activity of state officers. (See *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 484, 5 L.Ed.2d 492, 505, infra, §828 [meaning given "under color of law" in *Classic*, *Screws*, and *Williams* was correct, "and we adhere to it"]; 15 Am.Jur.2d (2000 ed.), *Civil Rights* §205 et seq.)

(3) *Conspiracy*. Under 18 U.S.C., §241, it is a crime for two or more persons to conspire "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The statute covers conspiracies to violate Fourteenth Amendment rights, but the requirement of state action (see supra, §§619, 697 et seq.) must be satisfied. (See *United States v. Price* (1966) 383 U.S. 787, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267, 273; *United States v. Guest* (1966) 383 U.S. 745, 86 S.Ct. 1170, 1176, 16 L.Ed.2d 239, 247; 15 Am.Jur.2d (2000 ed.), *Civil Rights* §199 et seq.)

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8 Witkin Sum. Cal. Law Const Law § 816

[§ 816] Civil Liability.

(1) *The Statute*. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (42 U.S.C., §1983; see *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, *infra*, §828; *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142; *Pulliam v. Allen* (1984) 466 U.S. 522, 104 S.Ct. 1970, 1980, 80 L.Ed.2d 565, 578; *Wilson v. Garcia* (1985) 471 U.S. 261, 105 S.Ct. 1938, 1947, 85 L.Ed.2d 254, 266, *infra*, §841; *Oklahoma City v. Tuttle* (1985) 471 U.S. 808, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791, 799, *infra*, §831; on defense of reliance in good faith on unconstitutional statute, see *Pierson v. Ray* (1967) 386 U.S. 547, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288, 296; on color of state law, see *infra*, §828.)

(2) *State or Territory*. *District of Columbia v. Carter* (1973) 409 U.S. 418, 93 S.Ct. 602, 609, 34 L.Ed.2d 613, 623, held that the District of Columbia was not a "State or Territory" within the meaning of 42 U.S.C., §1983. The decision was nullified by a 1979 amendment to the statute specifically making it applicable to statutes, etc., of the District of Columbia. The 1979 amendment also provided that "any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

"Whether Puerto Rico is now considered a territory or a state" makes little difference "because each is included" within 42 U.S.C., §1983. (*Examining Bd. of Engineers, Architects & Surveyors v. Flores De Otero* (1976) 426 U.S. 572, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65, 82.) However, "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under §1983." (*Ngiraingas v. Sanchez* (1990) 495 U.S. 182, 110 S.Ct. 1737, 1743, 109 L.Ed.2d 163, 174.)

(3) *Indian Tribe*. An Indian tribe, like a state, is not a "person" who may sue under 42 U.S.C., §1983. (*Inyo v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* (2003) 538 U.S. 701, 123 S.Ct. 1887, 1892, 155 L.Ed.2d 933, 941.)

(4) *Texts and Commentary.* The statute has been the subject of extensive commentary. (See 4 Rotunda, §19.13 et seq.; 82 *Harv. L. Rev.* 1134; 90 *Harv. L. Rev.* 1133; 99 *Harv. L. Rev.* 4; 29 *McGeorge L. Rev.* 825 [proposals to amend Civil Rights Act]; 45 *So. Cal. L. Rev.* 131; 51 *So. Cal. L. Rev.* 355, 381; 42 *Stanf. L. Rev.* 51 [A Critical Approach to Section 1983 with Special Attention to Sources of Law]; 7 U.C. Davis J. Juvenile Law & Policy 117 [foster parents as state actors]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §62 et seq.; 55 *A.L.R.2d* 512 [liability under 42 U.S.C., §1983 of state officers who attempt to coerce confessions or guilty pleas]; 98 *A.L.R.2d* 1160 [statute of limitations]; 169 *A.L.R. Fed* 141 [actions for sex discrimination under 42 U.S.C., §§1983, 1985--Supreme Court cases]; 48 *Am.Jur.* Trials 587 [liability of educators under 42 U.S.C., §1983 for personal injury or death of public school student due to excessive punishment or failure to supervise].)

West's Key Number Digest, Civil Rights k.191 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Texts and Commentary.* See 4 Rotunda 4th, §19.13 et seq.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law XI. EQUAL PROTECTION OF THE LAWS D. Federal Civil Rights Legislation. 1. Original Civil Rights Acts. a. Constitutional and Statutory Framework. 4. Damages for Conspiracy.

8 Witkin Sum. Cal. Law Const Law § 817

[§ 817] Damages for Conspiracy.

Under 42 U.S.C., §1985, persons injured by an overt act in furtherance of a conspiracy to interfere with their civil rights have an action for damages against any of the conspirators. The first two subdivisions of the section cover conspiracies (a) to prevent federal officers from performing their duties (42 U.S.C., §1985(1)), and (b) to intimidate a party, witness, or juror in a federal court or obstruct justice in a state court (42 U.S.C., §1985(2)). (See *Kush v. Rutledge* (1983) 460 U.S. 719, 103 S.Ct. 1483, 1487, 75 L.Ed.2d 413, 419 [first part of 42 U.S.C., §1985(2) involving intimidation of witnesses does not require racial or class-based invidious discriminatory state of mind, but second part on obstruction of justice in state courts specifically requires intent to deny citizens equal protection]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §183 et seq.)

However, most of the cases and commentary have involved 42 U.S.C., §1985(3), which covers conspiracies to deprive a "person or class of persons" of equal privileges and immunities under the law, or to hinder the authorities from giving these persons equal protection of the laws, or to prevent support or advocacy in an election of federal officers. (See *Stefanelli v. Minard* (1951) 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138; *Taylor v. Mitzel* (1978) 82 C.A.3d 665, 673, 147 C.R. 323; *Graham v. Biggs* (1979) 96 C.A.3d 250, 253, 157 C.R. 761; *Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 [protesters blockading abortion clinics]; *Haddle v. Garrison* (1998) 525 U.S. 121, 119 S.Ct. 489, 492, 142 L.Ed.2d 502, 508 [petitioner stated claim for damages by alleging that conspiracy proscribed by 42 U.S.C., §1985(2) induced employer to terminate at-will employment; that employment at will is not "property" under Due Process Clause does not mean that its loss may not injure petitioner in his person or property under statute]; 4 *Rotunda*, §19.9; 107 *Harv. L. Rev.* 332 [Bray]; 20 *Hastings Const. L. Q.* 905 [same]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §§186, 187; 169 *A.L.R. Fed* 141 [Actions Brought Under 42 U.S.C.A. §§1983 and 1985 for Sex Discrimination--Supreme Court Cases].)

In *Collins v. Hardyman* (1951) 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253, the Court held that the statute reached only conspiracies under color of state law. This interpretation was repudiated in *Griffin v. Breckenridge* (1971) 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338. The section covers private conspiracies. (91 S.Ct. 1798, 29 L.Ed.2d 348.) As so construed, it is supported by both the Thirteenth Amendment and the power of Congress to protect the right of interstate travel against private as well as governmental interference. (91 S.Ct. 1800, 29 L.Ed.2d 350.) (See 85 *Harv. L. Rev.* 95.)

In *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott* (1983) 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049, an action under 42 U.S.C., §1985(3) involving a private conspiracy to infringe the First Amendment rights of nonunion employees, the Court limited the scope of the statute as follows:

(a) The holding in *Griffin v. Breckenridge*, *supra*, applies only to conspiracies to interfere with rights constitutionally protected against *both* private and official encroachment. (103 S.Ct. 3358, 77 L.Ed.2d 1057.) For rights protected only against state encroachment, such as First Amendment rights, a cause of action under 42 U.S.C., §1985(3) is not stated "unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state." (103 S.Ct. 3357, 77 L.Ed.2d 1055.)

(b) Regardless of whether 42 U.S.C., §1985(3) applies to discrimination against groups other than Blacks and those supporting their cause (a question not decided), the statute was not intended "to reach conspiracies motivated by bias towards others [than Blacks] on account of their *economic* views, status, or activities." (103 S.Ct. 3360, 77 L.Ed.2d 1060.)

In *Great Amer. Fed. Savings & Loan Assn. v. Novotny* (1979) 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957, plaintiff alleged a conspiracy to deprive him of a right created by Title VII of the Civil Rights Act of 1964 (see *infra*, §855). *Held*, the suit could not be maintained; it would avoid most of the detailed provisions of Title VII and completely bypass the important administrative process. (99 S.Ct. 2351, 60 L.Ed.2d 966.) Three justices dissented. (See 9 *Hastings Const. L. Q.* 579.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 *Rotunda 4th*, §19.9.



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D. Federal Civil Rights Legislation.
1. Original Civil Rights Acts.
b. Federal and State Court Jurisdiction.

8 *Witkin Sum. Cal. Law Const Law* § 818

[§ 818] Federal and State Court Jurisdiction.

(1) *Federal Courts.* Federal courts have original jurisdiction over actions to (a) redress the deprivation, under color of state law, etc., of rights, etc., "secured by the Constitution ... or by any act of Congress providing for equal rights," and (b) recover damages, etc., "under any act of Congress providing for the protection of civil rights." (28 U.S.C., §1343(3), (4).)

28 U.S.C., §1343 does not confer jurisdiction over all claims under 42 U.S.C., §1983. In *Chapman v. Houston Welfare Rights Organization* (1979) 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508, the Court held that federal courts lacked jurisdiction over a claim that a state welfare regulation was invalid because it conflicted with the Social Security Act, because that Act provided neither for "equal rights" under 28 U.S.C., §1343(3) nor "civil rights" under 28 U.S.C., §1343(4). (99 S.Ct. 1917, 60 L.Ed.2d 523.)

Jurisdiction could not be based on 28 U.S.C., §1331, the general federal-question statute, because the amount in controversy did not exceed \$ 10,000. (99 S.Ct. 1910, 60 L.Ed.2d 515.) However, this obstacle to assuming jurisdiction over claims under 42 U.S.C., §1983 was removed by the 1980 amendment deleting from 28 U.S.C., §1331 the requirement of a monetary value on the amount in controversy. (See 4 Rotunda, §19.15; 2 *Cal. Proc.* (4th), *Jurisdiction*, §66.)

In *Lynch v. Household Finance Corp.* (1972) 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424, plaintiff brought a class action in federal district court to enjoin Connecticut sheriffs from levying prejudgment garnishments. The district court did not reach the constitutional issue, holding that federal court jurisdiction under 28 U.S.C., §1343(3) extends only to personal rights. *Held*, this is a mistaken assumption; the "dichotomy between personal liberties and property rights is a false one." Rights in property are basic civil rights, and the district court had jurisdiction. (92 S.Ct. 1122, 31 L.Ed.2d 434.) (See 86 *Harv. L. Rev.* 201; 24 *Stanf. L. Rev.* 1134.)

(2) *State Courts.* State courts have concurrent jurisdiction with federal courts over actions under 42 U.S.C., §1983. (See *Martinez v. California* (1980) 444 U.S. 277, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488, footnote 7; *Maine v. Thiboutot* (1980) 448 U.S. 1, 100 S.Ct. 2502, 2507, 65 L.Ed.2d 555, 558, footnote 1; *Tafflin v. Levitt* (1990) 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887; *Yellow Freight System v. Donnelly* (1990) 494 U.S. 820, 110 S.Ct. 1566, 108

L.Ed.2d 834; Brown v. Pitchess (1975) 13 C.3d 518, 521, 523, 119 C.R. 204, 531 P.2d 772; Williams v. Horvath (1976) 16 C.3d 834, 837, 129 C.R. 453, 548 P.2d 1125, 3 Cal. Proc. (4th), Actions, §236; 4 Rotunda, §19.15.) (On exhaustion of state remedies and res judicata effect of state decisions, see *infra*, §844.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Federal Courts.*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §65.

(2) *State Courts.* See 4 *Rotunda* 4th, §19.15.

Williams case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §245.



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c. Persons Liable.

8 Witkin Sum. Cal. Law Const Law § 819

[§ 819] Persons Liable.

In *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45, the Court held that a state official acting in his or her *official capacity* is not a "person" and therefore is not subject to liability under 42 U.S.C., §1983. (See *Baughman v. California* (1995) 38 C.A.4th 182, 187, 45 C.R.2d 82 [citing *Will*; campus police acting in their official capacity were not "persons" within meaning of 42 U.S.C., §1983]; on employee immunities under statute, see *infra*, §834 et seq.)

Will was distinguished in *Hafer v. Melo* (1991) 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301, holding that state officials sued in their *individual capacities* are "persons." H, elected Auditor General of Pennsylvania, dismissed employees on the basis that they had "bought" their jobs. M and other terminated employees sued H in district court, seeking damages and reinstatement. The district court dismissed the claims on the ground that H could not be held liable for employment decisions made in her official capacity as Auditor General. The Court of Appeals reversed, holding that, while H's power to hire and fire derived from her official position, a suit for damages based on the exercise of this power could be brought against her in her personal capacity. The Supreme Court affirmed the judgment of the Court of Appeals.

(a) In *Kentucky v. Graham* (1985) 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114, the Court "sought to eliminate lingering confusion about the distinction between personal--and official--capacity suits." (112 S.Ct. 361, 116 L.Ed.2d 309.)

(1) Official-capacity suits represent another way of pleading an action against an entity of which an officer is an agent. A suit against a state official in his or her official capacity therefore should be treated as a suit against the state; and the only immunities available to the defendant are those that the governmental entity possesses. (112 S.Ct. 361, 116 L.Ed.2d 309.)

(2) "Personal-capacity suits, on the other hand, seek to impose individual liability upon a governmental officer for actions taken under color of state law." (112 S.Ct. 362, 116 L.Ed.2d 309.) Officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as an objectively reasonable reliance on existing law. (112 S.Ct. 362, 116 L.Ed.2d 309.)

(b) *Will* turned in part on these differences. *Will* makes clear that the distinction between official-capacity suits and personal-capacity suits is more than a mere pleading device. "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them. ... By contrast, officers sued in their personal capacity come to court as individuals." (112 S.Ct. 362, 116 L.Ed.2d 310.)

(c) H contends that imposing personal liability on officeholders may infringe on state sovereignty, and that the Eleventh Amendment forbids personal-capacity suits against state officials in federal court. This view was rejected in *Scheuer v. Rhodes* (1974) 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (see supra, §52). (112 S.Ct. 364, 116 L.Ed.2d 312.) Although imposing personal liability on state officers may hamper their performance of public duties, these "concerns are properly addressed within the framework of our personal immunity jurisprudence." (112 S.Ct. 364, 116 L.Ed.2d 313.)

(d) Thus, "state officials, sued in their individual capacities, are 'persons' within the meaning of §1983. The Eleventh Amendment does not bar these suits, nor are state officers absolutely immune from personal liability under §1983 solely by virtue of the 'official' nature of their acts." (112 S.Ct. 365, 116 L.Ed.2d 313.)

In *Pitts v. Kern* (1998) 17 C.4th 340, 70 C.R.2d 823, 949 P.2d 920, the issue was whether, for purposes of local government liability under 42 U.S.C., §1983, a district attorney acts for the state or the county when prosecuting criminal violations of state law, and when establishing policy and training personnel in criminal prosecution. If the district attorney represents the county, the court would need to consider whether the district attorney's absolute immunity under 42 U.S.C., §1983 also immunizes the county. If the district attorney acts for the state, he or she may not be held liable under 42 U.S.C., §1983, and the court's inquiry is over. *Held*, the district attorney represents the state and is not a policymaker for the county. (17 C.4th 345.)

(a) A county is a "person" within the meaning of 42 U.S.C., §1983, and is subject to liability for damages under this section. However, neither a state nor state officials sued in their official capacity are persons subject to liability under the statute. (17 C.4th 344.)

(b) In *McMillian v. Monroe County, Alabama* (1997) 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1, the U.S. Supreme Court "provided an analytical framework for resolving the question of which entity a governmental official represents when performing a certain function. In particular, the court considered whether Alabama sheriffs represent the county or the state for purposes of §1983 when they act in a law enforcement capacity." (17 C.4th 353.) "The essential thrust of *McMillian* is that a court must discern which entity a government official represents 'in a particular area, or on a particular issue' by examining how the official's functions are defined by state law." (17 C.4th 356.)

(c) In California, each county district attorney is supervised by the *Attorney General*. (17 C.4th 356.) The Attorney General is authorized by Govt.C. 12524 to "conference" with district attorneys "to discuss their duties 'with the view of uniform and adequate enforcement' of state law." (17 C.4th 358.) District attorneys have complete authority to enforce state criminal law in their counties. (17 C.4th 358.) When prosecuting state criminal law violations, a district attorney acts in the name of the people of the state. (17 C.4th 359.) On the other hand, a district attorney is elected by county voters, is included in the list of county officers, and must be a registered voter in the county where his or her duties are to be performed. "These characteristics are ... consistent with an understanding of [district attorneys] as state officials who have been locally placed throughout the State, with an element of control granted to the officials and residents of the county which receives the [district attorney's] services." (17 C.4th 361, quoting *McMillian*.)

(d) No meaningful analytical distinction can be made between preparing to prosecute and prosecuting criminal violations on the one hand, and training and developing policy regarding prosecutions on the other hand. (17 C.4th 362.) Cal. Const., Art. V, §13, provides that the Attorney General has "direct supervision over every district attorney ... in all matters pertaining to the duties of their ... office." (17 C.4th 363.) This includes oversight of policies and training in connection with the district attorney's prosecution of crimes. "Our conclusion as to which entity the district attorney represents might differ were plaintiffs challenging a district attorney's alleged action or inaction related to hiring or

firing an employee, workplace safety conditions, procuring office equipment, or some other administrative function arguably unrelated to the prosecution of state criminal law violations." (17 C.4th 363.)

Two justices dissented, believing that when a district attorney engages in training, supervision, and other managerial tasks, he or she is acting as a local policymaker. (17 C.4th 366.) (See *Los Angeles v. Superior Court (Peters)* (1998) 68 C.A.4th 1166, 1174, 80 C.R.2d 860 [following *McMillian* and *Pitts*; in establishing policies for release of persons from county jail, sheriff acts as state official, and not as policymaker for county]; *Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 C.A.4th 1098, 1105, 100 C.R.2d 289 [case of first impression; in view of California's extensive control over school districts' fiscal affairs and political status, districts are instrumentalities of state, exempt from suit under 42 U.S.C., §1983]; *Hernandez v. San Bernardino* (2004) 117 C.A.4th 1055, 1060, 12 C.R.3d 452 [relying on *McMillian*, *Pitts*, and *Peters*; trial court erred in granting defendant family support division's motion for judgment on pleadings where it could not be conclusively determined whether defendant's asserted civil rights violation was state action; defendant acted under auspices of county district attorney in reporting misidentified plaintiff to Franchise Tax Board, but was not engaged in prosecuting crimes or enforcing criminal law]; 33 U.C. Davis L. Rev. 677 [*McMillian*].)

In *Venegas v. Los Angeles* (2004) 32 C.4th 820, 11 C.R.3d 692, 87 P.3d 1, the court relied on *Pitts* and *Peters* in holding that a sheriff engaged in a criminal investigation is a state officer and hence not a "person" for purposes of 42 U.S.C., §1983. (32 C.4th 830.) However, sheriff's deputies are not shielded by the sheriff's immunity, and are "persons" who may be held liable for damages under the statute, unless they are entitled to qualified immunity. (32 C.4th 839; on qualified immunity, see *infra*, §837.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Brunius v. Parrish* (2005) 132 C.A.4th 838, 858, 34 C.R.3d 55 [state Mining Board and its members, who performed inspections under county authorization, were state actors not subject to suit under 42 U.S.C., §1983; board took back regulatory powers when local government failed to administer state policy, and board at all times enforced state, not local, policy]; *Bougere v. Los Angeles* (2006) 141 C.A.4th 237, 241, 45 C.R.3d 711 [following *Venegas v. Los Angeles* (2004) 32 C.4th 820, 11 C.R.3d 692, 87 P.3d 1, text, p. 238; sheriff was immune from liability for failing to move inmate to another facility after repeated threats from other inmates; policies and procedures governing placement of inmates at county jail is law enforcement function performed on behalf of state]; *Macias v. Los Angeles* (2006) 144 C.A.4th 313, 322, 50 C.R.3d 364 [summary judgment was properly granted to officers who, though participating in search of plaintiff's premises, were not integral part of conduct leading to violation of plaintiff's Fourth Amendment rights]; CACI, No. 3013 [supervisor liability].



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d. Elements of Cause of Action.
1. Deprivation of Rights.
aa. Constitutional Rights.

8 Witkin Sum. Cal. Law Const Law § 820

[§ 820] Constitutional Rights.

The language in 42 U.S.C., §1983 (deprivation of "rights, privileges, or immunities secured by the Constitution or laws"; see *supra*, §816) covers deprivations of Fourteenth Amendment rights. In *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, *infra*, §828, the Court noted that similar language in 18 U.S.C., §241 (see *supra*, §815) had been interpreted as covering only those rights that a person has by reason of his or her relation to the federal Government, not to state governments. (81 S.Ct. 475, 5 L.Ed.2d 496, citing *United States v. Williams* (1951) 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758.) However, a similarly narrow interpretation of 42 U.S.C., §1983 is precluded by its legislative history, which establishes enforcement of Fourteenth Amendment rights as its primary objective. (81 S.Ct. 475, 5 L.Ed.2d 496.)

A number of other decisions address the scope of the statutory language. (See *Zuniga v. Housing Authority of Los Angeles* (1995) 41 C.A.4th 82, 104, 48 C.R.2d 353, 5 Summary (10th), *Torts*, §267 [defendants, a city and its housing authority, could be held liable under 42 U.S.C., §1983 for failure to protect plaintiffs from retaliation by drug dealers who congregated in front of plaintiffs' apartment and about whom plaintiffs had complained; by acting in callous disregard of plaintiffs' security, defendants deprived them of liberty interest]; *Sacramento County Deputy Sheriffs' Assn. v. Sacramento* (1996) 51 C.A.4th 1468, 1482, 59 C.R.2d 834 [videotaping of deputy sheriffs working in release office of jail did not violate their Fourth Amendment rights where they had no reasonable expectation of privacy while in release office]; *Breneric Associates v. Del Mar* (1998) 69 C.A.4th 166, 182, 81 C.R.2d 324 [denial of discretionary land use permit does not infringe constitutionally protected property interest for purposes of 42 U.S.C., §1983]; *Conn v. Gabbert* (1999) 526 U.S. 286, 119 S.Ct. 1292, 1296, 143 L.Ed.2d 399, 407 ["Fourteenth Amendment right to practice one's calling is not violated by execution of a search warrant, whether calculated to annoy or even to prevent [attorney's] consultation with a grand jury witness"]; *Zelig v. Los Angeles* (2002) 27 C.4th 1112, 1147, 119 C.R.2d 709, 45 P.3d 1171 [criticizing *Zuniga*; action for deprivation of civil rights cannot be based on failure of county to provide protection from private violation; fact that shooting took place in courthouse while victim was pursuing litigation does not change result]; 32 *Loyola L.A. L. Rev.* 907 [*Conn v. Gabbert*]; 4 *Rotunda*, §19.19; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §68 et seq.)

In *Dennis v. Higgins* (1991) 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969, petitioner, doing business as a motor carrier in Ohio, filed a class action suit in Nebraska against the State of Nebraska, challenging the constitutionality of retaliatory taxes and fees imposed on motor carriers with vehicles registered in other states and operated in Nebraska. He sought declaratory and injunctive relief, and also a claim under 42 U.S.C., §1983 based on the unlawful burden on interstate commerce. *Held*, a suit for violation of the Commerce Clause may be brought under §1983.

(a) The Court has repeatedly held that the coverage of 42 U.S.C., §1983 must be broadly construed. (111 S.Ct. 868, 112 L.Ed.2d 975, citing *Golden State Transit Corp. v. Los Angeles* (1989) 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420.) Respondents argued that the Commerce Clause merely allocates power between the federal and state Governments, and does not confer "rights." But the clause is also a self-executing substantive restriction on permissible state regulation of interstate commerce (see *infra*, §1300) giving injured individuals the right to sue for injunctive and declaratory relief. "This combined restriction on state power and entitlement to relief ... amounts to a 'right, privilege, or immunity' under the ordinary meaning of those terms." (111 S.Ct. 871, 112 L.Ed.2d 980.)

(b) The attempt to analogize the Commerce Clause to the Supremacy Clause is unsound. The Supremacy Clause is not a source of federal rights; it secures federal rights by according them priority when they come into conflict with state law. "By contrast, the Commerce Clause of its own force imposes limitations on state regulation of commerce, and is the source of a right of action in those injured by regulations that exceed such limitations." (111 S.Ct. 872, 112 L.Ed.2d 978.)

Two justices joined in a dissent, asserting that 42 U.S.C., §1983 "now becomes simply one more weapon in the litigant's arsenal, to be considered whenever the defendant is a state actor and its use is advantageous to the plaintiff." (111 S.Ct. 880, 112 L.Ed.2d 990.)

In *Galland v. Clovis* (2001) 24 C.4th 1003, 103 C.R.2d 711, 16 P.3d 130, 12 Summary (10th), *Real Property*, §§595, 596, plaintiff landowners sought damages for costs incurred as a result of defendant city's arbitrary and unreasonable rent adjustment hearings. The court set forth the appropriate standard for determining "when the actions of an administrative body charged with implementing the law are arbitrary and conscience-shocking in a constitutional sense." (24 C.4th 1034.)

(a) To prevail in an action for damages for a substantive due process violation under 42 U.S.C., §1983, "a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities. Only a substantial infringement of state law prompted by personal or group animus, or a *deliberate flouting of the law that trammels significant personal or property rights*, qualifies for relief under § 1983. ... Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute." (24 C.4th 1034, quoting federal appellate case.)

(b) Here, "a deliberate flouting of the law may be said to have occurred if the city's demands for information and other procedural demands were so excessive and irrelevant to the regulatory task at hand as to lead a court to conclude that such demands were imposed not in order to obtain more information or increase the reliability of the eventual decision, but rather to obstruct or discourage landlords from either requesting or obtaining reasonable rent increases to which they are constitutionally entitled." (24 C.4th 1036.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Grassilli v. Barr* (2006) 142 C.A.4th 1260, 1279, 1282, 48 C.R.3d 715 [substantial evidence supported plaintiff's claim that CHP officers wrongfully retaliated against him after he exercised free speech rights by making complaint about officer's improper conduct; plaintiff was not required to prove lack of probable cause for repeated traffic and equipment stops and citations]; *Benn v. Los Angeles* (2007) 150 C.A.4th 478, 490, 58 C.R.3d 563 [nonprofit agency that contracted with county to provide family and foster services to dependent minors did not have property interest in its contract that gave it enforceable procedural and substantive due process rights; contract included provision that it could be terminated "for convenience" in best interests of county]; 4 Rotunda 4th, §19.19.



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8 Witkin Sum. Cal. Law Const Law § 821

[§ 821] Federal Statutory Rights.

(1) *In General.* The phrase "and laws" in 42 U.S.C., §1983 is not limited to civil rights or equal protection laws; the statute creates a cause of action for deprivation of any federal statutory right. (*Maine v. Thiboutot* (1980) 448 U.S. 1, 100 S.Ct. 2502, 2506, 65 L.Ed.2d 555, 561; see *Wright v. Roanoke Redevelopment & Housing Authority* (1987) 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 [low-income tenants charged higher rent than allowable under Brooke Amendment to Housing Act of 1937 were entitled to bring §1983 action]; 94 Harv. L. Rev. 223 [*Maine v. Thiboutot*]; 92 Cal. L. Rev. 1119 [arguing that No Child Left Behind Act should be enforceable under 42 U.S.C., §1983]; 9 Hastings Const. L. Q. 487 [same]; 4 Rotunda, §19.20; 15 Am.Jur.2d (2000 ed.), Civil Rights §70.) Despite the broad language in *Maine v. Thiboutot*, *supra*, the Supreme Court has recognized two exceptions to the applicability of 42 U.S.C., §1983 to statutory violations.

(2) *Exception: Comprehensive Enforcement Provided by Other Statute.* *Middlesex County Sewerage Authority v. National Sea Clammers Assn.* (1981) 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435, involved alleged violations of the Federal Water Pollution Control Act (33 U.S.C., §1251 et seq.) and the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C., §1401 et seq.): "[W]hen 'a state official is alleged to have violated a federal statute which provides its own *comprehensive enforcement scheme*, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under §1983.' " (101 S.Ct. 2626, 69 L.Ed.2d 4560.) (See *Smith v. Robinson* (1984) 468 U.S. 992, 104 S.Ct. 3457, 3470, 82 L.Ed.2d 746, 766 [Education of the Handicapped Act was sole remedy for handicapped child asserting right to free appropriate education under either Act itself or Equal Protection Clause]; cf. *White v. California* (1987) 195 C.A.3d 452, 463, 240 C.R. 732 [Act contains no class action provision; hence, plaintiff could bring §1983 class action based on systematic exclusion of his class from Act entitlements].)

(3) *Exception: No Enforceable Right.* An exception occurs when the statute in question does not create enforceable "rights" under 42 U.S.C., §1983. In *Pennhurst State School & Hosp. v. Halderman* (1981) 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694, the main issue was whether there was a private right of action to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (former 42 U.S.C., §6000 et seq.), a federal-state grant program providing federal funds for treatment of the disabled to states complying with the conditions of the Act.

"[R]espondents here, unlike the plaintiff in *Thiboutot* who alleged that state law prevented him from receiving federal funds to which he was entitled, can only claim that the state plan has not provided adequate 'assurances' to the Secretary. It is at least an open question whether an individual's interest in having a State provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of §1983." (101 S.Ct. 1545, 67 L.Ed.2d 714.) (See *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 109 S.Ct. 2702, 2722, 105 L.Ed.2d 598, 627 [action under 42 U.S.C., §1983 is exclusive federal damages remedy for violation of 42 U.S.C., §1981 (supra, §814) by state actor]; *Golden State Transit Corp. v. Los Angeles* (1989) 493 U.S. 103, 110 S.Ct. 444, 452, 107 L.Ed.2d 420, 432 [National Labor Relations Act grants rights enforceable under 42 U.S.C., §1983]; *Wilder v. Virginia Hosp. Assn.* (1990) 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 [Boren Amendment, imposing binding obligation on states participating in Medicaid program to adopt reasonable and adequate rates, is enforceable under 42 U.S.C., §1983 by health care providers]; *Blessing v. Freestone* (1997) 520 U.S. 329, 117 S.Ct. 1353, 1361, 137 L.Ed.2d 569, 584 [state agency compliance with Title IV-D of Social Security Act is not federal right enforceable by private individual under 42 U.S.C., §1983]; 103 Harv. L. Rev. 320 [Jett]; 104 Harv. L. Rev. 339 [Golden State Transit Corp.].)

In *Suter v. Artist M.* (1992) 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1, the Court held that the Adoption Assistance and Child Welfare Act of 1980 did not create a right of private individuals to enforce its provisions by an action under the Act or under 42 U.S.C., §1983.

In *Soldal v. Cook County, Illinois* (1992) 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450, plaintiff mobilehome owners sued deputy sheriffs and the owner and manager of a trailer park for disconnecting their trailer and towing it off the park premises. The Court of Appeals held that the Fourth Amendment protection against search and seizures applies only where privacy and liberty interests are infringed, and that the action would not lie where only possessory interests were involved. *Held*, the language of the Fourth Amendment, and the case law, make it clear that the Amendment protects property as well as privacy. (113 S.Ct. 544, 549, 121 L.Ed.2d 459, 465.)

In *Gonzaga University v. Doe* (2002) 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309, the Court held that the Family Educational Rights and Privacy Act (FERPA), which prohibits federal funding of educational institutions that release educational records to unauthorized persons, is a funding provision that does not provide a basis for private enforcement under 42 U.S.C., §1983. That section may be used only to assert violations of federal *rights*, and not merely violations of federal *law*. (122 S.Ct. 2275, 153 L.Ed.2d 321.) FERPA lacks the "rights creating" language necessary to show requisite congressional intent to create new rights. The focus of the statute is on the direction to the Secretary of Education to withhold funds and not on the individual entitlements of students and parents. (122 S.Ct. 2277, 153 L.Ed.2d 323.) (See 116 Harv. L. Rev. 372 [Gonzaga].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 4 Rotunda 4th, §19.20; 52 U.C.L.A. L. Rev. 601 [An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation]. (2) *Exception: Comprehensive Enforcement Provided by Other Statute.* The availability of a private judicial remedy does not conclusively establish congressional intent to preclude relief under 42 U.S.C., §1983. (*Rancho Palos Verdes, Calif. v. Abrams* (2005) 544 U.S. 113, 125 S.Ct. 1453, 1459, 161 L.Ed.2d 316, 327 [because Telecommunications Act provides comprehensive scheme to enforce its limitations on local zoning authority, private person had no right of enforcement under §1983].)

(3) *Exception: No Enforceable Right.* See *Benn v. Los Angeles* (2007) 150 C.A.4th 478, 494, 58 C.R.3d 563 [federal Adoption Assistance and Child Welfare Act did not create enforceable private rights in nonprofit agency that contracted with county to provide family and foster services to dependent minors].



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8 Witkin Sum. Cal. Law Const Law § 822

[§ 822] High-Speed Police Pursuit.

In *Sacramento v. Lewis* (1998) 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043, the question was whether, in a high-speed police pursuit case, the legal standard of conduct necessary to establish a police officer's violation of substantive due process under the Fourteenth Amendment is "shocks the conscience," "deliberate indifference," or "reckless disregard." *Held*, the proper standard is "shocks the conscience." "[H]igh-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under 42 U.S.C., §1983." (118 S.Ct. 1720, 140 L.Ed.2d 1062.)

(a) There is no Fourth Amendment seizure where a pursuing police car seeks to stop a suspect. Thus, liability in this case does not turn on an application of the reasonableness standard governing searches and seizures. Instead, the due process standard of liability for constitutionally arbitrary executive action applies. (118 S.Ct. 1715, 140 L.Ed.2d 1056.)

(b) Due process rules are not subject to mechanical application. Deliberate indifference that shocks the conscience in one environment, such as in ignoring the medical needs of a prisoner, may not be so patently egregious in another, such as in a prison riot, "and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." (118 S.Ct. 1718, 140 L.Ed.2d 1060.) It is a police officer's duty to restore and maintain lawful order. An officer must act decisively and show restraint at the same time. Often his decisions must be made in haste and under pressure, without time to deliberate. (118 S.Ct. 1720, 140 L.Ed.2d 1061.) "[W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose" to shock the conscience. (118 S.Ct. 1720, 140 L.Ed.2d 1062.)

Four justices concurred in three separate opinions (118 S.Ct. 1721, 1722, 140 L.Ed.2d 1063, 1065), and three justices concurred in the judgment in two separate opinions (118 S.Ct. 1723, 140 L.Ed.2d 1065, 1066). (See *Weaver v. California* (1998) 63 C.A.4th 188, 204, 209, 73 C.R.2d 571 [police maneuver used to stop fleeing car was "seizure" within meaning of Fourth Amendment, but there could be no liability under 42 U.S.C., §1983 where seizure was reasonable]; 112 Harv. L. Rev. 192 [*Sacramento v. Lewis*]; 32 Loyola L.A. L. Rev. 1357 [same]; 41 Santa Clara L. Rev.

437 [same].)

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8 Witkin Sum. Cal. Law Const Law § 823

[§ 823] Voluntary Commitment.

In *Zinerman v. Burch* (1990) 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100, plaintiff Burch, under medication, requested admission to and treatment at a Florida state mental hospital. After his release, he filed a claim against doctors, administrators, and staff members at the hospital, alleging that defendants had violated state law by admitting him as a voluntary patient when they knew or should have known that he was incapable of giving an informed consent, and that their failure to give him a hearing to challenge his admission and treatment was a denial of due process. *Held*, the complaint was sufficient to state a cause of action.

Defendant petitioners relied on *Parratt v. Taylor* (1981) 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420, and *Hudson v. Palmer* (1984) 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393, *infra*, §825, holding that a deprivation of a constitutionally protected property interest by random unauthorized conduct does not give rise to a claim under 42 U.S.C., §1983 unless the state fails to provide a postdeprivation remedy. (110 S.Ct. 985, 108 L.Ed.2d 116.) These cases were not controlling:

"[P]etitioners cannot escape §1983 liability by characterizing their conduct as a 'random, unauthorized' violation of Florida law which the state was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy. Burch, according to the allegations of his complaint, was deprived of a substantial liberty interest without either valid consent or an involuntary placement hearing, by the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards. Such a deprivation is foreseeable, due to the nature of mental illness, and will occur, if at all, at a predictable point in the admission process. Unlike *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due because no deprivation safeguards would be of use in preventing the kind of deprivation alleged." (110 S.Ct. 990, 108 L.Ed.2d 122.) Four justices joined in a dissent. (On *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, see *supra*, §402.)

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8 Witkin Sum. Cal. Law Const Law § 824

[§ 824] Distinction: Ordinary Tort.

(1) *Defamation*. In *Paul v. Davis* (1976) 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405, the chiefs of police of two Kentucky counties, in a combined effort to alert merchants to shoplifters during the Christmas season, distributed a flyer to 800 merchants in the Louisville metropolitan area. The flyer warned of "active shoplifters," and contained the photographs and names of persons arrested during 1971 and 1972, including respondent Davis. Davis had been arrested, had pleaded not guilty, and had never been brought to trial; the charge was dismissed shortly after circulation of the flyer. When the flyer was brought to the attention of Davis' employer, he was warned about becoming involved in a similar situation in the future. Thus, Davis had a tort cause of action for defamation; but instead of suing in tort in state court, he brought an action against the two police chiefs under the federal Civil Rights Act (42 U.S.C., §1983). *Held*, he had no cause of action.

(a) Davis' theory was that use of the phrase "Active Shoplifters" by officers of the county government, together with his name and picture, deprived him of liberty protected by the Fourteenth Amendment. This construction of the Civil Rights statute "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." (96 S.Ct. 1159, 47 L.Ed.2d 412.)

(b) The plurality opinion in *Screws v. United States* (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, dealing with the criminal counterpart of 42 U.S.C., §1983 (see *supra*, §815), pointed out that Congress did not make all torts of state officials federal crimes; it brought within the statute only those acts that deprived a person of some rights secured by the U.S. Constitution or laws. *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, *infra*, §828, is to the same effect. (96 S.Ct. 1160, 47 L.Ed.2d 413.)

(c) Defamation calls for no exception. "[T]he weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause." (96 S.Ct. 1161, 47 L.Ed.2d 414.) In cases where state action altered or extinguished a right or status previously recognized by state law, the procedural guarantees of the Due Process Clause were properly invoked. But the interest in

reputation is quite different from the "liberty" or "property" recognized in these decisions. It is simply one of a number that the state may protect by virtue of its tort law, providing a forum for vindication of those interests by means of damage actions. (96 S.Ct. 1166, 47 L.Ed.2d 419.) (See *Ellenberger v. Espinosa* (1994) 30 C.A.4th 943, 949, 36 C.R.2d 360 [under *Paul v. Davis* and *Siebert v. Gilley* (1991) 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277, publication of defamatory statements, even if accompanied by loss of business or other property interests, does not violate federal Constitution]; *Higginbotham v. King* (1997) 54 C.A.4th 1040, 1046, 63 C.R.2d 114 [same]; 90 Harv. L. Rev. 86 [*Paul v. Davis*]; 17 Santa Clara L. Rev. 959 [same]; 30 Stanf. L. Rev. 191 [same].)

(2) *False Imprisonment*. In *Baker v. McCollan* (1979) 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433, the police, under a valid warrant, arrested the wrong man, and detained him 3 days over a holiday weekend until information establishing his identity was received. He alleged that defendant sheriff had negligently failed to establish identification procedures that would have revealed his innocence. *Held*, no cause of action was stated. There may have been a cause of action under state tort law, but 42 U.S.C., §1983 imposes liability only for violations of rights protected by the Constitution. Just as in *Estelle v. Gamble* (1976) 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251, *infra*, §826, in which it was said that medical malpractice does not become a constitutional violation merely because the victim is a prisoner, "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." (99 S.Ct. 2696, 61 L.Ed.2d 443.) The Court observed, however, that indefinite detention in the face of repeated protests of innocence might in effect deny the accused a speedy trial and therefore amount to a deprivation of liberty without due process of law. (99 S.Ct. 2694, 2695, 61 L.Ed.2d 441, 442.) (See 11 A.L.R.4th 228 [civil liability for attempting to deprogram adult member of religious sect].)

(3) *Other Torts*. In *Garcia v. Superior Court* (1990) 50 C.3d 728, 739, 268 C.R. 779, 789 P.2d 960, 5 Summary (10th), *Torts*, §821, the court held that the state's failure to prevent a parolee who had previously been convicted of murdering his wife, from murdering his estranged lover, did not give rise to a cause of action under 42 U.S.C., §1983. (See *Collins v. Harker Heights, Texas* (1992) 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261, *infra*, §832 [no action against city under 42 U.S.C., §1983 for alleged failure to train or warn employees of known hazards in workplace].)

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aa. Fourth Amendment.

8 *Witkin Sum. Cal. Law Const Law* § 825

[§ 825] Fourth Amendment.

(1) *In General.* In *Hudson v. Palmer* (1984) 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393, plaintiff's claim was based on a shakedown search of his cell for the purpose of harassing him, and the seizure and destruction of noncontraband property. *Held*, there was no violation of plaintiff's Fourth Amendment rights, and hence, no cause of action under 42 U.S.C., §1983.

(a) "[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." (104 S.Ct. 3200, 82 L.Ed.2d 402.)

(b) The Fourth Amendment's proscription against unreasonable seizures is also inapplicable in a prison cell. "Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests." (104 S.Ct. 3201, 82 L.Ed.2d 404, footnote 8.) (See *Albright v. Oliver* (1994) 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 [action under 42 U.S.C., §1983 claiming infringement of right to be free from prosecution should be judged under Fourth Amendment]; 92 *Harv. L. Rev.* 610 [prisoner's suits]; 19 *Loyola L. Rev.* 551 [*Hudson v. Palmer*]; 64 *Am.Jur. Trials* 425 [Asserting Claims of Unconstitutional Prison Conditions Under 42 U.S.C., §1983].)

(2) *Applicable Standard.* The validity of a claim under 42 U.S.C., §1983 must be judged by the standard that governs the particular constitutional right involved, not by a generic "substantive due process" standard. In *Graham v. Connor* (1989) 490 U.S. 386, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443, 453, 454, petitioner claimed that police officers used excessive force in the course of an investigative stop and detention. The district court, using a generalized "excessive force" test, granted respondents' motion for a directed verdict, and the Court of Appeals affirmed. *Held*, the Fourth Amendment's "objective reasonableness" standard should have been applied. 42 U.S.C., §1983 is not a source of substantive rights; it provides a method for vindicating rights conferred elsewhere. Hence, analysis of an excessive force claim begins by identifying the specific constitutional right involved. The claim is then judged by the standard that

governs that right. (109 S.Ct. 1870, 104 L.Ed.2d 453, 454.) A claim that arises in the context of an arrest, investigatory stop, or other seizure of a person invokes the Fourth Amendment and is analyzed under its objective reasonableness test, not under a substantive due process approach. (109 S.Ct. 1871, 1872, 104 L.Ed.2d 454, 456.) (See 22 *Pacific L. J.* 157.)

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bb. Eighth Amendment.

8 Witkin Sum. Cal. Law Const Law § 826

[§ 826] Eighth Amendment.

In *Estelle v. Gamble* (1976) 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251, respondent, an inmate of a Texas prison, brought an action under 42 U.S.C., §1983 against prison officials and doctors, alleging violation of the Eighth Amendment by failure to give him proper medical care for an injury suffered while performing a work assignment. *Held*: (a) The *deliberate* indifference to serious medical needs of prisoners is an "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment, whether the indifference is manifested by doctors in their response to the prisoner's needs, or by guards denying or delaying access to medical care or intentionally interfering with treatment prescribed. (97 S.Ct. 291, 50 L.Ed.2d 260.) (b) However, the *inadvertent* or *negligent* failure to diagnose or treat a medical condition does not support a claim under the Amendment. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (97 S.Ct. 292, 50 L.Ed.2d 261.) (See *Ochoa v. Superior Court* (1985) 39 C.3d 159, 177, 216 C.R. 661, 703 P.2d 1, 6 Summary (10th), *Torts*, §1013 ["woefully inadequate" medical treatment may be basis for action under 42 U.S.C., §1983]; *West v. Atkins* (1988) 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40, *infra*, §828 [part-time state-employed doctor for inmates acted under color of state law]; *Thor v. Superior Court* (1993) 5 C.4th 725, 746, 21 C.R.2d 357, 855 P.2d 375 [distinguishing *Estelle v. Gamble*].)

In *Hudson v. McMillian* (1992) 503 U.S. 1, 112 S.Ct. 995, 998, 999, 117 L.Ed.2d 156, 165, 166, the Court, using the approach of *Whitley v. Albers* (1986) 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251, held that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury. The Court distinguished *Wilson v. Seiter* (1991) 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271. (112 S.Ct. 999, 117 L.Ed.2d 166.) Two justices dissented.

Helling v. McKinney (1993) 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22, held that a prisoner stated a cause of action by alleging that prison authorities had, with deliberate indifference, exposed him to levels of environmental tobacco smoke that posed an unreasonable risk of serious damage to his future health. Two justices dissented.

In *Farmer v. Brennan* (1994) 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811, an action by a preoperative transsexual who claimed to have been raped and beaten while incarcerated with other males in a federal prison, the

Court for the first time defined the "deliberate indifference" standard it had applied in *Estelle v. Gamble* and *Helling v. McKinney*. The test is not an objective one. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (114 S.Ct. 1979, 128 L.Ed.2d 825.) (See 66 A.L.R.5th 111 [Prisoner's Right To Die or Refuse Medical Treatment]; 64 Am.Jur. Trials 425 [Asserting Claims of Unconstitutional Prison Conditions Under 42 USCA, § 1983].)

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8 Witkin Sum. Cal. Law Const Law § 827

[§ 827] Fourteenth Amendment.

In *Daniels v. Williams* (1986) 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662, plaintiff prisoner, who fell over a pillow that had been negligently left on a stairway by a correctional officer, claimed that he had been deprived of his liberty interest in freedom from bodily harm without due process of law. *Held*, there was no cause of action under 42 U.S.C., §1983. Prior decisions support the "traditional and commonsense notion that the Due Process Clause, like its forebear in the Magna Carta, ... was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" (106 S.Ct. 665, 88 L.Ed.2d 668.) Hence, "[t]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." (106 S.Ct. 663, 665, 88 L.Ed.2d 666, repudiating contrary statement in *Parratt v. Taylor* (1981) 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420.) (See *Davidson v. Cannon* (1986) 474 U.S. 344, 106 S.Ct. 668, 670, 88 L.Ed.2d 677, 682 [*Daniels*' reasoning applied to prison officials' negligent failure to protect plaintiff from assault by fellow prisoner].)

The holdings in *Daniels* and *Davidson* were based on the absence of a "deprivation" within the meaning of the Fourteenth Amendment. In *Hudson v. Palmer* (1984) 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393, *supra*, §825, the Court assumed that the *intentional* destruction of the prisoner's noncontraband property was a "deprivation," but held that it was not "without due process of law."

(a) "[W]hen deprivations of property are effected through random and unauthorized conduct of a state employee, *predeprivation procedures* are simply 'impracticable' since the state cannot know when such deprivations will occur." (104 S.Ct. 3203, 82 L.Ed.2d 407.)

(b) "[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause ... if a meaningful *postdeprivation remedy* for the loss is available." (104 S.Ct. 3204, 82 L.Ed.2d 407.) There are several common law remedies available under Virginia law by which plaintiff can obtain adequate compensation for his loss. (104 S.Ct. 3204, 82 L.Ed.2d 408.)

In *Irwin v. Hemet* (1994) 22 C.A.4th 507, 27 C.R.2d 433, the parents and children of a city jail inmate who

committed suicide while in jail brought a wrongful death action against the city, the jail's watch commander, and three officers, and included a claim for deprivation of federal constitutional rights under 42 U.S.C., §1983. *Held*, plaintiffs could not state a claim against the individual defendants under 42 U.S.C., §1983. While the section contains no state-of-mind requirement, the underlying constitutional violation still needs to be proved and a particular mental state may therefore need to be established. (22 C.A.4th 519, citing *Daniels v. Williams*.) Plaintiffs alleged deprivation of their liberty interest in the continuation of the companionship and society between a parent and child. Deliberate indifference by defendants was the minimum required mental state, and this could not be established because the individual defendants presented un rebutted evidence that they neither knew nor should have known that the decedent was likely to kill himself. (22 C.A.4th 523, 525.) (See *Lucas v. Los Angeles* (1996) 47 C.A.4th 277, 287, footnote 4, 54 C.R.2d 655 [*Irwin* appears to have been decided before *Farmer v. Brennan* (1994) 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811, *supra*, §826, because *Irwin* applies objective, rather than subjective, test for deliberate indifference]; *Kentucky Dept. of Corrections v. Thompson* (1989) 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 [regulations containing nonexhaustive list of categories of excludable prison visitors did not give prisoners liberty interest protected by Due Process Clause]; 66 A.L.R.5th 237 [Validity, Construction, and Application of Restrictions on Use or Possession of Tobacco Products in Correctional Facilities].)

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SUPPLEMENT: [This section is current through the latest supplement]



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1. Original Civil Rights Acts.

d. Elements of Cause of Action.

3. Color of State Law.

aa. Constitutional and Statutory Provisions.

8 Witkin Sum. Cal. Law Const Law § 828

[§ 828] Constitutional and Statutory Provisions.

In *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, plaintiffs, a black family, alleged that 13 Chicago police officers broke into their home without a warrant or search warrant, physically mishandled them, ransacked their home, held the father for 10 hours without charge, without bringing him before a magistrate, and without permitting him to call his family or attorney, and finally released him without any charge. *Held*, the complaint stated a cause of action against the officers, but not the city of Chicago.

On the crucial question of the meaning of "under color of" state law, the Court explained that it encompassed both action, i.e., misuse of power, and inaction, i.e., failure to enforce laws. (a) The definition formulated in *United States v. Classic* (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, and *Screws v. United States* (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, with respect to 18 U.S.C., §242 (supra, §815) is applicable to 42 U.S.C., §1983: " 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.' " (81 S.Ct. 482, 5 L.Ed.2d 503.) (b) "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (81 S.Ct. 480, 5 L.Ed.2d 501.) (For decisions overruling *Monroe's* denial of right of action against municipalities, see *infra*, §830.)

The issue was involved in several later cases. (See *Polk County v. Dodson* (1981) 454 U.S. 312, 102 S.Ct. 445, 453, 70 L.Ed.2d 509, 516 [in representing indigents, public defender exercises private function, i.e., giving undivided loyalty to client's interests, and hence does not act under color of state law]; *Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 102 S.Ct. 2764, 2771, 73 L.Ed.2d 418, 425 [although private school had fiscal and regulatory relationship with public authorities, its decisions concerning discharge of employees were not influenced by state regulation and hence, were not made under color of state law]; *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 [corporate creditor acted under color of state law in using attachment procedure requiring participation by state officials]; *Tower v. Glover* (1984) 467 U.S. 914, 104 S.Ct. 2820, 2824, 81 L.Ed.2d 758, 764 [public defenders who

conspired with state officials to secure their client's conviction acted under color of state law]; 4 Rotunda, §19.17; 96 *Harv. L. Rev.* 241 [*Lugar*]; 21 *Hastings Const. L. Q.* 405 [argument for considering attorneys for SLAPP plaintiffs as state actors subject to liability under 42 U.S.C., §1983]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §72 et seq.)

In *West v. Atkins* (1988) 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40, the question presented was "whether a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis" acts under color of state law in treating an inmate. In holding that he did, the court distinguished *Polk County v. Dodson*, *supra*, and followed *Estelle v. Gamble* (1976) 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251, *supra*, §826.

(a) "We now make explicit what was implicit in our holding in *Estelle*: Respondent, as a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of §1983 when undertaking his duties in treating petitioner's injury. Such conduct is fairly attributable to the State." (108 S.Ct. 2258, 101 L.Ed.2d 53.)

(b) The only medical care petitioner could receive for his injury was that provided by the state; and if the doctor misused his power by demonstrating deliberate indifference to petitioner's serious medical needs, "the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care." (108 S.Ct. 2259, 101 L.Ed.2d 53.)

(c) The fact that the state employed the doctor under a contractual arrangement does not alter the analysis. "Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract." (108 S.Ct. 2259, 101 L.Ed.2d 54.)

(d) The fact that the employment was part-time is likewise immaterial. "It is the physician's function while working for the State, not the amount of time he spends in performance of those duties or the fact that he may be employed by others to perform similar duties, that determines whether he is acting under color of state law." (108 S.Ct. 2259, 101 L.Ed.2d 54.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 4 Rotunda 4th, §19.17.



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8 Witkin Sum. Cal. Law Const Law § 829

[§ 829] Custom With Force of Law.

In *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142, petitioner, a white schoolteacher from New York, went to defendant's Hattiesburg restaurant with six black children who were students in her Mississippi Freedom School. The children were offered service, but petitioner was refused service and was arrested and charged with vagrancy. In her suit for damages, under 42 U.S.C., §1983, verdict and judgment were given for defendant. *Held*, reversed.

(a) Plaintiff must prove deprivation of a right "under color of any statute, ordinance, regulation, custom, or usage." "Custom," as used in the statute, requires state involvement, not simply a long-standing social practice of people in the locality; i.e., the custom "must have the force of law by virtue of the persistent practice of state officials." (90 S.Ct. 1613, 26 L.Ed.2d 159.)

(b) But plaintiff can recover, under the rule of the restaurant sit-in cases (*supra*, §760), if she can show that discriminatory action of a private person is compelled by state law. (90 S.Ct. 1615, 26 L.Ed.2d 161.) "For state action purposes it makes no difference ... whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law--in either case it is the State that has commanded the result by its law. Without deciding whether less substantial involvement of a State might satisfy the state action requirement of the Fourteenth Amendment, we conclude that petitioner would show an abridgement of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom of segregating the races in public restaurants." (90 S.Ct. 1615, 26 L.Ed.2d 162.) (See 84 Harv. L. Rev. 71; 8 San Diego L. Rev. 144; 4 Rotunda, §19.18; 15 Am.Jur.2d (2000 ed.), Civil Rights §72 et seq.)

In *Monell v. Department of Social Services of New York* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, *infra*, §830, the Court held that municipal liability could be based on custom. "[A]lthough the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other §1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received

formal approval through the body's official decisionmaking channels." (98 S.Ct. 2036, 56 L.Ed.2d 635.) (See *Board of County Commrs. of Bryan County, Oklahoma v. Brown* (1997) 520 U.S. 397, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626, 639 [following *Monell*]; 62 So. Cal. L. Rev. 581 [Bryan County].)

SUPPLEMENT: [This section is current through the latest supplement]
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1. Right of Action Established.

8 Witkin Sum. Cal. Law Const Law § 830

[§ 830] Right of Action Established.

(1) *In General.* *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, supra, §828, held that a municipal corporation was not a "person" subject to liability under 42 U.S.C., §1983. In *Monell v. Department of Social Services of New York* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, female employees of New York City alleged that they had been forced to take unpaid pregnancy leaves of absence while still medically able to continue work. Although the lower court found that their constitutional rights had been infringed under *Cleveland Bd. of Education v. LaFleur* (1974) 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52, supra, §225, back pay was denied on the ground that these damages would ultimately be paid by the city, contrary to the immunity rule declared in *Monroe v. Pape*. Held, reversed, and on this point, *Monroe v. Pape* is overruled. (98 S.Ct. 2022, 56 L.Ed.2d 619.)

(a) The basic rule of liability is that local governing bodies can be sued directly under 42 U.S.C., §1983 for monetary, declaratory, or injunctive relief where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (98 S.Ct. 2035, 56 L.Ed.2d 635.)

(b) However, liability cannot be based on the doctrine of respondeat superior. "[A] local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." (98 S.Ct. 2038, 56 L.Ed.2d 638.) (See *Brandon v. Holt* (1985) 469 U.S. 464, 105 S.Ct. 873, 878, 83 L.Ed.2d 878, 885 [judgment against public official in his official capacity imposes liability on public entity, provided it received notice and opportunity to respond]; *Los Angeles v. Heller* (1986) 475 U.S. 796, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806, 810 [in action against police officer and municipality based on officer's lack of probable cause and use of excessive force in making arrest, general verdict for officer required dismissal of complaint against municipality]; 92 Harv. L. Rev. 311 [Monell]; 44 Hastings L. J. 499 [Bifurcation of Civil Right Defendants: Undermining Monell in Police Brutality Cases]; 44 Hastings L. J. 753 [endless cycle of abuse; why 42 U.S.C., §1983 is ineffective in deterring police brutality]; 62 So. Cal. L. Rev. 539 [Monell legacy: balancing federalism concerns and municipal accountability under 42 U.S.C., §1983]; 4 Rotunda, §19.32.)

Many later cases have agreed that municipal liability is not based on respondeat superior. (See *St. Louis v. Praprotnik* (1988) 485 U.S. 112, 108 S.Ct. 915, 927, 99 L.Ed.2d 107, *infra*, §831 [restating and reaffirming *Monell's* rejection of respondeat superior]; *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 109 S.Ct. 2702, 2722, 105 L.Ed.2d 598, 626, 627 [action under 42 U.S.C., §1983 is exclusive federal damages remedy for violation of 42 U.S.C., §1981 (*supra*, §814) by state actor; hence, municipality may not be held liable under respondeat superior theory]; *Board of County Commrs. of Bryan County, Oklahoma v. Brown* (1997) 520 U.S. 397, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626, 639 [following *Monell*]; *Choate v. Orange* (2000) 86 C.A.4th 312, 330, 103 C.R.2d 339 [where governmental entity indemnifies employees, and plaintiffs have already recovered full compensation from them, plaintiffs may not bring action against entity under *Monell*]; 103 Harv. L. Rev. 320 [*Jett*]; 35 U.C.L.A. L. Rev. 1187 [role of causation in §1983 municipal liability analysis].)

(2) *No Immunity From Suit.* A cause of action under 42 U.S.C., §1983 is independent from a state cause of action, even where the same conduct gives rise to both. The state cause of action may be barred by public entity immunity, but this does not mean that a city or its employees may not be liable under 42 U.S.C., §1983 for deprivation of a person's civil rights under color of law. (*Berman v. Daly City* (1993) 21 C.A.4th 276, 285, 286, 26 C.R.2d 493 [action by driver injured when struck by criminal suspect's car being pursued by police officer; officer's conduct, even if negligent, was not sufficiently reckless or outrageous to support action under 42 U.S.C., §1983].)

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit (1993) 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517, rejected the view that a federal court may apply a "heightened pleading standard" in civil rights cases alleging municipal liability under *Monell*. The municipality argued that a more relaxed pleading requirement would subject municipalities to expensive and time-consuming discovery in every §1983 case, "eviscerating their immunity from suit." (113 S.Ct. 1162, 122 L.Ed.2d 523.)

"This argument wrongly equates freedom from liability with immunity from suit." (113 S.Ct. 1162, 122 L.Ed.2d 523.) Unlike various government officials, municipalities do not enjoy immunity from suit, either absolute or qualified, under 42 U.S.C., §1983. A municipality can be sued under 42 U.S.C., §1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury. (113 S.Ct. 1162, 122 L.Ed.2d 523.) "The phenomenon of litigation against municipal corporations based on claimed constitutional violations by their employees dates from our decision in *Monell*. ... Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under §1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." (113 S.Ct. 1163, 122 L.Ed.2d 524.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 4 Rotunda 4th, §19.32.



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1a. (New) Superseding Intervening Cause.

8 Witkin Sum. Cal. Law Const Law § 830A

[§ 830A] (New) Superseding Intervening Cause.

In *Manta Management Corp. v. San Bernardino* (2008) 43 C.4th 400, 75 C.R.3d 353, 181 P.3d 159, plaintiff sought monetary damages under 42 U.S.C., §1983 against defendant city for lost profits to its business during a period in which a preliminary injunction and a stay pending appeal were in effect. Defendant had sought the preliminary injunction and stay, which were issued by the superior court and the Court of Appeal, respectively. Those courts ultimately ruled that the ordinance, which restricted adult clubs to certain districts in the city and which was the legal basis for the preliminary injunction, was unconstitutional. The California Supreme Court applied the tort concept of independent intervening cause. "[W]here a court is provided with appropriate facts to adjudicate a motion for a preliminary injunction or a motion for a stay pending appeal, the courts' intervening exercise of independent judgment breaks the chain of causation" for purposes of liability under 42 U.S.C., §1983. However, this rule does not apply when the judges are pressured or materially misled by a defendant to reach an erroneous decision. Here, because there was a dispute whether material misrepresentations were made, the case would be remanded for further proceedings. (43 C.4th 403, 412.)

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8 Witkin Sum. Cal. Law Const Law § 831

[§ 831] In General.

In *Oklahoma City v. Tuttle* (1985) 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791, the Court held that a municipal policy sufficient to impose liability under 42 U.S.C., §1983 could not be established by a single, isolated instance of misconduct by a police officer. (105 S.Ct. 2436, 2440, 85 L.Ed.2d 804, 810.) (See 13 *Hastings Const. L. Q.* 733.)

The question whether a *single decision* by a governmental official can ever establish the requisite governmental policy was explored in greater detail in *Pembaur v. Cincinnati* (1986) 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452, where deputy sheriffs and city policemen, acting on instructions from the county prosecutor, smashed down a door of plaintiff's medical clinic to serve capias on two of his employees. *Held*, the action, which violated plaintiff's Fourth Amendment rights, was taken pursuant to county policy.

(a) "[M]unicipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under §1983 for a single decision by its properly constituted legislative body ... because even a single decision by such a body unquestionably constitutes an act of official government policy." (106 S.Ct. 1298, 89 L.Ed.2d 463.) Moreover, *Monell v. Department of Social Services of New York* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, *supra*, §830, "makes clear that it expressly envisioned other officials 'whose acts or edicts may fairly be said to represent official policy.' " (106 S.Ct. 1298, 89 L.Ed.2d 463.)

(b) Hence, "municipal liability under §1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject in question." (106 S.Ct. 1300, 89 L.Ed.2d 465.)

(c) Here, the county prosecutor was authorized by statute and practice to make final decisions on legal questions. In ordering the officers to forcibly enter plaintiff's clinic, the prosecutor, rather than merely rendering legal advice, was establishing county policy under which the county could be held liable. (106 S.Ct. 1301, 89 L.Ed.2d 466.)

St. Louis v. Praprotnik (1988) 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107, observed that the plurality opinion in *Pembaur* had led to different interpretations by the Courts of Appeals, and attempted "again to clarify the issue." (108 S.Ct. 924, 99 L.Ed.2d 118.)

(a) The identification of policymaking officials is a question of state law, and is not a question of fact in the usual sense. "Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." (108 S.Ct. 925, 99 L.Ed.2d 119.)

(b) The plurality in *Pembaur* recognized that difficulties can arise when it is contended that a municipal policymaker has delegated his or her policymaking authority to another official. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability. If, however, a city's unlawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, §1983 could not serve its intended purpose. It may not be possible to draw an elegant line that will resolve this conundrum, but certain principles should provide useful guidance." (108 S.Ct. 925, 99 L.Ed.2d 120.) These principles are:

(1) "First, whatever analysis is used to identify municipal policymakers, egregious attempts by local government to insulate themselves from liability for unconstitutional policies are precluded by a separate doctrine. Relying on the language of §1983, the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law.' That principle, which has not been affected by *Monell* or subsequent cases, ensures that most deliberate municipal evasions of the Constitution will be sharply limited." (108 S.Ct. 926, 99 L.Ed.2d 120.)

(2) "Second, as the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. ... When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." (108 S.Ct. 926, 99 L.Ed.2d 120.)

Three justices joined in a separate concurrence criticizing the plurality's theory as "unduly narrow and unrealistic" (108 S.Ct. 928, 99 L.Ed.2d 123), and one justice dissented (108 S.Ct. 937, 99 L.Ed.2d 133). (See 102 Harv. L. Rev. 320 [*St. Louis v. Praprotnik*]; 62 So. Cal. L. Rev. 539; 35 U.C.L.A. L. Rev. 1187 [role of causation in §1983 municipal liability analysis].)

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SUPPLEMENT: [This section is current through the latest supplement]

In *Harman v. San Francisco* (2006) 136 C.A.4th 1279, 39 C.R.3d 589, the court, following *Pembaur v. Cincinnati* (1986) 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452, text, p. 256, held that defendant city and county was liable for racial discrimination against a white male. Plaintiff claimed that his promotion as an airport safety officer was delayed because a provisional pool of qualified applicants made up only of white applicants was terminated. Although there was no proof linking plaintiff's complaint of racial discrimination with policies of the civil service commission, under *Monell v. Department of Social Services of New York* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, text, §830, the commission was not the exclusive source of final policymaking authority. (136 C.A.4th 1299, 1300.) Here, defendant had effectively delegated its policymaking authority to the airport employment manager who operated as final arbiter of municipal policy regarding diversity staffing and provisional appointments. (136 C.A.4th 1301, 1303.)



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8 Witkin Sum. Cal. Law Const Law § 832

[§ 832] Inadequate Training.

In *Canton, Ohio v. Harris* (1989) 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412, plaintiff claimed that her due process right to medical attention while in custody was violated by virtue of the city's failure to train its police officers on when to summon medical care. *Held*, municipal liability under 42 U.S.C., §1983 could be imposed.

(a) "[T]he inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact." (109 S.Ct. 1204, 103 L.Ed.2d 426.) Under this test, it must be proved that inadequate training represents city policy and that the identified deficiency is closely related to the injury. (109 S.Ct. 1205, 1206, 103 L.Ed.2d 427, 428.)

(b) This approach is consistent with the rule of *Monell v. Department of Social Services of New York* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, *supra*, §830, that the violation must result from a municipal policy or custom. Also, to allow liability on a lesser standard would result in de facto respondeat superior liability, which was rejected in *Monell*. (109 S.Ct. 1205, 1206, 103 L.Ed.2d 427, 428.) (See *Irwin v. Hemet* (1994) 22 C.A.4th 507, 526, 527, 27 C.R.2d 433, *supra*, §827 [following *Canton*; parents and children of jail inmate who killed himself adequately alleged deprivation of liberty interest in companionship and society between parent and child resulting from city's adoption of custom or policy not to train jailers in suicide screening and prevention]; *Board of County Commrs. of Bryan County, Oklahoma v. Brown* (1997) 520 U.S. 397, 117 S.Ct. 1382, 1394, 137 L.Ed.2d 626, 646 [distinguishing *Canton*; municipality is not liable for sheriff's isolated decision to hire deputy without adequate screening where plaintiff failed to demonstrate that sheriff's decision reflected conscious disregard for high risk that deputy would use excessive force in violation of plaintiff's federally protected right]; *Melendez v. Los Angeles* (1998) 63 C.A.4th 1, 73 C.R.2d 469 [actions of off-duty police officers who used excessive force while working as private security officers without police department permission or approval did not trigger municipal liability under 42 U.S.C., §1983].)

Collins v. Harker Heights, Texas (1992) 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261, held that 42 U.S.C., §1983 does not provide a remedy for a municipal employee who is fatally injured in the course of his or her employment because the city customarily failed to train or warn its employees about known hazards in the workplace. "Even though

the city's conduct may be actionable under state law, we hold that §1983 does not apply because such conduct does not violate the Due Process Clause." (112 S.Ct. 1064, 117 L.Ed.2d 268.)

The opinion discusses *Canton* and *Oklahoma City v. Tuttle* (1985) 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791, supra, §831, explaining that "[o]ur purpose in citing these cases is to emphasize the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurs." (112 S.Ct. 1067, 117 L.Ed.2d 271.) "We are also not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' ... we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. ... The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship." (112 S.Ct. 1070, 117 L.Ed.2d 275.) (See supra, §824.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Original Civil Rights Acts.

e. Action Against Municipality.

2. Proof of Official Policy.

cc. Land Use Disputes.

8 Witkin Sum. Cal. Law Const Law § 833

[§ 833] Land Use Disputes.

In *Stubblefield Const. Co. v. San Bernardino* (1995) 32 C.A.4th 687, 38 C.R.2d 413, plaintiff developer, who was prevented from building an apartment complex, sued defendant city, its council, and former council member M for violations of substantive due process and equal protection under 42 U.S.C., §1983. The actions taken by defendants included the following: (1) annexing the property on the false promise that plaintiff would have the zoning necessary to complete the project; (2) telling plaintiff that it would be reviewed under the law in existence when it submitted a development application; (3) passing a new zoning ordinance that would require a conditional use permit from plaintiff, if the new ordinance applied to it; (4) passing an urgency ordinance that would make the new zoning ordinance applicable to plaintiff in 30 days; (5) appealing an environmental impact study, so that plaintiff could not meet the 30-day requirement; (6) passing an amendment to the review ordinance, under which proposed buildings had to be compatible with the surrounding neighborhood; and (7) denying plaintiff's request to have its project grandfathered, after a 2-year delay due to a moratorium that was imposed on all new developments as a result of an unrelated lawsuit. The trial judge entered judgment for plaintiff. *Held*, reversed.

(a) General rules.

(1) A cause of action under 42 U.S.C., §1983 requires (a) an action by a person acting under color of state law, and (b) conduct that deprives a person of rights, privileges, or immunities secured by the federal Constitution or laws. The term "person" includes local governments. (32 C.A.4th 704, citing *Monell v. Department of Social Services of New York* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, supra, §830.)

(2) Federal courts have been reluctant to turn land use disputes into federal civil rights claims. (32 C.A.4th 704, citing *Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126, and cases from the First and Second circuits.)

(b) Substantive due process.

(1) The city's argument that plaintiff had no vested right to develop its property has merit. As the court said in *Avco Community Developers v. South Coast Regional Com.* (1976) 17 C.3d 785, 132 C.R. 386, 553 P.2d 546: "[N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued." (32 C.A.4th 708.)

(2) Assuming that plaintiff did not need to have a vested right to assert substantive due process as a protection against irrational governmental action, the test is that this doctrine does not protect individuals from all governmental "actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression' or 'abuse of governmental power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'" (32 C.A.4th 709, 710.)

(3) Under this test, plaintiff has not shown arbitrary governmental action. Specifically, the alleged vendetta of former councilman M was merely a response to the concerns of his constituents, an appropriate factor for consideration in zoning decisions. Similarly, the actions of the city council were proper. A legislative body is generally not bound by the actions of its predecessor, and it can amend ordinances applicable to property without incurring liability. The amendment to the zoning ordinance applied to all multifamily residences, the moratorium affected 40 or 50 projects north of a certain line and was not directed specifically at plaintiff, and the refusal to grandfather the project simply resulted in plaintiff being treated like everyone else. In short, there was a rational basis for defendant city's actions. (32 C.A.4th 711.)

(c) *Equal protection.*

(1) There was nothing arbitrary or unreasonable in the zoning actions taken here. All of defendant's actions produced classifications reasonably related to a state interest. (32 C.A.4th 712.)

(2) Plaintiff argued that its property was unique, but there is no evidence that property similar to plaintiff's was treated differently, and none of the city council's actions applied to plaintiff's project alone. The regulation of foothill property is clearly a legitimate public purpose, especially here, because the environmental questions raised by the project's opponents have never been answered. The classifications adopted by defendants were clearly related to the purpose of regulating such property. (32 C.A.4th 715.)

(3) While it may be fairly certain that some of defendant's actions, especially those of former councilman M, were taken with plaintiff's project in mind and with the intent to block that project, the motives of legislators are generally not relevant. If the legislative determination that its action will tend to serve a legitimate public purpose is at least debatable, the challenge to that action must fail as a matter of law. (32 C.A.4th 714.) In other words, the dispute is too typical of the usual disagreement between a developer and a city planning council to rise to the level of a constitutional claim, regardless of the council's motives. (32 C.A.4th 712.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 834

[§ 834] In General.

Although 42 U.S.C., §1983 makes "every person" acting under color of state law liable for depriving another of his or her federal rights, the Supreme Court has held that Congress did not intend to abrogate the common law immunities that existed at the time the statute was enacted. (See *Tenney v. Brandhove* (1951) 341 U.S. 367, 71 S.Ct. 783, 786, 95 L.Ed. 1019, 1024, 5 Summary (10th), Torts, §165; 4 Rotunda, §19.21.) Hence, the following persons possess absolute immunity from liability under 42 U.S.C., §1983, when acting within the scope of their offices:

(1) *Legislators*. (See *Tenney v. Brandhove*, *supra*, 71 S.Ct. 786, 95 L.Ed. 1024 [state legislators]; *Lake Country Estates v. Tahoe Regional Planning Agency* (1979) 440 U.S. 391, 99 S.Ct. 1171, 1179, 59 L.Ed.2d 401, 412 [members of bi-state regional agency]; *Supreme Court of Virginia v. Consumers Union of United States* (1980) 446 U.S. 719, 100 S.Ct. 1967, 1976, 64 L.Ed.2d 641, 655 [members of state Supreme Court when enacting rules regulating legal profession]; *Bogan v. Scott-Harris* (1998) 523 U.S. 44, 118 S.Ct. 966, 970, 973, 140 L.Ed.2d 79, 85, 88 [extending absolute immunity to local legislators for legislative activities; thus, local legislators who enacted ordinance eliminating government office were immune, regardless of their motives]; 4 Rotunda, §19.22; 28 U.C.L.A. L. Rev. 1087 [*Lake County Estates*]; 5 Summary (10th), Torts, §165.)

(2) *Judges*. (See *infra*, §835.)

(3) *Prosecutors*. (See *infra*, §836.)

(4) *Witnesses*. (See *Briscoe v. LaHue* (1983) 460 U.S. 325, 103 S.Ct. 1108, 1113, 75 L.Ed.2d 96, 104, 5 Summary (10th), Torts, §184 [perjured testimony of police officer]; 4 Rotunda, §19.26; 5 Summary (10th), Torts, §184.)

Tower v. Glover (1984) 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758, held that *public defenders* had no immunity from liability under 42 U.S.C., §1983 for intentionally conspiring with state officials to secure their clients' convictions. Although lack of immunity may deter public defenders from negotiating with prosecutors, it is Congress' function to determine if §1983 liability has become too burdensome and, if so, what the appropriate remedy should be. (104 S.Ct.

2825, 2826, 81 *L.Ed.2d* 765, 766.) (See *Polk County v. Dodson* (1981) 454 U.S. 312, 102 S.Ct. 445, 453, 70 *L.Ed.2d* 509, 516 [in representing indigents, public defender exercises private function]; 4 Rotunda, §19.25.)

West's Key Number Digest, Civil Rights k.211 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Rotunda 4th, §19.21.



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8 Witkin Sum. Cal. Law Const Law § 835

[§ 835] Judges.

Judges possess absolute immunity from liability under 42 U.S.C., §1983 when acting within the scope of their office. (See *Pierson v. Ray* (1967) 386 U.S. 547, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288, 295, 5 Summary (10th), Torts, §166; *Stump v. Sparkman* (1978) 435 U.S. 349, 98 S.Ct. 1099, 1108, 55 L.Ed.2d 331, 344, 5 Summary (10th), Torts, §169; *Greene v. Zank* (1984) 158 C.A.3d 497, 506, 204 C.R. 770, 5 Summary (10th), Torts, §172 [State Bar and Committee of Bar Examiners were protected by quasi-judicial immunity in action based on delay in processing applicant's preadmission investigation]; 4 Rotunda, §19.23; 5 Summary (10th), Torts, §166 et seq.; cf. *Dennis v. Sparks* (1980) 449 U.S. 24, 101 S.Ct. 183, 186, 66 L.Ed.2d 185, 189, 5 Summary (10th), Torts, §175 [judge's immunity does not extend to private person who engages in corrupt conspiracy involving bribery of judge]; *Pulliam v. Allen* (1984) 466 U.S. 522, 104 S.Ct. 1970, 1978, 1982, 80 L.Ed.2d 565, 576, 580, 5 Summary (10th), Torts, §170 [judicial immunity bars neither prospective injunctive relief against judicial officer nor award of attorneys' fees under 42 U.S.C., §1988 to person obtaining such relief]; *Cleavinger v. Saxner* (1985) 474 U.S. 193, 106 S.Ct. 496, 501, 88 L.Ed.2d 507, 515 [members of prison discipline committee are not entitled to absolute judicial immunity].)

Mireles v. Waco (1991) 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9, a per curiam opinion with three justices dissenting, summarizes the case law on judicial immunity, in an unusual fact situation. Plaintiff, a Los Angeles public defender, failed to appear at the initial call of a superior court judge's morning calendar because he was in another courtroom waiting to appear. The judge ordered police officers to bring plaintiff into his courtroom. In this action for damages under 42 U.S.C., §1983 against the judge and two police officers, the complaint alleged that the judge ordered the officers "to forcibly and with excessive force" seize him and bring him into the courtroom; that the officers removed him "by means of unreasonable force and violence"; and that the judge "knowingly and deliberately approved and ratified each of the aforesaid acts." The district court dismissed the case on the ground of judicial immunity; the Court of Appeals reversed on the ground that the alleged actions were not taken in the judge's judicial capacity; the Supreme Court, on certiorari, summarily reversed the judgment of the Court of Appeals.

(a) "A long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit for money damages." (112 S.Ct. 287, 116 L.Ed.2d 13, citing the leading cases.) "Although unfairness and injustice to a litigant may

result on occasion," a judicial officer must be free to exercise his or her authority without apprehension of personal consequences. (112 S.Ct. 287, 116 L.Ed.2d 13.) Judicial immunity is not overcome by allegations of bad faith or malice. (112 S.Ct. 288, 116 L.Ed.2d 14, citing *Pierson v. Ray*, *supra*, and *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, *infra*, §837.)

(b) The immunity is overcome in only two sets of circumstances: first, nonjudicial actions, i.e., actions not taken in the judge's judicial capacity; second, actions, though judicial in nature, taken in the complete absence of all jurisdiction. (112 S.Ct. 288, 116 L.Ed.2d 14.)

(c) The judge's alleged actions were taken in his judicial capacity. A judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge. (112 S.Ct. 288, 116 L.Ed.2d 14.) A judge's direction to police officers to carry out an order with excessive force is not a function normally performed by a judge. "But if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a 'nonjudicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge." Accordingly, as the language in *Stump v. Sparkman* (1978) 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331, 5 Summary (10th), *Torts*, §169, indicates, "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself'. ... In other words, we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court." (112 S.Ct. 288, 116 L.Ed.2d 15.)

(d) The fact that the judge's order was carried out by police officers does not "transform his action from 'judicial' to 'executive' in character." As *Forrester v. White* (1988) 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555, 5 Summary (10th), *Torts*, §168, instructs, "it is 'the nature of the function performed, not the identity of the actor who performed it,' that inform[s] our immunity analysis. ... A judge's direction to an executive officer to bring counsel before the court is no more executive in character than a judge's issuance of a warrant for an executive officer to search a home." (112 S.Ct. 289, 116 L.Ed.2d 15.)

(e) The second part of the immunity inquiry is whether the actions were taken in the complete absence of all jurisdiction. "We have little trouble concluding that they were not. If Judge Mireles authorized and ratified the police officers' use of excessive force, he acted in excess of his authority. But such an action--taken in the very aid of the judge's jurisdiction over a matter before him--cannot be said to have been taken in the absence of jurisdiction." (112 S.Ct. 289, 116 L.Ed.2d 15.)

Two dissenting opinions were filed. (112 S.Ct. 289, 290, 116 L.Ed.2d 16.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Rotunda 4th, §19.23.



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cc. Prosecutors.

8 Witkin Sum. Cal. Law Const Law § 836

[§ 836] Prosecutors.

(1) *In General*. Prosecutors possess absolute immunity from liability under 42 U.S.C., §1983 when acting within the scope of their office. (See *Imbler v. Pachtman* (1976) 424 U.S. 409, 96 S.Ct. 984, 995, 47 L.Ed.2d 128, 144, 5 Summary (10th), Torts, §181; *Burns v. Reed* (1991) 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547, 5 Summary (10th), Torts, §181 [state prosecuting attorney; functional approach of *Imbler v. Pachtman* applied]; *Pitts v. Kern* (1998) 17 C.4th 340, 362, 366, 70 C.R.2d 823, 949 P.2d 920, supra, §819 [district attorney represents state and is not "person" subject to liability for damages under 42 U.S.C., §1983]; *Bach v. Butte* (1983) 147 C.A.3d 554, 566, 195 C.R. 268, 5 Cal. Proc. (4th), Pleading, §882; *Gensburg v. Miller* (1994) 31 C.A.4th 512, 519, 37 C.R.2d 97, 5 Summary (10th), Torts, §181 [employees of state and county Department of Social Services, charged under 42 U.S.C., §1983 with revoking foster home license, enjoyed absolute prosecutorial immunity]; 4 Rotunda, §19.24; 5 Summary (10th), Torts, §180 et seq.; cf. *Randle v. San Francisco* (1986) 186 C.A.3d 449, 458, 230 C.R. 901 [police officer in charge of plaintiff's case was not functionally equivalent to prosecutor, and hence, not entitled to absolute immunity in action based on alleged suppression of exculpatory evidence].)

(2) *Distinction: Investigatory Phase*. In *Buckley v. Fitzsimmons* (1993) 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209, petitioner Buckley brought a civil rights action under 42 U.S.C., §1983 seeking damages from respondent prosecutors for allegedly fabricating evidence during the preliminary investigation of a crime and making false statements at a press conference announcing the return of an indictment. The question presented was whether respondents were absolutely immune from liability on either or both of these claims. *Held*, applying the "functional approach" of *Burns v. Reed*, supra, the investigating work of the prosecutors did not provide them with absolute immunity. (113 S.Ct. 2613, 2614, 2618, 125 L.Ed.2d 223, 224, 229.)

After *Burns*, it would be anomalous "to grant prosecutors only qualified immunity when offering legal advice to police about an unarrested suspect, but then to endow them with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested. That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial. A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because,

after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." (113 S.Ct. 2617, 125 L.Ed.2d 227.)

One justice filed a concurring opinion (113 S.Ct. 2619, 125 L.Ed.2d 230), and four justices joined in an opinion concurring in part and dissenting in part (113 S.Ct. 2620, 125 L.Ed.2d 232).

(3) *Distinction: Prosecutor Acting as Complaining Witness.* A prosecutor who attests to facts recited in a certification for determination of probable cause supporting an arrest warrant performs the function of a complaining witness, and may be subject to liability under 42 U.S.C., §1983. (*Kalina v. Fletcher* (1997) 522 U.S. 118, 118 S.Ct. 502, 510, 139 L.Ed.2d 471, 482.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 4 Rotunda 4th, §19.24.

Bach case:

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8 *Witkin Sum. Cal. Law Const Law* § 837

[§ 837] In General.

(1) *Persons Covered.* Most state and local officials and employees who are not entitled to absolute immunity (*supra*, §834 et seq.) are entitled to qualified immunity. (See 4 Rotunda, §19.28; 5 *Summary* (10th), *Torts*, §177.) Thus, although a state official acting in his or her *official capacity* is not a "person" subject to liability under 42 U.S.C., §1983 (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45, 58), an official sued in his or her *individual capacity* is a "person" subject to liability under the statute (*Hafer v. Melo* (1991) 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301, *supra*, §819). (See *Chavez v. Martinez* (2003) 538 U.S. 760, 123 S.Ct. 1994, 2000, 2006, 155 L.Ed.2d 984, 993, 1000 [officer had qualified immunity in action alleging coercive interrogation; plaintiff's Fifth Amendment rights were not violated because plaintiff was never charged with crime and statements were never used against him in criminal proceeding]; *Ogborn v. Lancaster* (2002) 101 C.A.4th 448, 458, 124 C.R.2d 238 [officers who relied on inspection and abatement warrant in bulldozing home were entitled to qualified immunity]; 30 Cal. Western L. Rev. 201 [summary judgment and issues for trier of fact in cases involving qualified immunity]; 29 *Hastings Const. L. Q.* 613 [excessive force in carrying out court order]; on persons covered by 42 U.S.C., §1983 generally, see *supra*, §819.)

(2) *Objective Standard.* *Wood v. Strickland* (1975) 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214, held that the defense of qualified immunity had both an objective and a subjective component; i.e., the defense would fail either if the official knew or should have known that his or her action would violate the plaintiff's constitutional rights or if the official acted with malicious intent to do so. (95 S.Ct. 1001, 43 L.Ed.2d 221.)

However, *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, 5 *Summary* (10th), *Torts*, §179, adopted a purely objective standard: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (102 S.Ct. 2738, 73 L.Ed.2d 410, noting, in footnote 30, that although present case was action against federal officials based directly on Constitution, same standard applied in actions under 42 U.S.C., §1983.) (See 53 *So. Cal. L. Rev.* 945 [Civil Rights Suits Against State and Local Entities and Officials: Rights of Action, Immunities, and Federalism]; 59 *Proof of Facts* 3d 291 [Proof of Qualified

Immunity Defense in 42 U.S.C. §1983 or Bivens Actions Against Law Enforcement Officers].)

In considering a claim of qualified immunity, a court first must consider whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established. This inquiry ... must be undertaken in light of the specific context of the case." (*Saucier v. Katz* (2001) 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281 [following *Anderson v. Creighton* (1987) 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523, 5 Summary (10th), *Torts*, §183; test in excessive force cases is: first, was officer's use of force reasonable under circumstances, and second, was there clearly established rule prohibiting officer from acting as he or she did]; *Hope v. Pelzer* (2002) 536 U.S. 730, 122 S.Ct. 2508, 2516, 153 L.Ed.2d 666, 679 [past Eighth Amendment cases gave prison guards fair notice that shackling prisoner to hitching post, shirtless in the sun for 7 hours in painful position, with limited water, and without bathroom breaks was clear violation of proscription against cruel and unusual punishment, which warranted their loss of qualified immunity defense at summary judgment stage]; *Venegas v. Los Angeles* (2004) 32 C.4th 820, 11 C.R.3d 692, 87 P.3d 1, supra, §819 [ruling on qualified immunity requires analysis separate from question whether constitutional violation occurred; court also must consider whether reasonable officer would believe his or her conduct was clearly unlawful; remanded for consideration of *Saucier* principles].)

The objective standard was applied in the following cases. (See *Malley v. Briggs* (1986) 475 U.S. 335, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271, 278 [police officer is immune from liability for filing complaint and affidavit that fail to establish probable cause unless no reasonable officer could have concluded that warrant should issue]; *Wilson v. Layne* (1999) 526 U.S. 603, 119 S.Ct. 1692, 1700, 143 L.Ed.2d 818, 831 [police were immune from liability for allowing reporters into home during attempted execution of arrest warrant under state of law in existence at time of action]; *Groh v. Ramirez* (2004) 540 U.S. 551, 124 S.Ct. 1284, 1293, 157 L.Ed.2d 1068, 1082 [officer who prepared and conducted search under manifestly invalid warrant was not entitled to qualified immunity for illegal search]; *Elene H. v. Los Angeles* (1990) 220 C.A.3d 1445, 1453, 1454, 269 C.R. 783 [under *Malley* and *Anderson*, supra, law enforcement officers investigating possible child abuse are entitled to qualified rather than absolute immunity; officers' conduct in taking injured child and his sister into protective custody was objectively reasonable and justified finding of immunity as matter of law]; *Southern Calif. Rapid Transit Dist. v. Superior Court* (1994) 30 C.A.4th 713, 730, 36 C.R.2d 665 [transportation official was not immune, because he should have known that retaliatory firing of employee for exercising his First Amendment rights was prohibited]; *Conway v. Pasadena Humane Soc.* (1996) 45 C.A.4th 163, 178, 52 C.R.2d 777 [Fourth Amendment clearly prohibits warrantless, nonconsensual entry into home absent exigent circumstances; violation of city leash law did not constitute exigency justifying entry to impound dog who was secured inside house and posed no danger; officer's unreasonable ignorance that he has violated clearly established right does not confer qualified immunity]; *Martinez v. Los Angeles* (1996) 47 C.A.4th 334, 343, 344, 54 C.R.2d 772 [under objective standard, officers acted reasonably in shooting man who was high on drugs or alcohol, and who, despite repeated warnings to stop, approached officers with knife while shouting that he was going to kill them]; 28 *Pepperdine L. Rev.* 163 [Wilson].)

(3) *Pleading*. Qualified immunity is a defense that must be pleaded by the defendant. (*Gomez v. Toledo* (1980) 446 U.S. 635, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578; *Harlow v. Fitzgerald*, supra, 102 S.Ct. 2736, 73 L.Ed.2d 408, footnote 24.)

(4) *Burden of Proof*. *Crawford-El v. Britton* (1998) 523 U.S. 574, 118 S.Ct. 1584, 1595, 140 L.Ed.2d 759, 777, held that neither *Harlow* nor specific policy concerns warrant a heightened burden of proof for claims requiring proof of improper intent; that burden would undermine the very purpose of 42 U.S.C., §1983 to provide a remedy for federal rights violations. (See 112 *Harv. L. Rev.* 303 [Crawford-El].)

(5) *Review*. *Elder v. Holloway* (1994) 510 U.S. 510, 114 S.Ct. 1019, 1021, 1023, 127 L.Ed.2d 344, 348, 351, held that whether a federal right was clearly established is a question of law; hence, review of a qualified immunity

disposition must be conducted in light of all relevant precedents, not merely those cited to or considered in the district court.

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Persons Covered*. See 4 Rotunda 4th, §19.28; 35 *Golden Gate L. Rev.* 139 [qualified immunity in excessive force cases]. (2) *Objective Standard*. Conduct by an official that only violates state law will not support a claim under 42 U.S.C., §1983. (*Ritschel v. Fountain Valley* (2006) 137 C.A.4th 107, 116, 122, 40 C.R.3d 48 [following *Saucier v. Katz* (2001) 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272], text, p. 267; plaintiff failed to show that officers' failure to comply with California's implied consent law regarding alcohol testing, or officers' use of excessive force to obtain blood sample, effectively violated his federal constitutional rights under Fourth and Fourteenth Amendments].

See *Macias v. Los Angeles* (2006) 144 C.A.4th 313, 320, 50 C.R.3d 364 [trial court erred in granting summary judgment on 42 U.S.C., §1983 claim based on qualified immunity; it should have been clear to reasonable officer that detaining plaintiff in his driveway for one hour with his genitals exposed while premises were searched, when plaintiff posed no security threat and house had been secured within 4 minutes, violated plaintiff's Fourth Amendment right to reasonable detention incident to search]; *Wood v. Emmerson* (2007) 155 C.A.4th 1506, 1515, 1523, 66 C.R.3d 847 [trial court erred in determining as matter of law that search warrant was facially invalid and that officer was not immune from suit; officer had qualified immunity because reasonably well-trained officer would not have realized that affidavit was defective and reasonably would have relied on warrant to conduct search].



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bb. Violation of Other Provision.

8 Witkin Sum. Cal. Law Const Law § 838

[§ 838] Violation of Other Provision.

In *Davis v. Scherer* (1984) 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139, involving a highway patrolman whose Fourteenth Amendment rights were violated when he was fired without a formal pretermination or a prompt post-termination hearing, the principal issue was whether defendant officials had lost their qualified immunity by failing to follow a personnel regulation requiring a complete investigation of the charge and an opportunity for the employee to respond in writing. *Held*, immunity was not lost. Plaintiff's position was that an official's violation of a clear statute or regulation, although not itself the basis of the action, should deprive the official of immunity for violation of other statutory or constitutional provisions. (104 S.Ct. 3019, 82 L.Ed.2d 149.) This is untenable:

(a) It would disrupt the balance between the interests in vindication of persons' constitutional rights and in the officials' effective performance of their duties by making them liable for violations of even unclearly defined constitutional rights merely because their conduct also violated some other statute or regulation. (104 S.Ct. 3020, 82 L.Ed.2d 150.)

(b) Even if the proposed rule were limited to provisions that advanced important interests, it would require extensive judicial inquiry into the nature of various statutory and administrative codes and of the officials' awareness of them, thereby making it even more difficult for officials to anticipate the possible legal consequences of their actions. (104 S.Ct. 3020, 82 L.Ed.2d 150.)

(c) It is often unsound policy to demand official compliance with statutes and regulations on pain of money damages. Many officials must be free to take swift and firm action even though faced with a plethora of voluminous and ambiguous rules. (104 S.Ct. 3021, 82 L.Ed.2d 151.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 839

[§ 839] Distinction: Private Defendant.

(1) *Federal Law*. In *Wyatt v. Cole* (1992) 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504, C sought to dissolve his cattle partnership with W. When no agreement could be reached, C filed a state court complaint in replevin against W, accompanied by a replevin bond of \$ 18,000. At that time the statute gave the judge no discretion to deny the writ, and the court ordered the sheriff to seize a number of items of W's personal property. W then brought suit in federal district court against C, C's attorney, and the sheriff, challenging the constitutionality of the statute and seeking injunctive relief and damages. The district court held that the statute denied due process; that the government officials were entitled to qualified immunity; and that C was also entitled to qualified immunity for conduct arising prior to the statute's invalidation. The Court of Appeals affirmed, and the Supreme Court granted certiorari to resolve a conflict among the Courts of Appeals over whether private defendants are, like certain governmental officials, entitled to qualified immunity. *Held*, judgment of Court of Appeals reversed.

(a) *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482, held that private parties who attached a debtor's assets were subject to 42 U.S.C., §1983 liability if the attachment statute was constitutionally infirm. But *Lugar* left open the question whether private defendants were entitled to qualified immunity. (112 S.Ct. 1829, 1830, 118 L.Ed.2d 509, 511.)

(b) 42 U.S.C., §1983 does not on its face create immunities; however, if parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act, "we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law." (112 S.Ct. 1831, 118 L.Ed.2d 512.)

(c) In determining whether there was an immunity at common law that Congress intended to incorporate in the Act, "we look to the most closely analogous torts--in this case, malicious prosecution and abuse of process." (112 S.Ct. 1831, 118 L.Ed.2d 512.) Respondents argue that, because private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause, they were entitled to immunity under *Pierson v. Ray* (1967) 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288. But *Pierson* is of no avail here. "Even if there were sufficient

common law support to conclude that respondents, like the police officers in *Pierson*, should be entitled to a good-faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified *immunity* from suit accorded government officials." (112 S.Ct. 1832, 118 L.Ed.2d 513.)

(d) *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, supra, §837, altered the standard of qualified immunity adopted in prior cases.

(1) It established an *immunity from suit* rather than a mere *defense to liability*, which, like an absolute immunity, is lost if the case is erroneously permitted to trial. The reasons for recognizing this immunity were based not simply on the existence of a good-faith defense at common law, but on the special policy concerns involved in suing governmental officials. "[T]he qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." (112 S.Ct. 1833, 118 L.Ed.2d 515.)

(2) "These rationales are not transferable to private parties. Although principles of equality and fairness may suggest, as respondents argue, that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion. ... [E]xtending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." (112 S.Ct. 1833, 118 L.Ed.2d 515.)

(3) However, it may be that private defendants faced with §1983 liability under *Lugar v. Edmondson Oil Co.* are entitled to an affirmative defense based on good faith or probable cause. It may also be that §1983 suits against private, rather than governmental, parties require plaintiffs to carry additional burdens. (112 S.Ct. 1834, 118 L.Ed.2d 515.)

Three justices joined in a dissenting opinion. (112 S.Ct. 1837, 118 L.Ed.2d 520.)

(2) *California Law*. In *Bradley v. Medical Bd. of Calif.* (1997) 56 C.A.4th 445, 65 C.R.2d 483, plaintiff physician sued the Medical Board of California, the state, and numerous individuals for violation of his federal and state constitutional due process rights. The action arose out of an undercover investigation into plaintiff's practice of prescribing dangerous drugs without medical justification, which ultimately caused plaintiff to voluntarily surrender his medical license. The trial court granted summary judgment, in part based on defendants' immunities. *Held*, the private citizens involved in the investigation are entitled to qualified immunity.

(a) *Wyatt v. Cole* decided only that qualified immunity is not available for private defendants faced with liability under 42 U.S.C., §1983 for invoking a state replevin, garnishment, or attachment statute. The *Wyatt* court did not "foreclose the possibility that under certain circumstances a private citizen could be entitled to an affirmative defense based on qualified immunity." (56 C.A.4th 461, quoting federal district court opinion from Maryland.)

(b) Courts have held that the particular facts justified extending qualified immunity to private citizens in post-*Wyatt* decisions where the citizens acted at the request of state officials who enjoyed qualified immunity themselves, and the citizens had no personal animosity towards the subject of the investigation. (56 C.A.4th 461, citing federal opinions from First and Tenth Circuits.) Here, the acts of the private defendants in assisting the board were objectively reasonable, and they had "no ax to grind" against plaintiff. The board's investigators are entitled to immunity for their part in the undercover investigation and "it would be anomalous to not extend the same protections to the private defendants." (56 C.A.4th 462.)

(c) Both before and after *Wyatt*, the Ninth Circuit has consistently held that private citizens are not entitled to qualified immunity in actions under 42 U.S.C., §1983. "While we commonly follow Ninth Circuit opinions as

persuasive authority, in this instance we respectfully disagree with the court's apparent blanket position that qualified immunity does not shield private defendants" from liability under 42 U.S.C., §1983. (56 C.A.4th 462, footnote 14.)

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SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 840

[§ 840] Governmental Immunity.

(1) *States*. Congress, in enacting 42 U.S.C., §1983, did not intend to abrogate the basic rule that an action "by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (*Edelman v. Jordan* (1974) 415 U.S. 651, 94 S.Ct. 1347, 1356, 1362, 39 L.Ed.2d 662, 673, 680, supra, §53; *Quern v. Jordan* (1979) 440 U.S. 332, 99 S.Ct. 1139, 1143, 1145, 59 L.Ed.2d 358, 363, 367; *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 109 S.Ct. 2304, 2307, 2308, 105 L.Ed.2d 45, 53 [state is not "person" and hence is immune from liability under 42 U.S.C., §1983]; 4 Rotunda, §19.31; 18 *Hastings Const. L. Q.* 695 [proposal to remove Eleventh Amendment immunity in §1983 actions]; 53 *So. Cal. L. Rev.* 945 [Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism].)

(2) *School Districts*. In a case of first impression, *Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 C.A.4th 1098, 1105, 100 C.R.2d 289, held that in view of California's extensive control over school districts' fiscal affairs and political status, they are instrumentalities of the state, exempt from suit under 42 U.S.C., §1983.

(3) *Local Governments*. In *Owen v. Independence, Missouri* (1980) 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673, the Court, deciding a question reserved in *Monell v. Department of Social Services of New York* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, supra, §830, held that a municipality was not entitled to *qualified immunity* based on good faith of its officials. "[T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." This "decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the §1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." (100 S.Ct. 1419, 63 L.Ed.2d 697.)

Three justices dissented. (See *Heffington v. Stanislaus* (1983) 143 C.A.3d 838, 192 C.R. 202 [review of cases applying *Monell*]; 94 Harv. L. Rev. 215 [Owen]; 16 U.S.F. L. Rev. 517 [*Monell* and Owen in the Police Injury Context]; 4 Rotunda, §19.32.)

(4) *Punitive Damages Are Not Recoverable*. In *Newport v. Fact Concerts* (1981) 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616, plaintiffs, an organization licensed by defendant city to present musical concerts, and its promoter, sued when their license was cancelled for reasons constituting content-based censorship, and they suffered losses in a scheduled performance. The judgment, following a jury verdict, gave plaintiffs compensatory and punitive damages against the city and seven of its officials (mayor and council members). *Held*, the punitive damage award against the city was improper. *Monell* held that a local government was subject to suit as a person, but did not deal with particular immunities; the trial court here concluded that there was no reason to distinguish between individual officers and the municipality so far as the purposes of punitive damages are concerned. But the common law background and policy considerations call for a different result.

(a) The majority of jurisdictions refuse to sanction awards of punitive damages against municipalities. (101 S.Ct. 2756, 69 L.Ed.2d 627.) And nothing in the Civil Rights Act suggests that Congress intended to abolish that immunity. (101 S.Ct. 2758, 2759, 69 L.Ed.2d 630, 631.)

(b) Consideration of the objectives of punitive damages leads to the same conclusion. (1) *Retribution*: An award of punitive damages against a municipality punishes only the taxpayers, who took no part in the commission of the act; and a municipality can have no malice independent of that of its officials. (101 S.Ct. 2759, 2760, 69 L.Ed.2d 632, 633.) (2) *Deterrence*: It is far from clear that officials would be deterred from wrongdoing by the knowledge that punitive damages could be assessed on the basis of wealth of the municipality; and a more effective means of deterrence is an award against the offending individual. (101 S.Ct. 2760, 2761, 69 L.Ed.2d 633, 634.)

(c) The dangers of such an award are great. The §1983 damages remedy may now be available for violations of federal statutory as well as constitutional law, and state and local governmental entities may face liability for a wide range of abuses of authority. "To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities." (101 S.Ct. 2761, 69 L.Ed.2d 634.)

(d) "Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of §1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 USC §1983." (101 S.Ct. 2762, 69 L.Ed.2d 635.) (On recovery of punitive damages in §1983 actions generally, see *infra*, §842.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *States*. See 4 Rotunda 4th, §19.31.



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8 Witkin Sum. Cal. Law Const Law § 841

[§ 841] In General.

(1) *Accrual of Claim.* In *Chardon v. Fernandez* (1981) 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6, plaintiffs alleged that they lost their positions as administrators in the Puerto Rico Department of Education for political reasons, in violation of the First Amendment. The action was filed more than 1 year from the dates on which they received notices of their terminations, but less than 1 year from the actual dates of termination. *Held*, the action accrued on the date of notice and hence, was barred by Puerto Rico's 1-year statute of limitations; the crucial time is when the wrongful act occurs, not when its consequences become painful. (102 S.Ct. 29, 70 L.Ed.2d 9.) (See 4 Rotunda, §19.37.)

(2) *Claim Requirement Is Inapplicable.* *Williams v. Horvath* (1976) 16 C.3d 834, 129 C.R. 453, 548 P.2d 1125, 3 Cal. Proc. (4th), Actions, §236, held that the California statutory requirement that a claim be filed before a tort action can be brought against an employee of a public entity (5 Cal. Proc. (4th), Pleading, §882) does not apply to actions under 42 U.S.C., §1983. Filing a claim for damages is more than a procedural requirement, it is a condition precedent to the action. "And while it may be constitutionally permissible for the Legislature to place this substantive impediment in the path of a state cause of action, it is clear that the supremacy clause will not permit a like abrogation of the perquisites of a federal civil rights litigant." (16 C.3d 842.)

The U.S. Supreme Court, in *Felder v. Casey* (1988) 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123, gave this explanation: "In enacting §1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court." (108 S.Ct. 2314, 101 L.Ed.2d 147.)

(3) *Statute of Limitations.* Under 42 U.S.C., §1988, state law, to the extent "not inconsistent with the Constitution and laws of the United States," is to be applied whenever a federal statute is "deficient in the provisions necessary to furnish suitable remedies." Because 42 U.S.C., §1983 is "deficient" with respect to limitation periods and tolling

policies, these matters are governed by state law. (See *Board of Regents of University of New York v. Tomanio* (1980) 446 U.S. 478, 100 S.Ct. 1790, 1794, 64 L.Ed.2d 440, 447; *Chardon v. Fumero Soto* (1983) 462 U.S. 650, 103 S.Ct. 2611, 2619, 77 L.Ed.2d 74, 80; *Burnett v. Grattan* (1984) 468 U.S. 42, 104 S.Ct. 2924, 2929, 82 L.Ed.2d 36, 44; *Owens v. Okure* (1989) 488 U.S. 235, 109 S.Ct. 573, 577, 102 L.Ed.2d 594, 606, 3 Cal. Proc. (4th), Actions, §108; *Newton v. Napa* (1990) 217 C.A.3d 1551, 1563, 266 C.R. 682; 4 Rotunda, §19.37.) However, in 1990 Congress enacted a catch-all 4-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990. (See 28 U.S.C., §1658.) This statute is applicable to claims brought under 42 U.S.C., §1981 because §1981 was amended as part of the Civil Rights Act of 1991 (see *infra*, §849), which qualifies as an "Act of Congress enacted" after December 1, 1990. (*Jones v. R.R. Donnelley & Sons Co.* (2004) 541 U.S. 369, 124 S.Ct. 1836, 1845, 158 L.Ed.2d 645, 656, 657 [28 U.S.C., §1658 applies if claim against defendant "was made possible by a post-1990 enactment"].)

Wilson v. Garcia (1985) 471 U.S. 261, 105 S.Ct. 1938, 1943, 85 L.Ed.2d 254, 261, held that the *characterization* of an action under 42 U.S.C., §1983 for the purpose of selecting the appropriate state statute of limitations is a question of federal law. To promote uniformity and certainty, all §1983 claims should be characterized as actions for *personal injuries*. (105 S.Ct. 1947, 85 L.Ed.2d 266.) Otherwise, "counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each §1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various §1983 claims arising in the same State, and multiple periods of limitations would often apply to the same case. There is no reason to believe that Congress would have sanctioned this interpretation of its statute." (105 S.Ct. 1946, 85 L.Ed.2d 265.)

(4) *Survival*. By virtue of 42 U.S.C., §1988, state survival statutes are applicable in actions under 42 U.S.C., §1983 unless they are inconsistent with federal law. (*Robertson v. Wegmann* (1978) 436 U.S. 584, 98 S.Ct. 1991, 1995, 56 L.Ed.2d 554, 561 [Louisiana statute providing for survival only in favor of designated relatives, none of whom survived decedent in present case, was not inconsistent with federal law]; see *Ochoa v. Superior Court* (1985) 39 C.3d 159, 173, 216 C.R. 661, 703 P.2d 1, 6 Summary (10th), Torts, §1013 [claim by minor who died from improper medical treatment while confined in juvenile facility survived under former Prob.C. 573 (now C.C.P. 377.20 et seq.), 5 Summary (10th), Torts, §23]; *Los Angeles v. Superior Court* (Schonert) (1999) 21 C.4th 292, 309, 87 C.R.2d 441, 981 P.2d 68 [following *Robertson v. Wegmann*; trial court erred in refusing to apply C.C.P. 377.34, California's survival statute, to estate's federal civil rights claim; survival statute is not inconsistent with or preempted by federal law]; 32 *Loyola L.A. L. Rev.* 221 [survivorship under 42 U.S.C., §1983]; 4 Rotunda, §19.37.)

(5) *Release of Claims*. In *Newton v. Rumery* (1987) 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405, plaintiff filed an action under 42 U.S.C., §1983 after having executed a release of any such claim in return for the dismissal of a charge of tampering with a witness who had been the victim of sexual assault. In reversing and remanding for dismissal, the Court held: (a) Release-dismissal agreements are not inherently coercive because they often reflect a highly rational judgment that the benefit of escaping criminal prosecution exceeds the possibility of prevailing in a civil action. (107 S.Ct. 1193, 94 L.Ed.2d 417.) (b) They serve the public interests of protecting public officials from the burden of defending unjust claims and of allowing for the exercise of prosecutorial discretion. (107 S.Ct. 1193, 94 L.Ed.2d 418.) (c) The present agreement was voluntary on plaintiff's part, having been signed on advice of counsel, and entered into to further the legitimate prosecutorial interest of sparing the witness-victim the burden of testifying. (107 S.Ct. 1195, 94 L.Ed.2d 419.) (See 101 *Harv. L. Rev.* 310.)

(6) *Attack on Tax System*. In *Fair Assessment in Real Estate Assn. v. McNary* (1981) 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271, the court held that taxpayers are barred by the principle of comity from asserting actions under 42 U.S.C., §1983 in the federal courts attacking the validity of state tax systems. These "taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." (102 S.Ct. 186, 70 L.Ed.2d 283.) (See 96 *Harv. L. Rev.* 207.)

Under the principles applied in *Fair Assessment in Real Estate*, 42 U.S.C., §1983 may not be used to attack a local tax system. (*General Motors Corp. v. San Francisco* (1999) 69 C.A.4th 448, 460, 81 C.R.2d 544.)

West's Key Number Digest, Civil Rights k.231 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Accrual of Claim*. See 4 Rotunda 4th, §19.37.

(2) *Claim Requirement Is Inapplicable*.

Williams case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §245.

California claim-filing requirement:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §928.

(3) *Statute of Limitations.Owens case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §58.

(4) *Survival*. See 4 Rotunda 4th, §19.37.(7) (*New*) *Discovery Statutes. Los Angeles v. Superior Court (Gavira)* (2006) 139 C.A.4th 8, 42 C.R.3d 390, held that the rule of *Felder v. Casey* (1988) 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123, text, p. 275, that a plaintiff's right to recovery under 42 U.S.C., §1983 cannot be conditioned on a state notice-of-claim statute, did not apply to state statutes denying discovery of the records of medical peer review committees. Plaintiffs sued for federal civil rights violations in state court, and denying discovery of the records did not affect their substantive federal rights. (139 C.A.4th 17.)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law XI. EQUAL PROTECTION OF THE LAWS

D. Federal Civil Rights Legislation.

1. Original Civil Rights Acts.

g. Procedure.

2. Damages and Attorneys' Fees.

8 Witkin Sum. Cal. Law Const Law § 842

[§ 842] Damages and Attorneys' Fees.

(1) *Nominal Damages*. In *Carey v. Piphus* (1978) 435 U.S. 247, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252, 266, school pupils who had been suspended without procedural due process were entitled to recover nominal damages (not to exceed \$ 1), even if the suspension was justified and no actual injury was proved. (See *Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 106 S.Ct. 2537, 2544, 91 L.Ed.2d 249, 260, footnote 11; 93 Harv. L. Rev. 966 [Carey]; 67 Cal. L. Rev. 1242 [same]; 6 Hastings Const. L. Q. 97 [same]; 4 Rotunda, §19.33.)

(2) *Compensatory Damages*. In *Carey*, the Court held that an award of compensatory damages for denial of procedural due process requires proof of *actual harm*; i.e., no damages will be presumed from the mere denial of the right. (98 S.Ct. 1048, 55 L.Ed.2d 259.) (See 4 Rotunda, §19.33.) And in *Memphis Community School Dist.*, involving a denial of a *substantive* constitutional right, the Court followed *Carey* in holding that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages" in actions under 42 U.S.C., §1983. (106 S.Ct. 2545, 91 L.Ed.2d 261.) (See 100 Harv. L. Rev. 267.)

(3) *No State Limitation on Damages*. "[P]laintiffs who have been falsely arrested and imprisoned by employees of a public entity are entitled to the same damages in a section 1983 action filed in a California court as they would receive in a section 1983 action filed in federal court." (*Los Angeles v. Superior Court (Valentin)* (2000) 78 C.A.4th 212, 231, 92 C.R.2d 668.)

(4) *Punitive Damages*. *Smith v. Wade* (1983) 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632, 6 Summary (10th), *Torts*, §1595, held that punitive damages are permitted in actions under 42 U.S.C., §1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." (103 S.Ct. 1640, 75 L.Ed.2d 651.) (On immunity of municipality from assessment of punitive damages in §1983 action, see *supra*, §840.)

(5) *Attorneys' Fees*. The Civil Rights Attorney's Fee Awards Act of 1976 provides that, in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (42 U.S.C., §1988.) (See *Maher v. Gagne* (1980) 448 U.S. 122, 100 S.Ct. 2570, 2574, 65

L.Ed.2d 653, 660 [statute applies to all types of §1983 actions, not just to those based on violation of Constitution or statute providing for protection of civil or equal rights]; *15 Am.Jur.2d* (2000 ed.), *Civil Rights* §191 et seq.)

The scope and application of this statute are fully covered in 7 *Cal. Proc.* (4th), *Judgment*, §206 et seq. (See *Smith v. Robinson* (1984) 468 U.S. 992, 104 S.Ct. 3457, 3464, 82 *L.Ed.2d* 747, 759, 7 *Cal. Proc.* (4th), *Judgment*, §207 [action involving one claim covered by Act and one that is not]; *Hensley v. Eckerhart* (1983) 461 U.S. 424, 103 S.Ct. 1933, 76 *L.Ed.2d* 40, 7 *Cal. Proc.* (4th), *Judgment*, §209 [reasonable fees]; *Hewitt v. Helms* (1987) 482 U.S. 755, 107 S.Ct. 2672, 96 *L.Ed.2d* 654, 7 *Cal. Proc.* (4th), *Judgment*, §208 [what constitutes prevailing party]; *North Carolina Dept. of Trans. v. Crest Street Community Council* (1986) 479 U.S. 6, 107 S.Ct. 336, 93 *L.Ed.2d* 188, 7 *Cal. Proc.* (4th), *Judgment*, §213 [no award in separate independent action]; *Venegas v. Mitchell* (1990) 495 U.S. 82, 110 S.Ct. 1679, 109 *L.Ed.2d* 74, 7 *Cal. Proc.* (4th), *Judgment*, §210 [42 U.S.C., §1988 does not invalidate contingent fee contracts requiring plaintiff to pay attorney more than statutory award against defendant]; *West Virginia University Hosp. v. Casey* (1991) 499 U.S. 83, 111 S.Ct. 1138, 113 *L.Ed.2d* 68 [fees for services rendered by experts could not be shifted to losing party]; *Choate v. Orange* (2000) 86 C.A.4th 312, 322, 103 C.R.2d 339, 7 *Cal. Proc.* (4th), *Judgment*, Supp., §208 [different standard for prevailing defendant].)

In *Farrar v. Hobby* (1992) 506 U.S. 103, 113 S.Ct. 566, 121 *L.Ed.2d* 494, the Court held that a plaintiff who receives a judgment for nominal damages is a prevailing party under 42 U.S.C., §1988, but that this technical victory does not necessarily entitle the plaintiff to attorneys' fees. Here, plaintiffs demanded \$ 17 million as compensatory damages, but were awarded only nominal damages of \$ 1, and were not entitled to attorneys' fees. (113 S.Ct. 574, 575, 121 *L.Ed.2d* 505, 506.)

West's Key Number Digest, Civil Rights k.269 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nominal Damages*. See 4 Rotunda 4th, §19.33.(5) *Attorneys' Fees*.

Scope and application of statute:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §242 et seq.

Smith case:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §243. *Hensley case:*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §314.

Hewitt case:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §244.

North Carolina Dept. of Trans. case:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §247.

Venegas case:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §314.

Choate case:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §244.



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8 *Witkin Sum. Cal. Law Const Law* § 843

[§ 843] Limitations on Injunctive Relief.

In *Rizzo v. Goode* (1976) 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561, respondents brought a class action in the federal district court of Pennsylvania on behalf of minority citizens and Philadelphia residents in general, against petitioners, the Mayor, City Managing Director, and Police Commissioner of Philadelphia. The complaint alleged encouragement of police activity violating constitutional rights of citizens and failure to act in a manner that would prevent this activity. The district court, after hearing many witnesses, made detailed findings of fact and conclusions of law, indicating a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct. It therefore ordered petitioners to submit a comprehensive program for improvement of handling citizens' complaints. The program was submitted and incorporated into a final judgment. *Held*, reversed.

The Court found no authority to support the extension of federal equity power under 42 U.S.C., §1983 "to the fashioning of prophylactic procedures for a state agency." (96 S.Ct. 607, 46 L.Ed.2d 573.) The principles of federalism, emphasized in cases in which a federal court was asked to enjoin a state criminal prosecution, are not limited to that situation. "We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an agency of state or local governments such as respondents here." (96 S.Ct. 608, 46 L.Ed.2d 575.)

Three justices dissented. (See *Alvarez v. Wiley* (1977) 71 C.A.3d 599, 605, 139 C.R. 550 [wrongful death is governed by California statute and limited to claim for damages; hence, plaintiff could not enjoin county jail, under 42 U.S.C., §1983, from continuing practices that had resulted in son's death]; 90 Harv. L. Rev. 238 [Rizzo]; 29 Stanf. L. Rev. 1191 [same].)

In *Los Angeles v. Lyons* (1983) 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675, defendant police officers, after stopping plaintiff for a Vehicle Code violation, applied a chokehold which rendered him unconscious and damaged his larynx. Finding that these holds were authorized even where no one was threatened with death or serious bodily harm, that the officers were insufficiently trained, and that use of the holds involved a high risk of injury or death, the trial judge entered an injunction barring their use in the absence of a threat of injury or death. *Held*, reversed. Plaintiff lacked standing to seek an injunction because he alleged no case or controversy as required by *Article III of the U.S.*

Constitution. (103 S.Ct. 1665, 75 L.Ed.2d 684.) To meet this requirement, a plaintiff must allege that the threat of injury is both real and immediate; the allegations concerning his previous injury did not show a real and immediate threat of similar police misconduct in the future. (103 S.Ct. 1667, 75 L.Ed.2d 686.)

West's Key Number Digest, Civil Rights k.262 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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4. Effect of State Remedies.

8 Witkin Sum. Cal. Law Const Law § 844

[§ 844] Effect of State Remedies.

(1) *No Requirement of Exhaustion of State Remedies.* In *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, supra, §711, the Court explained the general rule that state judicial remedies need not be exhausted prior to bringing an action under 42 U.S.C., §1983. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State and the state remedy need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws searches and seizures is no barrier to the present suit in the federal court." (81 S.Ct. 482, 5 L.Ed.2d 502.) (See *Handschuh v. Superior Court* (1985) 166 C.A.3d 41, 43, 212 C.R. 296; 4 Rotunda, §19.39; 82 Harv. L. Rev. 1486 [suggesting limiting *Monroe* by requiring exhaustion of state remedies under specified circumstances]; cf. *Heck v. Humphrey* (1994) 512 U.S. 477, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383, 394, infra, §845 [requirement for action for damages for unlawful conviction or imprisonment].)

Patsy v. Board of Regents of Florida (1982) 457 U.S. 496, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172, 187, extended the no exhaustion of remedies rule to state administrative remedies. (See 96 Harv. L. Rev. 207.) However, under the federal Prison Litigation Reform Act of 1996 (42 U.S.C., §1997e(a)), a prisoner must exhaust available administrative remedies before bringing a federal civil rights action regarding prison conditions. (See *Booth v. Churner* (2001) 532 U.S. 731, 121 S.Ct. 1819, 1821, 149 L.Ed.2d 958, 962, 3 Cal. Proc. (4th), Actions, Supp., §323.)

(2) *Distinction: Requirements for Ripeness of Claim.* In seeking compensation for a regulatory taking, the plaintiff must first seek administrative mandamus or bring an action for inverse condemnation. Only after these avenues have failed to yield just compensation is a claim under 42 U.S.C., §1983 ripe for adjudication. (*Brenner Associates v. Del Mar* (1998) 69 C.A.4th 166, 188, 81 C.R.2d 324; see *Galland v. Clovis* (2001) 24 C.4th 1003, 103 C.R.2d 711, 16 P.3d 130, 12 Summary (10th), *Real Property*, §§595, 596 [landlords seeking damages under 42 U.S.C., §1983 for confiscatory rent regulation must first show that (a) confiscatory rent ceiling or regulation was imposed, and (b) relief via mandamus and adjustment under *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 C.4th 761, 66 C.R.2d 672, 941 P.2d 851, infra, §1155, is inadequate].)

(3) *State Procedure Affording Procedural Due Process.* The existence of a state procedure that satisfies the

requirements of procedural due process bars an action under 42 U.S.C., §1983. (See *Ingraham v. Wright* (1977) 430 U.S. 651, 97 S.Ct. 1401, 1415, 51 L.Ed.2d 711, 733; *Parratt v. Taylor* (1981) 451 U.S. 527, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420, 433; *Hudson v. Palmer* (1984) 468 U.S. 517, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393, 407, *supra*, §825; 4 Rotunda, §19.39; 13 *Hastings Const. L. Q.* 695; cf. *Handschuh v. Superior Court*, *supra*, 166 C.A.3d 45 [*Parratt v. Taylor* is not applicable to violations of substantive rights; hence, availability of state action for conversion did not preclude §1983 action for unconstitutional seizure of property].)

(4) *Res Judicata and Collateral Estoppel*. In *Allen v. McCurry* (1980) 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308, plaintiff's motion to suppress evidence on Fourth Amendment grounds was denied, and he was convicted of possession of heroin. Because plaintiff had not asserted a denial of a full and fair opportunity to litigate the search and seizure issue, he was barred from seeking habeas corpus by *Stone v. Powell* (1976) 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067. Hence, plaintiff sought federal court redress of the issue by bringing an action under 42 U.S.C., §1983 against the officers involved. *Held*, the doctrine of collateral estoppel barred relitigation of the issue in the federal courts.

(a) Under 28 U.S.C., §1738 (*supra*, §30), a state judicial proceeding has the same full faith and credit in federal courts that it has in the courts of the state. Nothing in either the language of 42 U.S.C., §1983 or its legislative history remotely suggests any intention to contravene the common law rules of preclusion or to repeal 28 U.S.C., §1738. (101 S.Ct. 416, 66 L.Ed.2d 315.)

(b) The unavailability of habeas corpus does not require a different conclusion. There is nothing in either the Constitution or 42 U.S.C., §1983 itself guaranteeing every person asserting a federal right at least one opportunity to litigate that right in a federal court. (101 S.Ct. 419, 66 L.Ed.2d 319.) (See 4 Rotunda, §19.38.)

In *Migra v. Warren City School Dist. Bd. of Education* (1984) 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56, the issue was the preclusive effect of a state court judgment on plaintiff's §1983 claim, which he did not raise in the state court proceeding even though he could have done so. After obtaining a state court judgment for breach of contract and wrongful interference with his contract, plaintiff brought an action under 42 U.S.C., §1983 based on violations of the First, Fourth, and Fourteenth Amendments. *Held*, the action was barred. In *Allen*, *supra*, the issue was actually litigated; but the holding is applicable regardless of whether an issue was, or was not, decided in the state court. (104 S.Ct. 897, 79 L.Ed.2d 63.)

In *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S.Ct. 3220, 3226, 92 L.Ed.2d 635, 646, 7 Cal. Proc. (4th), *Judgment*, §304, the Court extended preclusive effect to state administrative rulings. But *McDonald v. West Branch, Michigan* (1984) 466 U.S. 284, 104 S.Ct. 1799, 1802, 80 L.Ed.2d 302, 307, refused to give either *res judicata* or collateral estoppel effect to an unappealed arbitration award. "[A]lthough arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that §1983 is designed to safeguard." (104 S.Ct. 1803, 80 L.Ed.2d 308.) (See *Brosterhous v. State Bar* (1995) 12 C.4th 315, 323, 335, 48 C.R.2d 87, 906 P.2d 1242 [State Bar arbitration of claims regarding dues was not entitled to preclusive effect].)

In *Briggs v. Rolling Hills Estates* (1995) 40 C.A.4th 637, 47 C.R.2d 29, defendant city required plaintiff homeowners to remove a patio as a condition for approval of an addition to plaintiffs' house. Plaintiffs did not seek judicial review of the condition by means of administrative mandamus, but instead filed an action under 42 U.S.C., §1983. *Held*, their action was barred, not because of failure to exhaust administrative remedies, but under the doctrine of *res judicata*, which gives "collateral estoppel effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action." (40 C.A.4th 646.) (See *McDaniel v. Board of Education* (1996) 44 C.A.4th 1618, 1621, 1622, 52 C.R.2d 448 [doctrine of *res judicata* applies only where plaintiff has failed to seek judicial review of agency's *quasi-judicial* action; where challenged action (here, retaliatory refusal to consider late claim for early retirement) is *quasi-legislative*, plaintiff need not seek state judicial remedy before filing action under 42 U.S.C., §1983].)

West's Key Number Digest, Civil Rights k.209

SUPPLEMENT: [This section is current through the latest supplement]

(1) *No Requirement of Exhaustion of State Remedies*. See 4 Rotunda 4th, §19.39.*Booth case*:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §346.

(4) *Res Judicata and Collateral Estoppel*. See 4 Rotunda 4th, §19.38.*University of Tennessee case*:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §361.



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8 Witkin Sum. Cal. Law Const Law § 845

[§ 845] Effect of Other Federal Remedies.

In *Preiser v. Rodriguez* (1973) 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439, the action was brought by state prisoners seeking an injunction to compel restoration of good conduct time credits. *Held*, habeas corpus, with the concomitant requirement of exhaustion of state remedies, was their sole remedy. "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the *fact or length of their confinement*, and that specific determination must override the general terms" of 42 U.S.C., §1983. (93 S.Ct. 1836, 36 L.Ed.2d 450.) (On effect of enforcement provisions of federal statutes, see *supra*, §821.)

In *Wolff v. McDonnell* (1974) 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935, the Court held that *Preiser* precluded only those §1983 actions that sought an injunction to *restore* good conduct time credits. Hence, prisoners may maintain an action under 42 U.S.C., §1983 seeking (a) damages resulting from deprivation of the credits, (b) a declaratory judgment on the validity of the procedures used, and (c) an injunction enjoining the prospective enforcement of invalid prison regulations. (94 S.Ct. 2974, 41 L.Ed.2d 950.)

Preiser and *Wolff* were distinguished in *Heck v. Humphrey* (1994) 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383. Here, plaintiff sought damages under 42 U.S.C., §1983 while appeal of his conviction was pending. The Court held that to recover damages for an "allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. §2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable" under 42 U.S.C., §1983. (114 S.Ct. 2372, 129 L.Ed.2d 394.) (See *Edwards v. Balisok* (1997) 520 U.S. 641, 117 S.Ct. 1584, 1589, 137 L.Ed.2d 906, 915 [applying *Heck*]; *Susag v. Lake Forest* (2002) 94 C.A.4th 1401, 1408, 115 C.R.2d 269 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Wilkinson v. Dotson* (2005) 544 U.S. 74, 125 S.Ct. 1242, 1248, 161 L.Ed.2d 253, 262 [claims by prisoners that would render invalid state procedures used to deny parole eligibility and parole suitability were cognizable under 42

U.S.C., §1983; habeas corpus exception did not apply because claims did not challenge "fact or duration" of confinement]; *Truong v. Orange County Sheriff's Dept.* (2005) 129 C.A.4th 1423, 1427, 1429, 29 C.R.3d 450 [following *Heck v. Humphrey* (1994) 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383, text, p. 283; plaintiff's claims that sheriff's deputies used excessive force in violation of her civil rights were barred because claims called into question validity of plaintiff's conviction for resisting exercise of lawful duty]; 121 Harv. L. Rev. 868 [defining reach of *Heck*].

In *Yount v. Sacramento* (2008) 43 C.4th 885, 76 C.R.3d 787, 183 P.3d 471, the court both relied on and distinguished *Heck*. In attempting to arrest plaintiff, defendant police officer shot plaintiff by accident with his gun when he thought he was using his taser. Plaintiff pleaded no contest to resisting arrest. This conviction encompassed plaintiff's admission that he was resisting arrest up until the time he was shot. Hence, *Heck* foreclosed plaintiff's claims under 42 U.S.C., §1983 that he offered no resistance and that the officers had no justification to employ *any* force against him at the time he was shot. However, defendant conceded and the record showed that the use of deadly force in making the arrest was not justified. Thus, to the extent plaintiff's claim alleged that defendant's use of deadly force was an unjustified and excessive response to plaintiff's resistance, the claim was not barred because this claim did not implicitly question the validity of plaintiff's conviction for resisting arrest. (43 C.4th 898, 899.) Under the same reasoning, plaintiff's state law claim for battery, based on defendant's use of deadly force, was not barred. (43 C.4th 902.)



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2. Later Statutes.
a. Civil Rights Act of 1957.

8 *Witkin Sum. Cal. Law Const Law* § 846

[§ 846] Civil Rights Act of 1957.

The Civil Rights Act of 1957 prohibits interference with the right to vote, and authorizes the Attorney General to seek injunctive relief against this interference. (42 U.S.C., §1971; see 25 *Am.Jur.2d* (2004 ed.), *Elections* §105 et seq.)

In *United States v. Raines* (1960) 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524, the U.S. Attorney General brought an action in the federal district court of Georgia against registrars of Terrell County, charging that, through various devices in the conduct of their offices, they had discriminated on racial grounds against Blacks who desired to register to vote. The district court held the statute unconstitutional, on speculative considerations of its possible scope. *Held*, reversed. The statute is justified by the Fifteenth Amendment (legislation to prevent discriminatory action by state officials). And Congress can act against these lower state officials regardless of whether higher state authority might also correct their actions, for every state official is bound by the *Fourteenth and Fifteenth Amendments*. (80 S.Ct. 525, 4 L.Ed.2d 532.)

Answering the argument that it is beyond the power of Congress to authorize the U.S. to sue in support of private constitutional rights, the Court said: "But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief." (80 S.Ct. 526, 4 L.Ed.2d 533.)

In *United States v. Alabama* (1960) 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982, the U.S. brought an action against the Board of Registrars of Macon County, Alabama, and individual members of the board, for declaratory and injunctive relief, against alleged interference with black voting rights. Before the suit was instituted, the members of the board, pursuant to Alabama law, resigned, and the district court dismissed the action on the ground that the board itself was not a suable entity and no defendant remained. Before the Supreme Court hearing, Congress amended the statute to authorize actions against the state where an official has resigned and no successor has been appointed. *Held*, therefore, the State of Alabama was a proper defendant.

SUPPLEMENT: [This section is current through the latest supplement]



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b. Civil Rights Act of 1964.

8 Witkin Sum. Cal. Law Const Law § 847

[§ 847] Civil Rights Act of 1964.

The 1964 Act covers a wide area. (See 26 *Pacific L. J.* 765 [Symposium on Justice Department and Civil Rights Act of 1964]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §§26, 223 et seq.) The Act consists of the following titles:

- (1) The right to vote in federal elections. (Title I; 42 U.S.C., §1971.)
- (2) Discrimination in public accommodations. (Title II; 42 U.S.C., §2000a et seq.; see infra, §850.)
- (3) Discrimination in publicly owned facilities. (Title III; 42 U.S.C., §2000b et seq.)
- (4) School integration. (Title IV; 42 U.S.C., §2000c et seq.; see 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §281 et seq.; on unconstitutionality of segregation and duty to desegregate, see supra, §750 et seq.)
- (5) Continuation of Civil Rights Commission. (Title V; 42 U.S.C., §1975a et seq.)
- (6) Discrimination in federally assisted programs. (Title VI; 42 U.S.C., §2000d et seq.; see infra, §852 et seq.)
- (7) Discrimination in employment and creation of Equal Opportunity Commission. (Title VII; 42 U.S.C., §2000e et seq.; see infra, §855 et seq.)
- (8) Voting and registration statistics. (Title VIII; 42 U.S.C., §2000f.)
- (9) Authority of Attorney General to intervene in actions. (Title IX; 42 U.S.C., §2000h-2, 2000h-3.)
- (10) Community Relations Service. (Title X; 42 U.S.C., §2000g et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Civil Rights Act of 1968.

8 Witkin Sum. Cal. Law Const Law § 848

[§ 848] Civil Rights Act of 1968.

The 1968 Act covers the following:

(1) Riots and interference with federally protected activities. (Title I; *18 U.S.C.*, §241 et seq.; see *15 Am.Jur.2d* (2000 ed.), *Civil Rights* §408 et seq.)

(2) Rights of Indians. (Titles II-VII; *25 U.S.C.*, §1301 et seq.; see *82 Harv. L. Rev.* 834 [discussion of Title VII and comparison of its private enforcement provisions with those of 1964 Civil Rights Act]; *90 Harv. L. Rev.* 627 [Indian rights]; *12 U.C. Davis L. Rev.* 1 [same].)

(3) Discrimination in the sale or rental of housing by private persons, financial institutions, or brokerage services. (Title VIII; *42 U.S.C.*, §3601 et seq.; *infra*, §851.)

(4) Intimidation in fair housing cases. (Title IX; *42 U.S.C.*, §3631; *infra*, §851.)

(5) Civil disorders. (Title X; *18 U.S.C.*, §231 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Rights of Indians*. See *95 Cal. L. Rev.* 799 [tribal sovereignty and illiberalism].



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CHAPTER X - Constitutional Law

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XI. EQUAL PROTECTION OF THE LAWS
D. Federal Civil Rights Legislation.
2. Later Statutes.
d. Civil Rights Act of 1991.

8 *Witkin Sum. Cal. Law Const Law* § 849

[§ 849] Civil Rights Act of 1991.

(1) *Purposes.* In the 1991 Act, Congress found that the decision in *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733, *infra*, §870, "has weakened the scope and effectiveness of Federal civil rights protections." The purposes of the Act are (a) "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace"; (b) "to codify the concepts of 'business necessity' and 'job related' enunciated" in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, *infra*, §869, and other decisions prior to *Wards Cove*; (c) "to confirm statutory authority and provide statutory guidelines" for adjudicating disparate impact suits under 42 U.S.C., §2000e et seq. (*infra*, §855); and (d) to respond to recent Supreme Court decisions "by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." (42 U.S.C., §1981 note.) (See 106 *Harv. L. Rev.* 896; 79 *Cal. L. Rev.* 591 [Symposium on civil rights legislation in 1990s]; 85 *Cal. L. Rev.* 919 [comment on need for activists to pursue changes in Congress rather than in courts]; 29 *U.S.F. L. Rev.* 889 [agenda for post-civil rights era]; for discussion of which provisions of Act were in response to Supreme Court cases, see *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 114 S.Ct. 1483, 1489, 1490, 128 L.Ed.2d 229, 243, 244.)

(2) *Civil Rights Remedies.* The Act amended 42 U.S.C., §1981 (*supra*, §814) to include not only the making and enforcement of contracts, but also the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." (42 U.S.C., §1981(b).) The amendment is not retroactive. (*Rivers v. Roadway Express* (1994) 511 U.S. 298, 114 S.Ct. 1510, 1519, 1520, 128 L.Ed.2d 274, 289.)

(3) *Proof.* An unlawful employment practice is established by proof that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." (42 U.S.C., §2000e-2(m).) Direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive instruction. (*Desert Palace v. Costa* (2003) 539 U.S. 90, 123 S.Ct. 2148, 2153, 156 L.Ed.2d 84, 93; see 117 *Harv. L. Rev.* 400 [*Desert Palace*]; 24 *Proof of Facts* 3d 393 [proof of damages for sexual harassment].)

(4) *Disparate Impact Cases.* "Disparate impact" claims involve "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." (*International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396, 417, footnote 15 [proof of discriminatory motive is not required].) An unlawful employment practice

based on disparate impact is established only if (a) the complaining party demonstrates the disparate impact, and the employer fails to show that the practice is job-related for the particular position and consistent with business necessity, or (b) the complaining party demonstrates an alternative employment practice, and the respondent refuses to adopt it. (42 U.S.C., §2000e-2(k); see 106 *Harv. L. Rev.* 1621 [Civil Rights Act of 1991 and less discriminatory alternatives in disparate impact legislation].)

(5) *Compensatory and Punitive Damages.* The Act provides for recovery of compensatory and punitive damages in cases of unlawful intentional discrimination other than disparate impact cases. (42 U.S.C., §1981a; see *Landgraf v. USI Film Products*, *supra*, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229, 262 [compensatory and punitive damages provision is not retroactive]; 108 *Harv. L. Rev.* 310 [*Landgraf*]; 150 A.L.R. Fed 601 [punitive damages]; 154 A.L.R. Fed 347 [compensatory damages].)

Kolstad v. American Dental Assn. (1999) 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494, held that punitive damages are available under the Act where the employer engages in intentional discrimination "with malice or reckless indifference to the federally protected rights of an aggrieved individual," which means that the employer knows it may be in violation of federal law. Egregious conduct is not required. (119 S.Ct. 2124, 2126, 144 L.Ed.2d 504, 508.) "Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatement's strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.' " (119 S.Ct. 2129, 144 L.Ed.2d 512.) (113 *Harv. L. Rev.* 359 [*Kolstad*].)

(6) *Limitation of Challenges to Judgment.* The Act prohibits challenges to employment practices that implement litigated or consent judgments or orders by persons (a) who had a reasonable opportunity to present objections to the judgment or order, or (b) whose interests were adequately represented by another person who challenged the judgment or order on the same grounds and with similar facts. (42 U.S.C., §2000e-2(n).)

(7) *Application to Congress.* Title VII of the Civil Rights Act of 1964 (*infra*, §855) is generally applicable to employees of the legislative branch of the federal Government. (2 U.S.C., §1302.) The Government Employee Rights Act of 1991 (42 U.S.C., §2000e-16a et seq.) was added to "provide procedures to protect the rights of certain government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability." (42 U.S.C., §2000e-16a; see 42 U.S.C., §2000e-16c [defining covered employees as those serving elected officials, as specified].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Disparate Impact Cases.* See 53 U.C.L.A. L. Rev. 701 [Was the Disparate Impact Theory a Mistake?].(7)

Application to Congress. See 20 A.L.R. Fed 2d 481 [validity, construction, and application of Government Employee Rights Act].



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8 Witkin Sum. Cal. Law Const Law § 850

[§ 850] Public Accommodations.

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, advantages, and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin." (42 U.S.C., §2000a(a); see 42 U.S.C., §2000a(b) [defining places of public accommodation].) Title II of the 1964 Act (42 U.S.C., §2000a et seq.) has been upheld in a number of decisions.

In *Heart of Atlanta Motel v. United States* (1964) 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258, plaintiff operator of a motel in Atlanta, Georgia, with most of its patronage from out-of-state guests, contended that Title II was not a valid exercise of the commerce power and that it denied due process. *Held*, the legislation was a valid exercise of federal power over interstate commerce.

(a) The *Civil Rights Cases* (1883) 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *supra*, §814, did not fully consider the commerce power and are not controlling. (85 S.Ct. 354, 13 L.Ed.2d 264.)

(b) The basis of congressional action here was a showing that Blacks were subjected to discrimination in obtaining transient accommodations, with the effect of discouraging travel on the part of a substantial portion of the black community. (85 S.Ct. 355, 13 L.Ed.2d 265.) The commerce power extends both to regulation of interstate movement of persons and to local activities that affect it. (85 S.Ct. 356, 358, 13 L.Ed.2d 266, 269; see *infra*, §§1295, 1319 et seq.)

(c) The Fifth Amendment Due Process Clause confers no right to select guests free from appropriate regulation under the commerce power. (85 S.Ct. 358, 13 L.Ed.2d 269.)

Katzenbach v. McClung (1964) 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290, involved a restaurant, located away from the interstate highway, without interstate patrons. The Act applied because a substantial portion of the food served had moved in interstate commerce. *Held*, this provision was valid. Congress had evidence before it that discrimination against Blacks in local restaurants inhibited their travel, and discouraged skilled and professional people from moving into areas of discrimination, with the result that existing businesses suffered and new businesses were reluctant to enter. (85 S.Ct. 381, 13 L.Ed.2d 296.)

In *Hamm v. Rock Hill* (1964) 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300, Blacks were convicted of trespass for

sit-ins at segregated lunch counters, and their convictions were affirmed in the state appellate courts before the 1964 Act became effective. *Held*, nevertheless, the Act applied and abated the convictions.

Daniel v. Paul (1969) 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318, held the Act applicable to a so-called "private club," which offered memberships freely to white persons at a nominal fee (25 cents), while refusing them to Blacks. (See 82 Harv. L. Rev. 686 [application of Title II to entertainment facilities]; 112 Harv. L. Rev. 904 [public accommodation challenge to use of Indian team names and mascots in professional sports]; 15 Am.Jur.2d (2000 ed.), Civil Rights §223 et seq.)

West's Key Number Digest, Civil Rights k.119 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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4. Sale or Rental of Property.

8 Witkin Sum. Cal. Law Const Law § 851

[§ 851] Sale or Rental of Property.

The fair housing provisions of the Civil Rights Act of 1968 (Titles VIII and IX) prohibit discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin in the sale or rental of housing by private persons, financial institutions, and brokerage services, and proscribe interfering with or intimidating persons attempting to exercise their rights under the Act. (42 U.S.C., §3601 et seq.; see 93 *Harv. L. Rev.* 938 [race-conscious governmental policies to promote residential integration]; 27 *Pepperdine L. Rev.* 477 [limits of First Amendment immunity for actions under Fair Housing Act]; 58 *So. Cal. L. Rev.* 947 [In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's]; 26 *Thomas Jefferson L. Rev.* 103 [senior housing exemption in 1988 amendments to Fair Housing Act]; 17 *U.C. Davis L. Rev.* 445 [Justice Department's enforcement of Title VIII by attacking exclusionary municipal practices]; 27 *U.C.L.A. L. Rev.* 398 [Title VIII: standard for determination of discriminatory effect]; 45 *U.C.L.A. L. Rev.* 1401 [public vs. private enforcement of civil rights in housing]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §380 et seq.; 23 *Proof of Facts* 3d 499 [discrimination on basis of handicap under Fair Housing Act].) (On standing to sue under Title VIII, see *Gladstone, Realtors v. Bellwood* (1979) 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66, supra, §89; *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214.)

Under the Fair Housing Act, traditional agency principles apply to the imposition of liability on a corporation for discriminatory acts of its employees. Thus, normally a corporation is liable for an employee's unlawful acts, but its officers and owners are not. (*Meyer v. Holley* (2003) 537 U.S. 280, 123 S.Ct. 824, 828, 832, 154 L.Ed.2d 753, 761, 764 [owner's "right to control" is insufficient by itself to establish principal/agent or employer/employee relationship].)

An 1866 statute also prohibits discrimination on the basis of race in the purchase, lease, or sale of property. (42 U.S.C., §1982; see supra, §814.) This statute has none of the detail, and contains none of the exemptions, of the fair housing provisions of the 1968 Act. (See 42 U.S.C., §3601 et seq.; supra, §848.) Nevertheless, in *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189, the old statute was held effective to bar private discrimination in the sale or rental of property.

"At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." (88 S.Ct. 2205, 20 L.Ed.2d 1209.) (See *Memphis v. Greene* (1981) 451 U.S. 100, 101 S.Ct. 1584, 67 L.Ed.2d 769

[street closing through white neighborhood, which inconvenienced adjacent black neighborhood, was not violative of 42 U.S.C., §1982 or Thirteenth Amendment]; 82 *Harv. L. Rev.* 95 [pointing out that 42 U.S.C., §1982 may have broad effect in other situations]; 82 *Harv. L. Rev.* 1294 [The "New" Thirteenth Amendment]; 88 *Harv. L. Rev.* 1610 [damages recoverable for charging more for homes in black neighborhoods than for comparable homes in white neighborhoods]; 95 *Harv. L. Rev.* 310 [*Memphis*]; 22 *Santa Clara L. Rev.* 931 [same].)

Jones was followed in *Sullivan v. Little Hunting Park* (1969) 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386.

Defendant was a nonstock community playground facility for homeowners in Fairfax County, Virginia. Membership was open to every white person in the area, with assignable membership to his or her tenant. S, a Caucasian, owned one home and leased another to F, a Black. Defendant's board refused to approve the assignment to F and expelled S from membership. S and F sued in state court, under the 1866 statute, for injunctions and damages. The trial court denied relief. *Held*, reversed.

(a) Defendant was not a private social club; it was open to every white person within the area. "What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down" in *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, *supra*, §746. (90 S.Ct. 404, 24 L.Ed.2d 392.)

(b) If the expulsion of S is upheld, S is punished for trying to vindicate rights of minorities protected by the statute; hence, *Barrows v. Jackson* (1953) 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, *supra*, §85, applies. A white owner at times is the only effective adversary of the unlawful restriction. (90 S.Ct. 404, 24 L.Ed.2d 392.)

(c) There is no inconsistency between the administrative machinery provided in the Fair Housing Title of the 1968 Act (*supra*, §848) and the action recognized under the 1866 Act. (90 S.Ct. 405, 24 L.Ed.2d 393.)

(d) *Jones* held that although 42 U.S.C., §1982 provides no explicit method of enforcement, a federal court has power to fashion an effective equitable remedy. That remedy for the protection of a federal right is also available in a state court that has jurisdiction to grant injunctive relief. (90 S.Ct. 405, 24 L.Ed.2d 393.)

(e) *Jones* reserved the question of damages for violation of 42 U.S.C., §1982; but a general federal statute (42 U.S.C., §1988) makes federal standards govern damages for deprivation of a federal right. This means that "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." (90 S.Ct. 406, 24 L.Ed.2d 394.)

Three justices dissented, arguing that *Jones* was wrong in using the 100-year-old statute when new acts comprehensively cover the field; and that the present decision goes beyond *Jones*, fails to provide guidelines for the trial court, and is uncertain on damages in the state court. (90 S.Ct. 406, 24 L.Ed.2d 395.) (See 84 *Harv. L. Rev.* 82.)

In *Tillman v. Wheaton-Haven Recreation Assn.* (1973) 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403, respondent association operated a community swimming pool, use of which was limited to Whites and their white guests. Membership was by family units, largely confined to those residing within a three-quarter mile radius of the pool, and limited to 325 families. When a home within the preferential area was sold, the buyer obtained a first option on the seller's membership. Petitioners, black owners within the preferred area who were denied membership, and white members whose black guest was denied admission, sought declaratory relief under the Civil Rights Acts of 1866, 1870, and 1964 (42 U.S.C., §§1982, 1981, and 2000a et seq.). Summary judgment for the association was granted on the ground that it was an exempt private club under the 1964 Act. *Held*, reversed. *Sullivan* applied, despite the fact that membership preferences, rather than shares, were linked with the property; the preferences may have affected the price paid. (93 S.Ct. 1094, 35 L.Ed.2d 408.) The association was not a private club because membership was open to everyone who was white within the preferred area, subject only to the stated maximum on family memberships. It was therefore unnecessary to consider the issue of implied limitation on the sweep of 42 U.S.C., §1982, when its application to a truly private club, within the meaning of 42 U.S.C., §2000a(e), is under consideration. (93 S.Ct. 1094, 35 L.Ed.2d

410.)

To establish a claim of discrimination under 42 U.S.C., §1982, "the plaintiff must show that (1) he or she is a member of a racial minority, (2) the plaintiff applied for and was qualified to rent or purchase certain property or housing, (3) his or her bid to rent or buy was rejected, and (4) the housing or rental opportunity remained available thereafter." Once this prima facie case is shown, the burden shifts to the defendant "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reason. ... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (*Barber v. Rancho Mortg. & Inv. Corp.* (1994) 26 C.A.4th 1819, 1833, 1834, 1836, 32 C.R.2d 906 [same elements apply to actions under Equal Credit Opportunity Act (15 U.S.C., §1691 et seq.); evidence, although entirely circumstantial, supported black couple's claim of racial discrimination by mortgage lender in violation of 15 U.S.C., §1691 et seq.]; see 55 *Stanf. L. Rev.* 969 [implications of Communications Decency Act for fair housing on Internet].)

SUPPLEMENT: [This section is current through the latest supplement]

See 38 *Golden Gate L. Rev.* 329 [Fair Housing Act suits against roommate-matching websites]; 38 *Golden Gate L. Rev.* 489 [how Ninth Circuit circumvented intent of Fair Housing Act]; 93 *Proof of Facts* 3d 415 [housing discrimination against prospective tenant on account of race or national origin].



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8 *Witkin Sum. Cal. Law Const Law* § 852

[§ 852] In General.

Title VI of the Civil Rights Act of 1964 (42 U.S.C., §2000d et seq.) prohibits discrimination in federally assisted programs: "No person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity* receiving Federal financial assistance." (42 U.S.C., §2000d.) (See *Lau v. Nichols* (1974) 414 U.S. 563, 94 S.Ct. 786, 790, 39 L.Ed.2d 1, 4 [under Title VI, school district must take affirmative action to ensure equal educational opportunities for non-English-speaking students of Chinese ancestry]; *Hills v. Gautreaux* (1976) 425 U.S. 284, 96 S.Ct. 1538, 1547, 47 L.Ed.2d 792, 803 [in action against HUD for assisting Chicago Housing Authority in selecting sites within city limits to avoid placing black families in white neighborhoods, trial judge could devise remedy that covered entire Chicago metropolitan area]; 90 Harv. L. Rev. 223 [*Hills*]; 76 Cal. L. Rev. 1249, 1268 [discussing *Lau* and politics of federal intervention in bilingual education]; 30 *Hastings L. J.* 137 [Title VI and Health Facilities: Forms Without Substance]; 10 *Hastings Const. L. Q.* 15 [Title VI and the Intent/Impact Debate: A Critical Look at "Coextensiveness"]; 19 J. Juvenile Law 158 [Bilingual Education: Should the Traditional Approach Be Abandoned in Favor of "English Immersion"?]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §364 et seq.)

To establish a violation of Title VI, it is necessary to establish that a primary objective of the financial assistance was to provide employment. (42 U.S.C., §2000d-3.) (On lack of right of private individual to sue to enforce disparate-impact regulations under Title VI, see *infra*, §854.)

Title VI funding recipients do not implicitly consent to liability for punitive damages merely by accepting federal funds. (*Barnes v. Gorman* (2002) 536 U.S. 181, 122 S.Ct. 2097, 2102, 153 L.Ed.2d 230, 238; see 116 Harv. L. Rev. 312 [*Barnes*].)

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SUPPLEMENT: [This section is current through the latest supplement]



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b. Educational Amendments: Title IX.

8 *Witkin Sum. Cal. Law Const Law* § 853

[§ 853] Educational Amendments: Title IX.

Using language similar to Title VI, Title IX of the Educational Amendments of 1972 (20 U.S.C., §1681 et seq.) prohibits discrimination on the *basis of sex* under any educational program or activity receiving federal financial assistance. (20 U.S.C., §1681.) (See *Cannon v. University of Chicago* (1979) 441 U.S. 677, 99 S.Ct. 1946, 1953, 60 L.Ed.2d 560, 570 [Title IX contains implied private right of action]; *North Haven Bd. of Education v. Bell* (1982) 456 U.S. 512, 102 S.Ct. 1912, 1922, 72 L.Ed.2d 299, 308 [Title IX is applicable to employees of educational institutions, as well as students]; 110 *Harv. L. Rev.* 1627 [using Title IX to fight gender role oppression]; 20 *Santa Clara L. Rev.* 551 [Cannon]; 141 *A.L.R. Fed* 407 [action under Title IX against school or district for sexual harassment of student by student].)

It is not necessary that the institution receive direct financial assistance. If it admits students who receive federal assistance, it must comply with Title IX. (*Grove City College v. Bell* (1984) 465 U.S. 555, 104 S.Ct. 1211, 1217, 79 L.Ed.2d 516, 525; see 19 *Loyola L.A. L. Rev.* 235; 19 *U.S.F. L. Rev.* 53.)

In *Franklin v. Gwinnett County Public Schools* (1992) 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208, the question was whether the implied right of action recognized in *Cannon*, *supra*, supported a claim for monetary damages. *Held*, monetary damages are recoverable.

(a) "[T]he question of what remedies are available under a statute that provides a private cause of action is 'analytically distinct' from the issue of whether such a right exists in the first place. ... Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action ... , we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." (112 S.Ct. 1032, 117 L.Ed.2d 217.)

(b) In the years after the announcement in *Cannon*, two amendments to Title IX indicate that Congress was legislating with full cognizance of that decision, and that Congress did not intend to limit the remedies available. (112 S.Ct. 1036, 117 L.Ed.2d 221.) Thus, a damages remedy is available in an action to enforce *Title IX*. (112 S.Ct. 1038, 117 L.Ed.2d 224.)

In *Gebser v. Lago Vista Independent School Dist.* (1998) 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277, a teacher employed by defendant school district made sexually suggestive comments in his classes and then initiated a sexual relationship with a middle school student. The relationship lasted almost 1 year, until police discovered the teacher and student engaging in sexual intercourse and arrested the teacher. The student and her mother subsequently sued defendant in federal court under Title IX. *Held*, summary judgment for defendant affirmed.

(a) *Recovery of damages requires actual notice and deliberate indifference to misconduct.* Title IX expressly provides for administrative enforcement, including the termination of federal funding for educational institutions that violate its provisions. (118 S.Ct. 1994, 141 L.Ed.2d 286.) The private right of action under Title IX, however, is judicially implied and there is no legislative expression of the scope of available remedies. (118 S.Ct. 1996, 141 L.Ed.2d 288.) "[I]t does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." (118 S.Ct. 1997, 141 L.Ed.2d 289.)

(1) When Title IX was enacted in 1972, the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all. When Congress did provide for damages under Title VII in 1991, it carefully limited the amount available in individual cases. (118 S.Ct. 1997, 141 L.Ed.2d 289.)

(2) The express means of administrative enforcement requires actual notice to officials of the funding recipient; an agency may not initiate enforcement until it has advised the appropriate persons of the failure to comply and has allowed for voluntary compliance through remedial action. (118 S.Ct. 1998, 141 L.Ed.2d 290.) "It would be unsound ... for a statute's express system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially implied system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice." (118 S.Ct. 1999, 141 L.Ed.2d 291.)

(3) The implied damages remedy should be fashioned along the same lines as the express remedial scheme. An official who at least has authority to address the alleged discrimination must have actual knowledge of it and the official's response must amount to deliberate indifference before damages can be recovered. (118 S.Ct. 1999, 141 L.Ed.2d 292.)

(b) *Insufficient notice.* The only official alleged to have had information about the teacher's misconduct is the school principal, who had received complaints from other parents about the teacher's inappropriate remarks in class. That was insufficient to alert the principal or defendant to the possibility that the teacher was engaged in a sexual relationship with a student. (118 S.Ct. 2000, 141 L.Ed.2d 292.) Defendant's alleged failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims, as required by its federal funding agency, does not establish actual notice and deliberate indifference, nor does it constitute discrimination under *Title IX*. (118 S.Ct. 2000, 141 L.Ed.2d 293.)

Four justices dissented, stating that the majority's holding is "at odds with settled principles of agency law," under which defendant is responsible for the teacher's misconduct; by delegating authority to the teacher, defendant gave him a powerful influence over plaintiff student, allowing the abuse to be repeated over a prolonged period. (118 S.Ct. 2003, 141 L.Ed.2d 297.) The dissent characterized as "inappropriate" the majority's reliance on Title IX's administrative enforcement scheme to limit the availability of a damages remedy. (118 S.Ct. 2006, 141 L.Ed.2d 300.) (See 112 Harv. L. Rev. 335 [*Gebser*]; 20 J. Juvenile Law 231 [same]; 197 A.L.R. Fed 289 [right of action under Title IX against school or school district for sexual harassment by teacher or other school district employee].)

In *Davis v. Monroe County Bd. of Education* (1999) 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839, plaintiff brought an action for damages under Title IX alleging that her fifth-grade daughter had been the victim of sexual harassment by a male student in her class. The trial court dismissed the complaint on the ground that "student-on-student" harassment provides no basis for a private cause of action under Title IX. The Eleventh Circuit Court of Appeals, en banc, affirmed. *Held*, reversed.

(a) Recipients of federal funding who are deliberately indifferent to known acts of student-on-student sexual harassment may be liable for damages under Title IX.

(1) Title IX (20 U.S.C., §1681(a)) provides that no person in the United States may, on the basis of sex, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." (119 S.Ct. 1669, 143 L.Ed.2d 851.) A funding recipient who is deliberately indifferent to known acts of harassment by one student against another may intentionally violate this provision. (119 S.Ct. 1671, 143 L.Ed.2d 854.)

(2) The following sources provided recipients of federal funding with adequate notice that they could be liable for damages under Title IX: (1) the wording of 20 U.S.C., §1681(a), which extends liability to recipients who "subject" persons to discrimination; (2) the Court's decision in *Gebser*, which established liability for deliberate indifference to known acts of teacher-student harassment; and (3) the common law, which has imposed liability on schools for failure to protect students from the tortious acts of third parties. (119 S.Ct. 1671, 1672, 143 L.Ed.2d 854, 855.)

(b) A funding recipient's liability is limited by several factors.

(1) The recipient is liable for its own misconduct, not that of the harasser. (119 S.Ct. 1670, 143 L.Ed.2d 852.) If a funding recipient does not engage in harassment directly, it can be liable for damages only if its deliberate indifference "subjects" its students to harassment. The recipient need not have an agency relationship with the harasser to be held responsible, but it must have some control over the alleged harassment and the authority to take remedial action. (119 S.Ct. 1672, 143 L.Ed.2d 855.)

(2) Funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the alleged harassment is "clearly unreasonable in light of the known circumstances." (119 S.Ct. 1674, 143 L.Ed.2d 857.)

(3) The harassment must be "so severe, pervasive, and objectively offensive" that it deprives the victim of access to the educational opportunities and benefits that the school provides. It is not necessary to show that the harassment has physically excluded the victim from an educational opportunity or benefit, but the victim must have been "effectively denied equal access." (119 S.Ct. 1675, 143 L.Ed.2d 858.)

(4) Whether gender-oriented conduct rises to the level of actionable harassment depends on the surrounding circumstances. Damages are not available for simple acts of teasing or name-calling, even when these comments target differences in gender. (119 S.Ct. 1675, 143 L.Ed.2d 859.) Private damages actions are limited to cases having "a systemic effect on educational programs or activities." (119 S.Ct. 1676, 143 L.Ed.2d 860.)

(c) It was error to dismiss the complaint here. Plaintiff alleges that her daughter was the victim of repeated acts of sexual harassment, both verbal and physical, over a 5-month period. The harassment alleged could be considered severe, pervasive, and objectively offensive; the perpetrator ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that multiple victims sought to speak with the school principal about the harassment, and that the harassment had a concrete, negative effect on plaintiff's daughter's ability to receive an education. Finally, the complaint suggests that plaintiff may be able to show actual knowledge and deliberate indifference on defendant's part, because defendant made no effort to investigate or end the harassment. (119 S.Ct. 1676, 143 L.Ed.2d 860, 861.)

Four justices dissented, concerned that the decision will create federal control over issues of school discipline (119 S.Ct. 1683, 143 L.Ed.2d 870) and impose serious financial burdens on local school districts (119 S.Ct. 1689, 143 L.Ed.2d 877). (See *National Collegiate Athletic Assn. v. Smith* (1999) 525 U.S. 459, 119 S.Ct. 924, 929, 142 L.Ed.2d 929, 938 [NCAA's receipt of dues from colleges and universities receiving federal funds does not suffice to make NCAA subject to Title IX]; 113 Harv. L. Rev. 368 [school district liability for student-on-student sexual harassment]; 22 J. Juvenile Law 251 [Davis]; 28 Pepperdine L. Rev. 195 [same]; 158 A.L.R. Fed 563 [Sex Discrimination in Public Education under Title IX--Supreme Court Cases].)

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SUPPLEMENT: [This section is current through the latest supplement]

In *Jackson v. Birmingham Bd. of Education* (2005) 544 U.S. 167, 125 S.Ct. 1497, 161 L.Ed.2d 361, plaintiff, a girls' basketball coach, was fired after he complained about sex discrimination in the high school athletic program. Plaintiff brought an action alleging that defendant school board violated Title IX by retaliating against him for protesting the discrimination against the girls' team, but the district court dismissed the action on the ground that Title IX does not cover claims of retaliation. The Court of Appeals affirmed. *Held*, reversed. Title IX applies to claims "where the funding recipient retaliates against an individual because he has complained about sex discrimination." (125 S.Ct. 1502, 161 L.Ed.2d 369.)

(a) "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." (125 S.Ct. 1505, 161 L.Ed.2d 372.) Unlike Title VII of the Civil Rights Act (see text, §855), it does not specifically mention retaliation. (125 S.Ct. 1505, 161 L.Ed.2d 371.) But Congress did not include any specific discriminatory practices in the statute. The general prohibition on racial discrimination in 42 U.S.C., §1982 (see text, §814) was held to cover retaliation against those who advocate the rights of those protected by that statute in *Sullivan v. Little Hunting Park* (1969) 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386, text, §851. (125 S.Ct. 1505, 161 L.Ed.2d 372.) Title IX was enacted 3 years after that decision "and accordingly that decision provides a valuable context for understanding the statute." (125 S.Ct. 1506, 161 L.Ed.2d 372.) In this case, retaliation for plaintiff's advocacy of the rights of the girls' team was discrimination on the basis of sex, "just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." (125 S.Ct. 1506, 161 L.Ed.2d 373.)

(b) Title IX does not require the victim of the retaliation to be the victim of the discrimination that is the subject of the original complaint. "Where the retaliation occurs because the complainant speaks out about sex discrimination, the 'on the basis of sex' requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint." (125 S.Ct. 1507, 161 L.Ed.2d 374.)

(c) It would be difficult to achieve the objective of Title IX if persons who complain about sex discrimination do not have protection against retaliation. "[I]f retaliation were not prohibited, Title IX's enforcement scheme would unravel." Those "who witness discrimination would likely not report it, indifference claims would be short circuited, and the underlying discrimination would go unremedied." Further, Title IX's enforcement scheme "depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received 'actual notice' of the discrimination. ... If recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted. We should not assume that Congress left such a gap in its scheme." (125 S.Ct. 1508, 161 L.Ed.2d 375.)

(d) Legislation, like Title IX, enacted under the Spending Clause, essentially creates a contract between the states and the federal Government. The states agree to comply with conditions imposed in the legislation in return for receiving federal funds. However, under this legislation, a private damage action is not available unless the state has adequate notice that it could be liable for the proscribed conduct. "Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979." (125 S.Ct. 1509, 161 L.Ed.2d 376.) Title IX's private cause of action has consistently been interpreted broadly to encompass diverse forms of intentional sex discrimination. Retaliation "is easily attributable to the funding recipient, and it is always--by definition--intentional." (125 S.Ct. 1509, 161 L.Ed.2d 377.) Thus, Title IX itself supplied sufficient notice to defendant that it could not retaliate against plaintiff after he complained of sex discrimination against the girls' team. Further, the Court of Appeals cases that had considered this question at the time this case arose all had interpreted Title IX to cover retaliation. (125 S.Ct. 1510, 161 L.Ed.2d 377.)

Four justices dissented. (125 S.Ct. 1510, 161 L.Ed.2d 378.) (See 119 Harv. L. Rev. 357 [Jackson].)



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CHAPTER X - Constitutional Law

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XI. EQUAL PROTECTION OF THE LAWS
D. Federal Civil Rights Legislation.
5. Federally Assisted Programs.
c. Disparate Impact Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 854

[§ 854] Disparate Impact Regulations.

Alexander v. Sandoval (2001) 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517, held that private individuals may not sue to enforce disparate-impact regulations promulgated under Title VI.

(a) It is a given that private individuals may sue to enforce 42 U.S.C., §2000d, and obtain both injunctive relief and damages. (121 S.Ct. 1516, 149 L.Ed.2d 524.) And it is not disputed that the statute "prohibits only intentional discrimination." (121 S.Ct. 1516, 149 L.Ed.2d 524.) Further, regulations promulgated under 42 U.S.C., §2000d-1 "may validly proscribe activities that have a disparate impact on racial groups," even though these activities are permissible under 42 U.S.C., §2000d. (121 S.Ct. 1517, 149 L.Ed.2d 525.) However, the question remains whether 42 U.S.C., §2000d-1 confers a private right of action to enforce the disparate-impact regulations. If not, a failure to comply with those regulations that is not also a failure to comply with 42 U.S.C., §2000d is not actionable. (121 S.Ct. 1516, 149 L.Ed.2d 524.) The holdings in *Cannon v. University of Chicago* (1979) 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560, and *Guardians Assn. v. Civil Service Com. of New York* (1983) 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866, do not answer this question. *Cannon* assumed that the University of Chicago had intentionally discriminated, and *Guardians* held "that private individuals could not recover compensatory damages under Title VI except for intentional discrimination." (121 S.Ct. 1518, 149 L.Ed.2d 526.)

(b) Federal agencies are authorized by 42 U.S.C., §2000d-1 to effectuate 42 U.S.C., §2000d by issuing rules and regulations. The "rights-creating" language so critical to the Court's analysis in *Cannon* is completely missing from 42 U.S.C., §2000d-1. The section "empowers agencies to enforce their regulations either by terminating funding to the 'particular program, or part thereof,' that has violated the regulation or 'by any other means authorized by law,' 42 U.S.C., §2000d-1. No enforcement action may be taken, however, 'until the department has advised the appropriate person ... of the failure to comply ... and has determined that compliance cannot be secured by voluntary means.'" (121 S.Ct. 1521, 149 L.Ed.2d 530.) These and other elaborate restrictions on agency enforcement "tend to contradict a Congressional intent to create privately enforceable rights" through 42 U.S.C., §2000d-1 itself. (121 S.Ct. 1521, 149 L.Ed.2d 531.)

In a strongly worded dissent, four justices stated that the majority "badly misconstrues" *Cannon*. The fact that the "Court has never said in so many words that a private right of action exists to enforce the disparate-impact regulations ... does not absolve the Court of the responsibility to canvass our prior opinions for guidance. ... This Court has already considered the question presented today and concluded that a private right of action exists." (121 S.Ct. 1524, 149 L.Ed.2d 534.) (See 115 Harv. L. Rev. 497 [*Alexander v. Sandoval*]; 116 Harv. L. Rev. 1774 [judicial challenges and administrative possibilities after *Sandoval*]; 21 Pepperdine L. Rev. 1 [extending disparate-impact analysis to Title IX litigation]; 33 Stanf. L. Rev. 737 [Disparate Impact Suits under Title IX].)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law XI. EQUAL PROTECTION OF THE LAWS D. Federal Civil Rights Legislation. 6. Discrimination in Employment. a. In General. 1. Statutory Prohibition.

8 *Witkin Sum. Cal. Law Const Law* § 855

[§ 855] Statutory Prohibition.

(1) *In General.* Under Title VII of the Civil Rights Act of 1964 (42 U.S.C., §2000e et seq.), it is an unlawful employment practice for an employer, employment agency, union, or joint labor-management committee to discriminate on the basis of race, color, religion, sex, or national origin. (42 U.S.C., §2000e-2(a)-(d).) (See *New York City Transit Authority v. Beazer* (1979) 440 U.S. 568, 99 S.Ct. 1355, 1365, 1368, 59 L.Ed.2d 587, 602, 605 [city transit authority's refusal to hire methadone users was not violative of either Title VII or Equal Protection Clause]; *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 106 S.Ct. 2399, 2409, 91 L.Ed.2d 49, 63, infra, §864 [Court of Appeals "was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances"]; on regulation of employment generally, see 3 *Summary* (10th), *Agency and Employment*, §314 et seq.)

In *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 94 S.Ct. 334, 340, 38 L.Ed.2d 287, 294, the Court held that "national origin" refers to the place of birth and the place from which one's ancestors came; it does not cover alienage. Rejecting a claim of discrimination raised by a resident alien who was a citizen of Mexico, the Court made this distinction: "Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." (94 S.Ct. 340, 38 L.Ed.2d 295.) (See 2 *Hastings Const. L. Q.* 1052.)

As originally enacted, Title VII did not apply to governmental units. However, the Equal Employment Opportunity Act of 1972 amended Title VII to include state and local governments as employers (42 U.S.C., §2000e(a), (b)), and added a new provision prohibiting discrimination in federal employment (42 U.S.C., §2000e-16). (See *Brown v. General Services Administration* (1976) 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 [exclusive remedy for discrimination in federal employment]; *Chandler v. Rousebush* (1976) 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 [right of federal employees to trial de novo]; *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614, supra, §43 [award of money damages to private individual in action against state]; 8 U.S.F. L. Rev. 718 [Federal Government as Employer: Double Standard]; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §69 et seq.)

Discrimination with respect to government contractors is prohibited by executive order. (See 84 *Harv. L. Rev.* 1275; 60 *Cal. L. Rev.* 1196; 52 *So. Cal. L. Rev.* 767; 52 *So. Cal. L. Rev.* 973; 16 *U.S.F. L. Rev.* 491; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §92 et seq.; 44 *A.L.R.3d* 1283 [requirement of pledge against racial discrimination in hiring under construction contract].)

Title VII does not require employers to grant preferential treatment in order to correct employee imbalances with respect to race, color, religion, sex, or national origin. (42 *U.S.C.*, §2000e-2(j).)

(2) *Retaliation Against Former Employee.* Title VII makes it unlawful for an "employer to discriminate against any of his employees or applicants for employment" who have availed themselves of Title VII protections, or assisted others in doing so. (42 *U.S.C.*, §2000e-3(a).) The statute applies to former employees. The term "employees" is ambiguous, but the section expressly protects employees from retaliation for filing a "charge" under Title VII, and a "charge" alleging unlawful discharge would necessarily be brought by a former employee. Further, excluding former employees "would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims." (*Robinson v. Shell Oil Co.* (1997) 519 *U.S.* 337, 117 *S.Ct.* 843, 848, 136 *L.Ed.2d* 808, 816.) (See 149 *A.L.R. Fed* 431 [who has "participated" in investigation, proceeding, or hearing and is thereby protected from retaliation under Title VII].)

(3) *No Extraterritorial Application.* *Equal Emp. Opportunity Com. v. Arabian Amer. Oil Co.* (1991) 499 *U.S.* 244, 111 *S.Ct.* 1227, 113 *L.Ed.2d* 274, held that Title VII does not apply extraterritorially to regulate the employment practices of U.S. employers who employ U.S. citizens abroad.

(a) Congress has the authority to enforce its laws beyond the territorial boundaries of the U.S.; but whether it has in fact exercised that authority in a particular case is a matter of statutory construction. (111 *S.Ct.* 1230, 113 *L.Ed.2d* 281.)

(b) "It is a long-standing principle of American Law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' ... This 'canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained.' ... It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." (111 *S.Ct.* 1230, 113 *L.Ed.2d* 282.) Therefore, unless there is "the affirmative intention of the Congress clearly expressed," it must be presumed that the congressional act is primarily concerned with domestic conditions. (111 *S.Ct.* 1230, 113 *L.Ed.2d* 282.)

(c) The language relied on by petitioners to show an intent to give the statute extraterritorial operation is ambiguous, and is insufficient to overcome the presumption. (111 *S.Ct.* 1231, 113 *L.Ed.2d* 283.) "Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." (111 *S.Ct.* 1235, 113 *L.Ed.2d* 288.) "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." (111 *S.Ct.* 1236, 113 *L.Ed.2d* 289.) (See 105 *Harv L. Rev.* 369.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Arbaugh v. Y&H Corp.* (2006) 546 *U.S.* 500, 126 *S.Ct.* 1235, 1245, 163 *L.Ed.2d* 1097, 1110 [15-employee threshold in 42 *U.S.C.*, §2000e(b) for application of liability under Title VII is not jurisdictional; instead, employee numerosity requirement relates to substantive adequacy of plaintiff's Title VII claim, and thus it could not be raised defensively for first time after entry of judgment]; 40 *Loyola L.A. L. Rev.* 793 [Arbaugh].(2a) (*New Retaliation Against Employee.* In *Burlington Northern & Santa Fe Ry. Co. v. White* (2006) 548 *U.S.* 53, 126 *S.Ct.* 2405, 165 *L.Ed.2d* 345, the court answered the questions (a) whether the anti-retaliation provision of Title VII of the federal Civil Rights Act only covers employer activities that affect the terms and conditions of employment, and (b) how harmful the

adverse activities must be to fall within its scope. Plaintiff, the only woman working in defendant's maintenance yard, complained that her immediate supervisor was making disparaging, insulting, and inappropriate remarks to her. Defendant suspended the supervisor and ordered him to attend a sexual harassment class, but also removed plaintiff from her primary job as a forklift operator, reassigning her to standard track laborer tasks. Defendant explained that a "more senior man" should have the "less arduous and cleaner" forklift job. Plaintiff filed complaints with the Equal Employment Opportunity Commission (EEOC) claiming gender-based discrimination and retaliation. She filed an additional retaliation charge after being suspended without pay for insubordination, even though she was ultimately reinstated and awarded back pay as part of an internal grievance procedure. The Court of Appeals affirmed the District Court's judgment in plaintiff's favor, although members of the court differed regarding the proper standard to apply. *Held*, affirmed.

(a) The anti-retaliation provision is not limited to actions and harms that are related to employment or that occur at the workplace. (126 S.Ct. 2409, 165 L.Ed.2d 353.) Although the language of Title VII's anti-discrimination provision, 42 U.S.C., §2000e-2(a), protects an individual only from employment-related discrimination, the words of the anti-retaliation provision do not so provide. The two provisions also differ in purpose. The anti-discrimination provision "seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct." (126 S.Ct. 2412, 165 L.Ed.2d 356, 357.) Confining the protections of the statute "to employment-related actions would not deter the many forms that effective retaliation can take," and thus would not maintain unfettered access to its remedial provisions. (126 S.Ct. 2412, 165 L.Ed.2d 357.) "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. ... Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." (126 S.Ct. 2414, 165 L.Ed.2d 359.)

(b) The anti-retaliation provision covers only those "employer actions that would have been materially adverse to a reasonable employee or job applicant," which in this case, "means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." (126 S.Ct. 2409, 165 L.Ed.2d 353.) Thus, although context does matter, normally petty slights, minor annoyances, and a simple lack of good manners would not create sufficient deterrence to support a charge of retaliation. (126 S.Ct. 2415, 165 L.Ed.2d 360.) This "standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint." (126 S.Ct. 2416, 165 L.Ed.2d 361.)

(c) There was sufficient evidence to support the jury's verdict that defendant retaliated against plaintiff by reassigning her to standard track labor. The fact that plaintiff's forklift and track labor duties fell within the same job description did not protect defendant from a claim of retaliation. The EEOC has consistently found that retaliatory work assignments are a classic and widely recognized form of forbidden retaliation. Whether a particular reassignment would be considered materially adverse to a reasonable person in plaintiff's position depends on the circumstances of the particular case. Here, there was considerable evidence that plaintiff's track labor duties were dirtier and more arduous, and that the forklift position had more prestige and was considered a better job. (126 S.Ct. 2416, 2417, 165 L.Ed.2d 361, 362.)

(d) There was sufficient evidence to support the jury's finding that defendant retaliated against plaintiff by suspending her without pay for 37 days. The fact that plaintiff's suspension was ultimately reversed and that she was reimbursed back pay did not preclude a finding that the suspension was materially adverse. Title VII was amended in 1991 to permit victims of intentional discrimination to recover compensatory and punitive damages. That congressional judgment would be undermined by permitting employers to avoid liability in these circumstances. Plaintiff and her family were forced to live for 37 days without income, without knowing when she could return to work, during the Christmas holidays. She became depressed and obtained medical treatment for her emotional distress. "A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually receives backpay." (126 S.Ct. 2417, 165 L.Ed.2d 362.)

One justice concurred in the judgment. (126 S.Ct. 2418, 165 L.Ed.2d 363.) (See 41 Loyola L.A. L. Rev. 683 [Burlington Northern].)



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2. Texts and Commentary.

8 Witkin Sum. Cal. Law Const Law § 856

[§ 856] Texts and Commentary.

Commentary on employment discrimination and Title VII is extensive. (For commentary relating to *enforcement* of Title VII, see *infra*, §858.)

(1) *Texts and Practice Works*. See 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §1 et seq.; 149 A.L.R. *Fed* 405 [what constitutes religious harassment in employment under Civil Rights Act]; 160 A.L.R. *Fed* 441 [treating separate entities as one for determining number of employees required for coverage under Act]; 172 A.L.R. *Fed* 465 [requirement of replacement by nonprotected individual to establish prima facie employment discrimination]; 174 A.L.R. *Fed* 611 [liability of hospital under Title VII for refusing or revoking staff privileges of physician or nurse]; 57 *Proof of Facts* 3d 75 [Contingent Workers' Protection Under Federal Anti-Discrimination Statutes].

(2) *Law Reviews*. See 92 *Harv. L. Rev.* 757 [effect of past discriminatory acts]; 93 *Harv. L. Rev.* 702 [union liability for employer's discrimination]; 95 *Harv. L. Rev.* 947 [application of Title VII to jobs in high places]; 99 *Harv. L. Rev.* 655 [wage discrimination under Title VII]; 104 *Harv. L. Rev.* 749 [Invisible Man: Black and Male under Title VII]; 104 *Harv. L. Rev.* 1157 [discrimination in "general ability" job testing]; 108 *Harv L. Rev.* 1085 [arguing that employment antidiscrimination laws are mistake]; 109 *Harv L. Rev.* 1571 [developments in employment discrimination law]; 117 *Harv. L. Rev.* 1215 [effect of zero or negligible number of women or minorities working in particular job]; 81 *Cal. L. Rev.* 1241 et seq. [inaugural issue of Asian Law Journal]; 81 *Cal. L. Rev.* 1325 [accent discrimination as unlawful employment practice, and call for use of standardized test for assessment of comprehensibility of nonnative speakers]; 85 *Cal. L. Rev.* 261 [English-only rules in workplace]; 26 *Golden Gate L. Rev.* 413 [interaction of race and gender in Title VII claims]; 10 *Hastings Const. L. Q.* 20 [Disproportionate Impact Standard Under Title VII]; 26 *Hastings L. J.* 1408 [discrimination against ex-prisoners]; 21 *Hastings Const. L. Q.* 275 [application of Title VII to religious employers]; 31 *Hastings L. J.* 929 [continuing violation theory]; 43 *Hastings L. J.* 57 [fallacy of "pretext-plus" rule in employment discrimination cases]; 10 *La Raza L. J.* 1347 [English-only rules in workplace]; 37 *Loyola L.A. L. Rev.* 153 [usefulness of statistical evidence when implementing pay equity adjustments]; 37 *Loyola L.A. L. Rev.* 169 [First Amendment protection for whistle-blowing employee]; 31 *San Diego L. Rev.* 1 [symposium on Title VII]; 26 *Santa Clara L. Rev.* 667 [Child Care as an Employee Fringe Benefit: May An Employer Discriminate?]; 60 *So. Cal. L. Rev.* 734 [basing disparate treatment analysis on motive rather than intent]; 66 *So. Cal. L. Rev.* 709 [Law and

Macroeconomics: Employment Discrimination Litigation Over the Business Cycle]; 77 *So. Cal. L. Rev.* 307 [constructive discharge]; 36 *Stanf. L. Rev.* 1299 [Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet]; 43 *Stanf. L. Rev.* 241 [discrimination against "other" minorities as proof of discrimination in employment under federal law]; 43 *Stanf. L. Rev.* 983 [changing nature of employment discrimination litigation]; 47 *Stanf. L. Rev.* 1161 [cognitive bias approach to discrimination and equal employment opportunity]; 55 *Stanf. L. Rev.* 2195 [Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine]; 18 *U.C. Davis L. Rev.* 721 [similarity of congressional and judicial lawmaking under Title VII]; 31 *U.C.L.A. L. Rev.* 305 [disparate impact theory and demise of bottom line principle]; 25 *U.S.F. L. Rev.* 1 [critical analysis of recent Supreme Court decisions]; 30 *West L.A. L. Rev.* 94 [Facially Neutral Employment Criteria and Title VII: Competing Frameworks and Notions of Harm]; 37 *U.S.F. L. Rev.* 627 [guide to representing parties in EEOC mediations].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Texts and Practice Works.* See 24 *A.L.R. Fed* 2d 587 [Requirement that Workers Speak English in Workplace as Violative of Federal Constitutional and Statutory Law].

(2) *Law Reviews.* See 27 *California Lawyer* 36 (August 2007) [Banning Off-Duty Smoking]; 93 *Cal. L. Rev.* 623 [Work Culture and Discrimination]; 93 *Cal. L. Rev.* 1455 [maintaining work environments free of harassment and discrimination by nonemployees]; 95 *Cal. L. Rev.* 627 [effect of employment discrimination on private lives of employees]; 95 *Cal. L. Rev.* 669 [competitive conduct standard for assessing when disparate impacts are unjustified]; 59 *Hastings L. J.* 643 [unifying disparate treatment]; 59 *Hastings L. J.* 1235 [Why Binomial Distributions Do Not Work as Proof of Employment Discrimination]; 33 *Pepperdine L. Rev.* 385 [eliminating disparate treatment of third-party harassment]; 48 *Santa Clara L. Rev.* 1069 [Controlling the Cat's Paw: Circuit Split Concerning the Level of Control a Biased Subordinate Must Exert Over the Formal Decisionmaker's Choice To Terminate]; 60 *Stanf. L. Rev.* 73 [job security protections and equal employment opportunity in conflict]; 52 *U.C.L.A. L. Rev.* 1393 [NAACP, labor litigation, and making of civil rights in 1940s]; 39 *U.S.F. L. Rev.* 413 [Partners Without Power: Protecting Law Firm Partners from Discrimination]; 41 *U.S.F. L. Rev.* 171 [growing trend of family responsibilities discrimination].



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a. In General.
3. Exceptions and Exemptions.

8 Witkin Sum. Cal. Law Const Law § 857

[§ 857] Exceptions and Exemptions.

(1) *Exceptions.* The following practices are not unlawful employment practices under Title VII:

(a) To discriminate on the basis of *religion, sex, or national origin* where these factors are a "*bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise." (42 U.S.C., §2000e-2(e); see 57 So. Cal. L. Rev. 335 [biases of customers in foreign country as bona fide occupational qualification].)

(b) For a *religious educational institution* to hire persons of a particular religion. (42 U.S.C., §2000e-2(e); see 9 Loyola L.A. L. Rev. 124; 60 So. Cal. L. Rev. 1375.)

(c) To take action with respect to members of the *Communist Party* or a Communist-action or Communist-front organization. (42 U.S.C., §2000e-2(f).)

(d) To discriminate against persons who fail to meet *national security requirements*. (42 U.S.C., §2000e-2(g).)

(e) To differentiate in compensation or other conditions of employment pursuant to a *bona fide seniority or merit system*, or to the *location* of the employment, if the differentiation is not the result of an intention to discriminate on the basis of race, color, religion, sex, or national origin. (42 U.S.C., §2000e-2(h); on seniority systems, see *infra*, §878.)

(f) To utilize a *professionally developed ability test*, if the test is not designed to discriminate on the basis of race, color, religion, sex or national origin. (42 U.S.C., §2000e-2(h).)

(g) To differentiate in *compensation* on the basis of sex, where the differentiation is authorized by 29 U.S.C., §206(d) (seniority or merit system). (42 U.S.C., §2000e-2(h).)

(2) *Exemptions.* Title VII does not apply to the employment of aliens outside a state, to the employment of persons of a particular religion by a religious institution (42 U.S.C., §2000e-1), or to the preferential treatment of Indians living on or near a reservation by businesses so located (42 U.S.C., §2000e-2(i)).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Exceptions*. See 121 *Harv. L. Rev.* 1776 [ministerial exception to Title VII]. (2) *Exemptions*. See 95 *Cal. L. Rev.* 799 [tribal sovereignty and illiberalism].



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8 *Witkin Sum. Cal. Law Const Law* § 858

[§ 858] In General.

(1) *Statutory Procedure.* Title VII and the guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) establish an elaborate procedure for dealing with charges of unfair employment practices. (See *45B Am.Jur.2d* (2002 ed.), *Job Discrimination* §§1080 et seq., 1822 et seq.) The principal steps are:

- (a) Filing of a charge by an aggrieved party or a member of the EEOC. (*42 U.S.C.*, §2000e-5(b).)
- (b) Investigation of the charge by the EEOC and determination of its validity. (*42 U.S.C.*, §2000e-5(b).)
- (c) Conciliation efforts by the EEOC to eliminate the unlawful practice. (*42 U.S.C.*, §2000e-5(b).)
- (d) Filing of a civil action by the EEOC or the Attorney General (where the charge is against a governmental unit), or the aggrieved party. (*42 U.S.C.*, §2000e-5(f).)
- (e) Proceedings to compel compliance with the court's order. (*42 U.S.C.*, §2000e-5(i).) (See *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 [statute of limitations on action]; *United States Postal Service Bd. of Governors v. Aikens* (1983) 460 U.S. 711, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403, 409, footnote 3 [trial judge erred in requiring Title VII plaintiff to offer direct proof of discriminatory intent; as in any lawsuit, plaintiff may prove case by direct or circumstantial evidence]; *Equal Emp. Opportunity Com. v. Shell Oil Co.* (1984) 466 U.S. 54, 104 S.Ct. 1621, 1633, 80 L.Ed.2d 41, 59 [in pattern of discrimination cases, charge should disclose persons discriminated against, positions from which they had been excluded, methods of discrimination, and period during which it occurred]; *Roman v. Los Angeles* (2000) 85 C.A.4th 316, 326, 102 C.R.2d 13 [state right-to-sue notice does not satisfy EEOC requirement of obtaining right-to-sue notice]; *National R.R. Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 122 S.Ct. 2061, 2073, 2074, 153 L.Ed.2d 106, 122, 124 [statute only covers discrete acts of discrimination or retaliation occurring within statutory time period; however, for purposes of assessing liability on hostile environment claim, continuing acts may be considered as long as some act contributing to hostile environment took place within statutory time period]; 116 *Harv. L. Rev.* 352 [*National R.R. Passenger*]; 91 *Hastings L. J.* 1417 [same].)

(2) *Effect of Arbitration Award.* The question whether an arbitration award bars an action under Title VII was answered in *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147. The federal policies "can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." (94 S.Ct. 1025, 39 L.Ed.2d 165.) (See 32 *Loyola L.A. L. Rev.* 881 [debate surrounding compulsory arbitration of employment disputes and Title VII claims]; 27 *Pepperdine L. Rev.* 1 [Compulsory Employment Arbitration and the EEOC]; 47 *U.C.L.A. L. Rev.* 1885 [Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration To Accommodate Title VII Protections]; 152 *A.L.R. Fed* 75 [Enforceability of Arbitration Clauses in Collective Bargaining Agreements as Regards Claims Under Federal Civil Rights Statutes].)

(3) *Pleading Standard.* An employment discrimination complaint need not contain the "specific facts establishing a prima facie case of discrimination under the framework" outlined in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, *infra*, §870. Under *F.R. Civ. P., Rule 8(a)(2)*, a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." (*Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S.Ct. 992, 995, 998, 152 L.Ed.2d 1, 6, 9, 5 *Cal. Proc.* (4th), *Pleading*, Supp., §882.)

(4) *Verification Requirement.* An EEOC regulation permitting a later oath to relate back to a charge filed within the required time limits is valid. Although the Civil Rights Act requires a charge to be under oath (see 42 U.S.C., §2000e-5(b)) and filed within a specific time (see 42 U.S.C., §2000e-5(e)), these provisions do not combine to require that the verification be completed within the time set for filing the charge. (*Edelman v. Lynchburg College* (2002) 535 U.S. 106, 122 S.Ct. 1145, 1149, 152 L.Ed.2d 188, 197.)

(5) *EEOC Notification Letter.* Under 42 U.S.C., §2000e-16(c), an employee or applicant who is aggrieved by the EEOC's disposition of his or her complaint may file an action against the federal Government within 90 days of "receipt of notice" of the EEOC's final action. (See *Irwin v. Department of Veterans Affairs* (1990) 498 U.S. 89, 111 S.Ct. 453, 456, 458, 112 L.Ed.2d 435, 442, 444 [notification letter is "received" on receipt by either claimant or his or her attorney; failure to file action within prescribed period may be excused under equitable tolling doctrine, but excusable neglect is insufficient to invoke doctrine].)

(6) *Texts and Commentary.* Commentary on enforcement of Title VII is extensive. (See 80 *Harv. L. Rev.* 387 [Beyond the Prima Facie Case: Statistical Proof and Rebuttal]; 99 *Harv. L. Rev.* 619 [certifying classes in Title VII actions]; 10 *Golden Gate L. Rev.* 963 ["offer of judgment" rule]; 28 *Hastings L. J.* 877 [investigation and conciliation of charges; employers' rights]; 18 *Santa Clara L. Rev.* 115 [consent decrees]; 24 *Southwestern U. L. Rev.* 511 [road map of Title VII's procedures and remedies]; 39 *Stanf. L. Rev.* 851 [numerical remedies]; 18 *U.C. Davis L. Rev.* 749 [equitable modification of Title VII's time limits]; 22 *U.C.L.A. L. Rev.* 1288 [Scope of Inquiry and Class Action Under Title VII]; 45 *U.C.L.A. L. Rev.* 1401 [public vs. private enforcement of civil rights in employment]; 11 *West L.A. L. Rev.* 69 [filing of administrative complaint and statute of limitations]; 103 *A.L.R.5th* 557 [Pursuit of Nonjudicial Remedy for Employment Discrimination as Amounting to Election Against Judicial Remedy]; 63 *Am.Jur. Trials* 127 [defending employment discrimination cases]; 63 *Am.Jur. Trials* 257 [Defendant Class Actions in Title VII Cases].)

West's Key Number Digest, Civil Rights k.361 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Procedure.* In 2009, Congress amended 42 U.S.C., §2000e-5(e) to nullify the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982. *Ledbetter* held that the time for filing a sex discrimination charge begins to run when the discriminatory act occurs. Hence, the time to file charges relating to the ongoing effects of allegedly discriminatory pay raises began to run when the pay-setting decisions were made. Each decision was a discrete act for purposes of the statute, and paychecks that were issued during the 180-day period prior to filing an EEOC charge did not provide a basis for overcoming the prior failure to file a charge. (127 S.Ct. 2169, 167 L.Ed.2d 993.) (See 43 *Cal. Western L. Rev.* 497 [*National R.R. Passenger Corp.* and its effect on post-filing discrete acts in employment discrimination cases]; 38 *Golden Gate L. Rev.* 249 [Supreme Court's

limitation on employee's ability to challenge discriminatory pay under Title VII]; 121 *Harv. L. Rev.* 355 [*Ledbetter*].)

42 U.S.C., §2000e-5(e) specifies that for purposes of discrimination in compensation based on race, color, religion, sex, or national origin, an unlawful employment practice occurs (a) when a discriminatory compensation decision or practice is adopted, (b) when an individual becomes subject to a discriminatory compensation decision or practice, or (c) when an individual is affected by application of a discriminatory compensation decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from the decision or practice. (42 U.S.C., §2000e-5(e)(3)(A).) In addition to relief authorized by 42 U.S.C., §1981a, liability may accrue and an aggrieved person may obtain relief as provided in 42 U.S.C., §2000e-5(g)(1) (see text, §859). This remedy includes "recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge." (42 U.S.C., §2000e-5(e)(3)(B).) The amendment takes effect as if enacted on May 28, 2007, and applies to all claims of discrimination in compensation under Title VII.(3) *Pleading Standard*.

Swierkiewicz case:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §928.

(6) *Texts and Commentary*. See 13 *A.L.R. Fed* 2d 633 [tolling time period for bringing Title VII action based on personal status or circumstances]; 16 *A.L.R. Fed* 2d 507 [tolling time period for bringing Title VII charge with EEOC based on filings and administrative and court proceedings]; 20 *A.L.R. Fed* 2d 343 [general principles for tolling time period for filing Title VII charge with EEOC]; 21 *A.L.R. Fed* 2d 65 [general principles for tolling time period for bringing Title VII action]; 24 *A.L.R. Fed* 2d 263 [tolling of time period for bringing Title VII action based on neglect or misconduct of third party]; 25 *A.L.R. Fed* 2d 571 [tolling of time period for filing Title VII charge with EEOC based on personal status or circumstances]; 28 *A.L.R. Fed* 2d 73 [tolling of time period for filing Title VII charge with EEOC based on neglect or misconduct]; 29 *A.L.R. Fed* 2d 415 [tolling of time period for bringing Title VII action based on filings and administrative and court proceedings]; 97 *Proof of Facts* 3d 81 [litigating employment discrimination class action].



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8 Witkin Sum. Cal. Law Const Law § 859

[§ 859] Remedies, Costs, and Attorneys' Fees.

(1) *In General.* On finding that the defendant intentionally engaged in the charged unlawful employment practice, the trial judge may enjoin the practice and order appropriate affirmative action, including the reinstatement or hiring of employees, with or without back pay. (42 U.S.C., §2000e-5(g).) (See *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 [lack of bad faith by defendant is insufficient ground for denial of back pay award]; 41 *Hastings L. J.* 1301 [back pay remedy].)

(2) *Power of EEOC To Award Compensatory Damages.* The language, purposes, and history of the Title VII extension and the 1991 Civil Rights Act "convince us that Congress has authorized the EEOC to award compensatory damages in Federal Government employment discrimination cases." (*West v. Gibson* (1999) 527 U.S. 212, 119 S.Ct. 1906, 1909, 144 L.Ed.2d 196, 203; on damages under 1991 Civil Rights Act, see *supra*, §849.)

(3) *Attorneys' Fees and Costs.* Title VII provides for the award of attorneys' fees to the prevailing party as part of costs. The EEOC and the United States are liable for costs "the same as a private person." (42 U.S.C., §2000e-5(k); see *Christiansburg Garment Co. v. Equal Emp. Opportunity Com.* (1978) 434 U.S. 412, 98 S.Ct. 694, 700, 54 L.Ed.2d 648, 656 [attorneys' fees may be awarded to prevailing defendant only when plaintiff's action is shown to be frivolous]; *Library of Congress v. Shaw* (1986) 478 U.S. 310, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250, 259 [§2000e-5(k), making U.S. liable for attorneys' fees and costs "the same as a private person," was not waiver of sovereign immunity from award of interest thereon]; *Independent Federation of Flight Attendants v. Zipes* (1989) 491 U.S. 754, 109 S.Ct. 2732, 2736, 105 L.Ed.2d 639, 648 [attorneys' fees under §2000e-5(k) are recoverable against losing intervenor only if intervenor's action is frivolous, unreasonable, or without foundation]; 19 *Santa Clara L. Rev.* 487 [*Christiansburg*]; 140 *A.L.R. Fed* 301 [factors in employment discrimination cases justifying increase in attorneys' fees].)

West's Key Number Digest, Civil Rights k.391 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 860

[§ 860] Effect of After-Acquired Evidence of Wrongdoing.

In *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852, the issue was whether an employee discharged in violation of the Age Discrimination in Employment Act (infra, §873) "is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds." (115 S.Ct. 882, 130 L.Ed.2d 858.) *Held*, this evidence does not bar all relief, but it may limit the amount and type of relief.

(a) The ADEA and Title VII share common substantive features and a common purpose: elimination of discrimination in the workplace. The Act's remedial measures are designed both to deter discrimination and to compensate employees for injuries caused by the discrimination. A private litigant who seeks redress for injuries vindicates both these objectives, and it would not accord with the statutory scheme if after-acquired evidence of wrongdoing barred all relief for an earlier violation of the Act. (115 S.Ct. 884, 130 L.Ed.2d 861.)

(b) However, after-acquired evidence of the employee's wrongdoing may bear on the specific remedy to be ordered. (115 S.Ct. 885, 130 L.Ed.2d 862.) "In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern 'for the relative moral worth of the parties,' ... but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing." (115 S.Ct. 886, 130 L.Ed.2d 863.)

(c) The proper boundaries of remedial relief will vary from case to case. "[A]s a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." (115 S.Ct. 886, 130 L.Ed.2d 863.)

(d) The proper measure of back pay presents a more difficult problem. The statutory goals of deterrence and compensation must be remembered. However, "[o]nce an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the

course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party." (115 S.Ct. 886, 130 L.Ed.2d 864.)

(e) "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (115 S.Ct. 886, 130 L.Ed.2d 864.)

(f) Although employers might routinely engage in discovery into an employee's background or performance to resist claims under the Act, the authority of the courts to award attorneys' fees and to impose sanctions will deter abuses. (115 S.Ct. 887, 130 L.Ed.2d 864.) (See *Murillo v. Rite Stuff Foods* (1998) 65 C.A.4th 833, 849, 77 C.R.2d 12, *infra*, §927 [after-acquired evidence doctrine did not bar claim for sexual harassment by illegal alien; discussing *McKennon*]; 22 *Pepperdine L. Rev.* 365 [criticizing after-acquired evidence defense]; 45 *Stanf. L. Rev.* 175 [after-acquired evidence defense]; on admissibility under Fair Employment and Housing Act of after-acquired medical evidence supporting termination decision based on plaintiff's inability to perform job, see *infra*, §936.)

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8 Witkin Sum. Cal. Law Const Law § 861

[§ 861] In General.

(1) *Rejection of General Assumptions.* Title VII and the guidelines promulgated by the Equal Employment Opportunity Commission reject general assumptions about employment characteristics of women, and call for an individual inquiry into a particular woman's qualifications or a clearly justifiable classification with respect to a particular job category. (See *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 14, 95 C.R. 329, 485 P.2d 529, supra, §765.) (On discrimination against homosexuals, see supra, §798; on discrimination based on pregnancy, see infra, §§863, 877.)

Illustrative cases are numerous. (See *Long v. State Personnel Bd.* (1974) 41 C.A.3d 1000, 1016, 116 C.R. 562, supra, §766; *Dothard v. Rawlinson* (1977) 433 U.S. 321, 97 S.Ct. 2720, 2030, 53 L.Ed.2d 786, 802 [height and weight requirement for prison guards was not shown to be job-related; however, regulation allowing men only to fill "contact positions" in male prisons was justified as bona fide occupational qualification]; *Hishon v. King & Spalding* (1984) 467 U.S. 69, 104 S.Ct. 2229, 2234, 81 L.Ed.2d 59, 66 [allegations established that partnership consideration was, under Title VII, a term, condition, or privilege of plaintiff's employment with defendant law firm; hence, consideration must be without regard to sex]; *Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 [disparate impact analysis and evidentiary standards]; 95 Harv. L. Rev. 487 [*Dothard*]; 98 Harv. L. Rev. 227 [*Hishon*]; 102 Harv. L. Rev. 308 [*Watson*].)

In *Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657, petitioner, administering its retirement program, required its female employees to make larger contributions to the pension fund than its male employees. *Held*, the requirement violated both the language and policy of Title VII.

(a) Myths and habitual assumptions about a woman's ability to perform certain kinds of work are no longer acceptable reasons for refusal to employ or lesser compensation. The different treatment here, however, is based on the fact that women, as a class, live longer than men, although individual women may not live as long as individual men. The issue is therefore whether discrimination under Title VII is to be determined by comparison of class characteristics or individual characteristics. (98 S.Ct. 1375, 55 L.Ed.2d 665.)

(b) The statute's language clearly refers to the individual. "It precludes treatment of individuals as simply

components of a racial, religious, sexual, or national class. ... Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." (98 S.Ct. 1375, 55 L.Ed.2d 665.)

(c) It is true that unless women are assessed an extra charge, they will be subsidized to some extent by the male employees. But fairness to classes affected by the statute is a matter of policy for the Legislature, and Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. There is no reason to believe that Congress intended a different rule for group insurance coverage. When insurance risks are grouped, the better risks always subsidize the poorer. (98 S.Ct. 1376, 55 L.Ed.2d 666.) (See *Arizona Governing Committee for Tax Deferred Annuity & Deferred Comp. Plans v. Norris* (1983) 463 U.S. 1073, 103 S.Ct. 3492, 3503, 77 L.Ed.2d 1236, 1250 [retirement plans paying women lower monthly benefits than men making same contributions violate Title VII; retroactive application of decision denied]; *Florida v. Long* (1988) 487 U.S. 223, 108 S.Ct. 2354, 101 L.Ed.2d 206 [nonretroactivity of *Norris*]; 92 *Harv. L. Rev.* 299 [Manhart].)

(2) *Texts and Commentary.* Commentary on sex discrimination is extensive. (See 103 *Harv. L. Rev.* 1750 [Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument]; 9 *Golden Gate L. Rev.* 481 [Sex Discrimination in Academia]; 10 *Golden Gate L. Rev.* 1087 [Remedies for Sex-Discriminatory Health and Safety Conditions]; 28 *Golden Gate L. Rev.* 115 [hybrid sex and age discrimination claims by women]; 41 *Hastings L. J.* 471 [Sex Stereotyping and the Promotion of Women to Positions of Power]; 45 *Hastings L. J.* 667 [difference between sexual favoritism and sex discrimination]; 49 *Hastings L. J.* 105 [Horizontal Jurisprudence and Sex Discrimination]; 25 *Pepperdine L. Rev.* 819 [is sexual favoritism a form of sex discrimination]; 53 *So. Cal. L. Rev.* 1747 [Evidentiary Burdens Under Title VII and Section 1983 Compared]; 19 *U.C. Davis L. Rev.* 761 [physical abilities tests as discriminatory against women]; 20 *U.C. Davis L. Rev.* 501 [sex discrimination in faculty employment]; 35 *U.C. Davis L. Rev.* 1005 [conflicting Title VII approaches to sex discrimination and sexual orientation]; 29 *U.C.L.A. L. Rev.* 199 [no-spouse rules and American working woman]; 42 *U.C.L.A. L. Rev.* 1631 [arguing that glass ceiling prevents female attorneys from reaching partnership and that judicial remedies are inadequate to redress problem]; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §135 et seq.; 170 *A.L.R. Fed* 219 [Title VII Sex Discrimination in Employment--Supreme Court Cases]; 39 *Proof of Facts* 3d 55 [proof of sex discrimination in job assignment or transfer].)

West's Key Number Digest, Civil Rights k.158 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Commentary.* See 95 *Cal. L. Rev.* 561 [transgender employees and Title VII]; 42 *U.S.F. L. Rev.* 849 [enforcing femininity].



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8 Witkin Sum. Cal. Law Const Law § 862

[§ 862] Burden of Proof.

In *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268, plaintiff was passed over for partnership by defendant, an accounting partnership, after several partners made remarks in evaluations that were critical of plaintiff's personality and that reflected sex stereotyping. In her suit, both the district court and the Court of Appeals found unlawful discrimination and held that, once discriminatory motive has been shown, an employer has the burden of proving by clear and convincing evidence that it would have made the same decision in the absence of discrimination. *Held*, reversed.

A plurality opinion of four justices concluded that the statute, in prohibiting discrimination "because of ... sex" (42 U.S.C., §2000e-2(a)(1), (a)(2)), does not require that gender be the only factor in the employment decision; rather, decisions based on a mixture of legitimate and illegitimate considerations are also condemned. (109 S.Ct. 1785, 104 L.Ed.2d 282.) Once the plaintiff has shown that sex-based considerations played a part, the burden shifts to the employer, who may avoid liability only by proving that it would have made the same decision even if it had not considered gender. (109 S.Ct. 1786, 1787, 104 L.Ed.2d 283, 284.) However, proof by a preponderance of the evidence is sufficient to meet this burden. (109 S.Ct. 1792, 104 L.Ed.2d 289.)

One justice generally concurred in the plurality's analysis, but disagreed with the apparent requirement that the employer meet its burden by objective evidence. (109 S.Ct. 1795, 1796, 104 L.Ed.2d 293, 294.) Another justice, while agreeing that the facts of the case required shifting of the burden of persuasion to the employer, argued that this was proper only when the plaintiff has presented direct evidence of substantial reliance on an illegal factor and the employer is thus responsible for the uncertainty as to causation. (109 S.Ct. 1796, 104 L.Ed.2d 295.)

Three justices dissented, arguing that the burden of persuasion should remain on the plaintiff at all times and that the burden-shifting rule was confusing and of limited benefit to plaintiffs. (109 S.Ct. 1806, 104 L.Ed.2d 306.) (See *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 215 [allocation of burden and order of presentation of proof are governed by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, *infra*, §870]; *Carter v. CB Richard Ellis* (2004) 122 C.A.4th 1313, 1322, 19 C.R.3d 519 [administrative managers are not protected group, and evidence that, at most, established disparate impact

of new policies on them failed to present prima facie case of disparate impact sex and age discrimination]; *103 Harv. L. Rev.* 340 [*Price Waterhouse*]; *41 Hastings L. J.* 471 [same]; *46 Stanf. L. Rev.* 959 [direct evidence requirements in mixed-motive cases after *Price Waterhouse*]; on burden of proof in disparate impact cases, see *42 U.S.C.*, §2000e-2(k).)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Gender-Based Fetal Protection Policy.

8 Witkin Sum. Cal. Law Const Law § 863

[§ 863] Gender-Based Fetal Protection Policy.

International Union, United Auto., Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls (1991) 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158, poses the question: "May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?" (111 S.Ct. 1199, 113 L.Ed.2d 168.) Defendant manufactures batteries, using lead in the manufacturing process, and thus entailing the risk of harm to any fetus carried by a female employee. The company adopted a policy excluding from these jobs women who are pregnant or are capable of bearing children. Petitioners, the Auto Workers Union and several individual plaintiffs, filed a class action challenging the policy as sex discrimination in violation of Title VII. *Held*, the policy was facially discriminatory, and the employer did not establish the defense of sex as a bona fide occupational qualification (BFOQ).

(a) The bias in the policy is obvious: Fertile men, but not fertile women, are given a choice whether they wish to risk their reproductive health for a particular job. (111 S.Ct. 1202, 113 L.Ed.2d 172.) "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." (111 S.Ct. 1203, 113 L.Ed.2d 173.)

(b) Under 42 U.S.C., §2000e-2(e), an employer may discriminate in certain instances where religion, sex, or national origin "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." (111 S.Ct. 1204, 113 L.Ed.2d 174; see *supra*, §857.) The BFOQ defense is read narrowly, and the most telling term is "occupational": "this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes." (111 S.Ct. 1204, 113 L.Ed.2d 175.) The so-called safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job. (111 S.Ct. 1206, 113 L.Ed.2d 176.) Defendant cannot establish a BFOQ. "Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. ... Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." (111 S.Ct. 1207, 113 L.Ed.2d 178.)

(c) The concern about an employer's tort liability does not justify the discrimination. "Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risks, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." (111 S.Ct. 1208, 113 L.Ed.2d 179.) (See 105 Harv. L. Rev. 379; 45 Stanf. L. Rev. 453 [Employer Liability After *Johnson Controls*]; on pregnancy discrimination under federal law, see *infra*, §877; for challenge to fetal protection policy under California law, see *Johnson Controls v. Fair Emp. & Housing Com.* (1990) 218 C.A.3d 517, 267 C.R. 158, *infra*, §926.)

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aa. In General.

8 Witkin Sum. Cal. Law Const Law § 864

[§ 864] In General.

Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49, held that sexual harassment may constitute a violation of Title VII.

(a) The prohibition against discrimination with respect to "compensation, terms, conditions, or privileges of employment" (42 U.S.C., §2000e-2(a)(1)) encompasses all aspects of the work environment. Hence, sexual harassment that creates a *hostile environment* is a violation of Title VII, even though it involves no tangible loss of an economic character. (106 S.Ct. 2404, 91 L.Ed.2d 58.)

(b) The fact that the victim's sex-related conduct was "voluntary," in that she was not forced to participate against her will, is no defense. The correct inquiry is whether she indicated by her conduct that the sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary. (106 S.Ct. 2406, 91 L.Ed.2d 60.)

(c) At the trial judge's discretion, evidence of the victim's sexually provocative speech or dress may be admitted on the issue of whether she found particular sexual advances to be unwelcome. (106 S.Ct. 2407, 91 L.Ed.2d 61.) (See *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 C.A.3d 590, 612, 614, 262 C.R. 842 [under *Meritor*, sexual harassment must be sufficiently severe or pervasive to create abusive working environment; isolated instances do not give rise to cause of action]; 97 Harv. L. Rev. 1449 [*Meritor*]; 100 Harv. L. Rev. 276 [same]; 14 Loyola L.A. L. Rev. 25 [same]; 25 San Diego L. Rev. 125 [same]; 41 U.C.L.A. L. Rev. 118 [same]; 18 U.S.F. L. Rev. 333 [same].)

Meritor was reaffirmed, and its application explained, in *Harris v. Forklift Systems* (1993) 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295.

(a) The *Meritor* standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." (114 S.Ct. 370, 126 L.Ed.2d 302.)

(b) "But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily

abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin, offends Title VII's broad rule of workplace equality. The appalling conduct alleged in *Meritor*, and the reference in that case to environments 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,' ... merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." (114 S.Ct. 370, 126 L.Ed.2d 302.)

(c) "This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises. ... But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." (114 S.Ct. 371, 126 L.Ed.2d 302.) (See 108 *Harv. L. Rev.* 321 [*Harris*]; 32 *San Diego L. Rev.* 321 [same]; 22 *Western State L. Rev.* 111 [same]; on liability for sexual harassment under California law, see *infra*, §927 [generally]; §928 [liability of supervisors]; §929 [sexual harassment of job applicants]; §896 [sexual harassment occurring in professional relationship].)

Commentary on sexual harassment is extensive. (See 45B *Am.Jur.2d* (2002 ed.), *Job Discrimination* §822 et seq.; 111 *Harv. L. Rev.* 445 [Treating Sexual Harassment With Respect]; 83 *Cal. L. Rev.* 637 [balancing right to political speech with right to workplace free of sexual harassment]; 18 *California Lawyer* 73 (November 1998) [Investigating Sexual Harassment]; 34 *Cal. Western L. Rev.* 53 [Social Sexual Conduct at Work: How Do Workers Know When It Is Harassment and When It Is Not?]; 34 *Cal. Western L. Rev.* 457 [study of factors affecting employee perceptions and consequences of sexual harassment]; 34 *Golden Gate L. Rev.* 127 [customizing reasonable woman standard to fit emotionally and financially disabled plaintiffs as outside scope of Civil Rights Act]; 33 *Loyola L.A. L. Rev.* 133 [noncognizable harassing conduct in Title VII hostile work environment claims]; 75 *So. Cal. L. Rev.* 791 [gap between what judges and reasonable people believe is sexually harassing]; 22 *Southwestern U. L. Rev.* 53 [pornography in workplace]; 24 *Southwestern U. L. Rev.* 303 [critical analysis of two-pronged perspective for viewing hostile environment in sexual harassment cases]; 27 *Southwestern U. L. Rev.* 265 [balancing sexual harassment policies and reasonableness in primary and secondary classrooms]; 30 *Southwestern U. L. Rev.* 253 [use and abuse of "but for" analysis in sexual harassment law under Title VII]; 43 *Stanf. L. Rev.* 813 [Sex at Work]; 49 *Stanf. L. Rev.* 691 [sexual harassment as sex discrimination under Title VII]; 47 *Stanf. L. Rev.* 565 [argument that hostile work environment should be conceived as form of disparate treatment to reflect Congress' mandate]; 50 *Stanf. L. Rev.* 523 [applying Title IX to student-to-student peer sexual harassment]; 51 *Stanf. L. Rev.* 161 [implementing new theory in sexual harassment law]; 19 *Thomas Jefferson L. Rev.* 215 [sexual harassment, fair housing, and expanding statutory remedies into common law framework]; 24 *Thomas Jefferson L. Rev.* 125 [employee sexual harassment training by legal profession]; 28 *U.S.F. L. Rev.* 715 [sexual harassment of attorneys by clients]; 37 *U.S.F. L. Rev.* 467 [vulnerability of unsuspecting employers to hostile environment claims]; 31 *West L.A. L. Rev.* 135 [hostile work environment v. free speech]; 145 *A.L.R. Fed* 459 [conduct of plaintiff as defense]; 163 *A.L.R. Fed* 445 [liability of employer under Title VII for sexual harassment of employee by customer or client]; 52 *Proof of Facts* 3d 1 [Proof of Employer Liability for Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964]; 56 *Proof of Facts* 3d 1 [Proof of Employer Negligence in Hiring and Supervision of Employee With Propensity Toward Workplace Sexual Harassment]; 73 *Am.Jur. Trials* 1 [Sexual Harassment Damages and Remedies].)

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See 33 *Pepperdine L. Rev.* 385 [eliminating disparate treatment of third-party sexual harassment].



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8 Witkin Sum. Cal. Law Const Law § 865

[§ 865] Same-Gender Discrimination.

In *Oncale v. Sundowner Offshore Services* (1998) 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201, plaintiff, a male, was employed as a roustabout on defendant's offshore oil platform. Plaintiff alleged that on several occasions, several members of the eight-man crew forcibly subjected him to sex-related, humiliating actions in front of the rest of the crew, physically assaulted him, and threatened him with rape. After plaintiff's complaints to his supervisors produced no remedial action, plaintiff resigned to avoid further sexual harassment and verbal abuse. In plaintiff's subsequent action alleging discrimination in employment because of his sex, the district court granted summary judgment for defendant, reasoning that plaintiff had no cause of action under Title VII for harassment by other males. *Held*, reversed.

(a) Nothing in Title VII necessarily bars a sex discrimination claim merely because the plaintiff and the defendant, or the person acting on the defendant's behalf, are of the same sex. Although male-on-male sexual harassment was not the principal evil that concerned Congress when it enacted Title VII, statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. Sexual harassment of any kind that meets the statutory requirements is included within Title VII's prohibition against discrimination. (118 S.Ct. 1002, 140 L.Ed.2d 207.)

(b) Recognizing liability for same-sex harassment will not transform Title VII into a "general civility code" for the American workplace as long as careful attention is paid to the statute's requirements. Title VII prohibits discrimination because of sex. The critical issue is whether members of one sex are exposed to disadvantageous conditions of employment to which members of the other sex are not exposed. (118 S.Ct. 1002, 140 L.Ed.2d 207.) Although a plaintiff need not prove that the harassing conduct was motivated by sexual desire, he or she must always prove that the conduct constituted discrimination. (118 S.Ct. 1002, 140 L.Ed.2d 208.) Furthermore, the statute prohibits only behavior so objectively offensive, severe, and pervasive as to alter the conditions of the victim's employment and create a hostile work environment. Using common sense and an appropriate sensitivity to social context, courts and juries will be able to distinguish between simple teasing and conduct that a reasonable person would find hostile and abusive. (118 S.Ct. 1003, 140 L.Ed.2d 208.) (See 112 Harv. L. Rev. 325 [Oncale]; 26 Pepperdine L. Rev. 261 [standing requirements in transferred impact sexual harassment cases]; 36 Santa Clara L. Rev. 1147 [same-gender sexual harassment as sex discrimination under Title VII]; 40 Santa Clara L. Rev. 1 [Oncale]; 43 Santa Clara L. Rev. 249 [line of demarcation

between sex and sexual orientation discrimination]; *71 So. Cal. L. Rev. 1341* [same]; 61 Proof of Facts 3d 1 [Employer Liability for Same-Sex Harassment]; on discrimination based on sexual orientation, see *supra*, §798; on liability for same-gender sexual harassment under Fair Employment and Housing Act, see *infra*, §930.)

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8 Witkin Sum. Cal. Law Const Law § 866

[§ 866] Vicarious Liability.

In *Burlington Industries v. Ellerth* (1998) 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, plaintiff was a salesperson employed by defendant for over a year. Several months after resigning from her job, plaintiff sued defendant for damages under Title VII of the Civil Rights Act of 1964 (42 U.S.C., §2000e et seq.), alleging that during her employment she was subjected to constant sexual harassment by her supervisor. Although plaintiff received a promotion during that time, her supervisor allegedly had threatened to deny her tangible job benefits if she denied him sexual liberties and had repeatedly made boorish and offensive remarks and gestures. The trial judge found that the supervisor's alleged behavior was severe and pervasive enough to create a hostile work environment, but that defendant neither knew nor should have known about it. The judge granted summary judgment for defendant, which was reversed by the Court of Appeals. *Held*, reversal of summary judgment affirmed.

(a) Vicarious liability.

(1) Sexual harassment cases under Title VII based on threats that have been fulfilled are referred to as "quid pro quo" cases, and have been distinguished from those involving bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a "hostile work environment." (118 S.Ct. 2264, 141 L.Ed.2d 646.) These terms are relevant to the threshold question whether a plaintiff can prove discrimination in violation of Title VII, but they are not controlling on the issue of vicarious liability. Instead, Title VII should be interpreted using agency principles. (118 S.Ct. 2265, 141 L.Ed.2d 648.)

(2) Under Rest.2d, Agency §219(1), a central principle of agency law is that a master is subject to liability for the torts a servant commits while acting in the scope of employment. However, sexual harassment by a supervisor is generally not within the scope of employment; it usually is not motivated by a purpose to serve the employer. (118 S.Ct. 2266, 141 L.Ed.2d 649.)

(3) In limited circumstances, agency principles impose liability on employers even when employees commit torts outside the scope of employment. (118 S.Ct. 2267, 141 L.Ed.2d 650.) For example, an employer may be liable where its

own negligence is a cause of the harassment. Here, however, plaintiff seeks to invoke the more stringent standard of vicarious liability. (118 S.Ct. 2267, 141 L.Ed.2d 651.)

(4) Under Rest.2d, Agency §219(2)(d), vicarious liability may apply when the servant "was aided in accomplishing the tort by the existence of the agency relation." (118 S.Ct. 2267, 141 L.Ed.2d 651.) Whatever the exact contours of this standard may be, its requirements will always be met "when a supervisor takes a tangible employment action against the subordinate." (118 S.Ct. 2267, 141 L.Ed.2d 652.) A significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits, is a tangible employment action. (118 S.Ct. 2268, 141 L.Ed.2d 652.) Moreover, the "aided in the agency relation" standard imposes liability on an employer whose supervisory employee creates an actionable hostile environment, even when no tangible employment action occurs. (118 S.Ct. 2269, 141 L.Ed.2d 654.)

(b) *Affirmative defense.* In the absence of a tangible employment action, the employer may raise an affirmative defense to vicarious liability. The affirmative defense is comprised of the following two necessary elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action. (118 S.Ct. 2270, 141 L.Ed.2d 655.) Plaintiff here should have an adequate opportunity to prove defendant's liability. Although she has not alleged a tangible employment action by the supervisor, which would deprive defendant of the affirmative defense, this is not dispositive. Defendant is still subject to liability for the supervisor's activity, but should have an opportunity to assert and prove the affirmative defense. (118 S.Ct. 2270, 141 L.Ed.2d 655.)

Two justices dissented, stating that the standard of employer liability under Title VII should be the same whether a sexually or racially hostile environment is alleged: An employer should be liable if, and only if, the employee proves that the employer was negligent in permitting the supervisor's conduct to occur. (118 S.Ct. 2271, 141 L.Ed.2d 656.) (See 27 *Pepperdine L. Rev.* 175 [Ellerth].)

In *Faragher v. Boca Raton* (1998) 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, a companion case to *Ellerth*, plaintiff was an ocean lifeguard employed by defendant city for about 5 years. After resigning, plaintiff sued defendant for nominal damages under Title VII, alleging that during her employment, two of her supervisors had created a sexually hostile environment by repeatedly subjecting the female lifeguards to offensive touching and lewd and offensive remarks. Following a bench trial, the court found that the conduct of plaintiff's supervisors constituted an abusive working environment and that defendant was liable for that conduct. The court awarded plaintiff \$ 1 in nominal damages. The Court of Appeals reversed. *Held*, reversed, using the same reasoning as *Ellerth*.

Defendant here could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Defendant entirely failed to disseminate its policy against sexual harassment among the beach employees, and its officials made no attempt to keep track of the conduct of beach supervisors. Furthermore, defendant's policy did not assure that the harassing supervisors could be bypassed in registering complaints. (118 S.Ct. 2293, 141 L.Ed.2d 689.)

Two justices dissented, stating that an employer should not be vicariously liable if a supervisor creates a hostile work environment, and that the case should be remanded to consider whether defendant was negligent. (118 S.Ct. 2294, 141 L.Ed.2d 691.) (See 112 *Harv. L. Rev.* 313 [Ellerth and Faragher]; 112 *Harv. L. Rev.* 1977 [Notice in Hostile Environment Discrimination Law]; 29 *Golden Gate L. Rev.* 235 [agency principles in Title VII sexual harassment cases]; 36 *San Diego L. Rev.* 41 [Ellerth and Faragher]; 28 *Southwestern U. L. Rev.* 45 [employer liability for hostile environment sexual harassment by supervisor]; 21 *Thomas Jefferson L. Rev.* 103 [Ellerth and Faragher]; 35 *U.S.F. L. Rev.* 623 [same]; 157 *A.L.R. Fed* 1 [when is supervisor's hostile environment sexual harassment imputable to employer]; 170 *A.L.R. Fed* 219 [Title VII Sex Discrimination in Employment--Supreme Court Cases]; 195 *A.L.R. Fed* 463 [who is supervisor for purposes of imputing liability to employer]; 196 *A.L.R. Fed* 437 [when is coworker's hostile environment sexual harassment imputable to governmental employer]; on liability of supervisors under Fair Employment and

Housing Act, see *infra*, §919.)

In *Pennsylvania State Police v. Suders* (2004) 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204, the Court recognized for the first time the availability of a constructive discharge claim under *Title VII*. (124 S.Ct. 2352, 159 L.Ed.2d 217.) Plaintiff quit her employment after being subjected to severe and pervasive sexual harassment by her supervisors. Hence, her hostile work environment claim was not based on a "tangible employment action," as required to avoid the *Ellerth/Faragher* affirmative defense to vicarious liability. The trial court held that plaintiff's claim was untenable as a matter of law because she did not avail herself of defendant's internal procedure for reporting sexual harassment. The Court of Appeals held that (1) plaintiff had stated a claim for constructive discharge due to a hostile environment, and (2) "a constructive discharge, when proved, constitutes a tangible employment action," which "renders an employer strictly liable and precludes employer recourse to the affirmative action defense." *Held*, remanded.

"[A]n employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge," but the Court of Appeals erred in declaring that the affirmative defense is never available in constructive discharge cases. (124 S.Ct. 2351, 2357, 159 L.Ed.2d 216, 223.) The presence or absence of an "official act" by a supervisor marks the path that "constructive discharge claims based on harassing conduct must follow." (124 S.Ct. 2356, 159 L.Ed.2d 222.) (See 77 So. Cal. L. Rev. 307 [constructive discharge].)

SUPPLEMENT: [This section is current through the latest supplement]

See 39 U.C. Davis L. Rev. 529 [alternative approach to holding employer strictly liable for supervisory sexual extortion]; 198 A.L.R. Fed 1 [when to impute coworker's hostile environment sexual harassment to employer--manufacturing, wholesale, and retail industry--nongovernmental employment]; 5 A.L.R. Fed 2d 341 [same: service industry].



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8 *Witkin Sum. Cal. Law Const Law* § 867

[§ 867] Comparable Worth.

The contention that Title VII requires that different jobs of comparable worth receive equal compensation has not yet been directly considered by the Supreme Court; but *Washington v. Gunther* (1981) 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751, removed an impediment to the acceptance of this contention by holding that the prohibition against sex-based wage discrimination is not limited to cases involving unequal pay for equal work.

In *Gunther*, female county jail guards, who admittedly had less responsibility than their male counterparts (and hence did not perform equal work), claimed that part of the differential in their compensation was due to intentional sex discrimination. Their contention was based on the fact that, although a county evaluation of the positions determined that female guards should be paid 95% as much as male guards, they were, in fact, paid only 70% as much. The county's position was based on the Bennett Amendment to Title VII (42 U.S.C., §2000e-2(h)), which permits differentials in pay based on sex if authorized by the Equal Pay Act (29 U.S.C., §206(d)). That Act prohibits differentials for "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions," unless based on seniority, merit, quality or quantity of production, or a factor other than sex. Specifically, the county argued that the Bennett Amendment incorporated the entire Equal Pay Act, thereby limiting Title VII's application to cases satisfying the Act's "equal work" standard.

The Court concluded that both the language and legislative history of the Bennett Amendment, as well as the remedial purposes of Title VII, establish the congressional intent to incorporate only the Equal Pay Act's affirmative defenses. Hence, unless one of the affirmative defenses is applicable, a Title VII action exists for intentional sex-based wage discrimination even though no member of the opposite sex is receiving higher pay for the same work. (101 S.Ct. 2254, 68 L.Ed.2d 759.) (See 95 Harv. L. Rev. 300 [Gunther]; 99 Harv. L. Rev. 1728 [same]; 71 Cal. L. Rev. 730 [comparable work, disparate impact, and market rate salary problem]; 16 Pacific L. J. 833 [Gunther]; 16 Loyola L.A. L. Rev. 151 [same]; 21 Loyola L.A. L. Rev. 305 [same]; 22 Loyola L.A. L. Rev. 717 [Comparable Worth: An Impermissible Form of Affirmative Action?]; 18 San Diego L. Rev. 685 [Gunther]; 23 Southwestern U. L. Rev. 225 [comparable worth as remedy for gender-based wage discrimination]; 34 Stanf. L. Rev. 1083 [Gunther]; 18 U.C. Davis L. Rev. 449 [same]; 16 U.S.F. L. Rev. 357 [same]; 45A Am.Jur.2d (2002 ed.), Job Discrimination §§657, 658; 26 Proof of Facts 3d 269 [proof of violation of Equal Pay Act].)

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See 38 *Golden Gate L. Rev.* 249 [Supreme Court's limitation on employee's ability to challenge discriminatory pay under Title VII]; 19 *A.L.R. Fed* 2d 639 [Admissibility of Law and Expert Testimony in Actions Alleging Violations of Equal Pay Act].



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6. Discrimination Against Men.

8 Witkin Sum. Cal. Law Const Law § 868

[§ 868] Discrimination Against Men.

In *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Com.* (1983) 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89, a company health insurance plan, with one exception, provided for identical hospitalization coverage for male and female employees and their spouses. The exception involved a limitation on coverage for pregnant spouses of male employees that did not apply to other hospital confinement, including that for pregnant employees. *Held*, this constituted sex discrimination under Title VII.

(a) Title VII's prohibition applies to male as well as female employees. (103 S.Ct. 2632, 77 L.Ed.2d 101.) Hence, a plan that provided complete hospitalization for spouses of female employees, but did not cover the spouses of male employees when they had broken bones, would constitute sex discrimination against male employees. The same is true where, as here, the less inclusive coverage for the spouses of male employees relates to pregnancy, because the net result is that married male employees receive a benefit package for their dependents that is less inclusive than that provided for married female employees. (103 S.Ct. 2634, 77 L.Ed.2d 103.)

(b) There is no merit to the contention that, because Title VII applies only to discrimination in employment, it does not extend to discrimination against pregnant spouses. "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provisions of fringe benefits is also discrimination against male employees." (103 S.Ct. 2634, 77 L.Ed.2d 103.) (See 97 Harv. L. Rev. 252 [*Newport News*]; 153 A.L.R. Fed 609 [reverse or majority gender discrimination against males--public employment cases]; 162 A.L.R. Fed 273 [reverse or majority gender discrimination against males--private employment cases].)

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8 *Witkin Sum. Cal. Law Const Law* § 869

[§ 869] In General.

(1) *Procedures Neutral on Their Face*. In *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, defendant, with a past record of discriminating against Blacks, adopted a policy of requiring a high school diploma and passage of an intelligence test for eligibility to desirable departments. *Held*, the tests, not job-related, violated the Act, despite plaintiff's failure to show a subjective intent to discriminate.

(a) The object of Congress was to achieve equality of employment. Hence, procedures neutral on their face or in terms of intent cannot be maintained if they operate to preserve discriminatory practices. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." (91 S.Ct. 853, 28 L.Ed.2d 164.)

(b) The statute authorizes use of an ability test not intended or used to discriminate because of race. The Equal Employment Opportunity Commission has interpreted this to permit only the use of job-related tests, and this interpretation is sound. "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from discouraging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (91 S.Ct. 856, 28 L.Ed.2d 167.) (See *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 95 S.Ct. 2362, 2376, 2378, 45 L.Ed.2d 280, 304, 307 [following *Griggs*; testing program resulting in discrimination against Blacks]; *Washington v. Davis* (1976) 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 [test of verbal ability and reading capacity was related to performance in police training program; further validation was unnecessary]; *Connecticut v. Teal* (1982) 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 ["bottom line" theory of defense, i.e., there is no discrimination if "bottom line" of promotional process was racial balance, does not preclude proof of prima facie case of employment test's disparate impact]; *Goodman v. Lukens Steel Co.* (1987) 482 U.S. 656, 107 S.Ct. 2617, 2625, 96 L.Ed.2d 572, 579 [union's intentional failure to assert racially based grievances was violative of Title VII and 42 U.S.C., §1981 (*supra*, §814), even if motivation was to help minorities].)

(2) *Texts and Commentary.* *Griggs* and cases following it have been the subject of considerable commentary. (See 89 *Harv. L. Rev.* 225 [*Albemarle*]; 90 *Harv. L. Rev.* 114 [*Davis*]; 91 *Harv. L. Rev.* 793 [Differential Pass-Fail Rates in Employment Testing]; 90 *Harv. L. Rev.* 114 [*Davis*]; 96 *Harv. L. Rev.* 278 [*Teal*]; 117 *Harv. L. Rev.* 493 [equal protection and disparate impact]; 27 *Hastings Const. L. Q.* 89 [Neutrality of the Equal Protection Clause]; 26 *Hastings L. J.* 1377 [Diplomas, Degrees, and Discrimination]; 27 *Hastings L. J.* 1239 [*Albemarle*]; 34 *Golden Gate L. Rev.* 37 [expert testimony and "subtle discrimination" in workplace]; 20 *Loyola L.A. L. Rev.* 375 [disparate impact theory as applicable to subjective selection procedures]; 34 *McGeorge L. Rev.* 877 [discrimination in hiring of National Football League head coaches]; 25 *San Diego L. Rev.* 63 [application of *Griggs* to subjective employment practices]; 25 *San Diego L. Rev.* 881 [Racial Subordination Through Formal Equal Opportunity]; 17 *Santa Clara L. Rev.* 777 [*Griggs*]; 41 *Stanf. L. Rev.* 1105; 43 *Stanf. L. Rev.* 241 [discrimination against "other" minorities as proof of discrimination in employment under federal law]; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §§123 et seq., 288 et seq.; 165 *A.L.R. Fed* 143 [Can "At-Will" Employee Bring Action for Racial Discrimination Under 42 U.S.C., §1981?]; 182 *A.L.R. Fed* 61 [Supreme Court cases on Title VII race or national origin discrimination].)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Commentary.* See 38 *U.C. Davis L. Rev.* 573 [Indirect Employer Liability: The Ninth Circuit Limits Liability for Racial Discrimination]; 53 *U.C.L.A. L. Rev* 701 [Was the Disparate Impact Theory a Mistake?].



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Witkin Summary of California Law XI. EQUAL PROTECTION OF THE LAWS D. Federal Civil Rights Legislation. 6. Discrimination in Employment. c. Racial Discrimination. 2. Proof of Prima Facie Case.

8 Witkin Sum. Cal. Law Const Law § 870

[§ 870] Proof of Prima Facie Case.

The complaining party may invoke the conciliation powers of the Equal Employment Opportunity Commission, and, if unsuccessful there, may bring an action in federal court. (See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; 84 Harv. L. Rev. 1195; supra, §858.) But that party has the burden of establishing a prima facie case of discrimination. "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants for persons of complainant's qualifications." If he meets this burden, the employer must then articulate a "legitimate, nondiscriminatory reason" for this rejection. (*McDonnell Douglas Corp. v. Green*, supra, 93 S.Ct. 1824, 36 L.Ed.2d 677.) (See *Furnco Const. Corp. v. Waters* (1978) 438 U.S. 567, 98 S.Ct. 2943, 2951, 57 L.Ed.2d 957, 968 [prima facie showing under *McDonnell Douglas*, and employer's proof of no discriminatory motive].)

In *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733, nonwhite workers at Alaskan canneries filed a Title VII action claiming racial discrimination. Plaintiffs relied on evidence that unskilled "cannery jobs" on the line were filled predominantly by nonwhites, while skilled "noncannery jobs" were filled predominantly by whites. *Held*, this evidence was insufficient to establish a prima facie "disparate impact" case. The Court made the following points:

(a) When relying on statistics, the racial composition of persons holding the jobs in question must be compared to the racial composition of qualified persons in the labor market. (109 S.Ct. 2121, 104 L.Ed.2d 747.)

(b) Racial imbalance in one segment of an employer's work force does not by itself establish a prima facie case of disparate impact with respect to other segments. (109 S.Ct. 2122, 104 L.Ed.2d 749.)

(c) To establish a prima facie case of disparate impact, plaintiffs must prove not only underrepresentation in the jobs involved, but also causation by the employer's particular hiring practices; i.e., they must show "that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." (109 S.Ct. 2125, 104 L.Ed.2d 751.)

(d) If a prima facie case is established, the burden of producing evidence shifts to the employer to show a business justification. The burden of persuasion, however, remains on the plaintiff. (109 S.Ct. 2125, 2126, 104 L.Ed.2d 752, 753.)

(e) If the employer proves a business justification, plaintiff can still prevail by showing that other selection practices are available that would be equally effective in achieving the employer's goals and would have less racial impact. (109 S.Ct. 2126, 2127, 104 L.Ed.2d 753, 754.)

Four justices dissented, calling the decision a retreat from the goal of eliminating racial discrimination in employment. (109 S.Ct. 2127, 2136, 104 L.Ed.2d 754, 755.) (See 103 Harv. L. Rev. 340 [Wards Cove]; 26 Cal. Western L. Rev. 449 [same]; 23 Loyola L.A. L. Rev. 1483 [same].)

The Civil Rights Act of 1991 was enacted in response to *Wards Cove*. (See *supra*, §849.) (See *Los Angeles County Dept. of Parks & Recreation v. Civil Service Com.* (1992) 8 C.A.4th 273, 280, 10 C.R.2d 150 [discussing showing required under *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207]; 43 *Hastings L. J.* 57 [fallacy of "pretext-plus" rule in employment discrimination cases].)

Clark v. Claremont University Center (1992) 6 C.A.4th 639, 662, 8 C.R.2d 151, applied the *McDonnell Douglas* test, affirming a judgment for compensatory and punitive damages in favor of a university professor denied tenure after a faculty departmental review. The court added this comment: "Many employment discrimination cases do not survive to trial because evidence of the employer's improper motive is so difficult to obtain. This case is unusual, not because of Clark's claims, but because of Clark's strong evidence of improper motive. Our own computer-assisted research of tenure denial cases across the nation revealed none involving university professors who made such blatant remarks as in this case." (6 C.A.4th 670.)

In *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407, the Supreme Court, in a 5-4 opinion, restated and explained the *McDonnell Douglas* approach, and distinguished *Texas Dept. of Community Affairs v. Burdine*, *supra*. The issue before the Court was whether the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff. (113 S.Ct. 2746, 125 L.Ed.2d 414.)

(a) Although the *McDonnell Douglas* presumption places on the defendant the burden of producing an explanation to rebut the prima facie case, the ultimate burden of proof remains on the plaintiff, who must persuade the trier of fact that the defendant intentionally discriminated against the plaintiff. (113 S.Ct. 2747, 125 L.Ed.2d 416; for the distinction between the two burdens, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §1 et seq.)

(b) The district court made a finding, not challenged by plaintiff, that defendant employers sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions. At this point the shifted burden of production became irrelevant, and plaintiff had the opportunity to demonstrate, through presentation of his own case and cross-examination of defendants' witnesses, that the proffered reasons were not the true reasons for the employment decision. (113 S.Ct. 2747, 125 L.Ed.2d 416.)

(c) "In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility-assessment stage." (113 S.Ct. 2748, 125 L.Ed.2d 417.) "The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. ... But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof." (113 S.Ct. 2749, 125 L.Ed.2d 418.)

(d) "We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines, according to proper procedures, *that the employer has unlawfully*

discriminated. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable. The dissent's position amounts to precisely this, *unless* what is required to establish the *McDonnell Douglas* prima facie case is a degree of proof so high that it would, in the absence of rebuttal, require a directed verdict for the plaintiff. ... Quite obviously, however, what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands. The dissent is thus left with a position that has no support in the statute, no support in the reason of the matter, no support in any holding of this Court (that is not even contended), and support, if at all, only in the dicta of this Court's opinion." (113 S.Ct. 2751, 125 L.Ed.2d 421.)

Four justices joined in a dissenting opinion, relying in great part on *Burdine*, and charging that the majority, after two decades of stable law in the Supreme Court, departed from settled precedent and substituted a scheme of proof "that promises to be unfair and unworkable." (113 S.Ct. 2757, 125 L.Ed.2d 428.) The author of the dissenting opinion says in conclusion: "Whether Melvin Hicks wins or loses on remand, many plaintiffs in a like position will surely lose under the scheme adopted by the Court today, unless they possess both prescience and resources beyond what this Court has previously required Title VII litigants to employ." (113 S.Ct. 2766, 125 L.Ed.2d 439.) (See *Green v. Rancho Santa Margarita Mortg. Co.* (1994) 28 C.A.4th 686, 694, 695, 33 C.R.2d 706, *infra*, §907 [discussing *Hicks*]; 107 Harv. L. Rev. 342 [*Hicks*]; 87 Cal L. Rev. 983 [making sense of *McDonnell Douglas*: circumstantial evidence and proof of disparate treatment under Title VII]; 21 Pepperdine L. Rev. 385 [*Hicks*]; 28 U.C. Davis L. Rev. 261 [discussing evidentiary requirements after *Hicks*]; 48 Proof of Facts 3d 75 [racial discrimination in employment promotion decisions under Title VII].)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Discrimination Against Whites.

8 Witkin Sum. Cal. Law Const Law § 871

[§ 871] Discrimination Against Whites.

In *McDonald v. Santa Fe Trail Trans. Co.* (1976) 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493, petitioners, white employees of defendant, alleged that they were discharged for misappropriating cargo from a ship, but that a black employee, charged with the same offense, was not discharged. *Held*, a cause of action was stated: Title VII prohibits discrimination against Whites on the same standards as those applicable to Blacks. (96 S.Ct. 2578, 49 L.Ed.2d 501.) (See 90 Harv. L. Rev. 415, 440.)

Although under current classifications Arabs are Whites, the court in *St. Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582, held that denial of tenure to a college professor who was a U.S. citizen born in Iraq constituted *racial discrimination* under 42 U.S.C., §1981 (supra, §814), if it was based on his Arabian ancestry. "Based on the history of §1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended §1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory." (107 S.Ct. 2028, 95 L.Ed.2d 592.) However, the discrimination must be based "on the fact that he was born an Arab, rather than solely on the place or nation of origin, or his religion." (107 S.Ct. 2028, 95 L.Ed.2d 592.) (See *Shaare Tefila Congregation v. Cobb* (1987) 481 U.S. 615, 107 S.Ct. 2019, 2021, 95 L.Ed.2d 594, 597 [applying *St. Francis College*; discrimination against Jews is racial discrimination under 42 U.S.C., §1982, supra, §814]; *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 C.A.4th 846, 31 C.R.2d 617, *infra*, §924; Pepperdine L. Rev. 77 [St. Francis College]; 150 A.L.R. Fed 1 [private employment cases on reverse or majority race or national origin discrimination]; 168 A.L.R. Fed 1 [public employment cases on reverse discrimination].)

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8 Witkin Sum. Cal. Law Const Law § 872

[§ 872] Harassment by Employer.

In *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132, a black woman sued her employer of 10 years under 42 U.S.C., §1981 (supra, §814), claiming racial harassment by her supervisor, as well as discrimination in failing to promote her and eventually discharging her. *Held*, the racial harassment claim is not actionable under 42 U.S.C., §1981.

(a) 42 U.S.C., §1981 is limited by its terms to the making and enforcement of contracts. It prohibits racial discrimination in entering contracts and protects the right of access to the legal process to enforce contracts. It does not, however, extend to the performance of a contract after its formation. (109 S.Ct. 2372, 2373, 105 L.Ed.2d 150, 151.)

(b) Petitioner claims that she was subjected to various forms of racial harassment by her supervisor. However, with the possible exception of the refusal to promote her, all the challenged conduct involved the conditions of her employment after formation of the contract. "This type of conduct, reprehensible though it be if true, is not actionable under §1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process. Rather, such conduct is actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964." (109 S.Ct. 2374, 105 L.Ed.2d 152.)

(c) Applying 42 U.S.C., §1981 to postformation conduct would also undermine Title VII's procedure for conciliation and resolution of discrimination claims. (109 S.Ct. 2375, 105 L.Ed.2d 153.) "By reading §1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." (109 S.Ct. 2375, 105 L.Ed.2d 154.)

(d) The discriminatory promotion claim is actionable under 42 U.S.C., §1981 only if the change in position would involve a new and distinct employment relationship. (109 S.Ct. 2377, 105 L.Ed.2d 156.)

(e) The disparate treatment approach of Title VII (supra, §870) applies to proof of discrimination under 42 U.S.C.,

§1981. Hence, petitioner need not prove that she was better qualified than the white employee who was chosen. Rather, she can establish a prima facie case by showing that she was qualified but was rejected, and that the employer either continued to seek applicants or filled the position with a white employee. The employer must then present evidence of a legitimate nondiscriminatory reason for his actions. (109 S.Ct. 2378, 105 L.Ed.2d 157; see supra, §870.)

Four justices dissented, arguing that persistent racial harassment is sufficient to prove discrimination in the making of contracts within the meaning of 42 U.S.C., §1981. (109 S.Ct. 2379, 2395, 105 L.Ed.2d 158, 178.) (See 103 Harv. L. Rev. 330 [Patterson]; 76 So. Cal. L. Rev. 1437 [racial jokes, social context, and reasonable person]; 156 A.L.R. Fed 1 [racial harassment in employment violative of Title VII of Civil Rights Act].)

In response to *Patterson*, the contract provision of 42 U.S.C., §1981 was amended as part of the Civil Rights Act of 1991. (See supra, §849.)

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8 *Witkin Sum. Cal. Law Const Law* § 873

[§ 873] In General.

(1) *Age Discrimination in Employment Act*. The federal Age Discrimination in Employment Act (ADEA) (29 U.S.C., §621 et seq.), patterned after Title VII (see *supra*, §855 et seq.), makes it unlawful to discharge, refuse to hire, or otherwise discriminate against a person who is at least 40 years of age, because of the person's age. (29 U.S.C., §§623, 631(a).) (See *Trans World Airlines v. Thurston* (1985) 469 U.S. 111, 105 S.Ct. 613, 621, 83 L.Ed.2d 523, 532 [airline policy of denying age-disqualified captains' automatic transfer to position of flight engineer, while granting transfer to captains disqualified for other reasons, violated Act]; *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852, *supra*, §860 [effect of after-acquired evidence of employee's wrongdoing]; *Commissioner of Internal Revenue v. Schleier* (1995) 515 U.S. 323, 115 S.Ct. 2159, 132 L.Ed.2d 294 [proceeds from settlement under ADEA are not excludable from gross income under 26 U.S.C., §104(a)(2)]; *Caldwell v. Paramount Unified School Dist.* (1995) 41 C.A.4th 189, 195, 48 C.R.2d 448 [applying *McDonnell Douglas* test (*supra*, §870) to age discrimination claim]; *O'Mary v. Mitsubishi Electronics America* (1997) 59 C.A.4th 563, 581, 69 C.R.2d 389 ["seniority" is not to be simplistically equated with "age" in age discrimination suit]; 90 *Harv. L. Rev.* 380 [*Trans World Airlines*]; 109 *Harv. L. Rev.* 319 [*Schleier*]; on comparable California statute, see *infra*, §932; 3 *Summary* (10th), *Agency and Employment*, §§342, 343.)

However, the ADEA does not prohibit discriminatory preference for an older employee over a younger one. (*General Dynamics Land Systems v. Cline* (2004) 540 U.S. 581, 124 S.Ct. 1236, 1242, 157 L.Ed.2d 1094, 1106 [language and history of Act show that it was enacted to protect older workers].)

Age may be considered where it is a bona fide occupational qualification (BFOQ). (29 U.S.C., §623(f)(1); see *Western Air Lines v. Criswell* (1985) 472 U.S. 400, 105 S.Ct. 2743, 2753, 86 L.Ed.2d 321, 335 [BFOQ defense rejected as justification for airline's requirement that flight engineers retire at age 60].) And employers may observe bona fide seniority systems and employee retirement and pension plans, so long as these systems and plans do not require involuntary retirement because of age. (29 U.S.C., §623(f)(2).) (See *Public Employees Retirement System of Ohio v. Betts* (1989) 492 U.S. 158, 109 S.Ct. 2854, 2865, 2867, 106 L.Ed.2d 134, 153, 156 [retirement plan exemption includes all provisions of employee benefit plan unless it is subterfuge for discrimination; EEOC regulation limiting exemption to distinctions justified by cost was invalid]; 176 *A.L.R. Fed* 115 ["bona fide benefit plan" exception to ADEA as

applied to early retirement incentive plans]; 177 A.L.R. Fed 415 ["bona fide seniority system" exception to ADEA].)

Compulsory retirement is authorized for particular employees. (See 29 U.S.C., §623(j) [state or local firefighters or law enforcement officers], 29 U.S.C., §631(c)(1) [bona fide executives or high policymaking positions]; *Gregory v. Ashcroft* (1991) 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410, supra, §5 [Missouri Constitution's requirement that judges (other than municipal judges) retire at age 70 does not violate either ADEA or Equal Protection Clause of federal Constitution]; 105 Harv. L. Rev. 196 [*Gregory v. Ashcroft*]; 105 Harv. L. Rev. 889 [legality of mandatory retirement of tenured faculty under ADEA]; 5 San Fernando Valley L. Rev. 303 [constitutionality of mandatory retirement age]; 53 So. Cal. L. Rev. 1679 [mandatory retirement of law firm partners]; 41 U.C.L.A. L. Rev. 903 [*Gregory v. Ashcroft*]; 81 A.L.R.3d 811 [mandatory retirement of public officers and employees based on age]; on mandatory retirement generally, see supra, §802.)

(2) *Discrimination in Favor of Another Class Member.* A plaintiff alleging age discrimination need not show that he or she was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the framework established by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, supra, §870. (See *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433, 438 [fact that one person in protected class has lost out to another person in protected class is irrelevant, as long as person has lost out because of his or her age].) (See 28 West L.A. L. Rev. 411 [*O'Connor*].)

(3) *Procedure Where State Remedy Is Available.* Under 29 U.S.C., §633(b), in a state that has a law prohibiting age discrimination in employment, no suit may be brought under the federal Act before the expiration of 60 days after commencement of the state proceedings. The purpose of the provision, like that in Title VII (42 U.S.C., §2000e-5(c)), is to screen from the federal courts discrimination complaints that might be settled in state proceedings. However, the aggrieved party may comply with the requirement by merely filing a signed statement of facts with the proper state authority, and this may be done even though the statute of limitations has run on a proceeding for relief under the state statute. (*Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 99 S.Ct. 2066, 2073, 2076, 60 L.Ed.2d 609, 618, 621.) (See 12 U.S.F. L. Rev. 283 [ADEA and Preemption: A Case for Broader State Laws].)

(4) *Claim Subject to Compulsory Arbitration Under Agreement.* A claim under the Act can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26; 104 Harv. L. Rev. 568 [arbitration of claims under ADEA]; 54 Stanf. L. Rev. 1321 [antidiscrimination policy in post-*Gilmer* world].)

(5) *Standards for Liability.* In *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338, the Court explained the distinction between the "disparate treatment" and "disparate impact" theories of discrimination (113 S.Ct. 1705, 123 L.Ed.2d 346), and then said: "Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." (113 S.Ct. 1706, 123 L.Ed.2d 347.)

The opinion also reaffirmed the definition of "willful" in *Trans World Airlines, supra*, that the employer either knew or showed reckless disregard for whether its conduct was prohibited by the statute. "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision." (113 S.Ct. 1710, 123 L.Ed.2d 351.) (See 34 Stanf. L. Rev. 837 [disparate impact doctrine]; 165 A.L.R. Fed 1 [what constitutes willful violation under ADEA entitling victim to liquidated damages].)

In *Smith v. Jackson* (2005) ___ U.S. ___, 125 S.Ct. 1536, 161 L.Ed.2d 410, defendant city, in an effort to attract and retain qualified police officers, adopted a pay plan that gave larger percentage raises to those officers with less than 5 years of tenure. Most older officers had more than 5 years on the job. The district court granted summary judgment to defendant on claims of "disparate treatment" and "disparate impact" age discrimination by a group of older officers. The

Court of Appeals held that the ruling on the disparate treatment claim was premature, but it affirmed dismissal of the disparate impact claim on the ground that disparate impact discrimination claims are categorically unavailable under the ADEA. *Held*, affirmed by a court divided in its reasoning. Although nothing in *Hazen Paper Co.*, the language of the ADEA, or EEOC regulations precludes a disparate impact age discrimination claim, plaintiffs here failed to establish a valid claim.

(a) Although recovery under a disparate impact theory is authorized both under Title VII (see *supra*, §855) and the ADEA, the scope of disparate impact liability under the ADEA is narrower. The ADEA permits an employer to take "otherwise prohibited" actions "where the differentiation is based on reasonable factors other than age" (the RFOA provision). This provision "is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. ... Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact." Certain circumstances affect older workers as a group more strongly than younger workers. Thus, "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference." (125 S.Ct. 1545, 161 L.Ed.2d 422.)

(b) Here, plaintiffs failed to isolate and identify the specific employment practice within defendant's pay plan that had an adverse impact on older workers. Further, defendant's decision to grant larger percentage raises to lower echelon employees to bring salaries in line with those of surrounding police forces "was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers." (125 S.Ct. 1546, 161 L.Ed.2d 423.)

One justice concurred in part and concurred in the judgment, wishing to defer the question of disparate impact to the EEOC, which authorizes disparate impact claims. (125 S.Ct. 1546, 161 L.Ed.2d 423.) Three justices concurred in the judgment, while stating that Congress never intended to authorize disparate impact age discrimination claims, and that liability under the ADEA requires proof of discriminatory intent. (125 S.Ct. 1548, 161 L.Ed.2d 426.) One justice did not participate in the decision.

(6) *Release or Waiver of Claim*. The Older Workers Benefit Protection Act (OWBPA) (29 U.S.C., §626) imposes specific requirements for releases covering ADEA claims, and an employee may not waive an ADEA claim unless the employer complies with the OWBPA. (*Oubre v. Entergy Operations* (1998) 522 U.S. 422, 118 S.Ct. 838, 841, 139 L.Ed.2d 849, 855 [employee was not barred from pursuing action under ADEA by accepting money from employer under severance agreement, and then refusing to give it back, where employer failed to comply with release requirements of OWBPA].)

(7) *Texts and Commentary*. Age discrimination has been the subject of much commentary. (See 32 *Hastings L. J.* 1111 [symposium]; 33 *Hastings L. J.* 457 [punitive damages under ADEA]; 42 *Hastings L. J.* 683 [Symposium: "Legal Issues Relating to the Elderly"]; 64 *So. Cal. L. Rev.* 1677 [bibliography on gerontology and the law, 1986-1990]; 76 *So. Cal. L. Rev.* 1409 [interpretation of ADEA to allow older workers to be fired based on cost concerns]; 18 *U.S.F. L. Rev.* 187 [front pay as remedy under ADEA]; 51 *A.L.R.5th* 1 [application of state law to age discrimination in employment]; 155 *A.L.R. Fed* 283 [what constitutes direct evidence of age discrimination]; 175 *A.L.R. Fed* 359 [award of "front pay" (compensation for future economic loss) under ADEA]; 180 *A.L.R. Fed* 325 [Supreme Court cases on ADEA]; 184 *A.L.R. Fed* 1 [application of exemption for "bona fide employee benefit plan" to plans other than for early retirement]; 186 *A.L.R. Fed* 1 [disparate impact claims under ADEA]; 44 *Proof of Facts* 3d 79 [discrimination under ADEA]; 75 *Am.Jur. Trials* 363 [action under ADEA]; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §160 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Age Discrimination in Employment Act*. See 118 Harv. L. Rev. 436 [*General Dynamics Land Systems v. Cline*].

For purposes of discrimination in compensation based on age, an unlawful employment practice occurs (a) when a discriminatory compensation decision or practice is adopted, (b) when an individual becomes subject to a discriminatory compensation decision or practice, or (c) when an individual is affected by the application of a discriminatory compensation decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from the decision or practice. (29 U.S.C., §626(d)(3), added in 2009, effective as if enacted on May 28, 2007.) (3a) (New) *What Is "Charge" That Starts Enforcement Mechanism of ADEA*. When an employee files a "charge" with the EEOC alleging age discrimination, the ADEA's enforcement mechanism is set in motion and a 60-day waiting period before filing an action begins, during which time the EEOC notifies the charged party and initiates a conciliation process. (See 29 U.S.C., §626(d).) In *Federal Express Corp. v. Holowecki* (2008) 552 U.S. ___, 128 S.Ct. 1147, 170 L.Ed.2d 10, the Court upheld an agency determination that a "charge" for this purpose is a document that can reasonably be interpreted as requesting agency action and appropriate relief on the employee's behalf. (128 S.Ct. 1159, 170 L.Ed.2d 24.) Hence, the Court held that filing of intake questionnaire in which plaintiff consented to having her identity disclosed to her employer, along with a detailed affidavit concluding with a request that the agency force her employer to end its age discrimination plan, was a request for the agency to act, and could properly be construed as a "charge" under 29 U.S.C., §626(d). (128 S.Ct. 1160, 170 L.Ed.2d 24, 25.) (See 25 A.L.R. Fed 2d 145 [sufficiency of form of notice to EEOC charging violation of ADEA].)

(5) *Standards for Liability*. "Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status." (*Kentucky Retirement Systems v. Equal Emp. Opportunity Com.* (2008) 554 U.S. ___, 128 S.Ct. 2361, 2366, 2370, 171 L.Ed.2d 322, 330, 334 [following *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338, text, p. 330; state system that imputed varying additional years of service to hazardous position workers who took disability retirement when they were younger than age 55, but that did not add years when workers became disabled after reaching 55, did not violate ADEA; disparity in benefits turned on pension eligibility (employment for 5 years plus reaching age 55 or employment for 20 years) and not on stereotypes about older workers that ADEA sought to eradicate].)

The exemption for employer actions "otherwise prohibited" by the ADEA but "based on reasonable factors other than age," stated in 29 U.S.C., §626(f)(1), is an affirmative defense to a disparate impact claim of age discrimination. Hence, the employer must produce the evidence raising the defense and persuade the fact-finder of its merit. (*Meacham v. Knolls Atomic Power Laboratory* (2008) 554 U.S. ___, 128 S.Ct. 2395, 2401, 2403, 2404, 171 L.Ed.2d 283, 291, 293, 294 [following reasoning of *Smith v. Jackson* (2005) 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410, text, p. 331; defense of "reasonable factors other than age" in disparate impact action is not focused on asserted fact that nonage factor was at work, which is assumed, but on whether factor relied on was "reasonable" one for employer to be using; reasonableness is justification categorically distinct from factual condition "because of age" and not necessarily correlated with it; business necessity test has no place in ADEA disparate impact cases].)

See 119 Harv. L. Rev. 337 [*Smith v. Jackson*]. Citation: *Smith v. Jackson* (2005) 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410.(7) *Texts and Commentary*. See 55 *Hastings L. J.* 1399 [rehabilitate ADEA by resuscitating "reasonable factors other than age" defense and disparate impact theory]; 5 A.L.R. Fed 2d 243 [liquidated damages for wilful violation]; 27 A.L.R. Fed 2d 367 [sufficiency of contents of notice to EEOC charging violation of ADEA].



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2. Government Employers.

8 Witkin Sum. Cal. Law Const Law § 874

[§ 874] Government Employers.

The Age Discrimination in Employment Act is applicable to the federal Government. (See 29 U.S.C., §633a(a) [specifying federal agencies affected by ADEA]; 2 U.S.C., §1302 [ADEA is applicable to employees of legislative branch of federal Government]; cf. 29 U.S.C., §630(b) [term "employer" does not include U.S. or corporation wholly owned by U.S. Government].) In 1974, its provisions were extended to state and local governments (see 29 U.S.C., §630(b)), but the extension has been held to violate the states' sovereign immunity. (*Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 120 S.Ct. 631, 643, 650, 145 L.Ed.2d 522, 547, supra, §49.) (See 45A Am.Jur.2d (2002 ed.), *Job Discrimination* §§70, 160 et seq.; for case upholding 1974 extension, see *Equal Emp. Opportunity Com. v. Wyoming* (1983) 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 [involuntary retirement of game wardens]; 97 Harv. L. Rev. 199 [Wyoming].)

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Retaliation*: Despite the absence of a specific provision in 29 U.S.C., §633a(a) prohibiting retaliation in the federal sector, the statute protects federal employees who complain about age discrimination. (*Gomez-Perez v. Potter* (2008) 553 U.S. ___, 128 S.Ct. 1931, 1937, 1941, 170 L.Ed.2d 887, 896, 900 [following reasoning of *Sullivan v. Little Hunting Park* (1969) 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386, text, §851, and *Jackson v. Birmingham Bd. of Education* (2005) 544 U.S. 167, 125 S.Ct. 1497, 161 L.Ed.2d 361, Supp., supra, §853; retaliation for complaining about age discrimination constitutes "discrimination based on age"].)



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3. Sufficiency of Evidence.

8 Witkin Sum. Cal. Law Const Law § 875

[§ 875] Sufficiency of Evidence.

In *Reeves v. Sanderson Plumbing Products* (2000) 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105, a discharged employee sued his employer, alleging age discrimination under the ADEA. At trial, defendant contended that plaintiff was fired for failure to maintain accurate attendance records in the department under his supervision. Plaintiff attempted to demonstrate that this explanation was a pretext for age discrimination, introducing evidence that he had accurately recorded the attendance and hours of the employees he supervised, and that defendant's director of manufacturing had demonstrated age-based animus in his dealings with plaintiff. The jury returned a verdict for plaintiff. The Court of Appeals reversed. Although recognizing that plaintiff may well have offered sufficient evidence for the jury to have found that defendant's explanation was pretextual, this did not mean that plaintiff had presented sufficient evidence to show that he had been fired because of his age. In finding the evidence insufficient, the court weighed the evidence of discrimination introduced by plaintiff against other circumstances surrounding his discharge. *Held*, reversed, in a unanimous holding.

(a) Certiorari was granted to resolve a conflict among the federal Courts of Appeals on whether a plaintiff's prima facie case of employment discrimination (as defined in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, *supra*, §870), combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its action, is adequate to sustain a finding of liability for intentional discrimination. (120 S.Ct. 2104, 147 L.Ed.2d 115.)

(b) "When a plaintiff alleges disparate treatment, 'liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.' " (120 S.Ct. 2105, 147 L.Ed.2d 116, quoting *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338, *supra*, §873.) The Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims based principally on circumstantial evidence. This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under Title VII of the Civil Rights Act of 1964, also applies to ADEA actions. Because the parties do not dispute the issue, this Court assumes that the *McDonnell Douglas* framework is fully applicable here. (120 S.Ct. 2105, 147 L.Ed.2d 116.)

(c) *McDonnell Douglas* and subsequent decisions have established an allocation of the burden of production and an order for the presentation of proof in discriminatory treatment cases. "First, the plaintiff must establish a prima facie case of discrimination. ... It is undisputed that plaintiff satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA" (individuals at least 40 years of age), "(ii) he was otherwise qualified for the position ... , (iii) he was discharged" by defendant, and (iv) defendant hired a replacement or replacements to fill his position. The burden therefore shifted to defendant to produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Defendant "met this burden by offering admissible evidence sufficient for the trier of fact to conclude that ... [plaintiff] was fired because of his failure to maintain accurate attendance records." The evidentiary burden then shifted back to plaintiff. (120 S.Ct. 2106, 147 L.Ed.2d 116.)

(d) "Although intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' ... And in attempting to satisfy this burden, the plaintiff--once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision--must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.' " Moreover, although the presumption of discrimination disappears "once the defendant meets its burden of production, ... the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom on the issue of whether the employer's explanation is pretextual.' " (120 S.Ct. 2106, 147 L.Ed.2d 117, quoting *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207.)

(e) Here, plaintiff established a prima facie case and made a substantial showing that defendant's legitimate, nondiscriminatory explanation, i.e., plaintiff's shoddy recordkeeping, was false. He offered evidence showing that he had properly maintained the attendance records in question and that evidence cast doubt on whether he was responsible for any failure to discipline late and absent employees. (120 S.Ct. 2107, 147 L.Ed.2d 118.) In holding that the evidence was insufficient to sustain the jury's verdict, the Court of Appeals ignored this evidence, as well as the evidence supporting plaintiff's prima facie case, and instead confined its review of the evidence favoring plaintiff to that showing that defendant's director had directed derogatory, age-based comments at plaintiff and had singled him out for harsher treatment than younger employees. "It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand." In so reasoning, the court "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." (120 S.Ct. 2107, 147 L.Ed.2d 119.)

(f) In *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407, supra, §870, this Court "held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. ... The ultimate question is whether the employer intentionally discriminated, and proof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason ... is correct.' In other words, '[i]t is not enough ... to disbelieve the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.' " (120 S.Ct. 2108, 147 L.Ed.2d 119.)

(g) It "is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. ... Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. ... In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. ... Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. ... Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." (120 S.Ct. 2108, 147 L.Ed.2d 119.)

(h) This showing by a plaintiff will not *always* be adequate to sustain liability. Certainly there will be instances

where, although the plaintiff has established a prima facie case and introduced sufficient evidence to reject the employer's explanation, no rational fact finder could conclude that discrimination had occurred, e.g., if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision. "To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review ... , and ... trial courts should not 'treat discrimination differently from other ultimate questions of fact.' " (120 S.Ct. 2109, 147 L.Ed.2d 120, quoting *St. Mary's Honor Center*.) "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." (120 S.Ct. 2109, 147 L.Ed.2d 120.) This Court need not--and could not--resolve all such circumstances here. Here, it suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in determining that a plaintiff must always introduce additional, independent evidence of discrimination. (120 S.Ct. 2109, 147 L.Ed.2d 120.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 *Witkin Sum. Cal. Law Const Law* § 876

[§ 876] Religious Discrimination.

The prohibition against religious discrimination (*supra*, §855) was implemented by a 1972 amendment to Title VII requiring employers to "reasonably accommodate" the religious beliefs of their employees. (42 U.S.C., §2000e(j).)

In *Trans World Airlines v. Hardison* (1977) 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113, an employee with low seniority was required to work on Saturdays, in violation of his religious beliefs. *Held*, the employer's obligation did not require disregarding a seniority system established through collective bargaining. "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." (97 S.Ct. 2275, 53 L.Ed.2d 129.) (See 91 *Harv. L. Rev.* 265 [*Hardison*]; cf. *Rankins v. Commission on Professional Competence of Ducor Union School Dist.* (1979) 24 C.3d 167, 175, 154 C.R. 907, 593 P.2d 852, *supra*, §551 [reasonable accommodation required by California's constitutional prohibition against disqualification from employment because of creed].)

In *Ansonia Bd. of Education v. Philbrook* (1986) 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305, a school policy required employees to take unpaid leave for holy day observances in excess of the 3 days of paid leave allowed by the pertinent collective bargaining agreement. The Court held that 42 U.S.C., §2000e(j) is satisfied once the employer establishes that it has provided a reasonable accommodation for its employees' religious needs; there is no further requirement to show that any alternative accommodation offered by an employee would result in undue hardship. (107 S.Ct. 372, 93 L.Ed.2d 315.) In remanding for further factual findings, the Court observed that the policy in question would generally be a reasonable one, but that it would become unreasonable if the facts showed that paid leave was provided for all purposes except religious ones. (107 S.Ct. 373, 93 L.Ed.2d 316.) (See 19 *California Lawyer* 76 (August 1999) [religious proselytizing; free speech or harassment]; 15 *Hastings Const. L. Q.* 523; 30 *Hastings Const. L. Q.* 1 [Religious Discrimination, Public Funding, and Constitutional Values]; 42 *Santa Clara L. Rev.* 1 [employer's ambiguous duty to accommodate religious proselytizing]; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §§124 et seq., 265, 270.)

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f. Pregnancy Discrimination.

8 *Witkin Sum. Cal. Law Const Law* § 877

[§ 877] Pregnancy Discrimination.

(1) *Background.* In *General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343, an employer provided a disability plan for employees that paid weekly nonoccupational sickness and accident benefits, but excluded disabilities arising from pregnancy. *Held*, the plan did not violate Title VII. After observing that decisions construing the Equal Protection Clause were a useful starting point in interpreting the meaning of the term "discrimination" in Title VII, the Court relied on the holding in *Geduldig v. Aiello* (1974) 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256, that unless a design to effect an invidious discrimination is shown, the exclusion of pregnancy disabilities was not an unconstitutional discrimination based on sex, but rather was simply the permissible exclusion of one physical condition from the list of compensable disabilities. (97 S.Ct. 407, 50 L.Ed.2d 353.) (See *Nashville Gas Co. v. Satty* (1977) 434 U.S. 136, 98 S.Ct. 347, 352, 54 L.Ed.2d 356, 364 [employer's policy of denying accumulated seniority to female employees after pregnancy leave; *Gilbert* was controlling]; 90 Harv. L. Rev. 241 [*Gilbert*].)

(2) *Pregnancy Discrimination Act.* This Act, enacted in 1978 as an amendment to Title VII, specifies that the terms "because of sex" and "on the basis of sex" include discrimination based on pregnancy, childbirth, or related medical conditions, and requires all women so affected to "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." (42 U.S.C., §2000e(k).) (See 27 *Golden Gate L. Rev.* 223 [Employer Discrimination on the Basis of Pregnancy: Righting the Power Imbalance]; 25 *Santa Clara L. Rev.* 435 [men's right to infant-care leave under Pregnancy Discrimination Act]; 60 *So. Cal. L. Rev.* 1345; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §135 et seq.; on validity of gender-based fetal protection policies under federal law, see *supra*, §863, and under state law, see *infra*, §926.)

Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Com. (1983) 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89, *supra*, §868, held that the Act overturned the specific holding in *Gilbert*, and also rejected its test of discrimination. (103 S.Ct. 2626, 77 L.Ed.2d 97.) (See 97 Harv. L. Rev. 252.)

(3) *Preferential Treatment of Pregnancy.* *California Fed. Savings & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613, held that former Govt.C. 12945(b)(2) (now Govt.C. 12945(a)), requiring unpaid pregnancy leaves of up to 4 months and reinstatement in the same or a similar position, was not inconsistent with the

purposes of the Pregnancy Discrimination Act, and hence, was not preempted thereby.

(a) The second clause of the federal Act, requiring pregnancy and similar disabilities to be treated the same, does not invalidate the preferential treatment accorded pregnancy by the California statute. "Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." (107 S.Ct. 691, 93 L.Ed.2d 626.) In other words, Congress intended the Act to be " 'a floor beneath which pregnancy disability benefits may not drop--not a ceiling above which they may not rise.' " (107 S.Ct. 692, 93 L.Ed.2d 626.)

(b) The legislative history contains statements that the Act does not *require* preferential treatment for pregnancy; but this does not support the argument that it was intended to *prohibit* this treatment. The issue of preferential treatment was simply not raised, although both the Senate and House Reports suggest that state laws granting preferential treatment would continue to have effect under the Act. (107 S.Ct. 692, 93 L.Ed.2d 627.)

(c) The California statute is consistent with Title VII's basic goal of achieving equality of employment opportunities for all workers. By "taking pregnancy into account," it allows women, as well as men, to have families without fear of losing their jobs. (107 S.Ct. 694, 93 L.Ed.2d 629.) (See 101 Harv. L. Rev. 320; 19 Pacific L. J. 335.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Background.* See 58 *Stanf. L. Rev.* 1871 [Rehnquist's new approach to pregnancy discrimination].



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g. Seniority Systems.

8 Witkin Sum. Cal. Law Const Law § 878

[§ 878] Seniority Systems.

(1) *In General.* Under 42 U.S.C., §2000e-2(h), differentiation in compensation or other terms and conditions of employment pursuant to a bona fide seniority system is permitted, unless the differentiation is the result of an intention to discriminate. (See *California Brewers Assn. v. Bryant* (1980) 444 U.S. 598, 100 S.Ct. 814, 63 L.Ed.2d 55 [requirement that employees work 45 weeks in calendar year to attain permanent status was part of "seniority system" under 42 U.S.C., §2000e-2(h)]; *Pullman-Standard Div. of Pullman v. Swint* (1982) 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 [trial judge's finding that differential impact of seniority system was not result of intent to discriminate was finding of fact that could not be rejected unless "clearly erroneous" under F.R. Civ. P., Rule 52(a)]; *American Tobacco Co. v. Patterson* (1982) 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 [42 U.S.C., §2000e-2(h) is applicable to seniority systems adopted after Title VII's effective date, as well as to those adopted before]; *Firefighters Local Union No. 1784 v. Stotts* (1984) 467 U.S. 561, 104 S.Ct. 2576, 2585, 81 L.Ed.2d 483, 495 [injunction against "last hired, first fired" provision of seniority system, to save Blacks' jobs, could not be justified as enforcement or modification of consent decree covering hiring and promotion of Blacks, but not layoffs]; 96 Harv. L. Rev. 278 [Patterson]; 98 Harv. L. Rev. 267 [Stotts]; 14 U.C. Davis L. Rev. 791 [California Brewers]; 23 U.C.L.A. L. Rev. 177 [Fair Employment in a Depressed Economy: The Layoff Problem]; 45A Am.Jur.2d (2002 ed.), *Job Discrimination* §606 et seq.)

(2) *Retroactive Seniority as Remedy.* The issue whether a seniority system perpetuating past discrimination violates Title VII was settled in *Franks v. Bowman Trans. Co.* (1976) 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444. The Court held that where an employer's seniority system was used for determining layoffs, recalls, job assignments, and other benefits, full relief under the remedial provisions (42 U.S.C., §2000e-5(g)) called for an award of seniority retroactive to the date of the discrimination. "Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment ... will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors." (96 S.Ct. 1267, 47 L.Ed.2d 463.) (See *Zipes v. Trans World Airlines* (1982) 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 [retroactive seniority contrary to collective bargaining agreement could be awarded over objection of union which itself had not been found guilty of discrimination]; *Ford Motor Co. v. Equal Emp. Opportunity Com.* (1982) 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 [employer charged with discrimination may toll

liability for back pay by unconditionally offering claimant job previously denied without also offering retroactive seniority; claimant may obtain this seniority should he or she ultimately prevail]; 5 San Fernando Valley L. Rev. 389 [Franks].)

Franks dealt with post-Act discrimination. *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, involved both pre-Act and post-Act discrimination. The Court held that under 42 U.S.C., §2000e-2(h), a bona fide seniority system is not invalid merely because it perpetuates pre-Act discrimination, but no person is entitled to retroactive seniority to a date prior to the Act's effective date. (97 S.Ct. 1870, 52 L.Ed.2d 428.) (See 91 Harv. L. Rev. 250 [*International Brotherhood*].)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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7. Discrimination by Private School.

8 Witkin Sum. Cal. Law Const Law § 879

[§ 879] Discrimination by Private School.

In *Runyon v. McCrary* (1976) 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415, black children filed actions against the proprietors of private schools in Virginia that followed a policy of excluding qualified children solely because they were black. *Held*, plaintiffs were entitled to equitable and compensatory relief.

(a) *The issues*. This case does not involve the right of a private social organization to restrict membership on racial or other grounds; the right of a private school to limit its student body to boys or girls, or to adherents of a particular religious faith; or the right of private sectarian schools to practice racial exclusion on religious grounds. The two issues are (1) whether 42 U.S.C., §1981 (supra, §814) prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are black, and (2) if so, whether the law is constitutional as so applied. (96 S.Ct. 2592, 49 L.Ed.2d 423.)

(b) *Applicability of 42 U.S.C., §1981*. *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189, supra, §851, and *Tillman v. Wheaton-Haven Recreation Assn.* (1973) 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403, supra, §851, held that 42 U.S.C., 1981 prohibits racial discrimination in the making and enforcement of private contracts. (96 S.Ct. 2593, 49 L.Ed.2d 423.) "Just as in *Jones* a Negro's §1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's §1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees." (96 S.Ct. 2594, 49 L.Ed.2d 424.)

(c) *Constitutionality of 42 U.S.C., 1981 as applied*. Three constitutional challenges were made:

(1) The application of 42 U.S.C., §1981 violates the constitutionally protected right of freedom of association, recognized in *National Assn. for Advancement of Colored People v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, supra, §379, and similar cases. "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected." (96 S.Ct. 2596, 49 L.Ed.2d 428.)

(2) The application of 42 U.S.C., §1981 violates the parent's right to direct the education of his or her children (see *Meyer v. Nebraska* (1923) 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, *infra*, §1071, *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, *supra*, §519, *Wisconsin v. Yoder* (1972) 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15, *supra*, §519). "No challenge is made to the petitioners' right to operate their private schools or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school." They "remain presumptively free to inculcate whatever values and standards they deem desirable. *Meyer* and its progeny entitle them to no more." (96 S.Ct. 2597, 49 L.Ed.2d 429.)

(3) The application of 42 U.S.C., §1981 violates the constitutional right of privacy (see *supra*, §558 et seq.). The parental interests involved are related to protected procreative rights (*supra*, §560 et seq.); i.e., a person's decision whether to bear a child and a parent's decision concerning the manner of his or her education are exercises of familial rights. "But it does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education." (96 S.Ct. 2598, 49 L.Ed.2d 429.) There is no constitutional right to provide children with private school education unfettered by reasonable governmental regulation (see *Wisconsin v. Yoder*, *supra*), and 42 U.S.C., §1981, applied here, is an exercise of federal legislative power under §2 of the Thirteenth Amendment fully consistent with *Meyer*, *Pierce*, and cases following them. The prohibition of racial discrimination in contracts for private educational services furthers goals closely analogous to those served by the elimination of racial discrimination in the making of private employment contracts. (96 S.Ct. 2598, 49 L.Ed.2d 430.)

Two justices concurred with reluctance, and two dissented, arguing that the legislative history did not support the conclusion reached. (96 S.Ct. 2602, 2603, 2605, 49 L.Ed.2d 434, 436, 437.) (See 90 Harv. L. Rev. 412 [Runyon]; 91 Harv. L. Rev. 879.)

In *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132, *supra*, §872, the Court, finding "no special justification" (109 S.Ct. 2370, 105 L.Ed.2d 148) for overruling *Runyon v. McCrary* (1976) 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415, reaffirmed the rule that 42 U.S.C., §1981 prohibits racial discrimination in the making and enforcement of private contracts. (109 S.Ct. 2370, 105 L.Ed.2d 147.) (See 103 Harv. L. Rev. 330; 41 Hastings L. J. 1135.)

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SUPPLEMENT: [This section is current through the latest supplement]



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a. Rehabilitation Act.

8 *Witkin Sum. Cal. Law Const Law* § 880

[§ 880] Rehabilitation Act.

(1) *Purpose.* The purpose of the statute (29 U.S.C., § 701 et seq.) is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." (29 U.S.C., § 701(b).)

(2) *Discrimination Prohibited.* The prohibition against discrimination is contained in §504 of the Act: "No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." (29 U.S.C., §794; see *Consolidated Rail Corp. v. Darrone* (1984) 465 U.S. 624, 104 S.Ct. 1248, 1253, 79 L.Ed.2d 568, 575 [limitation in Title VI of Civil Rights Act of 1964, supra, §852, requiring that primary purpose of financial assistance be to promote employment, is inapplicable to actions under §504]; *Bowen v. American Hosp. Assn.* (1986) 476 U.S. 610, 106 S.Ct. 2101, 2115, 2118, 90 L.Ed.2d 584, 600, 604 [regulations governing provision of health care to disabled infants was invalid in absence of evidence that hospitals' failure either to provide care or to report parents' refusal to consent to care was on basis of disability]; *United States Dept. of Trans. v. Paralyzed Veterans of America* (1986) 477 U.S. 597, 106 S.Ct. 2705, 2710, 2714, 91 L.Ed.2d 494, 502, 507 [federal financial assistance to airport operators and federally provided air traffic control system did not constitute financial assistance to air carriers under §504]; *Fry v. Saenz* (2002) 98 C.A.4th 256, 261, 120 C.R.2d 30 [state program that terminated aid to disabled children at age 18 when those children were not expected to graduate from high school or vocational programs before reaching 19 years of age, but did not terminate aid for nondisabled children expected to graduate by 19 years of age, unlawfully discriminated against disabled children under ADA and Rehabilitation Act]; 100 *Harv. L. Rev.* 285 [Bowen].) (On duty to take affirmative action in hiring disabled, see 29 U.S.C., §791(b) [federal agencies], 29 U.S.C., §793 [federal contractors].)

In *Martin v. Los Angeles* (1984) 162 C.A.3d 559, 561, 209 C.R. 301, wheelchair access to a police station built before the enactment of the Act was provided through a rear door accessible from an upper level parking lot. The door was kept locked, but an officer could be summoned by a clearly marked buzzer. Access to the parking lot was by a 51-foot ramp with a slope of 8.1%, which was within the permissible standards. *Held*, access was adequate for preexisting buildings.

(a) Under applicable federal regulations, the architectural standards specified by the American National Standards Institute apply only to construction or alterations started after the effective date of the regulations. Hence, those standards are not controlling here. (162 C.A.3d 563.)

(b) For preexisting buildings, the regulations mandate only that each *program*, when viewed in its entirety, be accessible. There is no requirement for each facility to be barrier-free, unless that access is the only feasible way to provide program accessibility. (162 C.A.3d 565.)

(c) In the absence of evidence that plaintiff or any other disabled person had been denied access to the police station in question or had been denied the benefit of a program conducted there, the access provided gave plaintiff ample opportunity to participate in the programs and activities conducted at the station, e.g., participating in neighborhood watch meetings, making reports, registering guns and seeking information. (162 C.A.3d 567.)

(3) *Individual With Disability*. Disability means (a) "a physical or mental impairment that constitutes or results in a substantial impediment to employment" or (b) "a physical or mental impairment that substantially limits one or more major life activities." (29 U.S.C., §705(9).) (See *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 107 S.Ct. 1123, 1128, 1130, 94 L.Ed.2d 307, 317, 320 [teacher suffering from tuberculosis was disabled]; 100 Harv. L. Rev. 2035 [appearance as disability]; 16 Loyola L.A. L. Rev. 527; 29 U.C.L.A. L. Rev. 947 [§504 as applicable to victims of weight discrimination]; 22 U.C. Davis L. Rev. 653 [discussing whether Act's definition of handicapped applies to person with HIV infection]; 16 U.S.F. L. Rev. 653 [who is disabled under Act]; 22 U.S.F. L. Rev. 317 [arguing that Act applies to AIDS patients].)

(4) *Damages*. Congress has not waived the federal Government's sovereign immunity against monetary damages for violation of 29 U.S.C., §794(a). (*Lane v. Pena* (1996) 518 U.S. 187, 116 S.Ct. 2092, 2096, 2097, 135 L.Ed.2d 486, 492, 493.)

Punitive damages may not be awarded in actions under the Rehabilitation Act. (*Barnes v. Gorman* (2002) 536 U.S. 181, 122 S.Ct. 2097, 2103, 153 L.Ed.2d 230, 239.)

(5) *Commentary*. Many commentators have written about the rights of disabled persons under the Act. (See 97 Harv. L. Rev. 997 [employment discrimination against disabled and §504]; 21 California Lawyer 66 (May 2001) [Disabled Tenants]; 34 Hastings L. J. 491 [§504 as guaranteeing access to mass transportation]; 13 Pacific L. J. 1117 [§504 as guaranteeing wheelchair participation in road races]; 143 A.L.R. Fed 567 [validity of rules or laws limiting participation in interscholastic sports to those below specified age]; 160 A.L.R. Fed 297 [who is recipient of, and what constitutes program or activity receiving, federal financial assistance under Act]; 163 A.L.R. Fed 285 [rights of prisoners under Rehabilitation Act]; 166 A.L.R. Fed 503 [What Constitutes Reasonable Accommodation Under Federal Statutes Protecting Rights of Disabled Individual, as Regards Educational Program or School Rules as Applied to Learning Disabled Student].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Discrimination Prohibited*. The 2009 amendment to Title VII regarding claims of discrimination in compensation (see Supp., supra, §858), apply as well to claims of discrimination in compensation brought under 29 U.S.C., §§791 and 794. (See Pub. L. 111-2, 123 Stat. 5; 42 U.S.C., §2000e-5(e).)(5) *Commentary*. See 8 A.L.R. Fed 2d 375 [recovery of attorneys' fees under Act].



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b. Individuals With Disabilities Education Act.

8 Witkin Sum. Cal. Law Const Law § 881

[§ 881] Individuals With Disabilities Education Act.

This Act (20 U.S.C., §1400 et seq.) provides for federal assistance to states that have satisfied specified conditions, including having in effect a policy assuring all handicapped children the right to a free appropriate public education. (20 U.S.C., §1412.) (See *Los Angeles v. Smith* (1999) 74 C.A.4th 500, 519, 88 C.R.2d 159 [county was not entitled to reimbursement from mother of severely emotionally disturbed child from time individualized education program was prepared; Act preempts state statutes adopted pursuant to Social Security Act requiring counties to seek reimbursement for funds expended in support of needy children]; 20 Cal. Western L. Rev. 132 [availability of equal educational opportunities for disabled children]; 23 J. Juvenile Law 65 [where are advocates for rights of disabled school children]; 5 U.C. Davis L. Rev. 147 [Symposium on Special Education Law]; 153 A.L.R. Fed 1 [who is prevailing party for purposes of obtaining attorney's fees under Act].)

"Free appropriate public education" refers to (a) special education, i.e., specially designed instruction, including instruction in physical education, in the classroom, at home, and in hospitals, to meet the special needs of handicapped children (20 U.S.C., §1401(25)), and (b) related services, i.e., transportation and supportive services as required to assist handicapped children to benefit from special education (20 U.S.C., §1401(22)). (20 U.S.C., §1401(8).) (See *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 104 S.Ct. 3371, 3377, 82 L.Ed.2d 664, 672 [kidney patient was entitled to catheterization by school personnel as "related service"]; *Cedar Rapids Community School Dist. v. Garret F.* (1999) 526 U.S. 66, 119 S.Ct. 992, 997, 143 L.Ed.2d 154, 162 [following *Tatro*; providing ventilator dependent child with continuous care was "related service" required by Act]; 28 *Pepperdine L. Rev.* 143 [*Cedar Rapids*]; 36 *San Diego L. Rev.* 137 [reasonable accommodation of law students with disabilities in clinical placements]; 152 A.L.R. Fed 485 [obligation of public educational agencies under Act to pay tuition for students unilaterally placed in private schools]; 161 A.L.R. Fed 1 [services that must be provided by federally assisted schools under IDEA]; 189 A.L.R. Fed 297 [application of "least restrictive environment" provision of IDEA].)

The Act contains a "stay-put" provision, directing that a disabled child must remain in his or her current educational placement pending completion of judicial review of decisions with which the parents disagree. *Honig v. Doe* (1988) 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686, held that this provision prohibited school authorities from unilaterally excluding disabled children for dangerous or disruptive conduct growing out of their disabilities. Congress made no emergency exception for dangerous students, and the Court cannot create one. (108 S.Ct. 604, 605.) (See 17 J. Juvenile

Law 94 [discussing need to include dangerousness exception to "stay put" provision of Act].)

The language of the Act does not show an unmistakably clear congressional intent to abrogate the states' Eleventh Amendment immunity. Hence, an action for monetary damages for violation of the Act may not be brought against a state in federal court. (*Dellmuth v. Muth* (1989) 491 U.S. 223, 109 S.Ct. 2397, 2402, 105 L.Ed.2d 181, 190.)

West's Key Number Digest, Civil Rights k.173 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

The burden of proof in a hearing on the propriety of a child's individualized education program is on the party seeking relief. (*Schaffer v. Weast* (2005) 546 U.S. 49, 126 S.Ct. 528, 535, 163 L.Ed.2d 387, 397; see 58 *Stanf. L. Rev.* 1563 [looking beyond IDEA after *Schaffer*].)

Parents have independent, enforceable rights under the IDEA. These rights are not limited to matters that relate to procedure and cost recovery. Hence, parents are aggrieved parties under the IDEA, entitled to prosecute claims in federal court on their own behalf, with or without counsel. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 127 S.Ct. 1994, 1999, 2004, 2006, 167 L.Ed.2d 904, 915, 920, 923; see 121 *Harv. L. Rev.* 365 [Winkelman]; 16 *A.L.R. Fed* 2d 467 [right of parents to proceed pro se in actions under IDEA].)

See *Benjamin G. v. California Special Education Hearing Office* (2005) 131 *C.A.4th* 875, 879, 32 *C.R.3d* 366 [under both IDEA and California statutes, parents have right to have their expert observe proposed placement before attending administrative hearing at which placement will be determined]; 57 *Hastings L. J.* 1189 [educational needs of incarcerated youth]; 5 *Pepperdine Dispute Resolution L. J.* 137 [new amendments of IDEA]; 45 *San Diego L. Rev.* 251 [how denial of expert witness fees will adversely impact children with autism]; 34 *Southwestern U. L. Rev.* 551 [discrimination and developmental delays]; 57 *Stanf. L. Rev.* 2135 [accommodation of students with learning disabilities on SAT]; 3 *A.L.R. Fed* 2d 441 [recovery of witness and consultant fees under IDEA]; 13 *A.L.R. Fed* 2d 321 [construction and application of IDEA--Supreme Court cases]; 23 *A.L.R. Fed* 2d 553 [statute of limitations in actions for attorneys' fees brought under IDEA]; 27 *A.L.R. Fed* 2d 341 [jurisdiction of court to award attorneys' fees as part of costs under IDEA]; 93 *Proof of Facts* 3d 1 [parents' or students' proof in action for educational services or tuition reimbursement under the special education laws]; 99 *Proof of Facts* 3d 237 [School District's Proof that Services Offered to Student with Disabilities Met Statutory Standards].



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c. Americans With Disabilities Act (ADA).
1. In General.

8 Witkin Sum. Cal. Law Const Law § 882

[§ 882] In General.

(1) *Purpose and Activities Covered.* The Americans With Disabilities Act of 1990 (ADA) (42 U.S.C., §12101 et seq.) was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing" discrimination. (42 U.S.C., §12101(b)(1), (b)(2).)

Disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities" of a person, "a record of such an impairment," or "being regarded as having such an impairment." (42 U.S.C., §12102(2).) (See *Real v. Compton* (1999) 73 C.A.4th 1407, 1419, 87 C.R.2d 531 [fact that plaintiff police officer was terminated from defendant law enforcement agency due to inability to perform patrol duties was not sufficient to demonstrate that he was perceived as substantially limited in major life activity of working]; 52 *Stanf. L. Rev.* 171 [Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability].)

The Act requires equal opportunity for persons with disabilities in the following areas:

- (a) Employment. (See 42 U.S.C., §12111 et seq.; *infra*, §885.)
- (b) Participation in services provided by governmental units and other public entities. (See 42 U.S.C., §12131 et seq.; *infra*, §884.)
- (c) Public transportation. (See 42 U.S.C., §12141 et seq.)
- (d) Public accommodations. (See 42 U.S.C., §12181 et seq.; *infra*, §887.)

The Act contains broad prohibitions against discrimination on the basis of disability (42 U.S.C., §12112(a) [employment], 42 U.S.C., §12132 [public entities], 42 U.S.C., §12182(a) [places of public accommodation]) and also requires public transportation systems to take specified steps to make their facilities accessible to persons with disabilities (42 U.S.C., §12142 et seq. [public entities], 42 U.S.C., §12184 [private entities]). (See *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206, 118 S.Ct. 1952, 1954, 141 L.Ed.2d 215, 219 [ADA is applicable to state

prisoners]; *Ventura County Ry. Co. v. Hadley Auto Transport* (1995) 38 C.A.4th 878, 880, 45 C.R.2d 362 [subrogation action by workers' compensation carrier against railroad that caused injury to employee and that attempted to mitigate damages by cross-complaining against employer under ADA, alleging that employer discriminated against employee by refusing to rehire him after his injury; railroad lacked standing under ADA]; *Jackson v. Los Angeles* (1997) 60 C.A.4th 171, 178, 70 C.R.2d 96 [plaintiff was precluded from showing that he was "qualified worker with disability" under ADA where work restrictions were imposed on plaintiff pursuant to workers' compensation award]; *In re Diamond H.* (2000) 82 C.A.4th 1127, 1139, 98 C.R.2d 715 [ADA may not be used to attack court order denying reunification services to disabled person].)

The ADA recognizes both disparate treatment and disparate impact claims. (*Raytheon Co. v. Hernandez* (2003) 540 U.S. 44, 124 S.Ct. 513, 519, 157 L.Ed.2d 357, 366 [court should not consider discriminatory impact of employment policy where plaintiff only pursues disparate treatment claim].)

(2) *Covered Employers.* The Act applies to employers with a workforce of "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." (42 U.S.C., §12111(5).) *Clackamas Gastroenterology Associates, P.C. v. Wells* (2003) 538 U.S. 440, 123 S.Ct. 1673, 155 L.Ed.2d 615, held that in determining whether physicians in a professional corporation who actively engage in medical practice as shareholders and directors should be counted as employees for purposes of coverage under the Act depends on the amount of control they exercise. The Court approved the EEOC's guidelines for determining whether a shareholder director is an employee, including (a) whether the organization can hire and fire the shareholder, (b) the extent to which the organization supervises his or her work, (c) whether the shareholder reports to someone higher in the organization, (d) the extent to which the shareholder is able to influence the organization, (e) the availability of any written agreements stating the parties' positions, and (f) whether the shareholder shares in profits, losses, and liabilities. (123 S.Ct. 1679, 155 L.Ed.2d 625.)

(3) *Remedies.* The remedies provided by the Civil Rights Act of 1964 (*supra*, §847 et seq.) and by the Rehabilitation Act of 1973 (*supra*, §880) are available for enforcement of the ADA. (42 U.S.C., §12117 [employment; Civil Rights Act remedies], 42 U.S.C., §12133 [provision of public services; Rehabilitation Act remedies], 42 U.S.C., §12188 [public accommodations; Civil Rights Act remedies].) However, punitive damages are not recoverable under Title VI or the Rehabilitation Act (see *supra*, §§852, 880), and may not be awarded in actions under the ADA. (*Barnes v. Gorman* (2002) 536 U.S. 181, 122 S.Ct. 2097, 2103, 153 L.Ed.2d 230, 239; see 116 Harv. L. Rev. 312 [Barnes].)

States are immune from private damages actions under the ADA. (*Board of Trustees of University of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866, *supra*, §50.)

(4) *Liability of Supervisors.* A supervisor is not individually liable for ADA discrimination. (*Le Bourgeois v. Fireplace Mfrs.* (1998) 68 C.A.4th 1049, 1054, 80 C.R.2d 660 [applying reasoning of *Reno v. Baird* (1998) 18 C.4th 640, 76 C.R.2d 499, 957 P.2d 1333, *infra*, §919, which held that supervisors are not liable for discrimination under FEHA].)

(5) *Defense of Risk to Worker's Health.* An EEOC regulation permitting an employer to screen out a potential worker with a disability whose health would be endangered by the job is valid under the ADA. (*Chevron U.S.A. v. Echazabal* (2002) 536 U.S. 73, 122 S.Ct. 2045, 2049, 153 L.Ed.2d 82, 89 [regulation is not precluded by fact that ADA only specifically mentions defense of threat to health of others].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Purpose and Activities Covered.* See *Madden v. Del Taco* (2007) 150 C.A.4th 294, 303, 58 C.R.3d 313 [allowing concrete trash container to block wheelchair access to restaurant was *prima facie* violation of ADA]; *Coronado v. Cobblestone Village Community Rentals, L.P.* (2008) 163 C.A.4th 831, 850, 77 C.R.3d 883 [common area of residential

apartment complex that is not open to public is not public accommodation under ADA]; *Californians for Disability Rights v. Mervyn's LLC* (2008) 165 C.A.4th 571, 594, 81 C.R.3d 144 [retail store was not required to remove architectural barriers to disabled where reconfiguration would result in significant loss of sales, but store's failure to make facilities available through alternative methods such as customer assistance violated ADA; fact that new and remodeled stores outside area provided access to disabled did not excuse lack of access to existing stores].

The 2009 amendment to Title VII regarding claims of discrimination in compensation (see Supp., supra, §858), apply as well to claims of discrimination in compensation brought under 42 U.S.C., §§12111 et seq. and 794. (See Pub. L. 111-2, 123 Stat. 5; 42 U.S.C., §2000e-5(e).)(2) *Covered Employers*. See *Spector v. Norwegian Cruise Line Ltd.* (2005) 545 U.S. 119, 125 S.Ct. 2169, 2175, 2180, 162 L.Ed.2d 97, 105, 111 [as general matter, ADA applies to foreign-flag cruise ships in U.S. waters, but removal of barriers may not be "readily achievable" because ADA provisions may conflict with International Convention for the Safety of Life at Sea and other legal obligations governing foreign cruise ships].(3) *Remedies*. Although the ADA provides for abrogation of state sovereign immunity for private suits claiming a violation of the Act, it has been held to apply to the states only to the extent that it is appropriate legislation under Section 5 of the Fourteenth Amendment. (See *Board of Trustees of University of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866, text, §50 [state was immune from action seeking special accommodations]; *Tennessee v. Lane* (2004) 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820, Supp., supra, §44A [state was not immune from action under Title II for denial of access to courts].) Thus, a state is *not* immune from a private damage action under Title II of the ADA that is based on conduct that *actually* violates the Fourteenth Amendment. (*United States v. Georgia* (2006) 546 U.S. 151, 126 S.Ct. 877, 882, 163 L.Ed.2d 650, 659 [on remand, court must decide whether state's treatment of paraplegic inmate violated Title II, to what extent alleged misconduct also violated Fourteenth Amendment, and if conduct violated Title II but not Fourteenth Amendment, whether ADA's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid].)



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8 Witkin Sum. Cal. Law Const Law § 883

[§ 883] Texts and Commentary.

Law review commentary on the ADA is extensive. (See *109 Harv L. Rev.* 1602 [ADA and employment discrimination; developments in the law]; *85 Cal. L. Rev.* 701 [ADA and employment discrimination on basis of psychiatric disability]; *88 Cal. L. Rev.* 607 [liability of insurance companies under ADA]; *90 Cal. L. Rev.* 1981 [arguing that ADA must cover "nonmitigating" plaintiffs]; *39 Cal. Western L. Rev.* 349 [architectural barriers under ADA]; *47 Hastings L. J.* 871 [duty of health care providers to supply sign language interpreters for deaf patients]; *48 Hastings L. J.* 75 [voluntary disabilities and the ADA]; *52 Hastings L. J.* 749 [solutions for employees with diabetes claiming disability discrimination]; *52 Hastings L. J.* 1037 [ADA and public transit for disabled]; *54 Hastings L. J.* 243 [outdoor accessibility requirements on holders of conservation easements]; *34 Golden Gate L. Rev.* 1 [disability discrimination and the movies]; *30 Loyola L.A. L. Rev.* 977 [effect of ADA on federal, state, and local law enforcement agencies]; *31 Loyola L.A. L. Rev.* 775 [Symposium on Mental Disability Law]; *31 Pepperdine L. Rev.* 773 [whether "interacting with others" is major life activity under ADA]; *44 Santa Clara L. Rev.* 55 [discrimination through overly protective rules]; *74 So. Cal. L. Rev.* 399 [cancer and ADA]; *52 Stanf. L. Rev.* 1829 [diabetes and ADA]; *50 Stanf. L. Rev.* 469 [legal implications of flagging nonstandard test scores under ADA and Rehabilitation Act]; *23 Thomas Jefferson L. Rev.* 97 [defining psychiatric disabilities as physical disabilities]; *33 U.C. Davis L. Rev.* 95 [Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA]; *34 U.C. Davis L. Rev.* 849 [ADA, workplace, and myth of "dangerously mentally ill"]; *40 U.C.L.A. L. Rev.* 1341 [Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People With Disabilities]; *47 U.C.L.A. L. Rev.* 1135 [distinguishing speculative and substantial risk in presymptomatic job applicant: ADA direct threat defense]; *47 U.C.L.A. L. Rev.* 1279 [The Disability Term: Dignity, Default, and Negative Capability]; *50 U.C.L.A. L. Rev.* 17 [disability discrimination in assisted reproductive technologies]; *50 U.C.L.A. L. Rev.* 903 [Is the ADA Efficient?]; *38 U.S.F. L. Rev.* 831 [do disabled have right to best seats in movie theaters?].)

Commentary on the ADA in other texts is also extensive. (See *45A Am.Jur.2d* (2002 ed.), *Job Discrimination* §178 et seq.; *49 Am.Jur.* Trials 171 [defense of claim brought under ADA]; *74 Am.Jur.* Trials 255 [discrimination based on dyslexia]; *20 Proof of Facts 3d* 361 [employment discrimination in violation of ADA]; *33 Proof of Facts 3d* 1 [disability under ADA]; *38 Proof of Facts 3d* 129 [employment discrimination based on repetitive strain injury under ADA]; *42*

Proof of Facts 3d 1 [proof that employer did not discriminate against employee or applicant under ADA]; 48 Proof of Facts 3d 1 [mental disability under ADA]; 49 Proof of Facts 3d 1 [Discrimination in Provision of Medical Services on Basis of Disability]; 141 *A.L.R. Fed* 603 [substantial limitation on major life activity of working for purposes of ADA]; 143 *A.L.R. Fed* 567 [validity rules or laws limiting participation in interscholastic sports to those below specified age]; 146 *A.L.R. Fed* 1 [who is "qualified individual" under ADA provisions defining, and extending protection against employment discrimination to qualified individual with disability (42 U.S.C., §§12111(8), 12112(a))]; 148 *A.L.R. Fed* 305 ["impairment" under ADA]; 159 *A.L.R. Fed* 89 [medical examinations and inquiries under ADA]; 160 *A.L.R. Fed* 637 [when are public entities required to provide services, programs, or activities to disabled under ADA]; 162 *A.L.R. Fed* 603 [actions under ADA to remedy harassment or hostile work environment]; 163 *A.L.R. Fed* 285 [rights of prisoners under ADA]; 163 *A.L.R. Fed* 339 [when does public entity discriminate against disabled in provision of services, programs, or activities]; 164 *A.L.R. Fed* 433 [what constitutes employment discrimination by public entity under ADA]; 169 *A.L.R. Fed* 439 [exhaustion of administrative remedies as prerequisite to action under Title I of ADA]; 172 *A.L.R. Fed* 465 [requirement of replacement by nonprotected individual to establish prima facie employment discrimination under ADA]; 173 *A.L.R. Fed* 639 [ADA actions--Supreme Court cases]; 182 *A.L.R. Fed* 609 [constructive discharge under ADA]; 192 *A.L.R. Fed* 483 [what constitutes substantial limitation on major life activity of taking care of oneself]; 194 *A.L.R. Fed* 455 [substantial limitation on breathing]; 195 *A.L.R. Fed* 407 [substantial limitation on speaking].)

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Law review commentary: See 121 *Harv. L. Rev.* 1114 [law of mental illness]; 81 *So. Cal. L. Rev.* 111 [applying Title III of ADA to businesses behind commercial websites]; 58 *Stanf. L. Rev.* 859 [removing certification bar to disability-based employment discrimination class actions]; 27 *Thomas Jefferson L. Rev.* 421 [inconsistent treatment of fibromyalgia under ADA]; 54 *U.C.L.A. L. Rev.* 1 [limited civil rights remedies and abusive ADA litigation].

Other texts: See 198 *A.L.R. Fed* 209 [what constitutes substantial limitation on major life activity of eating]; 199 *A.L.R. Fed* 481 [what diseases or conditions constitute substantial limitation on major life activity of walking]; 2 *A.L.R. Fed* 2d 347 [what constitutes substantial limitation on major life activity of interacting with others]; 4 *A.L.R. Fed* 2d 569 [what injuries or impairments constitute substantial limitation on major life activity]; 6 *A.L.R. Fed* 2d 453 [use of "last chance" or "return to work" agreements under ADA]; 7 *A.L.R. Fed* 2d 447 [construction and application of association section of ADA]; 112 *A.L.R. Fed* 2d 423 [what constitutes substantial limitation on major life activity of sleeping for purposes of ADA]; 23 *A.L.R. Fed* 2d 197 [what constitutes substantial limitation on major life activity of lifting for purposes of ADA]; 99 Proof of Facts 3d 1 [Proof of Chronic Fatigue Syndrome and Fibromyalgia].



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3. Integration Mandate.

8 Witkin Sum. Cal. Law Const Law § 884

[§ 884] Integration Mandate.

In implementing the proscription against discrimination in the provision of public services (see 42 U.S.C., §12132), the Attorney General mandated that public entities must administer services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (28 C.F.R., §35.130(d).) In *Olmstead v. L.C.* (1999) 527 U.S. 581, 119 S.Ct. 2176, 2185, 144 L.Ed.2d 540, 556, plaintiffs, institutionalized for mental disabilities, claimed that the state's denial of community-based placement violated Article II of the ADA. *Held*, undue institutionalization qualifies as discrimination based on disability. States must "provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." (119 S.Ct. 2190, 144 L.Ed.2d 562.)

One justice concurred in part and concurred in the judgment, and two justices concurred in the judgment. (119 S.Ct. 2190, 144 L.Ed.2d 562.) Three justices dissented, believing that "temporary exclusion from community placement does not amount to 'discrimination' in the traditional sense" and that plaintiffs failed to show discrimination "by reason of" their disabilities. (119 S.Ct. 2194, 144 L.Ed.2d 567.) (See 113 Harv. L. Rev. 326 [Olmstead].)

Olmstead was interpreted in *Black v. Department of Mental Health* (2000) 83 C.A.4th 739, 100 C.R.2d 39, an action involving a mental patient who died due to inadequate care after being transferred to a private facility from a state mental hospital that was closing. "[W]hen the *Olmstead* court said the ADA does not condone transferring to community placement an institutionalized disabled person who will not benefit from such a placement, we do not believe it was either holding or signaling that a medically inappropriate transfer from institutionalization to community placement is, by itself, a violation of the integration mandate. It was, instead, merely identifying the outer limits of a state's duties under the integration mandate" of *Title II*. (83 C.A.4th 754.) Here, plaintiff's action is based on allegations that the state provided "inappropriate care due to a lack of other alternatives. While it might have been medically improper to do so, the state did not violate the integration mandate." (83 C.A.4th 755.)

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4. Reasonable Accommodation Requirement.

8 Witkin Sum. Cal. Law Const Law § 885

[§ 885] Reasonable Accommodation Requirement.

(1) *In General.* The ADA requires an employer to make a reasonable accommodation to the known disabilities of a qualified employee, *unless* the accommodation would work an *undue hardship* on the employer. (See 42 U.S.C., §12112(b)(5)(A); for definition of "reasonable accommodation," see 42 U.S.C., §12111(9).) (See *Brundage v. Hahn* (1997) 57 C.A.4th 228, 236, 238, 66 C.R.2d 830 [employer who did not know of disability at time of plaintiff's termination for abandonment of job could not be liable for discrimination "because of" disability; denial of reinstatement was not discriminatory act and reinstatement was not required as "reasonable accommodation"]; *San Diego Unified Port Dist. v. Gallagher* (1998) 62 C.A.4th 501, 505, 507, 73 C.R.2d 30 [disagreeing with federal cases; activity analogous to zoning, such as port district's allocation of sites for long-term anchorages, is subject to ADA; however, accommodation requirement does not permit disabled plaintiff to anchor anywhere plaintiff chooses]; *Cleveland v. Policy Management Systems Corp.* (1999) 526 U.S. 795, 119 S.Ct. 1597, 1602, 1603, 143 L.Ed.2d 966, 974, 977 [pursuit and receipt of SSDI benefits does not automatically estop recipient from pursuing ADA claim, and courts should not apply negative presumption to claim; however, recipient must explain why his or her SSDI contention is consistent with ADA claim that he or she could perform essential functions of previous job at least with "reasonable accommodation"]; *PGA Tour v. Martin* (2001) 532 U.S. 661, 121 S.Ct. 1879, 1890, 1893, 149 L.Ed.2d 904, 920, 923 [ADA applies to professional golf tournaments; disabled golfer should not be denied use of golf cart, although other participants must walk, when it does not "fundamentally alter" nature of tournament]; 115 Harv. L. Rev. 487 [*PGA Tour v. Martin*]; 32 Southwestern U. L. Rev. 151 [same].)

(2) *Effect of Seniority System on Reasonable Accommodation Requirement.* "Reasonable accommodation" may include a "reassignment to a vacant position." (See 42 U.S.C., §12111(9)(B).) In *US Airways v. Barnett* (2002) 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589, the question was whether the ADA required defendant employer "to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system." (122 S.Ct. 1520, 152 L.Ed.2d 599.) *Held*, in most cases the seniority system will prevail.

The "typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment" including job security and predictable advancement. (122 S.Ct. 1524, 152

L.Ed.2d 604.) "[T]o require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment." (122 S.Ct. 1524, 152 L.Ed.2d 604.) However, although the employer's showing of a violation of the rules of a seniority system by itself ordinarily will be sufficient, the employee remains free to show that, despite the seniority system, circumstances warrant finding that the requested accommodation is reasonable under the particular facts of the case. Those facts might include the employer's frequent departures from the seniority system. (122 S.Ct. 1525, 152 L.Ed.2d 604.)

Four justices dissented in two separate opinions. (122 S.Ct. 1528, 1532, 152 L.Ed.2d 608, 613.) (See 116 Harv. L. Rev. 342 [*US Airways*].)

(3) *Commentary.* The reasonable accommodation requirement has been the subject of considerable commentary. (See 111 Harv. L. Rev. 1560 [accommodating learning disabilities under ADA]; 33 *Golden Gate L. Rev.* 71 [future effects of reasonable accommodation requirement on golf courses]; 64 *So. Cal. L. Rev.* 1607 [reasonable accommodation and prohibition of employment discrimination under ADA]; 33 *Southwestern U. L. Rev.* 51 [employer and employee rights and obligations during interactive process]; 53 *Stanf. L. Rev.* 223 [Accommodation Mandates]; 35 *U.C. Davis L. Rev.* 1175 [three faces of reasonable accommodation]; 142 *A.L.R. Fed* 311 [When Does Job Restructuring Constitute Reasonable Accommodation of Qualified Disabled Employee or Applicant?]; 166 *A.L.R. Fed* 503 [What Constitutes Reasonable Accommodation Under Federal Statutes Protecting Rights of Disabled Individual, as Regards Educational Program or School Rules as Applied to Learning Disabled Student].)

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(3) *Commentary.* See 28 *California Lawyer* 39 (May 2008) [Accommodating Lawyers with Disabilities]; 35 *Pepperdine L. Rev.* 1 [assessing employer's reasonable accommodation obligation in "record of disability" cases].



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4A. (New) Retaliation and Harassment.

8 Witkin Sum. Cal. Law Const Law § 885A

[§ 885A] (New) Retaliation and Harassment.

In *Wilson v. Murillo* (2008) 163 C.A.4th 1124, 78 C.R.3d 214, defendant restaurant owner denied service to plaintiff and another wheelchair-bound companion. Plaintiff was a known activist for disabled persons who had complained about accessibility problems for the disabled after earlier visits, causing defendant to spend thousands of dollars in bringing the restaurant into compliance with applicable law. Defendant asked plaintiff and his companion to leave and showed them a sign reserving her right to refuse service to anyone. When plaintiff refused to leave, the bartender was ordered to remove their food and drinks and another employee began taking pictures of them. Defendant called the police, who refused to eject plaintiff. Plaintiff left the restaurant after the police left. As plaintiff and his companion rolled their wheelchairs toward their cars, a waitress and the employee who had been taking pictures inside came out and began taunting them while the waitress took more pictures. Plaintiff filed suit against defendant, alleging violations of the Unruh Civil Rights Act (see text, §898 et seq.) and the Disabled Persons Act (see text, §957 et seq.), which both incorporate violations of the ADA. The trial court granted defendant's summary judgment motion, finding that defendant's conduct did not rise to the level necessary for recovery under either statute. *Held*, reversed.

(a) *Prima facie case of retaliation.* 42 U.S.C., §12203(a) prohibits discrimination because an individual has opposed an act or practice made unlawful under the ADA. To establish a prima facie case of retaliation under the ADA, a plaintiff must prove that (1) he or she was engaged in protected activity, (2) the alleged retaliator knew that the plaintiff was involved in the protected activity, (3) an adverse decision or course of action was taken against the plaintiff, and (4) a causal connection exists between the protected activity and the adverse action. (163 C.A.4th 1133.) The question here was whether plaintiff presented sufficient evidence to satisfy the "adverse action" requirement. (163 C.A.4th 1134.)

(b) *Different standard used in public accommodation cases.* An "adverse action" in an employment setting would require a plaintiff to prove that an alleged retaliatory action had a detrimental and substantial effect on the plaintiff. However, "the dissimilar nature of the relationship between an employer and an employee from that between a restaurant owner and patron militates against using an employment definition of 'adverse action' for purposes of establishing a prima facie retaliation claim in a public accommodation setting." (163 C.A.4th 1135.) Although the adversity in an ADA retaliation action must be material, it need not be traumatic. The correct standard requires

analyzing whether a reasonable person in plaintiff's position would believe that the conduct allegedly taken against him or her was materially adverse. (163 C.A.4th 1136.) Here, if plaintiff's claims are found to be true, they are sufficient to allow a fact-finder, using both objective and subjective tests, to conclude that plaintiff was subjected to materially adverse acts of retaliation by defendant. (163 C.A.4th 1137.)

(c) *Harassment.* 42 U.S.C., §12203(b) prohibits coercion, intimidation, threats, or interference with an individual in the exercise or enjoyment of a right granted in the ADA. In other words, 42 U.S.C., §12203(b) prohibits harassment against those who are simply exercising their ADA rights, as opposed to 42 U.S.C., §12203(a), which prohibits retaliation. (163 C.A.4th 1138.) Hence, 42 U.S.C., §12203(b) covers a broader range of conduct and motivations than mere retaliation for reporting violations of government regulations. Plaintiff here produced sufficient evidence of material and intentional adverse acts that interfered with his full and equal use of a place of public accommodation to raise a triable issue of fact with respect to defendant's liability under the statute. (163 C.A.4th 1138, 1139.)

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5. Effect of Arbitration Agreement.

8 Witkin Sum. Cal. Law Const Law § 886

[§ 886] Effect of Arbitration Agreement.

The question presented in *Equal Emp. Opportunity Com. v. Waffle House* (2002) 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755, was whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the EEOC "from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action" alleging violation of the ADA. (122 S.Ct. 758, 151 L.Ed.2d 761.) The Court of Appeals held that, although the EEOC could bring an enforcement action because it was not a party to the contract, it could not seek victim-specific relief in court because of the arbitration agreement and the policies expressed in the Federal Arbitration Act (FAA); hence, the EEOC's remedies were limited to injunctive relief. *Held*, reversed.

(a) When enforcing the ADA, the EEOC has the same powers as it does when enforcing *Title VII of the Civil Rights Act*. (122 S.Ct. 759, 151 L.Ed.2d 763.) Title VII permits the recovery of damages by a "complaining party." This includes both private plaintiffs and the EEOC. (122 S.Ct. 760, 151 L.Ed.2d 764.) "There is no language in the statute ... suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available." (122 S.Ct. 761, 151 L.Ed.2d 765.)

(b) Although federal policy favors arbitration agreements, the contract language "defines the scope of disputes subject to arbitration." Nothing in the FAA compels arbitration by parties not covered in the contract. "The FAA does not mention enforcement by public agencies; it ensures the enforcement of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of judicial forum." (122 S.Ct. 762, 151 L.Ed.2d 766.)

(c) The EEOC does not need the complainant's consent to file suit. Once a charge is filed with the EEOC, it "has exclusive jurisdiction over the claim for 180 days. During that time, the employee must obtain a right-to-sue letter from the agency before prosecuting the claim. If, however, the EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit." It is the province of the EEOC, and not of the court "to determine whether public resources should be committed to the recovery of victim-specific relief. And if the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum." (122 S.Ct. 763, 151 L.Ed.2d 767.)

Three justices dissented, stating that the majority opinion conflicts with both the FAA "and the basic principle that the EEOC must take a victim of discrimination as it finds him." The EEOC may not "do on behalf of an employee that which an employee has agreed not to do for himself." (122 S.Ct. 766, 151 L.Ed.2d 771.) (See 116 Harv. L. Rev. 382 [*Equal Emp. Opportunity Com. v. Waffle House*]; 72 So. Cal. L. Rev. 929 [binding arbitration under ADA].)

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6. HIV as Disability.

8 Witkin Sum. Cal. Law Const Law § 887

[§ 887] HIV as Disability.

In *Bragdon v. Abbott* (1998) 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540, plaintiff, infected with human immunodeficiency virus (HIV), had a dental examination that revealed a cavity. Defendant dentist informed her that he had a policy against filling cavities of HIV-infected patients in his office. He offered to fill her cavity at a hospital at no extra charge for the dental services, although she would have to pay for the use of the hospital facilities. Plaintiff brought suit under 42 U.S.C., §12182(a), which prohibits disability discrimination in the enjoyment of services in a place of public accommodation, including the professional office of a health care provider. The district court ruled that plaintiff's HIV infection satisfied the definition of a disability. *Held*, affirmed.

(a) *HIV infection constitutes a disability under the ADA.* A person who has a physical impairment that substantially limits one or more of the person's major life activities has a disability under the ADA. (118 S.Ct. 2201, 141 L.Ed.2d 553, citing 42 U.S.C., §12102(2).)

(1) *HIV constitutes a physical impairment.* Under regulations of the Department of Health and Human Services, a physical impairment includes a physiological disorder or condition affecting the hemic and lymphatic systems, among others. (118 S.Ct. 2202, 141 L.Ed.2d 554.) HIV falls well within this definition. HIV initially concentrates in the blood, causing a sudden and serious decline in the number of CD4+ cells (white blood cells that play a critical role in the body's immune system), accompanied by mononucleosis-like symptoms. (118 S.Ct. 2203, 141 L.Ed.2d 555.) After 2 to 3 weeks these symptoms abate, and the disease enters the next phase, which lasts from 7 to 11 years, during which it migrates from the circulatory system into the lymph nodes. Although this is sometimes referred to as the asymptomatic phase, clinical features, including dermatological disorders, oral lesions, and bacterial infections, persist. The CD4+ count continues to drop 5% to 10% per year. When the CD4+ count drops below 10 cells/mm3, death soon follows. Due to the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, it is a physical impairment from the moment of infection. (118 S.Ct. 2204, 141 L.Ed.2d 556.)

(2) *HIV places a substantial limit on a major life activity.* Plaintiff claims that her ability to reproduce is a major life activity that has been substantially limited by her HIV infection. The regulations provide an illustrative list of major life activities, which includes caring for one's self, performing manual tasks, learning, and working, among others.

Reproduction cannot be regarded as less important than working and learning, being, as it is, central to the life process itself. Defendant did not advance any credible basis for confining major life activities to those that are public, economic, or have a daily dimension. (118 S.Ct. 2205, 141 L.Ed.2d 557, 558.) A woman infected with HIV who attempts to conceive imposes on the man a significant risk of infection and also risks infecting her child during gestation and childbirth. Although these difficulties may or may not be insurmountable, they do impose a significant limitation on a woman's ability to reproduce. (118 S.Ct. 2206, 141 L.Ed.2d 558.)

(b) *Result confirmed by agency interpretation.* The ADA's definition of disability is drawn almost verbatim from the Rehabilitation Act of 1973 (now 29 U.S.C., §705(9); supra, §880) and the Fair Housing Amendments Act of 1988 (42 U.S.C., §3602(h)(1)). Judicial and administrative interpretations of the Rehabilitation Act, including a comprehensive and significant opinion issued in 1988 by the Office of Legal Counsel (OLC) of the Department of Justice, have uniformly found statutory coverage for persons with asymptomatic HIV. And the implementing regulations issued by the Department of Housing and Urban Development (HUD) construed the definition to include infection with HIV. (118 S.Ct. 2208, 141 L.Ed.2d 561.) Every indication is that Congress intended to give the positions of the OLC and HUD its active endorsement in enacting the ADA. Moreover, the Justice Department, in implementing the public accommodation provisions of Title III of the ADA, has concluded that nonsymptomatic HIV is a physical impairment under the ADA. Other agencies authorized to administer various sections of the ADA, including the Equal Employment Opportunity Commission, the Attorney General, and the Department of Transportation, have also concluded that HIV is a physical impairment under the Act. (118 S.Ct. 2209, 141 L.Ed.2d 562, 563.)

Four justices, dissenting in part, disagreed with the conclusion that reproduction is a major life activity under the Act on the same order as those listed in the regulations. These justices further opined that the Act requires an individualized determination and that plaintiff failed to present any evidence that reproduction was a major life activity *to her*, i.e., that in the absence of HIV she would have had or was even considering having children. Three of these justices further argued that the HIV infection did not substantially impair plaintiff's ability to reproduce. (118 S.Ct. 2214 et seq., 141 L.Ed.2d 569 et seq.) (See 112 Harv. L. Rev. 283 [Bragdon]; 27 Pepperdine L. Rev. 323 [same]; 26 Proof of Facts 3d 341 [proof of discriminatory termination of HIV-positive employee].)

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7. Visual Impairment as Disability.

8 Witkin Sum. Cal. Law Const Law § 888

[§ 888] Visual Impairment as Disability.

In *Albertson's v. Kirkingburg* (1999) 527 U.S. 555, 119 S.Ct. 2162, 2173, 144 L.Ed.2d 518, 537, plaintiff, who had monocular vision, lost his truck driving job after failing a visual acuity test mandated by the Department of Transportation (DOT). Although plaintiff obtained a waiver under an experimental DOT certification program based on an applicant's past driving record and experience, defendant refused to rehire him. *Held*, the ADA did not require defendant to accept the waiver, which did not modify the substantive content of the general acuity regulation. The ADA "requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial." (119 S.Ct. 2169, 144 L.Ed.2d 531.)

In *Sutton v. United Airlines* (1999) 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450, plaintiffs, twin sisters, applied to defendant airline for employment as commercial airline pilots. Each plaintiff had vision that was 20/20 or better with corrective lenses, and 20/200 or worse without them. Defendant informed plaintiffs that they did not meet defendant's minimum vision requirement of *uncorrected* visual acuity of 20/100 or better, and defendant rejected plaintiffs for employment on that basis. Plaintiffs sued under the ADA, alleging that defendant had discriminated against them on the basis of their disability or because defendant regarded plaintiffs as having a disability. The district court dismissed plaintiffs' complaint for failure to state a claim, and the Tenth Circuit Court of Appeals affirmed. *Held*, affirmed.

(a) *Because their visual impairment is fully correctable, plaintiffs are not disabled under the ADA.*

(1) If a person is taking measures to correct for or mitigate a physical or mental impairment, the effects of those measures must be considered when determining whether the person is "substantially limited" in a major life activity. The phrase "substantially limited" appears in the ADA in the present indicative verb form and thus is properly read to require that a person be presently, not potentially or hypothetically, substantially limited in order to demonstrate a disability. (119 S.Ct. 2146, 144 L.Ed.2d 462.)

(2) The definition of disability also requires that disabilities be evaluated with respect to an individual. Judging persons in their uncorrected or unmitigated state runs directly counter to this mandated individualized inquiry, and

could lead to the anomalous result of determining disability without considering severe, negative side effects suffered by an individual from the use of mitigating measures. (119 S.Ct. 2147, 144 L.Ed.2d 463.)

(3) In enacting the ADA, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities." (119 S.Ct. 2147, 144 L.Ed.2d 463.) "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings." (119 S.Ct. 2149, 144 L.Ed.2d 465.)

(b) *Plaintiffs failed to allege properly that defendant "regarded" them as having a disability under the ADA.* Plaintiffs contend that defendant mistakenly believes that plaintiffs' vision impairments "substantially limit them in the major life activity of working." (119 S.Ct. 2150, 144 L.Ed.2d 467.) However, when the major life activity under consideration is "working," plaintiffs must at least allege that they are unable to work in a broad class of jobs. Plaintiffs allege only that defendant regards their poor vision as precluding them from holding positions as a "global airline pilot," which is a single job. A number of other positions using plaintiffs' skills, such as regional pilot and pilot instructor, are available to them. (119 S.Ct. 2151, 144 L.Ed.2d 468.) Plaintiffs have not alleged and cannot demonstrate that defendant's vision requirement reflects a belief that plaintiffs' vision substantially limits them. (119 S.Ct. 2152, 144 L.Ed.2d 469.)

Two justices dissented, arguing that, to be faithful to the remedial purpose of the ADA, the Act should be given a generous, rather than a miserly, construction. (119 S.Ct. 2152, 144 L.Ed.2d 470.) The threshold question whether an individual is disabled should focus on the individual's past or present physical condition, without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthesis, or medication. This is the approach adopted by eight of the nine federal Courts of Appeals to address the issue and by all three of the agencies charged with enforcing the ADA. (119 S.Ct. 2153, 144 L.Ed.2d 470.) Here, a narrow reading of the term "disability" is not necessary to avoid forcing defendant to hire pilots who could endanger their passengers' lives; the ADA requires a disabled person claiming discrimination to prove that an employer took action "because of" the person's impairment and that the person can perform the essential functions of the job, and the Act allows the employer to avoid liability by showing that its requirements are "job-related and consistent with business necessity" or that failure to meet the requirements poses a health or safety hazard. (119 S.Ct. 2156, 144 L.Ed.2d 475.) Nor is a narrow reading necessary to avoid a "tidal wave of lawsuits"; the impairment here, for instance, would be a matter of complete indifference to most employers. (119 S.Ct. 2159, 144 L.Ed.2d 480.) (See *Diffey v. Riverside County Sheriff's Dept.* (2000) 84 C.A.4th 1031, 1039, 101 C.R.2d 353 [color blindness is not disability because it does not limit major life activity; color vision is valid job requirement for deputy sheriff; following *Sutton*]; 113 Harv. L. Rev. 337 [*Sutton*]; 36 Loyola L.A. L. Rev. 1339 [discussing federal case on whether reading is major life activity]; 31 McGeorge L. Rev. 1129 [*Sutton*]; 28 Pepperdine L. Rev. 257 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Federal Civil Rights Legislation.

8. Discrimination Against Disabled Persons.

c. Americans With Disabilities Act (ADA).

8. Inability To Perform Manual Tasks as Substantial Impairment.

8 Witkin Sum. Cal. Law Const Law § 889

[§ 889] Inability To Perform Manual Tasks as Substantial Impairment.

In *Toyota Motor Mfg., Kentucky v. Williams* (2002) 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615, plaintiff claimed to be disabled from carpal tunnel syndrome and other related impairments caused by her work on defendant's assembly line. Plaintiff sued under the ADA for defendant's failure to make reasonable accommodation for her condition. The district court granted summary judgment for defendant, finding that plaintiff's impairments did not substantially limit any of her major life activities. The Court of Appeals reversed, finding that plaintiff was substantially limited in the major life activity of performing manual tasks, and granted her partial summary judgment on the issue whether she was disabled under the ADA. *Held*, reversed and remanded.

(a) The parties do not dispute that plaintiff's medical conditions amount to physical impairments. The relevant question is whether the Court of Appeals correctly analyzed whether these impairments substantially limited plaintiff "in the major life activity of performing manual tasks." (122 S.Ct. 691, 151 L.Ed.2d 630.) To be so limited, an individual must have an impairment that "prevents or severely restricts" activities of central importance to most people's daily lives. The impact of the impairment must also be permanent or long-term. (122 S.Ct. 691, 151 L.Ed.2d 631.)

(b) The Court of Appeals erred in suggesting that plaintiff must show (1) her manual disability involves a "class" of manual activities, and (2) those activities affect her ability to perform tasks at work. (122 S.Ct. 692, 151 L.Ed.2d 632.) "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." Otherwise, the restriction in *Sutton v. United Airlines* (1999) 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450, *supra*, §888, on claims of disability based on a substantial limitation in working (that plaintiff must allege inability to perform a broad class of jobs) "will be rendered meaningless because an inability to perform a specific job always can be recast as an ability to perform a 'class' of tasks associated with that specific job." (122 S.Ct. 693, 151 L.Ed.2d 633.) Further, the ADA definition of "disability" also applies to portions of the Act dealing with public transportation and accommodations. This demonstrates that the ADA is intended to cover individuals with disabling impairments "regardless of whether the individuals have any connection to a workplace." (122 S.Ct. 693, 151 L.Ed.2d 633.)

(c) "[T]he manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation-specific tasks may have only limited relevance to the manual task inquiry." (122 S.Ct. 693, 151 L.Ed.2d 633.) "[H]ousehold chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives." The Court should have focused on these types of activities as part of its assessment "whether respondent was substantially limited in performing manual tasks." (122 S.Ct. 693, 151 L.Ed.2d 634.) (See 31 *Pepperdine L. Rev.* 575.)

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See 200 A.L.R. *Fed* 55 [what constitutes substantial limitation on major life activity of performing manual tasks].



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1. In General.

a. Nature and Scope of Civil Rights Legislation.

8 *Witkin Sum. Cal. Law Const Law* § 890

[§ 890] Nature and Scope of Civil Rights Legislation.

(1) *In General.* States may enact legislation protecting civil rights from private as well as official discrimination. (See *Railway Mail Assn. v. Corsi* (1945) 326 U.S. 88, 65 S.Ct. 1483, 89 L.Ed. 2072, 2076 [upholding New York statute prohibiting racial and religious discrimination by labor organizations]; 15 *Am.Jur.2d* (2000 ed.), *Civil Rights* §12 et seq.; on application of state public accommodations law to privately sponsored parade as violation of sponsors' First Amendment rights, see *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487, *supra*, §390.)

(2) *Discrimination by Private Club.* In *New York State Club Assn. v. New York* (1988) 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1, the Court rejected a facial challenge to a New York City law forbidding discrimination in private clubs that have more than 400 members, provide regular meal service, and receive payments from nonmembers for furtherance of business.

(a) Under the decisions in the *Rotary Club of Duarte v. Board of Directors* (1986) 178 C.A.3d 1035, 224 C.R. 213, *infra*, §902, and *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, *supra*, §389, at least some of the large clubs are sufficiently nonprivate that the law constitutionally may be applied to them. (108 S.Ct. 2233, 101 L.Ed.2d 15.) The law does not necessarily infringe on individual member's rights of expressive association; it prevents the use of race, sex, and other specified characteristics but does not prevent exclusion of persons who do not share a club's view. (108 S.Ct. 2234, 101 L.Ed.2d 16.)

(b) The exemption of benevolent and religious corporations does not violate the Equal Protection Clause; the city could reasonably conclude that these clubs are unique and that business activity is not prevalent in them, and this view has not been shown to be erroneous. (108 S.Ct. 2236, 101 L.Ed.2d 18, 19.) (See 104 *Harv. L. Rev.* 1835 [discrimination by private clubs: First Amendment protection for nonexpressive associations]; 20 *Cal. Western L. Rev.* 511 [exclusion or expulsion from association or club]; 16 *Hastings Const. L. Q.* 623 [*New York State Club*]; 20 *Pepperdine L. Rev.* 643 [Sanctioned Discrimination or Justified Protection of Right to Associate?]; 19 *U.S.F. L. Rev.* 413 [exclusion or expulsion from association or club]; 38 *A.L.R.4th* 628 [same].)

(3) *California Statutory Framework.* California's primary civil rights statutes are the Unruh Civil Rights Act (see

infra, §898 et seq.) and the Fair Employment and Housing Act (see infra, §915 et seq.). Other statutes apply in particular contexts, including the following:

- (a) Insurance. (See infra, §891.)
- (b) Public programs and activities. (See infra, §892.)
- (c) Schools and education. (See infra, §893.)
- (d) Housing finance discrimination. (See infra, §894.)
- (e) Disabled persons. (See infra, §957 et seq.)
- (f) Public safety officers. (See infra, §960 et seq.)
- (g) Hate crimes, intimidation, and threats of violence. (See infra, §895.)
- (h) Sexual harassment in business and professional relationships. (See infra, §896.)
- (i) Other discrimination statutes. (See infra, §897.)

(4) *Texts and Commentary.* Many articles have commented on state civil rights legislation. (See *108 Harv. L. Rev.* 763 [note on Alaska case holding that housing antidiscrimination laws protecting unmarried couples do not violate free exercise rights of religious landlord]; *42 Hastings L. J.* 1415 [protecting unmarried couples from marital status discrimination]; *16 Pacific L. J.* 1047 [exclusion or access in public accommodations]; *47 Stanf. L. Rev.* 161 [historical review of African American lawyers and their importance in shaping civil rights law]; *85 A.L.R.3d* 351 [damages under state or local civil rights provisions]; *90 A.L.R.3d* 158 [state equal rights constitutional provisions forbidding determination of rights based on sex]; *74 A.L.R.4th* 746 [award of "front pay" under state job discrimination statutes]; *81 A.L.R.4th* 205 [state civil rights legislation prohibiting sex discrimination in housing]; *81 A.L.R.4th* 144 [discrimination "because of" handicap under state statutes prohibiting job discrimination on account of handicap]; *12 A.L.R.5th* 508 [right to jury trial in action under state civil rights law]; *81 A.L.R.5th* 367 [punitive damages under state employment discrimination law].)

West's Key Number Digest, Civil Rights k.102 et seq.; Constitutional Law k.82

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.
b. Insurance.

8 *Witkin Sum. Cal. Law Const Law* § 891

[§ 891] Insurance.

(1) *In General.* Unfair discrimination is prohibited between individuals of the same class and equal life expectancies in the rates charged, in the dividends or other benefits payable, and in any other terms and conditions of life insurance contracts. (*Ins.C. 790.03(f).*) Discrimination is also prohibited in the issuance and pricing of life and disability insurance on the basis of various factors, not including sex (*Ins.C. 10140*), and against an applicant who is or has been a victim of domestic violence (*Ins.C. 10144.3* [life insurers]; *Ins.C. 10144.2* [disability insurers]; *Ins.C. 676.9* [residential, liability, and commercial risk insurers]). (See *Wilson v. Fair Emp. & Housing Com.* (1996) 46 C.A.4th 1213, 1218, 54 C.R.2d 419 [Fair Employment and Housing Commission lacked jurisdiction to determine whether insurer's underwriting decisions, such as refusal to insure pilots over 60, violated Unruh Civil Rights Act, because these decisions are governed by Insurance Commissioner under *Ins.C. 1850.4* et seq.]; 29 *McGeorge L. Rev.* 677 [ensuring that victims of domestic abuse are not discriminated against].)

(2) *Property Damage or Liability Insurance.* Discrimination is prohibited in accepting, issuing, or cancelling property damage or liability insurance on the basis of "marital status, sex, race, color, religion, national origin, or ancestry." (See *Ins.C. 679.70* et seq..)

(3) *Motor Vehicle Insurance.* The Rosenthal Auto Insurance Nondiscrimination Law prohibits discrimination in accepting, issuing, or cancelling motor vehicle liability insurance on the basis of race, language, color, religion, national origin, ancestry, or geographic area. (*Ins.C. 11628*.) "Language," for this purpose, means the inability to speak, read, write, or comprehend English. (*Ins.C. 11628(a).*)

Discrimination also is prohibited in accepting, issuing, or cancelling insurance solely on the basis of occupation. (*Ins.C. 11628(c).*) However, insurers may consider occupation in setting rates, and may charge a deviated rate to any classification of risks involving a specific occupation if the rate meets the limitations imposed by *Ins.C. 1850* et seq. and is based on actuarial data supporting the deviation. (*Ins.C. 11628(c).*) And an insurer may limit the issuance of its insurance to persons who engage in or were engaged in military service. (*Ins.C. 11628(f).*) Insurance also may be refused or cancelled if it is for a commercial vehicle or if the action is based on consideration of the vehicle's size, weight, design, or intended use. (*Ins.C. 11628(d).*)

Insurers must provide a written explanation to applicants who are denied coverage, if it is requested within 30 days of rejection of the application. (See *Ins.C. 657*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General. Ins.C. 10140*, as amended in 2005, now also prohibits discrimination based on sex, except where a price differential is supported by "objective, valid, and up-to-date statistical and actuarial data or sound underwriting practices." (3) *Motor Vehicle Insurance. Ins.C. 11628* was amended in 2008 to prohibit discrimination based on the characteristics listed in C.C. 51(b) and (e), including language and geographic area.



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c. Public Programs and Activities.

8 Witkin Sum. Cal. Law Const Law § 892

[§ 892] Public Programs and Activities.

No person "shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." (*Govt.C. 11135*.) If the head of the state agency that administers the program or activity involved determines that there is probable cause to believe a violation has occurred, a hearing must be conducted, pursuant to the Administrative Procedure Act, to determine the issue. (*Govt.C. 11136*.) The statute must be interpreted in a manner that will not frustrate its purpose and that will not adversely affect lawful programs that benefit the disabled, the aged, minorities, and women. (*Govt.C. 11139*; on affirmative action programs, see *infra*, §965 et seq.) (See *Govt.C. 11137* [action to curtail state funding]; *Govt.C. 11138* [adoption of rules and regulations]; *Govt.C. 11139.5* [standards must be established to ensure consistent enforcement]; *Govt.C. 50260* et seq. [authorizing establishment of local human relations commissions to foster mutual respect and understanding among community racial, religious, and nationality groups]; *Govt.C. 53080* [prohibiting sex-based discrimination in community youth athletics programs and in allocation of recreation facilities and resources]; on rights of disabled persons under California law generally, see *infra*, §957 et seq.)

The statute provides for enforcement by civil action for equitable relief, in addition to other rights and remedies. (*Govt.C. 11139* [prohibitions and sanctions of statute are cumulative to other lawful prohibitions and sanctions]; see *Arriaga v. Loma Linda University* (1992) 10 C.A.4th 1556, 13 C.R.2d 619 [holding, under former version of statute, that there was no right of private action].)

SUPPLEMENT: [This section is current through the latest supplement]

Govt.C. 11135, as amended in 2006, further proscribes discrimination on the basis of sexual orientation. As used in the statute, "sex" and "sexual orientation" have the same meanings as those terms are defined in *Govt.C. 12926(p)* and (q). (*Govt.C. 11135(e)*, added in 2006; see text, §§925, 931.) *Govt.C. 11135* also applies to a perception that a person has, or is associated with another person who has one of the listed characteristics. (*Govt.C. 11135(f)*, added in 2006.)

Govt.C. 50260, as amended in 2008, further provides for commissions designed to foster peaceful relations among residents with the characteristics listed in *Govt.C. 11135*.

See *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 C.A.4th 993, 1003, 24 C.R.3d 474 [Govt.C. 11135 and 11139 do not provide relaxed concept of standing; thus, male "tester" who had not suffered injury from denial of services by domestic violence shelters lacked standing to sue under statutes].



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1. In General.
d. Schools and Education.

8 Witkin Sum. Cal. Law Const Law § 893

[§ 893] Schools and Education.

(1) *Elementary and Secondary Schools.* It is state policy "that elementary and secondary school classes and courses, including nonacademic and elective classes and courses be conducted, without regard to the sex of the pupils enrolled in such classes and courses." (See *Educ.C. 221.5(a)*.) Accordingly, a pupil cannot be prohibited on the basis of sex from enrolling in any class or course (except sex education), and pupils of one sex cannot be compelled to enroll in a particular class or course unless it is also required of pupils of the opposite sex. (*Educ.C. 221.5(b), (c)*.) Counseling must not be different for the sexes (*Educ.C. 221.5(d)*), and "[p]articipation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex" (*Educ.C. 221.5(e)*). (See *Educ.C. 221.7* [prohibition of sex discrimination in school-sponsored athletic program]; *86 Cal. L. Rev. 617* [protecting students from peer sexual orientation harassment]; *58 So. Cal. L. Rev. 1425* [equality in school sports].)

Further, it is state policy "to afford all persons, regardless of their sex, ethnic group identification, race, national origin, religion, or mental or physical disability," or on any actual or perceived characteristic listed in the definition of hate crimes in P.C. 422.55(a) (see *infra*, §895), "equal rights and opportunities in the educational institutions of the state." (*Educ.C. 200*.) Discrimination is prohibited in programs or activities conducted by educational institutions receiving and benefiting from state financial assistance or enrolling students who receive that assistance. (*Educ.C. 220*.) Harassment and other discrimination on the basis of sex includes, but is not limited to, (a) discrimination in any academic, extracurricular, research, occupational training, or other program or activity; (b) discrimination with respect to eligibility for financial aid; (c) exclusion from participation in, or denial of the equivalent opportunity in, athletic programs; (d) discrimination in employment opportunities; and (e) discrimination on the basis of potential parental, family, or marital status, or on the basis of pregnancy or related conditions. (*Educ.C. 230*; see *Educ.C. 212.5* ["sexual harassment" defined]; *33 Southwestern U. L. Rev. 95* [protecting students from sexual harassment by teachers].) These provisions do not apply to certain religious educational institutions (*Educ.C. 220.5*) or to specified organizations, e.g., Y.M.C.A., Boy Scouts, Boys State Conference, etc. (*Educ.C. 223, 224*). Nor do the provisions preclude father-son or mother-daughter activities (*Educ.C. 225*), or prohibit the maintenance of comparable separate toilet facilities, locker rooms, or living facilities. (*Educ.C. 231*).

The Bilingual-Bicultural Education Act of 1976 (*Educ.C. 52160 et seq.*) requires public school districts, other than community colleges, to provide education to pupils of limited-English-speaking ability in their primary language while

teaching them English.

(2) *Postsecondary Educational Institutions.* The Sex Equity in Education Act (*Educ.C. 66250 et seq.*) prohibits sexual harassment and discrimination on the basis of sex, ethnic group identification, race, national origin, religion, color, or mental or physical disability, or on any basis contained in the prohibition of hate crimes listed in P.C. 422.6(a), in postsecondary educational institutions receiving, or benefiting from, state financial assistance, or that enroll students who receive state student financial aid. (*Educ.C. 66251, 66252, 66270.*) Each postsecondary educational institution must "undertake educational activities to counter discriminatory incidents on school grounds and ... to minimize and eliminate a hostile environment on school grounds that impairs the access of students to equal educational opportunity." (*Educ.C. 66252(f).*) Further, each postsecondary educational institution must provide assurance to the agency administering state financial assistance or financial aid that each program or activity conducted by the institution is in compliance both with the Act and other state law prohibiting sex discrimination. (*Educ.C. 66290.*) The Act may be enforced through a civil action. (*Educ.C. 66292.4.*) It does not apply to certain religious educational institutions (*Educ.C. 66270.5*), educational institutions for training military or merchant marines (*Educ.C. 66272*), public institutions that traditionally and continually have admitted only students of one sex (*Educ.C. 66278*), and to tax-exempt social fraternities and sororities at postsecondary educational institutions (*Educ.C. 66272*).

(3) *Written Policy on Sexual Harassment.* Each educational institution must have a written policy on sexual harassment. (*Educ.C. 231.5(b).*) The policy must include information on where to obtain specific rules and procedures for reporting sexual harassment and for pursuing available remedies. (*Educ.C. 231.5(c).*) A copy of the policy must be posted in a prominent location (*Educ.C. 231.5(d)*) and must be included in any publication that sets forth the comprehensive rules, regulations, procedures, and standards of conduct of the institution (*Educ.C. 231.5(g)*). In addition, copies must be provided to new students (*Educ.C. 231.5(e)*) and to faculty and staff (*Educ.C. 231.5(f)*). (See *Educ.C. 48980(g)* [school district's notification to parents must include copy of policy on sexual harassment established under *Educ.C. 231.5*].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Elementary and Secondary Schools.* See 34 Southwestern U. L. Rev. 551 [discrimination and developmental delays].

Educ.C. 200 and *220*, as amended in 2007, now list the protected characteristics as "disability, gender, nationality, race or ethnicity, religion, sexual orientation," in addition to those characteristics contained in the definition of hate crimes. *Educ.C. 220.5* was renumbered in 2007 as *Educ.C. 221*. *Educ.C. 219*, added in 2007, further provides coverage for a person who is perceived to have, or is associated with a person who has, one of the protected characteristics.

In 2007, the Legislature adopted the Safe Place to Learn Act, *Educ.C. 234 et seq.* The Act requires the Department of Education to monitor adherence by local educational agencies of state-mandated antidiscrimination and antiharassment policies. Local agencies must adopt policies that prohibit discrimination and harassment based on the characteristics listed in *Educ.C. 220* and P.C. 422.55, and ensure that complainants are protected from retaliation. (*Educ.C. 234.1.*)

In *Donovan v. Poway Unified School Dist.* (2008) 167 C.A.4th 567, 579, 84 C.R.3d 285, two high school students brought an action for money damages against defendant school district, superintendent, principal, and assistant principal for peer sexual orientation harassment under *Educ.C. 220*. The jury returned a verdict against the district under *Educ.C. 220* and against the principal and assistant principal under the Equal Protection Clause of the U.S. Constitution, and awarded money damages. *Held*, judgment affirmed.

(a) *Money damages are available.* Money damages are available in a private enforcement action under *Educ.C. 220*. The term "civil law remedies" used in *Educ.C. 262.3* includes money damages. (167 C.A.4th 591.) This

interpretation ensures that state law is consistent with the remedies available under Title IX, on which *Educ.C. 220* is based. (167 C.A.4th 596.)

(b) *Elements of claim for money damages for discrimination in educational setting.* *Educ.C. 220* is silent regarding the elements a plaintiff must prove to state a cause of action. (167 C.A.4th 596.) However, legislative history shows that when *Educ.C. 200* and *220* were originally enacted, they were modeled on Title IX and developing federal law. There is no evidence that the Legislature based these statutes on the FEHA and its statutory framework. (167 C.A.4th 597.) Hence, using Title IX and its body of case law as a guideline, to prevail in an action for peer sexual orientation harassment under *Educ.C. 220*, a student must show that (1) he or she suffered "severe, pervasive and offensive" harassment that effectively deprived the student of the right of equal access to educational benefits and opportunities; (2) the school district had actual knowledge of the harassment; and (3) the school district acted with "deliberate indifference" in the face of that knowledge. (167 C.A.4th 579, 598, 603.)

(c) *No liability under doctrine of respondeat superior or constructive notice.* The FEHA imposes liability on an employer for the wrongful acts of a third party based on the doctrine of respondeat superior or constructive notice. (167 C.A.4th 604.) However, there is nothing in the Education Code's antidiscrimination provisions suggesting that the Legislature intended to impose liability for damages under *Educ.C. 220* against a funding recipient based on those principles. The claim involved here does not involve discrimination based on an official policy of the district, but is instead the result of peer sexual harassment and defendants' response to it. "[N]egligence principles should not apply to impose liability under a statutory scheme when administrative enforcement of that scheme contemplates actual notice to the funding recipient, with an opportunity to take corrective action before a private action may lie." Hence, liability for money damages under *Educ.C. 220* "is based on a funding recipient's own misconduct, determined by its own deliberate indifference to known acts of harassment." (167 C.A.4th 605.)

(d) *Use of wrong standard in jury instructions.* Although the trial court erred in applying the elements of liability from the FEHA and not from Title IX, when it instructed the jury under *Educ.C. 220*, the error was harmless. Given the specific jury findings, supported by substantial evidence, regarding "severe, pervasive and offensive" harassment, "actual notice," and "deliberate indifference" in regard to plaintiffs' equal protection claims, it was not reasonably probable that defendants would have obtained a more favorable result in the absence of the error. (167 C.A.4th 608, 618, 619.) Further, defendant school principal was an appropriate person to act on behalf of the district to address the harassment. Thus, the jury's findings imposing liability against the principal, although in the context of an equal protection violation, also supported liability of the district under *Educ.C. 220* for its own deliberate indifference to the harassment. (167 C.A.4th 609.) (2) *Postsecondary Educational Institutions.* *Govt.C. 11135*, prohibiting discrimination in programs and activities funded by the state (see text, §892), applies to the California State University. (*Govt.C. 11135(a)*, as amended in 2005.) (On California Athletes' Bill of Rights, enacted in 2005, see *Educ.C. 270* et seq.)

Educ.C. 66250 was amended in 2007 to rename the Act as the Equity in Higher Education Act. *Educ.C. 66251* and *66270* were also amended in 2007 regarding the list of protected characteristics; the statutes now provide for equal rights and opportunities "regardless of disability, gender, nationality, race or ethnicity, religion, sexual orientation," in addition to other characteristics listed in P.C 422.6. *Educ.C. 66270* also protects characteristics listed in *Govt.C 11135*. *Educ.C. 66270.5* was renumbered in 2007 as *Educ.C. 66271*.



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1. In General.
e. Housing Finance.

8 Witkin Sum. Cal. Law Const Law § 894

[§ 894] Housing Finance.

(1) *Background and Purposes.* "Redlining" consists of the refusal of lending institutions to finance the purchase or improvement of buildings in certain areas. (See *8 Pacific L. J.* 699; *10 U.C. Davis L. Rev.* 243.) The Housing Financial Discrimination Act of 1977, now designated the Holden Act (*Health & Saf.C. 35800* et seq.), prohibits the practice. (See *9 Pacific L. J.* 623.) (For definitions, see *Health & Saf.C. 35805*.)

The Act is expressly declared to be an exercise of the police power (*Health & Saf.C. 35803*), based on legislative findings (*Health & Saf.C. 35801*). Its purposes are declared as follows:

(a) "To prevent discrimination in the provision of financial assistance for financing or refinancing the purchase, construction, rehabilitation, or improvement of housing accommodations because of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the security property." (*Health & Saf.C. 35802(a)*.)

(b) "To encourage increased lending in neighborhoods or geographic areas in which conventional residential mortgage financing has been unavailable." (*Health & Saf.C. 35802(b)*.)

(c) "To increase the availability of housing accommodations to credit-worthy persons." (*Health & Saf.C. 35802(c)*.)

(d) "To ensure the supply of decent, safe housing." (*Health & Saf.C. 35802(d)*.)

(e) "To prevent the abandonment and decay of neighborhoods and geographic areas." (*Health & Saf.C. 35802(e)*.)

The Act is administered by the Secretary of the Business and Transportation Agency, who is granted the usual rule-making powers. (*Health & Saf.C. 35814* et seq.) Cumulative remedies are provided (*Health & Saf.C. 35831*), and the Act is to be liberally construed to effectuate its purposes (*Health & Saf.C. 35832*).

(2) *Prohibitions.* The Act prohibits (a) discrimination based on the location of a housing accommodation (*Health & Saf.C. 35810*); (b) discrimination based on "race, color, religion, sex, marital status, national origin, or ancestry" (*Health & Saf.C. 35811*); and (c) consideration of the "racial, ethnic, religious, or national origin composition of the neighborhood or geographical area surrounding a housing accommodation or whether or not such composition is

undergoing ... or is expected to undergo change." (*Health & Saf.C. 35812*).

The Act does not, however, (a) require financing where it is "clearly evident" that the property would create "an imminent threat to the health and safety of the occupant"; or (b) prevent consideration of the fair market value of the property that would secure the proposed loan. (*Health & Saf.C. 35813*.)

(3) *Complaint Resolution*. When an applicant seeks financial assistance, he or she must be notified of the provisions of the Act, and where a complaint may be filed (with the Secretary; *Health & Saf.C. 35820*). (*Health & Saf.C. 35830*.) The Secretary must "immediately" attempt to eliminate the alleged unlawful practice by "conference, conciliation, or persuasion." (*Health & Saf.C. 35821*.) Within 30 days after the complaint is filed, the Secretary must serve and file his or her findings. (*Health & Saf.C. 35822*.) If the Secretary finds that the Act has been violated, he or she must order the financial institution to cease and desist from its practice and to take one of the following steps: (a) provide the financial assistance applied for on nondiscriminatory terms; or (b) pay \$ 1,000 if financial relief would not be effective. The Secretary may also require a report of the manner of compliance. (*Health & Saf.C. 35822*.)

(4) *Administrative Review*. The Secretary's decision is final unless the complainant or the financial institution files a written request for a formal administrative hearing within 10 days of receipt of the decision. (*Health & Saf.C. 35823*.) The Secretary must file a copy of the request with the Office of Administrative Hearings, and a hearing must be held under the Administrative Procedure Act within 20 days thereafter. (*Health & Saf.C. 35823*.) If the Secretary ruled in favor of the complainant, the Secretary must represent the complainant at the hearing. (*Health & Saf.C. 35823*.)

The decision must be made within 45 days of receipt of the request; it must be in accordance with the provisions of *Health & Saf.C. 35822*, and is binding on the Secretary. (*Health & Saf.C. 35823*.)

(5) *Judicial Review*. Either party may seek judicial review by administrative mandamus pursuant to *C.C.P. 1094.5* (see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §262 et seq.). In this proceeding, the court may exercise its independent judgment on the evidence in the record, and may consider evidence improperly excluded, and "other relevant evidence ... which the court finds the offering party could not, in the exercise of reasonable diligence, have produced at the administrative hearing." (*Health & Saf.C. 35823*.) The court may also grant attorneys' fees to a prevailing complainant, without regard to which party sought judicial review. (*Health & Saf.C. 35823*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Prohibitions*. *Health & Saf.C. 35811*, as amended in 2006, now prohibits discrimination on any basis listed in *Govt.C. 12955(a)* or (d). (*Health & Saf.C. 35811(a)*; see text, §947.) An exception is made with respect to familial status for housing for older persons and senior citizens. (*Health & Saf.C. 35811(b)*.) (5) *Judicial Review*.

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §263 et seq.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
XI. EQUAL PROTECTION OF THE LAWS
E. California Civil Rights Legislation.

1. In General.

f. Hate Crimes, Intimidation, and Threats of Violence.

8 *Witkin Sum. Cal. Law Const Law* § 895

[§ 895] Hate Crimes, Intimidation, and Threats of Violence.

(1) *In General.* The Ralph Civil Rights Act (C.C. 51.7) recognizes the right of persons to be free from violence, intimidation, or threats based on discrimination. (See 32 *McGeorge L. Rev.* 546 [detering hate crimes and enforcing state and federal constitutional rights]; 16 *Pacific L. J.* 735; 19 *Pacific L. J.* 551; 1 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §3:1 et seq. [text and forms for actions under Act]; 57 Proof of Facts 3d 1 [Hate Crimes and Liability for Bias-Motivated Acts].)

(2) *Freedom From Violence, Intimidation, or Threat.* "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics." (C.C. 51.7(a) [this identification of particular bases of discrimination is illustrative rather than restrictive].) The statute is expressly inapplicable to "statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing." (C.C. 51.7(a).) "Sexual orientation" includes "heterosexuality, homosexuality, or bisexuality." (C.C. 51.7(b).) (See BAJI, No. 7.93 [violent civil rights violations]; CACI, No. 3023 [essential factual elements].)

(3) *Damages for Prohibited Violence.* The statute authorizes a private action for actual damages, punitive damages, a civil penalty of \$ 25,000, and attorneys' fees, for each violation of C.C. 51.7. (C.C. 52(b); see *Govt.C. 12970(e)* [civil penalty under FEHA of up to \$ 25,000 for violation of C.C. 51.7]; *Los Angeles County Metropolitan Trans. Authority v. Superior Court* (2004) 123 C.A.4th 261, 267, 20 C.R.3d 92 [civil penalty under C.C. 52(b) is not imposed primarily for sake of example and punishment, and thus is not prohibited by *Govt.C. 818*, which prohibits recovery of those damages against public agency]; BAJI, No. 7.94 [punitive damages]; CACI, Nos. 3026 [damages], 3027 [civil penalty]; on action for damages under C.C. 52, see *infra*, §914.)

(4) *Interference With Enjoyment of Legal Rights.* The Tom Bane Civil Rights Act (C.C. 52.1) authorizes the Attorney General, district or city attorneys, or individuals whose legal rights have been interfered with by threats, intimidation, or coercion, to bring a civil action for injunctive and other appropriate equitable relief. (C.C. 52.1(a), (b); see 1 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §3:16 et seq.) In addition, an aggrieved person may bring an action for damages under C.C. 52, and may be awarded reasonable attorneys' fees. (C.C. 52.1(b), (h).) When the action

is brought by the Attorney General or a district or city attorney, the defendant is subject to a civil penalty of \$ 25,000. If the penalty is requested, it is assessed individually against each person who has violated the statute and is awarded to each individual whose rights have been violated. (C.C. 52.1(a); see 33 *McGeorge L. Rev.* 187 [statutory penalty].)

Violation of a temporary restraining order or a preliminary or permanent injunction is punishable either by prosecution under P.C. 422.77 (see *infra*, this section) or by a proceeding for contempt under C.C.P. 1209 et seq. (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §332 et seq.). (C.C. 52.1(i); see C.C. 52.1(d) [requiring notice for violation to be crime].)

C.C. 52.1 does not require a showing of actual intent to discriminate so long as acts were accompanied by requisite threats, intimidation, or coercion. (*Venegas v. Los Angeles* (2004) 32 C.4th 820, 841, 11 C.R.3d 692, 87 P.3d 1.)

Speech alone is not sufficient to support an action under C.C. 52.1(a) or 52.1(b), except on a showing (a) "that the speech itself threatens violence against a specific person or group of persons"; (b) "that the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property"; and (c) "that the person threatening violence had the apparent ability to carry out the threat." (C.C. 52.1(j).)

No order issued in a proceeding under C.C. 52.1(a) or 52.1(b) may restrict the content of a person's speech. An order restricting the time, place, or manner of a person's speech may do so "only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined." (C.C. 52.1(k).)

C.C. 52.1 provides for a *personal* cause of action for the actual victim of a hate crime; it does not provide a cause of action for wrongful death. Hence, the parents of a black person killed by a white police officer lacked standing to bring an action under C.C. 52.1. (*Bay Area Rapid Transit Dist. v. Superior Court* (1995) 38 C.A.4th 141, 142, 144, 44 C.R.2d 887; see *Boccatto v. Hermosa Beach* (1994) 29 C.A.4th 1797, 1808, 1809, 35 C.R.2d 282 [to state cause of action under C.C. 52.1, plaintiff must allege that interference with his or her rights was due to plaintiff's membership in one of protected classes specified in C.C. 51.7].)

Although state action per se is not required for a recovery under C.C. 52.1, the statute does require an attempted or completed act or interference with a legal right. Because only the government or its agents can violate a person's right against unreasonable search and seizure, there can be no recovery under the statute where the unreasonable search and seizure is performed by private actors. (*Jones v. Kmart Corp.* (1998) 17 C.4th 329, 333, 70 C.R.2d 844, 949 P.2d 941.)

(5) *Penal Code Provisions.* A "hate crime" is a criminal act committed, in whole or in part, because of the victim's actual or perceived disability, gender, nationality, race, ethnicity, religion, sexual orientation, or association with a person or group with one of these actual or perceived characteristics. (P.C. 422.55(a).) "No person, whether or not acting under color of law, shall by force or threat of force willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her" under state or federal law based on "the actual or perceived characteristics of the victim" listed in P.C. 422.55(a). (P.C. 422.6(a).) Similarly, no person "shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege," as specified. (P.C. 422.6(b).) Violation of these provisions is a misdemeanor, punishable by imprisonment in county jail for not more than 1 year, a fine of not over \$ 5,000, or both, and community service of not more than 400 hours. (P.C. 422.6(c).) However, no person may be convicted of violating P.C. 422.6(a) based on speech alone, except on "a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat." (P.C. 422.6(c).) Conduct that violates P.C. 422.6 or another provision of law may be charged under all applicable provisions, but an act or omission punishable in different ways by this section and the other provisions cannot be punished under more than one provision, and the penalty must be determined as provided in P.C. 654. (P.C. 422.6(d).)

Except in the case of a person punished under P.C. 422.6, a hate crime that is not made punishable by imprisonment in a state prison is punishable as specified "if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that person's free exercise or enjoyment" of constitutional or statutory rights based on discrimination, and the crime is committed under specified circumstances charged in the accusatory pleading. (P.C. 422.7.) (See *In re M.S.* (1995) 10 C.4th 698, 716, 720, 725, 42 C.R.2d 355, 896 P.2d 1365, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §411 [construing and rejecting constitutional challenges to P.C. 422.6 and 422.7]; CALJIC (6th ed.), No. 9.95 (1999 Revision) [felony interference with civil rights under P.C. 422.7].)

Except in the case of a person punished under P.C. 422.7, a person who commits or attempts to commit a felony that is a hate crime must receive "an additional term of one, two, or three years in state prison, at the court's discretion." (P.C. 422.75; see *People v. Superior Court (Aishman)* (1995) 10 C.4th 735, 739, 42 C.R.2d 377, 896 P.2d 1387, 3 Cal. Crim. Law (3d), *Punishment*, §305 [construing P.C. 422.75].) And except where the court imposes additional punishment under P.C. 422.75, committing or attempting to commit a felony because of the victim's race, etc., is an aggravating circumstance in sentencing under P.C. 1170(b). (P.C. 422.76; see 3 Cal. Crim. Law (3d), *Punishment* §263.)

Except as otherwise required by law, nothing in P.C. 422.6 et seq. may "be construed to prevent or limit the prosecution of any person pursuant to any provision of law." (P.C. 422.8.)

A "willful and knowing violation" of an order issued pursuant to C.C. 52.1(a) or 52.1(b) is a misdemeanor punishable by a fine of not over \$ 1,000, imprisonment in county jail for not more than 6 months, or both. (P.C. 422.77(a); see P.C. 422.77(b) [person previously convicted of order under C.C. 52.1(a) or 52.1(b) must be imprisoned in county jail for not more than 1 year]; P.C. 422.78 [prosecuting agency of each county has primary responsibility to enforce orders issued pursuant to C.C. 52.1].)

P.C. 422.85 permits a court to order, as a condition of probation, that a defendant convicted of a hate crime or a specified offense committed because of the victim's actual or perceived race, color, ethnicity, religion, nationality, country of origin, ancestry, disability, gender, or sexual orientation, complete a class or program on racial or ethnic sensitivity, other similar training in civil rights, or a counseling program, and reimburse the victim or make payments to a program or local agency providing services to victims of hate violence. (See 3 Cal. Crim. Law (3d), *Punishment*, §561; on vandalism of place of worship and terrorizing by desecration or use of symbols, see 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare* §§18, 410.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* The Legislature, the courts, and commentators have not always been consistent in identifying by name the portions of the Civil Code dealing with civil rights. (See text, §898.) C.C. 51 may be cited as the Unruh Civil Rights Act (C.C. 51(a)). The Ralph Civil Rights Act added C.C. 51.7 and amended C.C. 52. (See Stats. 1976, Chap. 1293, §1.) The Tom Bane Civil Rights Act amended C.C. 51.7 and added C.C. 52.1. (See Stats. 1987, Chap. 1277, §1.)

The Ralph Civil Rights Act (C.C. 51.7) and the Tom Bane Civil Rights Acts (C.C. 52.1) are not part of the Unruh Civil Rights Act, and there is nothing in the Ralph or Bane Acts or their history that precludes them from being asserted in employment cases. (*Stamps v. Superior Court* (2006) 136 C.A.4th 1441, 1447, 1449, 1457, 39 C.R.3d 706 [Tom Bane Civil Rights Act was intended to supplement Ralph Civil Rights Act].)

(2) *Freedom From Violence, Intimidation, or Threat.* C.C. 51.7, as amended in 2005, now provides: "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of" a characteristic listed or defined in C.C. 51, or a "position in a labor dispute, or because another person perceives them to have one or more of those characteristics." (C.C. 51.7(a).) The provision excluding statements made during lawful labor picketing is now found in C.C. 51.7(b). "Sexual orientation" is now defined in C.C. 51(e). (See 37 *McGeorge L. Rev.* 181 [2005 amendment of C.C. 51.7].)(3) *Damages for Prohibited Violence.* An action for a violation of C.C. 51.7 must be

commenced within 3 years (C.C. 388(n), added in 2005), including an action for the \$ 25,000 statutory penalty (C.C. 52, as amended in 2005).

(4) *Interference With Enjoyment of Legal Rights*. Qualified immunity of the kind applicable to actions brought under 42 U.S.C., §1983 (see text, §837) does not apply to actions under C.C. 52.1. (*Venegas v. Los Angeles* (2007) 153 C.A.4th 1230, 1246, 63 C.R.3d 741 [question of first impression].) However, public employees acting in good faith under the apparent authority of an enactment that is inapplicable or unconstitutional have statutory immunity under Govt.C. 820.6, which applies to C.C. 52.1. (*O'Toole v. Superior Court* (2006) 140 C.A.4th 488, 504, 44 C.R.3d 531.) But the immunity provided by Govt.C. 821.6 for an injury caused by public employees in instituting or prosecuting a judicial or administrative proceeding, does not protect them from liability under C.C. 52.1 for false arrest. And, because the immunity provided public employees by Govt.C. 820.2 for discretionary acts covers only basic policy decisions, it does not protect them from liability under C.C. 52.1 for making an arrest without probable cause. (*Gillan v. San Marino* (2007) 147 C.A.4th 1033, 1047, 1051, 55 C.R.3d 158.) (On liability of public employees generally, see 5 *Summary* (10th), *Torts*, §345 et seq.)

Contempt proceeding:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §340 et seq.



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CHAPTER X - Constitutional Law

Witkin Summary of California Law XI. EQUAL PROTECTION OF THE LAWS E. California Civil Rights Legislation. 1. In General.

g. Sexual Harassment in Business and Professional Relationships.

8 Witkin Sum. Cal. Law Const Law § 896

[§ 896] Sexual Harassment in Business and Professional Relationships.

(1) *In General.* The 1994 Legislature, finding that "sexual harassment occurs not only in the workplace, but in relationships between providers of professional services and their clients" (Stats. 1994, Chap. 710, §1), added C.C. 51.9, creating a cause of action for sexual harassment that occurs as part of a professional relationship. The statute authorizes recovery of damages as provided by C.C. 52(b) (*supra*, §895). (C.C. 51.9(b); see C.C. 51.9(c) [statute does not limit application of other remedies provided by law]; C.C. 51.9(d) [statute's definition of sexual harassment and standards for liability are limited to actions brought under statute].) (See 1 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §10:5 et seq. [action under statute]; 61 Am.Jur. Trials 489 [Individual Liability for Sexual Harassment]; 62 Am.Jur. Trials 235 [Workplace Sexual Harassment: Quid Pro Quo]; on sexual harassment under Title VII of Civil Rights Act, see *supra*, §864 et seq.; on liability of supervisors for sexual harassment under FEHA, see *infra*, §928; on prohibited sexual harassment under FEHA, see *infra*, §927 et seq.)

(2) *Elements of Action.* A person is liable for sexual harassment under this statute when the plaintiff proves that: (a) there is a business, service, or professional relationship between the plaintiff and the defendant; (b) the defendant has made sexual advances, solicitations, requests, or demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature, or a hostile nature based on gender, that was unwelcome and pervasive or severe; (c) the plaintiff is unable to easily terminate the relationship; and (d) the plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including emotional distress or the violation of a constitutional or statutory right, as a result of the defendant's conduct. (C.C. 51.9(a); on what constitutes professional relationship, see C.C. 51.9(a)(1).) (See BAJI, No. 7.91 [elements of action]; CACI, No. 3024 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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1. In General.
h. Other Discrimination Statutes.

8 Witkin Sum. Cal. Law Const Law § 897

[§ 897] Other Discrimination Statutes.

Statutes outlaw discrimination in a number of fields, including the following:

(1) *Clubs Selling Liquor*. Under the Alcoholic Beverages Control Act (*B. & P.C. 23000* et seq.), certain clubs engaging in specified discriminatory practices are not eligible for an alcoholic beverage club license. (See, e.g., *B. & P.C. 23428.5* [press clubs]; *B. & P.C. 23428.18* [labor councils]; *B. & P.C. 23428.20* [nonprofit condominium and stock cooperative organizations]; *B. & P.C. 23428.21* [local dental societies]; *B. & P.C. 23428.22* [nonprofit corporations promoting cultural ties and understanding]; *B. & P.C. 23428.23* [letter carriers' local]; *B. & P.C. 23428.27* [peace officers' and employees' associations].) Other provisions of the Act provide that it is unlawful for certain licensed clubs to engage in specified discriminatory practices. (See, e.g., *B. & P.C. 23426.5* [tennis clubs]; *B. & P.C. 23428.19* [handball and racquetball clubs]; *B. & P.C. 23428.24* [nonprofit social organizations]; *B. & P.C. 23428.25* [Hidalgo society]; *B. & P.C. 23428.26* [nonprofit property owners' association].) In addition, *B. & P.C. 23438* provides that a person may not deduct club expenses for taxation purposes if the club engages in discriminatory practices. (See *19 Pacific L. J. 509*.)

(2) *Credit Denial to Woman*. The discriminatory refusal of credit to a married woman is prohibited. (See *C.C. 1812.30* et seq.; *11 Summary (10th), Husband and Wife*, §22.)

(3) *Dealerships*. The California Fair Dealership Law prohibits discrimination in granting dealerships. (See *C.C. 80* et seq.; *C.C. 81(b)* [defining dealership].)

(4) *Dentistry*. Legislation prohibits discrimination with respect to employment, staff privileges, or professional services against a licensed dentist solely on the basis of the educational degree held. (See *Govt.C. 7120* [discrimination by state and local government agencies]; *Health & Saf.C. 1373.13* [discrimination by health care service plans]; *Ins.C. 10177.9* [discrimination by nonprofit hospital service plans and self-insured employee welfare plans].)

(5) *Deprivation of Rights by Law Enforcement*. No governmental authority or agent may "engage in a pattern or practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected" by state or federal law. The Attorney General may bring a civil action "to obtain appropriate equitable and

declaratory relief to eliminate the pattern or practice of conduct." (C.C. 52.3.)

(6) *Disabled Persons*. (See *infra*, §957 et seq.)

(7) *Elder Care*. "Adult day care centers may not discriminate because of race, color, creed, national origin, sex, sexual orientation, or physical or mental disabilities." However, participants who cannot be appropriately cared for may be refused admittance to the program. (*Health & Saf.C. 1586.6*.)

(8) *Employment*. Except for reinstatement remedies prohibited by federal law, the protections, rights, and remedies available under state law are available to all individuals who have applied for employment or who are or have been employed, regardless of their immigration status. (C.C. 3339, *Govt.C. 7285*, *Health & Saf.C. 24000*, *Lab.C. 1171.5*; see *Govt.C. 12900* et seq. [California Fair Employment and Housing Act], *infra*, §915 et seq.; 34 *McGeorge L. Rev.* 435 [discussing statutes].)

(9) *Franchises*. Discrimination in the granting of a franchise is prohibited. (C.C. 51.8.)

(10) *Gender Violence*. Gender-motivated violence, including domestic violence and sexual abuse, is a form of sex discrimination prohibited by statute. (C.C. 52.4.) A person subject to gender violence may bring a civil action against the responsible party for actual, compensatory, and punitive damages and injunctive relief. (C.C. 52.4(a) ; 34 *McGeorge L. Rev.* 333 [discussing C.C. 52.4].)

(11) *Health Care and Nursing*. Health care service plans, group policies of disability insurance, self-insured employee welfare benefit plans, fraternal benefit societies, and nonprofit hospital service plans are prohibited from providing dependent spouses less favorable coverage than that provided covered employee spouses. (See *Health & Saf.C. 1374*; *Ins.C. 10122.2*, *10123.4*, and *11073*; on rights of patients in nursing facilities, see *Health & Saf.C. 1599* et seq.)

(12) *Licensed Persons*. A person holding a license (or certificate, permit, authority, etc.) under the Business and Professions Code is subject to disciplinary action if he or she refuses services to an applicant, or otherwise discriminates in performing services "because of the applicant's race, color, sex, religion, ancestry, disability, physical handicap, marital status, or national origin." (*B. & P.C. 125.6*.)

(13) *Linguistic Minorities*. The Dymally-Alatorre Bilingual Services Act (*Govt.C. 7290* et seq.) seeks to improve communication between public employees and persons unable to speak or write English effectively. It requires state and local agencies to employ qualified bilingual persons in public contact positions or as interpreters. (*Govt.C. 7292*, *7293*.)

(14) *Mental Health Services*. A nonprofit protection and advocacy agency ensures that state hospitals and licensed health and community care facilities observe mental health laws, regulations, and policies on the rights of mental health services recipients. (See *Welf.C. 5510* et seq.; see *Welf.C. 4901* [protection and advocacy agency].)

(15) *Mobilehome Park Tenancies*. Membership in a private club or organization, which is a condition for tenancy in a mobilehome park, "shall not be denied on the basis of race, color, religion, sex, national origin, ancestry, or marital status." (C.C. 798.20.)

(16) *Prisoners*. Prisoners are guaranteed specified civil rights, including the right to read materials, to initiate civil actions, to marry, and to make a will. (See *P.C. 2601*.)

(17) *Public Accommodations*. (See C.C. 51, 52, *infra*, §898 et seq. [Unruh Civil Rights Act]; *B. & P.C. 19572* [racetracks]; *Govt.C. 54091*, *54092* [public beaches]; 70 *A.L.R.3d* 1142 [trailer park as public accommodation]; 38 *A.L.R.4th* 339 [gender-based discrimination in places of public accommodation].)

(18) *Public Employment*. (See *Govt.C. 19572* [setting forth authorized causes for discipline of state civil service

employees, including unlawful discrimination and unlawful retaliation]; *Govt.C. 19702* [prohibiting discrimination against and harassment of state civil service employees or employee applicants on the bases of sex, race, religious creed, color, national origin, ancestry, marital status, or physical or mental disability]; *Govt.C. 19702(a)* [prohibiting retaliatory discrimination]; *Govt.C. 19702(h)* [burden of proof in retaliation actions]; *Govt.C. 19702.1* [state hiring and promotion must conform to Federal Civil Rights Act (*supra*, §847)]; *Govt.C. 50084* [same; local agencies]; *Govt.C. 19702.2* [only job-related tests are authorized for state hiring or promotional practices]; *Govt.C. 50085* [same; local agencies]; *Govt.C. 19704* [prohibiting notations or entries on documents relating to state examination, appointment, or promotion]; *Govt.C. 8310* [prohibiting certain questions to applicants for state employment]; *Educ.C. 45293, 88112* [prohibiting certain questions to applicants or candidates for elementary, secondary, or community college positions; prohibiting discrimination in appointment]; *Kidd v. California (1998) 62 C.A.4th 386, 405, 72 C.R.2d 758, infra*, §967 [use of race and sex in appointment of job applicants to civil service positions under supplemental certification policy violated *Govt.C. 19704, 19705*]; 3 *Summary* (10th), *Agency and Employment*, §332 et seq.; *infra*, §915 et seq.)

(19) *Public Safety Officers*. (See *infra*, §960 et seq.)

(20) *Public Utility Deposits and Rates*. No public utility may "prejudice, disadvantage, or require different rates or deposit amounts ... because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status." (*Pub.Util.C. 453(b)*.)

(21) *Residential Developments and Emergency Shelters*. Cities and counties are prohibited from discriminating against residential developments or emergency shelters because of (a) the method of financing, (b) "the race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, familial status, disability, or age" of the owners or intended occupants, or because (c) occupancy is by persons or families of low, moderate, or middle income. (*Govt.C. 65008*.)

(22) *State Militia*. Members of the state militia must not be discriminated against in enlistments, promotions, or commissions on any basis listed in *Govt.C. 12940(a)*, except as provided in *Govt.C. 12940*. (*Mil. & Vet.C. 130*.)

(23) *Transfer of Land*. Discriminatory provisions in written instruments relating to real property are prohibited. (*C.C. 53, 782*; see 12 *Summary* (10th), *Real Property*, §201.)

(24) *Voting Registration*. A county clerk may not refuse to deputize any person to register voters "because of race, creed, color, national origin, ancestry, sex, marital status, disability, religious or political affiliation, or age." (*Elec.C. 2110*.)

West's Key Number Digest, Civil Rights k.110 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(11a) *(New) Juvenile Detention*. The Youth Bill of Rights, *Welf.C. 224.70* et seq., added in 2007, enumerates the rights of youth committed to the custody of the Division of Juvenile Facilities and the duties of the Division regarding their care, placement, and services.

(12) *Licensed Persons*. *B. & P.C. 125.6*, as amended in 2007, no longer specifically lists the prohibited characteristics; instead, *B. & P.C. 125.6* refers to those characteristics listed or defined in *C.C. 51(b)* (see text and Supp., *infra*, §898) or defined in *C.C. 51(e)*. (15) *Mobilehome Park Tenancies*. *C.C. 798.20*, as amended in 2006, now provides that membership may not be denied on any basis listed in *Govt.C. 12955(a)* or (d). (*C.C. 798.20(a)*; see text, §947.) An exception is made with respect to familial status for housing for older persons and senior citizens. (*C.C. 798.20(b)*.) (20) *Public Utility Deposits and Rates*. *Pub.Util.C. 453(b)*, as amended in 2007, now lists the protected characteristics as "ancestry, medical condition, marital status or change in marital status, occupation, or any characteristic listed or defined in" *Govt.C. 11135* (see text and Supp., *supra*, §892).

(21) *Residential Developments and Emergency Shelters*. *Govt.C. 65008*, as amended in 2006, now prohibits

discrimination on any basis listed in *Govt.C. 12955(a)* or (d) (see text, §947). With respect to familial status, the statute does not apply to housing for older persons or senior citizens. *Govt.C. 65008* also now prohibits discrimination based on a person's or family's very low income.

(24) *Voting Registration. Elec.C. 2110*, as amended in 2007, now lists the protected characteristics as "ancestry, marital status, political affiliation, or any characteristic listed or defined in" *Govt.C. 11135* (see text and Supp, supra, §892).



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CHAPTER X - Constitutional Law

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8 *Witkin Sum. Cal. Law Const Law* § 898

[§ 898] In General.

(1) *The Statute.* Prior to 1959, the California Civil Rights Act (C.C. 51 et seq.) prohibited discrimination in certain specified places of public accommodation or amusement, and authorized an action for actual damages and for a statutory penalty of \$ 100. (See *In re Cox* (1970) 3 C.3d 205, 213, 90 C.R. 24, 474 P.2d 992.) The Act was repealed in 1959, and C.C. 51 and 52 were amended and designated the Unruh Civil Rights Act. This Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in *all business establishments of every kind whatsoever.*" (C.C. 51(b); see 31 U.C.L.A. L. Rev. 443 [uncertain guarantee of Unruh Act]; 36 U.S.F. L. Rev. 109 [saving California's statutory ban on arbitrary discrimination by businesses]; 29 Western State L. Rev. 1 [argument in favor of liberalizing Act]; 1 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §2:1 et seq. [actions under Unruh Act]; 2 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §13:16 et seq. [housing discrimination under Act]; 87 A.L.R.2d 120 [what establishments fall within protection of state civil rights statutes]; 83 A.L.R.5th 467 [What Constitutes Private Club or Association Not Otherwise Open to Public That Is Exempt From State Civil Rights Statute]; on businesses and acts covered, see *infra*, §899 et seq.; on enforcement, see C.C. 52, *infra*, §914.)

(2) *Popular Name.* C.C. 51(a) provides that it "shall be known, and may be cited, as the Unruh Civil Rights Act." Thus, some courts and commentators refer only to C.C. 51 as the Unruh Civil Rights Act (see *Alch v. Superior Court* (2004) 122 C.A.4th 339, 395, 19 C.R.3d 29), while others include both C.C. 51 and its related enforcement statute C.C. 52 (see *infra*, §914). Others refer to C.C. 51 through C.C. 53, inclusive, as the Unruh Civil Rights Act, thus including the Tom Bane Civil Rights Act (see *supra*, §895). (See C.C. 1801 [stating that statutes on retail installment sales may be cited as "Unruh Act"].)

(3) *Purpose and Scope of Act.* The primary purpose of the Unruh Civil Rights Act "is to compel recognition of the equality of all persons in the right to the particular service offered by an organization or entity covered by the act." (*Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 C.A.3d 712, 733, 195 C.R. 325.) The protection afforded by the Act applies to "all persons," and is not confined to a limited category of "protected classes." (*Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 730, 180 C.R. 496, 640 P.2d 115, 12 Summary (10th), *Real Property*, §683.) (See *Gates v. Superior Court* (1995) 32 C.A.4th 481, 508, 512, 38 C.R.2d 489, 5 Summary (10th), *Torts*, §303 [Act does

not supersede *Govt.C. 845* (immunity from liability for failure to provide police protection)).)

"Emanating from and modeled upon traditional 'public accommodations' legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.' " (*Marina Point Ltd. v. Wolfson* supra, 30 C.3d 731.) "By its use of the emphatic words 'all' and 'of every kind whatsoever,' the Legislature intended that the phrase 'business establishments' be interpreted 'in the broadest sense reasonably possible.' " (*Isbister v. Boys' Club of Santa Cruz* (1985) 40 C.3d 72, 78, 219 C.R. 150, 707 P.2d 212, infra, §901; see infra, §899 et seq.)

The enumeration of particular kinds of discrimination in the Act is "illustrative, rather than restrictive." The Act's "language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination* by business establishments," whether or not the ground of discrimination is expressly set forth in the Act. (*Marina Point, Ltd. v. Wolfson*, supra, 30 C.3d 725, 732; *Isbister v. Boys' Club of Santa Cruz*, supra, 40 C.3d 86; see infra, §905 et seq.) However, the Act is not violated by the establishment and enforcement of "reasonable department regulations that are rationally related to the services performed and the facilities provided." (*In re Cox* (1970) 3 C.3d 205, 217, 90 C.R. 24, 474 P.2d 992.) Nor is the Act violated by distinctions based on financial or economic status. (See *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 1150, 278 C.R. 614, 805 P.2d 873, infra, §912.) (On retaliatory discrimination, see infra, §913.)

(4) *Liberal Construction*. The Unruh Civil Rights Act must be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice. In enforcing its commands, "both the policy expressed in its terms, and the object implicit in its history and background, should be recognized." (*Koire v. Metro Car Wash* (1985) 40 C.3d 24, 28, 219 C.R. 133, 707 P.2d 195; *Winchell v. English* (1976) 62 C.A.3d 125, 127, 133 C.R. 20, infra, §907; *Curran v. Mt. Diablo Council*, supra, 147 C.A.3d 727; *Rotary Club of Duarte v. Board of Directors* (1986) 178 C.A.3d 1035, 1046, 224 C.R. 213, infra, §902.)

(5) *Proof of Violation*. Statistical evidence is admissible to support an inference of intentional discrimination when based on a "proper foundation and subject to the general rules of evidence." (*Everett v. Superior Court* (2002) 104 C.A.4th 388, 393, 128 C.R.2d 418 [citing *Harris v. Capital Growth Investors*; statistical evidence showing greater percentage of Blacks than people of other races being removed from amusement park for line-cutting was sufficient to support inference that park's facially neutral line-cutting policy was applied in discriminatory manner].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *The Statute*. C.C. 51, as amended in 2005, further prohibits discrimination based on marital status or sexual orientation. (See 37 *McGeorge L. Rev.* 181.)

See 37 *Loyola L.A. L. Rev.* 1065 [state protection of disability civil rights].(2) *Popular Name*. See *Stamps v. Superior Court* (2006) 136 C.A.4th 1441, 1449, 39 C.R.3d 706, Supp., supra, §895 [Unruh Civil Rights Act does not include Ralph Civil Rights Act (C.C. 51.7) or Tom Bane Civil Rights Act (C.C. 52.1)]; *Gunther v. Lin* (2006) 144 C.A.4th 223, 226, 50 C.R.3d 317 [strictly speaking, C.C. 52 is not part of Unruh Civil Rights Act, although it provides remedies for discrimination in violation of that Act].

(3) *Purpose and Scope of Act*. Although the Act has broad application, it does not extend to practices and policies that apply equally to all persons. (See C.C. 51(c).) Hence, a policy that is neutral on its face is not actionable, even when it has a disproportionate impact on a protected class. (*Turner v. Association of Amer. Med. Colleges* (2008) 167 C.A.4th 1401, 1408, 85 C.R.3d 94 [following *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R. 614, 805 P.2d 873, text, §912; Act did not require national testing service to alter standardized testing conditions to accommodate applicants with learning and reading-related disabilities].)

See *Ingels v. Westwood One Broadcasting Services* (2005) 129 C.A.4th 1050, 1072, 28 C.R.3d 933 [although certain aspects of operating and publishing commercial radio talk show may qualify for treatment under Unruh Civil

Rights Act, countervailing interests require additional scrutiny when First Amendment rights are involved; here, plaintiff claiming age discrimination failed to demonstrate compelling interest to apply Act in face of defendant broadcaster's right to determine content of radio show].



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b. Business Establishments.

8 *Witkin Sum. Cal. Law Const Law* § 899

[§ 899] Business Establishments.

C.C. 51 (*supra*, §898) states the rights of persons to equal treatment "in all business establishments of every kind whatsoever." The following are illustrations of businesses held subject to the Act.

(1) *Apartment Complex*. An apartment complex is a business establishment within the meaning of the Act. (*Flowers v. John Burnham & Co.* (1971) 21 C.A.3d 700, 703, 98 C.R. 644.)

(2) *Banks and Financing Agencies*. In *Holmes v. Bank of America* (1963) 216 C.A.2d 529, 535, 30 C.R. 917, allegations that defendant bank conspired with defendant developer of homes to refuse to sell or finance sales to Blacks on housing built under the National Housing Act were held to state a cause of action.

In *Jackson v. Superior Court* (1994) 30 C.A.4th 936, 36 C.R.2d 207, plaintiff, a black investment adviser, accompanied two elderly female customers into defendant bank to transfer some funds from certificates of deposit to a mutual fund. While there, he was wrongfully accused by defendant bank manager of trying to pull a scam on the two customers, who left defendant bank without transferring the funds. *Held*, even though plaintiff was not a customer of defendant, he, as a member of the public, was entitled to full and equal accommodations under C.C. 51. Furthermore, neither the more limited, business language of C.C. 51.5 (discrimination in selling, buying, or trading; see *infra*, §906), nor the failure to allege a pattern of discrimination on the basis of race changed this result. (30 C.A.4th 940.)

(3) *Country Club*. In *Warfield v. Peninsula Golf & Country Club* (1989) 214 C.A.3d 646, 262 C.R. 890, plaintiff wife, in a dissolution proceeding, was awarded the family membership in defendant club, but defendant terminated the membership under its bylaw allowing memberships to be issued only to males. In this action, plaintiff alleged that defendant operated a restaurant and bar and recreational facilities for members and their guests, and also leased facilities to others. *Held*, the pleaded allegations, if proved, would bring defendant within the "business establishments" clause of the statute. (214 C.A.3d 655.) (See *Warfield v. Peninsula Golf & Country Club* (1995) 10 C.4th 594, 607, 42 C.R.2d 50, 896 P.2d 776, *supra*, §389 [evidence established that, although not all private clubs are business establishments, club in question had sufficient transactions with nonmembers to qualify]; 83 A.L.R.5th 467 [What Constitutes Private Club or Association Not Otherwise Open to Public That Is Exempt From State Civil Rights Statute].)

(4) *Medical Office*. In *Washington v. Blampin* (1964) 226 C.A.2d 604, 38 C.R. 235, the Act was held applicable to a physician who refused to render medical service to a black person. The court pointed out that various statutes refer to medical practice as a "business," and held that the broad language of C.C. 51 ("services in all business establishments of every kind whatsoever") was intended to cover the professions. Because the action was for damages only, the problem of compelling an unwelcome physician-patient relationship was not involved. (226 C.A.2d 608.) (See *Leach v. Drummond Med. Group* (1983) 144 C.A.3d 362, 369, 370, 192 C.R. 650 [following *Blampin*; only medical group providing medical services within area covered].)

(5) *Real Estate Broker's Office*. The office that "a real estate broker is required by law to maintain at a specified location, and from which his business must be transacted, is a business establishment within the meaning of the Unruh Act." (*Lee v. O'Hara* (1962) 57 C.2d 476, 478, 20 C.R. 617, 370 P.2d 321; see *Vargas v. Hampson* (1962) 57 C.2d 479, 481, 20 C.R. 618, 370 P.2d 322 [same holding, but special demurrer for uncertainty was properly sustained]; *Wagner v. O'Bannon* (1969) 274 C.A.2d 121, 130, 79 C.R. 44 [sale to white purchasers rushed through for same price offered by black purchasers of listed property].) However, a broker's failure to take affirmative steps to seek out qualified black buyers for a white seller is not a basis for an action by the seller. Inaction could amount to discrimination if there was a failure to show property to black prospects, but failure to look for or advertise for them is not; and if there is discrimination, it is not against the white seller. (*Crowell v. Isaacs* (1965) 235 C.A.2d 755, 757, 45 C.R. 566.)

(6) *Shopping Center*. A shopping center is a business open to the public, and is subject to the restrictions of the Act. "In some areas the public must rely upon the shopping center as its sole source of food, clothing and other commodities. If a shopping center arbitrarily denies individuals the right to purchase essentials, these people may have no practicable alternative source of supply. Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." (*In re Cox* (1970) 3 C.3d 205, 218, 90 C.R. 24, 474 P.2d 992.)

(7) *Community Service Organizations*. Certain nonprofit community service organizations are subject to the Act. (See *infra*, §900 et seq.)

(8) *Talent Agency*. The exclusion of "discrimination in employment" from coverage under the Act does not extend to age discrimination claims in the services provided by talent agencies to their clients. (*Alch v. Superior Court* (2004) 122 C.A.4th 339, 391, 19 C.R.3d 29 [writers who were would-be clients of talent agencies had no employer-employee relationship with talent agencies].)

West's Key Number Digest, Civil Rights k.119 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Country Club*. On marital status discrimination by country club, see *Supp.*, *infra*, §908A.

(3a) *(New) Hospital*. A hospital that operates as a business offering "its facilities to qualified physicians, who are not its employees, in exchange for fees and other considerations" is a business establishment for purposes of the Unruh Civil Rights Act and may not restrict its staff privileges on the basis of race. (*Payne v. Anaheim Memorial Med. Center* (2005) 130 C.A.4th 729, 733, 748, 30 C.R.3d 230 [see dissent, at p. 749, finding this extension of liability under Unruh Civil Rights Act to be unwarranted].)



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1. In General.

8 Witkin Sum. Cal. Law Const Law § 900

[§ 900] In General.

By use of the words "all" and "of every kind whatsoever," the Legislature intended that the phrase "business establishments" in the Unruh Civil Rights Act be interpreted "in the broadest sense reasonably possible." (*Isbister v. Boys' Club of Santa Cruz* (1985) 40 C.3d 72, 78, 219 C.R. 150, 707 P.2d 212, *infra*, §901; 83 A.L.R.5th 467 [What Constitutes Private Club or Association Not Otherwise Open to Public That Is Exempt From State Civil Rights Statute]; see *supra*, §898.)

"Nothing in the language or history of its enactment calls for excluding an organization from its scope simply because it is nonprofit. ... Indeed, hospitals are often nonprofit organizations, and they are clearly business establishments to the extent that they employ a vast array of persons, care for an extensive physical plant and charge substantial fees to those who use the facilities." (*O'Connor v. Village Green Owners Assn.* (1983) 33 C.3d 790, 796, 191 C.R. 320, 662 P.2d 427, 12 Summary (10th), *Real Property*, §116; see 21 *San Diego L. Rev.* 477 [O'Connor]; 31 *U.C.L.A. L. Rev.* 443 [uncertain guarantee of Unruh Civil Rights Act].)

Thus, the term extends to various kinds of nonprofit organizations that have "businesslike attributes," including the following:

(1) Homeowners' associations. (See *O'Connor v. Village Green Owners Assn.* *supra*, 33 C.3d 796 [condominium association]; *Park Redlands Covenant Control Committee v. Simon* (1986) 181 C.A.3d 87, 93, 226 C.R. 199 [tract housing association].)

(2) Mother's Against Drunk Driving. (*Harris v. Mothers Against Drunk Driving* (1995) 40 C.A.4th 16, 20, 46 C.R.2d 833.)

(3) Boys' Club. (See *infra*, §901.)

(4) Rotary Club. (See *infra*, §902.)

However, the Boy Scouts and a cult awareness network have been held not to have the necessary business attributes

to be covered by the Act. (See *infra*, §§903, 904.)

West's Key Number Digest, Civil Rights k.124

SUPPLEMENT: [This section is current through the latest supplement]



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2. Boys' Club.

8 Witkin Sum. Cal. Law Const Law § 901

[§ 901] Boys' Club.

Isbister v. Boys' Club of Santa Cruz (1985) 40 C.3d 72, 219 C.R. 150, 707 P.2d 212, held that the Act applied to defendant, a private charitable organization that operates a community recreational facility. The Boys' Club of Santa Cruz, a private nonprofit California corporation, owns and operates a building that includes a gymnasium, an indoor swimming pool, a snack bar, and craft and game areas. It is affiliated with the Boys' Clubs of America, a congressional chartered organization. Its membership is open to all Santa Cruz male children between 8 and 16 for a nominal annual membership fee (\$ 3.25). Its main source of funds consists of donations from a private trust. Plaintiff girls were denied membership and brought suit for injunctive and declaratory relief. The lower court granted relief, permanently enjoining the Club from denying membership or access to its facilities to girls. *Held*, affirmed.

(a) *Boys' Club is a business establishment.*

(1) The Club is "public" in its operation; it is open to the entire male youthful population of Santa Cruz. Its emphasis is on drop-in use of the facilities, thus minimizing any sense of social cohesiveness, shared identity, or continuity. (40 C.3d 81.)

(2) *O'Connor v. Village Green Owners Assn.* (1983) 33 C.3d 790, 191 C.R. 320, 662 P.2d 427, 12 Summary (10th), *Real Property*, §116, held that a nonprofit condominium owners' association was covered, and the fact that defendant's purposes and operations are not strictly commercial does not preclude application of the Act. (40 C.3d 83.)

(3) The fact that parallel California statutes banning discrimination in housing and employment contain express exemptions for nonprofit organizations does not call for an implied exemption in the *Unruh Civil Rights Act*. (40 C.3d 84.)

(4) It is suggested that extension of the Act to the Boys' Club will threaten all private organizations that traditionally serve the special cultural or charitable needs of particular minority groups with common interests. But the Club's status as a "business establishment" arises from its "public" nature. "[I]t offers basic recreational facilities to a broad segment of the population, excluding only a particular group expressly recognized by the Act as a traditional

target of discrimination." (40 C.3d 84.)

(5) Application of the Act would not interfere with current members' constitutional rights of association; a similar contention was rejected in *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, supra, §389, holding that no federal constitutional right was infringed by the Minnesota Human Rights Act. "We reach a similar conclusion under California's Constitution, though we recognize it affords greater privacy, expressive, and associational rights in some cases than its federal counterpart." (40 C.3d 85.)

(b) *Male-only membership policy prohibited.* The contention that the "traditional" membership policy of the Club is "reasonable" and therefore permitted by the Act is unacceptable. Under *Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 180 C.R. 496, 640 P.2d 115, 12 Summary (10th), *Real Property*, §683, it is "arbitrary" to exclude an entire class on the basis of stereotyped notions. (40 C.3d 86, 87.) The *Marina Point* exception, that the Act might allow the exclusion of a class whose presence would not accord with the nature of the enterprise, is inapplicable here. Defendant has not proved that "the crafts, games, counseling programs, and recreational facilities offered by the Club are suited or safe only for males." (40 C.3d 88.) Good faith is not sufficient to support group discrimination. (40 C.3d 89, footnote 19.) And the argument that the Club traditionally serves boys can no longer be sustained, for the record shows that a number of local Clubs have admitted girls with no untoward effects. (40 C.3d 90.)

(c) *Scope of holding.* The conclusions reached in this opinion are compelled by "the Legislature's very broad antidiscrimination policy." But the holding is based on "the particular nature and function of the Club." "Nothing we say necessarily requires a similar result in the case of other single-sex youth organizations. Nor may we foreclose the Legislature from a more precise formulation of the situations in which private discrimination is forbidden." (40 C.3d 91.)

Two justices dissented in separate opinions. (40 C.3d 93, 98.) (See 19 U.S.F. L. Rev. 431; on permissible exclusion of gays, atheists, and agnostics from Boy Scouts, see *infra*, §904.)

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3. Rotary Club.

8 Witkin Sum. Cal. Law Const Law § 902

[§ 902] Rotary Club.

(1) *California Decision*. In *Rotary Club of Duarte v. Board of Directors* (1986) 178 C.A.3d 1035, 224 C.R. 213, the issue was whether the Board of Directors of Rotary International could revoke the charter of the local club of Duarte and terminate its membership in International because it had admitted three women to the club. International is a worldwide nonprofit corporation with approximately 19,788 local clubs and over 900,000 individual members. Membership in local clubs is limited to men, but Duarte decided that its membership growth goals could best be reached by allowing qualified women to join. In this action for injunctive and declaratory relief, brought by Duarte and two of the women, the trial judge ruled that International and the local were not "business establishments" within the Act. *Held*, reversed.

(a) International, though a nonprofit organization, has substantial businesslike attributes, including publication of books and periodicals that produce substantial revenues. (178 C.A.3d 1051 et seq.)

(b) Although Rotarians perform charitable services, business concerns are a motivating factor in joining local clubs. (178 C.A.3d 1047.) "By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members." (178 C.A.3d 1058.)

(c) Although the Act does not govern truly "private" relationships that are "continuous, personal and social," membership in Rotary is not of this type. (178 C.A.3d 1058.) Forcing International to excuse compliance with the male-only-membership policy would not violate the associational freedom protected by the federal Constitution. The immense size of the organization and the number of Rotarians throughout the world negative any intimate relations, and the state's compelling interest in eradicating discrimination against women justifies any impact on associational freedoms of male members. (178 C.A.3d 1064, 1065, discussing and following *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, *supra*, §389.)

(2) *U.S. Supreme Court Decision*. *Board of Directors of Rotary Int. v. Rotary Club of Duarte* (1987) 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474, affirmed the California decision on the principles laid down in *Roberts v. United States*

Jaycees. (a) Application of the Unruh Act does not violate the freedom of private association because the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection. (107 S.Ct. 1946, 95 L.Ed.2d 484.) (b) The Act does not violate the right of expressive association, because the slight infringement on the right serves the state's compelling interest in eliminating discrimination against women. (107 S.Ct. 1947, 95 L.Ed.2d 486.) (See 19 *Pacific L. J.* 399; 18 *Southwestern U. L. Rev.* 559.)

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4. Cult Awareness Network.

8 Witkin Sum. Cal. Law Const Law § 903

[§ 903] Cult Awareness Network.

In *Hart v. Cult Awareness Network* (1993) 13 C.A.4th 777, 16 C.R.2d 705, the court held that the Cult Awareness Network (CAN) and its Los Angeles Chapter (CAN-LA) are not business establishments within the meaning of C.C. 51. CAN is a nonprofit corporation; its purpose is to educate the public about the harmful effects of mind control as practiced by destructive cults and about the unethical or illegal practices they employ. Its membership is open to all individuals on payment of an annual fee of \$ 30, and the members receive a monthly newsletter and the right to attend yearly meetings. CAN-LA is a separate association that requires payment of \$ 100 annual dues; it has no paid employees, owns no tangible assets, and sells no products or services of any kind. It holds meetings in rooms provided without charge. Its only revenue comes in the form of donations, and the entire "work force" consists of unpaid volunteers.

In 1991, CAN-LA received many letters from acknowledged Scientologists requesting admission to membership, purportedly to engage in religious dialogue with other members. Believing that this campaign of the Church of Scientology was a harassment measure, CAN-LA rejected the applications. Plaintiff, a member of the church, then filed a complaint for damages and a permanent injunction, and also filed an application for a preliminary injunction. The trial court denied the application on the ground that plaintiff did not demonstrate a reasonable probability that he would succeed in showing that CAN-LA is a business establishment. *Held*, order affirmed.

(a) CAN-LA's associational rights.

(1) *Freedom of private association.* The relationship among CAN-LA members is the type of intimate and private relationship that warrants constitutional protection. It is not a "large and basically unselective" group as in *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, *supra*, §389. It is a "well-defined subgroup," whose membership is highly restricted and selective, based on shared opinions, thoughts, and concerns with respect to "destructive cults." (13 C.A.4th 789.)

(2) *Freedom of expressive association.* Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic,

educational, religious, and cultural ends. A regulation that forces the group to accept members it does not desire may impair the ability of the original members to express only those views that brought them together. (13 C.A.4th 790.) There is a substantial basis in the record to support the conclusion that admitting plaintiff and other Scientologists as members of CAN-LA would impede its ability to engage in protected activities and to disseminate its preferred views. (13 C.A.4th 790.)

(b) *No compelling state interest justifies application of Unruh Act.*

(1) Plaintiff argued, with no supporting authority, that any privacy rights of members of CAN-LA are outweighed by California's compelling interest in eradicating religious discrimination so that all persons may be judged solely on their individual merits. But what plaintiff characterizes as "religious discrimination" is simply CAN-LA's expression of its own ideas and beliefs in a private and highly selective forum from which Scientologists are excluded. (13 C.A.4th 791.)

(2) "Moreover, in light of the establishment clause of the United States Constitution and the religion clauses of the California Constitution ... , it is difficult to postulate any state interest which would justify application of the Unruh Civil Rights Act to the circumstances of this case." (13 C.A.4th 791.) The proper stance of government with respect to the instant case is best stated in *Sands v. Morongo Unified School Dist.* (1991) 53 C.3d 863, 281 C.R. 34, 809 P.2d 809, supra, §533: "Ours is a religiously diverse nation. Within the vast array of Christian denominations and sects, there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religions or to no religion. Respect for the differing religious choices of the people of this country requires that government neither place its stamp of approval on any particular religious practice, nor appear to take a stand on any religious question." (13 C.A.4th 792.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Nonprofit Community Service Organizations.

5. Boy Scouts.

8 Witkin Sum. Cal. Law Const Law § 904

[§ 904] Boy Scouts.

The California Supreme Court unanimously ruled in *Curran v. Mount Diablo Council of the Boy Scouts of America* (1998) 17 C.4th 670, 72 C.R.2d 410, 952 P.2d 218, and *Randall v. Orange County Council, Boy Scouts of America* (1998) 17 C.4th 736, 72 C.R.2d 453, 952 P.2d 261, that the Boy Scouts organization is not a "business establishment" within the scope of the Unruh Civil Rights Act, and thus may exclude gays, atheists, and agnostics.

In *Curran*, plaintiff, a former Eagle Scout, applied to become an assistant scoutmaster. His application was rejected by defendant, a regional council of the Boy Scouts, after plaintiff publicly stated that he was a homosexual and committed to communicating his view that homosexuality is acceptable and moral, a view in conflict with the Boy Scouts' official position. Plaintiff sought an injunction prohibiting defendant from rejecting his application. The trial court entered judgment for defendant, concluding that defendant was a "business establishment" covered by the Act, but that application of the Act to prohibit defendant from rejecting plaintiff's application would violate defendant's members' right of expressive association under the First and Fourteenth Amendments. The Court of Appeal affirmed, agreeing with the trial court that application of the Act would violate the members' federal constitutional right of association, but finding, contrary to the trial court, that defendant was not a business establishment subject to the Act. *Held*, affirmed.

(a) *Boy Scouts is not business establishment within Unruh Act.* In expanding the reach of California's prior public accommodation law by enacting the Unruh Civil Rights Act in 1959, the Legislature chose to bring within the reach of the Act "all business establishments of every kind whatsoever." (17 C.4th 696, quoting C.C. 51.) Past decisions have stressed that the term "business establishments" must properly be interpreted in the broadest sense reasonably possible, and have applied the Act to a variety of entities that ordinarily might not be thought of as traditional business establishments. Thus, past decisions demonstrate that the Act clearly applies not only to for-profit commercial enterprises, but also to nonprofit entities designed to serve the business or economic interests of owners or members. However, no prior decision has interpreted the "business establishments" language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, the formation and activities of which are unrelated to the promotion or advancement of its members' economic or business interests. Given the organization's overall purpose and function, the Boy Scouts cannot reasonably be found to

constitute a business establishment the membership decisions of which are subject to the Act. (17 C.4th 696.)

(b) *Isbister case distinguished. Isbister v. Boys' Club of Santa Cruz* (1985) 40 C.3d 72, 219 C.R. 150, 707 P.2d 212, supra, §901, involving a local boys' club, concluded that the Unruh Act was intended to extend the reach of California's prior public accommodation statute, and that the very broad "business establishments" language of the Act applies to the membership policies of an entity—even a charitable organization that lacks a significant business-related purpose—if the entity's attributes and activities make it the "functional equivalent" of a classic "place of public accommodation or amusement." However, the circumstance that the Boy Scouts is generally nonselective in its admission policies, and affords membership to a large segment of the public, is not itself sufficient to characterize the organization as the functional equivalent of a traditional place of public accommodation or amusement. The record establishes that the Boy Scouts is an organization the primary function of which is the inculcation of a specific set of values in its members, and the recreational facilities and activities of which are complementary to the organization's primary purpose. Unlike membership in the boys' club in *Isbister*, membership in the Boy Scouts is not simply an admission ticket to a recreational facility that is open to a large segment of the public and that has all the attributes of a place of public amusement. Scouts meet regularly in small groups (often in private homes) that are intended to foster close friendship, trust, and loyalty, and Scouts are required to participate in a variety of activities, ceremonies, and rituals that are designed to teach the moral principles to which the organization subscribes. (17 C.4th 697.)

(c) *Warfield case distinguished. Warfield v. Peninsula Golf & Country Club* (1995) 10 C.4th 594, 42 C.R.2d 50, 896 P.2d 776, supra, §899, applied the Act to the membership decisions of a private country club that permitted nonmembers to use its facilities for a fee. It is likewise distinguishable. Although the Boy Scouts, like the country club in *Warfield*, engages in business transactions with nonmembers on a regular basis (by operating retail shops and licensing the use of its insignia), those business activities differ significantly from those of the defendant in *Warfield*. The Boy Scouts is an expressive social organization. Its primary function is the inculcation of values in its members, and its small social-group structure and activities are not comparable to those of a traditional place of public accommodation or amusement. Unlike the business transactions involved in *Warfield*, the business transactions engaged in by the Boy Scouts do not involve the sale of access to the basic activities or services offered by the organization. Nonmembers cannot purchase entry to pack or troop meetings, overnight hikes, the national jamboree, or any portion of the Boy Scouts' extended training and educational process. Although the Act *would* apply to, and would prohibit discrimination in, the actual business transactions with nonmembers in its retail stores and elsewhere, those transactions do not render the Boy Scouts a business establishment so as to bring its membership policies or decisions within the reach of the Unruh Act. Those business transactions are distinct from the Scouts' *core functions* and do not demonstrate that the organization has become a commercial purveyor of the primary incidents and benefits of membership. (17 C.4th 699.)

(d) *Constitutional issue is not determined.* Because the judgment for defendant must be sustained on the basis of statutory interpretation, there is no occasion to pass on the merits of defendant's claims relating to the constitutional right of association. (17 C.4th 701.)

In *Randall*, supra, plaintiffs were prohibited from continuing their membership and advancing in the Cub Scouts by defendant, another regional council of the Boy Scouts, because they failed or refused to participate in religion-related elements of the scout program and refused to affirm a belief in God. They sought injunctive and other relief. The trial court granted the injunction, and the Court of Appeal generally affirmed. *Held*, reversed, adopting the reasoning in *Curran*. (17 C.4th 744.)

In both cases, four justices filed separate concurring opinions, generally expressing the need to further clarify what constitutes a business establishment under the Act. (17 C.4th 702, 744.) (See 29 Southwestern U. L. Rev. 401 [Curran]; on exclusion of gay scoutmaster based on Boy Scouts' right of expressive association, see *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554, supra, §391.)

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1. In General.

8 Witkin Sum. Cal. Law Const Law § 905

[§ 905] In General.

(1) *Sex Discrimination*. The Gender Tax Repeal Act of 1995, C.C. 51.6, prohibits discrimination in pricing services based on a person's gender. (C.C. 51.6(b).) However, businesses may charge different prices "based specifically on the amount of time, difficulty, or cost of providing the services." (C.C. 51.6(c); see C.C. 51.6(f) [required disclosure of prices for standard services of specified businesses]; cf. *Koire v. Metro Car Wash* (1985) 40 C.3d 24, 219 C.R. 133, 707 P.2d 195 [decided before enactment of C.C. 51.6, but holding that sex-based price discounts are prohibited by Act].)

In *Easebe Enterprises v. Alcoholic Bev. Control App. Bd.* (1983) 141 C.A.3d 981, 986, 190 C.R. 678, a business establishment licensed to sell liquor featured male dancers and admitted women only. *Held*, it was unlawfully discriminating against male customers.

(2) *Discrimination in Dress Regulations*. In *Hales v. Ojai Valley Inn & Country Club* (1977) 73 C.A.3d 25, 140 C.R. 555, plaintiff alleged that he and his family entered defendant's dining room for dinner; that he was refused service because he was wearing a "leisure suit" without a necktie; that women patrons "similarly attired in leisure suits" were served; and that he was consequently the victim of sex discrimination. *Held*, judgment for defendant on demurrer reversed. Under *In re Cox* (1970) 3 C.3d 205, 218, 90 C.R. 24, 474 P.2d 992, *supra*, §899, an establishment may not *arbitrarily* discriminate; and factual issues were raised by the pleading regarding the meaning of "leisure suit," the nature of the establishment, and the local community standards of dress for both sexes. (73 C.A.3d 29.) (See *Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 C.A.4th 833, 836, 103 C.R.2d 552 [applying principles of *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R. 614, 805 P.2d 873, *infra*, §912, to discrimination claim by motorcycle club members required to remove their "colors" before entering defendant bar; "no colors" rule does not violate Act]; *Gatto v. Sonoma* (2002) 98 C.A.4th 744, 765, 120 C.R.2d 550 [following *Hessians*; refusing plaintiff entry to county fair because he refused to remove vest showing membership in motorcycle club did not violate Act]; 89 A.L.R.3d 7 [validity of dress or grooming requirements for customers of establishments serving food or beverages].)

(3) *Discrimination Against Disabled Persons*. (See *infra*, §957 et seq.; on discrimination against disabled under FEHA, see *infra*, §§936 et seq., 947.)

(4) *Occupational Discrimination*. In *Long v. Valentino* (1989) 216 C.A.3d 1287, 265 C.R. 96, plaintiff police officer attended an A.C.L.U. seminar on police espionage. He was in plain clothes and his purpose was apparently to spy. His identity was discovered and he was verbally ordered to leave, which he did. Defendant seminar provider was subsequently found liable for unlawful occupational discrimination in violation of the Unruh Civil Rights Act. *Held*, the officer was entitled to the protection of the Act.

(a) Defendant does not argue that *physical* expulsion because of an individual's occupation is permissible; however, relying on *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, *supra*, §357, he claims that a police officer on a spying mission is not entitled to the protection of the Act, and that the officer's verbal ejection was lawful. (216 C.A.3d 1293, 1298.) However, defendant chose self-help rather than the legal process, and did not properly tender the issue of lawfulness of the officer's conduct. (216 C.A.3d 1299.)

(b) "Even if applicable to the present facts, *White* cannot excuse Lloyd's conduct. He is no more entitled to relief based on Long's allegedly improper activities than would be the owner of a diner, who after being denied an apartment because of her race, sex, or occupation, refused service to the offending landlord for the identical reason. Neither violation excuses the other. We have found no authority on this precise point and rely on a basic principle of our jurisprudence: Two wrongs do not make a right. Assuming Long was engaged in improper surveillance at the instance of his department, the remedy selected by Lloyd cannot be condoned." (216 C.A.3d 1299.) (See *Roth v. Rhodes* (1994) 25 C.A.4th 530, 539, 30 C.R.2d 706, *infra*, §912 [operators of medical building could refuse to lease to podiatrist on basis of policy of only leasing to medical doctors].)

West's Key Number Digest, Civil Rights k.105

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Sex Discrimination*. Generally, a business establishment's policy of giving gender-based price discounts violates the Unruh Civil Rights Act. (*Angelucci v. Century Supper Club* (2007) 41 C.4th 160, 173, 59 C.R.3d 142, 158 P.3d 718 [following *Koire v. Metro Car Wash* (1985) 40 C.3d 24, 219 C.R. 133, 707 P.2d 195, text, p. 388; lower admission fee for women].)(3) *Discrimination Against Disabled Persons*. Unless a defendant is required by another statute to make structural modifications to a property, the existence of a structural barrier does not violate C.C. 51. (*Coronado v. Cobblestone Village Community Rentals, L.P.* (2008) 163 C.A.4th 831, 841, 77 C.R.3d 883 [because defendant landlord was not required by ADA, Disabled Persons Act (text, §958), or other statutes providing structural access standards to construct wheelchair ramp at particular curb, defendant was not liable under Unruh Civil Rights Act for injuries caused by its absence].)

(4) *Occupational Discrimination*. See *Sisemore v. Master Financial* (2007) 151 C.A.4th 1386, 1405, 60 C.R.3d 719, citing the text [following *Long v. Valentino* (1989) 216 C.A.3d 1287, 265 C.R. 96, text, p. 388; plaintiff, who was denied mortgage to purchase home solely because she was family day care home operator, stated cause of action for discrimination under Act on basis of occupational status].(5) *(New) Age Discrimination*. Arbitrary age discrimination is prohibited by the Unruh Civil Rights Act. (*Ingels v. Westwood One Broadcasting Services* (2005) 129 C.A.4th 1050, 1070, 28 C.R.3d 933.)

(6) *(New) Discrimination Against Canine Unit*. During declared emergencies, a peace officer or firefighter assigned to a canine unit and away from his or her home jurisdiction may not be discriminated against in lodging, eating establishments, or in public transportation. (C.C. 54.25.)



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2. Business Discrimination.

8 Witkin Sum. Cal. Law Const Law § 906

[§ 906] Business Discrimination.

(1) *Business Boycotts*. The Unruh Civil Rights Act (supra, §898 et seq.) and the Cartwright Act (1 *Summary* (10th), *Contracts*, §591 et seq.) bar business boycotts:

(a) *Unruh Civil Rights Act*. Business establishments "of any kind whatsoever" are prohibited from discriminating against, boycotting, blacklisting, or refusing to buy from, contract with, sell to, or trade with any person in this state (1) "because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers"; (2) "because a person is perceived to have one or more of the protected characteristics"; or (3) "because the person is associated with a person who has, or is perceived to have, any of those characteristics." (C.C. 51.5; on enforcement, see C.C. 52, *infra*, §914.)

(b) *Cartwright Act*. (1) *B. & P.C. 16721* prohibits contracts that exclude or require exclusion of anyone from a business transaction to effect the discriminatory policies of a third party based on sex, race, color, religion, ancestry, or national origin, or because of where a person conducts or has conducted business. (2) *B. & P.C. 16721.5* makes it an unlawful trust and an unlawful restraint of trade (a) to grant or accept a letter of credit (or similar document), or to enter into a contract for the sale of goods or services, that contains a provision, or (b) to refuse to do any of those acts because of the lack of a provision, that requires a "person to discriminate against or to certify that he, she, or it has not dealt with any other person on the basis of sex, race, color, religion, ancestry, or national origin, or on the basis of a person's lawful business associations." (For enforcement, see 1 *Summary* (10th), *Contracts*, §599 et seq.)

The possible application of these statutes to interstate or foreign commerce raised constitutional questions. In 1977, federal legislation was enacted to prohibit compliance with a foreign boycott; and *B. & P.C. 16721.6* was adopted to declare the legislative intent that *B. & P.C. 16721* and *16721.5* be interpreted and applied so as not to conflict with federal law.

(2) *Distinction: Reasonable Business Restrictions*. A business establishment may impose reasonable restrictions on customers rationally related to the business being conducted or the facilities and services being provided. Thus, an

establishment serving liquor may refuse access or service to an intoxicated person or one who had in the past created a disturbance; and a gambling establishment may legally contract with a husband to bar his wife, a compulsive gambler, from further play. (*Wynn v. Monterey Club* (1980) 111 C.A.3d 789, 796, 168 C.R. 878.)

In *Frantz v. Blackwell* (1987) 189 C.A.3d 91, 234 C.R. 178, plaintiff sued defendant, a developer of single-family homes, alleging that defendant refused to sell to him because he had successfully sued and obtained a settlement from defendant on a prior purchase. Defendant offered evidence showing that plaintiff was not a home purchaser but an investor-speculator, who purchased units in new developments for resale before escrow closing, using the time delay and the developer's promotional efforts to create a profit. *Held*, judgment for defendant affirmed. If the allegations of the complaint were true, defendant's refusal to deal was an arbitrary discrimination that might come within the broad scope of the Act (189 C.A.3d 95); but the evidence showed that defendant, engaged in selling new homes, was protecting his enterprise. (189 C.A.3d 96.) "The Unruh Act seeks to remedy arbitrary discrimination. It does not seek to remedy traditional wrongs arising out of tort or breach of contract, nor does it seek to remedy discrimination based on purely personal grounds." (189 C.A.3d 96, citing *Wynn v. Monterey Club*.) (See *Lazar v. Hertz Corp.* (1999) 69 C.A.4th 1494, 1503, 82 C.R.2d 368 [no violation of Act for car rental companies to refuse to rent to persons under 25 years of age].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Business Boycotts*.

(a) *Unruh Civil Rights Act*. C.C. 51.5, as amended in 2005, no longer specifically lists the prohibited characteristics; instead, C.C. 51.5 refers to those characteristics listed or defined in C.C. 51 (see text and Supp., supra, §898). (b) *Cartwright Act*. B. & P.C. 16721 and 16721.5, as amended in 2007, no longer specifically list the prohibited characteristics; instead, both statutes refer to those characteristics listed or defined in C.C. 51(b) (see text and Supp., supra, §898) or defined in C.C. 51(e). Both statutes still prohibit discrimination or refusal of service based on a person's lawful business associations.

B. & P.C. 16721.5, as amended in 2008, now refers to dealing with "another person" instead of "any other person."



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8 Witkin Sum. Cal. Law Const Law § 907

[§ 907] Racial Discrimination.

In *Winchell v. English* (1976) 62 C.A.3d 125, 133 C.R. 20, plaintiffs, white tenants of defendants' mobilehome court, had been given permission to sublease to others. The complaint alleged that defendants discriminated against plaintiffs because plaintiffs subleased to, and associated with, black persons. *Held*, a cause of action was stated. The broad language of C.C. 52 (infra, §914) does more than protect a person who is the immediate object of the discrimination; by prohibiting discrimination "on account of" color, it applies to discrimination against white persons on account of their association with black persons. (62 C.A.3d 129.)

In *Green v. Rancho Santa Margarita Mortg. Co.* (1994) 28 C.A.4th 686, 33 C.R.2d 706, plaintiffs, a black couple with a monthly income of over \$ 16,000 and considerable assets, went to a mortgage broker to obtain a loan for the purchase of a new house. An officer at the broker told plaintiffs that she could not find a lender who would accept them. Plaintiffs brought the present action for racial discrimination in violation of the Unruh Civil Rights Act, and the jury awarded them \$ 150,000 in damages. *Held*, affirmed.

(a) Until recently, discrimination cases have been analyzed as a sort of game of "hot potato." The plaintiff had the burden of making a prima facie case. The defendant then had the burden of showing a nondiscriminatory reason for its treatment of the plaintiff. If it failed in carrying that burden, the plaintiff won. If it succeeded, however, the burden then shifted back to the plaintiff to show that the defendant's reason was only a pretext. In *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407, supra, §870, decided after the trial in the present case, the U.S. Supreme Court pointed out a flaw in the way this game operated: If the plaintiff was able to show that the defendant's articulated reason was false, the plaintiff won, even though the defendant's real reason might not be discriminatory. For this reason the Court held that "the mere rejection by the trier of fact of a defendant's proffered reason still did not relieve the plaintiff of the necessity of proving actual discrimination." (28 C.A.4th 695.)

(b) *St. Mary's Honor Center* however, is inapplicable in the present case. "Any error in the verdict forms in allowing the Greens to prevail on an unrebutted prima facie case--that is, simply an inference of discrimination--was waived by the mortgage broker." Defendant asserts neither that it objected to the special verdict forms, nor that the forms did not truly reflect the law at the time. Defendant's own brief reflected the idea that plaintiffs should win if the

jury disbelieved defendant's "explanation." (28 C.A.4th 696.)

(c) Question three of the special verdict forms asked the jury whether defendant properly submitted home loan applications from nonminorities with financial qualifications similar to plaintiffs' and those loans were approved by lenders. The jury's affirmative response to this question helped establish plaintiffs' prima facie case, and it was supported by substantial, if somewhat scattered, evidence. But even if the evidence was lacking in this respect, plaintiffs established a prima facie case quite independent of question three. "The central fact largely ignored by the mortgage broker is that it *could have found the Greens a loan*. Ninety percent of 'B' lenders and 100 percent of 'C' lenders would have made a loan. The Greens testified that they put no restrictions on the level of lender--they simply wanted a loan under the best terms they could get. ... The explanation that was given--that the Greens artificially restricted the loan search to 'A' lenders--was simply rejected as untrue by the jury. ... [T]he jury's verdict does not reflect merely the outcome of an artificial game of legal hot potato, but the valid and un rebutted possibility of race discrimination." (28 C.A.4th 698, 699.) (See *Jackson v. Superior Court* (1994) 30 C.A.4th 936, 36 C.R.2d 207, supra, §899.)

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8 Witkin Sum. Cal. Law Const Law § 908

[§ 908] Housing Discrimination.

(1) *Discrimination Against Children.* In *Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 736, 180 C.R. 496, 640 P.2d 115, 12 Summary (10th), *Real Property*, §683, discrimination against children by the lessor of a private apartment complex was held a violation of the Unruh Civil Rights Act. And in *O'Connor v. Village Green Owners Assn.* (1983) 33 C.3d 790, 794, 191 C.R. 320, 662 P.2d 427, 12 Summary (10th), *Real Property*, §116, the *Marina Point* holding was applied to prevent a condominium homeowners association from engaging in similar discrimination. (See *San Jose Country Club Apartments v. Santa Clara* (1982) 137 C.A.3d 948, 952, 187 C.R. 493 [ordinance prohibiting discrimination against children was upheld on authority of *Marina Point*]; *Sunrise Country Club Assn. v. Proud* (1987) 190 C.A.3d 377, 380, 382, 235 C.R. 404, *Real Property*, §116 [Act prohibits only unreasonable, arbitrary, or invidious discrimination; condominium rules dividing development into "Adult" and "Family" regions were not unreasonable or arbitrary and were valid, although outright prohibition of sale to owners with children was invalid]; *Bliler v. Covenant Control Com.* (1988) 205 C.A.3d 18, 26, 252 C.R. 50; *Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 C.A.3d 1012, 1018, 261 C.R. 875; 94 Harv. L. Rev. 1829; 71 Cal. L. Rev. 1234; 15 Cal. Western L. Rev. 219; 11 Loyola L.A. L. Rev. 609; 17 San Diego L. Rev. 403; 19 Santa Clara L. Rev. 21.)

The Legislature subsequently clarified the decisions in *Marina Point* and *O'Connor*, by adding C.C. 51.2 and 51.3 to the Unruh Civil Rights Act. (C.C. 51.2(b).) Under C.C. 51.2(a), C.C. 51 must "be construed to prohibit a business establishment from discriminating in the sale or rental of housing based upon age."

(1) *Senior Housing.* Special rules apply to senior housing:

(a) Where accommodations are designed to meet the physical and social needs of senior citizens, they may be preserved as such pursuant to C.C. 51.3, unless preempted by the federal Fair Housing Act amendments regarding discrimination on the basis of familial status. Accommodations constructed before February 8, 1982, that meet the criteria for senior citizen housing specified in C.C. 51.3, may be established and preserved as such without the development "being designed to meet the physical and social needs of senior citizens." (C.C. 51.2(a)) A housing development for senior citizens constructed on or after January 1, 2001, is presumed to be designed to meet the needs of senior citizens if it includes statutorily prescribed elements. (C.C. 51.2(d).)

(b) "The covenants, conditions, and restrictions and other documents or written policy shall set forth the limitations on occupancy, residency, or use on the basis of age." (C.C. 51.3(c).) However, the limitations must not be more exclusive than the following:

(1) One resident in each "dwelling unit" may be required to be a "senior citizen"; other residents may be a "qualified permanent resident," a "permitted health care resident," or a person under 55 years who is exempted because of long-term residency. (C.C. 51.3(c); for definitions, see C.C. 51.3(b)(1) ["qualifying resident" or "senior citizen"], C.C. 51.3(b)(2) ["qualified permanent resident"], C.C. 51.3(b)(4) ["senior citizen housing development"], C.C. 51.3(b)(5) ["dwelling unit" or "housing"], C.C. 51.3(b)(6) ["cohabitant"], C.C. 51.3(b)(7) ["permitted health care resident"]; on grandfathering in of long-term residents, see C.C. 51.3(h), 51.4(b).)

(2) Temporary residency of a person less than 55 years of age for not less than 60 days in any calendar year. (C.C. 51.3(d).)

(3) The death, dissolution of marriage, hospitalization, or other prolonged absence of the qualifying resident cannot preclude any qualified permanent resident from continuing residency. (C.C. 51.3(e).)

(4) The development must have been developed and initially put to use as a senior citizen housing development or have been substantially rehabilitated or renovated and immediately used for senior citizen housing. Developments constructed before January 1, 1985, are exempt. (C.C. 51.3(f).)

These statutes do not apply to Riverside County. (See C.C. 51.2(c), 51.3(k), 51.4(e); for senior housing in Riverside County, see C.C. 51.10, 51.11.) (On age-based preferences generally, see *infra*, §909.)

(2) *Mobilehomes*. The management of a mobilehome park may require a prospective purchaser to comply with rules and regulations "limiting residency based on age requirements for housing for older persons," provided these rules and regulations comply with the federal Fair Housing Act. (C.C. 798.76; on Fair Housing Act, see *supra*, §851.)

In *Schmidt v. Superior Court* (1989) 48 C.3d 370, 383, 256 C.R. 750, 769 P.2d 932, the court upheld the validity of a regulation limiting residence in the park to persons 25 years or older. In concluding that C.C. 798.76 was not in conflict with the antidiscrimination policy of the Unruh Civil Rights Act, the court reviewed the legislative history and came to the following conclusion on legislative intent: "[A]lthough A.B. 3909, as originally introduced, proposed a modification of section 798.76 which would have imposed the same limitations in mobilehome parks as in all other housing, the Legislature eliminated that proposed modification of section 798.76 in the course of its deliberation and instead adopted a comprehensive legislative package which defined 'housing' to specifically exclude mobilehome developments. In light of this history, we think that it is inescapable that one of the compromises reached in the legislative process was to exclude mobilehome parks--the one category of housing as to which there was an already existing statutory provision--from the reach of the new Unruh Act provisions." (48 C.3d 387.) (See *Colony Cove Associates v. Brown* (1990) 220 C.A.3d 195, 199, 203, 269 C.R. 234 [mobilehome park rule limiting residence to persons 55 years or older was not invalid under federal Fair Housing Amendments Act of 1988; although federal statute generally prohibits discrimination in housing on basis of "familial status," exception is allowed for "housing for older persons"].)

(3) *Housing for Homeless Youth*. Housing for homeless youth is authorized and does not constitute unlawful age discrimination, notwithstanding other provisions of law and local housing or age discrimination ordinances. (See *Govt.C. 11139.3*.)

(4) *Landlord Discrimination Against Homosexuals*. Under the reasoning of *Marina Point*, homosexuals are protected under the Act from arbitrary discrimination in rental of housing. (*Hubert v. Williams* (1982) 133 C.A.3d Supp. 1, 3, 184 C.R. 161.)

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5. (New) Marital Status Discrimination.

8 Witkin Sum. Cal. Law Const Law § 908A

[§ 908A] (New) Marital Status Discrimination.

In *Koebke v. Bernardo Heights Country Club* (2005) 36 C.4th 824, 31 C.R.3d 565, 115 P.3d 1212, plaintiffs, a lesbian couple who had registered as domestic partners, claimed that defendant country club's refusal to extend to them the same benefits it extends to married members constituted marital status discrimination under the Unruh Civil Rights Act, C.C. 51. The trial court granted defendant summary judgment and the Court of Appeal affirmed. *Held*, reversed. Defendant is not entitled to summary judgment on the marital status discrimination claim. Under the Domestic Partner Act, effective in 2005, plaintiffs must be treated the same as spouses for purposes of the Unruh Civil Rights Act. Further, although defendant's spousal benefit policy did not constitute impermissible marital status or sexual orientation discrimination on its face prior to enactment of the Domestic Partner Act, plaintiffs adduced sufficient evidence of unequal application of defendant's policy to allow them to proceed under the Unruh Civil Rights Act on that theory.

(a) Under the Domestic Partner Act, *Family C. 297 et seq.*, registered domestic partners have the same rights and protections granted to spouses. The Act is to be "construed liberally." It uses the broadest terms possible to grant domestic partners the same rights and responsibilities as spouses in specified areas of the law. (36 C.4th 838.)

(b) Under the Unruh Civil Rights Act, all persons within state jurisdiction "no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." The protections of the Act are not confined to the enumerated categories; these categories are illustrative. (36 C.4th 839.) In *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R. 614, 805 P.2d 873, the court created a three-part framework for determining whether a future claim of discrimination involving a category not enumerated in C.C. 51 should be cognizable under the Act. (36 C.4th 840.) Thus, the court must consider the following:

(1) *Whether marital status involves personal characteristics.* Like the categories listed in the statute and those added by judicial construction, marital status represents "traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition." (36 C.4th 842.) Although there is a strong public policy favoring marriage, the Legislature has granted legal recognition comparable to marriage to registered domestic partners "both procedurally and in terms of the substantive rights and obligations granted to and imposed upon the partners, which are supported by

policy considerations similar to those that favor marriage." (36 C.4th 845.) Thus, "permitting a business to discriminate against registered domestic partners by denying them benefits or services it extends to spouses violates the comparable public policy favoring domestic partnership" and "is a type of discrimination that falls within the ambit of the Act." (36 C.4th 846.)

(2) *Whether the restriction of benefits to married couples serves a legitimate business interest.* "Registered domestic partners occupy a legal status that, like marital status, is formalized, public and verifiable." Hence, a business is not required to intrude into a couple's private life to determine whether the union has "a sufficient assurance of permanence and legal unity of interests to extend benefits formerly reserved for spouses." And, because registered domestic partners have legal rights and responsibilities, businesses extending them benefits "have the same assurance against loss or fraud" that they would have in the case of spouses. Further, while promoting a "family-friendly" environment "may be a legitimate business interest, that interest is not furthered by excluding families formed through domestic partnership." (36 C.4th 847.)

(3) *The consequences of allowing plaintiffs' claim to proceed.* Because this ruling affects only *registered* domestic partners, it would not permit other unmarried couples to claim discrimination, and it would effectuate "the Legislature's intent expressed in the Domestic Partner Act to create substantial legal equality between registered domestic partners and spouses." (36 C.4th 848.)

(c) Discrimination "based on marital status implicates discrimination against homosexuals who, as the Legislature recognized in the Domestic Partner Act, have been subject to widespread discrimination. ... [O]ne purpose served by expanding the rights of domestic partners is to combat such discrimination." (36 C.4th 849.)

(d) Before the effective date of the Domestic Partner Act, legitimate business interests facially justified defendant's spousal benefit policy. Defendant sought to strike a balance between attracting and maintaining members and preventing overutilization of its facilities. Defendant "could reasonably have concluded that these goals would best be served by extending certain benefits to families created through marriage but not to unmarried couples and individuals." (36 C.4th 851.) Prior to the Domestic Partner Act, a marriage license was the clearest method by which defendant "could distinguish among its members in order to extend benefits to some, but not to others, and achieve its larger goals." Defendant's failure to make finer distinctions than married and unmarried, "even though it may have resulted in some degree of unfairness to committed couples like plaintiffs, did not on its face constitute impermissible marital status discrimination." (36 C.4th 852.)

(e) Likewise, prior to the current Domestic Partner Act, defendant's spousal benefit policy did not facially violate the proscription in the Unruh Civil Rights Act against sexual orientation discrimination. The language of the Unruh Civil Rights Act suggests that it protects against *intentional* acts of discrimination in providing public accommodations. (36 C.4th 853.) However, *evidence* of disparate impact can be admitted in Unruh Civil Rights Act cases where it is probative of intentional acts of discrimination. Here, there is evidence that defendant did not apply its facially neutral policy in an impartial manner, and that defendant's directors were motivated by animus towards plaintiffs because of their sexual orientation. Thus, plaintiffs should be allowed to try to establish that defendant's spousal benefit policy was discriminatorily applied in violation of the Unruh Civil Rights Act prior to 2005. (36 C.4th 854.)

One justice dissented from the majority's conclusion that legitimate business interests facially justified defendant's spousal benefit policy prior to the effective date of the current *Domestic Partner Act*. (36 C.4th 855.)

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6. (New) Sexual Orientation Discrimination.

8 *Witkin Sum. Cal. Law Const Law* § 908B

[§ 908B] (New) Sexual Orientation Discrimination.

In *North Coast Women's Care Med. Group v. Superior Court* (2008) 44 C.4th 1145, 81 C.R.3d 708, 189 P.3d 959, plaintiff, a lesbian, after undergoing fertility treatments at defendant medical group, sought intrauterine insemination. Two group doctors refused to perform the procedure for religious reasons, and two other group doctors, who had no religious objection, were not licensed to perform the procedure. Plaintiff was referred to another doctor outside the practice. Plaintiff sued the group and the objecting doctors for sexual orientation discrimination in violation of the Unruh Civil Rights Act, C.C. 51. The court concluded that the rights of religious freedom and free speech, as guaranteed by both the U.S. and California Constitutions, did not exempt the medical group's physicians from complying with the Act.

(a) The U.S. Supreme Court, in *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1988) 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753, text, §523, held that "a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with the law is contrary to the objector's religious beliefs." This holding was applied in *Catholic Charities of Sacramento v. Superior Court* (2004) 32 C.4th 527, 10 C.R.3d 283, 85 P.3d 67, text, §528, to reject a claim by an employer affiliated with the Roman Catholic Church that it was exempt from complying with the *Women's Contraceptive Equity Act*. (44 C.4th 1155.)

(b) *Smith* is also applicable here. The Unruh Civil Rights Act is a "neutral and valid law of general applicability." It requires business establishments to provide "full and equal accommodations, advantages, facilities, privileges, or services" to all persons notwithstanding their sexual orientation. Hence, the First Amendment right to the free exercise of religion does not exempt defendants from conforming their conduct to the Act's antidiscrimination requirements, even if compliance poses an incidental conflict with their religious beliefs. (44 C.4th 1156.)

(c) *Smith* does not control a challenge under the California Constitution. However, even under a strict scrutiny test, defendants' claim of exemption fails. The Unruh Civil Rights Act "furtheres California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal." (44 C.4th 1158.)

On marriage between persons of the same sex, see Supp., supra, §226A.

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8 Witkin Sum. Cal. Law Const Law § 909

[§ 909] Age-Based Preferences.

In *Starkman v. Mann Theatres Corp.* (1991) 227 C.A.3d 1491, 278 C.R. 543, plaintiffs, who were neither adults of 60 or over nor children of 12 or under, paid the \$ 6 general admission price for tickets at defendant's theatre. They then brought this action alleging that the theater's pricing policy of 50% discount to senior citizens and children was a violation of the Unruh Civil Rights Act. *Held*, summary judgment for defendant affirmed.

(a) In *Koire v. Metro Car Wash* (1985) 40 C.3d 24, 219 C.R. 133, 707 P.2d 195, the court found sex-based discounts illegal, but fully approved age-based discounts, pointing out that differential treatment of children and adults was supported by public policy and federal and state legislation. (227 C.A.3d 1498.)

(b) "Establishing different price rates for seniors and children in an amusement business does not perpetuate irrational stereotypes. The pricing discounts are aimed directly at encouraging attendance at a family-oriented business. Such classifications recognize that without such incentives these populations may be totally excluded from enjoying some of the pleasures of our society. Paying for the necessities of life frequently strains the pocketbooks of many Americans. Without discount tickets, a family may never be able to afford and enjoy a baseball game, amusement parks, Disneyland, the zoo, museums, campgrounds, state fairs, parks or a movie. Making these American pastimes affordable is beneficial to us all." (227 C.A.3d 1499.)

(c) "All members of society regardless of their sex, race, religion or national origin will, in the normal course of events, be members of each class entitled to the discount. This is neither arbitrary, discriminatory nor unfair." (227 C.A.3d 1501.)

Koire and *Starkman* were followed in *Sargoy v. Resolution Trust Corp.* (1992) 8 C.A.4th 1039, 10 C.R.2d 889, which involved an action against a savings and loan that offered higher interest rates to senior citizens. *Held*, age-based preferences based on a strong public policy do not violate the *Unruh Civil Rights Act*. (8 C.A.4th 1043.) The opinion adds two instructive comments:

(a) "Although most states have public accommodations statutes similar to the Unruh Act and comparable federal

legislation has also been enacted, no case law from any other jurisdiction has been found which prohibits the favorable treatment of senior citizens." (8 C.A.4th 1046.)

(b) "Should this court reverse the trial court's decision, every discount or preference offered senior citizens would be placed in jeopardy by eliminating countless socially beneficial practices. Such a result would have a profound impact on the quality of life enjoyed by senior citizens throughout the state. The fundamental purpose of the Unruh Act is the elimination of antisocial discriminatory practices--not the elimination of socially beneficial ones." (8 C.A.4th 1049.) (On housing reserved for seniors or homeless youths, see *supra*, §908.)

West's Key Number Digest, Civil Rights k.106

SUPPLEMENT: [This section is current through the latest supplement]

See *Pizarro v. Lamb's Players Theatre* (2006) 135 C.A.4th 1171, 1174, 37 C.R.3d 859 [offering discount to baby boomers to attend production about that generation did not involve arbitrary class-based generalization prohibited by Unruh Civil Rights Act].



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8 Witkin Sum. Cal. Law Const Law § 910

[§ 910] Classification Based on Marital Status.

In *Beatty v. Truck Ins. Exchange* (1992) 6 C.A.4th 1455, 8 C.R.2d 593, the issue was whether an insurer violated the Unruh Civil Rights Act when it refused to offer a couple cohabiting in a homosexual relationship the same insurance policy and at the same premium that it regularly offered to married couples. Plaintiffs had lived together for 18 years, owned a home as joint tenants, maintained a joint credit card account and a joint bank account, jointly owned two cars and the furnishings in their home, and had wills and life insurance policies naming each other as primary beneficiary. They also had joint homeowners and automobile insurance policies issued by defendant. However, to provide extended additional protection, they applied to defendant for a joint umbrella liability insurance policy in the amount of \$ 1 million. Defendant refused to issue the policy for a single premium because these policies are issued only to married couples. Instead, defendant offered plaintiffs separate umbrella policies, each with its own premium. Plaintiffs refused the offer, and filed an action seeking damages and injunctive and declaratory relief, contending that defendant's conduct was an arbitrary and unlawful discrimination. *Held*, judgment for defendant on demurrer affirmed.

(a) This case is similar to *Hinman v. Department of Personnel Administration* (1985) 167 C.A.3d 516, 213 C.R. 410, *supra*, §785, an action brought by the same plaintiffs. In *Hinman*, the court rejected plaintiffs' claims, pointing out that the insurer's denial of coverage was not on the basis of sexual orientation but on the basis of marital status, and holding that the classification was valid. (6 C.A.4th 1455.) Plaintiffs argued that, because *Hinman* was decided on the constitutional Equal Protection Clause, the decision was not controlling on the issue of interpretation of the Act. But the same conclusion must be reached on either theory.

(b) To the extent that plaintiffs are treated in a manner different from the treatment of a married couple, it is because they are not married, not because they are homosexuals. (6 C.A.4th 1460, 1461.)

(c) The Act has been extended to include categories not expressly stated in C.C. 51 and 52; but no court has extended it to claimed discrimination on the basis of marital status. (6 C.A.4th 1462.) And in *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R. 614, 805 P.2d 873, *infra*, §912, the court made it clear that future expansion of prohibited categories should be carefully weighed to insure a result consistent with the legislative intent. (6 C.A.4th 1462.) To expand the Act to include "marital status" would be contrary to the strong policy in this state in favor

of marriage. (6 C.A.4th 1462.)

(d) There are many statutes in which the Legislature has included "marital status" in antidiscrimination legislation. "Clearly the Legislature knows how to designate marital status as a prohibited category of discrimination when inclined to do so." (6 C.A.4th 1463.)

(e) C.C. 51 states that the section must not be construed to confer any right or privilege on a person that is applicable alike to persons of every sex, color, etc. (See supra, §898.) This indicates that the Act was not intended to create a right of insurance access so long as the insurer's policy is applicable alike to all persons regardless of sex, etc. (6 C.A.4th 1463.)

(f) The Act prohibits "arbitrary" discrimination; but there is nothing arbitrary about defendant's issuance of joint umbrella policies only to married persons. "Given the legal unity of interest and the shared responsibilities attendant upon a marriage, an insurer could reasonably conclude there is no significant risk in covering both an insured and his or her spouse with a joint policy for a single premium. With regard to unmarried couples of whatever sexual orientation, an insurer could conclude the relationship lacks the assurance of permanence necessary to assess with confidence the risks insured against in a joint umbrella policy." (6 C.A.4th 1464.) "Equally important, the shared responsibilities and the legal unity of interest ... provides a fair and reasonable means of determining eligibility for services or benefits." (6 C.A.4th 1464.)

(g) "[T]o assess the risk with regard to unmarried individuals, the insurer would necessarily be required to undertake a 'massive intrusion' ... into the private lives of applicants--e.g., inquire into their sexual fidelity and emotional and economic ties. ... We see no reason why an insurer, any more than an administrative agency, should be forced to engage in such inquiry, which could only lead to inconsistent results and predictably to allegations of discriminatory treatment by the insurer." (6 C.A.4th 1465.)

(h) What plaintiffs seek to achieve by this litigation is that both defendant and this court treat them as if they were in fact married. This result would not only be contrary to the strong policy favoring marriage but would ignore the fact that de facto couples are not generally entitled to the benefits afforded to married couples. "[M]arried couples receive special consideration in a number of areas not available to unmarried individuals, including the right to bring a wrongful death action if a third party kills the other spouse ... , the right to sue for loss of consortium and negligent infliction of emotional distress ... , the marital communications privilege ... , and community property laws, including the right to divide community property and to seek spousal support on the termination of marriage." (6 C.A.4th 1466.)

(i) In the final analysis, plaintiffs' quarrel is with the Legislature. They may achieve the reform they seek only by attacking C.C. 4100 (now *Family C. 300*), which defines marriage as a civil contract "between a man and a woman." (6 C.A.4th 1466.) (On applicability of Fair Employment and Housing Act to marital status discrimination, see *infra*, §941.)

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 51, as amended in 2005, now prohibits discrimination based on marital status.



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8 Witkin Sum. Cal. Law Const Law § 911

[§ 911] Nonsmokers.

In *King v. Hofer* (1996) 42 C.A.4th 678, 49 C.R.2d 719, plaintiff brought an action under the Unruh Act based on defendant restaurant owner's alleged discrimination against nonsmokers. *Held*, applying the test enunciated in *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R.2d 614, 805 P.2d 873, *infra*, §912, summary judgment for defendant affirmed. Nonsmokers are not a protected class under the Act.

(a) Nonsmoking is not an immutable "physical attribute" that carries a negative connotation in the usual social setting. Nor is it a "personal belief," equatable with religion, the only express "belief" category in the Act. (42 C.A.4th 683.)

(b) There is no authority or history suggesting that the Act was designed to deal with health and safety in public accommodations. *In re Cox* (1970) 3 C.3d 205, 90 C.R. 24, 474 P.2d 992, *supra*, §899, is distinguishable, because *Cox* dealt with protection of persons having an "unconventional" appearance, while the nonsmokers involved here have a "conventional" appearance. (42 C.A.4th 683.)

(c) Discrimination against nonsmokers serves legitimate business interests. By so discriminating, the restaurant is complying with local ordinances, maintaining order, and protecting its reputation, all legitimate business interests. (42 C.A.4th 684.)

(d) Making nonsmokers a protected class would place restaurants in a bind. Discrimination against them would be both required under local ordinances and prohibited under the Act. (42 C.A.4th 684.)

(e) Finally, granting protected status to nonsmokers would divide the entire world into smokers and nonsmokers, categories that are often difficult to recognize. (42 C.A.4th 684.) (On accommodation under Fair Employment and Housing Act of employee with respiratory sensitivity to tobacco smoke, see *Fresno v. Fair Emp. & Housing Com.* (1991) 226 C.A.3d 1541, 277 C.R. 557, *infra*, §937.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 912

[§ 912] Economic Criteria.

In *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R. 614, 805 P.2d 873, plaintiffs, female heads of low income families whose income consisted of public assistance benefits, filed a representative action against defendant owners and operators of apartment buildings, challenging their minimum income policy as economic and sex discrimination. Defendants had an express written policy that prospective tenants must have a monthly income equal to or greater than three times the rent charged. Plaintiffs alleged that they could afford to pay the rent but did not have incomes equal to three times the rent; and they contended that the policy was grounded on unsubstantiated assumptions and had a disparate impact on women. The trial court gave judgment for defendants on demurrer. *Held*, affirmed.

(a) *Economic discrimination.*

(1) *Prior decisions of Supreme Court.* In *re Cox* (1970) 3 C.3d 205, 90 C.R. 24, 474 P.2d 992, *supra*, §899, *Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 180 C.R. 496, 640 P.2d 115, *supra*, §898, and other cases construed the Unruh Act to apply to several classifications not expressed in the statute. (52 C.3d 1155.) Nevertheless, the Legislature "has continued to pay close attention to the specified categories of discrimination," and its addition of new categories reflects the continued importance of the categories in interpreting the Act. (52 C.3d 1158, 1159.)

(2) *Statutory language.* The doctrine of *ejusdem generis* allows the court to reconcile the plain language of the statute with the holdings of prior cases and the Legislature's reactions. C.C. 51 refers to the freedom and equality of all persons and then illustrates the reference with the specific categories of race, color, religion, etc. "The categories involve personal as opposed to economic characteristics--a person's geographical origin, physical attributes, and personal beliefs. Conspicuously absent from the list is any reference to financial or economic status, although the Legislature could not have been unaware throughout the history of the Unruh Act that businesses make charges for goods and services and impose financial conditions on access to their establishments." (52 C.3d 1160.) Moreover: "The parties have cited no case nor has our research disclosed any in which distinctions based on financial or economic status (as opposed to personal characteristics) have been subjected to scrutiny under the Act. Although most states have public accommodations statutes similar to the Unruh Act and comparable federal legislation has also been enacted, there appears to be no case law from any jurisdiction supporting the proposition that economic distinctions are proscribed."

(52 C.3d 1161.)

(3) *Legitimate business interest.* Business establishments have an obvious and important interest in obtaining full and timely payment for the goods and services they provide, and California appellate cases have recognized that this interest may justify limitations on consumer access to public accommodations. (52 C.3d 1162, 1163.) The minimum income policy is similar in purpose and effect to stated prices or payment terms. "In pursuit of the objective of securing payment, a landlord has a legitimate and direct economic interest in the income level of prospective tenants, as opposed to their sex, race, religion, or other personal beliefs or characteristics. For nearly all tenants, current income is the source of the monthly rental payment. When a tenant ceases paying rent during the term of the tenancy, the landlord must resort to legal process to obtain possession of the premises and to collect any back rent that may be due." (52 C.3d 1163.) The policy of screening out prospective tenants who are likely to default assumes that, at some ratio of rent to income, the burden of paying rent along with other living expenses will impose a hardship and result in default. It is not arbitrary in the way that race and sex discrimination are arbitrary; "it is based on the rational economic interest of the landlord to minimize defaults and maintain the solvency of his business establishment." (52 C.3d 1164.)

(4) *Consequences of allowing claims for economic discrimination.* Plaintiffs contend that the policy is arbitrary because it "stereotypes" them instead of treating them as individuals. But their proposed interpretation would involve the courts in a multitude of "microeconomic decisions" that they are ill equipped to make; the trial "would devolve into a battle of economic studies and experts, with each side arguing from statistical and other evidence in support of its favorite criteria." (52 C.3d 1166.) Moreover, plaintiffs' argument is not one readily confined to landlords and tenants; many other businesses, including lending institutions and retail and wholesale sellers, use minimum income policies as well as other financial criteria to make risk-oriented decisions regarding what customers to deal with and on what terms. (52 C.3d 1167.) For these reasons, the economics of credit practices have "traditionally been left to the guidance of market forces or to specific legislative and administrative action designed to address particular grievances." (52 C.3d 1167.) The individualized determinations proposed by plaintiffs "may have pernicious effects on the antidiscrimination policy of the Unruh Act itself." (52 C.3d 1168.) Instead of encouraging landlords and other businesses to rely on "criteria that are race-and sex-neutral" in making business decisions, plaintiffs would challenge the criteria on a case-by-case basis, "thereby inducing landlords to abandon such criteria in favor of subjective, individualized decisions." These evaluations might serve to disguise and thereby promote the very kinds of invidious discrimination that the Act prohibits. (52 C.3d 1169.)

(b) *Sex discrimination based on disparate impact on women.*

(1) *Allegations of disparate impact.* Plaintiffs alleged that a disproportionate number of families receiving public assistance are headed by women; that women generally have lower average incomes than men; that defendants' minimum income policy excludes a disproportionate number of female-headed households from the pool of applications to whom defendants will rent units; and that this constitutes sex discrimination because of an alleged disparate impact. (52 C.3d 1170.)

(2) *Nature of disparate impact test.* The disparate impact test, as developed in federal law in cases like *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, supra, §869, and *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733, supra, §870, allows a plaintiff in certain contexts to establish a prima facie case of discrimination by showing that a defendant's policies or practices have an adverse impact on a statutorily protected class of persons such as women, Blacks, and Hispanics. The test originated in, and continues to apply, in employment discrimination cases. (52 C.3d 1170, 1171.) California appellate courts have applied the test under the Fair Employment and Housing Act in employment discrimination cases like *Ibarbia v. Regents of Univ. of Calif.* (1987) 191 C.A.3d 1318, 237 C.R. 92, infra, §923, and *San Francisco v. Fair Emp. & Housing Com.* (1987) 191 C.A.3d 976, 236 C.R. 716, infra, §923. (52 C.3d 1171.)

(3) *Disparate impact test does not apply to Unruh Civil Rights Act.* Nothing in the language or history of the Unruh Civil Rights Act indicates a legislative intent to use the test. The language of the Act suggests that only *intentional* acts

of discrimination are covered; and the damages provisions reveal a desire to punish intentional and morally offensive conduct. (52 C.3d 1172.) Moreover, the Unruh Act is part of a large body of federal and state legislation dealing with public accommodations, and no case has been found in which a disparate impact test was used in applying any of these statutes. (52 C.3d 1173.)

(c) *Conclusion*. "[A] plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act. A disparate impact analysis or test does not apply to Unruh Act claims. In so holding, we do not preclude the admission of relevant evidence of disparate impact in Unruh Act cases on proper foundation and subject to the general rules of evidence. Because such evidence may be probative of intentional discrimination in some cases, a blanket rule of exclusion cannot be justified. In addition, we express no view as to whether a disparate or adverse impact test applies to housing, employment, or other discrimination claims under the FEHA or any other provision of law." (52 C.3d 1175.)

Two justices dissented in two opinions. (52 C.3d 1176.) (See 19 *Pepperdine L. Rev.* 230; 29 *Western State L. Rev.* 1 [Unruh Act after *Harris*].)

In *Roth v. Rhodes* (1994) 25 C.A.4th 530, 30 C.R.2d 706, defendant medical building operators had a policy of leasing offices only to medical doctors. Plaintiff, a podiatrist, brought the present action, alleging that defendants' refusal to lease to him constituted a violation of the Unruh Act. The trial judge granted defendants' motion for summary adjudication. *Held*, affirmed.

(a) A policy or classification that is otherwise permissible may nevertheless be illegal if it is merely a device to accomplish prohibited discrimination. However, there is no hint that defendants had any ulterior purpose, or that their policy was applied in light of plaintiff's race, sex, religion, or other personal characteristic. (25 C.A.4th 538.)

(b) The Act reaches discrimination involving "personal as opposed to economic characteristics--a person's geographical origin, physical attributes, and personal beliefs." Moreover, legitimate business interests may justify limitations on consumer access to public accommodations. (25 C.A.4th 539, quoting *Harris, supra*.) Here, defendants had an obvious legitimate business interest. "If operators of an office building perceive a niche in the market for a particular type of tenant, no useful purpose is to be served by our interfering with their economic decision to so limit the tenancy." (25 C.A.4th 539.) (On use of economic criteria for determining age discrimination under Fair Employment and Housing Act, see *infra*, §935.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 913

[§ 913] Retaliatory Discrimination.

In *Vaughn v. Hugo Neu Proler Int.* (1990) 223 C.A.3d 1612, 1617, 1619, 273 C.R. 426, the court held that plaintiff's claim under the Unruh Civil Rights Act stated a cause of action. Defendants had excluded her from their business because of her previous sex discrimination lawsuit against them.

In *Gayer v. Polk Gulch* (1991) 231 C.A.3d 515, 282 C.R. 556, plaintiff filed a complaint against defendant, a public drinking establishment, for violation of the Act. He alleged that defendant initially refused to serve him and later permanently excluded him in retaliation for a previous discrimination suit he had instituted against defendant. *Held*, judgment for defendant on demurrer affirmed.

(a) The Act has been held to prohibit discrimination based on several classifications not specifically enumerated in the statute. (231 C.A.3d 520, 521, citing *Marina Point, Ltd. v. Wolfson* (1982) 30 C.3d 721, 180 C.R. 496, 640 P.2d 115, *supra*, §898; *In re Cox* (1970) 3 C.3d 205, 217, 90 C.R. 24, 474 P.2d 992, *supra*, §899; and *Vaughn*.) But *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R. 614, 805 P.2d 873, *supra*, §912, decided after *Vaughn* was filed, concluded that coverage of the Act should be limited to discrimination based on personal characteristics. (231 C.A.3d 522.)

(b) "Appellant's argument is not completely without merit. The Act might indeed offer better protection for victims of class-based discrimination if an action for retaliatory discrimination were added to the list of remedies currently available under the Act." (231 C.A.3d 524.) However, the Legislature has not specifically included this protection. (231 C.A.3d 524.) And "[w]e refrain from amending the Act to so expand coverage thereunder, whether that expansion is based on individualized discrimination, a never before protected class of litigants, or on asserted needs of the statutory scheme." (231 C.A.3d 525.)

A dissenting justice disagreed, contending that the majority misread *Harris*, and that the holding in *Vaughn* should control. (231 C.A.3d 526, 527.) (See *Scripps Clinic v. Superior Court* (2003) 108 C.A.4th 917, 934, 134 C.R.2d 101 [following *Gayer*; retaliatory discrimination by medical group by terminating medical care of patients who file lawsuits against its doctors is not kind of discrimination covered by Act]; on retaliatory discrimination under Fair Employment

and Housing Act, see *infra*, §940.)

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8 *Witkin Sum. Cal. Law Const Law* § 914

[§ 914] Enforcement.

(1) *In General.* A private action may be brought for actual damages, punitive damages (up to three times actual damages, but not less than \$ 4000), and attorneys' fees, for each violation of C.C. 51 (see *supra*, §898), C.C. 51.5 (see *supra*, §906), or C.C. 51.6 (see *supra*, §905). (C.C. 52(a); see C.C. 52(h) ["actual damages" means special and general damages]; on action for damages for prohibited violence, see C.C. 52(b), *supra*, §895.)

The action may be brought in any court of competent jurisdiction, including small claims court, if the amount sought does not exceed its jurisdictional limits. (C.C. 52.2.) (For jury instructions relating to Unruh Act violations, see BAJI, No. 7.90 et seq.)

(2) *Preventive Relief for Discriminatory Conduct.* The Attorney General, a district or city attorney, or the person aggrieved by prohibited conduct may bring a civil action in the appropriate court by filing a complaint (a) signed by the officer or aggrieved person, (b) setting forth facts pertaining to the conduct, and (c) requesting preventive relief, including an application for a permanent or temporary injunction, a restraining order, or other order against the person or persons responsible for the conduct. (C.C. 52(c).)

A nonprofit corporation organized to secure equal housing opportunities is not an "aggrieved person" entitled to seek relief under C.C. 52(c). The term "person aggrieved," as used in the statute, refers to the actual victims of the discriminatory acts. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 C.A.3d 1377, 1384, 1386, 271 C.R. 99.) However, a nonprofit corporation may have standing under the Unfair Competition Statute (see *B. & P.C. 17204*, 13 *Summary* (10th), *Equity*, §124) to seek injunctive relief to compel enforcement of the *Unruh Act*. (221 C.A.3d 1389, 1393.)

(3) *Intervention by State.* The Attorney General or a district or city attorney may intervene whenever an action has been commenced in any court seeking relief from the denial of equal protection under the Fourteenth Amendment "on account of race, color, religion, sex, national origin, or disability." Application to intervene must be timely and the intervening attorney must certify that the case is of "general public importance." On intervention, the state is entitled to the same relief as if it had instituted the action. (C.C. 52(d).)

(4) *Cumulative Remedies*. Actions under C.C. 52 are independent of other remedies or procedures available to an aggrieved party. (C.C. 52(e); see *Wolitarisky v. Blue Cross of Calif.* (1997) 53 C.A.4th 338, 61 C.R.2d 629 [C.C. 52(e) does not prevent arbitration of claim arising under Act, where parties agree to submit all disputes regarding insurer's decisions to arbitration].)

A person claiming to be aggrieved by an alleged unlawful practice in violation of C.C. 51 (supra, §898) or C.C. 51.7 (supra, §895) may also file a verified complaint with the Department of Fair Employment and Housing, pursuant to Govt.C. 12948 (infra, §941). (C.C. 52(f).)

Discrimination may be a *defense* in an unlawful detainer action. (See *Abstract Inv. Co. v. Hutchinson* (1962) 204 C.A.2d 242, 248, 22 C.R. 309, 12 Summary (10th), *Real Property*, §682.)

(5) *Matters Not Affected*. C.C. 52 does not (a) require the alteration, repair, etc. of any new or existing structure beyond that otherwise required by law; or (b) augment, restrict, or alter in any way the authority of the State Architect to require construction, etc. (C.C. 52(g).)

(6) *Immigration Status Is Irrelevant*. A person's immigration status is irrelevant to the issue of liability for purposes of enforcing state labor, employment, civil rights, and employee housing laws. Thus, unless an inquiry into a person's immigration status is necessary to comply with federal immigration law, no such inquiry may be made to enforce those state laws. (C.C. 3339, Govt.C. 7285, *Health & Saf.C. 24000*, *Lab.C. 1171.5*; see 34 *McGeorge L. Rev.* 435 [discussing statutes].)

West's Key Number Digest, Civil Rights k.448 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. Intentional discrimination must be proved to recover damages under C.C. 52. (*Gunther v. Lin* (2006) 144 C.A.4th 223, 232, 234, 50 C.R.3d 317 [Legislature's addition of C.C. 51(f) in 1992 did not change judicial interpretation of triggering language of C.C. 52 made in *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 278 C.R. 614, 805 P.2d 873, text, §912].) However, to state a claim under C.C. 52, a plaintiff need not demonstrate that he or she affirmatively requested nondiscriminatory treatment and was refused. (*Angelucci v. Century Supper Club* (2007) 41 C.4th 160, 168, 59 C.R.3d 142, 158 P.3d 718 [involving price discounts for women at night club].)

See 36 *McGeorge L. Rev.* 661 [California disability antidiscrimination law--damages and notice].



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a. Nature and Purpose of Act.

8 *Witkin Sum. Cal. Law Const Law* § 915

[§ 915] Nature and Purpose of Act.

(1) *Statutory Development.* In 1959, California adopted a comprehensive police power measure prohibiting discrimination in employment, the California Fair Employment Practice Act (former Lab.C. 1410 et seq.). (See *Bennett v. Borden* (1976) 56 C.A.3d 706, 709, 128 C.R. 627; *Mahdavi v. Fair Emp. Practice Com.* (1977) 67 C.A.3d 326, 333, 136 C.R. 421.) The statute was repealed in 1980 and replaced by the California Fair Employment and Housing Act (FEHA). (*Govt.C. 12900* et seq.; see *infra*, §916 et seq.)

(2) *Legislative Policy.* *Govt.C. 12920* and *12921* contain the declarations of legislative policy.

Govt.C. 12920 states:

"It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation."

"It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foment domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general."

"Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation in housing accommodations is declared to be against public policy."

"It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices."

"This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state."

Govt.C. 12921 adds: "The opportunity to seek, obtain, and hold *employment* without discrimination because of

race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or any other basis" prohibited by C.C. 51 "is hereby recognized as and declared to be a civil right." (*Govt.C. 12921(a).*)

"The opportunity to seek, obtain and hold *housing* without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation is hereby recognized as and declared to be a civil right." (*Govt.C. 12921(b).*)

(3) *Relation to Other Antidiscrimination Provision.* The FEHA must be liberally construed, and other antidiscrimination statutes, such as the Unruh Civil Rights Act (*supra*, §898), are not repealed "unless those provisions provide less protection" to the persons covered under the Act. (*Govt.C. 12993(a).*) Although the Legislature intends to displace local laws banning discrimination in employment and housing, it does not intend, "in any manner or way, to limit or restrict the application" of C.C. 51 (*supra*, §898), or C.C. 51.7 (*see supra*, §895). (*Govt.C. 12993(c), 12993.5.*) By expressly disclaiming a purpose to repeal other applicable state laws, the Legislature has manifested an intent to amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination. (*Rojo v. Kliger* (1990) 52 C.3d 65, 75, 276 C.R. 130, 801 P.2d 373, *infra*, §952; on common law claim for wrongful termination of employment in violation of public policy, *see* 3 *Summary* (10th), *Agency and Employment*, §242 *et seq.*) (*See Citizens for Uniform Laws v. Contra Costa* (1991) 233 C.A.3d 1468, 1470, 1475, 285 C.R. 456 [Act does not preempt county ordinance prohibiting discrimination against persons who test positive for HIV]; *Caldwell v. Montoya* (1995) 10 C.4th 972, 986, 42 C.R.2d 842, 897 P.2d 1320, 5 *Summary* (10th), *Torts*, §353 [school board members who voted not to renew contract of school superintendent were immune under *Govt.C. 820.2*, despite fact that their action allegedly constituted race and age discrimination in violation of FEHA].)

(4) *Commentary.* Many articles discuss the FEHA and similar statutes in other states. (*See* 2 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §13:1 *et seq.* [actions involving housing discrimination]; 37 *U.C. Davis L. Rev.* 511 [study of low success rates for women and minorities charging employment discrimination and wrongful discharge]; 22 *U.S.F. L. Rev.* 317, 333 [arguing that Act applies to AIDS patients]; 31 *U.S.F. L. Rev.* 1017 [employment law in second appellate district]; 44 *A.L.R.2d* 1138 [fair employment statutes designed to eliminate discrimination in private employment]; 99 *A.L.R.3d* 154 [state laws prohibiting advertisements by job seekers identifying themselves by race, religion, national origin, sex, or age]; 37 *A.L.R.5th* 349 [state laws prohibiting religious discrimination in employment]; 63 *Am.Jur. Trials* 127 [defending employment discrimination cases]; 45A *Am.Jur.2d* (2002 ed.), *Job Discrimination* §115 *et seq.*)

West's Key Number Digest, Civil Rights k.131, 141 *et seq.*

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Commentary.* *See* 36 *McGeorge L. Rev.* 871 [dissemination of FEHA standards].



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1. In General.

8 Witkin Sum. Cal. Law Const Law § 916

[§ 916] In General.

(1) *General Coverage of Act.* Regarding *employment*, the FEHA applies to employers, employees, employment agencies, and labor organizations. (See *infra*, §921 et seq.) With respect to *examinations*, non-job-related inquiries, etc., the prohibitions of the Act apply to licensing boards. (*Govt.C. 12944.*) Regarding *housing*, the Act applies to owners of housing accommodations. (See *infra*, §945 et seq.) (For definitions of "employee" and "employer," see *infra*, §§917, 918; on liability of supervisors, see *infra*, §§919, 928.)

(2) *Liberal Construction.* Nothing in the Act may be construed to afford to the protected classes fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 and implementing regulations (see *supra*, §851), or state law on fair employment and housing as it existed prior to the effective date of the section. State laws purporting to require or permit an action that would be an unlawful practice under the FEHA are to that extent invalid. However, the Act may be construed to afford greater rights and remedies than federal law and other state laws. (*Govt.C. 12955.6.*) (See *Stevenson v. Superior Court (1997) 16 C.4th 880, 894, 66 C.R.2d 888, 941 P.2d 1157* [FEHA policy against age discrimination in employment is sufficiently substantial and fundamental to support tort claim for wrongful discharge by employers who are not statutorily exempt].)

(3) *Nonemployees.* For purposes of sexual harassment only (*Govt.C. 12940(j)*, *infra*, §927 et seq.), an employer may be responsible for acts of nonemployees when the employer, or its agents or supervisors, knows or should have known of objectionable conduct and fails to take immediate corrective action. In reviewing claims involving acts of nonemployees, "the extent of the employer's control and other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered." (*Govt.C. 12940(j)(1).*) (See 76 Proof of Facts 3d 331 [liability for sexual harassment by customers or third parties].)

(4) *Employment Agencies.* "Employment agency" includes a "person undertaking for compensation to procure employees or opportunities to work." (*Govt.C. 12926(e).*)

(5) *Labor Organizations.* "Labor organization" includes an "organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or

conditions of employment, or of other mutual aid or protection." (*Govt.C. 12926(g).*)

(6) *Licensing Boards*. "Licensing board" means a "state board, agency, or authority in the State and Consumer Services Agency that has the authority to grant licenses or certificates which are prerequisites to employment eligibility or professional status." (*Govt.C. 12944(f).*)

(7) *Disability*. "Disability" includes, but is not limited to, those physical or mental disabilities defined in *Govt.C. 12926*. (*Govt.C. 12955.3*.) The term "mental disability" includes having, or being regarded or treated as having, or having had, a mental or psychological disorder or condition that limits a major life activity. (*Govt.C. 12926(i).*) The term "physical disability" includes having or being regarded or treated as having a "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss" that affects a specified body system or limits a major life activity. (*Govt.C. 12926(k).*) Neither mental nor physical disability includes "sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current use of controlled substances or other drugs." (*Govt.C. 12926(i), (k)(6).*)

(8) *Familial Status*. "Familial status" means one or more individuals under 18 years of age who reside with (a) a parent, (b) another person with care and legal custody, (c) a person who has been given care and legal custody of that individual by the state or a local agency, or (d) the designee of a parent or person with legal custody of that individual with written consent. The protections against discrimination on the basis of familial status also apply to persons who are pregnant, or are in the process of securing legal custody or of being given care and custody of an individual under 18 years of age. (*Govt.C. 12955.2*.)

(9) *Illegal Aliens*. "[T]he employment discrimination statutes apply to undocumented alien employees notwithstanding the illegality of employing them." (*Murillo v. Rite Stuff Foods (1998) 65 C.A.4th 833, 849, 77 C.R.2d 12, infra, §927.*)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Nonemployees*. *Govt.C. 12940(j)(1)*, as amended in 2003, clarifies existing law by providing explicit standards to determine employer liability for sexual harassment by nonemployees. Hence, it may be applied retroactively. (*Carter v. California Dept. of Veterans Affairs (2006) 38 C.4th 914, 930, 44 C.R.3d 223, 135 P.3d 637.*)



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8 Witkin Sum. Cal. Law Const Law § 917

[§ 917] Employees.

(1) *In General*. "Employee" does not include (a) an individual employed by his or her parents, spouse, or child, or (b) an individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility. (*Govt.C. 12926(c)*; see *Shephard v. Loyola Marymount University* (2002) 102 C.A.4th 837, 842, 125 C.R.2d 829 [issue of first impression; student athlete receiving athletic scholarship is not school employee under FEHA]; *Estes v. Monroe* (2004) 120 C.A.4th 1347, 1360, 16 C.R.3d 616 [FEHA does not cover claims of national guardsmen on state active duty when challenged personnel action is incident to military service].)

In *Campbell v. Arco Marine* (1996) 42 C.A.4th 1850, 50 C.R.2d 626, the court, applying the reasoning of *Equal Emp. Opportunity Com. v. Arabian Amer. Oil Co.* (1991) 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274, supra, §855, held that the Act does not apply to nonresidents where the prohibited conduct occurred outside of California. Applying the FEHA in that situation would raise serious constitutional concerns under the Commerce, Due Process, and Full Faith and Credit clauses. (42 C.A.4th 1856.)

(2) *Civil Service Employees*. The Legislature intended that the Act cover state civil service employees; accordingly, the Department of Fair Employment and Housing and Fair Housing Commission have jurisdiction concurrently with the State Personnel Board over civil service discrimination complaints. (*State Personnel Bd. v. Fair Emp. & Housing Com.* (1985) 39 C.3d 422, 427, 217 C.R. 16, 703 P.2d 354; see *Ruiz v. Department of Corrections* (2000) 77 C.A.4th 891, 897, 92 C.R.2d 139 [following *State Personnel Bd.*; civil service employee has option of pursuing administrative remedy either through State Personnel Board or DFEH, or both].) Likewise, an aggrieved municipal employee need not exhaust the internal remedies set out in a city charter before filing a complaint with the DFEH. (*Schifando v. Los Angeles* (2003) 31 C.4th 1074, 1089, 6 C.R.3d 457, 79 P.3d 569 [relying on *State Personnel Bd.* and approving *Ruiz*; it would be inconsistent with legislative purpose of expanding employee rights to require aggrieved employee to exhaust administrative remedies under city charter contemporaneously with or before filing claim with DFEH]; *Williams v. Housing Authority of Los Angeles* (2004) 121 C.A.4th 708, 727, 17 C.R.3d 374 [extending *Schifando* exemption to FEHA-related nonstatutory claim that might have preclusive effect on FEHA claim, but requiring exhaustion of administrative remedies for non-FEHA claims that are not related and have no preclusive effect on FEHA claim, such as breach of implied contract not to terminate].) But once a public employee chooses the civil service process and pursues

it through evidentiary hearings to a proposed decision, the employee must exhaust the administrative and judicial remedies even if the statute of limitations will then preclude a FEHA action. (*Page v. Los Angeles County Probation Dept.* (2004) 123 C.A.4th 1135, 1142, 20 C.R.3d 598.) (On exhaustion of administrative remedies generally, see *infra*, §952.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Mendoza v. Ross* (2005) 128 C.A.4th 625, 27 C.R.3d 452 [volunteer community service officer, who received no form of remuneration, was not "employee" and was not entitled to sue town for employment discrimination or wrongful termination under FEHA]; *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 C.A.4th 1612, 1627, 71 C.R.3d 222 [registry employee hired as temporary social worker at state prison was employee for purposes of FEHA even though she was not official employee of state for civil service and benefit purposes; amount of control employer exercises over person's work is important factor in determining who is employee for purposes of FEHA].

(2) *Civil Service Employees.* See *Jenkins v. Riverside* (2006) 138 C.A.4th 593, 616, 41 C.R.3d 686 [trial court did not err in granting defendant county's motion for summary judgment in action claiming disability discrimination and failure to accommodate where plaintiff was temporary employee whose discharge was based on exceeding number of hours she was authorized to work]; on equitable tolling of statute of limitations during voluntary pursuit of internal administrative remedy, see *Supp.*, *infra*, §948.



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3. Employers.

8 Witkin Sum. Cal. Law Const Law § 918

[§ 918] Employers.

(1) *In General.* "Employer" for purposes of the *antidiscrimination* provisions of the Act, includes (a) a person regularly employing *five or more* persons, (b) a person acting as an agent of an employer, directly or indirectly, (c) the state or any of its political or civil subdivisions, and (d) cities. Excluded are (a) persons who do not regularly employ five or more persons, and (b) religious associations and nonprofit corporations. (*Govt.C. 12926(d)*; see *Jennings v. Marralle* (1994) 8 C.4th 121, 135, 32 C.R.2d 275, 876 P.2d 1074, 3 Summary (10th), *Agency and Employment*, §248 [restriction of age discrimination liability to employers of five or more persons indicates intent not to establish fundamental public policy prohibiting age discrimination by employers of fewer than five persons]; *International Union of Operating Engineers, Local No. 12 v. Fair Emp. Practice Com.* (1969) 276 C.A.2d 504, 511, 81 C.R. 47 [labor union as employer]; *Bohemian Club v. Fair Emp. & Housing Com.* (1986) 187 C.A.3d 1, 9, 231 C.R. 769, *infra*, §925 [private nonprofit social club is "employer" subject to antidiscrimination provisions of FEHA]; *Laird v. Capital Cities/ABC* (1998) 68 C.A.4th 727, 738, 80 C.R.2d 454 [parent corporation was not plaintiff's "employer" where it did not exercise control over subsidiary's employment decisions or over plaintiff, and operations of two corporations were not interrelated]; *Vernon v. California* (2004) 116 C.A.4th 114, 121, 10 C.R.3d 121 [state was not employer for purposes of liability under FEHA in action by firefighter whose employment was terminated because he could not meet policies mandated by CAL-OSHA regulations and his employer did not receive variance from those regulations; state did not pay or exert control over plaintiff or his employment opportunities].)

For purposes of the *antiharassment* provisions of the Act only, "employer" includes a person regularly employing *one or more* persons. The remainder of the definition of employer is the same as for the antidiscrimination statutes; and religious associations and nonprofit corporations are exempted. (*Govt.C. 12940(j)(4)*; see *infra*, §§922, 927.)

Robinson v. Fair Emp. & Housing Com. (1992) 2 C.4th 226, 5 C.R.2d 782, 825 P.2d 767, construed the statutory term "regularly employing" as applicable to an employer who had more than five employees, even though as many as five of them worked only 2 days of each week. The number of persons on the payroll, not the number working on any particular day, is determinative of the number of employees an employer regularly employs. (2 C.4th 231.) In reaching its conclusion, the court engaged in a comprehensive review of the history of the California Act and of similar legislation in other states. (2 C.4th 234 et seq.) (See 20 *Pepperdine L. Rev.* 824.)

(2) *Employment Agencies*. For purposes of the FEHA, an employment agency and its client "are treated as the employer, and employees of the client entity are treated as coworkers of employees" of the employment agency. Thus, when general and special employment exists, an injured employee may look to both employers for redress. (*Mathieu v. Norrell Corp.* (2004) 115 C.A.4th 1174, 1184, 10 C.R.3d 52.)

(3) *Religious Association*. Notwithstanding Govt.C. 12926(d), and except as provided in Govt.C. 12926.2(d), an "employer" for purposes of the FEHA includes a religious corporation or association with respect to persons it employs to perform nonreligious duties at a health care facility that is not restricted to adherents of the religion that established the association or corporation. (Govt.C. 12926.2(c); cf. *Kelly v. Methodist Hosp. of Southern Calif.* (2000) 22 C.4th 1108, 1111, 1126, 95 C.R.2d 514, 997 P.2d 1169 [religiously affiliated hospital is exempt from claim for wrongful termination of nurse in violation of public policy as expressed in FEHA; applying law in effect prior to amendment of religious-entity exemption in 1999].) However, a religious corporation "may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized." (Govt.C. 12922.) (See 5 Rotunda, §21.15; on nonprofit public benefit corporation as employer under Act, see Govt.C. 12926.2(e), (f).)

To claim exemption from the FEHA, a religious entity need not incorporate under the Nonprofit Religious Corporation Law. (See *McKeon v. Mercy Healthcare Sacramento* (1998) 19 C.4th 321, 325, 79 C.R.2d 319, 965 P.2d 1189 [organization of requisite religious character does not lose its exemption by organizing under Nonprofit Public Benefit Corporation Law].)

(4) *Exemption Under First Amendment Religion Clauses*. In *Schmoll v. Chapman University* (1999) 70 C.A.4th 1434, 83 C.R.2d 426, a case of first impression, plaintiff university chaplain sued defendant university for discrimination and retaliation under the FEHA. Defendant did not claim that it was exempt, but rather that the religion clauses of the First Amendment barred judicial review. *Held*, "[t]he First amendment guarantees to a religious institution the right to decide matters affecting its ministers' employment, free from the scrutiny and second-guessing of the civil courts." (70 C.A.4th 1436.) (See *Hope Int. University v. Superior Court* (2004) 119 C.A.4th 719, 738, 14 C.R.3d 643 [in action for marital status discrimination, trial court correctly denied motion for summary judgment where defendant religious university failed to establish as matter of law that ministerial exception applied to its firing of two nonordained, psychology professors who taught marriage and family therapy and worked in defendant's counseling center, and who it suspected of having affair before divorce of one of them was final]; 5 Rotunda, §21.15 [regulation of employment practices of religious organizations].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Religious Association*. See 6 Rotunda 4th, §21.15.(4) *Exemption Under First Amendment Religion Clauses*. See 6 Rotunda 4th, §21.15.



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b. Scope of Act.
4. Supervisors.

8 Witkin Sum. Cal. Law Const Law § 919

[§ 919] Supervisors.

(1) *Harassment*. A supervisor is a "person" within the meaning of former Govt.C. 12940(h) (now Govt.C. 12940(j)); see *infra*, §§927, 928), and hence is capable of committing sexual harassment. (*Page v. Superior Court* (1995) 31 C.A.4th 1206, 1210, 37 C.R.2d 529.)

In *Matthews v. Superior Court* (1995) 34 C.A.4th 598, 40 C.R.2d 350, plaintiff, a male heterosexual, brought an action against his former employer and four individual defendants, all of whom were supervisors and two of whom were gay, alleging that he was the victim of sexual harassment. Specifically, he alleged that two of the supervisors engaged in the harassment, and that the other two were aware of it, but did nothing. The individual defendants successfully demurred, on the ground that the FEHA does not impose individual liability. *Held*, mandamus granted, directing the trial judge to vacate his orders sustaining the demurrers.

(a) Former Govt.C. 12940(h) (now Govt.C. 12940(j)), as well as several other sections of the Act, impose liability on several entities, including "persons," a term defined as including an "individual." Hence, a "person" may be accused in an action under the Act. (34 C.A.4th 603, citing *Page*.)

(b) The Fair Employment and Housing Commission has consistently held that supervisors who either engage in the wrongful activity or tacitly agree with it are individually liable. It is assumed that the Legislature was aware of the Commission's long-standing practice of imposing liability on individuals, when it enacted various amendments to the Act. Had the Legislature intended the word "person" to apply only to "employers," it could have so provided. The fact that reference to "person" or "persons" survived several amendments is consistent with the legislative goal of construing the Act liberally to remove all illegal discrimination. This interpretation is supported by the cases which, without question, have imposed individual liability. (34 C.A.4th 604.)

(c) "Unlike discrimination in hiring, the ultimate responsibility for which rests with the employer, sexual or other harassment perpetrated by a supervisor with the power to hire, fire and control the victimized employee's working conditions is a particularly personal form of the type of discrimination which the Legislature sought to proscribe when it enacted the FEHA. Our holding that the responsibility for such acts must be borne both by the offender as well as the

employer who tolerates the offense is consistent with the Legislature's intent to provide 'effective remedies which will eliminate such discriminatory practices.' " (34 C.A.4th 605.)

The suggestion in *Matthews* that mere inaction would be sufficient to hold a supervisor liable for sexual harassment was refuted by the same court in *Fiol v. Doellstedt* (1996) 50 C.A.4th 1318, 1327, 58 C.R.2d 308: "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (50 C.A.4th 1331.) (See BAJI, No. 12.21 [direct liability and as aider and abettor]; 33 U.S.F. L. Rev. 487 [*Fiol*]; 61 Am.Jur. Trials 489 [Individual Liability for Sexual Harassment]; on vicarious liability of employer for sexual harassment under Title VII of Civil Rights Act, see *supra*, §866; on liability of supervisor for workplace sexual harassment, see *infra*, §928; on coworker liability for harassment, see *infra*, §§922, 928.)

(2) *Discrimination*. *Janken v. GM Hughes Electronics* (1996) 46 C.A.4th 55, 53 C.R.2d 741, concluded that while individual supervisory employees may be personally liable for conduct that constitutes *harassment*, they may not be held liable for conduct that constitutes *discrimination*; only "employers" may be held liable for prohibited discrimination. (46 C.A.4th 62.) *Govt.C. 12926(d)*, which defines "employer" to include any person acting as the employer's agent, was designed to make clear that an employer could be liable under principles of respondeat superior for discriminatory acts of its supervisors, not to make those supervisors personally liable. (46 C.A.4th 65, 67.) (See 37 *Santa Clara L. Rev.* 517 [Individual Supervisor Liability in Employment Discrimination Claims in California].)

In *Reno v. Baird* (1998) 18 C.4th 640, 76 C.R.2d 499, 957 P.2d 1333, plaintiff employee sued her former supervisor, alleging that the supervisor had discriminated against her and wrongfully discharged her on the basis of her medical condition (cancer), in violation of the FEHA. The Court of Appeal reversed the trial court's summary judgment for defendant. *Held*, reversed. Supervisors may not be held liable for discrimination under the Act.

(a) *Harassment versus discrimination*. The FEHA treats harassment and discrimination differently. While former *Govt.C. 12940(h)(1)* (now *Govt.C. 12940(j)(1)*) prohibits an employer "or any other person" from harassing an employee, *Govt.C. 12940(a)* prohibits only "an employer" from engaging in improper discrimination. (18 C.4th 644.) This differing treatment reflects the fact that supervisory employees can insulate themselves from harassment claims by refraining from harassing conduct, but they cannot refrain from the type of conduct (hiring, firing, job assignments, office assignments, promotions or demotions, performance evaluations, and the like) that could later give rise to a discrimination claim. (18 C.4th 646, 657.) Whatever similarities there may be between discrimination and harassment, "the employer ultimately does the former; coworkers and supervisors do the latter." (18 C.4th 657.)

(b) *Agency language*. *Govt.C. 12926(d)* prohibits discrimination by a "person acting as an agent of an employer, directly or indirectly." However, this agency language does not extend personal liability for discrimination to supervisors:

(1) This reading of the agency language is supported by the decisions of the federal courts, which have overwhelmingly rejected individual liability for supervisory employees under the federal antidiscrimination acts. Those acts are "virtually identical" in language, purpose, and intent to the *FEHA*. (18 C.4th 659.)

(2) The potential for individual liability for discrimination would place supervisors in a direct conflict of interest with their employers whenever they made a personnel decision. The supervisors would be pressed to make whatever decision would be least likely to lead to a future discrimination claim, which might not be the best decision for meeting the employer's interests. (18 C.4th 651, 662.)

(3) The lack of personal liability will not give supervisors the freedom to discriminate with impunity. They will face swift discipline from their employers, who will not condone discriminatory acts for which the employers ultimately must pay. (18 C.4th 654, 662.) "Until the Legislature provides for punishing individual employees, [the courts] should leave that task to the employers." (18 C.4th 662.)

(c) *Aiding and abetting prohibition.* Although Govt.C. 12940(g) prohibits aiding and abetting someone else in discriminating, this prohibition does not impose personal liability on individual supervisors. (18 C.4th 656, 659.) "Linguistically, it is questionable whether it can properly be said that an employee who exercises delegated personnel management authority is aiding and abetting" the employer. The Legislature would not have reached such a significant result as personal liability for supervisors by this "roundabout" method. (18 C.4th 656, quoting *Janken*.)

(d) *Contrary administrative decision.* Administrative decisions of the Fair Employment and Housing Commission, although consistently holding supervisors individually liable for discrimination, do not provide strong support for that position. "None considered the differing statutory treatment of harassment and discrimination. More importantly, they rested solely on now-outdated federal authority." (18 C.4th 661.) (See 83 A.L.R.5th 1 [Individual Liability of Supervisors, Managers, Officers or Co-Employees For Discriminatory Actions Under State Civil Rights Act].)

(3) *Retaliation.* *Reno v. Baird*, *supra*, is not controlling as to retaliatory actions. Thus, a supervisor may be liable for a retaliatory discharge "in violation of the public policy set forth in the FEHA." (*Walrath v. Sprinkel* (2002) 99 C.A.4th 1237, 1242, 1243, 121 C.R.2d 806.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Retaliation.* The court in *Taylor v. Los Angeles Dept. of Water & Power* (2006) 144 C.A.4th 1216, 1237, 51 C.R.3d 206, followed *Walrath v. Sprinkel* (2002) 99 C.A.4th 1237, 121 C.R.2d 806, text, p. 415, in holding that a supervisor is a "person" subject to liability under Govt.C. 12940(h). However, both *Walrath* and *Taylor* were disapproved in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 C.4th 1158, 1174, 72 C.R.3d 624, 177 P.3d 232, to the extent they conflict with its holding.

In *Jones*, plaintiff sued his employer and his supervisor under the FEHA for retaliation after he complained about sexual harassment. Although the trial court originally entered judgment on a jury verdict for plaintiff, it subsequently granted both defendants' motions for judgment notwithstanding the verdict, and entered judgment for defendants. The Court of Appeal reversed, and reinstated the original judgment for plaintiff on the verdict. Both parties appealed. The Supreme Court's grant of review was limited to the question whether a nonemployer individual may be held personally liable for retaliation under the FEHA. *Held*, reversed; only the employer may be held liable for retaliation under the FEHA.

(a) Govt.C. 12940(a) prohibits an employer from engaging in specified forms of discrimination. *Reno v. Baird* (1998) 18 C.4th 640, 76 C.R.2d 499, 957 P.2d 1333, text, p. 414, held that, under Govt.C. 12940(a) employers, but not nonemployer supervisors, may be held liable for discrimination. Govt.C. 12940(h) prohibits retaliation by "any employer, labor organization, employment agency, or person," and the issue in this case is whether the word "person" evinces a legislative intent that individuals be held personally liable for retaliation. (42 C.4th 1162.)

(b) Plaintiff argued that the plain meaning of Govt.C. 12940(h) is to make individuals personally liable for retaliation and that other forms of statutory interpretation need not be utilized. This contention is without merit. (42 C.4th 1162.) Govt.C. 12940(h) is a catch-all provision aimed at prohibiting retaliation against an individual who opposes any practices forbidden "under this part" or who assists in any proceeding "under this part." (42 C.4th 1163.) Govt.C. 12940(h) thus incorporates unlawful employment practices defined in other parts of Govt.C. 12940, and forbids retaliation against anyone opposing an unlawful employment practice. Each of the entities to which Govt.C. 12940(h) applies (employer, labor organization, employment agency, or person) is the subject of one or more other subdivisions of Govt.C. 12940, defining specific unlawful employment practices. It is thus possible that the Legislature merely used each of these terms in subdivision (h) to reflect that the other subdivisions of Govt.C. 12940 use those terms, rather than to impose additional personal liability on nonemployer individuals. Accordingly, it is necessary to engage in statutory interpretation to resolve this ambiguity. (42 C.4th 1164.)

(c) In concluding that the FEHA does not make individuals personally liable for discrimination, *Reno* followed the reasoning of *Janken v. GM Hughes Electronics* (1996) 46 C.A.4th 55, 53 C.R.2d 741, text, p. 414: (1) The FEHA makes

at least some individuals liable for harassment, but not for discrimination, because there is a fundamental distinction between harassment, which is a type of conduct not necessary to the performance of a supervisor's job, and business or personnel management decisions, which are inherently necessary to the performance of a supervisor's job and which might later be considered discriminatory. (42 C.4th 1164, 1165.) (2) Under the FEHA, small employers (those employing fewer than five employees) may be sued for harassment, but may not be sued for discrimination. Because the Legislature clearly intended to protect small employers from the burdens of litigating discrimination claims, it is highly unlikely that it simultaneously intended to subject individual nonemployers to these burdens. (3) Sound policy favors avoiding conflicts of interest and the chilling of effective management that would result were supervisors to be held personally liable. (42 C.4th 1165, 1166.) (4) Corporate employment decisions are often collective. (42 C.4th 1166.) (5) It is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision. All of these reasons for not imposing individual liability for discrimination apply equally to retaliation. Indeed, some may apply even more forcefully to retaliation claims. For example, if an employee gains a reputation as a complainer, supervisors might be particularly afraid to impose discipline on that employee or make other lawful personnel decisions out of fear that the employee might claim retaliation. (42 C.4th 1167.)

(d) *Yanowitz v. L'Oreal USA* (2005) 36 C.4th 1028, 32 C.R.3d 436, 116 P.3d 1123, Supp., infra, §940, held that the employment actions that give rise to a claim for retaliation are identical to the employment actions that give rise to a claim for discrimination, despite differences in wording between *Govt.C. 12940(h)* and *Govt.C. 12940(a)*. Thus, "it is hard to conceive why the Legislature would impose individual liability for actions that are claimed to be retaliatory but not for the *same* actions that are claimed to be discriminatory." (42 C.4th 1168, 1169.)

(e) The word "person" was added to *Govt.C. 12940(h)* in 1987. If plaintiff's claim that this addition made individuals liable for retaliation is correct, then the legislation created individual liability where none had existed previously. The legislative history does not support this conclusion. The bill adding the word "person" made several amendments to the FEHA, but the Legislative Counsel's Digest describing several of these amendments does not mention *Govt.C. 12940*. The bill refers only to "technical and conforming changes" to the Act. (42 C.4th 1169.) A change that created individual liability for retaliation where none existed previously would be substantive, not technical. (42 C.4th 1171, citing *Ailanto Properties v. Half Moon Bay* (2006) 142 C.A.4th 572, 48 C.R.3d 340.) Plaintiff relies on documents analyzing these legislative changes, both of which documents were dated approximately 13 years after the legislation. They are inherently unreliable, as well as ambiguous. (42 C.4th 1171, 1173.)

Three justices dissented in two opinions. They argued that the language of *Govt.C. 12940(h)* clearly provides for nonemployer liability for retaliation. Further, it would be illogical to conclude, as the majority did, that the Legislature intended to expose a supervisor to individual liability for harassing an employee, while shielding that supervisor from liability for retaliating against the employee for opposing that harassment. (42 C.4th 1174, 1175.)



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c. Department and Commission.

8 Witkin Sum. Cal. Law Const Law § 920

[§ 920] Department and Commission.

(1) *In General.* The FEHA is administered by the Department of Fair Employment and Housing, headed by a Director (*Govt.C. 12901*), and by the seven-member Fair Employment and Housing Commission (*Govt.C. 12903*).

(2) *The Department.* The department may (a) adopt rules and regulations (*Govt.C. 12930(e)*); (b) investigate and conciliate complaints (*Govt.C. 12930(f)*); (c) subpoena and examine witnesses, take depositions and issue written interrogatories, and gather documentary evidence (*Govt.C. 12930(g)*); (d) issue accusations (*Govt.C. 12930(h)*); and (e) publish the results of investigations and research (*Govt.C. 12930(i)*). It is also empowered to assist communities in resolving disputes relating to discriminatory practices (*Govt.C. 12931*), and is directed to maintain liaison with local human relations commissions (*Govt.C. 12933*).

(3) *The Commission.* In addition to rulemaking (*Govt.C. 12935(a)*) and conducting hearings (*Govt.C. 12935(b)*), (f) and mediations (*Govt.C. 12935(c)*), the Fair Employment and Housing Commission may (a) create or provide financial or technical assistance to advisory agencies and conciliation councils (*Govt.C. 12935(g)*); (b) publish its opinions (*Govt.C. 12935(h)*); (c) issue publications and research results (*Govt.C. 12935(i)*); and (d) appoint administrative law judges (*Govt.C. 12935(j)*).

The actions and procedures of the Commission must be conducted pursuant to its own regulations, or if no regulation is applicable, then pursuant to the Administrative Procedure Act (see 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §28 et seq.). (*Govt.C. 12972*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *The Commission.*

Administrative Procedure Act.

Cross-Reference: 9 *Cal. Proc. (5th)*, *Administrative Proceedings*, §34 et seq.



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8 Witkin Sum. Cal. Law Const Law § 921

[§ 921] Discrimination.

Govt.C. 12940 makes it an unlawful employment practice to discriminate on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation" unless the discrimination is based on a "bona fide occupational qualification" or applicable state or national security regulations. Specifically, it is unlawful:

(1) For an employer to refuse to hire, to refuse to select for a training program leading to employment, to discharge, or to discriminate "in compensation or in terms, conditions, or privileges of employment." (*Govt.C. 12940(a).*)

(2) For a labor organization to exclude, expel, or restrict membership, or to provide only second-class or segregated membership, or to discriminate in the election of officers or selection of staff, or to discriminate against a member, an employer, or a person employed. (*Govt.C. 12940(b).*) (On discrimination in selection of business agent, see *International Union of Operating Engineers, Local No. 12 v. Fair Emp. Practice Com.* (1969) 276 C.A.2d 504, 512, 81 C.R. 47.)

(3) For a person to discriminate in the selection for apprenticeship and other training programs leading to employment. (*Govt.C. 12940(c).*)

(4) For an employer or employment agency to make any non-job-related inquiry that expresses a limitation or specification as to race, etc. (*Govt.C. 12940(d)*); on permissibility of inquiry into applicant's age as provided by law, see *infra*, §934.)

(5) For an employer or employment agency to require a medical or psychological examination of an applicant, or to inquire into his or her disabilities or medical condition, except as it relates to job-related functions, or a request for reasonable accommodation. (*Govt.C. 12940(e)*; see *infra*, §936 et seq.)

(6) For an employer or employment agency to require a medical or psychological examination of an employee, or

to inquire into his or her disabilities or medical condition, unless it is "job-related and consistent with business necessity." (*Govt.C. 12940(f)*; see *infra*, §936 et seq.)

(7) "For an employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against" a person in retaliation for reporting, pursuant to P.C. 11161.8, suspected patient abuse by a health or community care facility. (*Govt.C. 12940(g)*.)

(8) "For an employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against" a person in retaliation for that person's opposition to practices forbidden by the Act, or for his or her filing of a complaint, testifying, or assisting in a proceeding under the Act. (*Govt.C. 12940(h)*; see *infra*, §940.)

(9) For a person to "aid, abet, incite, compel, or coerce the doing" of the forbidden acts, or to attempt to do so. (*Govt.C. 12940(i)*; see *Vernon v. California (2004) 116 C.A.4th 114, 131, 10 C.R.3d 121* [state is not "person" subject to liability under *Govt.C. 12940(i)*].)

(10) For an employer, labor organization, employment agency, or apprenticeship training program "to fail to take all reasonable steps necessary to prevent discrimination" from occurring. (*Govt.C. 12940(k)*.)

(11) For an employer or other covered entity to discriminate based on a conflict between a person's religious belief and observance and an employment requirement, except where the employer or other entity demonstrates that it cannot make a reasonable accommodation without undue hardship on the conduct of business. "Religious belief or observance" includes observance of a Sabbath or other holy day, and reasonable travel time. (*Govt.C. 12940(l)*; see *infra*, §941.)

(12) For an employer or other covered entity (a) "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee," or (b) "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations." (*Govt.C. 12940(m), 12940(n)*; see *infra*, §937.)

(13) For an employer or other covered entity to subject a person "to a test for the presence of a genetic characteristic." (*Govt.C. 12940(o)*.)

Employees of public agencies and applicants for employment may be solicited to voluntarily declare ethnic information, but this information cannot be used to give discriminatory preference to a member of a group. (*Govt.C. 1233*.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Taylor v. Los Angeles Dept. of Water & Power (2006) 144 C.A.4th 1216, 123, 51 C.R.3d 206* [retaliation is form of discrimination actionable under *Govt.C. 12940(k)*]; *93 Cal. L. Rev. 1455* [maintaining work environments free of harassment and discrimination by nonemployees]; *39 Loyola L.A. L. Rev. 1369* [Towards an "Honest Belief Plus" Standard in California Employment Discrimination Cases]; *43 San Diego L. Rev. 733* [Symposium: Rights and wrongs of discrimination]; *41 U.S.F. L. Rev. 171* [growing trend of family responsibilities discrimination]; CACI, No. 2527 [failure to prevent discrimination--essential factual elements]. (*New Disparate treatment and disparate impact*: To establish a prima facie case of disparate treatment, an employee must show: (a) membership in a protected class, (b) qualification for the position at issue, (c) an adverse employment action, and (d) at least an inference of intentional discrimination from facts showing that the employer chose the particular policy because of its effect on members of a protected class, and not just that the employer "was aware that a given policy would lead to adverse consequences for a given group." To establish a prima facie case of disparate impact, an employee must show that, regardless of the employer's motive, "a facially neutral practice or policy bearing no relation- ship to job requirements had a disproportionate adverse effect on members of the protected class." (*Hall v. Los Angeles (2007) 148 C.A.4th 318, 326, 327, 55 C.R.3d 732* [sex discrimination]; see *Frank v. Los Angeles (2007) 149 C.A.4th 805, 817, 822, 57 C.R.3d 430* [racial discrimination]; CACI, No. 2500 [disparate treatment]; CACI, No. 2502 [disparate impact]; CACI, No. 2507

[motivating reason].)



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8 Witkin Sum. Cal. Law Const Law § 922

[§ 922] Harassment.

It is an unlawful employment practice under the FEHA:

(1) "For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person" to harass an employee, applicant, or other person providing services "because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." Harassment by an employee other than an agent or supervisor is unlawful "if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (*Govt.C. 12940(j)(1)*; see *Etter v. Veriflo Corp. (1998) 67 C.A.4th 457, 464, 79 C.R.2d 33* [instruction that acts of racial harassment must be more than "occasional, isolated, sporadic, or trivial" was accurate statement of threshold standard of severe or pervasive conduct]; *Dee v. Vintage Petroleum (2003) 106 C.A.4th 30, 36, 129 C.R.2d 923* [single ethnic slur by supervisor may be sufficient to establish employer liability for hostile work environment]; on who is "employer" for harassment purposes, see *supra*, §918; on sexual harassment of employee or applicant, see *infra*, §927 et seq.)

(2) For one of the entities mentioned above "to fail to take all reasonable steps necessary" to prevent harassment from occurring. (*Govt.C. 12940(k)*.)

(3) "For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against" a person in retaliation for reporting, pursuant to P.C. 11161.8, suspected patient abuse by health or community care facilities. (*Govt.C. 12940(g)*.)

An employee is *personally liable* for harassment prohibited by *Govt.C. 12940* that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action. (*Govt.C. 12940(j)(3)*.)

SUPPLEMENT: [This section is current through the latest supplement]

See 93 *Cal. L. Rev.* 1455 [maintaining work environments free of harassment and discrimination by nonemployees]; 17 *A.L.R.6th* 563 [what constitutes racial harassment violative of state civil rights acts]; BAJI, No. 12.05.1 [prompt corrective action]; BAJI, No. 12.20 [failure to prevent harassment]; CACI, No. 2527 [same]; CACI, Nos. 2521A et seq., 2522A et seq. [hostile work environment]; CACI, No. 2523 [harassing conduct explained]; CACI, No. 2524 ["severe or pervasive" explained].



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aa. Discrimination Against Minorities.

8 Witkin Sum. Cal. Law Const Law § 923

[§ 923] Discrimination Against Minorities.

(1) *In General.* In *Alameda v. Fair Emp. & Housing Com.* (1984) 153 C.A.3d 499, 200 C.R. 381, C, a black woman, applied for a permanent cook position with the county Sheriff's Department. C's eligibility examination score placed her at the top of the eligibility list, but the job went to a white woman who was second on the list and whose prior cooking experience was substantially less than C's. The county's service manager testified that it was the first time in 9 years that he had not hired the applicant with the highest score, that it was his preference to hire C, but that he felt the other applicant's prior cooking experience with high school students was more relevant than C's restaurant work because he likened students to prison inmates. The FEHC found that the county wrongfully denied C employment (*Govt.C. 12940(a)*), and the trial court denied the county's petition for administrative mandamus. *Held*, judgment affirmed.

(a) While the California Act and Title VII of the Federal Civil Rights Act of 1964 (see *supra*, §847) differ in some particulars, their objectives are identical, and California courts rely on federal law to interpret analogous provisions of the state statute. (153 C.A.3d 504.)

(b) Under both Acts, the employee alleging racial discrimination must first establish a *prima facie* case. "This may be done by showing (1) that he or she belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualification, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications." Thereafter, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Finally, if the employer gives reasons for the rejection, the complainant must be given an opportunity to show that these reasons were a mere pretext for discrimination. The complainant "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were a coverup for a racially discriminatory decision." (153 C.A.3d 504.)

(c) The substantial evidence test applies in reviewing the decision of the FEHC (153 C.A.3d 503); and there was sufficient evidence to establish a *prima facie* case of racial discrimination and that the county's nondiscriminatory reason was a mere pretext. (153 C.A.3d 504, 505.)

In *San Francisco v. Fair Emp. & Housing Com.* (1987) 191 C.A.3d 976, 236 C.R. 716, the FEHC determined, after a lengthy administrative proceeding, that the city discriminated against black firefighters by using a written promotional examination for the position of lieutenant that had an adverse impact on Blacks and was not proven to be job related. The city sought administrative mandamus, contending that the examination was sufficiently related to a lieutenant's duties to justify any disproportionate impact it might have on black applicants. The writ issued, and the black firefighters appealed. *Held*, judgment reversed.

(a) Under the substantial evidence test, the FEHC's findings of fact were presumptively correct. (191 C.A.3d 983, 984.) And the FEHC made out a prima facie case by showing a statistically disparate impact on racial minorities in the passage rate of the examination in question. Statistical disparities alone may constitute prima facie proof of discrimination. Here, 47.8% of the white firefighters passed the examination, as compared to 18.18% of the black firefighters. "Similar passage rates have been found statistically significant in establishing a prima facie case of discrimination." (191 C.A.3d 986 et seq.)

(b) The city failed to carry its burden of proving that the examination was sufficiently job-related so as to overcome the prima facie case. Although the primary function of the position tested was supervision, the job description did not list ability to supervise as a necessary component, ability to supervise was not tested, and there was no evidence correlating higher examination scores with better job performance. (191 C.A.3d 989 et seq.)

(c) However, inasmuch as parallel proceedings regarding the same subject had been commenced in federal court, deference to the remedies fashioned by that court was more appropriate than reinstatement of the FEHC's original remedial order. (191 C.A.3d 991 et seq.)

In *Ibarbia v. Regents of Univ. of Calif.* (1987) 191 C.A.3d 1318, 237 C.R. 92, I, a Filipino-American, sought a position as farm advisor with the Cooperative Extension, a part of the U.C. Division of Agricultural Services. A search committee notified I by letter that although the position had "not yet been filled," I had not been selected as a finalist. I then wrote a letter of protest to U.C. and filed a discrimination complaint with the federal EEOC. Subsequently, U.C. reevaluated the applications and contacted I by phone to inform him that he was a finalist for the position and to invite him for an interview. However, I declined the interview, assertedly because it was merely a pretext and because the selection of a candidate had already taken place. The position was then offered to another candidate. Following adverse rulings by the EEOC and the FEHC, I filed an employment discrimination action. Summary judgment was entered against I. *Held*, summary judgment against I affirmed.

(a) A claim of employment discrimination because of race or national origin may be pursued under either federal or state law in two different ways: "An individual may allege that he has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact on his racial group.' ... To overcome defendant's motion for summary judgment, under either theory, plaintiff has to offer facts sufficient to establish a prima facie case." (191 C.A.3d 1327.)

(b) I failed to make a sufficient showing of disparate treatment by the employer because he failed to complete the application process by declining the proffered interview. (191 C.A.3d 1328.) I's assertion that the interview was a mere pretext did not relieve him of the burden of having to complete the application process because his claims were purely speculative and unsupported by the evidence. (191 C.A.3d 1329.)

(c) "A disparate impact plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue. ... This is usually done by establishing 'that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants.' " (191 C.A.3d 1329.) I failed to present a prima facie case because the evidence on which he based his assertion was inconclusive and inadmissible. (191 C.A.3d 1330.)

In *Mixon v. Fair Emp. & Housing Com.* (1987) 192 C.A.3d 1306, 237 C.R. 884, M, a black man, was terminated

from his job as a business representative for a labor union, after refusing to comply with the union's request that he relocate to reduce union expenses from his lengthy commute. The FEHC found that the union had not discriminated on the basis of race, and the trial court denied M's petition for administrative mandamus. *Held*, judgment affirmed. Although M established a prima facie case of disparate-treatment racial discrimination, the union's desire to reduce its expenses resulting from his commute was a legitimate nondiscriminatory reason for termination. Thereafter, it was M's burden to prove that a discriminatory intent, and not this proffered reason, was behind the decision to terminate. However, M produced no direct evidence of racial animus, he knew at the outset that he might be required to relocate, and white employees who were allowed to commute great distances were in circumstances different from his. (192 C.A.3d 1320 et seq.)

In *Clark v. Claremont University Center* (1992) 6 C.A.4th 639, 8 C.R.2d 151, a black assistant professor brought the action after he was denied promotion and tenure, and judgment was rendered in his favor on a verdict for compensatory and punitive damages. The Court of Appeal affirmed the judgment, holding that the evidence was sufficient to sustain the jury's verdict. (6 C.A.4th 643, detailing an extraordinary history of anti-black behavior by faculty and administration.) The opinion then discusses the problem of proof as follows:

(a) "In most disparate treatment employment discrimination cases, the plaintiff will lack direct evidence of the employer's discriminatory intent, which is a necessary element to prevail." (6 C.A.4th 662.) *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, supra, §870, mandates a three-part analysis and provides the applicable standard of proof. (6 C.A.4th 662.)

(b) If the employer successfully rebuts the presumption raised by a prima facie case, the fact finder must decide on all the evidence before it whether it believes the employer's explanation of its actions or the employee's. The employee, who retains the burden of persuasion, has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. (6 C.A.4th 664.) Many courts have used the term "pretext" in describing the employee's burden, a term that refers to "but for" causation; i.e., the employee must prove by a preponderance of evidence that there was a causal connection between the employee's protected status and the adverse employment decision. (6 C.A.4th 665.) In this case, there was strong evidence of improper motive, and "the jury was justified in inferring that the entire tenure process was tainted by discrimination." (6 C.A.4th 669.)

Heard v. Lockheed Missiles & Space Co. (1996) 44 C.A.4th 1735, 52 C.R.2d 620, held that *McDonnell Douglas*, supra, did not require that the plaintiff prove, as part of his prima facie case, that similarly situated non-Blacks were treated differentially in the terms and conditions of their employment. "To state that a plaintiff may never establish a prima facie case if the plaintiff fails to produce evidence that similarly situated employees outside the protected class were promoted, restricts unfairly the circumstances from which discrimination may be inferred. ... Such a requirement also unfairly emphasizes one way of proving intentional discrimination instead of properly focusing upon the pivotal issue in disparate treatment cases--whether a particular individual was discriminated against and why. ... Although the characteristics of the employee replacing a discharged or demoted employee are certainly relevant in evaluating an employer's motive for an employment decision, we believe those characteristics go to the weight of the evidence rather than its legal sufficiency." (44 C.A.4th 1755, 1756.) (See *Perez v. Santa Clara* (2003) 111 C.A.4th 671, 676, 3 C.R.3d 867, 7 Cal. Procedure (4th), Judgment, Supp., §107A [although, under *McDonnell Douglas*, burden shifts back and forth between plaintiff and defendant, ultimate burden of persuading trier of fact that defendant intentionally discriminated against plaintiff remains with plaintiff, who may either directly persuade trier of fact that discriminatory reason more likely motivated employer or indirectly show that employer's proffered explanation is not believable].)

Many other cases involve racial discrimination actions under the FEHA. (See *Valdez v. Los Angeles* (1991) 231 C.A.3d 1043, 1052, 282 C.R. 726 [effect of continuing nature of discrimination]; *Janken v. GM Hughes Electronics* (1996) 46 C.A.4th 55, 53 C.R.2d 741, supra, §919, citing the text [California courts look to federal decisions in interpreting FEHA]; *Los Angeles County Office of the Dist. Attorney v. Civil Service Com. of Los Angeles* (1997) 55 C.A.4th 187, 201, 63 C.R.2d 661 [black deputy district attorney failed to prove prima facie race discrimination; his transfer out of special unit was consistent with management's usual policy of rotating attorneys]; *Sada v. Robert F.*

Kennedy Med. Center (1997) 56 C.A.4th 138, 151, 153, 65 C.R.2d 112 [Mexican American made prima facie case of employment discrimination based on race: she belonged to protected class, applied for job, and was rejected; defendant employer failed to show that plaintiff was not qualified or that more qualified persons were hired]; *Etter v. Veriflo Corp.* (1998) 67 C.A.4th 457, 464, 79 C.R.2d 33 [instruction that acts of racial harassment must be more than "occasional, isolated, sporadic, or trivial" was accurate statement of threshold standard of severe or pervasive conduct].) (See 104 *Harv. L. Rev.* 817 [race discrimination in retail car negotiations]; 81 *Cal. L. Rev.* 1241 et seq. [inaugural issue of Asian Law Journal]; on racial discrimination under federal statutes, see supra, §869 et seq.)

(2) *Effect of Workers' Compensation Exclusivity Provision.* An action by an employee seeking damages for racial discrimination in violation of the FEHA is not barred by the exclusive remedy provision of the Workers' Compensation Act (see 2 *Summary* (10th), *Workers' Compensation*, §24 et seq.). (*Jones v. Los Angeles Community College Dist.* (1988) 198 C.A.3d 794, 808, 244 C.R. 37, 2 *Summary* (10th), *Workers' Compensation*, §46.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Frank v. Los Angeles* (2007) 149 C.A.4th 805, 821, 824, 57 C.R.3d 430 [following *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733, text, §870; paying county police officers, 70% of whom were minorities, less than county sheriff's deputies, 70% of whom were Caucasian, did not constitute disparate impact or disparate treatment racial discrimination; county policy was to pay all police officers less because they were members of county police rather than members of sheriff's department; no county policy or procedure deterred or prevented plaintiffs from applying for deputy sheriff positions and there was no evidence that pay disparity was product of racial discrimination].



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2. Racial Discrimination.

bb. Discrimination Against Whites.

8 Witkin Sum. Cal. Law Const Law § 924

[§ 924] Discrimination Against Whites.

In *Sandhu v. Lockheed Missiles & Space Co. (1994) 26 C.A.4th 846, 31 C.R.2d 617*, the issue was whether plaintiff could state a claim for racial discrimination under *Govt.C. 12940*, even though he was born in India and, as a self-described "East Indian," was Caucasian. Defendant employer demurred on this ground, and the trial judge, although overruling the demurrer, ordered plaintiff to strike all references to race from his complaint. When he filed an amended complaint alleging national origin discrimination instead, the judge sustained defendant's demurrer without leave to amend on the ground that the administrative complaint had not alleged this form of discrimination. *Held, reversed.*

(a) The principle stated in *St. Francis College v. Al-Khazraji (1987) 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582*, supra, §871, is applicable. A group may be entitled to legal protection solely because of its ancestry or ethnic characteristics even if it would not be categorized as a race in terms of modern scientific theory; a distinctive physiognomy is not essential. (26 C.A.4th 855.) "Sandhu's allegation that he was subject to a discriminatory animus based on his membership in a group which is perceived as distinct when measured against other Lockheed employees, and which is not based on his birthplace alone, is sufficient to make out a cognizable claim for racial discrimination under FEHA." (26 C.A.4th 857.)

(b) Plaintiff's failure to check the "national origin" box on his administrative complaint was not a proper ground for dismissal. The crucial element of the administrative complaint is the factual statement. A plaintiff may not even be aware of the motivation for an employer's discriminatory conduct. The selection of which box to check is nothing more than the attachment of a legal conclusion to the facts alleged, and is therefore a mere technical defect. "[W]e are confident that the administrative investigation into Sandhu's claim of disparate treatment because he was 'Asian' would likely have encompassed both race and national origin." (26 C.A.4th 859.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 14 A.L.R.6th 277 [what constitutes reverse discrimination under state law].



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aa. In General.

8 *Witkin Sum. Cal. Law Const Law* § 925

[§ 925] In General.

(1) *Nature and Scope of Requirement.* The FEHA makes it an unlawful employment practice to discriminate on the basis of sex. (*Govt.C. 12940*, supra, §921; see *Govt.C. 12947.5* [it is unlawful employment practice for employer to refuse to permit employee to wear pants because of employee's sex, but statute does not prohibit employer from requiring employees to wear uniform]; *Govt.C. 12949* [employer may require employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of law, provided that employees are permitted to appear or dress consistently with their gender identity].) "Sex" as defined in the Act includes a person's gender as defined in P.C. 422.56, which includes the employee's actual sex or the employer's perception of the employee's sex. (*Govt.C. 12926(p)*.) (See 104 *Harv. L. Rev.* 817 [gender discrimination in retail car negotiations]; 87 *A.L.R.3d* 93 [application of state laws prohibiting sex discrimination in employment]; 123 *A.L.R.5th* 411 [employment discrimination based on heterosexual conduct or relationship]; on sex discrimination under federal statute, see supra, §861.)

However, this prohibition does not affect the operation of the terms or conditions of a "bona fide retirement, pension, employee benefit, or insurance plan," if the terms or conditions are in accordance with "customary and reasonable or actuarially sound underwriting practices." (*Govt.C. 12993(b)*.) And the prohibition does not affect the employer's right (a) to consider veteran status in selecting employees, or (b) to afford special consideration to Vietnam Era veterans. (*Govt.C. 12940(a)(4)*; see 13 *Pacific L. J.* 693.)

(2) *Valid Practices.* The following are not unlawful practices:

(a) Providing child care services for employees or members who are responsible for minor children. (*Govt.C. 12947*.)

(b) Denying a promotion based on neutral nondiscriminatory criteria. (See *University of Southern Calif. v. Superior Court* (1990) 222 C.A.3d 1028, 1036, 1039, 272 C.R. 264; *Cucuzza v. Santa Clara* (2002) 104 C.A.4th 1031, 1043, 128 C.R.2d 660 [even if supervisor had bias against women, plaintiff did not dispute fact that evaluation of job candidates

was fair, that supervisor took no part in evaluation, and that person hired was better qualified for job than plaintiff].)

(c) Hiring on the basis of gender, if gender is a bona fide occupational qualification for a particular position. (See *Dothard v. Rawlinson* (1977) 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786, 800 [upholding exclusion of woman as prison guard in maximum-security male prison]; *Long v. State Personnel Bd.* (1974) 41 C.A.3d 1000, 1015, 116 C.R. 562 [upholding exclusion of female minister as chaplain at state youth training center].)

(3) *Illustrations.* *Alameda v. Fair Emp. & Housing Com.* (1984) 153 C.A.3d 499, 505, 200 C.R. 381, supra, §923, distinguishing *Dothard*, held that gender was not a bona fide occupational qualification for the position of cook in a men's prison, in the absence of evidence that hiring a woman would seriously threaten the privacy interests of male inmates, endanger the security of the prison, or unreasonably increase the likelihood of physical injury to the applicant. However, "except in extreme circumstances, government agencies must attempt to make suitable accommodations in matters where the privacy interests of the population to be served clash with the applicant's right to obtain a job without fear of sexual discrimination." (153 C.A.3d 506.)

In *Bohemian Club v. Fair Emp. & Housing Com.* (1986) 187 C.A.3d 1, 231 C.R. 769, the FEHC filed an accusation against the club, a private nonprofit men's association, alleging that its hiring policy systematically excluded women from all temporary and permanent jobs at its campground facilities and most of these positions at its city location. The club denied that it is a covered employer, asserted that male gender is a bona fide occupational qualification, and alleged that the FEHA is preempted by Title VII of the Federal Civil Rights Act of 1964 (supra, §847). The FEHC ordered the club to institute an affirmative action program (see infra, §965 et seq.) to employ women at both its camp and city locations. The trial court set aside the FEHC's decision and dismissed the underlying accusation. *Held*, judgment reversed.

(a) A private nonprofit social club is an "employer," subject to the FEHA. (187 C.A.3d 9; see supra, §918.)

(b) Compelling the club to hire women did not violate the members' constitutional right of association (see supra, §378 et seq.). This right protects "highly personal" and "intimate" relationships, but no such relationship existed between the club members and the club employees so as to warrant protection from state intrusion. (187 C.A.3d 11 et seq.) Moreover, the impact of forced hiring of female employees on club members' associational rights was justified "by the state's compelling interest in eliminating employment discrimination." (187 C.A.3d 14.)

(c) The FEHA is not preempted by Title VII of the Federal Civil Rights Act of 1964. Even though Title VII excludes coverage of private clubs, the inclusion of these clubs in the FEHA coverage "in no way hinders Title VII's overriding objective of eliminating employment discrimination." (187 C.A.3d 17.) "Title VII is neutral on the subject of all employment practices it does not prohibit"; thus, states are free to extend their antidiscrimination laws to areas not covered by Title VII. (187 C.A.3d 15, 18.)

(d) Male gender is not a bona fide occupational qualification for club employees. (1) To justify discrimination against women, the employer must establish "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved," and must also establish that it would be impossible to rearrange job responsibilities. (187 C.A.3d 19.) The *preference* of club members for male employees cannot form the basis of a defense. (187 C.A.3d 19 et seq.) (2) Claims based on the privacy interests of club members were not justified where the club facilities had enclosed showers and bathrooms; if a member chose not to use these enclosed facilities, no legally enforceable right of privacy was impaired. (187 C.A.3d 22.)

In *Proksel v. Gattis* (1996) 41 C.A.4th 1626, 49 C.R.2d 322, plaintiff filed sexual discrimination and harassment charges against defendant employer on the grounds that he had given preferential treatment to another employee with whom he was romantically involved. *Held*, "a romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." Because plaintiff "has shown nothing more than such a relationship, her sexual discrimination and

harassment claims were properly dismissed." (41 C.4th 1631.) However, evidence of a romantic involvement with another employee might be relevant to prove liability under another theory, such as creation of a hostile work environment, where there is other evidence to support that theory. (41 C.4th 1629, 1630.)

West's Key Number Digest, Civil Rights k.158 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature and Scope of Requirement*. See 34 *Pepperdine L. Rev.* 313 [Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict].



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3. Sex Discrimination.

bb. Discrimination Based on Pregnancy.

8 *Witkin Sum. Cal. Law Const Law* § 926

[§ 926] Discrimination Based on Pregnancy.

(1) *Statutory Provisions.* It is an unlawful employment practice, unless based on a bona fide occupational qualification, to discriminate against females because of pregnancy, childbirth, or related medical condition. (See *Govt.C. 12945*; *Govt.C. 12926* [defining "sex" as including pregnancy, childbirth, or related medical conditions].) The statute specifies a number of prohibited acts, including (a) refusal to allow reasonable pregnancy leave; (b) refusal to allow the usual benefits or privileges of employment; and (c) refusal to transfer a pregnant employee to a less strenuous or hazardous position, where this can be reasonably accommodated. (*Govt.C. 12945*; see *Govt.C. 12943(a)* [prohibition against discrimination by school districts].) (See *Williams v. MacFrugal's Bargains-Close-outs* (1998) 67 C.A.4th 479, 482, 79 C.R.2d 98 [phrase "related medical conditions" in *Govt.C. 12945* only applies to medical conditions related to pregnancy or childbirth; it does not "cover 'indirect' related medical conditions, such as a 'diagnostic hysterectomy' performed years after childbirth"]; 17 Southwestern U. L. Rev. 409 [equal opportunity child care]; on pregnancy discrimination under federal statute, see *supra*, §877.)

(2) *Illustrations.* In *Johnson Controls v. Fair Emp. & Housing Com.* (1990) 218 C.A.3d 517, 267 C.R. 158, J, the operator of an automotive battery plant, voluntarily adopted a "fetal protection program" that excluded women of child-bearing age and capacity from jobs involving exposure to lead oxide. Respondent F, a young, physically able woman, applied for a job as a cast-on-strap loader (COS loader), but was denied employment because she declined to produce medical evidence of infertility. She filed a complaint with the FEHC. The Commission, after lengthy hearings, found that J's exclusion of F constituted unlawful sex discrimination, and that the two justifications relied on by the company--bona fide occupational qualification (BFOQ) and business necessity (BND)--were not supported by sufficient proof. J sought administrative mandamus, and the superior court, reweighing the evidence under the independent judgment test, granted the writ, ruling (1) that J had proved a substantial risk of harm, and (2) that the Commission erred in failing to consider the business necessity defense. *Held*, reversed.

(a) The substantial evidence test was the appropriate standard of review. There is no vested right of an employer to conduct a business free of reasonable governmental rules and regulations. (218 C.A.3d 531, citing *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 C.A.3d 14, 112 C.R. 872.) Hence, the Commission's decision must be upheld

unless the record shows it so lacking in evidentiary support as to make the decision unreasonable. (218 C.A.3d 532.)

(b) *Govt.C. 12940* makes it unlawful to refuse to hire on the basis of sex unless the practice is "based upon a bona fide occupational qualification." The California Code of Regulations makes it unlawful to refuse to hire a female because she is of child-bearing age, or to require an employee to be sterilized as a condition of employment. Here, the evidence is uncontradicted: "Before a woman could obtain work under the fetal protection program, she must demonstrate, in effect, there is medical certainty that she is sterile." (218 C.A.3d 533.)

(c) After a number of federal decisions had reached conflicting decisions on the issue of sex discrimination based on pregnancy, Congress enacted the Pregnancy Discrimination Act (PDA) (*supra*, §877) to provide that discrimination based on sex includes discrimination based on pregnancy, childbirth, and related medical conditions. "The effect of the PDA was to make categorical discrimination against a subclass of women, viz., pregnant women, discrimination on the basis of sex, requiring affirmative proof that 'nonpregnancy' was a bona fide occupational qualification." (218 C.A.3d 535.)

(d) The scientific evidence offered on the effect of lead in the blood did not justify the exclusion of fertile females only: "[T]he evidentiary paucity supports the factual conclusion that the exclusion of fertile women only from the battery factory workplace is a facial, blatant, overt gender based job discrimination" violative of *Govt.C. 12940*, "unless warranted by a bona fide occupational qualification." (218 C.A.3d 539.)

(e) The BFOQ defense is an extremely narrow exception to the general prohibition of discrimination on the basis of sex. An employer has the burden of proving "that he had reasonable cause to believe ... that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." (218 C.A.3d 541.) "In contrast, the BND is to be applied in connection with facially neutral practices that have a demonstrably disproportionate and adverse impact on members of a protected class. ... The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." (218 C.A.3d 541.)

(f) J failed to establish a factual basis for applying the BFOQ defense. "There is no evidence that fertile women cannot efficiently perform jobs involving contact with lead at the Company's facilities. Although *some* women have become pregnant while working there, thus creating the *possibility* of harm to their offspring, this fact falls far short of a showing that 'all or substantially all' female workers create such a risk." (218 C.A.3d 542.) Federal cases holding that fetal protection programs are subject to the BND test are not controlling and will not be followed. (218 C.A.3d 543.)

(g) "From the perspective of fetal protection, *until* a fertile woman becomes pregnant, she stands in precisely the same position as a fertile man; in either case, the danger to unborn offspring is nonexistent, or, at least, identical (assuming as evidence suggests there may be some danger of injury to reproductive cells posed by exposure to lead compounds). It is not the abstract biological fact that women are *capable* of becoming pregnant which supposedly requires the exclusion of women, but rather the chance that they will *become* pregnant--a factor speaking more about the ability of women to control their lives and their bodies than about biological distinctions." (218 C.A.3d 550.)

(h) J's policy is predicated on "the presumption that the employer is better suited to safeguard the interests of a woman's future offspring, should there be an unexpected pregnancy, than is the woman herself--i.e., that society's interest in fetal safety is best served, not by fully informing women of the risks involved and allowing them to make informed choices, not by fixing the workplace, but rather by removing from women the opportunity to make any choices in the matter at all." (218 C.A.3d 551.) "[T]his is not discrimination based on 'objective differences' between men and women, it is discrimination based on categorical, long ago discarded assumptions about the ability of women to govern their sexuality and about the comparative ability of women to make reasoned, informed choices." (218 C.A.3d 551.)

(i) "However laudable the concern by businesses such as J for the safety of the unborn, they may not effectuate their goals in that regard at the expense of a woman's ability to obtain work for which she is otherwise qualified." (218

C.A.3d 552.) (See *International Union, United Auto., Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls* (1991) 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158, supra, §863; *Carr v. Barnabey's Hotel Corp.* (1994) 23 C.A.4th 14, 19, 28 C.R.2d 127 [verdict for plaintiff hotel employee was supported by evidence that food and beverage director told plaintiff "this was no place for pregnant women to be" and "no woman talks to me this way," and that other employees were stupid and lazy due to her incompetence]; *Spaziano v. Lucky Stores* (1999) 69 C.A.4th 106, 112, 81 C.R.2d 378 [employer's policy of providing pregnant disabled workers with same leave as other workers disabled by nonindustrial causes, though less than workers disabled through work-related illness or injury, was not discriminatory]; 99 A.L.R.5th 1 [discrimination against pregnant employee].)

West's Key Number Digest, Civil Rights k.162

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations.* See *Kelly v. Stamps.com* (2005) 135 C.A.4th 1088, 1100, 38 C.R.3d 240 [trial court erred in granting summary judgment to defendant employer in action for pregnancy discrimination based on plaintiff's dismissal during defendant's downsizing when plaintiff was 7 months pregnant; plaintiff's superior had listed her as person to retain and her reviews had been excellent, but new CEO claimed that plaintiff had "already checked out," and his contract turnaround specialist, who later took over plaintiff's duties, submitted new, critical review within 1 day of plaintiff's complaint that impending dismissal might be based on her pregnancy].



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aa. In General.

8 Witkin Sum. Cal. Law Const Law § 927

[§ 927] In General.

(1) *Nature of Prohibition.* It is an unlawful employment practice for an employer or other covered entity to harass an employee or applicant because of race, etc., including sex. (*Govt.C. 12940(j)*; see *supra*, §922.) For this purpose, harassment because of sex includes "sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (*Govt.C. 12940(j)(4)(C).*) *Govt.C. 12940(j)* "is declaratory of existing law, except for the new duties imposed on employers with regard to harassment." (*Govt.C. 12940(j)(2).*) (See *Govt.C. 12950.1* [requiring employers with 50 or more employees to provide specified education and training on sexual harassment to supervisory employees]; on who is employer for harassment purposes, see *supra*, §918; on employer's liability for acts of nonemployees generally with respect to sexual harassment, see *supra*, §916; on sexual harassment under Title VII of the Civil Rights Act, see *supra*, §864 et seq.; on supervisor as "person" subject to liability for sexual harassment under FEHA, see *supra*, §919; on sexual harassment occurring in professional relationship, see *supra*, §896.)

The following decisions are illustrative. (See *Farmers Ins. Group v. Santa Clara* (1995) 11 C.4th 992, 1001, 47 C.R.2d 478, 906 P.2d 440, 5 Summary (10th), Torts, §240 [sexual harassment was not within deputy sheriff's scope of employment]; *Proksel v. Gattis* (1996) 41 C.A.4th 1626, 49 C.R.2d 322, *supra*, §925; *Fiol v. Doellstedt* (1996) 50 C.A.4th 1318, 1327, 58 C.R.2d 308, *supra*, §919 [mere inaction by nonharassing supervisor does not constitute aiding and abetting]; *Birschstein v. New United Motor Mfg.* (2001) 92 C.A.4th 994, 1001, 1003, 112 C.R.2d 347 [trial court erred in finding that coworker's repeated acts of staring at plaintiff could not qualify as actionable sexual harassment as matter of law, particularly in light of coworker's prior overt acts of sexual harassment; applying continuing violation doctrine of *Richards v. CH2M Hill* (2001) 26 C.4th 798, 111 C.R.2d 87, 29 P.3d 175, 3 Cal. Procedure (4th), Actions, Supp., §521]; *Herberg v. California Institute of the Arts* (2002) 101 C.A.4th 142, 149, 124 C.R.2d 1 [student display for 24 hours of art piece depicting employee engaged in sexual act was not sufficiently severe or pervasive to warrant liability for sexual harassment]; *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 C.A.4th 153, 164, 134 C.R.2d 492 [trial court erred in granting defendant's motion for summary judgment in sexual harassment action where, although harassment lasted less than 7 days, defendant knew that harasser might be violent; defendant's failure to act could be found to have amounted to deliberate indifference that caused plaintiff to suffer physical attack by

harasser].)

The FEHA establishes "minimum requirements" for employers to ensure a workplace free of sexual harassment:

(a) The department must amend its poster on discrimination in employment to include information on the illegality of sexual harassment, and every employer must post the amended poster in a prominent and accessible location. (*Govt.C. 12950(a).*)

(b) Every employer must (1) distribute to all employees the department's information sheet on sexual harassment, or (2) provide to all employees equivalent information containing, at a minimum, components on the illegality, definition, and description of sexual harassment, the employer's internal complaint process, the legal remedies and complaint process available through, and directions on how to contact, the department and the Commission, and the protection provided against retaliation. (*Govt.C. 12950(b), (c).*) (See *Govt.C. 12950(d)* [compliance or noncompliance with distribution requirements does not establish or negate employer's liability for sexual harassment]; *Govt.C. 12950(e)* [if employer violates section, Commission must issue order requiring compliance].)

(2) *Hostile Work Environment.* To support a claim for sexual harassment involving creation of a hostile work environment, the alleged misconduct need not seriously affect the plaintiff employee's psychological well-being. "So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co. (1994) 22 C.A.4th 397, 412, 27 C.R.2d 457* [trial judge properly rejected instruction to contrary].) However, to prove a claim for sexual harassment involving an abusive workplace, a nexus must be established between the allegedly hostile environment and plaintiff's experience in the workplace. "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment." (*Beyda v. Los Angeles (1998) 65 C.A.4th 511, 520, 76 C.R.2d 547* [evidence of acts of sexual harassment against others was properly excluded where acts did not occur in plaintiff's presence and plaintiff failed to present evidence that she knew of acts during employment].)

(3) *After-Acquired Evidence Doctrine Is Not Applicable.* Application of the after-acquired evidence doctrine (*supra*, §860) to bar claims for sexual harassment during the employment relationship when the employer discovers evidence of wrongdoing that, in any event, would have led to an employee's discharge on legitimate and lawful grounds, would not serve the purposes of the antidiscrimination statutes. The likely consequence of widespread exploitation of the doctrine would be underenforcement of the statutes and underdeterrence of discriminatory employment practices. "In applying the after-acquired evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo v. Rite Stuff Foods (1998) 65 C.A.4th 833, 849, 850, 77 C.R.2d 12* [involving sexual harassment of illegal alien hired with false documents].)

(4) *Harassment by Customer or Client.* An employer may be liable for sexual harassment by a customer or client under specified circumstances. (See *Govt.C. 12940(j)(1)*, *supra*, §916; *Salazar v. Diversified Paratransit (2004) 117 C.A.4th 318, 326, 11 C.R.3d 630* [statute is clarification of existing law and may be applied retroactively].)

(5) *Texts and Commentary.* Many articles have commented on sexual harassment in the workplace. (See 18 California Lawyer 73 (November 1998) [Investigating Sexual Harassment]; 34 Cal. Western L. Rev. 457 [study of factors affecting employee perceptions and consequences of sexual harassment]; 19 Thomas Jefferson L. Rev. 215 [sexual harassment, fair housing, and expanding statutory remedies into common law framework]; 28 U.S.F. L. Rev. 715 [sexual harassment of attorneys by clients]; 18 A.L.R.4th 328 [sexual harassment of employee as violation of state civil rights law]; 93 A.L.R.5th 47 [when is work environment intimidating, hostile, or offensive]; 94 A.L.R.5th 1 [when is supervisor's or coemployee's hostile environment sexual harassment imputable to employer]; 62 Am.Jur. Trials 235 [Workplace Sexual Harassment: Quid Pro Quo].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Prohibition.* See *Bradley v. Department of Corrections & Rehabilitation (2008)* 158 C.A.4th 1612, 1630, 71 C.R.3d 222 [once employer is informed about sexual harassment, employer must take remedial action designed both to stop harassment and to deter future harassment; it is not sufficient for employer simply to conduct investigation]. (2) *Hostile Work Environment.* "[A]n employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." A hostile work environment can be established by showing that the objectionable conduct conveyed the message that management views women as "sexual playthings" or that the way for women to succeed in the workplace is to engage in sexual conduct, thereby creating a demeaning atmosphere. (*Miller v. Department of Corrections (2005)* 36 C.4th 446, 466, 468, 30 C.R.3d 797, 115 P.3d 77 [plaintiff raised triable issue of fact on issue whether sexual favoritism by prison warden constituted hostile work environment].) (See CACI, No. 2521A [essential factual elements]; CACI, Nos. 2521C, 2522C [widespread sexual favoritism]; CACI, No. 2524 ["severe or pervasive" explained].)

The essence of a sexual harassment claim based on a hostile work environment "is the disparate treatment of an employee on the basis of sex--not the mere discussion of sex or use of vulgar language" in the employee's presence. Although the use of coarse and vulgar language in the workplace might establish actionable sexual harassment, the FEHA "does not outlaw sexually coarse and vulgar language or conduct that merely offends." (*Lyle v. Warner Bros. Television Productions (2006)* 38 C.4th 264, 280, 287, 295, 42 C.R.3d 2, 132 P.3d 211 [defendant television writers met burden of showing that cause of action for sexual harassment had no merit; none of sexual antics and coarse language was directed at plaintiff, plaintiff was warned that creative process in writing show involved sexual discussions and coarse language, and most of conduct took place in group sessions with both male and female writers recounting sexual experiences while brainstorming and generating script ideas for adult-themed show; plaintiff failed to show how vulgar discussions and conduct affected her work hours or duties in disparate manner].) (See *Mokler v. Orange (2007)* 157 C.A.4th 121, 145, 68 C.R.3d 568 [plaintiff failed to establish hostile work environment by evidence of isolated rude, offensive, and boorish comments and nonsexual and slight touchings made by defendant who did not work in same building as plaintiff and who was not plaintiff's supervisor]; 40 U.C. Davis L. Rev. 1963 [Lyle].)

(4) *Harassment by Customer or Client.* See *Carter v. California Dept. of Veterans Affairs (2006)* 38 C.4th 914, 44 C.R.3d 223, 135 P.3d 637, Supp., supra, §916 [retroactive application of Govt.C. 12940(j)(1)]. (5) *Texts and Commentary.* See 25 California Lawyer 37 (March 2005) [Rules for Sexual Harassment Training]. *Correction:* Page 431, line 7 of first full paragraph, "*Birschstein*" should read "*Birschtein*".



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8 *Witkin Sum. Cal. Law Const Law* § 928

[§ 928] Liability of Supervisor or Coworker.

(1) *Supervisors*. In *Department of Health Services v. Superior Court* (2003) 31 C.4th 1026, 6 C.R.3d 441, 79 P.3d 556, plaintiff was sexually harassed by her supervisor for nearly 2 years before she reported the harassment to management. Once the report was made, an investigation commenced and disciplinary action against the supervisor was taken. Plaintiff brought an action for sexual harassment against defendant employer for violation of the FEHA. Defendant sought to defend the action based on the federal defense to Title VII actions, as enunciated in *Burlington Industries v. Ellerth* (1998) 524 U.S. 742, 118 S.Ct 2257, 141 L.Ed.2d 633, supra, §866, and *Faragher v. Boca Raton* (1998) 524 U.S. 775, 118 S.Ct 2275, 141 L.Ed.2d 662, supra, §866. *Held*, under the FEHA, an employer is strictly liable for sexual harassment by a supervisor, but the avoidable consequences doctrine may limit an employer's liability. Although instructive, federal precedent does not apply. (31 C.4th 1040.)

(a) "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee." (31 C.4th 1040.) Here, the harasser was a supervisor, and "an employer is liable for *all* acts of sexual harassment by a supervisor. But strict liability is not absolute in the sense that it precludes all defenses. ... Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." (31 C.4th 1042.)

(b) Under the FEHA, an employee may recover those damages "generally available in noncontractual actions." In civil actions generally, that right is qualified by the common law doctrine of avoidable consequences, which is described in the *Rest.2d, Torts*, §918(1), as preventing the injured party from recovering damages for harm he or she could have avoided "by the use of reasonable effort or expenditure after the commission of the tort." (31 C.4th 1042.)

(c) The defendant bears the burden of pleading and proving the defense. It has three elements: "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (31 C.4th 1044.)

(d) The avoidable consequences doctrine allows an employer to escape liability only for those damages "that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment. Deciding when a harassed employee has first suffered compensable harm and when a reasonable employee would have reported the harassment will in many and perhaps most instances present disputed factual issues to be resolved by application of practical knowledge and experience." (31 C.4th 1044.) Delay that results from the employee's initial resort to informal attempts to resolve the problem with the supervisor must be carefully evaluated to determine whether it was reasonable in the particular employment situation. (31 C.4th 1045.)

(e) Being part of the law of damages, the avoidable consequences doctrine only affects the remedy. "If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (31 C.4th 1045.)

(f) The avoidable consequences doctrine furthers the goal of the FEHA by encouraging employees to use employer-provided grievance procedures, and thus to stop harassment before it becomes severe or pervasive. However, exhausting an employer's grievance procedures is not a prerequisite to filing an FEHA claim or bringing an FEHA action; it is merely a relevant factor in determining the merits of the avoidable consequences defense should the employer choose to assert it. (31 C.4th 1047.) (See *Chapman v. Enos* (2004) 116 C.A.4th 920, 931, 10 C.R.3d 852 [trial court erred in instructing jury that to be supervisor, one must be "fully accountable and responsible" for employee's performance and work product; this instruction narrowed definition of "supervisor" contained in FEHA, impaired plaintiff's rights under statute, and incorrectly stated statutory requirements for liability]; on liability of supervisors under FEHA generally, see *supra*, §919.)

(2) *Coworker Liability*. Govt.C. 12940 was amended in 2000 in response to *Carrisales v. Department of Corrections* (1999) 21 C.4th 1132, 90 C.R.2d 804, 988 P.2d 1083. The statute now provides that an employee is personally liable for harassment prohibited by Govt.C. 12940 "that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (Govt.C. 12940(j)(3).) Although the statute specifically states that it is "declaratory of existing law" (see Govt.C. 12940(j)(2)), the amendment does more than just clarify existing law; it imposes personal liability on nonsupervisory coworkers where, according to *Carrisales*, there had been none. Thus, the amendment does not apply retroactively. (*McClung v. Employment Dev. Dept.* (2004) 34 C.4th 467, 471, 20 C.R.3d 428, 99 P.3d 1015.) (See 32 *McGeorge L. Rev.* 483 [personal liability for sexual harassment under FEHA]; 61 Am.Jur. Trials 489 [Individual Liability for Sexual Harassment]; BAJI, No. 12.21 [direct liability and as aider and abettor].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Supervisors*. See *Myers v. Trendwest Resorts* (2007) 148 C.A.4th 1403, 1421, 56 C.R.3d 501 [following *Department of Health Services v. Superior Court* (2003) 31 C.4th 1026, 6 C.R.3d 441, 79 P.3d 556, text, p. 433; trial court erred in granting summary judgment to employer on sexual harassment claim even though worst harassment took place outside office; there was no private relationship between supervisor and employee unconnected with employment and harassing conduct occurred during work-related excursions]; CACI, No. 2525 ["supervisor" defined]. (2) *Coworker Liability*. See CACI, No. 2521A [hostile work environment--essential factual elements].



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8 Witkin Sum. Cal. Law Const Law § 929

[§ 929] Harassment of Applicant.

In *Doe v. Capital Cities* (1996) 50 C.A.4th 1038, 58 C.R.2d 122, the issue was posed as follows: "An aspiring actor is first drugged and then gang-raped by a casting director and four other men one Sunday at the casting director's home. Can the actor successfully allege causes of action for sexual harassment and negligent hiring against the casting director's employers?" (50 C.A.4th 1042.) *Held*, a cause of action for sexual harassment lies, but not one for negligent hiring. Plaintiff alleged that he was recruited and groomed by defendant M for an acting position at defendant ABC, where M was a casting director. Over the course of a month, M spent several hours a day working with plaintiff and preparing him for auditions. Finally, on a Sunday morning, plaintiff, at M's request, went to M's home for what he thought was a meeting to further his acting career. Instead, plaintiff was drugged, beaten, and gang-raped by M and four other men. Plaintiff's complaint with respect to ABC alleged causes of action for sexual harassment and negligent hiring.

(a) The FEHA prohibits sexual harassment not only of employees, but also of applicants. (Former Govt.C. 12940(h), now Govt.C. 12940(j).) Contrary to what ABC seems to suggest, the same conduct can give rise to both civil and criminal liability, and a violent sexual assault can be the basis of a claim under the Act for sexual harassment. (50 C.A.4th 1045.)

(b) Under former Govt.C. 12940(h)(1) (now Govt.C. 12940(j)(1)), an employer is strictly liable for harassment by an agent or supervisor, but is liable for harassment by a coworker only if the employer knew or should have known of the conduct and failed to take immediate corrective action. Here, plaintiff's allegations are sufficient to allege that M was ABC's agent. (50 C.A.4th 1046.) The Act applies to employees and applicants. In the case of an applicant, the counterpart to a supervisor must be the person to whom application for employment is made. The complaint alleges that M acted as ABC's agent in finding, grooming, and recruiting actors. These allegations establish that, vis-a-vis plaintiff's position as a potential employee at ABC, M was an "agent" within the terms of the Act. (50 C.A.4th 1047.)

(c) Decisions from the FEHC, cited in *Capitol City Foods v. Superior Court* (1992) 5 C.A.4th 1042, 7 C.R.2d 418, have recognized that, while harassing conduct need not occur in the workplace, it must occur in a work-related context.

Unwelcome sexual conduct that occurs outside the workplace but is in some fashion work-related constitutes sexual harassment. Hence, liability is not defeated by the fact that the sexual assault occurred on a *Sunday at M's home*. (50 C.A.4th 1048.)

(d) Rigid principles of respondeat superior apparently do not apply to FEHA claims, but they do provide guidance. (50 C.A.4th 1048, citing *Farmers Ins. Group v. Santa Clara* (1995) 11 C.4th 992, 47 C.R.2d 478, 906 P.2d 440, 5 Summary (10th), Torts, §240.) Hence, while liability under the Act is broader than liability under the doctrine of respondeat superior, principles of respondeat superior are still relevant in determining liability for sexual harassment that occurs during nonwork hours away from the workplace. (50 C.A.4th 1048.)

(e) The Supreme Court's recent decision on the relationship between respondeat superior and sexual assaults, *Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 C.4th 291, 48 C.R.2d 510, 907 P.2d 358, involved a plaintiff who was sexually molested by a technician while undergoing a hospital examination. The court, noting that vicarious liability under principles of respondeat superior requires a causal nexus between the tort and the employee's work, i.e., some relationship between the nature of the work involved and the type of tort committed, concluded as a matter of law that the hospital could not be held vicariously liable for the assault. (50 C.A.4th 1049.)

(f) This case is different. A casting director, acting as gatekeeper to the glamorous world of entertainment, occupies a position that will predictably create the risk that he will commit intentional torts of the type involved here. The hiring process for actors and actresses is not limited to the workplace, and plaintiff's allegations reveal a pattern of conduct by which plaintiff was essentially at M's beck and call. It is not farfetched that plaintiff believed his presence at M's home on that Sunday would advance his acting ambitions, and M's alleged conduct thus was sufficiently work-related to render ABC liable. (50 C.A.4th 1050.) Plaintiff's allegations are adequate to establish a statutory claim for sexual harassment, and, if plaintiff can prove those allegations, ABC is strictly liable without regard to what it knew or should have known about M's propensities. (50 C.A.4th 1052, 1053.)

(g) The conclusion here is not inconsistent with *Capitol City Foods*, the only published case to consider an employer's liability for sexual harassment by a supervisor while off duty and not at the workplace. *Capitol City Foods* involved a date between the plaintiff and her supervisor; the impetus for the date came from the plaintiff, the date was not work-related, and it did not occur in a work-related context. It did not involve "anything like the pattern of conduct alleged here where the applicant's admission to employment requires continuous participation in a variety of activities at various locations in pursuit of his acting career." (50 C.A.4th 1052.)

(h) Plaintiff's causes of action for violation of former Govt.C. 12940(i) (now Govt.C. 12940(k)) (failure to take all reasonable steps necessary to prevent discrimination and harassment) and negligent hiring fail. The cornerstone of a negligent hiring theory is the risk that the employee will act in a certain way and the employee does act in that way. Here, no facts are alleged to show ABC's prior knowledge of M's propensity to engage in this particular form of sexual harassment. Allegations that ABC knew that M used mind-altering drugs and used his position to gain sexual favors do not show knowledge that he would surreptitiously drug a prospective employee and then brutally assault him. (50 C.A.4th 1053, 1054.) (On sexual harassment under Title VII of the Civil Rights Act, see supra, §864 et seq.; on who is an employer for harassment purposes, see supra, §918; on coworker liability for sexual harassment, see supra, §928.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 930

[§ 930] Same-Gender Harassment.

In *Mogilefsky v. Superior Court* (1993) 20 C.A.4th 1409, 26 C.R.2d 116, plaintiff, a male, filed an action for sexual harassment, claiming that his supervisor, also male, had made sexual comments to him, asked him to perform sexual acts on him, and falsely told others that plaintiff had engaged in sex with him. The trial judge sustained defendants' demurrers without leave to amend, and denied plaintiff's motion for reconsideration. *Held*, plaintiff's petition for mandamus granted.

(a) Sexual harassment may be of two types. To state a cause of action for "quid pro quo" harassment, the plaintiff need only allege that "a term of employment was expressly or impliedly conditioned on acceptance of a supervisor's unwelcome sexual advances." (20 C.A.4th 1414.) A cause of action for "hostile environment" harassment, by contrast, is stated where the plaintiff alleges that the employer created a hostile environment for the plaintiff because of the plaintiff's sex. (20 C.A.4th 1415.)

(b) The only previous California case alleging same-gender harassment was a hostile environment case, *Hart v. National Mortg. & Land Co.* (1987) 189 C.A.3d 1420, 235 C.R. 68. There, the court stated that the alleged harassment was not "because of sex," but admitted that if the plaintiff had been a woman, the alleged misconduct would have unquestionably constituted sexual harassment. "*Hart's* failure to mention, much less discuss, this double standard leaves the opinion vulnerable to criticism." Furthermore, to the extent *Hart* turned on the lack of showing of discrimination in the terms, conditions, or privileges of employment, it rested on *Govt.C. 12940(a)*, not former *Govt.C. 12940(h)* (now *Govt.C. 12940(j)*), which is the basis for the present case. (20 C.A.4th 1416.)

(c) There is no support in the statutory language for the contention that the Legislature intended to limit protection from sexual harassment to male-female harassment, and this conclusion is confirmed by decisions under federal law. Behavior inflicted on a plaintiff "because of sex" need not be tolerated simply because the plaintiff is a member of the "empowered" gender. (20 C.A.4th 1416, 1417.)

(d) Thus, an action for sexual harassment may be stated under the FEHA "by a member of the same sex as the

harasser, whether based on the quid pro quo theory or the hostile environment theory or a hybrid of both theories." (20 C.A.4th 1418.) (See 73 A.L.R.5th 1 [Same-Sex Sexual Harassment Under State Antidiscrimination Laws]; on same gender harassment under federal Civil Rights Act, see *supra*, §865.)

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See *Singleton v. United States Gypsum Co.* (2006) 140 C.A.4th 1547, 1561, 45 C.R.3d 597 [applying guidelines of *Lyle v. Warner Bros. Television Productions* (2006) 38 C.4th 264, 42 C.R.3d 2, 132 P.3d 211, Supp., *supra*, §927; trial court erred in granting summary judgment to defendant employer where there were material issues of fact regarding whether plaintiff was subjected to sexual harassment; male-on-male harassment that consistently challenges employee's heterosexual identity is harassment "because of sex"; motive behind harassment need not be sexual].



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5. Sexual Orientation Discrimination.

8 *Witkin Sum. Cal. Law Const Law* § 931

[§ 931] Sexual Orientation Discrimination.

(1) *Development of Law.* The 1992 Legislature codified decisions prohibiting discrimination on the basis of sexual orientation (*supra*, §708), based on former Lab.C. 1102.1. (See *Delaney v. Superior Fast Freight* (1993) 14 C.A.4th 590, 596, 18 C.R.2d 33 [municipal ordinance prohibiting discrimination in employment on basis of sexual orientation was preempted by FEHA, even though Act did not ban discrimination on basis of sexual orientation]; 18 California Lawyer 59 (June, 1998) [Eliminating Sexual Orientation Bias]; 24 *Pacific L. J.* 969; 66 *So. Cal. L. Rev.* 2297 [discussion of background, constitutional issues, cases, and legislative history of Lab.C. 1102.1 and related sections]; 82 *A.L.R.5th* 1 [validity, etc., of state enactment or regulation prohibiting sexual orientation discrimination]; on same-gender sexual harassment, see *Mogilefsky v. Superior Court* (1993) 20 C.A.4th 1409, 26 C.R.2d 116, *supra*, §930; on sexual orientation discrimination as violation of Equal Protection Clause, see *supra*, §§708, 798.)

(2) *Sexual Orientation as Covered Characteristic Under FEHA.* Lab.C. 1102.1 was repealed in 1999, and "sexual orientation" was added to the list of characteristics protected by the FEHA. (See *Govt.C. 12920, 12921*, *supra*, §915; *Govt.C. 12940*, *supra*, §921.) "Sexual orientation" is defined as "heterosexuality, homosexuality, and bisexuality." (*Govt.C. 12926(q).*) (See *Murray v. Oceanside Unified School Dist.* (2000) 79 C.A.4th 1338, 1357, 95 C.R.2d 28 [plaintiff could proceed under either or both FEHA and former Lab.C. 1102.1 for workplace harassment based on sexual orientation; because conduct that would have violated Lab.C. 1102.1 as it read on December 1, 1999, is deemed violation of FEHA as amended, "harassing conduct, as well as adverse employment consequences, are each fully actionable when sexual orientation harassment in the workplace is involved"].)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Sexual Orientation as Covered Characteristic Under FEHA.* See *Hope v. California Youth Authority* (2005) 134 C.A.4th 577, 589, 36 C.R.3d 154 [evidence that plaintiff's supervisor continually called plaintiff "motherfuckin' faggot" and "homo," that kitchen security officer continually called plaintiff "faggot ass bitch" and "faggot ass motherfucker" and that he refused to let wards assist plaintiff in cooking duties and told them that plaintiff thought male wards were pretty, and openly refused to discipline wards when plaintiff complained about their misbehavior, that all of this

conduct was well known to other employees and to supervisors, and that plaintiff's promotion was revoked, in violation of departmental policies, on ground that he was "just not right," supported finding of harassment because of sexual orientation under FEHA].



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8 *Witkin Sum. Cal. Law Const Law* § 932

[§ 932] In General.

(1) *Development of Law.* Under former Govt.C. 12941, it was an unlawful employment practice "to refuse to hire or employ, or to discharge, dismiss, reduce, suspend or demote, any individual over the age of 40 on the ground of age." The statute included several general and specific exceptions, including where: (a) the law provided otherwise, (b) the employee or applicant failed to meet "bona fide requirements" of the job, (c) bona fide retirement or pension programs or existing collective-bargaining agreements were applicable, or (d) promotions or hiring were made on the basis of experience and training; rehiring was based on seniority and prior service; or hiring was made under an established recruiting program. (Former Govt.C. 12941(a).) The statute did not limit the right to select or refer "the better qualified person from among all applicants for a job," and the burden of proving a violation was on the claimant. (Former Govt.C. 12941(b).)

Govt.C. 12941 was repealed in 2002. Age is now a protected class under *Govt.C. 12940*. (See *infra*, §934.) (See *Levy v. Regents of Univ. of Calif.* (1988) 199 C.A.3d 1334, 1343, 245 C.R. 576 [as guide to analysis of claims under FEHA, California looks to federal decisions]; *Jennings v. Marralle* (1994) 8 C.4th 121, 135, 32 C.R.2d 275, 876 P.2d 1074, 3 Summary (10th), *Agency and Employment*, §248 [Legislature's restriction of employer liability to employers of five or more persons under *Govt.C. 12926(d)* indicates it did not intend to make right to be free of age discrimination by small employers a fundamental public policy]; *Stevenson v. Superior Court* (1997) 16 C.4th 880, 885, 66 C.R.2d 888, 941 P.2d 1157 [FEHA policy against age discrimination satisfies criteria necessary to support common law action for tortious wrongful discharge]; *West v. Bechtel Corp.* (2002) 96 C.A.4th 966, 978, 117 C.R.2d 647 [foreign principal's bias against worker cannot be imputed to innocent U.S. agent making business decision that is otherwise neutral]; 51 A.L.R.5th 1 [application of state law to age discrimination in employment]; on age discrimination under federal statute, see *supra*, §873; on unlawful practice of harassing employee because of age, see 3 Summary (10th), *Agency and Employment*, §346.)

Other statutory provisions also recognize and protect the employment rights of older workers. (See, e.g., *Govt.C. 12942*, 3 Summary (10th), *Agency and Employment*, §343 [prohibition of mandatory retirement]; *Govt.C. 19706* [with certain exceptions, applicant for civil service position cannot be required to indicate his or her age on application];

*Unemp.Ins.C. 2070 et seq., 3 Summary (10th), Agency and Employment, §342 [employment for older workers]; Welf.C. 9000 et seq. [Older Californians Act; provides employment services, etc.].) (See *Smith v. Alum Rock Union Elementary School Dist.* (1992) 6 C.A.4th 1651, 1655, 8 C.R.2d 399 [discrimination action under former Educ.C. 23902 was improper; statute conflicted with federal Age Discrimination in Employment Act, *supra*, §873, and ADEA controls under Supremacy Clause].)*

(2) *Prima Facie Case.* A prima facie case of age discrimination is established by evidence that the plaintiff is over the age of 40, was performing satisfactorily at the time of termination, and was discharged under circumstances giving rise to an inference of unlawful discrimination, i.e., others under the age of 40 were retained, or plaintiff's job was filled by someone of comparable skill under the age of 40. (*Gibbs v. Consolidated Services* (2003) 111 C.A.4th 794, 798, 4 C.R.3d 187; see *Ewing v. Gill Industries* (1992) 3 C.A.4th 601, 610, 4 C.R.2d 640 [instructions on elements of prima facie case, under line of cases following *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, *supra*, §870]; *Smith v. International Brotherhood of Electrical Workers* (2003) 109 C.A.4th 1637, 1657, 1 C.R.3d 374 [defendants were entitled to summary judgment in action for age discrimination where plaintiff admitted that he was not in physical condition to carry out all his duties and where, after termination, plaintiff's duties were divided up among other employees, many of whom were over age 40 when hired].)

Nothing in the FEHA prohibits classwide claims of systematic discrimination, and in a "pattern or practice" claim, class action plaintiffs are not required to plead individual prima facie cases of discrimination. (*Alch v. Superior Court* (2004) 122 C.A.4th 339, 378, 19 C.R.3d 29.)

(3) *Replacement by Younger Worker Is Not Required.* In *Begnal v. Canfield & Associates* (2000) 78 C.A.4th 66, 92 C.R.2d 611, plaintiff, a 40-year-old employee, was replaced by an older worker. The court held, in a case of first impression, that although evidence that plaintiff was replaced by an older worker weighs against the inference that she was terminated based on her age, it does not "conclusively establish the absence of age discrimination, or preclude the jury from drawing other inferences." (78 C.A.4th 76.) As stated in *Heard v. Lockheed Missiles & Space Co.* (1996) 44 C.A.4th 1735, 1756, 52 C.R.2d 620, *supra*, §923, involving racial discrimination: "Although the characteristics of the employee replacing a discharged or demoted employee are certainly relevant in evaluating an employer's motive for an employment decision, we believe those characteristics go to the weight of the evidence rather than its legal sufficiency." (78 C.A.4th 75.)

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8 Witkin Sum. Cal. Law Const Law § 933

[§ 933] Sufficiency of Evidence.

In *Martin v. Lockheed Missiles & Space Co. (1994) 29 C.A.4th 1718, 35 C.R.2d 181*, a 65-year-old plaintiff sued defendant, claiming that she was laid off from her job because of age discrimination. *Held*, summary judgment for defendant affirmed; defendant was able to justify its actions.

(a) Had plaintiff reached trial, she would have had the burden of proving age discrimination by defendant. The burden would then have shifted to defendant to show a lawful reason for its action, after which the burden would have returned to plaintiff to show that the justification was a mere pretext. However, in a sense defendant's motion for summary judgment reversed the procedure; defendant was required initially to show either that there was no discrimination or, assuming it existed, that it was justified, the latter being the most appropriate here. (*29 C.A.4th 1730.*)

(b) As justification for its action, defendant was able to show that the layoff was due to adverse economic conditions. More specifically, plaintiff's manager was directed to lay off two workers, and he determined that one of them should be in the position occupied by plaintiff. A younger woman also occupied this position, so one of the two had to go. To select which workers to keep and which to lay off, defendant had created a salary performance appraisal (SPA), which was weighted in favor of seniority. Despite plaintiff's having more seniority, the younger woman had a higher SPA, and as a result plaintiff was the one laid off. This was sufficient evidence by defendant to establish prima facie justification for its action. (*29 C.A.4th 1731.*)

(c) It was admitted that plaintiff was competent at her job. However, in an economically motivated layoff, good workers often lose their jobs. The question is whether defendant selected the workers to be laid off in a fair and nondiscriminatory manner. To meet the burden of showing that defendant's justification was a mere pretext, plaintiff attempted to show that defendant had a policy of age discrimination. Specifically, she introduced memos allowing a fund for preferred treatment for "young" people with critical skills and one disallowing pay raises for workers over 60 and management positions for those over 40; a statement by a coworker that persons were ranked first on the basis of whom they knew, and then given an SPA to fit the ranking; unsupported claims of a substantial number of age discrimination suits against defendant since 1988; and various statements directed at plaintiff that showed that, over the

years, age discrimination was the prevalent climate at defendant. (29 C.A.4th 1732.)

(d) "Whether or not a trier of fact would find any of this to be persuasive evidence on issues to which it was germane, it is apparent that none of it is material to the issue which was before the trial court and thus is before us, which is whether Martin had raised a triable issue of fact material to Lockheed's showing that *on a specific occasion in early 1991* Martin was found available for reassignment by means of valid and fair procedures validly and fairly applied without regard to her age. ... The purpose of the summary judgment procedure, as we perceive it, is to identify those cases in which there is no factual issue which warrants the time and cost of fact-finding by trial. Obviously the procedure cannot fairly serve its purpose unless and until all parties have had sufficient opportunity, through discovery and otherwise, adequately to develop their factual cases. But where, as here, the parties have received (and apparently have utilized) that opportunity, we believe the correct rule to be that to meet an employer's sufficient showing of a legitimate reason for discharge the discharged employee, to avert summary judgment, must produce 'substantial responsive evidence' that the employer's showing was untrue or pretextual. ... For this purpose, speculation cannot be regarded as substantial responsive evidence. ... In our view Martin's showing in the trial court was insufficient to create more than speculation that Lockheed's showing was pretextual or false." (29 C.A.4th 1734, 1735.) (See *Hersant v. Department of Social Services* (1997) 57 C.A.4th 997, 1004, 67 C.R.2d 483 [following *Martin*]; *Horn v. Cushman & Wakefield Western* (1999) 72 C.A.4th 798, 805, 85 C.R.2d 459 [following *Martin* and *Hersant*]; *Muzquiz v. Emeryville* (2000) 79 C.A.4th 1106, 1116, 94 C.R.2d 579 [plaintiff failed to carry burden; following *Martin* and *Hersant*].)

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8 Witkin Sum. Cal. Law Const Law § 934

[§ 934] Age as Protected Class.

In *Esberg v. Union Oil Co. of Calif.* (2002) 28 C.4th 262, 121 C.R.2d 203, 47 P.3d 1069, the question was whether defendant employer's denial of postgraduate educational benefits to plaintiff, a 56-year-old employee, violated the proscription against age discrimination in the FEHA. Held, the statute does not apply.

(a) Two provisions of the FEHA, *Govt.C. 12940* and *12941*, identify protected classes of people and prohibited forms of discrimination in the workplace. *Govt.C. 12940*, which includes coverage for discrimination in the terms and condition of employment, does not list age as a protected class. *Govt.C. 12941* makes it "an unlawful employment practice to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any person over the age of 40 on the ground of age," but does not prohibit discrimination in the terms and conditions of employment. (28 C.4th 268.) "Because the language of these sections is unambiguous, we need not consider various extrinsic aids, such as the purpose of the statute, the evils to be remedied, the legislative history, public policy, or the statutory scheme encompassing the statute." (28 C.4th 269.)

(b) 2 *Cal. Code Reg. §7295.2(a)*, which provides that the denial of employment benefits may be considered in establishing age discrimination, is invalid insofar as it is inconsistent with the authorizing statute. (28 C.4th 270.)

(c) Plaintiff's common law tort claim also fails. A "common law tort claim based on the public policy against age discrimination articulated in the FEHA is subject to the FEHA's limitations on the nature and scope of the statutory prohibition against age discrimination." (28 C.4th 272.) Because the FEHA does not prohibit employers from denying educational benefits on the basis of age, "plaintiff may not ground a common law claim for denial of the same benefits in the FEHA's prohibition against age discrimination." (28 C.4th 272.)

In 2002, the Legislature rejected the reasoning of *Esberg*. It repealed *Govt.C. 12941* and amended *Govt.C. 12940* to include age as a class protected against harassment (see *Govt.C. 12940(j)*) and discrimination, including discrimination in compensation and the "terms, conditions, or privileges of employment" (see *Govt.C. 12940(a)*). However, an employer still may refuse to employ a person "because of his or her age if the law compels or provides for that refusal.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices." (*Govt.C. 12940(a)(5)*.) Further, an employer or employment agency may inquire into an applicant's age, and specify age limitations, "where the law compels or provides for that action." (*Govt.C. 12940(d)*; see *Alch v. Superior Court (2004) 122 C.A.4th 339, 396, 19 C.R.3d 29* [amendments to *Govt.C. 12940(d)*, as they apply to employment agencies, do not apply retroactively].) (See *Gibbs v. Consolidated Services (2003) 111 C.A.4th 794, 800, 4 C.R3d 187* [supervisor who was terminated in job restructuring had no right to another position within company].)

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8 *Witkin Sum. Cal. Law Const Law* § 935

[§ 935] Use of Economic Criteria.

In *Marks v. Loral Corp.* (1997) 57 C.A.4th 30, 68 C.R.2d 1, plaintiff was employed by defendant in Newport Beach. Most of the Newport Beach positions were eliminated in 1992, but new departments were created at seven other locations. With the exception of plaintiff and one other person, who was also over 40 years old, employees willing to relocate found new positions. Plaintiff sued under state and federal age discrimination laws, but the jury returned a defense verdict. On appeal, plaintiff challenged an instruction that an employer is entitled to choose employees with lower salaries, even if this results in choosing younger employees, and that a choice based on salary does not constitute age discrimination. *Held*, decisions based on relative compensation rates do not constitute prohibited age discrimination.

(a) *The issue.* Federal courts have struggled with the problem whether a policy or practice that has a disparate impact on older workers generally constitutes illegal age discrimination. Earlier cases, and a few later ones, concluded that a decision based on salary is actionable age discrimination if it disproportionately affects older workers. Other recent cases, particularly those decided after *Hazen Paper Co. v. Biggins* (1993) 507 U. S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338, *supra*, §873, held that an employer is not liable for age discrimination based on economic decisions despite a disparate impact on older workers. (57 C.A.4th 43, 44.)

(b) *The state statute.* Unlike federal law, the California statute does not specifically permit an employer to base decisions on "reasonable factors other than age." However, it does permit an employer to choose "the better qualified person from among all applicants" (Govt.C. 12941(b)), and the phrase "better qualified" applies not only to individual qualifications such as skills, experience, and ability, but also to price, i.e., the wage demanded. (57 C.A.4th 52, 54.) The language of the statute does not prohibit use of salary to differentiate between employees, and, because price-based decisions are basic to a free market system, a court should not extend the statute to prohibit these decisions. (57 C.A.4th 53.) The purpose behind the California statute, as stated in *Unemp.Ins.C. 2070* (see 3 *Summary* (10th), *Agency and Employment*, §342), is to eliminate "arbitrary and unreasonable rules which bar or terminate employment on the basis of age." The normal preference of businesses and others to pay no more money than necessary for goods or services is neither arbitrary nor unreasonable. (57 C.A.4th 59, 60.)

(c) *Principles of disparate impact analysis.* The principles of disparate impact analysis, properly understood, do not apply to differentiations based on salary. As first stated in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, supra, §869, disparate impact discrimination involves a requirement or criterion that *does not* have a business justification; it does not include purely economic business decisions. (57 C.A.4th 61.) "Given the emphasis on job relatedness, job performance, individualized assessment of ability to do a job, and business necessity, it is unfathomable that disparate impact analysis should apply to differentiation on the basis of salary. Such differentiation goes to the very essence of any enterprise." (57 C.A.4th 63.)

Marks v. Loral Corp. was superseded by *Govt.C. 12941.1* in 1999. The statute was renumbered as *Govt.C. 12941* in 2002. It declares its intent that:

(a) *Marks* "does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment."

(b) "[T]he use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group."

(c) "[T]he disparate impact theory of proof may be used in claims of age discrimination."

(d) Courts should interpret state statutes prohibiting age discrimination in employment "broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers."

(e) Affirmative defenses traditionally available in employment discrimination cases are not limited.

In *Guz v. Bechtel Nat.* (2000) 24 C.4th 317, 100 C.R.2d 352, 8 P.3d 1089, defendant, a large engineering company, discharged plaintiff, a 49-year-old management information supervisor who had worked for defendant for 22 years, when it eliminated his work unit allegedly to reduce costs and because of a workload downturn. Plaintiff brought a wrongful discharge claim on three theories, including age discrimination. The trial judge granted summary judgment for defendant on all theories. *Held*, affirmed.

(a) *McDonnell-Douglas test.* California has adopted the three-stage test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, supra, §870, for trying claims of discrimination, including age discrimination, based on a theory of disparate treatment. (24 C.4th 354.) The test requires the following: (1) Plaintiff has the initial burden at trial to establish a prima facie case of discrimination; if plaintiff does so, a rebuttable presumption of discrimination arises. (2) The burden then shifts to the employer to rebut the presumption by producing admissible evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer sustains this burden, the presumption of discrimination disappears. (3) The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer other evidence of discriminatory motive. (24 C.4th 356.) For purposes of summary judgment, a sufficient prima facie showing combined with proof of pretext (i.e., defendant's stated reasons for terminating plaintiff are untrue) *may* preclude summary judgment for defendant. However, even in that case, summary judgment still may be appropriate where the employer presents strong evidence that its termination was based on innocent reasons and plaintiff's countervailing evidence of discriminatory motive is too weak to raise a rational inference that discrimination occurred. (24 C.4th 362.)

(b) *Sufficiency of evidence.* Here, plaintiff presented only a weak suspicion that discrimination was a likely basis for his termination. (24 C.4th 369.) Against that evidence, defendant presented a plausible, extensive, and uncontradicted explanation that it eliminated plaintiff's work unit to cut costs and because the unit was not performing adequately, and that defendant chose others for alternative jobs over plaintiff because defendant believed they were better qualified. (24 C.4th 370.)

(c) *Salary reduction as factor.* Although plaintiff "occasionally insinuated" that defendant's decisions "were discriminatory efforts to reduce salaries by releasing higher-paid older workers", plaintiff never made a developed claim to that effect. While defendant concedes that it sought to save costs by eliminating plaintiff's unit, "any evidence that the motive was to eliminate senior salaries is no greater or different than the evidence that the decision disfavored older workers *directly*." Nor did defendant's decision to select one junior employee for a junior position have a disparate impact on older workers *as a group*. (24 C.4th 369, footnote 29.) (See 27 Pepperdine L. Rev. 807 [firing older employees to satisfy shareholder demands for higher earnings]; on use of economic criteria for determining discrimination under Unruh Civil Rights Act, see *supra*, §912.)

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aa. In General.

8 *Witkin Sum. Cal. Law Const Law* § 936

[§ 936] In General.

(1) *State v. Federal Protections*. The 1992 Legislature amended the Unruh Civil Rights Act (*supra*, §898 et seq.), the FEHA, and related statutes to substantially increase the protections afforded to persons with disabilities. The purpose of the Act was "to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 ... and to retain California law when it provides more protection for individuals with disabilities." (Stats. 1992, Chap. 913, §1.) (On ADA, see *supra*, §882 et seq.; on rights of disabled persons outside of FEHA, see *infra*, §957 et seq.)

The FEHA provides broader protection than the ADA in the area of reasonable accommodation for an employee with a disability. Under the FEHA, the right of an employee to assert an employer's duty of reasonable accommodation is not limited, as under the ADA, to cases where there has been some kind of adverse employment action. Hence, "the duty of reasonable accommodation under the FEHA should be construed according to our own state regulation." (*Bagatti v. Department of Rehabilitation* (2002) 97 C.A.4th 344, 118 C.R.2d 443 [disagreeing with use of interpretative statement of EEOC, construing ADA, to define scope of reasonable accommodation under FEHA].)

(2) *Statutory Protections*. It is an unlawful employment practice to discriminate on the basis of physical or mental disability or medical condition. (*Govt.C. 12940(a)*.) Failure to make reasonable accommodation for the known physical or mental disability of an applicant or employee is also an unlawful employment practice. (*Govt.C. 12940(m)*.) (For definitions, see *Govt.C. 12926(h)* ["medical condition"]; *Govt.C. 12926(i)* ["mental disability"]; *Govt.C. 12926(k)* ["physical disability"]; *Govt.C. 12926(n)* ["reasonable accommodation"].) If the ADA provides broader coverage of a disability or medical condition, then its provisions prevail over those definitions in *Govt.C. 12926*. (*Govt.C. 12926(l)*.) (See *Raytheon Co. v. Fair Emp. & Housing Com.* (1989) 212 C.A.3d 1242, 1250, 261 C.R. 197 [AIDS is physical handicap under FEHA]; 78 A.L.R.4th 265 [handicap as job disqualification]; 81 A.L.R.4th 144 [discrimination because of handicap under state statute prohibiting job discrimination on account of handicap]; 82 A.L.R.4th 26 [what is "handicap" under state legislation forbidding discrimination on account of handicap]; 77 A.L.R.5th 595 [Visual Impairment as Handicap or Disability Under State Employment Discrimination Law].)

However, an employer may refuse to hire or may discharge an employee if, even with reasonable accommodations,

the employee, because of his or her physical or mental disability or medical condition, either is unable to perform his or her essential duties or cannot perform them without endangering the health or safety of the employee or others. (*Govt.C. 12940(a)*.) Also, the employer or other covered entity is not required to make an accommodation that is demonstrated to produce undue hardship to its operation. (*Govt.C. 12940(m)*.) But the employer or other entity must "engage in a timely, good faith, interactive process with the employee or applicant to determine effective, reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (*Govt.C. 12940(n)*.) (See *Govt.C. 12926(d)*, *supra*, §918 ["employer" defined]; *Govt.C. 12926(f)* ["essential functions" defined]; *Govt.C. 12926(s)* ["undue hardship" defined]; *Quinn v. Los Angeles* (2000) 84 C.A.4th 472, 480, 100 C.R.2d 914 [trial court erred in denying defendant's motion for directed verdict where plaintiff failed to produce evidence that he was qualified to be hired as police officer; plaintiff had failed qualifying hearing test and was only hired because of clerical error]; *Diffey v. Riverside County Sheriff's Dept.* (2000) 84 C.A.4th 1031, 1039, 101 C.R.2d 353 [color vision is valid job requirement for deputy sheriff].)

An employer or employment agency may not inquire into an *applicant's* medical or psychological condition unless an inquiry or examination is job-related and consistent with business necessity, and is required of all entering employees in the same job classification. (*Govt.C. 12940(e)*.) Likewise, an employer may not inquire into an *employee's* medical or psychological condition unless it is job-related and consistent with business necessity. (*Govt.C. 12940(m)*.)

(3) *Legislative Clarification of California Law.* *Govt.C. 12926.1*, added in 2000, reiterates that, notwithstanding any interpretation of law in *Cassista v. Community Foods* (1993) 5 C.4th 1050, 22 C.R.2d 287, 856 P.2d 1143, *infra*, §938, the ADA provides a floor of protection, but California law affords additional protections. California law protects applicants and employees from "discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling." (*Govt.C. 12926.1(b)*.) Although the definitions of "physical disability" and "mental disability" require a "limitation" on a major life activity, they do not require, as does the ADA, a "substantial limitation." And, "whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law" under the ADA. Further, "working" is a "major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments." (*Govt.C. 12926.1(c)*.) By enacting *Govt.C. 12926(i)(4)* and *Govt.C. 12926(k)(4)*, the Legislature intends to provide protection when an individual is erroneously or mistakenly believed to have a physical or mental condition that limits a major life activity. (*Govt.C. 12926.1(d)*.) (See *Govt.C. 12926.1(e)* [affirming importance of interactive process between employee or applicant and employer in determining reasonable accommodation].)

In *Colmenares v. Braemar Country Club* (2003) 29 C.4th 1019, 130 C.R.2d 662, 63 P.3d 220, the court clarified that *Govt.C. 12926.1* retains former FEHA language requiring a mere limitation, and not a substantial limitation, on a major life activity. Thus, plaintiff, who was fired in 1997 for a chronic back injury, needed to show only that his condition *limited* his ability to participate in major life activities. (29 C.4th 1030, 1032.) The court disapproved *Diffey v. Riverside County Sheriff's Dept.*, *supra*, and other cases to the extent they hold or suggest that the ADA "substantial limitation" standard applied to disability claims under the FEHA. (29 C.4th 1031, footnote 6.)

(4) *Effect of Workers' Compensation Remedy.* *Lab.C. 132a*, the workers' compensation exclusive remedy provision, does not provide the exclusive remedy for discrimination based on work-related disabilities, and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies. (*Moorpark v. Superior Court* (1998) 18 C.4th 1143, 1148, 1158, 77 C.R.2d 445, 959 P.2d 752, 2 Summary (10th), *Workers' Compensation*, §20; 37 *Santa Clara L. Rev.* 587 [protecting rights of workers disabled on job to file suits for disability discrimination]; 38 *Santa Clara L. Rev.* 893 [*Moorpark*].)

(5) *Physical Ability To Work Elsewhere.* In *Maloney v. ANR Freight System* (1993) 16 C.A.4th 1284, 20 C.R.2d 656, plaintiff, a truck driver for defendant ANR, had only one kidney, a transplant. Unable to do long runs, he requested assignment to short routes without loss of seniority. On denial of this request, he asked for and was granted a medical leave of absence for 3 years, during which period he worked as a truck driver for several different employers. In this

present action for violation of the FEHA, the trial court granted summary judgment for defendants, on the ground that plaintiff did not meet the coverage threshold of being a "handicapped individual" under FEHA and its regulations. *Held*, summary judgment affirmed. The courts "have consistently declined to provide statutory protection to persons whose conditions have rendered them unable to meet their employer's requirements for a particular job, but who are otherwise physically able to work elsewhere in their chosen profession." (16 C.A.4th 1287, citing federal cases.)

(6) *After-Acquired Evidence*. After-acquired medical evidence relating to a plaintiff's physical condition is admissible to show that the plaintiff was not physically able to perform his or her job and that this was the reason for termination. (*Finegan v. Los Angeles* (2001) 91 C.A.4th 1, 12, 109 C.R.2d 762 [distinguishing *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852, *supra*, §860].)

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(1) *State v. Federal Protections*. See 59 *Hastings L. J.* 429 [Rethinking the Application of ADA Precedent to FEHA Disability Discrimination Cases]. (2) *Statutory Protections*. See *Knight v. Hayward Unified School Dist.* (2005) 132 C.A.4th 121, 131, 33 C.R.3d 287 [FEHA does not prohibit treatment-based distinctions in health insurance coverage; hence, denial of coverage for in vitro fertilization is not disability discrimination]; *Malais v. Los Angeles City Fire Dept.* (2007) 150 C.A.4th 350, 358, 58 C.R.3d 444 [firefighter did not suffer adverse employment action in transfer to special duty assignment after loss of lower leg in work-related accident; although firefighter preferred to work in platoon duty, he suffered no loss of pay, benefits, or promotional opportunities and no hostile work environment]; BAJI, No. 12.12 [disability discrimination]; CACI, No. 2507 [motivating reason]; CACI, No. 2540 [disparate treatment--essential factual elements]; CACI, No. 2543 et seq. [affirmative defenses].

Inability to perform essential duties: An employee's inability to perform the essential duties of a job is not an affirmative defense to an action claiming that an employer has discriminated on the basis of a disability in violation of the FEHA. Instead, the employee bears the burden of proving that he or she was able to perform the essential duties of the position, with or without reasonable accommodation. (*Green v. California* (2007) 42 C.4th 254, 262, 64 C.R.3d 390, 165 P.3d 118 [FEHA does not change rule requiring plaintiff to prove essential elements of claim; although language used in ADA and FEHA is different, both acts limit protective scope to disabled employees who can perform essential duties of job, with reasonable accommodation]; see BAJI, No. 12.14 [defense of inability to perform].)

Interactive process: See *Claudio v. Regents of Univ. of Calif.* (2005) 134 C.A.4th 224, 247, 35 C.R.3d 837 [although employee cannot ordinarily force employer to go through employee's attorney for interactive process, unusual circumstances here raised triable issue of fact whether employer's refusal to communicate with employee's attorney constituted failure to engage in interactive process in good faith; employee was told repeatedly that his employment had been terminated and that he had been dropped from employer's computer]; *Nadaf-Rahrov v. The Neiman Marcus Group* (2008) 166 C.A.4th 952, 982, 83 C.R.3d 190 [Govt.C. 12940(n) imposes liability for failing to engage in timely, good faith, interactive process only if reasonable accommodation would have been possible, and burden of proving availability of reasonable accommodation in that action is on employee; triable issue existed on whether employer's refusal to provide employee with information on available positions before employee was released to return to work contributed to breakdown in interactive process]; BAJI, No. 12.12.6 [failure to engage in interactive process]; CACI, No. 2546 [same]. (7) *(New) Effect of Compassionate Use Act*. Nothing in the Compassionate Use Act prevents an employer from considering an employee's or an applicant's use of marijuana in making employment-related decisions. The Act was enacted solely to decriminalize the possession and use of marijuana in California for medical purposes, when the drug is prescribed by a physician. Marijuana use and possession remain illegal under federal law. The FEHA does not require employers to accommodate the use of illegal drugs. (*Ross v. Raging Wire Telecommunications* (2008) 42 C.4th 920, 926, 70 C.R.3d 382, 174 P.3d 200 [relying on *Loder v. Glendale* (1997) 14 C.4th 846, 59 C.R.2d 696, 927 P.2d 1200, text, §592; plaintiff, who was prescribed marijuana for back condition, failed to state cause of action for disability-based discrimination under FEHA based on employment being terminated after preemployment drug test showed marijuana use].)



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[§ 937] Accommodation Requirement.

In *Fresno v. Fair Emp. & Housing Com.* (1991) 226 C.A.3d 1541, 277 C.R. 557, B and C alleged that Fresno County forced them to work in inadequately ventilated rooms filled with cigarette smoke, despite the county's knowledge that they suffered from severe respiratory problems and despite requests for reasonable accommodation. The commission granted relief, but the trial court on administrative mandamus ordered the commission to set aside its decision. *Held*, reversed.

(a) Former Govt.C. 12926(h) (now Govt.C. 12926(k)) defines "physical handicap" to include impairment of physical ability because of "loss of function." And in *American Nat. Ins. Co. v. Fair Emp. & Housing Com.* (1982) 32 C.3d 603, 186 C.R. 345, 651 P.2d 1151, the court concluded that in certain cases high blood pressure may be a physical handicap. (226 C.A.3d 1549.) The same court, in dicta, observed that some "ills or defects" such as "respiratory, digestive or skin disorders are not handicapping." (226 C.A.3d 1549.) But this does not mean that respiratory disorders as a category are not covered by the FEHA. In the present case the evidence showed that because of a respiratory disorder, exposure of B and C to tobacco smoke substantially limited their ability to breathe. (226 C.A.3d 1549, 1550.)

(b) The county's contention that hypersensitivity to smoke is merely an "environmental limitation" and not a physical handicap is equally unmeritorious. "Tobacco smoke in the environment may simply be an environmental limitation to those who do not suffer from severe respiratory disorders. To most people tobacco smoke is merely irritating, distasteful or discomforting. Someone who suffers from a respiratory disorder and whose ability to breathe is severely limited by tobacco smoke is, nevertheless, physically handicapped within the meaning of the Act." (226 C.A.3d 1550.)

(c) The Act requires an employer to make reasonable accommodations to the physical disability of an employee (see now Govt.C. 12940(m), *supra*, §936), and the commission regulations define "reasonable accommodation." (226 C.A.3d 1551, 1552.) Similar regulations of the federal Rehabilitation Act as interpreted in the federal courts (226 C.A.3d 1553), support the commission's conclusion that the county failed to provide reasonable accommodation. (226 C.A.3d 1555, describing existing conditions and accommodation efforts.) (See 53 *Stanf. L. Rev.* 223 [Accommodation

Mandates]; 32 *U.S.F. L. Rev.* 75 [accommodating individuals with disabilities in courts]; 76 *A.L.R.4th* 310 [requirement of accommodation by employer under state law forbidding job discrimination on account of handicap].)

In *Jensen v. Wells Fargo Bank* (2000) 85 *C.A.4th* 245, 102 *C.R.2d* 55, plaintiff bank manager suffered from posttraumatic stress disorder brought on by an attempted robbery at her branch. The trial court granted defendant's motion for summary judgment on plaintiff's FEHA failure-to-accommodate claim, holding that plaintiff's disorder did not substantially limit her ability to participate in major life activities, and that she had been reasonably accommodated. *Held*, reversed and remanded.

(a) To establish a failure-to-accommodate claim under *Govt.C. 12940(k)*, plaintiff must prove (1) that she suffers from a disability covered by the FEHA, and (2) that she is a qualified individual, meaning that "she can perform the essential functions of the job to which reassignment is sought. ... [T]he employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself." (85 *C.A.4th* 256.)

(b) To be a "mental disability" under the FEHA, a disorder need not *substantially* limit a major life activity. (85 *C.A.4th* 257, noting adoption of *Govt.C. 12926.1*, *supra*, §936.) However, even if the court were to apply the stricter ADA substantial limitation test, summary judgment should not have been granted here because defendant failed to present evidence on the severity of plaintiff's mental disorder. (85 *C.A.4th* 259.)

(c) Assuming that an employee is disabled, an "employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless it establishes through undisputed facts that (1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith." (85 *C.A.4th* 263.) Here it is clear that a factual dispute existed on these issues. The only employment ever offered was a temporary job. Further, defendant never established whether there were available positions that met plaintiff's qualifications. (85 *C.A.4th* 264.) It is not the employee's burden to identify possible alternative positions. (85 *C.A.4th* 265.)

(d) To the extent defendant rejected plaintiff "for positions for which she was qualified because it had applicants who were more qualified or had seniority, it overlooks that when reassignment of an existing employee is at issue, the disabled employee is entitled to preferential consideration." (85 *C.A.4th* 265.)

Other decisions deal with the accommodation requirement. (See *Prilliman v. United Air Lines* (1997) 53 *C.A.4th* 935, 950, 62 *C.R.2d* 142 [employer who knows that employee's disability prevents him or her from performing current job has affirmative duty to make other suitable job opportunities with it known to employee if it can do so without undue hardship or if it offers similar assistance to other employees]; *Hanson v. Lucky Stores* (1999) 74 *C.A.4th* 215, 228, 87 *C.R.2d* 487 [employer made reasonable accommodation for physically disabled employee by extending duration of leave and seeking available, alternative position, despite failure to engage in interactive process with employee concerning accommodations as recommended in EEOC guidelines]; *Spitzer v. The Good Guys* (2000) 80 *C.A.4th* 1376, 1386, 1390, 96 *C.R.2d* 236 [trial court erred in granting summary judgment on claim of failure to accommodate when there were triable issues of fact on whether defendant knew it had not reasonably accommodated plaintiff's limitations and, if so, whether other suitable positions were available to her; court's conclusion that requesting plaintiff to continually check defendant's job hotline constituted reasonable accommodation was untenable as matter of law]; *Hastings v. Department of Corrections* (2003) 110 *C.A.4th* 963, 972, 2 *C.R.3d* 329 [probationary corrections officer who was not able to complete training due to injury and therefore was not able to demonstrate that he was qualified for position, was not entitled, as reasonable accommodation, to reassignment to another position with different qualifications within same department]; 26 *Western State L. Rev.* 71 [*Prilliman*].)

SUPPLEMENT: [This section is current through the latest supplement]

An employer must reasonably accommodate an employee or applicant whom it *regards* as disabled, and, on request, must engage in an informal, interactive process to determine an effective accommodation. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 C.A.4th 34, 55, 61, 43 C.R.3d 874 [issue of first impression under FEHA; although employee was not actually disabled, employer believed him to be when it failed to rehire or accommodate him].)

An employer is liable under *Govt.C. 12940(m)* (see text, §936) for failing to accommodate an employee with a known disability "only if the work environment could have been modified or adjusted in a manner that would have enabled the employee to perform the essential functions of the job." The employee bears the burden of proving that he or she was able to perform the essential functions of the job with the accommodation. (*Nadaf-Rahrov v. The Neiman Marcus Group* (2008) 166 C.A.4th 952, 969, 977, 83 C.R.3d 190 [facts regarding plaintiff's physical restrictions and availability of vacant positions that could accommodate her did not support summary adjudication for defendant employer].)

See *Raine v. Burbank* (2006) 135 C.A.4th 1215, 1223, 37 C.R.3d 899 [employer has no duty under FEHA to make temporary light-duty assignment permanent when employee's disability becomes permanent if doing so would require employer to create new position just for disabled employee]; *Jenkins v. Riverside* (2006) 138 C.A.4th 593, 616, 41 C.R.3d 686 [county had no duty to make reasonable accommodation for temporary employee]; BAJI, No. 12.12.5 [failure to make reasonable accommodation]; BAJI, No. 12.14 [defense of inability to perform]; BAJI, No. 12.15 [defense of undue hardship]; CACI, No. 2541 [essential factual elements]; CACI, No. 2542 [reasonable accommodation explained].



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cc. Discrimination on Basis of Weight.

8 *Witkin Sum. Cal. Law Const Law* § 938

[§ 938] Discrimination on Basis of Weight.

In *Cassista v. Community Foods* (1993) 5 C.4th 1050, 22 C.R.2d 287, 856 P.2d 1143, the issue was whether the FEHA prohibits employment discrimination on the basis of a person's weight. The court, in an extensive review of statutes and case law, state and federal, concluded that weight may qualify as a protected "handicap" or "disability" only if medical evidence demonstrates that "it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity." (5 C.4th 1052.)

Plaintiff was 5 feet 4 inches tall and weighed 305 pounds. She sought employment by defendant, a health food store operating as a neighborhood collective. Her application was rejected, the department determined not to file a complaint, and she brought this action. The case was tried before a jury, and the court instructed the jury that plaintiff was required to prove that "but for" her handicap she would have been hired. The verdict was for defendant. The Court of Appeal held that the instruction was prejudicial error and reversed the trial court's judgment. The Supreme Court reversed the judgment of the Court of Appeal.

(a) *American Nat. Ins. Co. case*. The majority opinion in *American Nat. Ins. Co. v. Fair Emp. & Housing Com.* (1982) 32 C.3d 603, 186 C.R. 345, 651 P.2d 1151, supra, §937, reasoned that "handicap" must be construed as coextensive with its dictionary definition, and held that high blood pressure was such a handicap. A strong dissenting opinion asserted that this construction virtually ignored both the statutory language and the legislative history. (5 C.4th 1057.)

(b) *Amendment of Govt.C. 12926 in 1992*. This sweeping amendment completely rewrote the law of handicap discrimination, replacing "physical handicap" with "physical disability," and defining the phrase as including a number of elements. (5 C.4th 1058; see supra, §936.) However, in an apparent effort to maintain continuity with the former law, the statute stated the intent of the Legislature "that the definition of 'physical disability' ... shall have the same meaning as the term 'physical handicap' " construed in *American Nat. Ins. Co.* (5 C.4th 1059.) The obvious similarity of the old law and the new law is evidenced by the legislative history. Both derive from the federal Rehabilitation Act of 1973; and the Americans with Disabilities Act of 1990 adopted the Rehabilitation Act definition. (5 C.4th 1060.) Case law,

including *Raytheon Co. v. Fair Emp. & Housing Com.* (1989) 212 C.A.3d 1242, 261 C.R. 197, and *Fresno v. Fair Emp. & Housing Com.* (1991) 226 C.A.3d 1541, 277 C.R. 557, supra, §937, also reveals a general consistency between the current and former versions of Govt.C. 12926. (5 C.4th 1061.) Thus, under both the current and former versions of Govt.C. 12926, "the touchstone of a qualifying handicap or disability is an actual or perceived physiological disorder which affects a major body system and limits the individual's ability to participate in one or more major life activities." (5 C.4th 1061.)

(c) *Weight as physical disability.* Case law in actions brought under the FEHA is minimal but instructive. (5 C.4th 1061.) Federal cases decided under the federal Rehabilitation Act are also pertinent. (5 C.4th 1063.) The rule that obesity does not constitute a qualifying disability absent proof of physiological causation is followed by the *Equal Employment Opportunity Commission* (5 C.4th 1064), and by most other state decisions on the subject (5 C.4th 1065).

(d) *Perception of disability.* Plaintiff argues that even if weight does not qualify as an actual handicap or disability, one might still qualify as a handicapped individual if he or she is "regarded as having such a physical handicap." This argument is unavailing. The language of the statute makes it clear that the condition, as perceived by the employer, must still be in the nature of a physiological disorder within the meaning of the FEHA. (5 C.4th 1065, 1066.) The record is devoid of evidence that plaintiff's weight is the result of a physiological condition or disorder affecting one or more of the body systems. "Indeed, plaintiff alleged in her complaint and maintained at trial that despite her weight she is a healthy, fit individual. Thus, she demonstrated neither an actual nor a perceived handicap within the meaning of the FEHA." (5 C.4th 1066.) (See *Hegwer v. Board of Civil Service Commrs.* (1992) 5 C.A.4th 1011, 1024, 7 C.R.2d 389 [application of weight limitation standards to obese city paramedic was reasonable and not discriminatory under Govt.C. 12940, notwithstanding thyroid problem that contributed to paramedic's weight gain]; *McMillen v. Civil Service Com.* (1992) 6 C.A.4th 125, 129, 8 C.R.2d 548 [same, as applied to overweight city fire department ambulance driver]; 90 Cal. L. Rev. 57 [weight discrimination in employment]; 31 Cal. Western L. Rev. 41 [legality under federal statutes of obesity discrimination in employment]; 21 *Pepperdine L. Rev.* 271 [Cassista].)

The 2000 Legislature clarified California law "[n]otwithstanding any interpretation of law" in *Cassista* by adopting Govt.C. 12926.1. (See supra, §936.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 939

[§ 939] Chronic Alcoholics.

Both state and federal disability laws require employers to reasonably accommodate the mental and physical disabilities of otherwise qualified employees and job applicants. (See *supra*, §937.) However, recent decisions have refused to fault an employer for allegedly failing to reasonably accommodate an employee's chronic alcoholism before terminating him.

In *Gonzalez v. State Personnel Bd.* (1995) 33 C.A.4th 422, 39 C.R.2d 282, a state employee challenged his dismissal for misconduct related to his alcoholism, including driving with a suspended license and abandoning a state vehicle. The employee claimed that his dismissal was improper because he was not first afforded an opportunity to undergo inpatient treatment. *Held*, the employee's misconduct was egregious as a matter of law, and thus he was disqualified from the protection of both the state and federal disability statutes, rendering it unnecessary to reasonably accommodate his disability as a precondition to termination. (33 C.A.4th 431.)

In *Gosvener v. Coastal Corp.* (1996) 51 C.A.4th 805, 59 C.R.2d 339, plaintiff, a former shift supervisor for defendant chemical refinery, brought a wrongful termination action on various theories, alleging that he was illegally discharged due to his alcohol abuse problem and that defendant failed to reasonably accommodate him. Plaintiff's alcohol abuse problem spanned 3 years of employment, and he had unsuccessfully participated in two treatment programs during that period. *Held*, summary judgment for defendant affirmed.

(a) *Discharge is not in violation of FEHA.*

(1) Plaintiff's claim that he was discharged in violation of the FEHA because of his alcoholism disability is without merit. Defendant repeatedly granted plaintiff reasonable accommodations in his attempts to recover from alcoholism; however, plaintiff began drinking again after every accommodation, violated numerous agreements with defendant designed to allow him to recover and save his job, and lied to defendant about the reasons for his absences. It was also highly significant that plaintiff was the only supervisor on duty at crucial times at a dangerous chemical refinery located in a residential area. (51 C.A.4th 812.)

(2) "It is unfortunate that appellant suffered from alcoholism and continually relapsed into binge drinking which prevented him from working, but the employer's duty to accommodate such a disabling condition is not unlimited, and an employer cannot be an insurer of recovery. Nor should an employer be required to tolerate unsafe conditions, or be forced to enable substance abuse to continue indefinitely." (51 C.A.4th 813.)

(b) *No breach of contract.* Plaintiff contended that defendant breached (1) an express contract based on unspecified oral statements and on two written agreements expressly providing and warning plaintiff that he could be discharged for continued alcohol abuse, (2) an implied contract not to terminate him except for good cause, and (3) the implied covenant of good faith and fair dealing. These contentions are invalid. It was undisputed that plaintiff did not honor his contractual promises to maintain an exemplary attendance record, take only absences that could be verified, remain drug and alcohol free, be fit for work, and follow the terms of his substance abuse treatment program. (51 C.A.4th 813.)

(c) *No violation of public policy.* Plaintiff's termination did not violate public policy, as expressed in *Lab.C. 1025*, requiring private employers with 25 or more employees to reasonably accommodate an employee wishing to participate in an alcohol or drug rehabilitation program (see 3 *Summary* (10th), *Agency and Employment*, §428):

(1) Defendant did not refuse to allow plaintiff to enroll in a treatment program. Plaintiff enrolled in two treatment programs, and defendant aided him in his attempts to recover. (51 C.A.4th 816.)

(2) Defendant's refusal to rescind plaintiff's termination when he offered to enroll in still another program did not violate *Lab.C. 1025* because plaintiff's previous programs had failed and he had been warned that discharge would result from those failures. (51 C.A.4th 816.)

(3) The fact that plaintiff had a large sick leave balance outstanding at discharge was of no import, because sick leave is for sickness, not drinking. An employer is not required to allow an employee abusing alcohol to use up his or her sick leave. (51 C.A.4th 816.)

(4) Finally, *Lab.C. 1025* does not prevent a discharge where, as here, plaintiff was adversely affected by current alcohol use. (51 C.A.4th 816.)

Gosvenor was disapproved in *Colmenares v. Braemar Country Club* (2003) 29 C.4th 1019, 130 C.R.2d 662, 63 P.3d 220, *supra*, §936, to the extent it states that the FEHA incorporates the ADA "substantial limitation" test for a covered disability.

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SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 940

[§ 940] Retaliatory Discrimination.

The Act prohibits an employer, labor organization, or employment agency from discharging, expelling, or otherwise discriminating against a person who has opposed an unlawful employment practice or who has filed a complaint, testified, or assisted in a proceeding under the Act. (*Govt.C. 12940(h)*; see *Doe v. Capital Cities* (1996) 50 C.A.4th 1038, 1053, 58 C.R.2d 122, supra, §929 [no cause of action where alleged acts of retaliation occurred *before* plaintiff filed sexual harassment complaint with DFEH]; *Chen v. Orange* (2002) 96 C.A.4th 926, 931, 948, 116 C.R.2d 786 [trial court did not err in dismissing retaliation claim where plaintiff failed to show causal connection between her failure to be promoted and original complaint]; *Mathieu v. Norrell Corp.* (2004) 115 C.A.4th 1174, 1185, 10 C.R.3d 52, supra, §918 [taking corrective measures after being notified of hostile work environment sexual harassment did not exonerate employer from potential liability for retaliation due to employee's complaints; to establish prima facie case of retaliation, plaintiff must show causal link between engaging in protected activity and being subjected to adverse employment action by employer]; BAJI, No. 12.10 [retaliation]; CACI, No. 2505 [same]; on retaliatory discrimination under Unruh Civil Rights Act, see supra, §913.)

For retaliation to be actionable, it must have had substantial and material adverse effect on the terms and conditions of employment. (*Thomas v. Department of Corrections* (2000) 77 C.A.4th 507, 510, 91 C.R.2d 770 [change in terms of employment is not limited to discharge, demotion, or refusal to hire or promote, but one-time events such as delayed check, early job change, and failure to receive overtime check are insufficient]; *Akers v. San Diego* (2002) 95 C.A.4th 1441, 1455, 116 C.R.2d 602 [written criticisms of employee's performance generated shortly after she complained about discrimination, and management's demonstrated willingness to use this information against her in deciding promotions were sufficient to satisfy test].)

Evidence that may be offered to show that an employer's nonretaliatory explanation is pretextual includes "(1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics." (*Iwekaogwu v. Los Angeles* (1999) 75 C.A.4th 803, 816, 89 C.R.2d 505.)

In *Reeves v. Safeway Stores* (2004) 121 C.A.4th 95, 16 C.R.3d 717, the court reversed a summary judgment for defendant employer. Plaintiff was discharged for cause based on an alleged incidence of workplace violence after

having complained about the sexual harassment of female employees. The district manager who fired plaintiff was ignorant of plaintiff's sexual harassment allegations, but acted on information supplied by plaintiff's supervisor. The evidence raised triable issues regarding whether the investigator and manager acted as tools or "cat's paws" for the supervisor, i.e., instrumentalities by which the supervisor's retaliatory animus was carried into effect.

(a) The ignorance of a "decisionmaker" does not categorically shield the employer from liability if other substantial contributors to the decision bear the requisite animus. (121 C.A.4th 110.) A plaintiff can establish causation "by showing that *any* of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a but-for cause, i.e., a force without which the adverse action would not have happened." (121 C.A.4th 108.)

(b) "If a supervisor makes another his tool for carrying out a discriminatory action, the original actor's purpose will be imputed to the tool, or through the tool to their common employer." (121 C.A.4th 113.)

The antiretaliation provision of the FEHA covers applicants for employment in addition to employees. (*Sada v. Robert F. Kennedy Med. Center* (1997) 56 C.A.4th 138, 151, 160, 162, 65 C.R.2d 112 [trial court erred in entering summary judgment against Mexican American nurse who was terminated as independent contractor after filing complaint that she was denied regular employment due to racial discrimination].)

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SUPPLEMENT: [This section is current through the latest supplement]

A plaintiff establishes a prima facie case of retaliation under the FEHA by showing that (a) the plaintiff was engaged in a protected activity, (b) the employer subjected the plaintiff to an adverse employment action, and (c) there was a causal link between the protected activity and the employer's action. Once a prima facie case is established, the employer must offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for that action, the presumption of retaliation "drops out of the picture," and the burden of proof shifts back to the plaintiff to show intentional discrimination. (*Yanowitz v. L'Oreal USA* (2005) 36 C.4th 1028, 1042, 32 C.R.3d 436, 116 P.3d 1123.) (See *Taylor v. Los Angeles Dept. of Water & Power* (2006) 144 C.A.4th 1216, 1229, 1235, 51 C.R.3d 206 [in action for retaliation based on plaintiff's opposition to race discrimination against subordinate and failure to prevent retaliation, causal link was established between protected activity and employer's action where retaliation commenced or intensified shortly after each of plaintiff's acts in opposition to race discrimination against subordinate or retaliation by supervisor]; *Mamou v. Trendwest Resorts* (2008) 165 C.A.4th 686, 715, 81 C.R.3d 406 [when employer offers reason for adverse action, central issue remains whether evidence as whole supports reasoned inference that challenged action was product of retaliatory animus; employer's articulation of legitimate reason entitles employer to summary judgment only when employee's showing, while sufficient to invoke presumption of improper motive, is too weak to sustain reasoned inference in employee's favor]; CACI, No. 2505 [retaliation]; CACI, No. 2507 [motivating reason].)

To be protected by the antiretaliation provisions of the FEHA, a complaining employee is not required to communicate to his or her employer the legal theory underlying his or her complaint. (*Miller v. Department of Corrections* (2005) 36 C.4th 446, 474, 30 C.R.3d 797, 115 P.3d 77, Supp., supra, §927 [although not specifically reciting words "sexual harassment," complaints of sexual favoritism in workplace fell within general purview of FEHA]; *Yanowitz v. L'Oreal USA*, supra, 36 C.4th 1046 [following *Miller*; plaintiff's continuing refusal to fire employee who employer said was not sufficiently sexually attractive, coupled with plaintiff's multiple requests for "adequate justification" for firing, sufficiently communicated to employer that plaintiff believed order was discriminatory].)

Requirement that retaliation had substantial and material adverse impact on terms and conditions of employment: The term "otherwise discriminate," as used in Govt.C. 12940(h), "should be interpreted to refer to and encompass the same forms of adverse employment activity that is actionable under" Govt.C. 12940(a) (see text, §921). "[A]dverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or

promotion falls within the reach of the antidiscrimination provisions" of Govt.C. 12940(a) and (h). (*Yanowitz v. L'Oreal USA*, *supra*, 36 C.4th 1050, 1054.) The *Yanowitz* standard also applies to an employee retaliation action under Lab.C. 1102.5(b) (retaliation for whistleblowing regarding legal violations that are reasonably believed to have occurred). (*Patten v. Grant Joint Union High School Dist.* (2005) 134 C.A.4th 1378, 1381, 37 C.R.3d 113; see 3 Summary (10th), *Agency and Employment*, §284 et seq.)

See *Pinero v. Specialty Restaurants Corp.* (2005) 130 C.A.4th 635, 646, 30 C.R.3d 348 [plaintiff failed to establish retaliation under FEHA where evidence failed both "materiality" test of *Thomas v. Department of Corrections* (2000) 77 C.A.4th 507, 91 C.R.2d 770, text, p. 457, and *Akers v. San Diego* (2002) 95 C.A.4th 1441, 116 C.R.2d 602, text, p. 457, and "less stringent EEOC 'deterrence test' which looks only to see whether the employer's action is reasonably likely to deter employees from engaging in protected activity"]; *McRae v. Department of Corrections & Rehabilitation* (2006) 142 C.A.4th 377, 393, 397, 48 C.R.3d 313 [job transfer to comparable position in other facility was not actionable adverse employment action where plaintiff suffered no substantial or tangible harm and employer's reason for making transfer appeared to be reasonable management decision]; *Taylor v. Los Angeles Dept. of Water & Power*, *supra*, 144 C.A.4th 1231 [plaintiff sufficiently pleaded adverse action under both materiality test of *Yanowitz* and deterrence test adopted by *Burlington Northern & Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345, Supp., *supra*, §855; plaintiff alleged that he was stripped of supervisory position, barred from completing needed courses to advance in position, excluded from meetings, deprived of necessary information to carry out duties, denied emergency promotion to full engineer but required to train appointee, and labeled as troublemaker to prevent transfer]; *Loggins v. Kaiser Permanente Int.* (2007) 151 C.A.4th 1102, 1111, 60 C.R.3d 45 [employer who asserted facially valid and specific basis for employment termination was not additionally required to prove objective fairness of termination procedures as part of burden of proof]; *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 C.A.4th 413, 423, 69 C.R.3d 1 [although instructions in action for retaliatory discrimination failed to contain phrase that employer's retaliatory conduct must have had *substantial and material* adverse effect on terms and conditions of employment, instructions given were sufficient where their combined effect required jurors not to include management decisions that involved ordinary discretion, even if they found that conduct to be unfair, and plaintiff had to prove animus and retaliation]; *Steele v. Youthful Offender Parole Bd.* (2008) 162 C.A.4th 1241, 1255, 76 C.R.3d 632 [FEHA protects employees against preemptive retaliation; hence, trial court properly considered evidence of intolerable or aggravated working conditions from time that defendant learned of incident that might subject it to claim of sexual harassment and that plaintiff might be witness or complainant; plaintiff established constructive discharge by substantial evidence of coercion to resign, including series of uninvestigated work performance issues, hints that she might be laid off, threats of suspension, and transfer of complaining coworker].



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8 Witkin Sum. Cal. Law Const Law § 941

[§ 941] Other Prohibited Discrimination.

(1) *Civil Rights Violation*. It is an unlawful practice to deny the rights created by C.C. 51 (supra, §898), C.C. 51.5 (supra, §906), C.C. 51.7 (supra, §895), C.C. 54, 54.1, or 54.2 (infra, §957 et seq.). (*Govt.C. 12948*.)

(2) *Language Restriction*. It is an unlawful employment practice for an employer, as defined in *Govt.C. 12926(d)* (supra, §918), to adopt or enforce a policy limiting or prohibiting the use of a language in the workplace, unless both (a) the restriction is justified by a business necessity, and (b) the employer has notified the employees of the circumstances, the times when the language restriction is required, and the consequences of violating the restriction. (*Govt.C. 12951(a)*.) "Business necessity" means an overriding legitimate business purpose, i.e., the language restriction must be necessary to the safe and efficient operation of the business; it must effectively fulfill the business purpose it is supposed to serve; and there must not be an alternative practice that would accomplish the purpose equally well with a lesser discriminatory impact. (*Govt.C. 12951(b)*.) (See 81 Cal. L. Rev. 1325 [discussion of accent discrimination as unlawful employment discrimination, and call for use of standardized test for assessment of comprehensibility of nonnative speakers]; 33 McGeorge L. Rev. 433 [codification of FEHA workplace language policies and regulations].)

(3) *Marital Status Discrimination*. It is an unlawful employment practice to discriminate on the basis of marital status. (*Govt.C. 12940(a)*, supra, §921; see 44 A.L.R.4th 1044 [what constitutes marital status employment discrimination].) However, marital status may be considered for (a) "reasons of supervision, safety, security, or morale" when working spouses are in the same "department, division, or facility," and (b) health plans that provide "additional or greater benefits to employees with dependents than to those employees without or with fewer dependents." (*Govt.C. 12940(a)(3)*.) (See *Chen v. Orange* (2002) 96 C.A.4th 926, 930, 939, 116 C.R.2d 786 [trial court did not err in dismissing marital status discrimination claim where any antipathy against plaintiff was based on political disfavor husband was in at time and not result of her status as married or single, or fact that she was married to coworker]; *Hope Int. University v. Superior Court* (2004) 119 C.A.4th 719, 742, 14 C.R.3d 643 [trial court did not err in denying motion for summary judgment to defendant university that fired two married professors who made up entire graduate psychology department, to extent that claims were based on theory that married couple cannot work in same department; two professors working in same department does not necessarily implicate "problems of supervision" that would make summary judgment appropriate]; on applicability of Unruh Civil Rights Act to marital status)

discrimination, see *supra*, §910.)

(4) *Public Works Contractors*. Discrimination is prohibited in employment in public works on any basis listed in *Govt.C. 12940(a)* (*supra*, §921), except as provided in *Govt.C. 12940*. (*Lab.C. 1735*.)

An employer who is a contractor with the state for public works or for goods or services is subject to the Act, and each prospective contractor or subcontractor may be required to submit a nondiscrimination program for approval and certification. (*Govt.C. 12990(a)*, (b).)

(5) *Religious Creed Discrimination*. It is an unlawful employment practice to discriminate on the basis of religious creed. (*Govt.C. 12940(a)*, *supra*, §921; see *Slatkin v. University of Redlands* (2001) 88 C.A.4th 1147, 1156, 106 C.R.2d 480 [evidence that stated reasons for denying tenure were pretextual is not necessarily evidence that tenure was denied because of plaintiff's religion; following *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407, *supra*, §870]; *Friedman v. Southern Calif. Permanente Med. Group* (2002) 102 C.A.4th 39, 66, 125 C.R.2d 663 [veganism by itself is not religious creed entitled to protection under FEHA; adopting approach of federal circuits]; *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 C.A.4th 1004, 1013, 18 C.R.3d 906 [statute covers religious observances as well as beliefs, and fact that employee's attendance at particular religious convention may not have been required by tenets of his religion or amounted to "temporal mandate" did not excuse defendant's failure to accommodate request for time off to attend]; 36 *Loyola L.A. L. Rev.* 1709 [*Friedman*]; 37 *A.L.R.5th* 349 [construction of state legislation prohibiting religious discrimination in employment]; on religious discrimination under federal statute, see *supra*, §876.)

An employer or other covered entity may not discriminate based on a conflict between a person's religious belief and observance and an employment requirement, except where the employer or other entity demonstrates that it cannot make a reasonable accommodation without undue hardship on the conduct of business. "Religious belief or observance" includes observance of a Sabbath or other holy day, and reasonable travel time. (*Govt.C. 12940(l)*; see *Soldinger v. Northwest Airlines* (1996) 51 C.A.4th 345, 58 C.R.2d 747 [action based on refusal to allow employee to take time off for religious holiday; collective bargaining agreement between employer and union, by itself, was not accommodation as matter of law].)

West's Key Number Digest, Civil Rights k.145, 146, 151

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 942

[§ 942] In General.

(1) *Nature and Purpose of Statute.* The 1991 Legislature added two sections to the Government Code: *Govt.C. 12945.2* and *19702.3*, now known as the Moore-Brown-Roberti Family Rights Act. (*Govt.C. 12945.1.*) (See *23 Pacific L. J. 720.*) The Act is also referred to as the CFRA. (For other statutes relating to family care rights, including Paid Family Care Leave Act and federal Family and Medical Leave Act, see *3 Summary* (10th), *Agency and Employment*, §§420, 421.)

On *child care*, the enacting statute includes the Legislature's findings and declarations that: (a) the "United States is the only industrialized country that does not have a mandated policy on child care leave"; (b) a majority of women are now in the workforce; (c) there is a shortage of day care, particularly for infants; (d) it is in the child's best interest to have close contact with his or her parents; and (e) "both men and women should have the option of taking leave for child-rearing purposes." (Stats. 1991, Chap. 462, §2.)

On *elder care*, the enacting statute notes that: (a) the population is aging and the number of adults caring "for their parents due to physical and mental disabilities is growing"; (b) family care is generally preferable to institutionalization; (c) there is a lack of affordable and available elder care; (d) women have traditionally cared for aged parents, but now a majority of women are in the workforce, and providing elder care may jeopardize their employment and career opportunities; (e) there is a growing number of elderly in this state and many "must receive home care or be confined to hospitals or nursing homes"; and (f) facilitating home care "can present economic savings to the health system, seniors, care givers, and employers." (Stats. 1991, Chap. 462, §3.)

The Act is not intended to affect the rights of state employees to pregnancy leaves of absence under *Govt.C. 19991.6* or *Educ.C. 89519*. (Stats. 1991, Chap. 462, §8.) (See *35 Santa Clara L. Rev. 983* [family leave laws as ensuring job security and family values]; *77 So. Cal. L. Rev. 1067* [striking balance between needs of employers and employees]; *57 A.L.R.5th 477* [state family, parental, or medical leave acts].)

(2) *Definitions.* The Act defines the following terms:

(a) "*Child*" and "*parent*" are defined to include biological, adoptive, foster, and step parent-child relationships, as well as legal ward and guardian or a child of a person standing in loco parentis. A child must be under 18 or an adult dependent child. (Govt.C. 12945.2(c)(1), (c)(7).)

(b) *Family care and medical leave* includes leave for childbirth, adoption, or foster care, or for a child's serious health condition; leave to care for a parent or spouse who has a serious health condition; and leave because of an employee's own serious health condition (other than pregnancy, childbirth, or related medical conditions) that makes the employee unable to perform his or her job functions. (Govt.C. 12945.2(c)(3).) (See *Pang v. Beverly Hosp.* (2000) 79 C.A.4th 986, 995, 94 C.R.2d 643 [it is not enough that parent has serious health condition; caregiver's participation must be warranted during period of treatment or supervision; thus, help given in moving mother to new home because she was no longer able to deal with stairs and yard did not entitle plaintiff to take leave under CFRA].)

(c) *Serious health condition* means "an illness, injury, impairment, or physical or mental condition" that involves either inpatient care in a hospital, hospice, or residential care facility, or continuing treatment or supervision by a health care provider. (Govt.C. 12945.2(c)(8).) (See *Gibbs v. American Airlines* (1999) 74 C.A.4th 1, 8, 87 C.R.2d 554 [cold or flu is not incapacitating serious health condition under Act, absent unusual circumstances].)

(d) *FMLA* means the federal Family and Medical Leave Act of 1993. (Govt.C. 12945.2(c)(5).)

(e) *Health care provider* includes physicians, surgeons, and osteopathic physicians or surgeons, whether licensed in California or another jurisdiction, and other persons determined by the Secretary of Labor to be capable of providing health care services under the federal Family and Medical Leave Act (FMLA). (Govt.C. 12945.2(c)(6).)

(f) *Employer* is (1) a person directly employing 50 or more persons, or (2) the state, its subdivisions, and cities. (Govt.C. 12945.2(c)(2).)

(g) *Employment in same or comparable position* means employment in a position with the same or similar duties and pay at the same or similar geographic location as before the leave. (Govt.C. 12945.2(c)(4).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature and Purpose of Statute.* See 59 *Hastings L. J.* 1285 [Symposium on family responsibilities discrimination and stereotyping evidence]; 41 *U.S.F. L. Rev.* 171 [growing trend of family responsibilities discrimination]. (2) *Definitions.*

(b) *Family care and medical leave:* Under Govt.C. 12945.2(c)(3)(C), an employee is entitled to medical leave when suffering from a "serious medical condition" that "makes the employee unable to perform the functions of the position of that employee." This inability refers to the job assigned to the employee by his or her employer. It does not refer to an inability to perform essential job functions generally. Hence, an employee's ability to work part time for a different employer during the period when the employee is seeking medical leave, doing essentially the same tasks, although strong evidence of the employee's capacity to perform the functions of the job, is not dispositive of whether the employee has a serious medical condition. (*Lonicki v. Sutter Health Cen.* (2008) 43 C.4th 201, 214, 216, 74 C.R.3d 570, 180 P.3d 321.)



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8 Witkin Sum. Cal. Law Const Law § 943

[§ 943] Requirements for Taking Leave.

(1) *Refusal To Grant Request.* A family care or medical leave request "shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave. The commission shall adopt a regulation specifying the elements of a reasonable request." (*Govt.C. 12945.2(a).*)

In adopting the regulations required by *Govt.C. 12945.2*, the Fair Employment and Housing Commission must consider and specify: (a) the length of time necessary for appropriate advance notice for a leave request; (b) the appropriate minimum duration of a leave; (c) what would constitute undue hardship for denial or deferral of a leave; and (d) what accommodation of the employee's family care rights, short of granting a leave, would be reasonable. (*Stats. 1991, Chap. 462, §6; see 2 Cal. Code Reg., §7297.0 et seq.*)

(2) *Advance Notice to Employer.* If the need for family care and medical leave is foreseeable, the employee must provide reasonable advance notice to the employer. (*Govt.C. 12945.2(h).*) If the need is foreseeable due to a planned medical treatment or supervision, the employee must make a reasonable effort to schedule the treatment or supervision to avoid disruption of the employer's operations, subject to the health care provider's approval. (*Govt.C. 12945.2(i).*) (See *Gibbs v. American Airlines* (1999) 74 C.A.4th 1, 7, 87 C.R.2d 554 [employee's messages to employer that she was absent for flu or cold symptoms and taking antibiotics was not notice sufficient to make employer aware that she needed CFRA qualifying leave]; *Stevens v. Department of Corrections* (2003) 107 C.A.4th 285, 292, 132 C.R.2d 19 [request for vacation time to spend holidays with ailing parents was insufficient to trigger requirements of CFRA; in context of ailing parent, reasonable notice requires some communication, express or implied, that employee seeks leave to care for parent]; 24 *Pepperdine L. Rev.* 1209 [notice requirements under Act]; for adequacy of notice to employer under federal Act, see 184 A.L.R. Fed 171.)

(3) *Certification.* When an employee requests leave, the employer may require that the request be supported by a certification from the health care provider of the person requiring care. (*Govt.C. 12945.2(j), (k).*) If the leave is to care for a child, spouse, or parent, a certification is sufficient if it includes (a) the date on which the serious health condition

commenced, (b) its probable duration, (c) an estimate of the amount of time that the provider believes the employee needs to care for the person, and (d) a statement that the condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the person. (*Govt.C. 12945.2(j)*.) If the leave is because of the employee's own serious health condition, the employer may further require the certification to include a statement that, due to the condition, the employee is unable to perform the function of his or her position. If the employer has reason to doubt the validity of the certification, it may seek a second opinion at its expense. (*Govt.C. 12945.2(k)*.)

(4) *Periods of Leave.* An employee may take leave in one or more periods. The 12-month period for taking leave and the leave taken under the CFRA must run concurrently with the 12-month period and any leave (other than leave for pregnancy, childbirth, or related medical conditions) taken under the FMLA. (*Govt.C. 12945.2(p), (s)*.) The total leave (other than leave for pregnancy, childbirth, or related medical conditions) under both statutes may not exceed 12 workweeks in a 12-month period. (*Govt.C. 12945.2(s)*.)

The provisions governing family care and medical leave are separate and distinct from those governing pregnancy leave (*Govt.C. 12945, supra, §926*). (*Govt.C. 12945.2(o)*.) If otherwise qualified, an employee is entitled to take pregnancy leave under *Govt.C. 12945*, in addition to family and medical leave under *Govt.C. 12945.2* and FMLA. (*Govt.C. 12945.2(s)*.)

If both parents are entitled to leave and employed by the same employer, the employer is not required to grant leave for birth, adoption, or foster care that would allow the parents family care and medical leave totaling more than 12 workweeks in a 12-month period. (*Govt.C. 12945.2(q)*.)

(5) *Pay and Benefits During Leave.* The leave is normally without pay. (*Govt.C. 12945.2(d)*.) However, an employee may elect, or an employer may require, that accrued vacation leave, other accrued time off, other paid or unpaid time off negotiated with the employer, or, if the leave is for the employee's own serious health condition, accrued sick leave, be substituted for family care and medical leave. An employee may not otherwise use sick leave during a family care and medical leave unless the employer agrees. (*Govt.C. 12945.2(e)*.)

During the leave, the employer must maintain and pay for coverage under a group health plan for at least 12 workweeks during a 12-month period, on the same conditions that would apply if the employee were continuously employed. (*Govt.C. 12945.2(f)(1)*.) During any period that this coverage is not provided, an employee is entitled to participate in employee health, benefit, pension and retirement, and supplemental unemployment benefit plans, under the same conditions as apply to other unpaid leave. In the absence of these conditions, the employee is entitled to participate in these plans, but the employer may require payment of premiums, at the group rate, for health and welfare employee benefit plans. An employee's nonpayment does not constitute a break in service for purposes of longevity, seniority, or any benefit plan. An employer is not required to make payments to a pension or retirement plan, and the leave period is not counted as time accrued under the plan, but an employee may continue to make contributions to a pension plan. (*Govt.C. 12945.2(f)(2)*.)

An employee retains employee status during the leave period, and the leave does not constitute a break in service for purposes of longevity, seniority, or any benefit plan. For purposes of layoff, recall, promotion, job assignment, and seniority-related benefits, the employee returns with no less seniority than he or she had before the leave. (*Govt.C. 12945.2(g)*.)

(6) *Exceptions.* It is not an unlawful employment practice for an employer to refuse to grant an employee's leave request if the employer employs fewer than 50 employees within 75 miles of that employee's worksite. (*Govt.C. 12945.2(b)*.) In addition, an employer may refuse to reinstate an employee returning from leave to the same or a comparable position if (a) the employee is a salaried employee who is among the highest paid 10% of the employees employed within 75 miles of that employee's worksite, (b) "refusal is necessary to prevent substantial and grievous economic injury" to the employer's operations, and (c) the employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary. (*Govt.C. 12945.2(r)(1)*.) If the leave has

already commenced, the employer must give the employee a reasonable opportunity to return to work following the notice. (*Govt.C. 12945.2(r)(2)*.) (See *Tomlinson v. Qualcomm (2002)* 97 C.A.4th 934, 940, 118 C.R.2d 822 [employee on pregnancy leave had no greater right to job protection than other employees, and was thus subject to layoff in company work force reduction].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Advanced Notice to Employer.* See *Avila v. Continental Airlines (2008)* 165 C.A.4th 1237, 1257, 82 C.R.3d 440 [in case involving medical emergency, notice on hospital's preprinted form of employee's hospitalization submitted to employer after employee returned to work might be sufficient to notify employer of employee's need for CFRA-qualifying leave at least regarding absent days, and thus might constitute "request" for leave under CFRA].

(3) *Certification.* When leave is for the employee's own health condition and there is a difference of opinion between the employee's certification and the opinion of the employer's health care provider, the employer may require, at its expense, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee. If obtained, this third opinion is binding on both parties. (*Govt.C. 12945.2(k)(3)*); see *Lonicki v. Sutter Health Cen. (2008)* 43 C.4th 201, 209, 74 C.R.3d 570, 180 P.3d 321, Supp., supra, §942 [employer's failure to obtain binding opinion by third health care provider did not bar it from asserting that it was justified in firing plaintiff because she did not meet statutory requirement for having serious health condition that prevented her from doing job].)



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8 *Witkin Sum. Cal. Law Const Law* § 944

[§ 944] Unlawful Employment Practices.

(1) *Refusal To Grant Request*. It is an unlawful employment practice for an employer "to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave." (*Govt.C. 12945.2(a)*.)

(2) *Discriminatory Discharge or Refusal To Hire*. It is an unlawful employment practice for an employer "to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against," a person because of the person's (a) exercise of the right to family care and medical leave, or (b) giving information or testimony as to his, her, or another person's family care and medical leave, in an inquiry or proceeding related to rights guaranteed under *Govt.C. 12945.2*. (*Govt.C. 12945.2(l)*.) The same prohibition against discrimination in hiring, discharge, etc., applies to state civil service employees. (See *Govt.C. 19702.3(a)*.)

The elements of a cause of action under the CFRA for retaliation against an employee needing medical leave are: (a) the defendant was an employer covered by the CFRA; (b) the plaintiff was an employee eligible to take leave; (c) the plaintiff exercised his or her right to take leave for a qualifying purpose; and (d) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of the exercise of his or her right to take leave. (*Dudley v. Department of Trans. (2001) 90 C.A.4th 255, 261, 108 C.R.2d 739*; see *McDaneld v. Eastern Mun. Water Dist. Bd. (2003) 109 C.A.4th 702, 706, 135 C.R.2d 267* [employer did not err in terminating employee who it reasonably believed had misused leave and who was untruthful in investigation].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Discriminatory Discharge or Refusal To Hire*. See *Neisendorf v. Levi Strauss & Co. (2006) 143 C.A.4th 509, 520, 49 C.R.3d 216* [plaintiff could not state valid claim under CFRA for failure of employer to reinstate her after she took extended medical leave because employer had legitimate nondiscriminatory reason for terminating plaintiff's employment which had nothing to do with her taking CFRA leave]; *Faust v. California Portland Cement Co. (2007) 150 C.A.4th 864, 881, 58 C.R.3d 729* [trial court erred in granting summary judgment to defendant employer where

defendant failed to establish that it complied with CFRA notice requirements; although plaintiff failed to personally respond to defendant's requests for more information about his condition, defendant failed to contact plaintiff's doctor or attorney as directed by plaintiff's wife].



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8 Witkin Sum. Cal. Law Const Law § 945

[§ 945] In General.

(1) *Discrimination Prohibited.* "[T]he practice of discrimination because of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation in housing accommodations is declared to be against public policy." (*Govt.C. 12920*; see *Hess v. Fair Emp. & Housing Com.* (1982) 138 C.A.3d 232, 235, 187 C.R. 712 [discrimination against unmarried couples]; *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 C.A.4th 1578, 1593, 18 C.R.3d 669 [condominium association with no-dog policy violated FEHA by failing to permit condominium owners to keep dog as reasonable accommodation to their mental disabilities]; 108 Harv. L. Rev. 763 [note on Alaska case: anti-discrimination laws protecting unmarried couples do not violate free exercise rights of religious landlord]; 21 California Lawyer 66 (May 2001) [Disabled Tenants]; 31 McGeorge L. Rev. 211 [minority housing and employment rights]; 25 U.C. Davis L. Rev. 1055 [discrimination against unmarried couples]; 96 A.L.R.3d 497 [state civil rights acts prohibiting racial discrimination in rental of privately owned residential property]; 28 A.L.R.4th 685 [state civil rights acts prohibiting discrimination in housing based on physical handicap]; 33 A.L.R.4th 964 [state civil rights acts prohibiting discrimination in housing based on marital status]; 81 A.L.R.4th 205 [state civil rights legislation prohibiting sex discrimination in housing]; 2 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §13:5 et seq. [text and form]; on unlawful practices, see *infra*, §947; on discrimination by landlords against children, see *supra*, §908.)

(2) *Construction.* The Act is to be liberally construed. (*Govt.C. 12993(a)*) The Act occupies the field, superseding any city or county regulations on the subject. But it does not restrict or limit the application of the Unruh Civil Rights Act, C.C. 51 (*supra*, §898), or the Tom Bane Civil Rights Act, C.C. 51.7 (*supra*, §895). (*Govt.C. 12993(c)*, 12993.5.)

The FEHA is not to be construed to:

(a) Affect the title or other interest of a bona fide purchaser or encumbrancer without knowledge or notice of a violation. (*Govt.C. 12995(a)(1).*)

(b) Prohibit private or public postsecondary educational institutions from providing separate housing for male or female students, or for married students or students with minor dependents residing with them. (*Govt.C. 12995(a)(2).*)

(c) Prohibit selection based on "factors other than race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or other basis prohibited by the Unruh Civil Rights Act." (*Govt.C. 12995(a)(3).*)

(d) "Promote housing accommodations on a preferential or quota basis." (*Govt.C. 12995(a)(4).*)

(e) Prohibit "the nondiscriminatory enforcement of state and local public nuisance laws" that do not otherwise conflict with the Act. (*Govt.C. 12995(b).*)

Further, the Act does not prohibit a religious organization, association, or society, or a nonprofit institution or organization operated or controlled by it, "from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to those persons, unless membership in that religion is restricted on account of race, color, or national origin." (*Govt.C. 12955.4.*)

(3) *Preservation of Records.* On notice that a verified complaint against it has been filed, the owner of housing accommodations must maintain and preserve all rental records and other written materials relevant to the complaint, "until the complaint is fully and finally disposed of and all appeals or related proceedings terminated." (*Govt.C. 12956.*)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Fair Employment and Housing Act.
e. Housing.
2. Definitions.

8 Witkin Sum. Cal. Law Const Law § 946

[§ 946] Definitions.

(1) *Discrimination*. For purposes of the Act, "discrimination" is broadly defined in *Govt.C. 12927(c)(1)* to include the following:

- (a) The refusal to sell, rent, or lease housing accommodations.
- (b) The refusal to negotiate for the sale, rental, or lease of housing accommodations.
- (c) A representation that a housing accommodation is not available for inspection, sale, or rental when the housing accommodation is, in fact, available.
- (d) Other denials or withholdings of housing accommodations.
- (e) The provision of inferior terms, conditions, privileges, facilities, or services in connection with the housing accommodations.
- (f) Harassment in connection with housing accommodations.
- (g) The cancellation or termination of a sale or rental agreement.
- (h) The provision of segregated or separated housing accommodations.
- (i) The "refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises ... and includes refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." However, in the case of a rental, the landlord, where reasonable, may "condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear)." (*Govt.C. 12927(c)(1).*)

"Discrimination" does not include "refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household, and the owner complies with" *Govt.C. 12955(c)* (infra, §947), on proper notices and advertisements. (*Govt.C. 12927(c)(2)*.) Where living space in a single unit is to be shared, "discrimination" does not include advertising targeted to persons of one sex. (*Govt.C. 12927(c)(2)*.)

(2) *Owner*. "Owner" includes (a) the lessee, sublessee, assignee, managing agent, real estate broker, or salesman; (b) a person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations; and (c) the state and its political subdivisions or their agencies. (*Govt.C. 12927(e)*.)

(3) *Housing Accommodation*.

"Housing accommodation" is a "building, structure, or portion thereof that is occupied as, or intended for occupancy as, a residence by one or more families and any vacant land that is offered for sale or lease for the construction" of such a building, etc. (*Govt.C. 12927(d)*.)

(4) *Person*. "Person" includes "all individuals and entities" described in 42 U.S.C., §3602(d), and in the definition of "owner" in *Govt.C. 12927(e)*, and all institutional third parties, including the Federal Home Loan Mortgage Corporation. (*Govt.C. 12927(f)*.)

(5) *Aggrieved Person*. "Aggrieved person" includes a "person who claims to have been injured by a discriminatory housing practice or believes that the person will be injured by a discriminatory housing practice that is about to occur." (*Govt.C. 12927(g)*.)

(6) *Real Estate-Related Transactions*. "Real estate-related transactions" includes (a) the making or purchasing of loans for the purchase, maintenance, or improvement of residential real estate, (b) the sale, brokering, or appraisal of residential real estate, and (c) the use of territorial underwriting criteria to require earthquake insurance. (*Govt.C. 12927(h)*.)

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(5) *Aggrieved Person*. See *Sisemore v. Master Financial* (2007) 151 C.A.4th 1386, 1426, 60 C.R.3d 719 [nonprofit fair housing organization that was required to divert scarce resources to address defendant lender's alleged discriminatory conduct was "person aggrieved" under *Govt.C. 12989.1* and had standing to assert FEHA claim].



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8 Witkin Sum. Cal. Law Const Law § 947

[§ 947] Unlawful Activities.

(1) *Statutory Provisions.* The FEHA sets forth unlawful acts and practices relating to housing discrimination and harassment based on a person's "race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability" (*Govt.C. 12955*), or the *perception* that a person has, or is associated with a person who has, one of these protected characteristics (*Govt.C. 12955(m)*). Specifically, it is unlawful:

(a) For the owner of a housing accommodation to discriminate against or harass a person because of that person's race, etc. (*Govt.C. 12955(a)*.)

(b) For the owner to make an inquiry concerning the race, etc., *but not the source of income*, of a person seeking to purchase, rent, or lease any housing accommodation. (*Govt.C. 12955(b)*); on inquiry into source of income, see *Govt.C. 12955(p)*.)

(c) For a person to make any form of publication with respect to the sale or rental of a housing accommodation expressing any discriminatory preference. (*Govt.C. 12955(c)*.)

(d) For a person subject to the Unruh Act (*supra*, §898 et seq.) to discriminate against any person on the ground of race, etc. (*Govt.C. 12955(d)*.)

(e) For a person, bank, mortgage company, or other financial institution to whom application is made for financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against a person or group of persons because of the race, etc., of the person or persons, or of prospective occupants or tenants, "in the terms, conditions, or privileges relating to the obtaining or use of that financial assistance." (*Govt.C. 12955(e)*.)

(f) For an owner of housing accommodations "to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations," when the owner's dominant purpose is retaliation for seeking or supporting enforcement of the Act. (*Govt.C. 12955(f)*) [this provision is not intended to cause or permit delay of unlawful detainer action].)

(g) "For any person to aid, abet, incite, compel, or coerce" any of the proscribed acts or practices, or to attempt to do so. (*Govt.C. 12955(g).*)

(h) "For any person, for profit, to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons" of a particular race, etc. (*Govt.C. 12955(h).*)

(i) For any person, organization, or entity "whose business involves real estate-related transactions to discriminate" on the basis of race, etc., in making a transaction available or in the terms or conditions of a transaction. (*Govt.C. 12955(i).*)

(j) "To deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service" because of race, etc. (*Govt.C. 12955(j).*)

(k) "To otherwise make unavailable or deny a dwelling based on discrimination" because of race, etc. (*Govt.C. 12955(k).*)

(l) "To discriminate through public or private land use practices, decisions, and authorizations" because of race, etc. Discrimination includes "restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law" (*Govt.C. 65000 et seq., infra, §1010 et seq.*), "that make housing opportunities unavailable." This includes the use of a restrictive covenant, even if accompanied by a statement that it has been repealed or is void. (*Govt.C. 12955(l).*) (See *Broadmoor San Clemente Homeowners Assn. v. Nelson (1994) 25 C.A.4th 1, 9, 30 C.R.2d 316, 12 Summary (10th), Real Property, §456* [in enacting 1993 amendments of *Govt.C. 12955 and 12955.6* (see *supra*, §916), Legislature intended to bring California law into compliance with federal law, which prohibits enforcement of restrictive covenants having effect of excluding group homes for disabled].)

(m) "To use a financial or income standard in the rental of housing that fails to account for the aggregate income of persons residing together ... on the same basis as the aggregate income of married persons residing together." (*Govt.C. 12955(n).*)

(n) Where there is a government rent subsidy, "to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of rent to be paid by the tenant." (*Govt.C. 12955(o).*)

For purposes of *Govt.C. 12955*, discrimination includes "failure to design and construct a covered multifamily dwelling in a manner that allows access to and use by disabled persons." (*Govt.C. 12955.1* [providing required minimum features and standards that must be applied]; see *Govt.C. 12955.1(a)(2)* [defining "covered multifamily dwelling"].)

It is unlawful "to coerce, intimidate, threaten, or interfere with any person" who exercises or aids another in exercising a right granted or protected by *Govt.C. 12955* or *Govt.C. 12955.1*. (*Govt.C. 12955.7.*)

(2) *Familial Status*. Provisions relating to discrimination on the basis of familial status do not apply to specified housing for older persons. (*Govt.C. 12955.9.*)

(3) *Marital Status*. In *Smith v. Fair Emp. & Housing Com. (1996) 12 C.4th 1143, 51 C.R.2d 700, 913 P.2d 909*, a landlord refused on religious grounds to rent an apartment to an unmarried couple. Acting on the couple's complaint, the Fair Employment and Housing Commission determined that the landlord had violated the FEHA by discriminating on the basis of marital status. The landlord argued that the Act does not prohibit housing discrimination against unmarried couples. *Held*, the Act applies. Three justices joined in the lead opinion, and a fourth concurred fully in the disposition of the case.

(a) Under *Govt.C. 12955(a)*, it is unlawful for the owner of housing to discriminate against a person because of "marital status." The usual and ordinary meaning of the words "marital status," as applied to two prospective tenants, is

that a landlord may not ask them whether they are married or refuse to rent to them because they are or are not married. (12 C.4th 1155.) The language means that unmarried *couples*, as well as single, married, widowed, and divorced *individuals* are protected from discrimination. This reading of the words "marital status" is confirmed by the Legislature's use of the words in other statutes. (12 C.4th 1156.)

(b) The Commission has interpreted *Govt.C. 12955* to protect unmarried couples since 1980, when the FEHA was enacted. Although final responsibility for interpreting the statute rests with the courts, the Commission's interpretation is entitled to great weight: (1) the interpretation is contemporaneous with the statute's enactment, uniform, and long standing, and (2) nothing in the legislative history of *Govt.C. 12955* contradicts the established interpretation. (12 C.4th 1157.) (On court's rejection of landlord's claim that statute burdened her exercise of religious freedom, see *supra*, §527.)

(4) *Sexual Harassment*. The FEHA applies to sexual harassment in housing. In *Brown v. Smith* (1997) 55 C.A.4th 767, 64 C.R.2d 301, the court explained that the Act should conform to the general requirements of federal law in the area and is to be liberally construed to accomplish its purposes. (55 C.A.4th 780, citing *Govt.C. 12993*.) Federal case law has recognized a hostile housing environment cause of action. (55 C.A.4th 781.) The nature of the environment as hostile or abusive can be determined only by looking at all the circumstances. Factors to be considered include the frequency of the objectionable conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with a tenant's enjoyment of the housing conditions. (55 C.A.4th 784.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Provisions*. See *Sisemore v. Master Financial* (2007) 151 C.A.4th 1386, 1416, 60 C.R.3d 719 [fact that *Govt.C. 12955(p)(1)* defines "source of income" in context of discrimination by landlord against tenant does not confine other protections afforded by statute to discrimination against tenants; plaintiffs, who alleged that lender discriminated against them on basis of source of income in connection with efforts to obtain mortgage to purchase home to be used as family day care business, stated claim under *Govt.C. 12955(e)*].

(*New*) *Disparate impact*: An act or a failure to act that is otherwise covered under the FEHA provisions governing housing discrimination, and that has the effect, regardless of intent, of discriminating on one of the specified grounds, is actionable. (See *Govt.C. 12955.8(b)*.) Hence, a housing discrimination claim under the FEHA may be based on a disparate impact theory. (*Sisemore v. Master Financial*, *supra*, 151 C.A.4th 1419 [although FEHA does not protect home day care operators as class, plaintiffs stated claim for disparate impact discrimination where effect of defendant's policy not to give mortgages to home day care providers was to discriminate against plaintiffs on basis of gender or familial status].)



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8 *Witkin Sum. Cal. Law Const Law* § 948

[§ 948] In General.

(1) *Enforcement Responsibility.* Responsibilities for enforcing the FEHA are allocated between the Department of Fair Employment and Housing and the Fair Employment and Housing Commission (see *supra*, §920). The Act establishes a procedure for the prevention and elimination of unlawful practices. (See *Govt.C. 12960 et seq.*; on judicial enforcement, see *infra*, §951; on effect of arbitration on claim under FEHA, see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, Supp., §494A *et seq.*)

(2) *Initiation of Investigation by Complaint.* A person aggrieved by an unlawful employment practice, or the director of the department or his or her authorized representative, may file a verified complaint with the department. (*Govt.C. 12960(b).*) A complaint on behalf of a class is permitted. (*Govt.C. 12961.*) Also, an employer whose employees refuse to cooperate may file a complaint "asking for assistance by conciliation or other remedial action." (*Govt.C. 12960(c).*)

The complaint must be filed within 1 year of the alleged unlawful practice, subject to a 90-day extension if the practice was not discovered within that period. (*Govt.C. 12960(d).*) It must be served on the person, employer, or organization alleged to have committed the unlawful practice at the time of initial contact or within 60 days, "whichever first occurs." (*Govt.C. 12962.*) (See *Balloon v. Superior Court* (1995) 39 C.A.4th 1116, 1120, 46 C.R.2d 161 [time for filing complaint is not tolled during minority]; *Williams v. Belvedere* (1999) 72 C.A.4th 84, 93, 84 C.R.2d 658 [issuance of right-to-sue letter does not overturn rule requiring timely filing of administrative claim as prerequisite to filing civil action]; *Morgan v. Regents of Univ. of Calif.* (2000) 88 C.A.4th 52, 64, 105 C.R.2d 652 [series of rejected job applications with different departments of defendant university did not demonstrate continuing violation sufficient to permit evidence of events occurring before limitations period].)

(3) *Investigatory Powers.* The department must promptly investigate a complaint of unfair employment practices. (*Govt.C. 12963.*) It may (a) issue and serve subpoenas requiring the attendance and testimony of witnesses by deposition or otherwise, and the production of documentary evidence and physical materials (*Govt.C. 12963.1(a)*); (b) issue and serve written interrogatories (*Govt.C. 12963.2(a)*); (c) take depositions (*Govt.C. 12963.3*); and (d) issue and serve

requests for the production, inspection, and copying of documentary evidence and physical materials (*Govt.C. 12963.4(a)*).

The superior court has jurisdiction to compel the attendance and testimony of witnesses, the production of evidence, and the answering of interrogatories. (*Govt.C. 12963.5(a)*.) Orders are final and not subject to review by appeal, but the losing party may seek mandamus to compel the court to set aside or otherwise modify its order. (*Govt.C. 12963.5(d)*.) (See *12 Pacific L. J. 567*.)

(4) *Conference, Conciliation, and Persuasion*. If the department determines that the complaint is valid, it must seek to eliminate the unlawful practice by confidential conference, conciliation, and persuasion. (*Govt.C. 12963.7(a)*.) A successful agreement must be reduced to writing, and the department retains power to enforce it if it is not implemented. (*Govt.C. 12964*.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Enforcement Responsibility*.

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §518 et seq.

(2) *Initiation of Investigation by Complaint*. As amended in 2003, *Govt.C. 12962* only requires the department to serve a verified complaint for an unrepresented employee that is "filed for investigation." Where an employee is represented by private counsel, service of the administrative complaint is made by counsel. But where an unrepresented employee files an administrative complaint and asks for a right-to-sue letter to pursue the matter in court, the department does not start an investigation, and the employee need not serve the defunct administrative complaint on the employer within the 60-day time limit as a prerequisite to bringing an action. (*Wasti v. Superior Court (2006) 140 C.A.4th 667, 672, 674, 44 C.R.3d 625* [because 2003 amendment did not change filing requirements for unrepresented employees, even if time limit applied to employee in this case, department would have been responsible for serving complaint].)

See *Blum v. Superior Court (2006) 141 C.A.4th 418, 428, 45 C.R.3d 902* [attorney may verify DFEH complaint for client by signing attorney's own name to complaint].

(New) *Tolling of 1-year period to file complaint*: The FEHA does not foreclose as a matter of law the equitable tolling of the statute of limitations for filing a complaint with the DFEH during a complainant's voluntary pursuit of an internal administrative remedy. (*McDonald v. Antelope Valley Community College Dist. (2008) 45 C.4th 88, 106, 84 C.R.3d 734, 194 P.3d 1026*.)



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8 Witkin Sum. Cal. Law Const Law § 949

[§ 949] Accusation, Hearing, and Decision.

(1) *Formal Accusation.* A written accusation is issued if conference, conciliation, or persuasion fails (see *supra*, §948), or if the department determines that the "circumstances warrant" it. If the complaint is treated as a class complaint or alleges a violation of C.C. 51.7 (*supra*, §895), the accusation must be issued within 2 years after the filing of the complaint; otherwise within 1 year. (*Govt.C. 12965(a)*.) If the accused is a state contractor or supplier, notice and a copy of the accusation must be sent to the appropriate agency. (*Govt.C. 12966*.)

The language in *Govt.C. 12965(a)* allowing the division to issue an accusation in advance of conference, conciliation, or persuasion "if circumstances warrant" was intended to give the division (a) the discretion to determine what circumstances warrant a premature filing, and (b) the right to salvage otherwise unsuccessfully resolved claims by filing them on the last possible day. (*Motors Ins. Corp. v. Division of Fair Emp. Practices (1981) 118 C.A.3d 209, 224, 173 C.R. 332* [decided under predecessor statute].)

(2) *Hearing.* The Commission must hold a hearing on an accusation issued pursuant to *Govt.C. 12965* (*Govt.C. 12967*), and the hearing must take place not more than 90 days after issuance of the accusation (*Govt.C. 12968*). The department prosecutes accusations before the Commission. (*Govt.C. 12930(h)*.)

A commissioner who has engaged in the investigation of a particular case may not hear the case or participate in the Commission's deliberations on the case. (*Govt.C. 12969*; see *Govt.C. 12970(h)* [findings must identify members who participated in decisions].)

(3) *Injunction Pending Decision.* The department may obtain temporary or preliminary relief pending final disposition of the complaint if necessary to carry out the purposes of the Act. (*Govt.C. 12974*.)

(4) *Findings, Determination, and Order.* If the Commission concludes that there was an unlawful practice, it makes findings of fact, and issues and serves its order. This order requires the respondent "to cease and desist from the unlawful practice and to take action, including, but not limited to," the following:

- (a) Hiring, reinstatement, or upgrading of employees, with or without back pay. (*Govt.C. 12970(a)(1).*)
- (b) Restoration to membership in any respondent labor organization. (*Govt.C. 12970(a)(2).*)
- (c) Payment of damages. (See *infra*, §950.)
- (d) Affirmative or prospective relief that will prevent a recurrence of the unlawful practice. (*Govt.C. 12970(a)(5).*)
- (e) Reporting to the Commission regarding compliance. (*Govt.C. 12970(a)(6).*)

(5) *Copy of Decision to State Agency.* If the unlawful practice occurred in connection with respondent's exercise of a license or privilege granted by a state agency, the Commission must provide that agency with a copy of its decision or order. (*Govt.C. 12970(f).*)

(6) *Copy of Decision to District Attorney.* If it appears that the unlawful practice consisted of a violation of specified statutes relating to sexual offenses, the Commission, with the complainant's consent, must provide the local district attorney's office with a copy of its decision and order. (*Govt.C. 12970(j)*); for discussion of crimes specified, see 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §26; 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §§1 et seq., 31 et seq., 37 et seq., 47 et seq.)

(7) *Judicial Review.* The Commission's order must contain on its face "references to the rights of appeal of any party to the proceeding to whose position the order is adverse." (*Govt.C. 12970(i).*) (On standard of judicial review by administrative mandamus under former Lab.C. 1410 et seq., see *Kerrigan v. Fair Emp. Practice Com.* (1979) 91 C.A.3d 43, 52, 154 C.R. 29 [independent judgment rule governed review of finding that employer had not discriminated on basis of age in refusing to hire plaintiff]; cf. *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 C.A.3d 14, 21, 112 C.R. 872 [employer claiming right to set its own employment practices sought review by administrative mandamus of order finding it guilty of racial discrimination; because claimed right was neither fundamental nor vested, substantial evidence rule was proper standard of review].)

(8) *Compliance Review.* Within 1 year of the effective date of every final order or decision, the department must "conduct a compliance review to determine whether the order or decision has been fully obeyed and implemented." (*Govt.C. 12973(a).*)

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8 Witkin Sum. Cal. Law Const Law § 950

[§ 950] Damages and Penalties.

(1) *Historical Background.* In *Peralta Community College Dist. v. Fair Emp. & Housing Com.* (1990) 52 C.3d 40, 276 C.R. 114, 801 P.2d 357, the court, applying the reasoning of *Dyna-Med. v. Fair Emp. & Housing Com.* (1987) 43 C.3d 1379, 241 C.R. 67, 743 P.2d 1323, held that the Fair Employment and Housing Commission cannot make an award of compensatory damages.

(a) If the department deems a claim valid, it may issue an accusation to be heard by the Commission. If the department determines not to prosecute, it must give the complainant a "right to sue" letter, and the complainant may then bring a civil action in the superior court and recover compensatory and punitive damages. (52 C.3d 45.)

(b) *Dyna-Med.* concluded that the statutory remedies "are exclusively corrective," and relate to matters that "serve to make the aggrieved employee whole in the context of the employment." (52 C.3d 49.) Under *Govt.C. 12970*, this includes such actions as "hiring, reinstatement or upgrading of employees, with or without back pay, ... as, in the judgment of the Commission, will effectuate the purposes" of the *FEHA*. (52 C.3d 46.) *Govt.C. 12987* authorizes the award of both actual and limited punitive damages in *housing* discrimination cases. "Had the Legislature intended to authorize the Commission to award damages in employment as in housing cases, it could easily have expressly so provided." (52 C.3d 51.)

(c) The Attorney General argues that in harassment cases, where no detriment to the employment has been shown and the employee's out-of-pocket expenses are minimal, the only injury is emotional distress and the only redress is compensatory damages. (52 C.3d 53.) But the administrative procedure does not preclude the employee from instituting a private lawsuit based on a nonstatutory cause of action. (52 C.3d 54.) And the department in every case has the discretion to issue a right-to-sue letter, clearing the way for a private civil action under the *FEHA*. (52 C.3d 54.)

Two justices joined in a dissenting opinion, stressing the seriousness of the problem of sexual harassment and discrimination in the workplace, and asserting that the majority's holding frustrates the legislative goal of providing administrative relief. (52 C.3d 63.) (See 19 *Pepperdine L. Rev.* 211.)

(2) *Statutory Amendments and Legislative Policy.* The 1992 Legislature responded to *Peralta* and *Dyna-Med.* by amending *Govt.C. 12970* and related sections. (See Stats. 1992, Chap. 911.) A "primary public policy" of the FEHA "is the prevention and elimination of unlawful employment practices" in California. "A critical corollary to this policy is the availability of effective remedies in administrative proceedings" before the commission. (Stats. 1992, Chap. 911, §1(a).) "The commission must be able to assess civil penalties or fines against particularly egregious respondents to meaningfully vindicate the strong public interest in the prevention and elimination of unlawful employment practices. The commission must be able to redress the victim of discrimination for damages resulting from harassment or discrimination to effectuate the act's remedial purpose of making whole victims of discrimination." (Stats. 1992, Chap. 911, §1(b).) (See *Govt.C. 12920.5* ["effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons" are necessary to eliminate discrimination].)

(3) *Remedies.*

(a) *Orders.* In addition to a cease and desist order, order to hire employees, etc., (see *supra*, §949), the Commission may order (1) payment of actual damages (*Govt.C. 12970(a)(3)*, (a)(4)); (2) an administrative fine (*Govt.C. 12970(c)*); and (3) payment of a civil penalty of up to \$ 25,000 to a person denied any right provided by C.C. 51.7 (Tom Bane Civil Rights Act, *supra*, §895) (*Govt.C. 12970(e)*).

(b) *Actual damages.* Actual damages include damages for emotional injuries. Actual damages "for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" may not exceed, in combination with any administrative fine, \$ 150,000 per aggrieved person per respondent. (*Govt.C. 12970(a)(3)*.) Further, actual damages up to \$ 150,000 may be awarded for a violation of C.C. 51.7. (*Govt.C. 12970(a)(4)*.)

(c) *Proof of actual injury.* To sustain an award of actual damages, the department must prove, by a preponderance of the evidence, that an aggrieved person has sustained actual injury; proof of an unlawful practice alone is not sufficient. In determining the amount, if any, to award for emotional injuries, the Commission must consider the effects of discrimination on the aggrieved person with respect to specified factors, the duration of the injury, and whether it was caused or exacerbated by the person's knowledge of respondent's failure to respond adequately to, or to correct, the discriminatory practice or by the egregiousness of the practice. (*Govt.C. 12970(b)*.)

(d) *Administrative fines.* To assess an administrative fine, the Commission must find that respondent has been guilty of oppression, fraud, or expressed or implied malice, as required by C.C. 3294 (6 *Summary* (10th), *Torts*, §1599) for punitive damages. In determining the amount, the Commission must consider relevant evidence of specified factors. (*Govt.C. 12970(d)*.) However, the amount of the fine must be determined "in accordance with the combined amount limitation" of *Govt.C. 12970(a)(3)*. (*Govt.C. 12970(c)*.) Administrative fines are paid into the General Fund and may not be assessed against a public entity. (*Govt.C. 12970(d)*.)

(e) *Punitive damages.* The Commission may not award punitive damages for employment discrimination. (*Govt.C. 12970(d)*.)

(4) *Transfer of Proceedings.*

(a) *Election to transfer.* If an accusation seeks damages for emotional injuries, administrative fines, or both, the respondent may elect to transfer the proceedings to a court. The election must be made within 30 days of service of the accusation, by serving a written notice, on a form prescribed by the Commission, on the department, the Commission, and the person claiming to be aggrieved. (*Govt.C. 12965(c)(1)*.)

(b) *Dismissal of action.* Within 30 days after service of the notice of election, the department must dismiss the accusation and, either itself or through the Attorney General, file an action in its own name on behalf of the aggrieved person as real party in interest. Venue is determined in the same manner as in civil actions under *Govt.C. 12965(b)* (*infra*, §951). The real party in interest has the right to participate as a party and to be represented by counsel. (*Govt.C. 12965(c)(2)*.)

(c) *Relief available.* The court may grant the same relief as could be granted in an action under *Govt.C. 12965(b)*, as well as other relief that will effectuate the purpose of *Govt.C. 12900* et seq. (*Govt.C. 12965(c)(3)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Remedies.*

(b) *Actual damages.* See *14 A.L.R.6th 417* [compensatory damages recoverable in state action for employer's sexual harassment or discrimination].



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dd. Judicial Enforcement.

8 Witkin Sum. Cal. Law Const Law § 951

[§ 951] Judicial Enforcement.

(1) *Judgment and Review.* The department may apply to the appropriate court to enforce the final Commission order or decision, or the order as modified in accordance with a decision on judicial review. If, after a hearing, the court determines that an order or decision has been issued by the Commission and that either the time limits for judicial review have lapsed, or the order or decision was upheld in whole or in part on judicial review, the court must issue a judgment enforcing the order or decision, or order as modified; it may not review the merits of the Commission order or decision. The court's judgment is nonappealable and has the same force and effect as a judgment in a civil action. (*Govt.C. 12973(b).*) However, where a reviewing court denies a petition for review of a Commission order or decision, the court must "enter judgment denying the petition and enforcing the Commission's final order or decision." (*Govt.C. 12973(c).*)

(2) *Civil Action.* If an accusation is not issued within 150 days after filing the complaint, or if the department earlier determines that no accusation will issue, it must promptly notify the complainant in writing that a right-to-sue notice will be issued on his or her request. If the complainant does not request a right-to-sue notice, the department must issue the notice on completing its investigation, and not more than 1 year after filing the complaint. The notice must indicate that the complainant may bring a civil action against the person or entity named in the complaint within 1 year from the date of the notice. (*Govt.C. 12965(b)*) [under specified conditions, civil action may be filed by county if complainant claims HIV/AIDS discrimination]; see *Williams v. Pacific Mut. Life Ins. Co.* (1986) 186 C.A.3d 941, 948, 231 C.R. 234 [employee's private right of action under *Govt.C. 12965(b)* does not *accrue* until receipt of right-to-sue notice].)

Civil actions under the FEHA may not be filed or maintained as class actions where the aggrieved persons "have filed" a class action in the federal courts alleging a comparable claim of employment discrimination against the same defendants. (*Govt.C. 12965(b).*) However, the words "have filed" do not mean that any past filing of a federal class action bars a subsequent FEHA class action in state court. The provision only bars a state class action when a comparable federal claim is pending. (*Alch v. Superior Court* (2004) 122 C.A.4th 339, 362, 19 C.R.3d 29 [writers who filed and then dismissed age discrimination actions in federal court were not barred from pursuing FEHA class action in state court].)

Venue lies (a) in the county in which the unlawful practice is alleged to have been committed, (b) in the county in which the records relevant to the practice are maintained and administered, or (c) in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice; but if the defendant is not found within these counties, the action may be brought in the county of defendant's residence or principal office. (*Govt.C. 12965(b)*; see *Brown v. Superior Court* (1984) 37 C.3d 477, 487, 208 C.R. 724, 691 P.2d 272, 3 Cal. Proc. (4th), *Actions*, §801 [where FEHA claims were joined with non-FEHA claims arising from same facts, special venue provisions of *Govt.C. 12965(b)* governed entire action, prevailing over general venue provisions of C.C.P. 395].)

All forms of relief granted to civil litigants generally, including punitive damages where appropriate, may be awarded by the court in the civil action. (*Commodore Home Systems v. Superior Court* (1982) 32 C.3d 211, 215, 185 C.R. 270, 649 P.2d 912, 6 Summary (10th), *Torts*, §1596; *Aguilar v. Avis Rent A Car System* (1999) 21 C.4th 121, 132, 141, 87 C.R.2d 132, 980 P.2d 846 [injunctive relief against post-trial use of discriminatory and harassing language]; on effect of arbitration agreement on claim under FEHA, see 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §494A et seq.)

(3) *Effect of Pendency of Proceeding Before EEOC*. The 1-year statute of limitations commencing after issuance of the right-to-sue notice by the department is tolled after the concurrent filing of a charge of discrimination or harassment with the EEOC and the department, when the investigation is deferred by the department to the EEOC (see *Govt.C. 12965(d)*), or by the EEOC to the department (see *Govt.C. 12965(e)*). (See *Downs v. Department of Water & Power* (1997) 58 C.A.4th 1093, 1102, 68 C.R.2d 590, 3 Cal. Proc. (4th), *Actions*, Supp., §659 [*Govt.C. 12965(d)* is codification of *Downs*].) The time for commencing an action when the statute of limitations has been tolled expires when the federal right to sue period expires, or 1 year from the date of the right-to-sue notice by the department, whichever is later. (*Govt.C. 12965(d)(2)*, *12965(e)(2)*.)

(4) *Interference With Duties or Violation of Order*. A person who wilfully interferes with a member of the department, the Commission, or their agents or employees, in the performance of statutory duties relating to employment discrimination, or who wilfully violates a commission order relating to this matter, is guilty of a misdemeanor, punishable by county jail imprisonment for not more than 6 months, a fine of not over \$ 1,000, or both. (*Govt.C. 12975*.)

(5) *Failure To Retain Records*. Employers, labor organizations, and employment agencies must keep their personnel and application records for 2 years (except the State Personnel Board, which must do so for 1 year), and until final disposition of a complaint. (*Govt.C. 12946*.) Wilful violation of *Govt.C. 12946* is a misdemeanor, punishable by county jail imprisonment for not more than 6 months, a fine of not over \$ 1,000, or both. (*Govt.C. 12976*.)

(6) *Immigration Status Is Irrelevant*. A person's immigration status is irrelevant to the issue of liability for purposes of enforcing state labor, employment, civil rights, and employee housing laws. Thus, unless an inquiry into a person's immigration status is necessary to comply with federal immigration law, no such inquiry may be made to enforce those state laws. (C.C. 3339, *Govt.C. 7285*, *Health & Saf.C. 24000*, *Lab.C. 1171.5*; see 34 *McGeorge L. Rev.* 435 [discussing statutes].)

West's Key Number Digest, Civil Rights k.448 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Civil Action.Brown case:*

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §886.

Effect of arbitration agreement:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §517 et seq.

(3) Effect of Pendency of Proceeding Before EEOC.

Downs case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §731.



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8 Witkin Sum. Cal. Law Const Law § 952

[§ 952] Exhaustion of Administrative Remedies.

(1) *In General.* In *Baker v. Children's Hosp. Med. Center* (1989) 209 C.A.3d 1057, 257 C.R. 768, plaintiff's internal grievance was denied by his employer; he then filed a complaint with the department, which did not file an accusation. His subsequent civil action, in addition to repeating his earlier charges that he was the victim of racial discrimination in work hours, claimed harassment and discriminatory treatment because of race and in retaliation for his earlier pursuit of the internal grievance. The employer's motion for summary judgment was granted on the ground of failure to exhaust administrative remedies. *Held*, reversed. "[T]he allegations of harassment and differential treatment encompass the allegations of discrimination in his DFEH complaint. Moreover, it is reasonable that an investigation of the allegations in the original DFEH complaint would lead to the investigation of subsequent discriminatory acts undertaken by respondents in retaliation for appellant's filing an internal grievance. Consequently, we conclude the instant action is not barred by the exhaustion doctrine." (209 C.A.3d 1065.)

In *Rojo v. Kliger* (1990) 52 C.3d 65, 276 C.R. 130, 801 P.2d 373, plaintiffs, employed as assistants to defendant physician, brought an action for (1) violation of the FEHA, (2) intentional infliction of emotional distress, and (3) tortious discharge in contravention of public policy. The complaint alleged that they had been subjected by defendant to sexually harassing remarks and demands for sexual favors which had ultimately forced them to leave their employment. Defendant moved for summary judgment on the grounds that the FEHA was plaintiffs' exclusive remedy and that plaintiffs had failed to exhaust their administrative remedies under that Act. The trial judge granted the motion, the Court of Appeal reversed, and the Supreme Court affirmed the Court of Appeal judgment.

(a) *FEHA does not supplant other statutory or common law claims.* Govt.C. 12993(a) specifically provides that the Act does not supplant other statutory remedies (see *supra*, §915). (52 C.3d 73.) The common law provides a "number of remedial theories" to compensate for injuries relating to discrimination. (52 C.3d 74, citing *Brown v. Superior Court* (1984) 37 C.3d 477, 487, 208 C.R. 724, 691 P.2d 272.) And the Supreme Court has recognized on many occasions that both administrative and judicial remedies are available to victims of employment discrimination. (52 C.3d 74.)

(b) *Exhaustion as prerequisite to statutory cause of action.* If an action is brought on the statutory cause of action

under the Act, exhaustion of administrative remedies is a prerequisite to judicial relief. (52 C.3d 83, citing *Yurick v. Superior Court* (1989) 209 C.A.3d 1116, 1121, 1123, 257 C.R. 665.) Compliance with this condition serves the important policy interests of resolving disputes by conciliation, and the salutary goals of easing the burden on the court system. The condition is not an impediment to a civil suit because the department's practice is to issue a right-to-sue letter (Govt.C. 12965) at the employee's request as a matter of course. (52 C.3d 83.)

(c) *Exhaustion doctrine is inapplicable to nonstatutory cause of action.* The exhaustion rule declared in *Abelleira v. District Court of App., Third Dist.* (1941) 17 C.2d 280, 109 P.2d 942, "speaks only to the need to exhaust administrative remedies provided for a statutory right and does not govern rights and remedies outside the legislative scheme." (52 C.3d 84.) Nor do policy considerations require extension of the requirement to constitutional and common law claims. The cases dealing with exhaustion of internal remedies of a private association are not persuasive. (52 C.3d 85, 86; see 3 Cal. Proc. (4th), *Actions*, §303.) "[R]equiring exhaustion as to nonstatutory claims ... , would either lead to routine issuance of right-to-sue letters, thus nullifying the requirement, or, alternatively, burden the Department and Commission with the investigation and determination of issues beyond their jurisdiction and special expertise, limit the resources available for the resolution of cases within the scope of the act, raise complex issues of collateral estoppel or res judicata, and ultimately have no beneficial impact on the judicial system, in that the case in any event must still enter the 'judicial pipeline,' a result the exhaustion doctrine was in part intended to avert." (52 C.3d 88.)

(d) *Conclusion.* "[A]lthough an employee must exhaust the FEHA administrative remedy before bringing suit on a cause of action under the act or seeking the relief provided therein, exhaustion is not required before filing a civil action for damages alleging nonstatutory causes of action. An employee, of course, may elect to waive the statutory cause of action and remedies, and proceed directly to court on the common law claims ... ; alternatively, the employee may pursue both the administrative and the judicial remedies, either sequentially ... or simultaneously, in the latter case amending his or her complaint to join the FEHA cause of action once the Department has issued the right-to-sue letter." (52 C.3d 88.) (See *Keiffer v. Bechtel Corp.* (1998) 65 C.A.4th 893, 899, 76 C.R.2d 827 [claim that plaintiff failed to present allegations of discrimination to department within 1 year, as required by FEHA, did not concern trial court's fundamental jurisdiction and could be waived where plaintiff filed complaint and received right-to-sue notice]; 19 *Pepperdine L. Rev.* 291 [Rojo]; on right of civil service employee to pursue FEHA action without exhausting administrative remedies, see supra, §917; on common law claim for wrongful termination in violation of public policy, see 3 *Summary* (10th), *Agency and Employment*, §242 et seq.)

(2) *Need To Name Defendant.* In *Martin v. Fisher* (1992) 11 C.A.4th 118, 13 C.R.2d 922, plaintiff employee failed to name defendant supervisor in the caption of his administrative complaint, or to obtain a right-to-sue letter naming him. The trial court dismissed defendant on the ground of failure to exhaust administrative remedies. However, plaintiff had named defendant in the body of his complaint, and defendant participated in the administrative investigation. *Held*, dismissal of defendant for failure to name him in the caption of the administrative complaint was error.

"The function of an administrative complaint is to provide the basis for an investigation into an employee's claim of discrimination against an employer, and not to limit access to the courts. A strict rule would harm victims of discrimination without providing legitimate protection to individuals who are made aware of the charges through the administrative proceeding. If they are described in the charge as the perpetrators of the harm, they can certainly anticipate they will be named as parties in any ensuing lawsuit." (11 C.A.4th 122.) (See *Cole v. Antelope Valley Union High School Dist.* (1996) 47 C.A.4th 1505, 1511, 1515, 55 C.R.2d 443 [under Govt.C. 12960 (supra, §948), persons who discriminated must be named in either caption or body of administrative complaint, and failure to do so bars civil action against those persons; naming persons in letter to department is insufficient]; *Medix Ambulance Service v. Superior Court* (2002) 97 C.A.4th 109, 116, 118 C.R.2d 249 [following *Cole*; fact that employer was named in FEHA sexual harassment complaint did not obviate need to name individual defendants; statutory requirement could not be circumvented by asserting purported common law cause of action for sexual harassment].)

(3) *Need for Department To Receive Notice of Claim.* In *Martin v. Lockheed Missiles & Space Co.* (1994) 29 C.A.4th 1718, 35 C.R.2d 181, supra, §933, plaintiff filed with the EEOC a complaint alleging age discrimination by

defendant. The EEOC referred the matter to the DFEH, which sent plaintiff a letter saying that in the future the EEOC would handle the matter. However, the department issued a right-to-sue letter with respect to the age discrimination charge. Approximately 1 year later, plaintiff filed with the EEOC an amended complaint that included charges of sex discrimination, harassment, and retaliation, and the EEOC issued a right-to-sue letter. No complaint with respect to these charges was ever filed with the DFEH, which apparently never knew of the charges and never issued a right-to-sue letter regarding them. However, the present suit was filed, alleging that it stated charges under California statutes, including the charges for which the DFEH had never issued a right-to-sue letter. *Held*, summary judgment for defendant affirmed with respect to the charges of sex discrimination, harassment, and retaliation; plaintiff had failed to exhaust her administrative remedies.

"[T]he only claim before the DFEH in April 1991 was that Martin had been a victim of age discrimination. We cannot know how the DFEH would have reacted to the additional claims Martin made nearly a year later, because so far as we are aware those additional claims never reached the DFEH. If the procedural purposes of the Fair Employment and Housing Act (and, for that matter, the Title VII policy of initial deferral to a qualified state agency) are to be served, we cannot treat the DFEH's decision to defer an age discrimination claim as an effective delegation to the EEOC for the purpose of any further claim the aggrieved person may later make. If Martin wished to avail herself of state judicial remedies for her additional claims, it was essential that she undertake by reasonable means to make the additional claims known to the DFEH. In our view she did not do so, and therefore she did not exhaust her state administrative remedies." (29 C.A.4th 1729, 1730.) (See *Okoli v. Lockheed Technical Operations Co.* (1995) 36 C.A.4th 1607, 1612, 43 C.R.2d 57 [action for retaliatory firing was barred where it was not contained in charge filed with DFEH; retaliatory firing was not related to other claims, and DFEH thus had no chance to investigate it].)

(4) *No Need for Current Right-To-Sue Letter.* *Martin v. Lockheed Missiles & Space Co.* was distinguished in *Grant v. CompUSA* (2003) 109 C.A.4th 637, 135 C.R.2d 177, where the issue was whether the plaintiff could proceed with an action under the FEHA without having an outstanding right-to-sue notice. Plaintiff had filed a complaint with the DFEH and had received a right-to-sue notice, but the notice was later rescinded when the case was reopened after the EEOC returned the case to the DFEH for investigation. The DFEH sent a proposed settlement agreement to defendant employer, but it was not accepted. When there was no successful resolution of the matter within 1-year from filing the complaint, plaintiff filed this action against defendant. *Held*, plaintiff's failure to obtain a second right-to-sue letter does not preclude a finding that she exhausted her administrative remedies. Plaintiff's "right to sue arose by operation of law when the DFEH failed to resolve the matter within one year from the time she filed her administrative complaint." (109 C.A.4th 640.)

West's Key Number Digest, Civil Rights k.444

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Holland v. Union Pac. R. Co.* (2007) 154 C.A.4th 940, 947, 65 C.R.3d 145 [failure to file timely administrative complaint was not fatal to disability discrimination action where plaintiff diligently pursued remedy with DFEH, raised issue of tardiness with DFEH, and relied on DFEH's assurances that he would meet deadline]. *Cross-Reference:* 3 Cal. Proc. (5th), Actions, §320.



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8 Witkin Sum. Cal. Law Const Law § 953

[§ 953] In General.

(1) *In General.* Govt.C. 12980 et seq. establish a procedure for enforcing the prohibitions against housing discrimination (see supra, §945 et seq.). The procedure is basically the same as that established for employment discrimination. (See supra, §948.)

(2) *Complaint.* Complaints may be filed by the Attorney General or the Director (Govt.C. 12980(b)), as well as by an aggrieved person (Govt.C. 12980(a)). The complaint must be filed within 1-year from the date the violation occurred or terminated. (Govt.C. 12980(b).) The department then must, within 10 days, serve a copy of the verified complaint on the person charged, with notice of his or her procedural rights and obligations. The respondent may file an answer. (Govt.C. 12986.)

The department may not dismiss a complaint or accusation unless (a) the complainant withdraws the complaint, or (b) the department, after a thorough investigation, determines that there is no reasonable cause to believe that an unlawful housing practice has occurred or is about to occur. (Govt.C. 12981.1.)

(3) *Coordination with Unruh Civil Rights Act.* The filing of a complaint and pursuit of conciliation or remedy under the FEHA does not prejudice the complainant's right to pursue effective judicial relief under other applicable laws. However, if a civil action has been filed under the Unruh Civil Rights Act (supra, §914), the department must terminate proceedings under the FEHA, on notice of entry of final judgment, unless it is a judgment of dismissal entered at the complainant's request. (Govt.C. 12980(a).) Before a remedy will be provided under the FEHA, all rights under the Unruh Civil Rights Act must be waived. (Govt.C. 12987(b).)

(4) *Investigation.* The department's investigation of the complaint, and attempt to eliminate the discriminatory practice through conference, conciliation, and persuasion, proceeds in the same manner as in discriminatory employment practice (see supra, §948). (Govt.C. 12980(c) [provisions of Govt.C. 12980 et seq. prevail where they provide greater rights and remedies to aggrieved person].) Except as provided in Govt.C. 12980, matters connected with a conference or conciliation effort are privileged, and disclosure is prohibited. (Govt.C. 12984; see Govt.C. 12985

[respondent to be informed of privilege].)

On filing a complaint, the department must serve notice on the complainant of the time limits, rights of the parties, and choice of forums provided by law, and must provide a written explanation informing the complainant that, if an accusation is issued, the complainant may recover damages for emotional distress or other intangibles only through a civil action under *Govt.C. 12989*. (*Govt.C. 12980(d)*.) The department must begin proceedings within 30 days after the complaint is filed. (*Govt.C. 12980(e)*.)

Unless impracticable, the investigation must be completed within 100 days of receipt of the complaint; if the investigation is not completed within 100 days, the department must notify the complainant and respondent in writing of its reasons for not doing so. (*Govt.C. 12980(f)*.) On concluding the investigation, the department must prepare a final investigative report containing the names and dates of contact with witnesses; a summary of the dates of contacts with the aggrieved persons or the respondent; answers to interrogatories; and summaries of witness statements and other pertinent records. This report may be amended if additional evidence is later discovered. (*Govt.C. 12980(g)*.)

(5) *Settlement Agreement*. Settlement agreements on housing discrimination complaints must be made public, unless (a) the complainant and respondent otherwise agree, and (b) the department determines that disclosure is not required to further the purpose of the law. (*Govt.C. 12980(i)*.) These agreements are between the respondent and complainant and are subject to approval by the department. (*Govt.C. 12980(j)*.)

(6) *Injunction Pending Decision*. If the department finds that probable cause exists, it may bring an action to enjoin the owner from taking further steps to sell or rent until the department completes its investigation and makes its determination. However, a temporary restraining order cannot be effective for more than 20 days. (*Govt.C. 12983* [Attorney General may also bring action for injunctive relief].)

(7) *Affirmative Actions*. The Commission may engage in "affirmative actions" with owners in furtherance of the purposes of the Act. (*Govt.C. 12988*; for definition of term, see *Govt.C. 12927(a)*.)

(8) *Judicial Review*. A Commission order must have printed on its face references to the provisions of the Administrative Procedure Act that prescribe the right of appeal by any party. (*Govt.C. 12987(e)*.) This right of "appeal" is a right to review by administrative mandamus. (See *Govt.C. 11523*, 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §122.)

(9) *Compliance Review*. The department must conduct a compliance review within 1 year of every final order and decision to determine if it has been implemented. (*Govt.C. 12981(d)*.)

(10) *Judicial Enforcement*. If the time for judicial review of a final commission order or decision has lapsed, or if all means of judicial review have been exhausted, the department may apply to the appropriate superior court, in the same manner as is provided for discriminatory employment practices (see *supra*, §948), for enforcement of its order. (*Govt.C. 12981(f)*.) If it has reasonable cause to believe that a respondent has breached a conciliation agreement, the department must refer the matter to the Attorney General with a recommendation that a civil action for enforcement be filed. (*Govt.C. 12981(e)*.)

West's Key Number Digest, Civil Rights k.441 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(8) *Judicial Review*.

Administrative mandamus:

Cross-Reference: 9 *Cal. Proc. (5th)*, *Administrative Proceedings*, §148.



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8 *Witkin Sum. Cal. Law Const Law* § 954

[§ 954] Accusation, Hearing, and Decision.

(1) *Formal Accusation.* If conciliation fails or the department determines that the circumstances warrant a written accusation, it is issued in the same manner as under *Govt.C. 12965* (see *supra*, §949). (*Govt.C. 12981(a)* [provisions of *Govt.C. 12980* et seq. prevail where they provide greater rights and remedies to aggrieved person].)

An accusation alleging an unfair housing practice must, if possible, be issued within 100 days after filing a complaint. (*Govt.C. 12981(a).*) It must require the respondent to answer the charges at an administrative hearing or a civil trial as elected by the parties under *Govt.C. 12989*. Any aggrieved person may intervene as a party. (*Govt.C. 12981(a).*)

If the department determines on the basis of its investigation that an accusation or amended accusation should include a prayer for damages for emotional distress or other intangible injuries, it must advise the complainant in writing that these damages may only be recovered through a civil action under *Govt.C. 12989*. (*Govt.C. 12981(g).*)

If an allegation concerns the legality of a zoning or other land use law or ordinance, the department or the Attorney General must take appropriate action according to the procedures established for other complaints of housing discrimination. (*Govt.C. 12981(b).*)

(2) *Hearing.* Hearings on accusations are held by the Commission in the same manner as provided in *Govt.C. 12967* et seq. (see *supra*, §949). (*Govt.C. 12981(c)* [provisions of *Govt.C. 12980* et seq. prevail where they provide greater rights and remedies to aggrieved person].) Unless impracticable, the Commission must make a final administrative disposition of a complaint alleging unfair housing practices within 1 year after it is filed. If the department is unable to do so, it must notify the complainant and respondent in writing of its reasons for not doing so. (*Govt.C. 12981(c).*) (On proof of intentional violation or discriminatory effect, see *Govt.C. 12955.8*.)

(3) *Decision and Orders.* If the Commission, after hearing, finds in favor of the respondent, it must state its findings of fact and issue an order dismissing the accusation. (*Govt.C. 12987(d).*) If it finds against the respondent, it

must state its findings and issue its order requesting the respondent: (a) to cease and desist from the discriminatory practice; and (b) to take such actions as will further the purposes of the Act, including but not limited to, any of the following: (1) sell or rent to the aggrieved person if the accommodation is still available; (2) sell or rent a like accommodation, if one is available; (3) provide financial assistance, in cases of violation of *Govt.C. 12955(f)* (see *supra*, §947); (4) pay a civil penalty; (5) pay actual damages; (6) give affirmative or prospective relief. (*Govt.C. 12987(a)*); on penalties and damages, see *infra*, §956.) The Commission may require a report of the manner of compliance. (*Govt.C. 12987(c)*.)

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cc. Civil Action.

8 *Witkin Sum. Cal. Law Const Law* § 955

[§ 955] Civil Action.

(1) *Where Accusation Is Not Filed.* If an accusation (supra, §954) is not issued within 100 days of filing the complaint, or the department earlier determines that it will not file an accusation, the complainant must be so notified. Unless the department has determined that no accusation will be issued, the notice also must inform the complainant that, if he or she does not desire to file a civil action, the complainant may continue to seek redress through the procedures of the department. (*Govt.C. 12980(h).*)

An action may be filed in an appropriate court not later than 2 years after the occurrence or termination of the discriminatory housing practice or the breach of a conciliation agreement, whichever occurs last. Any time during which an administrative proceeding was pending on a complaint or accusation is excluded from this period. (*Govt.C. 12989.1.*)

(2) *Election To Have Claim Adjudicated in Civil Proceeding.* If an accusation is filed, a complainant, respondent, or aggrieved person may elect to have the claims adjudicated in a civil action. (*Govt.C. 12989(a).*) A written notice of election may be filed with the department within 20 days of service of the accusation, and not more than 20 days after service of the complaint to the respondent. The department must serve a copy of the notice on the director, the respondent, and the aggrieved person, and the notice must be served on all parties in accordance with *Govt.C. 12962* (supra, §948). (*Govt.C. 12989(b).*)

Within 30 days after service of the notice of election, the department must dismiss the accusation and, either itself or through the Attorney General, file an action in its own name or on behalf of the aggrieved person as real party in interest. The action may be filed (a) in any county where an unlawful practice is alleged to have been committed, (b) in the county where relevant records are maintained and administered, or (c) in the county where the aggrieved person would have resided in the housing accommodation. If the respondent is not found in those counties, the action may be filed in the county of respondent's residence or principal office. (*Govt.C. 12989(c).*) Any aggrieved person may intervene in the action. (*Govt.C. 12989(d), 12989.1.*) (See *Govt.C. 12989(e)* [if no election is made, director must maintain administrative proceeding in accordance with *Govt.C. 12981*, supra, §954]; *Govt.C. 12989(f)* [director or

designate must be available for consultation concerning issues raised by Attorney General in civil action].)

An aggrieved person may bring a civil action whether or not a complaint has been filed. However, an aggrieved person may not bring an action if the department has commenced a hearing on an accusation issued on the discriminatory housing practice in question, and an aggrieved person who has consented to a conciliation agreement may bring an action only to enforce the agreement. (*Govt.C. 12989.1.*)

(3) *Action by Attorney General.* The Attorney General may bring a civil action in specified situations: (a) when there is a "pattern or practice" of denying others their rights or when a denial of rights raises an "issue of general public importance" (*Govt.C. 12989.3(a)*); (b) on referral under *Govt.C. 12981(b)* (*Govt.C. 12989.3(b)*); (c) on referral, for breach of a conciliation agreement (*Govt.C. 12989.3(d)*); (d) on request, to enforce subpoenas (*Govt.C. 12989.3(e)*). An action generally must be brought within 18 months of the date of occurrence or termination of the discriminatory housing practice (*Govt.C. 12989.3(c)*), but an action for breach of a conciliation agreement must be brought within 90 days of the referral (*Govt.C. 12989.3(d)*).

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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E. California Civil Rights Legislation.
3. Fair Employment and Housing Act.
f. Enforcement Procedure.
2. Housing.
dd. Damages and Penalties.

8 *Witkin Sum. Cal. Law Const Law* § 956

[§ 956] Damages and Penalties.

(1) *Historical Development.* *Walnut Creek Manor v. Fair Emp. & Housing Com.* (1991) 54 C.3d 245, 284 C.R. 718, 814 P.2d 704, held that (1) the provision in *Govt.C. 12987* authorizing the Commission to award compensatory damages for emotional distress violates the Judicial Powers Clause of the California Constitution (Cal. Const., Art. VI, §1), and (2) the provision authorizing punitive damages not to exceed \$ 1,000 permits only one award against a respondent for a course of discriminatory conduct against the same individual on the same unlawful basis.

(a) *Actual damages.* The Judicial Powers Clause permits only "restitutive" damages--defined as "quantifiable amounts of money due an injured private party from another party to compensate for the pecuniary loss directly resulting from the second party's violation of law." (54 C.3d 262, 263.) "General compensatory damages for emotional distress ... are not pecuniarily measurable, defy a fixed rule of quantification, and are awarded without proof of pecuniary loss." (54 C.3d 263.) In *Dean Witter Reynolds v. Superior Court* (1989) 211 C.A.3d 758, 259 C.R. 789, the court concluded that general compensatory damages are not available under *B. & P.C. 17200* et seq. (the unfair competition statute), and the same holds true for the administrative adjudication of emotional distress damages in housing discrimination cases. The purpose of the Act is "to provide a streamlined and economic procedure for preventing and redressing discrimination in housing as an alternative to the more cumbersome and costly procedure of civil suit." (54 C.3d 264.) "The award of unlimited general compensatory damages is neither necessary to this purpose nor merely incidental thereto; its effect, rather, is to shift the remedial focus of the administrative hearing from affirmative actions designed to redress the particular instance of unlawful housing discrimination and prevent its recurrence, to compensating the injured party not just for the tangible detriment to his or her housing situation, but for the intangible and nonquantifiable injury to his or her psyche suffered as a result of the respondent's unlawful acts, in the manner of a traditional private tort action in a court of law." (54 C.3d 264.)

(b) *Punitive damages.* *Govt.C. 12987(2)* authorizes an award of \$ 1,000 as punitive damages on a finding of any "unlawful practice." The term "practice" is not defined, but its plain meaning is "a course of conduct," and in refusing to rent to the complainant on the basis of race, respondents committed a single "unlawful practice." (54 C.3d 269.) Had they also discriminated against the complainant on grounds of marital status (i.e., because he was single), that

discrimination would have constituted a separate violation of the Act, permitting a separate award of punitive damages. (54 C.3d 270.) To construe this essentially remedial statute as permitting unlimited multiple cumulative awards of punitive damages based on rentals made to others while the complainant's application was pending would be to alter fundamentally the nature of the administrative remedy. (54 C.3d 271.) A statute is to be construed whenever possible so as to preserve its constitutionality; and a statute authorizing the administrative award of major or substantial punitive damages with no cap on the cumulative amount "would be constitutionally suspect." (54 C.3d 271.)

A strong dissent of two justices argued that state and federal efforts to combat discriminatory housing practices have not been sufficient, and that vigorous administrative enforcement, with meaningful compensatory and punitive damage awards, offer the best available means to ensure a free and nondiscriminatory housing market. (54 C.3d 287.) (See 19 *Pepperdine L. Rev.* 741.)

(2) *Statutory Provisions.* Govt.C. 12987 was amended after the decision in *Walnut Creek Manor*, and now provides as follows:

(a) If the Commission finds that a respondent has committed an unlawful housing practice, it may, in addition to serving a cease and desist order and ordering other appropriate relief (see supra, §954), direct the respondent to pay the complainant actual damages and a civil penalty up to \$ 10,000. (Govt.C. 12987(a)(3).) In determining whether to assess a civil penalty, the Commission must find that the respondent has been guilty of fraud, malice, or oppression. Specified conduct must be considered in determining the amount of the penalty. (See Govt.C. 12987(b).)

(b) If the respondent has a prior intentional violation of Govt.C. 12955 within the preceding 5 years, the civil penalty may not exceed \$ 25,000; if the respondent has two or more prior intentional violations of Govt.C. 12955 within the preceding 7 years, the civil penalty may not exceed \$ 50,000. (Govt.C. 12987(a)(3).)

(c) The Commission may award attorneys' fees and costs, including expert witness fees, to a prevailing party other than the state, against any party other than the state. (Govt.C. 12987(a)(3).)

A respondent who has engaged in unlawful discrimination in housing under Govt.C. 12948 (violation of civil rights; supra, §941), is subject to the remedies provided in Govt.C. 12987, and other provisions pertaining to housing discrimination. (Govt.C. 12970(k).)

In a civil action brought under Govt.C. 12989 or 12989.1 (see supra, §955), the court may grant actual and punitive damages and other appropriate relief, including injunctive relief, and may award the prevailing party, other than the state, reasonable attorneys' fees and costs against any party other than the state. (Govt.C. 12989.2.)

In an action by the Attorney General (see supra, §955), the court may award preventive relief, including injunctive relief, other appropriate relief, including monetary damages to aggrieved persons, and a civil penalty of not more than \$ 50,000 for a first violation or \$ 100,000 for a subsequent violation. (Govt.C. 12989.3(f).) Attorneys' fees and costs, including expert witness fees, may be awarded to a prevailing party other than the state, but may not be awarded against the state. (Govt.C. 12989.3(g).) An aggrieved person may intervene and be granted relief as authorized by Govt.C. 12989.2. (Govt.C. 12989.3(h).)

(3) *Effect of Amendments to FEHA.* In *Konig v. Fair Emp. & Housing Com.* (2002) 28 C.4th 743, 123 C.R.2d 1, 50 P.3d 718, the court examined whether amendments to the FEHA following its decision in *Walnut Creek Manor* authorize the Commission to award emotional distress damages to victims of housing discrimination. Held, the amendments, particularly the judicial option provision of Govt.C. 12989, "remedy separation of powers concerns over the Commission's authority to award emotional distress damages." (28 C.4th 745.)

(a) *Walnut Creek Manor* held that the Commission's award of damages for emotional distress "constituted an exercise of judicial power by a nonjudicial body and thus violated the California Constitution's judicial powers clause." (28 C.4th 748.) However, after that decision, the Legislature made several significant amendments to the FEHA: (1) It

sought to make the FEHA "substantially equivalent" to the federal Fair Housing Act, which permits HUD administrative law judges to award emotional distress damages in administrative hearings. (28 C.4th 749, 750.) (2) It added *Govt.C. 12989*, which provides the option of a civil action in lieu of an administrative proceeding. (28 C.4th 750.) (3) It amended *Govt.C. 12987* to increase the amount of civil penalties available, set apart the authority to award "actual damages" in a separate subdivision, and affirmed its intent that the FEHA should not be construed to afford fewer rights or remedies than the federal Act. (28 C.4th 750.) (4) It amended *Govt.C. 12980* and *12981* to require notice that a housing discrimination complainant "may only be able to recover damages for emotional distress or other intangible injuries through a civil action." (28 C.4th 751.)

(b) *Walnut Creek Manor* did not consider whether the ability to opt out of the FEHA administrative proceeding would have made a difference in its constitutional analysis. Thus, that decision is not dispositive on whether the recent amendments "address separation of powers concerns over the Commission's authority to award emotional distress damages." (28 C.4th 751.)

(c) The ability to choose between quasi-judicial and judicial proceedings highlights an important aspect of the constitutional analysis. Because both complainants and respondents have the option of adjudicating an FEHA claim in state court, the decision to invoke an administrative proceeding before the Commission is left entirely to the parties. The power of the judiciary to take jurisdiction of these matters is unaffected. (28 C.4th 753.)

(d) It is instructive to compare arbitration and FEHA administrative proceedings. The court has had several opportunities since *Walnut Creek Manor* to reaffirm the broad discretion of arbitrators to resolve cases and fashion relief free from judicial review. "Courts generally may not correct arbitration awards, which are both binding and final, even if an award is based on an arbitrator's factual or legal error. ... In contrast, the Commission's awards ... are subject to judicial review and are enforceable only by a court judgment and order. ... Were we to hold that the Commission's authority to award emotional distress damages violated the judicial powers clause ... we would create an unjustified distinction between the authority of arbitrators and that of administrative adjudicators." (28 C.4th 754.)

(e) The amendment of *Govt.C. 12980* and *12981*, to require that advice be given to complainants that the recovery of emotional distress damages may only be able to be recovered in a civil action, simply reflects "the uncertainty of recovering these damages in light of *Walnut Creek Manor*." (28 C.4th 757.)

One justice dissented. (28 C.4th 759.) *Govt.C. 12980* and *12981* were amended in 2003 to delete the requirement that the department advise complainants in writing regarding recovery of damages for emotional distress and other intangible injuries.

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law XI. EQUAL PROTECTION OF THE LAWS E. California Civil Rights Legislation. 4. Rights of Disabled Persons. a. In General.

8 Witkin Sum. Cal. Law Const Law § 957

[§ 957] In General.

A number of statutes provide that physically disabled persons have the same rights as able-bodied persons to public and private facilities, places, and services. The 1992 Legislature amended the Unruh Civil Rights Act and many of these related statutes to substantially increase the protections afforded persons with disabilities. The purpose of the act was "to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 ... and to retain California law when it provides more protection for individuals with disabilities." (Stats. 1992, Chap. 913, §1; see C.C. 54.1(d) [violations of rights of individuals under ADA also constitute violations of C.C. 54 or 54.1].) (See 2 Cal. Civil Practice (2003 ed.), Civil Rights Litigation, §12:1 et seq. [California's disability access statutes]; on Americans with Disabilities Act of 1990, see *supra*, §882 et seq.; on employment rights of disabled persons, see *supra*, §936 et seq.) The following are illustrative:

(1) *Civil Rights*. "Disability" is expressly included within the bases of discrimination prohibited by general civil rights statutes. (See, e.g., C.C. 51, *supra*, §898 [rights of persons in business establishments]; C.C. 51.5, *supra*, §906 [discrimination against businesses]; C.C. 51.8, *supra*, §897 [discrimination in granting of franchises]; C.C. 52, *supra*, §914 [actions for damages and other relief]; C.C. 53, *supra*, §897 [discriminating restrictions in real property instruments].) However, these statutes do not require anyone who rents, leases, or otherwise provides real property for compensation to construct, alter, or repair the property beyond that which is otherwise required by law for new and existing structures. (C.C. 51, 51.5, 51.8, 52.) (See *Hankins v. El Torito Restaurants* (1998) 63 C.A.4th 510, 518, 74 C.R.2d 684 [restaurant's policy of denying disabled persons access to employee restroom, which was only restroom accessible to plaintiff, violated C.C. 51].)

(2) *Developmentally Disabled Persons*. The Lanterman Developmental Disabilities Services Act (Welf.C. 4500 et seq.) is designed to preserve the legal rights and responsibilities of developmentally disabled persons. (Welf.C. 4502 [listing most important rights]; see 20 *Loyola L.A. L. Rev.* 1249 et seq. [disability rights symposium]; on community living facilities for developmentally disabled, see Welf.C. 4830 et seq.)

(3) *Education*. A teacher is prohibited from giving instruction, a school district is prohibited from sponsoring any activity (*Educ.C. 51500*), and a school board is prohibited from adopting any instructional material, that reflects adversely on persons because of their disability (*Educ.C. 51501, 60044*). Discrimination against teachers with

disabilities is also prohibited. (*Educ.C. 44337, 44338.*)

(4) *Health Care Service Plans.* An individual or group health care service plan may not refuse equal service to a person solely because of a physical or mental impairment, except on sound actuarial or sound underwriting practices. (*Health & Saf.C. 1367.8.*)

(5) *Life, Annuity, or Disability Insurance.* Insurers may not discriminate on the basis of a physical or mental impairment in issuing insurance providing for life, annuity, or disability benefits, or in establishing the extent of coverage or rates, unless the discrimination is based on sound actuarial principles or related to "actual and reasonably anticipated experience." (*Ins.C. 10144.*)

(6) *Motor Vehicle Liability Insurance.* Vehicle liability insurers may not discriminate on the basis of an insured's physical handicap; but the insurer may require proof of qualification for a driver's license since the occurrence of the handicapping condition, and may, on the basis of actuarial evidence, charge a higher rate or premium. (*Ins.C. 11628.5*; see *11 Pacific L. J. 554.*) Further, insurers may not refuse to issue motor vehicle liability policies on the basis of the vehicle owner's blindness; but the insurer may refuse to cover an *unlicensed* blind owner for injuries and damages incurred while he or she is operating the vehicle. (*Ins.C. 11628.7.*)

(7) *State Sponsored Programs or Activities.* Unlawful discrimination against, or denial of benefits to, a person on the basis of disability is prohibited by *Govt.C. 11135* et seq. in any program or activity that is operated or administered by the state or a state agency, or is funded by, or receives financial assistance from, the state. (*Govt.C. 11135(a)*; see *Govt.C. 11135(b)* [programs and activities subject to statute must meet protections and prohibitions of ADA or laws of California, whichever is stronger]; *People v. Levinson (1984) 155 C.A.3d Supp. 13, 16, 203 C.R. 426* [municipal court's discretionary referral to traffic schools is not "program or activity" within meaning of *Govt.C. 11135*; hence, court was not required to appoint oral interpreter to assist hearing-impaired person in traffic school].)

(8) *Use of Guide, Signal, or Service Dog.* Several statutes regulate the rights of disabled or handicapped persons accompanied by a specially trained guide, signal, or service dog. (See, e.g., *C.C. 54.1(b)(5), (6)* [it is discriminatory practice to refuse to rent or lease housing accommodations to disabled person with guide dog, etc., unless no persons with dogs are allowed to use accommodations]; *C.C. 54.1(c)* [right of access of trainers and disabled persons to public places during training]; *C.C. 54.2* [prohibiting extra charges for guide dogs, etc. in public facilities]; *P.C. 365.5* [right to have guide dog, etc. on common carrier or in places of public accommodation]; *C.C. 54.7* [guide dogs may be excluded from zoo if zoo animals are not separated from public by physical barrier; zoo must then provide free kennel facilities, free transportation on any mode of transportation provided to public, and sighted escorts].) A violation of a blind person's rights under the ADA is also a violation of *C.C. 54.2*. (*C.C. 54.2(b).*) (See *28 Pacific L. J. 883* [Disabled Access and Dog Tags: "Cleaning Up" Equal Access for Disabled Individuals].)

(9) *Assistance for Hearing Impaired in Judicial Proceeding.* In all civil and criminal proceedings an assistive listening or computer-aided transcription system must be furnished, on advance notice, to any hearing impaired party, witness, attorney, judicial employee, judge, juror, or other participant who requests one. (*C.C. 54.8*; see *3 Cal. Evidence (4th), Presentation at Trial, §40.*)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Turner v. Association of Amer. Med. Colleges (2008) 167 C.A.4th 1401, 1411, 85 C.R.3d 94* ([Disabled Persons Act did not require national testing service to alter standardized testing procedures to accommodate applicants with learning and reading-related disabilities].)(1) *Civil Rights.* See *37 Loyola L.A. L. Rev. 1065* [state protection of disability civil rights]; *57 Stanf. L. Rev. 2135* [accommodation of students with learning disabilities on SAT].



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b. Physical Access.

8 *Witkin Sum. Cal. Law Const Law* § 958

[§ 958] Physical Access.

(1) *Access to Housing.* Individuals with disabilities are guaranteed "full and equal access" to housing accommodations offered for rent, lease, or compensation. (C.C. 54.1(b)(1).) This statute does not apply to a single-family residence, whose occupants do not rent more than one room. (C.C. 54.1(b)(2).) And it does not require modification of the premises to provide a higher degree of care than that given other persons. (C.C. 54.1(b)(4).) However, a lessor must permit a disabled tenant to make reasonable modifications necessary to afford the person full enjoyment of the premises, on the condition that the tenant agree to restore the premises to their prior condition on termination of the tenancy. The lessor may not require additional security for this purpose, but may require that a reasonable amount be paid into an escrow account to cover the estimated cost of restoring the property. (C.C. 54.1(b)(3)(A).) A lessor must make reasonable accommodations in rules, policies, practices, or services when necessary to afford individuals with a disability equal opportunity to use and enjoy the premises. (C.C. 54.1(b)(3)(B).) (See *Govt.C. 12955.1*, supra, §947 [access to covered multifamily dwellings]; *Health & Saf.C. 19902* et seq. [promoting shared housing for elderly and disabled].)

(2) *Access to Public Facilities.* C.C. 54 et seq. provide that disabled persons are entitled to equal access to all public facilities. Individuals with disabilities are entitled to "the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places." (C.C. 54; on special parking privileges, see *Govt.C. 14679* and *Veh.C. 22511.5*.) They also have the right to "full and equal access" to all forms of public transportation (whether public or private), "telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited." (C.C. 54.1(a).) (See *Donald v. Sacramento Valley Bank* (1989) 209 C.A.3d 1183, 1195, 260 C.R. 49 [bank automatic teller machine is "public accommodation" or facility within meaning of C.C. 54.1]; *Hankins v. El Torito Restaurants* (1998) 63 C.A.4th 510, 524, 74 C.R.2d 684 [C.C. 54.1 et seq. apply to policies as well as structural impediments; restaurant violated C.C. 54.1 because disabled person who was unable to climb stairs to public restroom was denied access to first floor employee restroom].)

"Full and equal access" for purposes of transportation means access that meets the standards of the Americans with Disabilities Act of 1990 or of the laws of California, whichever is higher. (C.C. 54.1(a)(3).)

Gasoline service stations are required to provide, at no extra cost, refueling service to a disabled driver of a vehicle displaying a disabled person's or veteran's plate or placard. (*B. & P.C. 13660(a)*.) However, the statute provides exemptions during specified hours (*B. & P.C. 13660(b)*), and provides for posting notice whether the station provides service to disabled persons (*B. & P.C. 13660(c)*).

(3) *Construction and Alteration of Buildings*. All construction and alteration of public buildings, and private buildings for public accommodations, must be designed to facilitate their use by the disabled. (*Govt.C. 4450* et seq. [public buildings]; *Health & Saf.C. 19955* et seq. [private buildings for public accommodation]; see *Donald v. Sacramento Valley Bank*, *supra*, 209 C.A.3d 1194 [bank automatic teller machine is "public facility" within meaning of *Govt.C. 4450* et seq. and *Health & Saf.C. 19955*]; *Wilshire Financial Tower v. Los Angeles* (1990) 217 C.A.3d 119, 122, 124, 265 C.R. 685 [under *Health & Saf.C. 19955.5* and *Govt.C. 4456*, office building alterations must provide handicapped with restroom access; exception under *Health & Saf.C. 19956* for public accommodations was inapplicable]; *Donald v. Cafe Royale* (1990) 218 C.A.3d 168, 182, 183, 266 C.R. 804 [*Govt.C. 4450* et seq. and *Health & Saf.C. 19955* et seq. do not provide cause of action independent of enforcement provisions of C.C. 54 et seq.; hence, even if building is not in compliance with access requirements, individual must actually be denied access before action for damages is proper]; *Berkeley Center for Independent Living v. Coyle* (1996) 42 C.A.4th 874, 878, 50 C.R.2d 39 [*Govt.C. 4450* refers to buildings constructed with public funds and intended for use by general public, regardless of whether building is publicly or privately owned].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Access to Public Facilities*. See *Madden v. Del Taco* (2007) 150 C.A.4th 294, 303, 58 C.R.3d 313 [allowing concrete trash container to block wheelchair access to restaurant violated ADA and C.C. 54 et seq.]; *Urhausen v. Longs Drug Stores Calif.* (2007) 155 C.A.4th 254, 263, 65 C.R.3d 838 [plaintiff on crutches who fell while attempting to reach raised curb in front of handicapped space did not have cause of action under C.C. 54.3; although disabled parking area violated slope regulations, plaintiff was not denied equal access to store where she did not use disabled accessible aisle provided by store or prove that it was inadequate]; *Californians for Disability Rights v. Mervyn's LLC* (2008) 165 C.A.4th 571, 594, 81 C.R.3d 144 [although retail store was not required to remove architectural barriers to disabled where reconfiguration would result in significant loss of sales, store's failure to make facilities available through alternative methods such as customer assistance violated ADA and Disabled Persons Act; fact that new and remodeled stores outside area provided access to disabled did not excuse lack of access to existing stores].(3) *Construction and Alteration of Buildings*. Unless a defendant is required by another statute to make structural modifications to a property, the existence of a structural barrier does not violate the Disabled Persons Act, C.C. 54 et seq. (*Coronado v. Cobblestone Village Community Rentals, L.P.* (2008) 163 C.A.4th 831, 845, 77 C.R.3d 883 [because neither *Govt.C. 4450* et seq. nor *Health & Saf.C. 19955* et seq. required defendant landlord to construct wheelchair ramp at particular curb in common area of complex that was not open to general public, defendant was not liable under Disabled Persons Act for injuries caused by its absence].)

(4) *(New) Compliance With Construction-Related Accessibility Standards*. The 2008 Legislature enacted the Construction-Related Accessibility Standards Compliance Act, C.C. 55.51 et seq. The Act provides for the hiring and training of certified access specialists to inspect construction sites for places of public accommodation and to make written reports regarding compliance with accessibility standards. Beginning July 1, 2010, each local agency must have at least one building inspector who is a certified accessibility specialist. (C.C. 55.53.) Having an inspection report issued by a certified accessibility specialist allows a defendant in a construction-related accessibility claim to request a court stay and an early evaluation conference. (C.C. 55.54.)



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8 *Witkin Sum. Cal. Law Const Law* § 959

[§ 959] Enforcement.

Several remedies are available for discrimination against the disabled:

(1) *Civil Action for Damages*. A person, firm, or corporation who denies or interferes with the rights of a disabled person under C.C. 54, 54.1, or 54.2 is liable for actual damages, punitive damages from \$ 1000 to three times the actual damages, and attorneys' fees. (C.C. 54.3; see *Donald v. Cafe Royale* (1990) 218 C.A.3d 168, 177, 180, 266 C.R. 804 [minimum statutory damage amount must ordinarily be awarded for denial of equal access; intent to violate statute is not required].) The remedies provided by the statute are nonexclusive and are in addition to other remedies provided by law, including actions for injunctive or other equitable relief. (C.C. 54.3(b).) However, a person may not be held liable for damages under both C.C. 54.3 and C.C. 52 (supra, §914) for the same act or failure to act. (C.C. 54.3(c).)

An action may be brought to enforce C.C. 54.3 in any court of competent jurisdiction, including small claims court, if the amount sought does not exceed its jurisdictional limits. (C.C. 52.2.)

(2) *Complaint to Department of Fair Employment and Housing*. A person claiming to be aggrieved by an alleged unlawful practice in violation of C.C. 54, 54.1, or 54.2 may also file a verified complaint with the Department of Fair Employment and Housing, pursuant to *Govt.C. 12948* (supra, §941). (C.C. 54.3(b).)

(3) *Injunction Proceedings*. A person who is "aggrieved or potentially aggrieved" by a violation of C.C. 54 or 54.1, *Govt.C. 4450* et seq., or *Health & Saf.C. 19955* et seq. may bring an action to enjoin the violation. (C.C. 55; see *Donald v. Cafe Royale*, supra, 218 C.A.3d 184 [denial of injunctive relief was proper where restaurant ceased operating during course of litigation].) The prevailing party in the action is entitled to reasonable attorneys' fees. (C.C. 55.) The district attorney, city attorney, or Attorney General is authorized to bring an action to enjoin a violation of C.C. 54 or 54.1. (C.C. 55.1.)

In *Deukmejian v. CHE* (1983) 150 C.A.3d 123, 197 C.R. 484, the state and the Director of the State Department of Rehabilitation brought an action against a restaurant operator and others to compel the restaurant to provide legally sufficient access for the physically handicapped and to mandate compliance with legal requirements. When the restaurant first opened, the physically disabled were restricted to entering through a locked employee entrance that was

neither designated nor decorated for patron access. Defendants moved for summary judgment, contending that (1) the laws only require public accommodations to provide *some* means of access to the facilities; (2) the restaurant was exempt under *Health & Saf.C. 19956* because it occupied a two-story building and the restaurant facilities were on the upper floor; and (3) the restaurant was entitled to a "hardship" exemption under *Health & Saf.C. 19957*. *Held*, summary judgment for defendants reversed.

(a) Under the statutory schemes, at least one *primary entrance* must be "accessible to and usable by" the physically disabled. (150 C.A.3d 134.) "[T]he required primary entrance must necessarily be burdened by a substantial flow of pedestrian traffic." Hence, a restaurant entrance only used by the physically disabled is not a "primary entrance." (150 C.A.3d 135.)

(b) Although *Health & Saf.C. 19956* exempts "a restaurant with accessible, equivalent dining areas on both the first and second floors from having to provide access to tables on the second floor," it "does not exempt a restaurant having all its public accommodations above the ground floor from providing an upper floor primary entrance equivalent" to the disabled. (150 C.A.3d 136.)

(c) Summary judgment was erroneous because several triable issues of fact existed, including whether the entry provided disabled persons was a "primary entrance"; whether that entry accommodated a substantial portion of the general public patrons; whether that entry subjected disabled persons to safety hazards; whether the city director had granted the restaurant an exemption under *Health & Saf.C. 19957*; and whether the restaurant was entitled to the exemption by showing "practical difficulty, unnecessary hardship," or that the existing method of entry secured "equivalent facilitation and protection." (150 C.A.3d 136 et seq.) (See *San Francisco v. Grant Co. (1986) 181 C.A.3d 1085, 1090, 227 C.R. 154* [remodeled restaurant violated access requirements for disabled, under C.C. 54.1(a) and *Health & Saf.C. 19955* et seq., where telephones and restrooms were situated on restaurant's second floor without wheelchair access from first floor, and first floor itself had two levels but no ramp or other means of wheelchair access between them].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Civil Action for Damages*. See *Gunther v. Lin (2006) 144 C.A.4th 223, 231, 50 C.R.3d 317* [discussing proof requirements of C.C. 52(f) and 54.3, and observing that intentional discrimination need not be proved under C.C. 54.3]; 36 *McGeorge L. Rev.* 661 [California disability antidiscrimination law--damages and notice].

Statutory damages under C.C. 52(a) or 54.3 may be recovered on a construction-related accessibility claim against a place of public accommodation only if the violation of one or more construction-related accessibility standards denied the plaintiff full and equal access to the place of accommodation on a particular occasion. (C.C. 55.56(a), added in 2008.)



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
XI. EQUAL PROTECTION OF THE LAWS
E. California Civil Rights Legislation.
5. Rights of Public Safety Officers.
a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 960

[§ 960] In General.

(1) *Purpose and Scope of Act.* The Public Safety Officers Procedural Bill of Rights Act (*Govt.C. 3300 et seq.*) contains the following statement of purpose: "[T]he rights and protections provided to peace officers under this chapter constitute a matter of statewide concern." Effective law enforcement depends on the maintenance of stable employer-employee relations between public safety employees and their employers. To "assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California." (*Govt.C. 3301.*) However, agencies that have adopted a procedure that provides "at a minimum" the same rights or protections are not subject to the Act. (*Govt.C. 3310.*)

The Act applies only to *public safety officers*, which means all peace officers specified in numerous designated sections of the Penal Code. (*Govt.C. 3301.*) Thus, the Act applies to police chiefs. (*Gray v. Gustine (1990) 224 C.A.3d 621, 627, 273 C.R. 730; Binkley v. Long Beach (1993) 16 C.A.4th 1795, 20 C.R.2d 903.*) But it does not apply to city fire chiefs. (*Gauthier v. Red Bluff (1995) 34 C.A.4th 1441, 1445, 1447, 41 C.R.2d 35* [under P.C. 830.37(b), members of fire department are peace officers only if their primary duty is enforcement of laws relating to fire prevention or suppression].) And temporary employees are not covered. (*Bell v. Duffy (1980) 111 C.A.3d 643, 649, 168 C.R. 753.*)

In *Burden v. Snowden (1992) 2 C.4th 556, 561, 7 C.R.2d 531, 828 P.2d 672*, the issue was whether plaintiff, hired by defendant city police department as a "police recruit," came within the coverage of the Act. A "police recruit" is a candidate for a police officer position who has not yet completed a training academy and who is not authorized to use peace officer powers. Defendant police department denied coverage; the trial court and the Court of Appeal disagreed; but the Supreme Court reversed the judgment of the Court of Appeal. (*2 C.4th 569.*)

In addition to its extended discussion of statutory construction, the Court rejected the policy argument that the Act must "logically cover" recruits and trainees to achieve its goals. "Indeed, to judicially deem police recruits to be the equivalent of police officers, thus entitling them to the full panoply of protections under the Act, may even detract from effective law enforcement. Appointing new hires to the position of recruit offers local law enforcement agencies their first opportunity to quickly screen out those candidates who are unfit or unable to function as officers. It behooves cities, police departments, police officers, and most important, the public, to weed out these candidates at the earliest

opportunity. Construing the term 'police officer' to include recruits unnecessarily restricts local agencies from eliminating those candidates whose background investigations and/or academy performance indicates their likely unsuitability as police officers." (2 C.4th 567.)

(2) *No Discriminatory Duty Assignment*. "No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment." (Govt.C. 3303(j).)

(3) *Exercise of Constitutional Rights*. Safety officers, except as provided by law or when on duty or in uniform, may not be prohibited from engaging in, or be coerced or required to engage in, political activity. (Govt.C. 3302.) They may not be discriminated against for the lawful exercise of their constitutional rights, their rights under the Act, or those under a grievance procedure. (Govt.C. 3304(a).) However, Govt.C. 3304(a) does not prohibit greater punishment when an officer exercises his or her right to an administrative appeal; the statute only prohibits increased punishment that is retaliatory or vindictive, and the officer has the burden of establishing this vindictiveness. (*Holcomb v. Los Angeles* (1989) 210 C.A.3d 1560, 1567, 1568, 259 C.R. 1; *Jackson v. Los Angeles* (1999) 69 C.A.4th 769, 782, 81 C.R.2d 814 [following *Holcomb*; on appeal of disciplinary suspension, once board has convened, officer has no right to terminate proceedings by withdrawing or abandoning appeal, and officer may not complain of receiving increased punishment on appeal].)

(4) *Polygraph Test*. Public safety officers may not be compelled to submit to a polygraph test, and their refusal to do so may not be used against them. (Govt.C. 3307; see *Civil Service Assn. v. Civil Service Com.* (1983) 139 C.A.3d 449, 458, 188 C.R. 806, 3 Summary (10th), *Agency and Employment*, §299 [Govt.C. 3307 does not unconstitutionally discriminate against other public employees]; *Los Angeles Police Protective League v. Los Angeles* (1995) 35 C.A.4th 1535, 1537, 1540, 1544, 42 C.R.2d 23 [Govt.C. 3307 does not apply where polygraph examination is used to screen applicants voluntarily seeking transfer within police department to specialized divisions involving unusually sensitive work and requiring highest level of integrity].)

(5) *Personnel Files and Privacy*. Adverse comments in the personnel files of safety officers are prohibited unless first shown to them. (Govt.C. 3305.) The officers are then entitled to insert a written response. (Govt.C. 3306.) (See *Aguilar v. Johnson* (1988) 202 C.A.3d 241, 251, 247 C.R. 909 [citizen's complaint is adverse comment within meaning of Govt.C. 3305, 3306]; *Riverside v. Superior Court* (2002) 27 C.4th 793, 802, 803, 118 C.R.2d 167, 42 P.3d 1034, *infra*, §962 [following *Aguilar*; background investigation of peace officer during probationary employment is personnel matter subject to Act because materials affect status of employment; Act applies whether personnel matter at issue arises out of conduct prior to or during employment, and whether comments are prepared and filed prior to or after termination]; *Sacramento Police Officers Assn. v. Venegas* (2002) 101 C.A.4th 916, 923, 124 C.R.2d 666 [following *Riverside*; index card kept in officer's name by department of internal affairs listing complaints against him is file "used for any personnel purposes" under Govt.C. 3305, and officer was entitled to read and respond to adverse comments even though complaint did not result in adverse personnel action]; *Seligsohn v. Day* (2004) 121 C.A.4th 518, 528, 16 C.R.3d 909 [following *Venegas*; police officers employed by community college had right to copies of discrimination complaints against them filed with college's office of affirmative action, with copies sent to their superior officer and to college's vice chancellor].)

With specified exceptions, safety officers may not be required or requested, for purposes of assignments or other personnel action, to disclose their personal finances. (Govt.C. 3308.) Their lockers, and other storage areas assigned to them, may not be searched unless they are present and consent to the search, or a search warrant is obtained. (Govt.C. 3309.)

(6) *Notice of Discipline*. If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, it must notify the officer in writing within 30 days of its decision. The notice must include the date discipline will be imposed. (Govt.C. 3304(f).)

West's Key Number Digest, Civil Rights k.132.1

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Purpose and Scope of Act*. See *Benach v. Los Angeles* (2007) 149 C.A.4th 836, 843, 57 C.R.3d 363 [Act did not apply where deputy's transfer did not constitute punitive demotion]; on similar protections for firefighters, see Firefighters Procedural Bill of Rights Act, Govt.C. 3250 et seq., added in 2007.

The Act does not cover investigations "concerned solely and directly with alleged criminal activities." (Govt.C. 3303(i); see *California Correctional Peace Officers Assn. v. California* (2000) 82 C.A.4th 294, 307, 98 C.R.2d 302, text, §961; *Van Winkle v. Ventura* (2007) 158 C.A.4th 492, 497, 69 C.R.3d 809, Supp., infra, §961.) (6) *Notice of Discipline*. See *Sulier v. State Personnel Bd.* (2004) 125 C.A.4th 21, 27, 22 C.R.3d 615 [Govt.C. 3304(d), requiring that public safety officer be notified of *proposed* discipline within 1 year, does not require that formal notice of adverse action be given under Govt.C. 19574; formal notice is required by Govt.C. 3304(f) when agency *decides* to impose discipline].



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CHAPTER X - Constitutional Law

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b. Interrogation and Investigation.

8 Witkin Sum. Cal. Law Const Law § 961

[§ 961] Interrogation and Investigation.

(1) *Interrogation*. Detailed standards are provided for interrogation of officers that may lead to discipline, dismissal, or criminal charges. These standards include: (a) questioning only at reasonable times and for reasonable periods; (b) notice of who will be conducting the interrogation, and the nature of the investigation; (c) freedom from verbal abuse, threats, and exposure to the news media; (d) a record hearing, a transcript, and access to all notes, etc., taken during the hearing; (e) if arrest is likely, notice of rights; and (f) if discipline or criminal charges may result, the right to be represented. (*Govt.C. 3303*.) However, the statute does not apply to "counseling, instruction, or informal verbal admonishment by, or other routine contact or unplanned contact with, a supervisor" (*Govt.C. 3303(i)*), or to investigations by persons other than the officer's commanding officer or members of the employing department (*People v. Velez* (1983) 144 C.A.3d 558, 564, 192 C.R. 686).

The fact that the statute (now *Govt.C. 3303(g)*), provides for recording the interrogation does not grant preinterrogation discovery rights to a peace officer who is the subject of an internal affairs investigation. (*Pasadena Police Officers Assn. v. Pasadena* (1990) 51 C.3d 564, 569, 578, 273 C.R. 584, 797 P.2d 608 [providing detailed discussion of statute]; 18 *Pepperdine L. Rev.* 1078.)

(2) *No Absolute Right to Representative of Choice*. In *Upland Police Officers Assn. v. Upland* (2003) 111 C.A.4th 1294, 4 C.R.3d 629, the court held, on a question of first impression, that the statutory right to a representative of an officer's choice is limited by a reasonableness requirement. Otherwise, an officer could prevent a timely investigation by choosing a representative who is temporarily unavailable. (111 C.A.4th 1305.) Further, an officer is responsible for securing the attendance of his or her chosen representative at the interrogation. (111 C.A.4th 1306.)

(3) *Rights of Representatives*. Under *Govt.C. 3303(i)*, an officer's representative has a privilege not to disclose information divulged by the officer being investigated for noncriminal matters. However, this privilege is not unlimited. "Whatever representative privilege may be created by the Act, it does not supplant an officer's official duties." (*Alhambra Police Officers Assn v. Alhambra Police Dept.* (2003) 113 C.A.4th 1413, 1422, 1423, 7 C.R.3d 432 [statute does not authorize officer to remove documentary evidence pertaining to misconduct of another officer and return it to that officer, in contravention of department rules, even if officer is acting as other's representative].)

(4) *Right to Investigatory Evidence.* The reference in *Govt.C. 3303(g)* to the rights of officers to receive reports or complaints made by other persons, "provides officers with protections similar to those enjoyed by criminal defendants, including the rights to raw notes and tape-recorded statements of witnesses." (*San Diego Police Officers Assn v. San Diego* (2002) 98 C.A.4th 779, 785, 120 C.R.2d 609.)

(5) *Information as to Constitutional Rights.* In *Lybarger v. Los Angeles* (1985) 40 C.3d 822, 221 C.R. 529, 710 P.2d 329, a police officer was removed from his position with total loss of pay for insubordination because he refused to answer questions during an investigation of allegations against his unit, and the superior court denied his petition for mandamus. *Held*, reversed. Under *Govt.C. 3303*, a safety officer must be informed of his or her constitutional rights when it is deemed that the officer may be charged with a criminal offense. Hence, the officer "should have been told, among other things, that, although he had the right to remain silent and not incriminate himself, (a) his silence could be deemed insubordination, leading to administrative discipline, and (b) any statement made under the compulsion of the threat of discipline could not be used against him in any subsequent criminal proceeding." (40 C.3d 829.) (See *Williams v. Los Angeles* (1988) 47 C.3d 195, 201, 252 C.R. 817, 763 P.2d 480 [distinguishing *Lybarger*; although officer was not told extent of protection afforded to statements he might make, he was not prejudiced by omission because it only would have provided him with additional incentive to speak to investigators; thus, it did not have any causal connection to his ultimate dismissal]; *Hanna v. Los Angeles* (1989) 212 C.A.3d 363, 375, 260 C.R. 782 [distinguishing *Williams*; probationary police officer's statements made after his request for counsel was denied were properly suppressed where violation might have affected content of his statements, and might have changed outcome]; *Los Angeles v. Superior Court (Labio)* (1997) 57 C.A.4th 1506, 1516, 67 C.R.2d 775 [discussing *Williams* and *Hanna*; suppression of officer's statements was warranted where officer had not been informed that he was being investigated; however, statements could be used for impeachment].)

(6) *Investigation by Other Persons.* In *California Correctional Peace Officers Assn. v. California* (2000) 82 C.A.4th 294, 98 C.R.2d 302, the superior court issued a preliminary injunction limiting the conduct of the California Department of Justice (DOJ) and the California Department of Corrections (CDC) in an investigation of alleged criminal misconduct by correctional officers at a state prison. *Held*, the injunction against the CDC was proper, but there was no authorization for an injunction against the DOJ.

(a) *Govt.C. 3303 was applicable.* *Govt.C. 3303* expressly states that it applies only to investigations by an officer's commanding officer or "other member of the employing public safety department." (82 C.A.4th 306.) However, here, the DOJ and the CDC must be considered to have been acting in concert in the investigation. The CDC ordered the officers to cooperate in the DOJ investigation, delivered interviewees to DOJ investigators, threatened the officers with arrest or discipline if they asserted their rights during interrogation, prevented the officers from leaving the prison grounds until they were interviewed, and guarded the hallway exits and interrogation rooms. (82 C.A.4th 307.)

(b) *Statutory interpretation.* The exception in *Govt.C. 3303(i)* that the statute does not apply to "an investigation concerned solely and directly with alleged criminal activities," and the corollary provision in *Govt.C. 3304* authorizing the employer to require an officer's cooperation with other agencies involved in criminal investigations, must be "limited to investigations conducted by outside agencies that are substantially independent of the employer." (82 C.A.4th 307, 308.) Otherwise, they would effectively defeat the purpose of the Act because "[a]lmost every administrative investigation of alleged misconduct could be recast as a criminal investigation to avoid the requirements of the Act." (82 C.A.4th 308.)

(c) *Separation of powers doctrine precludes injunctive relief against DOJ.* *Govt.C. 3309.5* (infra, §963) only authorizes injunctive relief against the employing public safety department. (82 C.A.4th 312.) The power of the DOJ to investigate and prosecute criminal conduct is subject to prior restraint only under extraordinary circumstances not present here. (82 C.A.4th 311, 312.) "Enjoining the DOJ is, as a practical matter, unnecessary because the injunction issued against the CDC will effectively prevent any such future concerted activity." (82 C.A.4th 312.) (See *Shafer v. Los Angeles County Sheriff's Dept.* (2003) 106 C.A.4th 1388, 1399, 131 C.R.2d 670 [distinguishing *Calif. Correctional Peace Officers Assn.*; officer's deposition testimony taken by county counsel's office regarding his workers']

compensation claim was admissible in officer's discharge hearing even though he was not informed that he was under investigation; interrogations by county counsel's office are not covered by Act and that office was not acting in concert with sheriff's department].)

(7) *Time for Investigation*. No punitive action, or denial of promotion on grounds other than merit, may be undertaken for an allegation of misconduct if the investigation of the allegation is not completed within 1 year of the public agency's discovery of the misconduct by a person authorized to initiate an investigation. (Govt.C. 3304(d); see *Jackson v. Los Angeles* (2003) 111 C.A.4th 899, 906, 4 C.R.3d 325 [Govt.C. 3304(d) addresses matter of statewide concern, and its limitations provision prevails over one stated in city charter].) The 1-year period may be tolled or extended as provided by statute. (Govt.C. 3304(d)(1)-(d)(8).) The 1-year period is inapplicable where a predisciplinary response or grievance procedure is required or utilized. (Govt.C. 3304(e).) (See *Alameida v. State Personnel Bd.* (2004) 120 C.A.4th 46, 62, 15 C.R.3d 383, *infra*, §963 [dishonesty charge against officer that flowed directly from investigation of assault did not start new limitations period; to allow employer to prove underlying charge (barred by statute of limitations) in order to demonstrate employee's dishonesty in denying that charge would defeat purpose of Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Interrogation*. See *Steinert v. Covina* (2006) 146 C.A.4th 458, 466, 53 C.R.3d 1 [statute did not apply to routine conversation with supervisor who sought information regarding only officer's knowledge of proper procedures to be followed in search of criminal records].

(2) *No Absolute Right to Representative of Choice*. See *Association for Los Angeles Deputy Sheriffs v. Los Angeles* (2008) 166 C.A.4th 1625, 1636, 1646, 83 C.R.3d 494 [following *Upland Police Officers Assn. v. Upland* (2003) 111 C.A.4th 1294, 4 C.R.3d 629, text, p. 501; trial court did not abuse discretion in denying preliminary injunction to enjoin sheriff's department from implementing anti-huddling policy, which restricted officers involved in or witnessing officer-involved shootings from collectively consulting with labor representative or legal counsel; restriction was reasonable and did not violate officers' constitutional rights to association or to counsel]. (4) *Right to Investigatory Evidence*. *Gilbert v. Sunnyvale* (2005) 130 C.A.4th 1264, 31 C.R.3d 297, disagrees with *San Diego Police Officers Assn. v. San Diego* (2002) 98 C.A.4th 779, 120 C.R.2d 609, text, p. 502: "Nothing in the Act's language or legislative history reveals a legislative intent to provide an officer who is the subject of an administrative internal affairs investigation with broad statutory discovery rights similar to those held by criminal defendants." (130 C.A.4th 1287.) The main purpose of Govt.C. 3303 is to prevent abusive tactics during the conduct of an officer's interrogation. Fair treatment of the officer does not require that all the material amassed in the course of the investigation, including raw notes, be provided to the officer after his or her interrogation. (130 C.A.4th 1286.) However, Govt.C. 3303(g) does cover nonconfidential reports by persons other than the agency's investigators, such as those originating from a criminal investigation, where they have been "expressly made part of the department's internal affairs investigation of an officer." (130 C.A.4th 1287.) The statute fails to specify a time frame for disclosure; hence, "a reasonable, post-interrogation time frame is implied." (130 C.A.4th 1293.) (See *Hinrichs v. Orange* (2004) 125 C.A.4th 921, 928, 23 C.R.3d 186 [in disciplinary proceeding based on odor of alcohol on officer's breath, department's failure to provide nonconfidential reports created during course of investigation, including statement of other officer that he only smelled medicine on officer's breath, was prejudicial].)

(5) *Information as to Constitutional Rights*. See *Hinrichs v. Orange*, *supra*, 125 C.A.4th 926 [distinguishing *Los Angeles v. Superior Court (Labio)* (1997) 57 C.A.4th 1506, 67 C.R.2d 775, text, p. 502; failure expressly to inform officer of nature of investigation was harmless where initial questioning took place within hour of alcohol being noted on officer's breath, and it began with prefatory statement by other officer that he had smelled alcohol on her breath]. (6) *Investigation by Other Persons*. *California Correctional Peace Officers Assn. v. California* (2000) 82 C.A.4th 294, 98 C.R.2d 302, text, p. 503, was distinguished, and dicta that Govt.C. 3303(i) only applies to criminal investigations conducted primarily by outside agencies was rejected, in *Van Winkle v. Ventura* (2007) 158 C.A.4th 492, 69 C.R.3d 809. Plaintiff officer obtained an injunction preventing defendant county, his employer, from using statements that he made during a criminal investigation at his civil service hearing. The statements were made after he was arrested for embezzling property from defendant and after he waived his *Miranda* rights. Plaintiff claimed that the statements must

be suppressed because defendant failed to give the advisements required by the Public Safety Officers Procedural Bill of Rights Act. *Held*, injunction vacated. The Act does not apply to officers subject to criminal investigations conducted by their employers.

(a) *Govt.C. 3303(i)* unambiguously excepts from its coverage investigations "concerned solely and directly with alleged criminal activities." (158 C.A.4th 497, 499.) To require that the excepted investigations be ones conducted primarily by outside agencies would impede law enforcement agencies from pursuing their own personnel who commit crimes. The Act only covers law enforcement employers, so there would have been no reason for the Legislature to have added this provision to regulate the conduct of agencies that are not covered by the Act. (158 C.A.4th 499.)

(b) The court in *California Correctional Peace Officers Assn.* misinterpreted *Govt.C. 3303(i)*, and narrowed its scope. The statutory language regarding criminal investigations does not limit the law enforcement agencies that may conduct those investigations. Yet the court assumed, without evidence to support its speculation, that it needed to alter the statute because it believed that law enforcement employers would routinely violate the Act. The Legislature knew that there could be abuses by law enforcement employers conducting criminal and internal affairs investigations of their employees; that is why it qualified the exemption with language that the investigation had to be "concerned solely and directly with alleged criminal activities." There was no need to regulate purely criminal investigations because officers subject to those investigations have *Miranda* protections. In addition, the Act allows officers to challenge in a trial court the type of investigations law enforcement agencies conduct. (158 C.A.4th 500.)

See *Berkeley Police Assn. v. Berkeley* (2008) 167 C.A.4th 385, 408, 84 C.R.3d 130 [following *California Correctional Peace Officers Assn.*; POBRA was applicable to investigative and public hearing process of city police review commission (PRC) that investigated citizen complaints of misconduct by police officers; although PRC had no power to order officer to provide statement during investigation, police chief had issued written order to officers to attend interview under penalty of discipline, including dismissal, for failing to appear].(7) *Time for Investigation*.

Tolling or extension of period: See *Parra v. San Francisco* (2006) 144 C.A.4th 977, 993, 50 C.R.3d 822 [issue of first impression; limitations period was properly tolled under *Govt.C. 3304(d)(1)* during criminal investigation into allegations of misconduct against many officers even though charges were dismissed against some of them; limitations period was properly extended under *Govt.C. 3304(d)(4)* by evidence of (a) lack of cooperation by police department, (b) administrative and criminal investigations, and (c) complexity of case, including numerous witnesses and numerous allegations of misconduct against many officers]; *Breslin v. San Francisco* (2007) 146 C.A.4th 1064, 1080, 55 C.R.3d 14 [under *Govt.C. 3304(d)(6)*, statute is tolled when public safety officer is named defendant in civil action; provision applies only to officer named in civil action, and not to others involved in incident; fact that complaint could have been amended to name other officers by substituting them for Doe defendants was not sufficient to toll statute as to them]; *Bettencourt v. San Francisco* (2007) 146 C.A.4th 1090, 1100, 53 C.R.3d 402 [tolling provision of *Govt.C. 3304(d)(6)* does not require that investigation actually be impeded by civil action; statute only requires that civil action and investigation involve same incident].

(8) *(New) Notice of Discipline.* Notice of "proposed disciplinary action" must be given to the public safety officer within the 1-year period required for investigation. (*Govt.C. 3304(d)*.) This provision does not require notice of a specific punishment. Instead, the notice contemplated by the statute is simply notice that the public agency, having completed its investigation, has decided to take disciplinary action for the alleged misconduct. (*Mays v. Los Angeles* (2008) 43 C.4th 313, 317, 325, 74 C.R.3d 891, 180 P.3d 935 [disapproving *Sanchez v. Los Angeles* (2006) 140 C.A.4th 1069, 1079, 45 C.R.3d 188, to extent that it requires notice of specific discipline; notice proposing that alleged misconduct be adjudicated by Board of Rights constituted sufficient notice of proposed disciplinary action under statute].)

(9) *(New) Raising Statute of Limitations Defense.* The defense of the statute of limitations must be raised either (a) at the administrative hearing, or (b) in a proceeding under *Govt.C. 3309.5* (see text, §963), that asserts a violation of the Act. (*Moore v. Los Angeles* (2007) 156 C.A.4th 373, 384, 67 C.R.3d 218 [following *Alameida v. State Personnel Bd.*

(2004) 120 C.A.4th 46, 15 C.R.3d 383, text, §963, and distinguishing *Sanchez v. Los Angeles*, *supra*].)



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c. Waiver of Rights.

8 *Witkin Sum. Cal. Law Const Law* § 962

[§ 962] Waiver of Rights.

In *Haight v. San Diego* (1991) 228 C.A.3d 413, 278 C.R. 334, an officer voluntarily resigned while an investigation was pending, but later demanded a "name-clearing" hearing concerning derogatory comments in the separation report placed in his personnel file after his departure. *Held*, he no longer had a due process right to a hearing. (228 C.A.3d 417.)

In *Riverside v. Superior Court* (2002) 27 C.4th 793, 118 C.R.2d 167, 42 P.3d 1034, a city police department was disbanded and law enforcement services were contracted with the county. Plaintiff police officer had been under investigation, without his knowledge, by the police department when he was discharged as part of the department closure. On being hired by the county on a probationary basis, pending a background investigation, plaintiff signed waivers giving up his right to receive feedback and to read or review any background investigation report prepared by the county. The release lasted for 1 year. Plaintiff first learned of the prior investigation when he was asked to take a polygraph examination. He voluntarily submitted to the exam, and was discharged several months later while still on probation. *Held*, the waivers were valid as to those matters arising prior to plaintiff's employment with the county.

(a) Where an employee's waiver is limited to an investigation of matters that arose prior to employment, and the waiver expires after 1 year, so that the employee is not subject to a continuing investigation long after being hired, enforcement of the waiver would not particularly undermine the public purpose of the Act. Rather, "enforcement of the waiver would serve that purpose by facilitating an earlier hiring date for new police officers who are transferred from other agencies." (27 C.4th 806.) However, this kind of waiver should be limited to officers like plaintiff who are already peace officers at the time of signing a waiver and are merely trying to transfer from one agency to another. (27 C.4th 806.)

(b) The waiver also must be signed voluntarily, "with sufficient awareness of the relevant circumstances and likely consequences." (27 C.4th 806.) Here, plaintiff knew or should have known of the consequences of his waiver, including that any background investigation would become available to future law enforcement employers. (27 C.4th 807.)

Three justices joined in a dissent. (27 C.4th 807.)

SUPPLEMENT: [This section is current through the latest supplement]



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XI. EQUAL PROTECTION OF THE LAWS
E. California Civil Rights Legislation.
5. Rights of Public Safety Officers.
d. Remedies.

8 *Witkin Sum. Cal. Law Const Law* § 963

[§ 963] Remedies.

(1) *In General.* It is unlawful for a public safety department to deny or refuse a public safety officer "the rights and protections guaranteed" by the statute. (*Govt.C. 3309.5(a).*) Appropriate injunctive and other extraordinary relief is authorized to remedy a violation. (*Govt.C. 3309.5(c)(1).*) Sanctions may be recoverable against a party filing a frivolous action, or one brought in bad faith or for an improper purpose. (*Govt.C. 3309.5(d)(1).*) With regard to acts taken within the scope of employment, if the public safety department or its agents or employees acted maliciously with intent to injure a public safety officer, the department is liable to the officer for a civil penalty and actual damages. An individual is not liable for an "act for which a public safety department is liable under this section." (*Govt.C. 3309.5(e).*) (See *Zazueta v. San Benito* (1995) 38 C.A.4th 106, 112, 113, 44 C.R.2d 678 [officer waived right to seek judicial remedy under *Govt.C. 3309.5* by participating in binding arbitration].)

The superior court has initial jurisdiction over actions for violations of the Act. (*Govt.C. 3309.5(c).*) However, this does not mean that the trial court has *exclusive* jurisdiction. Before being served with a notice of adverse action, the peace officer may bring an action in the trial court asserting a violation of the Act without waiting for punitive action to be taken. After punitive action is taken, the officer can assert the violation "as a defense to discipline in the administrative proceedings, or can seek an adjudication in court." (*Alameida v. State Personnel Bd.* (2004) 120 C.A.4th 46, 54, 15 C.R.3d 383.)

(2) *Concurrent Actions.* *Gales v. Superior Court* (1996) 47 C.A.4th 1596, 55 C.R.2d 460, holds that an officer may pursue an action under *Govt.C. 3309.5* simultaneously with an action seeking administrative mandamus under *C.C.P. 1094.5*.

(a) Under *Govt.C. 3309.5*, an officer may file an action for injunctive or other extraordinary relief, such as mandamus, quo warranto, and habeas corpus. In that action, the court, rather than a jury, makes the determination whether the Act was violated. (47 C.A.4th 1602.)

(b) An action under *Govt.C. 3309.5* may be filed after the employer has issued its final decision. (47 C.A.4th 1602.)

(c) Review under *Govt.C. 3309.5* is limited to determining whether the employer violated the officer's rights under the Act. On the other hand, a mandamus action under *C.C.P. 1094.5* requires inquiry into the validity of the final administrative decision. (47 C.A.4th 1602, 1603.)

(d) "The answer, we believe, is to *require* an officer to file, after a final administrative decision has been rendered, a mandamus petition" pursuant to *C.C.P. 1094.5*, and to *permit* the officer to file a concurrent action pursuant to *C.C.P. 3309.5*. "The subject matter of the actions will, of course, overlap, and consolidation will undoubtedly be required. And issues decided in one action will be binding in the other. For example, should a judicial officer determine, in connection with" a *Govt.C. 3309.5* action, "that a violation of the Act occurred, that finding will be binding" in the *C.C.P. 1094.5* action. (47 C.A.4th 1603.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* In 2003, *Govt.C. 3309.5(c)(1)*, providing for injunctive relief, was relettered as *Govt.C. 3309.5(d)(1)*. *Govt.C. 3309.5(d)(2)* now provides for sanctions.

Govt.C. 3309.5(e) is not the exclusive basis for recovering attorneys' fees for a violation of the Public Safety Officers Procedural Bill of Rights. Attorneys' fees also may be awarded under the private attorney general statute, *C.C.P. 1021.5* (see 7 Cal. Proc. (5th), *Judgment*, §259). (*Riverside Sheriffs' Assn. v. Riverside* (2007) 152 C.A.4th 414, 420, 61 C.R.3d 295 [issue of first impression; *Govt.C. 3309.5(e)* and *C.C.P. 1021.5* are reconcilable; Legislature did not intend to limit attorneys' fee awards only to malicious violations as provided in *Govt.C. 3309.5(e)*].)

See *Perez v. Los Angeles* (2008) 167 C.A.4th 118, 123, 83 C.R.3d 821 [excluding evidence that officer pointed loaded weapon at fellow officer during improper interrogation was not proper remedy for POBRA violation; no deterrent effect would be served by excluding evidence, which was independent act of physical misconduct taken to demonstrate prior conduct and in response to question that called for verbal answer].(3) (*New*) *Government Claims Act*. Claims under the Public Safety Officers Procedural Bill of Rights are not exempt from the Government Claims Act (see 3 Cal. Proc. (5th), *Actions*, §238). Thus, a claim for actual damages and civil penalties under *Govt.C. 3309.5* will be barred if the public safety officer fails to present a claim to the public entity employer pursuant to the claim filing requirement. (*Lozada v. San Francisco* (2006) 145 C.A.4th 1139, 1152, 1163, 52 C.R.3d 209 [claims here for money damages were more that incidental to extraordinary relief sought].)



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e. Administrative Appeal.

8 *Witkin Sum. Cal. Law Const Law* § 964

[§ 964] Administrative Appeal.

(1) *In General*. "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period" without providing an opportunity for administrative appeal. (*Govt.C. 3304(b)*.) (See *White v. Sacramento* (1982) 31 C.3d 676, 679, 683, 183 C.R. 520, 646 P.2d 191 [decision to reassign peace officer to lower paying position is per se disciplinary or punitive in nature and entitles officer to administrative appeal]; *Henneberque v. Culver City* (1983) 147 C.A.3d 250, 254, 194 C.R. 869 [police officer was entitled to administrative appeal where he was promoted to probationary position of police sergeant with corresponding increase in salary and benefits, and received no unfavorable evaluations while serving in this capacity, but was summarily demoted with reduction in salary and benefits after he was elected president of city police officers association, the recognized employee organization]; *Runyan v. Ellis* (1995) 40 C.A.4th 961, 964, 47 C.R.2d 356 [transfer of police officer with reduction in pay is punitive action requiring administrative appeal]; *Caloca v. San Diego* (1999) 72 C.A.4th 1209, 1220, 85 C.R.2d 660 [deputies were entitled to administrative appeal of citizen review board's findings of misconduct where board's reports would be considered in future personnel decisions and could lead to punitive action]; *Giuffre v. Sparks* (1999) 76 C.A.4th 1322, 1329, 1332, 91 C.R.2d 171 [following *Runyan* and *White v. Sacramento*; reassignment from SWAT team that paid special duty pay to position that did not was punitive in nature and required administrative appeal before civil service commission]; *Gordon v. Horsley* (2001) 86 C.A.4th 336, 349, 102 C.R.2d 910 [placing sheriff's written reprimand in officer's personnel file and enforcing restrictions it outlined regarding officer's right to carry weapon and make off-duty arrests constituted punitive action entitling officer to administrative appeal]; *Otto v. Los Angeles Unified School Dist.* (2001) 89 C.A.4th 985, 995, 107 C.R.2d 664 [whether "summary of conference" memorandum inserted in officer's file constitutes punitive action that triggers administrative appellate rights depends on contents of memorandum].)

(2) *Removal or Demotion of Police Chief*. No police chief may be removed without providing the chief written notice, the reason for removal, and an opportunity for administrative appeal. (*Govt.C. 3304(c)*.) A police chief's demotion and reduction in salary constitute punitive action triggering the right to an administrative appeal. (*Gray v. Gustine* (1990) 224 C.A.3d 621, 631, 273 C.R. 730.)

In *Binkley v. Long Beach* (1993) 16 C.A.4th 1795, 20 C.R.2d 903, defendant city manager of a charter city notified plaintiff Binkley that he was being removed as police chief. At the administrative appeal hearing, which was heard by a

hearing officer appointed by the city manager, the chief's request to cross-examine the witnesses against him was denied, and the burden of disproving the allegations against him was placed on the chief. The hearing officer concluded that the decision to discharge should be sustained, and, on review, the city manager reaffirmed his decision. The trial court granted the chief's petition for mandamus, ordering a new administrative appeal hearing and prohibiting the city manager from exercising any review authority. *Held*, reversed.

(a) The Act was not intended to interfere with the right of charter cities to regulate peace officers, including the right to terminate an officer at will without a showing of "just cause." The limited purpose of an appeal under *Govt.C. 3304* is to give the peace officer the opportunity to establish a formal record of the circumstances surrounding his or her termination and to attempt to convince the employing agency to reverse its decision. (16 C.A.4th 1806.)

(b) Removal as police chief based on charges of misconduct, mismanagement, and misjudgment would tend to stigmatize plaintiff and impair his employment opportunities. Hence, "due process requires, at minimum, that he be given an opportunity to refute the charges and clear his name." (16 C.A.4th 1807.)

(c) Plaintiff argues that he was denied due process because he was not permitted to cross-examine his accusers and was improperly forced to assume the burden of proof. But he held his position at the pleasure of the city manager, who could discharge him without just cause. No case supports his claim that a peace officer serving at will has a right of confrontation under either the Act or the *Due Process Clause*. (16 C.A.4th 1809.)

(d) Plaintiff also claims that the appeal process was biased. However, the facts do not support a claim that the hearing officer was biased. (16 C.A.4th 1810.) And the city manager's retention of final decision-making authority did not violate any due process rights. (16 C.A.4th 1811.)

(3) *Procedure Set by Local Entity*. *Govt.C. 3304(b)* guarantees only "an opportunity for administrative appeal." It leaves the procedural details for implementing the procedure to the entity employing the public safety officers. (See *Govt.C. 3304.5* [appeal by public safety officer must be conducted "in conformance with rules and procedures adopted by the local public agency"]; *Howell v. San Bernardino* (1983) 149 C.A.3d 200, 206, 196 C.R. 746 [transfer, unlike dismissal, does not involve "fundamental vested right"; hence, there was no basis for implying "good cause" exception in administrative rule prescribing 5-day limit for requesting review of employee reassignment]; *Caloca v. San Diego* (2002) 102 C.A.4th 433, 443, 445, 126 C.R.2d 3 [on administrative appeal of citizen review findings, county bears burden of sustaining findings; because of public nature of these findings, deputies have substantial interest in being vindicated in open, public hearing]; *James v. Coronado* (2003) 106 C.A.4th 905, 910, 131 C.R.2d 85 [although placing written memorandum in personnel file triggers officer's right of appeal, due process does not require that hearing include full panoply of rights, including right to confront and cross-examine witnesses].)

The appeal process implemented by the employing agency must include procedural safeguards that comply with due process. (*Runyan v. Ellis*, *supra*, 40 C.A.4th 965, 966 [memorandum of understanding calling for appeal before city manager lacked procedural safeguards sufficient to satisfy due process and did not comply with *Govt.C. 3304(b)*]; see *Los Angeles Police Protective League v. Los Angeles* (2002) 102 C.A.4th 85, 92, 124 C.R.2d 911 [administrative order providing appeal process for officers to challenge reassignment or punitive reduction in pay grade, which relieved department of burden of proof and of obligation to present evidence to support its action, did not satisfy procedural due process requirements]; *Brown v. Los Angeles* (2002) 102 C.A.4th 155, 175, 178, 125 C.R.2d 474 [same; fact that police chief initially authorizes punitive action and is also final decision maker on administrative appeal contributes to risk of unfair procedure].)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 965

[§ 965] Nature of Programs.

(1) *In General.* Affirmative action programs provide "benign discrimination" or "reverse discrimination" in favor of minority groups that have suffered past discrimination. The constitutionality of these methods has been challenged in a number of cases. (See *infra*, §968 et seq.)

(2) *Texts and Commentary.* Affirmative action has been the subject of considerable commentary. (See 3 Rotunda, §18.10; 106 *Harv. L. Rev.* 1709 ["whiteness" as form of property; necessity of affirmative action to eradicate "legacy of oppression"]; 109 *Harv. L. Rev.* 1357 [diversity as compelling interest justifying affirmative action in higher education]; 82 *Cal. L. Rev.* 893 [The Outmoded Debate Over Affirmative Action]; 84 *Cal. L. Rev.* 887 [symposium on race-based remedies]; 89 *Cal. L. Rev.* 59 [Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace]; 92 *Cal. L. Rev.* 683 [moral justification for affirmative action and reparations]; 19 *Hastings Const. L. Q.* 599 [Affirmative Action and Disadvantaged Neighborhoods]; 23 *Hastings Const. L. Q.* 921 [Understanding Affirmative Action]; 22 *Loyola L.A. L. Rev.* 717; 25 *San Diego L. Rev.* 1027; 47 *U.C.L.A. L. Rev.* 1521 [California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education]; 37 *San Diego L. Rev.* 575 [Has Affirmative Action Been Negated? A Closer Look at Public Employment]; 49 *U.C.L.A. L. Rev.* 943 [American Indians and "Preferential" Treatment]; 29 *Western State L. Rev.* 57 [paradox of legalized inequality and revised context for race based affirmative action]; 150 *A.L.R. Fed* 1 [What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes--Private Employment Cases]; 152 *A.L.R. Fed* 1 [What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes--Nonemployment Cases]; 153 *A.L.R. Fed* 609 [What Constitutes Reverse or Majority Gender Discrimination Against Males Violative of Federal Constitution or Statutes-Public Employment Cases]; 162 *A.L.R. Fed* 273 [What Constitutes Reverse or Majority Gender Discrimination Against Males Violative of Federal Constitution or Statutes--Private Employment Cases]; 166 *A.L.R. Fed* 1 [What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or Statutes--Nonemployment Cases]; 168 *A.L.R. Fed* 1 [What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes--Public Employment Cases].)

West's Key Number Digest, Civil Rights k.154

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Texts and Commentary.* See 3 Rotunda 4th, §18.10; 43 Cal. Western L. Rev. 131 [Patching Leaks in Diversity Pipeline to Law School and the Bar]; 43 Cal. Western L. Rev. 151 [policy and strategies for affirmative action admissions in higher education]; 54 *U.C.L.A. L. Rev.* 1931 [federal Government as constitutional niche in affirmative action cases].



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8 Witkin Sum. Cal. Law Const Law § 966

[§ 966] California Statutes.

(1) *In General.* A number of statutes have been enacted in furtherance of affirmative action:

(a) *Educ.C. 44100* et seq. require local public education agencies and the Department of Education to establish affirmative action programs for school employees.

(b) *Govt.C. 19230* et seq. require every state agency to develop an affirmative action plan for the employment of disabled persons. (See 9 *Pacific L. J.* 525.)

(c) *Govt.C. 19705* permits the State Personnel Board to ask civil service applicants to provide ethnic data for use in assessing the fairness of the selection process and in planning affirmative action efforts.

(d) *Govt.C. 19702* provides remedies, such as hiring, reinstatement, or upgrading, for civil service employees who have been victims of discrimination. (*Govt.C. 19702(f)*.) (See *Dawn v. State Personnel Bd.* (1979) 91 C.A.3d 588, 593, 154 C.R. 186 [promotion of woman employee over equally-qualified male employee, to effect affirmative action plan adopted pursuant to *Govt.C. 19702* and *19705*, was not denial of equal protection].)

(e) *Pub.Util.C. 8281* et seq. require each electric, gas, and telephone corporation with gross annual revenues of over \$ 25 million to submit annual plans for increasing the percentage of procurement contracts awarded to women and minority business enterprises.

(f) *Pub.Contr.C. 10115* et seq. establish statewide participation goals for state contracts of at least 15% for minority business enterprises and at least 5% for women business enterprises. (See *Govt.C. 14132(b)* [same goals for Department of Transportation]; *Govt.C. 16850* et seq. [same goals for professional bond services]; 20 *Pacific L. J.* 715.) These statutes were held unconstitutional by a federal Court of Appeals in 1997, and an executive order in 1998 directed cessation of enforcement. (See *Barlow v. Davis* (1999) 72 C.A.4th 1258, 1262, 1267, 85 C.R.2d 752 [holding *Pub.Contr.C. 10115.5*, on monitoring of participation levels, void as inextricably connected to invalid provisions]; *Connerly v. State Personnel Bd.* (2001) 92 C.A.4th 16, 62, 112 C.R.2d 5, *infra*, §967 [disagreeing with *Barlow v. Davis*; because reporting requirement in *Pub.Contr.C. 10115.5* may be severed mechanically, grammatically, and functionally

from invalid portions of Act, they are valid and enforceable].)

(g) *Pub.Contr.C. 10116* requires yearly reports by departments awarding contracts on the level of participation of business enterprises by race, ethnicity, and gender of owner in contracts concerning construction, professional services, or purchases of equipment, materials, and supplies. The report also must disclose participation in contracts of less than \$ 25,000. However, these departments and contractors are prohibited from using this data to discriminate or provide preferences.

(2) *Effect of Proposition 209*. Although Proposition 209 (see *infra*, §967) prohibits affirmative action by public entities, "this prohibition does not prevent governmental agencies from engaging in inclusive public sector outreach and recruitment programs" as a part of general recruitment, including "focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions of a public sector employer." (*Govt.C. 11139.6*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

(e) *Pub.Util.C. 8283*, as amended in 2008, also requires water corporations with gross annual revenue of over \$ 25 million to submit annual plans. Electrical, gas, water, and telephone corporations that are exempt from submitting annual plans are encouraged to adopt voluntary plans to increase women, minority, and disabled veteran business enterprise procurement.(g) *Pub.Contr.C. 10116* was repealed by its own terms, effective January 1, 2007.



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1. In General.

c. Proposition 209: Affirmative Action Prohibited.

8 Witkin Sum. Cal. Law Const Law § 967

[§ 967] Proposition 209: Affirmative Action Prohibited.

(1) *Discrimination and Preferential Treatment Are Prohibited.* Proposition 209, an initiative measure adopted at the November 1996 election, added Cal. Const., Art. I, §31, prohibiting affirmative action by public entities. The measure provides: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (Cal. Const., Art. I, §31(a); see Cal. Const., Art. I, §31(f) ["state" includes cities, counties, universities, community college and school districts, and other political subdivisions and governmental instrumentalities].)

For purposes of Cal. Const., Art. I, §31(a), Govt.C. 8315, added in 2003, uses the definition of "racial discrimination" stated in the International Convention on the Elimination of All Forms of Racial Discrimination: "[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (Govt.C. 8315(b).)

(2) *Authorized Actions.* The measure does not prohibit: (a) bona fide qualifications based on sex that are reasonably necessary (Cal. Const., Art. I, §31(c)); (b) actions that must be taken to establish or maintain eligibility and avoid loss of funds for federal programs (Cal. Const., Art. I, §31(e)). The measure also does not invalidate court orders or consent decrees in force on the effective date of the section. (Cal. Const., Art. I, §31(d).) (See *C&C Const. v. Sacramento Mun. Util. Dist.* (2004) 122 C.A.4th 284, 298, 18 C.R.3d 715 [to discriminate on basis of loss of federal funds, government agency "must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize" discrimination]; 44 *Santa Clara L. Rev.* 457 [federal funding exception].)

(3) *Remedies.* Remedies available for violation of the section must be the same, regardless of the injured party's race, sex, etc., as are otherwise available for violations of California antidiscrimination laws. (Cal. Const., Art. I, §31(g); see 33 *Southwestern U. L. Rev.* 521 [right to damages under Proposition 209].)

In *Kidd v. California* (1998) 62 C.A.4th 386, 72 C.R.2d 758, plaintiff civil service applicants were denied employment under a certification program that allowed the use of race and sex as factors in hiring. *Held*, they were

entitled to equitable relief for the violation of their constitutional and statutory rights. However, plaintiffs' request that those persons hired under the certification program be dismissed was denied. (62 C.A.4th 410.) The beneficiaries of the certification program did not cause the civil service to discriminatorily hire them, and it would be inequitable to penalize them by ousting them from their positions. (62 C.A.4th 411.)

(4) *Measure Is Self-Executing.* The section is self-executing. If any part is found to be in conflict with the federal Constitution or law, the section must be implemented to the maximum extent permissible. Any provision held invalid is severable from the remainder of the section. (Cal. Const., Art. I, §31(h).)

(5) *Applications.* In *Hi-Voltage Wire Works v. San Jose* (2000) 24 C.4th 537, 101 C.R.2d 653, 12 P.3d 1068, a city program requiring contractors bidding on city projects to notify and use minority (MBE) and women (WBE) subcontractors or to document their efforts in attempting to hire these subcontractors, was held to violate Proposition 209.

(a) Unlike the Equal Protection Clause, Proposition 209 expressly prohibits discrimination and preferential treatment. "Its literal language admits no 'compelling state interest' exception" and there is nothing to suggest that the voters intended to include one. (24 C.4th 567.)

(b) "Satisfying the participation option discriminates against non-MBE's/WBE's on the basis of race and sex in the operation of public contracting to the extent the prime contractor utilizes sufficient MBE/WBE subcontractors to meet the city's evidentiary presumption. Satisfying the outreach option grants preferential treatment because prime contractors must notify, solicit bids from, and negotiate with MBE's and WBE's, but may exclude non-MBE's/WBE's. If a contractor fails to satisfy either option, the city discriminates on the basis of race and sex by rejecting its bid out of hand even, as in this case, when that bid is the lowest otherwise responsive submission." (24 C.4th 564.) "This result is precisely what the voters were told Proposition 209 would prohibit." (24 C.4th 564.)

(c) However, not all outreach programs necessarily violate the Proposition. "Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." (24 C.4th 565.)

One justice wrote a separate concurring opinion (24 C.4th 570), one justice concurred in the judgment without concurring in the other opinions (24 C.4th 575), and one justice wrote a lengthy concurring and dissenting opinion (24 C.4th 576). (See 74 So. Cal. L. Rev. 913 [Hi-Voltage].)

Proposition 209 overlaps, but is not synonymous with, equal protection. Under equal protection principles, actions that meet the rigid strict scrutiny test are constitutionally permissible. However, Proposition 209 "prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny." Thus, "[t]o the extent the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action." (*Connerly v. State Personnel Bd.* (2001) 92 C.A.4th 16, 31, 42, 112 C.R.2d 5 [for purposes of equal protection analysis, gender is not "suspect" classification under federal law, but it is under California law]; see *Crawford v. Huntington Beach Union High School Dist.* (2002) 98 C.A.4th 1275, 1279, 1283, 121 C.R.2d 96 [following *Hi-Voltage* and *Connerly*; school district's attempts to keep racial balance in one high school by limiting transfers in and out to swapping positions with same race students in other high schools violated Proposition 209].)

(6) *Distinction: Outreach Programs.* Although Proposition 209 prohibits affirmative action by public entities, government agencies must engage in public sector and outreach programs to recruit the economically disadvantaged, and to minorities and women if they are underrepresented in entry level positions. (*Govt.C. 11139.6*.)

(7) *Commentary and Practice Works.* Commentary on Proposition 209 has been extensive. (See 111 Harv. L. Rev. 2081 [constitutionality of Proposition 209]; 113 Harv. L. Rev. 1449 [The Relationship Between Equality and Access in Law School Admissions]; 27 Golden Gate L. Rev. 287 [symposium on race relations: affirmative action]; 23 Hastings

Const. L. Q. 999 [impact of proposed California Civil Rights Initiative]; 23 *Hastings Const. L. Q.* 1019 [Equal Protection, Unequal Political Burdens, and the CCRI]; 23 *Hastings Const. L. Q.* 1135 [California Civil Rights Initiative]; 23 *Hastings Const. L. Q.* 1153 [debunking myth that subdivision (c) of the CCRI lessens standard of judicial review of sex classifications in California]; 24 *Hastings Const. L. Q.* 969 [Wood: Does decisional law grant fewer political rights to whites under Fourteenth Amendment]; 24 *Hastings Const. L. Q.* 1001 [response to Wood article]; 30 *Loyola L.A. L. Rev.* 1447 [Proposition 209: temporary diversion on road to racial disaster]; 35 *San Diego L. Rev.* 689 [Proposition 209]; 38 *San Diego L. Rev.* 661 [Proposition 209 and School Desegregation Programs in California]; 38 *Santa Clara L. Rev.* 141 [A Progressive Reply to the ACLU on Proposition 209]; 38 *Santa Clara L. Rev.* 235 [California civil rights initiative and future of affirmative action]; 39 *Santa Clara L. Rev.* 1153 ["conservative" response to "progressive" critique of ACLU on Proposition 209]; 27 *Southwestern U. L. Rev.* 1 [Proposition 209 and evolution of affirmative action]; 44 *U.C.L.A. L. Rev.* 1335 [interpretive guide to California Civil Rights Initiative]; 24 *Western State L. Rev.* 1 [legal implications of Proposition 209]; 2 *Cal. Civil Practice* (2003 ed.), Civil Rights Litigation, §9:1 et seq. [text and form].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Authorized Actions.* See *Hernandez v. Board of Education of Stockton Unified School Dist.* (2004) 126 C.A.4th 1161, 1178, 25 C.R.3d 1 [favorable funding during transition period of magnet schools that were established under desegregation order but that were no longer racially imbalanced did not violate Cal. Const., Art. I, §31; selection of one racially balanced school over another does not constitute preference of one or discrimination against other based on race].(7) *Commentary and Practice Works.* See 96 *Cal. L. Rev.* 1139 [Symposium on affirmative action]; 27 *California Lawyer* 31 (October 2007) [Redistributing California's Schoolchildren].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
XI. EQUAL PROTECTION OF THE LAWS
F. Affirmative Action Programs.
2. Programs Directed at Discrimination in Education.
a. Bakke Case: California Decision.

8 Witkin Sum. Cal. Law Const Law § 968

[§ 968] Bakke Case: California Decision.

In *Bakke v. Regents of Univ. of Calif.* (1976) 18 C.3d 34, 132 C.R. 680, 553 P.2d 1152, a program saving 16 out of 100 available places for admission to the University of California at Davis medical school for disadvantaged students was held unconstitutional. Plaintiff, a Caucasian, complained that he was qualified, but that he was denied admission because he is white, that all students admitted under the special program were members of racial minorities, and that the use of separate standards resulted in the acceptance of minority applicants less qualified than nonminority applicants, thereby denying them equal protection under the Fourteenth Amendment. The University cross-complained, seeking a determination that the special admission program was valid. The cross-complaint alleged that minority status was only one factor in the selection process, and that the purposes of the special program were to promote diversity in the student body and the medical profession, and to expand medical education opportunities to persons from economically or educationally disadvantaged backgrounds.

The trial judge, ruling on pleadings, a deposition, a declaration, and interrogatories, found that (1) the program discriminated against plaintiff because of his race, and that he was entitled to have his application evaluated without regard to race; and (2) that he was not entitled to an order for admission because, although qualified, he would not have been selected even if no special program existed. *Held*, affirmed as to invalidity of the program, reversed for determination of whether he would have been selected.

(a) *Strict scrutiny standard applies.* Where a racial classification is involved, (1) the purpose of the classification must serve a compelling state interest, and (2) it must be demonstrated that there are no reasonable ways to achieve the state's goals that impose a lesser limitation on the rights of the disadvantaged group. (18 C.3d 49; see *supra*, §704.) The Equal Protection Clause applies to "any person," and the rights are guaranteed to the individual. (18 C.3d 51, and footnote 17.) Thus, the University's contention that the strict standard applies only to discrimination against a minority is unsound. (18 C.3d 50.)

(b) *Application of standard.* The justifications for the program asserted by the University are insufficient:

(1) *Compelling state interest:* The two major aims--to integrate the medical school and the profession, and to increase the number of doctors willing to serve the minority community--may be assumed, arguendo, to meet the

standards. But the additional assertion that black physicians would have greater rapport with black patients, and more interest in treating diseases especially prevalent among them, is unacceptable. "The record contains no evidence to justify the parochialism implicit in the latter assertion; and as to the former, we cite as eloquent refutation to racial exclusivity the comment of Justice Douglas in his dissenting opinion in *De Funis*: 'The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans.' " (18 C.3d 53.)

(2) *Necessity of program to achieve goals*: (a) The University is not required to afford determinative weight in admissions to quantitative factors of grade point averages and test scores; it may adopt flexible admission standards, taking into consideration character and matters relating to the needs of the profession and society, provided that it does not do so in a racially discriminatory manner. (18 C.3d 54.) (b) It may increase the number of places available in the medical schools, by allowing additional enrollments in existing schools or by expanding the schools. (18 C.3d 55.) (c) It may employ more directly effective methods to induce doctors to assist in meeting the minority community's medical needs; e.g., academic and clinical courses on those needs and emphasis on the training of general practitioners to serve them. (18 C.3d 57.)

(c) *Absence of past discrimination*. Employment cases under the Civil Rights Act cited by the University to support the validity of a preference to a racial majority all involved a showing of past discrimination, making preferential treatment necessary to grant the opportunity for equality. "Absent a finding of past discrimination--and thus the need for remedial measures to compensate minorities for the prior discriminatory practices of the employer--the federal courts, with one exception, have held that the preferential treatment of minorities in employment is invalid on the ground that it deprives a member of the majority of a benefit because of his race." (18 C.3d 57.) Here, the record contains nothing to indicate that the University has discriminated against minority applicants in the past, and neither party has contended that it has. (18 C.3d 59.)

(d) *Conclusion*. The court noted the persuasive arguments for preferential treatment to overcome the effect of more than a century of unequal treatment, but stressed the stronger policy reasons against preferential admissions based on race: "The divisive effect of such preferences needs no explication and raises serious doubts whether the advantages obtained by the few preferred are worth the inevitable cost to racial harmony. The overemphasis upon race as a criterion will undoubtedly be counterproductive: rewards and penalties, achievements and failures, are likely to be considered in a racial context through the school years and beyond. Pragmatic problems are certain to arise in identifying groups which should be preferred or in specifying their numbers, and preferences once established will be difficult to alter or abolish; human nature suggests a preferred minority will be no more willing than others to relinquish an advantage once it is bestowed. Perhaps most important, the principle that the Constitution sanctions racial discrimination against a race--any race--is a dangerous concept fraught with potential for misuse in situations which involve far less laudable objectives than are manifest in the present case." (18 C.3d 61.)

One justice wrote a lengthy dissent, concluding: "It is anomalous that the Fourteenth Amendment that served as the basis for the requirement that elementary and secondary schools could be *compelled* to integrate, should now be turned around to *forbid* graduate schools from voluntarily seeking that very objective." (18 C.3d 67, 92.) (See 65 Cal. L. Rev. 506; 17 Santa Clara L. Rev. 271 [Symposium on *Bakke*]; 10 Loyola L.A. L. Rev. 648; 3 Hastings Const. L. Q. 879, 891; 13 Cal. Western L. Rev. 588; 9 Southwestern U. L. Rev. 571, 583, 597.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

Witkin Summary of California Law
XI. EQUAL PROTECTION OF THE LAWS
F. Affirmative Action Programs.
2. Programs Directed at Discrimination in Education.
b. Bakke Case: United States Supreme Court Decision.

8 Witkin Sum. Cal. Law Const Law § 969

[§ 969] Bakke Case: United States Supreme Court Decision.

In *Regents of Univ. of Calif. v. Bakke* (1978) 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, the California decision (supra, §968) was affirmed in part and reversed in part. The several opinions differ in their views on the principles to be applied, and are separately briefed below. However, the first (Powell) opinion states the effect of the appellate *judgment* as follows: One part of the California judgment, that the special admissions program is unlawful and that Bakke must be admitted to the Medical School, is affirmed (Powell, Burger, Stewart, Rehnquist, Stevens). The other part of the California judgment, enjoining the Regents from according any consideration to race, is reversed (Powell, Brennan, White, Marshall, Blackmun).

A. *The Powell Opinion.* (98 S.Ct. 2738, 57 L.Ed.2d 758.)

(1) *Title VI, §601, of the Civil Rights Act of 1964.*

(a) Whether a right of action for private parties exists under Title VI is uncertain; the Title contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, which do. But the question was not argued in the courts below, and is not resolved here; nor is the contention that private plaintiffs under Title VI must exhaust administrative remedies passed upon. For purposes of this case, it is assumed that plaintiff has a right of action. (98 S.Ct. 2745, 57 L.Ed.2d 767.)

(b) Section 601 (42 U.S.C., §2000d; supra, §852), like the Equal Protection Clause, is "majestic in its sweep." "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The legislative history reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution; and supporters of Title VI repeatedly declared that it enacted constitutional principles, and refused to precisely define the term "discrimination." Thus, the statute incorporates a constitutional standard, and "must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." (98 S.Ct. 2747, 57 L.Ed.2d 769.)

(2) *Strict scrutiny of racial classification.*

(a) The special admissions program, in defendant's view, is a "goal" of minority representation; in plaintiff's view, it is a racial quota. But the semantic distinction is beside the point: "the special admissions program is undeniably a classification based on race and ethnic background," whether described as a quota or a goal. (98 S.Ct. 2748, 57 L.Ed.2d 770.)

(b) The Fourteenth Amendment extends to persons, and cannot have one meaning when applied to one individual and something else when applied to a person of another color. Defendant's argument that strict scrutiny is not required because white males are not a minority requiring extraordinary protection is unsupported by past decisions. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." (98 S.Ct. 2749, 57 L.Ed.2d 771.)

(c) The Equal Protection Clause was relegated to decades of relative desuetude while the Due Process Clause flourished as a cornerstone in the court's defense of property and contract. Only as the era of substantive due process came to a close did the Equal Protection Clause begin to attain vitality. By this time it was no longer possible to peg its guarantees to the struggle for equality of one racial minority because the United States had become a nation of minorities. Landmark decisions arose in response to discrimination against Blacks, but the results did not depend on Caucasian discrimination against Blacks; and they do not support the theory that discrimination against Caucasians can be "benign." "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." (98 S.Ct. 2751, 57 L.Ed.2d 774.)

(d) There are serious problems of justice connected with the idea of preference: (1) It may not always be clear that it is in fact benign; individual members of particular groups may have burdens imposed on them to advance the group's general interest. (2) The programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection. (3) There is inequity in forcing innocent persons like plaintiff to bear the burdens of redressing grievances not of his making. (98 S.Ct. 2753, 57 L.Ed.2d 776.) By hitching the meaning of the Equal Protection Clause to these transitory considerations, judicial scrutiny of racial and ethnic classification might vary with the ebb and flow of political forces. (98 S.Ct. 2753, 57 L.Ed.2d 776.)

(e) "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently." (98 S.Ct. 2753, 57 L.Ed.2d 777.)

(f) Cases in which preferential classifications were not subjected to exacting scrutiny are mainly in three areas: school desegregation, employment discrimination, and sex discrimination. All are distinguishable: (1) School desegregation cases involved remedies for clearly determined constitutional violations; here, there were none. (2) Employment discrimination cases were based on determination of past discrimination by the industries affected, and remedies were fashioned to rectify it. (3) Gender-based classifications have never been viewed as inherently suspect or as comparable to racial or ethnic classifications. (98 S.Ct. 2754, 2755, 57 L.Ed.2d 778.)

(g) *Lau v. Nichols* (1974) 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1, and *United Jewish Organizations of Williamsburgh v. Carey* (1977) 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229, are also distinguishable. There has been no determination by the Legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts; and the special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals totally foreclosed from competition for the 16 special admissions seats. (98 S.Ct. 2756, 57 L.Ed.2d 780.)

(3) *State purposes are insufficient to support use of suspect classification.*

(a) The state has a substantial interest in eliminating the disabling effects of identified discrimination, as in the school cases. But here there are no judicial, legislative, or administrative findings of constitutional or statutory

violations. Hence, the purpose of helping certain groups whom the faculty perceived as victims of societal discrimination does not justify a classification that imposes disadvantages on innocent persons like plaintiff. "To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." (98 S.Ct. 2759, 57 L.Ed.2d 784.)

(b) Another purpose--improving the delivery of health care services to communities currently underserved--has no support in the record, as the California opinion pointed out; i.e., there was no evidence that the special admissions program was either needed or geared to promote that objective. (98 S.Ct. 2759, 57 L.Ed.2d 784.)

(c) The goal of attainment of a diverse student body is constitutionally permissible; but ethnic diversity is only one element in the range of factors a university may consider in attaining the goal of a heterogeneous student body, and constitutional limitations protecting individual rights may not be disregarded. Thus, though the interest in diversity is compelling, the question remains whether the racial classification is necessary to promote this interest. (98 S.Ct. 2759, 57 L.Ed.2d 785.)

(d) The reservation of a specified number of seats for individuals from the preferred ethnic groups would contribute to ethnic diversity, but the argument that it is the only effective means of serving the interests of diversity is unsound. Racial or ethnic diversity is only one kind, and the special admissions program based solely on these would hinder rather than attain genuine diversity. (98 S.Ct. 2761, 57 L.Ed.2d 786.) Nor would the interest in genuine diversity be served by expanding this two-track system into a multitrack program with a prescribed number of seats for each identifiable category of applicants. The experience of other university programs, e.g., Harvard, shows that assignment of a fixed number of places to a minority group is not a necessary means toward the end. Race or ethnic background may be deemed a "plus" in a particular applicant's file but will not be decisive; other qualities would be considered, and each applicant would be considered as an individual. (98 S.Ct. 2762, 57 L.Ed.2d 788.)

(e) The suggestion that a program considering race as only one factor is simply a subtle and more sophisticated means of according racial preference is not persuasive. The Davis program has a facial intent to discriminate; no such facial infirmity exists in the other kind of program. "And a Court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system." (98 S.Ct. 2763, 57 L.Ed.2d 789.)

(4) *Conclusion.* (a) The state has failed to sustain the burden of showing that the challenged classification is necessary to support a substantial state interest; hence, the California court's judgment holding the program invalid is affirmed. (b) In enjoining defendant from ever considering an applicant's race, the court "failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." Hence, that part of the judgment is reversed. (c) The Regents have conceded that it cannot be proved that plaintiff would not have been admitted anyway; hence, he is entitled to an injunction directing his admission, and that part of the judgment is affirmed. (98 S.Ct. 2764, 57 L.Ed.2d 790.)

B. The Brennan Opinion, with White, Marshall, and Blackmun, concurring and dissenting. (98 S.Ct. 2766, 57 L.Ed.2d 792.)

(1) No single opinion speaks for the court, but the central meaning of the opinions is this: "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." (98 S.Ct. 2766, 57 L.Ed.2d 793.)

(2) Burger, Stewart, Rehnquist, and Stevens conclude that Title VI prohibits the Davis type program, and would hold that plaintiff's rights were violated on that statutory theory alone. Powell reaches the same result on the Constitution. We agree with Powell that, as applied to this case, Title VI goes no further in prohibiting use of race than

the Equal Protection Clause. Powell agrees with us that some uses of race in university admissions are permissible; hence, "he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future." (98 S.Ct. 2766, 2767, 57 L.Ed.2d 793.)

(3) The legislative history of Title VI, the regulations promulgated under it, and decisions, show the court's construction of remedial statutes to support the objective of eliminating discrimination. (98 S.Ct. 2781, 57 L.Ed.2d 807.)

(4) Racial classifications are not per se violative of the Equal Protection Clause; but, because of the risk that ostensibly benign purposes can be misused, strict scrutiny is appropriate, and an important and articulated purpose must be shown. (98 S.Ct. 2782, 57 L.Ed.2d 813.) Defendant's articulated purpose is sufficiently important to justify the use of race-conscious admissions programs "where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school." (98 S.Ct. 2785, 57 L.Ed.2d 816.) The requirement of a judicial determination of a constitutional or statutory violation as a predicate would be self-defeating--undermining efforts to achieve voluntary compliance. (98 S.Ct. 2786, 57 L.Ed.2d 818.) Defendant's program meets the test stated above. (98 S.Ct. 2789, 57 L.Ed.2d 823.) The Harvard program openly and successfully employs a racial criterion; it may be more acceptable to the public than defendant's quota, but there is no basis for preferring a particular preference program. (98 S.Ct. 2794, 57 L.Ed.2d 827.)

C. *The White Opinion.* (98 S.Ct. 2794, 57 L.Ed.2d 827.) He is unwilling merely to assume that Title VI provides for a private cause of action: four justices say yes, four assume it for the case; he agrees with the position of Brennan and the others that there is such a private cause of action. (98 S.Ct. 2798, 57 L.Ed.2d 832.)

D. *The Marshall Opinion.* (98 S.Ct. 2798, 57 L.Ed.2d 832.) Defendant's program is constitutional. Nothing in the history or prior cases justifies the conclusion that the University may not remedy cumulative effects of society's discrimination. (98 S.Ct. 2803, 57 L.Ed.2d 837.) We have come full circle. After the Civil War, the government started several "affirmative action" programs, and the court in *Civil Rights Cases* (1883) 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, and *Plessy v. Ferguson* (1896) 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, destroyed the movement toward complete equality. For a century, there was inaction; then *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, supra, §750, and the Civil Rights Acts were followed by numerous affirmative action programs. Now the court steps in to stop them. (98 S.Ct. 2806, 57 L.Ed.2d 841.)

E. *The Blackmun Opinion.* (98 S.Ct. 2806, 57 L.Ed.2d 841.) (1) If affirmative action conflicts with idealistic equality, that tension is part of the Fourteenth Amendment's very nature. (98 S.Ct. 2807, 57 L.Ed.2d 843.) (2) Government preference is not a stranger to our legal life: we see it in veterans' preferences, aid to the handicapped, progressive income tax, and Indian programs. (98 S.Ct. 2808, 57 L.Ed.2d 844.) (3) It would be impossible to arrange an affirmative action program in a racially neutral way and have it be successful; "[t]o get beyond racism, we must first take account of race." (98 S.Ct. 2808, 57 L.Ed.2d 844.) (4) It is a Constitution we are expounding, and the same principle that governed *McCulloch v. Maryland* (1819) 4 Wheat. 316, 4 L.Ed. 579, infra, §1293, should govern *Bakke*. (98 S.Ct. 2808, 57 L.Ed.2d 845.)

F. *The Stevens Opinion, with Burger, Stewart and Rehnquist.* (98 S.Ct. 2809, 57 L.Ed.2d 845.) (1) Only if the Regents should prevail on the statutory issue would it be necessary to decide whether the program violated the Constitution. (98 S.Ct. 2811, 57 L.Ed.2d 847.) (2) The program violated Title VI in excluding plaintiff by reason of his race. (98 S.Ct. 2815, 57 L.Ed.2d 853.) Accordingly, he concurs in the judgment so far as it affirms the California court; "[t]o the extent that it purports to do anything else, I respectfully dissent." (98 S.Ct. 2815, 57 L.Ed.2d 853.) (See 92 Harv. L. Rev. 131; 67 Cal. L. Rev. 1 et seq. [Symposium--entire issue]; 15 Cal. Western L. Rev. 179; 29 Hastings L. J. 1021; 6 San Fernando Valley L. Rev. 75; 10 Southwestern L. Rev. 617; 11 U.C. Davis L. Rev. 1; 36 U.C. Davis L. Rev. 505 [Affirmative Action in Higher Education: Federal Circuit Court Split Over *Bakke*'s Diversity Rationale].)

SUPPLEMENT: [This section is current through the latest supplement]
See 32 Hastings Const. L. Q. 847 [*Bakke*].



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2. Programs Directed at Discrimination in Education.
c. Gratz and Grutter Cases.

8 *Witkin Sum. Cal. Law Const Law* § 970

[§ 970] Gratz and Grutter Cases.

In *Gratz v. Bollinger* (2003) 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, two Caucasian Michigan residents filed a class action claiming that defendant University of Michigan's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C., §2000d et seq.), and 42 U.S.C., §1981. Plaintiffs' applications to the University were rejected even though underrepresented minority applicants with plaintiffs' qualifications would have been admitted. The district court held that admissions guidelines used by defendant from 1995 through 1998 essentially established a quota that "ran afoul of Justice Powell's opinion" in *Regents of Univ. of Calif. v. Bakke* (1978) 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, supra, §969, but that guidelines used since 1999, based on an accumulation of points from a variety of factors in a student's record, did not use rigid quotas and were narrowly tailored to achieve defendant's "interest in the educational benefits that flow from a racially and ethnically diverse student body." (123 S.Ct. 2421, 156 L.Ed.2d 274.) The Supreme Court granted certiorari before the Court of Appeals rendered a judgment in order to address the constitutionality of using race as a consideration in university admissions, in conjunction with hearing *Grutter v. Bollinger* (2003) 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (infra, this section), involving law school admissions. *Held*, the current guidelines are unconstitutional.

(a) *Strict scrutiny*. As set forth in *Grutter*, a university's desire for a diverse student body may constitute a sufficiently compelling interest to employ racial preferences. (123 S.Ct. 2426, 156 L.Ed.2d 280.) However, racial classifications are subject to strict scrutiny. Thus, defendant must demonstrate that its policy is narrowly tailored to further compelling governmental interests. Defendant's policy of automatically distributing one-fifth of the points needed to guarantee admission to every single "underrepresented minority" applicant solely because of race "is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program." (123 S.Ct. 2427, 156 L.Ed.2d 281.) Justice Powell's opinion in *Bakke* "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. ... Instead, ... each characteristic of a particular application was to be considered in assessing the applicant's entire application." (123 S.Ct. 2428, 156 L.Ed.2d 282.)

(b) *Effect of difficulty of implementation*. The fact that "implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise

problematic system." (123 S.Ct. 2430, 156 L.Ed.2d 284.)

(c) *Effect of constitutional violation.* Discrimination that violates the Equal Protection Clause of the Fourteenth Amendment by an institution that accepts federal funds also constitutes a violation of Title VI. Likewise, 42 U.S.C., §1981 proscribes discrimination "in the making or enforcement of contracts against, or in favor of, race," and a contract for educational services is a "contract" for purposes of 42 U.S.C., §1981. "Finally, purposeful discrimination that violates the Equal Protection Clause ... will also violate §1981." (123 S.Ct. 2430, 156 L.Ed.2d 285, footnote 23.)

Three justices concurred in three opinions. (123 S.Ct. 2431, 2433, 156 L.Ed.2d 285, 288.) Three justices dissented in three opinions, in which a fourth justice joined in part. (123 S.Ct. 2434, 2438, 2442, 156 L.Ed.2d 289, 294, 298.) Two dissenting opinions would dismiss for lack of jurisdiction (123 S.Ct. 2434, 2438, 156 L.Ed.2d 289, 294), and one would have affirmed the district court opinion (123 S.Ct. 2442, 156 L.Ed.2d 298).

In *Grutter v. Bollinger*, *supra*, a companion case to *Gratz v. Bollinger*, the question was whether the use of race as a factor in defendant University of Michigan's law school admissions was unlawful. To answer this question, the Court needed to (1) resolve a disagreement between the Courts of Appeals on whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities, and (2) determine whether defendant's selection system satisfied the strict scrutiny requirement of being narrowly tailored to the achievement of that goal. *Held*, defendant's use of race in its admissions process did not violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act (42 U.S.C., §2000d et seq.), or 42 U.S.C., §1981.

(a) *Diversity is compelling interest.* Justice Powell's opinion in the splintered decision in *Bakke*, "has served as the touchstone for constitutional analysis of race-conscious admissions policies." (123 S.Ct. 2336, 156 L.Ed.2d 328.) "Justice Powell approved the university's use of race to further only one interest: 'the attainment of a diverse student body.' " He emphasized the importance of wide exposure "to the ideas and mores" of students from diverse backgrounds, who will contribute to a "robust exchange of ideas." However, racial and ethnic origin is only one element of diversity. (123 S.Ct. 2336, 156 L.Ed.2d 329.) "[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." (123 S.Ct. 2337, 156 L.Ed.2d 330.) Defendant has a compelling interest in attaining a diverse student body. (123 S.Ct. 2339, 156 L.Ed.2d 332.)

(b) *Strict scrutiny requirements.* "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. ... When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." (123 S.Ct. 2338, 156 L.Ed.2d 331.) The inquiry into whether an admissions program is narrowly tailored "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." (123 S.Ct. 2341, 156 L.Ed.2d 335.) A narrowly tailored program calls for individualized consideration, where "race is used in a flexible, nonmechanical way." Thus, the program may not use a quota system. It must consider race or ethnicity only as a "plus," without placing certain racial groups on a separate admissions track or insulating their members from competition for admission. (123 S.Ct. 2342, 156 L.Ed.2d 336.) "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." However, it does "require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." (123 S.Ct. 2344, 156 L.Ed.2d 339.)

(c) *No quota.* Defendant's "goal of attaining a *critical mass* of underrepresented minority students does not transform its program into a quota." As Justice Powell noted in *Bakke*, there will be "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." Here, between 1993 and 2000, the number of underrepresented minority students "in each class varied from 13.5 to 20.1 percent, a range inconsistent with a quota." (123 S.Ct. 2343, 156 L.Ed.2d 337.)

(d) *Individualized consideration.* Defendant "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy ... of automatic acceptance or rejection based on any single 'soft' variable." Unlike the program in *Gratz*, defendant "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." Further, defendant "gives substantial weight to diversity factors besides race." (123 S.Ct. 2343, 156 L.Ed.2d 338.)

(e) *No undue harm to nonminority applicants.* Because defendant "considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants." (123 S.Ct. 2345, 156 L.Ed.2d 340.)

Two justices concurred. (123 S.Ct. 2347, 156 L.Ed.2d 342.) Two justices concurred and dissented, joining in two opinions. (123 S.Ct. 2348, 2350, 156 L.Ed.2d 344, 346.) Four justices dissented in two opinions, asserting that the majority failed to use strict scrutiny in its analysis of the admissions program. (123 S.Ct. 2365, 2370, 156 L.Ed.2d 364, 370.) (See 30 *Hastings Const. L. Q.* 425 [*Gratz and Grutter*]; 31 *Hastings Const. L. Q.* 557, 587 [same]; 77 *So. Cal. L. Rev.* 481 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See 94 *Cal. L. Rev.* 457 [*Grutter*]; 42 *Cal. Western L. Rev.* 1 [impact of *Grutter* on use of race in law school admissions]; 32 *Hastings Const. L. Q.* 847 [*Grutter*]; 56 *Hastings L. J.* 379 [concept of merit in affirmative action debate]; 35 *Pepperdine L. Rev.* 569 [necessity of diversity in legal profession]; 45 *San Diego L. Rev.* 33 [*Grutter*]; 59 *Stanf. L. Rev.* 761 [social science justification for diversity rationale in *Grutter* and *Gratz*]; 38 *U.C. Davis L. Rev.* 545 [perpetuating exclusion of Asian Americans from affirmative action debate: oversight of diversity rationale in *Grutter*]; 52 *U.C.L.A. L. Rev.* 563 [After *Grutter*: Ensuring Diversity in K-12 Schools].



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XI. EQUAL PROTECTION OF THE LAWS
F. Affirmative Action Programs.
2. Programs Directed at Discrimination in Education.
d. Other Decisions.

8 *Witkin Sum. Cal. Law Const Law* § 971

[§ 971] Other Decisions.

In *DeRonde v. Regents of Univ. of Calif.* (1981) 28 C.3d 875, 172 C.R. 677, 625 P.2d 220, the issues raised in *Bakke* (supra, §§968, 969) were again presented in an action by plaintiff, a white male, whose application for admission to the law school at the University of California at Davis, was rejected. The University's admissions procedures treated "ethnic minority status" as a factor but did not employ a quota system or reserve a fixed number of positions for minority applicants. *Held*, the procedures were not in violation of either the federal or California Constitution.

The U.S. Supreme Court decision in *Bakke* (see supra, §969) is controlling; and, "whether based on the Powell reasoning of assuring an academically beneficial diversity among the student body, or on the Brennan rationale of mitigating the effects of historical discrimination, it is abundantly clear that the University's 1975 admissions program would, on its face meet federal constitutional standards as declared by a majority of the justices of the high court." (28 C.3d 886.) A facially valid procedure may in application produce a constitutionally discriminatory result; e.g., where it operates as a cover for the functional equivalent of a quota system. "[W]e emphasize Justice Powell's analysis on the point because the Brennan group presumably would permit even a deliberate and systematic exclusion of white applicants if supported by the requisite showing of past discrimination." (28 C.3d 887.) Here, there is no showing of bad faith or disproportionate impact. (28 C.3d 887, 888.)

The court found no violation of the *California Constitution*. (28 C.3d 890.) However, Cal. Const., Art. I, §31, added by Proposition 209 in 1996, now prohibits affirmative action by public entities (see supra, §967). (See 28 Southwestern U. L. Rev. 1 [consequences of including race as factor in law school admissions].)

In *Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, the Jackson Board of Education in Michigan, because of racial tension in the community, added a provision to the collective bargaining agreement between the board and the teachers union, to protect minority employees against layoffs. Under the provision, there could not be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time. When it appeared that the result would be the layoff of tenured nonminority teachers while minority teachers on probationary status were retained, the board took the position that the layoff provision conflicted with the Michigan Teacher Tenure Act, and kept the tenured teachers. But after legal proceedings in the state court, the board laid off the nonminority teachers, and they sued in the federal district court claiming a denial of equal

protection. The district court and Court of Appeals concluded that although there was no showing of prior discrimination, the board's interest in providing minority role models for minority students was sufficient to justify the racial classification embodied in the layoff provision. *Held*, reversed.

(a) "[B]ecause the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students. ... Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected" in *Brown v. Board of Education of Topeka, Shawnee, Kansas* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, *supra*, §750. (106 S.Ct. 1847, 90 L.Ed.2d 270.)

(b) The Court of Appeals employed a test of "reasonableness" of the means chosen to accomplish the board's race-conscious purposes; but the proper standard is necessity. (106 S.Ct. 1849, 90 L.Ed.2d 272.) Prior cases upholding the remedy under this strict test involved hiring goals, but "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." (106 S.Ct. 1851, 90 L.Ed.2d 274.) "We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes--such as the adoption of hiring goals--are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause." (106 S.Ct. 1852, 90 L.Ed.2d 274.)

Four justices dissented. (See *Bolin v. San Bernardino City Unified School Dist.* (1984) 155 C.A.3d 759, 763, 202 C.R. 416 [school district guideline, setting goal of 29 to 45 percent minority faculty at each school, did not violate rights of transferred Caucasian teacher whose race was only one factor considered]; 101 Harv. L. Rev. 1797 [Wygant]; 112 Harv. L. Rev. 940 [race-conscious admissions programs in public elementary and secondary schools]; 87 Cal. L. Rev. 1299 [reflections on values of affirmative action]; 20 Hastings Const. L. Q. 877 [Bakke and Wygant]; 28 Southwestern U. L. Rev. 1 [consequences of including race as factor in law school admission].)

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XI. EQUAL PROTECTION OF THE LAWS

F. Affirmative Action Programs.

3. Programs Directed at Discrimination in Employment.

a. Programs Created Through Collective Bargaining.

8 *Witkin Sum. Cal. Law Const Law* § 972

[§ 972] Programs Created Through Collective Bargaining.

In *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480, Kaiser Corporation, with a history of racial imbalance in its craft workers, entered into a master collective-bargaining agreement. It contained an affirmative action plan, providing for on-the-job training programs to teach unskilled workers the skills necessary to become craft workers, with openings of 50% reserved for black workers until the percentage of black skilled craft workers approximated the black work force in the area. Plaintiff, a white production worker with more seniority than successful black applicants, applied for admission to the program and was rejected. He brought this class action challenging the legality of the plan. Because the private agreement did not involve state action, there was no violation of the Equal Protection Clause; the challenge was made under Title VII of the Civil Rights Act of 1964, which makes it unlawful to discriminate because of race in the hiring and selection of apprentices for training programs. Chief reliance was placed on *McDonald v. Santa Fe Trail Trans. Co.* (1976) 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493, supra, §871, holding that Title VII forbids discrimination against Whites as well as Blacks. The district court and Court of Appeals held his challenge good; the Supreme Court reversed.

(a) Following the literal language of the statute would bring about a result completely at variance with its purpose, which was to open employment opportunities for Blacks in occupations that had been traditionally closed to them. (99 S.Ct. 2727, 2728, 61 L.Ed.2d 488, 489.) And the legislative history makes it clear that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem. (99 S.Ct. 2728, 61 L.Ed.2d 490.) Hence, the statute's prohibition against racial discrimination "does not condemn all private, voluntary, race-conscious affirmative action plans." (99 S.Ct. 2730, 61 L.Ed.2d 492.)

(b) It is unnecessary to define in detail the line of demarcation between permissible and impermissible affirmative action plans; this one falls on the permissible side of the line because it does not unnecessarily trammel the interests of white employees: (1) It does not require the discharge of white workers and their replacement with black workers. (2) It does not create an absolute bar to the advancement of white employees; half of those trained will be white. (3) It is a temporary measure, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance; i.e., preferential selection will end as soon as the percentage of black skilled craft workers in the plant approximates the percentage of Blacks in the local labor force (here, 39%). (99 S.Ct. 2730, 61 L.Ed.2d 492.)

Two justices joined in a strong dissent: "Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions." (99 S.Ct. 2737, 61 L.Ed.2d 501.) (See 93 Harv. L. Rev. 243 [Weber]; 102 Harv. L. Rev. 658 [Rethinking Weber: The Business Response to Affirmative Action]; 27 Pepperdine L. Rev. 377 [Weber]; 27 U.C.L.A. L. Rev. 1159 [same].)

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b. Programs Mandated by Statute, Ordinance, or Rule.

1. United States Supreme Court Cases.

8 Witkin Sum. Cal. Law Const Law § 973

[§ 973] United States Supreme Court Cases.

(1) *Fullilove Case*. The Public Works Employment Act of 1977 contains a "minority business enterprise" provision, which requires that 10% of federal funds granted for local public works projects be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of specified minority groups (42 U.S.C., §6705(f)(2)). In *Fullilove v. Klutznick* (1980) 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, a 6-3 decision with no majority opinion, the facial constitutional challenge was rejected. The decision thus holds that racial and ethnic criteria may be used to accomplish the objective of remedying present effects of past discrimination. (See 94 Harv. L. Rev. 125.)

(2) *Johnson Case*. In *Johnson v. Transportation Agency, Santa Clara, Calif.* (1987) 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615, defendant Transportation Agency of Santa Clara County, California, promulgated an affirmative action plan for promotions of employees. In selecting a person for the position of road dispatcher, the Agency took into account the sex of the applicants, and promoted a female employee applicant. Plaintiff, a male employee passed over, challenged the procedure as a violation of Title VII (supra, §855). Held, under the criteria in *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480, supra, §972, the plan was valid.

"[T]he Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace." (107 S.Ct. 1457, 94 L.Ed.2d 637.)

(3) *Richmond Case*. In *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, the City Council in Richmond, Virginia, adopted a Minority Business Utilization Plan, requiring prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount to one or more minority business enterprises. These were defined as businesses with at least 51% of minority group members (Blacks, Spanish-speaking persons, Asians, Indians, Eskimos, or Aleuts). There was no geographic limit; an otherwise qualified business from

anywhere in the U.S. could avail itself of the 30% set-aside. Supporters of the plan relied on *Fullilove*; the Court, applying the strict scrutiny test of *Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, supra, §971, concluded that the city had failed to demonstrate a compelling governmental interest and that the 30% set-aside was not narrowly tailored to achieve a remedial purpose.

(a) Appellant city argued that under *Fullilove*, a city council need not make specific findings of discrimination to engage in race-conscious relief. But Congress, unlike a state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. "That Congress may identify and redress the effects of society-wide discrimination does not mean that *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. ... To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under §5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under §1." (109 S.Ct. 719, 102 L.Ed.2d 880.)

(b) "It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. ... Thus, if the city should show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." (109 S.Ct. 720, 102 L.Ed.2d 880.)

(c) "The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking. ... Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." (109 S.Ct. 721, 102 L.Ed.2d 881.)

(d) Because none of the city's evidence points to any identified discrimination in its construction industry, the city failed "to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. ... We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." (109 S.Ct. 727, 102 L.Ed.2d 889.)

(e) "If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion would arise. ... Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. ... In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." (109 S.Ct. 728, 102 L.Ed.2d 892.)

Three justices filed concurring opinions; three justices joined in a dissenting opinion, and two joined in a separate

dissenting opinion. (See 103 Harv. L. Rev. 217; 42 Hastings L. J. 1257; 37 U.S.F. L. Rev. 887.)

(4) *Metro Broadcasting Case*. In *Metro Broadcasting v. Federal Communications Com.* (1990) 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445, the issue was whether certain minority preference policies of the FCC "violate the equal protection component of the Fifth Amendment. The policies in question are (1) a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority 'distress sale' program, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms." *Held*, these policies do not violate equal protection. (110 S.Ct. 3002, 111 L.Ed.2d 455.)

In the lead opinion, in which four justices joined, the Court first pointed out that *Richmond* recognized that Congress may adopt race-conscious classifications to address racial and ethnic discrimination. (110 S.Ct. 3009, 111 L.Ed.2d 463.) The opinion contains a lengthy historical review of the development of the policies, and then states:

"Congress found that 'the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.' ... Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree." (110 S.Ct. 3009, 111 L.Ed.2d 464.)

One justice concurred in a brief opinion, four justices joined in a dissenting opinion, and two of the dissenters joined in a separate dissenting opinion. (See *Shaw v. Reno* (1993) 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, *supra*, §296 [reapportionment statute]; 84 Cal. L. Rev. 875 [*Metro Broadcasting*]; 17 Hastings Const. L. Q. 483 [The Supreme Court and Affirmative Action: Whose Classification Is Suspect?]; 64 So. Cal. L. Rev. 293 [*Metro Broadcasting*]; 38 U.C.L.A. L. Rev. 583 [same].)

(5) *Adarand Constructors Case*. *Adarand Constructors v. Pena* (1995) 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158, involved the use by federal agencies of subcontractor compensation clauses under which general contractors are given financial incentives to hire subcontractors controlled by disadvantaged individuals, and race-based presumptions are used in identifying these individuals. The District Court and the Court of Appeals, applying the "lenient standard" of intermediate scrutiny adopted in *Fullilove*, and further developed in *Metro Broadcasting*, rejected the equal protection challenge of a nondisadvantaged subcontractor. *Held*, reversed. "All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled." (115 S.Ct. 2113, 132 L.Ed.2d 182.) (See 109 Harv. L. Rev. 151; 84 Cal. L. Rev. 875; 70 So. Cal. L. Rev. 591; 26 Southwestern U. L. Rev. 1161; 37 U.S.F. L. Rev. 887; 27 West L.A. L. Rev. 525.)

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b. Programs Mandated by Statute, Ordinance, or Rule.

2. California Cases.

8 Witkin Sum. Cal. Law Const Law § 974

[§ 974] California Cases.

The following cases were decided prior to the adoption of Cal. Const., Art. I, §31, added by Proposition 209 in 1996, which prohibits affirmative action by public entities (see *supra*, §967):

In *Price v. Civil Service Com.* (1980) 26 C.3d 257, 161 C.R. 475, 604 P.2d 1365, the question was whether a county could voluntarily adopt a race-conscious, affirmative action hiring program of limited duration to alleviate an underrepresentation of minority employees that the entity finds is attributable to its own past discriminatory employment practices. (26 C.3d 261.) The court found no violation of the following:

(a) The Fair Employment Practices Act (former Lab.C. 1410 et seq., now *Govt.C. 12900* et seq., *supra*, §915 et seq.), because although it creates a statewide remedy for victims of discriminatory employment practices, "nothing in the act evidences any intent to preclude employers--public or private--from voluntarily implementing affirmative action plans to overcome the continuing effects of past discrimination." (26 C.3d 270.)

(b) Title VII of the Civil Rights Act, because the program involved here seeks to eliminate established discriminatory practices; it does not contemplate discharge of nonminority employees or create a bar against their hiring; and the remedial orders are temporary. (26 C.3d 275.)

(c) The federal Equal Protection Clause, because "the *principle* that the eradication of past discrimination against minorities may be corrected by affirmative actions of government entities under the Fourteenth Amendment has been upheld by a majority of the Supreme Court in *Bakke* and by the rulings of all of the federal courts of appeals that have addressed the issue." (26 C.3d 284.)

(d) California's equal protection guarantee, because although it provides distinct safeguards, it does not place greater restrictions on bona fide affirmative action programs than those imposed by the *Fourteenth Amendment*. (26 C.3d 284.)

In conclusion, the court found that "affirmative steps are at times necessary to overcome the legacy of the past

degradation of minorities and to bring minorities into full membership in American society. One such instance of that essential affirmative action is the correction of an employer's past discriminatory employment practice by a race-conscious hiring program such as that of the instant case." (26 C.3d 286.) (See *Department of General Services v. Superior Court* (1978) 85 C.A.3d 273, 284, 147 C.R. 422 [recognizing that minority business participation plan may be valid, but remanding for determination of whether there was sufficient finding of prior discrimination justifying adoption of plan].)

In *Hiatt v. Berkeley* (1982) 130 C.A.3d 298, 181 C.R. 661, defendant city's affirmative action program, setting up rigid quotas in hiring and promoting employees based solely on race or sex, was held violative of both the federal and state Constitutions' equal protection guarantees. The plan lacks features that have been deemed significant to a finding of validity in the analysis of other affirmative-action plans: Limited duration, continuing oversight, synthesis of factors such as race and sex with several other factors, *all* of which are to be considered in arriving at the classification, and use of flexible ratios rather than fixed quotas. (130 C.A.3d 319.) (See *Domar Elec. v. Los Angeles* (1995) 41 C.A.4th 810, 825, 827, 48 C.R.2d 822 [distinguishing *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, *supra*, §973; city's outreach program for public contract bidding did not violate equal protection, where it did not establish fixed quotas but instead established goals for participation by businesses owned by minorities and women, to be reached by good faith application of stated criteria].)

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c. Programs Created by Court Order.

8 *Witkin Sum. Cal. Law Const Law* § 975

[§ 975] Programs Created by Court Order.

In *Local 28 of Sheet Metal Workers' Int. Assn. v. Equal Emp. Opportunity Com.* (1986) 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344, defendant union was found guilty of discriminating against nonwhites in recruitment, training, and admission in violation of Title VII of the Civil Rights Act of 1964 (see *supra*, §855 et seq.). The remedy fashioned by the trial judge under §706(g) of the Act (42 U.S.C., §2000e-5(g)) included a 29% nonwhite membership goal, and when the union was judged in contempt, a fine to be placed in a fund designed to increase nonwhite membership. *Held*, these remedies did not violate Title VII or the equal protection component of the Fifth Amendment's Due Process Clause.

(a) Title VII.

(1) The last sentence of §706(g), providing that a union need not admit a person who was denied admission for any reason other than discrimination, does not prohibit a court from ordering affirmative action that might benefit some individuals who were not the actual victims of discrimination. (106 S.Ct. 3035, 92 L.Ed.2d 370.) While this provision confirms that a union may not be ordered to admit an unqualified individual, it does not say that a court may grant relief only to the actual victims of discrimination. (106 S.Ct. 3035, 92 L.Ed.2d 370.) There is nothing supporting a contrary interpretation in the legislative history, because the debate centered around a concern with, and rejection of, the need to adopt racial preferences *merely* because of a racial imbalance, but said nothing about the use of racial preferences as a *remedy* for past discrimination. (106 S.Ct. 3043, 92 L.Ed.2d 380.)

(2) In cases involving longstanding or egregious discrimination, an injunction is often useless. Requiring the employer or union to admit qualified minorities in proportion to their number in the work force may be the only effective way to ensure compliance with *Title VII*. (106 S.Ct. 3036, 92 L.Ed.2d 370.)

(3) Even if an employer or union has ceased to discriminate, its reputation may discourage minorities from seeking employment. In these circumstances, affirmative race-conscious relief, which " 'promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices,' " may be the only effective remedy. (106 S.Ct. 3036, 92 L.Ed.2d 371.)

(4) Although affirmative relief will not be appropriate in many cases, several factors support its use here: (a) the record clearly established both defendant's pervasive and egregious discrimination and the lingering effects of that discrimination (106 S.Ct. 3050, 92 L.Ed.2d 388); (b) the trial judge's flexible application of the membership goal (extensions in the deadline and approval of changes in the size of apprenticeship classes) clearly indicated that it was being used as a means of measuring defendant's compliance with the judge's orders, rather than as a strict racial quota (106 S.Ct. 3051, 92 L.Ed.2d 389); (c) the relief granted was a temporary measure designed to remedy past discrimination, rather than to maintain a previously achieved racial balance (106 S.Ct. 3052, 92 L.Ed.2d 390); (d) the relief did not unnecessarily trammel the rights of white employees, for there were no layoffs, no discrimination against existing union members, and no absolute bar to hiring new white employees (106 S.Ct. 3052, 92 L.Ed.2d 390).

(b) *Equal protection*. It is well established that governmental bodies may adopt racial classifications as a remedy for past discrimination. (106 S.Ct. 3052, 92 L.Ed.2d 390.) The relief ordered is narrowly tailored to achieve the compelling governmental interest in remedying past discrimination. The test is satisfied by the same factors that rendered the relief appropriate under *Title VII*. (106 S.Ct. 3053, 92 L.Ed.2d 391.)

Local No. 93, Int. Assn. of Firefighters, AFL-CIO C.L.C. v. Cleveland (1986) 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405, involved alleged discrimination against nonwhites in a city fire department. The trial judge, after finding that the discrimination was established, approved a consent decree between the city and an organization of minority firefighters requiring that a specified number of promotions be given to nonwhite firefighters. The decree was to be effective for 4 years, during which time the trial judge retained jurisdiction regarding its enforcement and modification. A union representing a majority of the firefighters intervened and challenged the decree, arguing that §706(g) of Title VII prohibited relief to persons who were not actual victims of discrimination and that the statutory language that "[n]o order of the court" may provide this relief extended the limitation to consent decrees. *Held*, the decree was valid; the statute is inapplicable to relief awarded in a consent decree.

(a) *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480, *supra*, §972, held that employers and unions may enter into private agreements that include race-conscious relief that benefits persons who were not actual discrimination victims. (106 S.Ct. 3072, 92 L.Ed.2d 419.) There is no reason to conclude that the relief held appropriate in *Weber* would be rendered inappropriate by Title VII simply because it was incorporated into a consent decree. (106 S.Ct. 3073, 92 L.Ed.2d 421.)

(b) The union argued that a consent decree is an "order of the court" within the meaning of §706(g) and that, therefore, this provision constitutes an independent limitation on what courts, as opposed to private parties, may do. (106 S.Ct. 3073, 92 L.Ed.2d 421.) This position is untenable. The legislative history of §706(g) shows that its enactment was due to a desire to protect the right of employers and unions to engage in voluntary action. Hence, it is readily apparent that consent decrees, whose primary characteristic is voluntariness, are not among the "orders" referred to in §706(g). (106 S.Ct. 3075, 92 L.Ed.2d 423.) The facts that a consent decree looks like a judgment, is modifiable by the trial judge, and is enforceable by a contempt citation do not override the basic fact that the decree is created by the agreement of the parties. (106 S.Ct. 3076, 92 L.Ed.2d 424.)

(c) The union argued that the decree was void because the trial judge would have been powerless, under §706(g), to issue it had the case gone to trial. This contention is also untenable. A trial judge is not necessarily barred from entering a consent decree merely because the relief provided in it is broader than that which he or she could have awarded after a trial. (106 S.Ct. 3077, 92 L.Ed.2d 425.) Of course, the parties may not reach an agreement that violates the statute on which the conflict was based. "However, inasmuch as the limits placed by §706(g) on the remedial authority of a federal court--whatever these may be--are not implicated by voluntary agreements, there is no conflict with or violation of §706(g) when a federal court enters a consent decree that provides such relief." (106 S.Ct. 3078, 92 L.Ed.2d 426.)

(d) The court rejected the contention that the decree was invalid because it was approved without the union's consent; the union was given ample opportunity to participate in the hearings on the matter and the decree imposed no obligations on it. (106 S.Ct. 3080, 92 L.Ed.2d 428.)

United States v. Paradise (1987) 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203, involved a challenge by black plaintiffs of the long-standing practice of the Alabama Department of Public Safety of discrimination in hiring and promotion. Protracted litigation resulted in an interim order of the federal district court requiring one-black-for-one-white promotion of state troopers. The lead opinion concludes: "The remedy imposed here is an effective, temporary and flexible measure. It applies only if qualified blacks are available, only if the Department has an objective need to make promotions, and only if the Department fails to implement a promotion procedure that does not have an adverse impact on blacks. The one-for-one requirement is the product of the considered judgment of the District Court which, with its knowledge of the parties and their resources, properly determined that strong measures were required in light of the Department's long and shameful record of delay and resistance." (107 S.Ct. 1074, 94 L.Ed.2d 232.) (See *Hull v. Cason* (1981) 114 C.A.3d 344, 370, 171 C.R. 14 [order establishing quota for nonwhite firefighters was invalid where none of plaintiffs had been victims of discrimination and, for past decade, defendant had attempted in good faith to recruit minority firefighters].)

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CHAPTER X - Constitutional Law

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XII. POLICE POWER

A. In General.

1. Nature of Police Power.

a. Inherent Power To Regulate.

8 *Witkin Sum. Cal. Law Const Law* § 976

[§ 976] Inherent Power To Regulate.

(1) *Inherent Power*. It has been said that the police power is simply the power of sovereignty or power to govern--the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare. (See *Western Indem. Co. v. Pillsbury* (1915) 170 C. 686, 694, 151 P. 398; *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 510, 78 L.Ed. 940, 948; *Churchill v. Parnell* (1985) 170 C.A.3d 1094, 1098, 216 C.R. 876, quoting the text; *Massingill v. Department of Food & Agriculture* (2002) 102 C.A.4th 498, 504, 125 C.R.2d 561, quoting the text [upholding statute requiring service stations to provide free air and water to customers buying gasoline]; 27 Hastings L. Rev. 511 [observations on evolving police power]; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §313 et seq.)

Congress has the same powers in the District of Columbia. (*Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27, 37.)

(2) *No Alienation or Delegation*. The inherent power cannot be alienated even by express contract. (*Laurel Hill Cemetery v. San Francisco* (1907) 152 C. 464, 475, 93 P. 70.) While the Constitution permits the state to grant police power to specified local subdivisions with respect to local affairs, it cannot delegate the power to private persons or public corporations not specified in the Constitution. (See *infra*, §984; cf. *In re Petersen* (1958) 51 C.2d 177, 183, 184, 331 P.2d 24 [requirement of abutting property owner's consent to exclusive taxi stand was condition precedent to permit, not delegation of power to designate].)

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(1) *Inherent Power*. See *Cotta v. San Francisco* (2007) 157 C.A.4th 1550, 1557, 69 C.R.3d 612, quoting the text.



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A. In General.

1. Nature of Police Power.

b. Paramount Power.

8 *Witkin Sum. Cal. Law Const Law* § 977

[§ 977] Paramount Power.

Private rights of property and contract must yield to the police power. (*Queenside Hills Realty Co. v. Saxl* (1946) 328 U.S. 80, 66 S.Ct. 850, 852, 90 L.Ed. 1096, 1098 ["police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights"]; *Clemons v. Los Angeles* (1950) 36 C.2d 95, 102, 222 P.2d 439 [sale of various types of property has been subject to regulation in innumerable situations]; *Agricultural Lab. Rel. Bd. v. Superior Court (Tulare)* (1976) 16 C.3d 392, 403, 128 C.R. 183, 546 P.2d 687 [all private property is subject to power of government to regulate its use for public welfare]; see *infra*, §1060 et seq.)

Thus, the constitutional prohibition against impairment of the obligation of contract does not prevent this impairment when it is the result of a reasonable exercise of the police power. (*Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 54 S.Ct. 231, 239, 78 L.Ed. 413, 427; *Sutter Butte Canal Co. v. Railroad Com. of Calif.* (1927) 202 C. 179, 184, 259 P. 937; *Bent Bros. v. Campbell* (1929) 101 C.A. 456, 462, 281 P. 717; see *infra*, §1289 et seq.)

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A. In General.

1. Nature of Police Power.

c. Elastic Power.

8 *Witkin Sum. Cal. Law Const Law* § 978

[§ 978] Elastic Power.

The police power is elastic; its scope changes with social and economic progress, and in its exercise the Legislature and the courts continually apply new views of what constitutes legislation for the preservation of the public peace, safety, morals, health, and general welfare. (See *Miller v. Board of Public Works of Los Angeles* (1925) 195 C. 477, 484, 234 P. 381; *Jones v. Los Angeles* (1930) 211 C. 304, 320, 295 P. 14.) "Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." (*Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27, 37.)

"The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. ... Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. ... 'To justify the state in ... interposing its authority in behalf of the public, it must appear--First, that the interests of the public ... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' " (*Goldblatt v. Hempstead* (1962) 369 U.S. 590, 82 S.Ct. 987, 990, 8 L.Ed.2d 130, 134, *infra*, §981.)

Thus, the state is not restricted to traditional forms of regulation of property or business, but may act *affirmatively*, as in slum clearance and redevelopment. (See *Berman v. Parker*, *supra*; *Housing Authority of Los Angeles v. Dockweiler* (1939) 14 C.2d 437, 449, 94 P.2d 794.) And the police power justifies measures to achieve "the political well-being," such as protecting the right of suffrage. (*Day-Brite Lighting v. Missouri* (1952) 342 U.S. 421, 72 S.Ct. 405, 408, 96 L.Ed. 469, 473.)

The scope of the power is necessarily increased in an emergency. Thus, in a housing shortage, state legislation regulating rents and preventing dispossession of tenants was upheld. (*Marcus Brown Holding Co. v. Feldman* (1921) 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; see *Block v. Hirsh* (1921) 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865.) Similarly, the federal power over commerce justified a statute prescribing an 8-hour day and fixing wages for persons employed by interstate railroads, pending investigation by a federal commission, the purpose being to avert a general strike. (*Wilson v. New* (1917) 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755.) (See *Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413; *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940;

16A Am.Jur.2d (1998 ed.), Constitutional Law §323; infra, §§1072, 1289.)

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A. In General.

1. Nature of Police Power.

d. Legislative Judgment.

8 *Witkin Sum. Cal. Law Const Law* § 979

[§ 979] Legislative Judgment.

The modern tendency is to defer to the legislative judgment regarding the existence of evils requiring regulation, and to disregard charges that special interests have procured the enactment of the measure. (See *Daniel v. Family Sec. Life Ins. Co.* (1949) 336 U.S. 220, 69 S.Ct. 550, 552, 93 L.Ed. 632, 636 ["We cannot undertake a search for motive in testing constitutionality"]; *Sandstrom v. California Horse Racing Bd.* (1948) 31 C.2d 401, 407, 189 P.2d 17 [when state regulates matter that is within its police power, "its authority over the subject is plenary and can be reviewed by the courts only to the extent of determining whether the regulation is reasonable"]; *Markus v. Justice's Court* (1953) 117 C.A.2d 391, 393, 255 P.2d 883 [court cannot condemn law merely because it is unreasonable or unnecessarily severe]; *Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 75 S.Ct. 461, 464, 99 L.Ed. 563, 572 [Supreme Court will not use Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought"]; *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 82 S.Ct. 987, 990, 8 L.Ed.2d 130, 134; *Skyline Materials v. Belmont* (1961) 198 C.A.2d 449, 455, 18 C.R. 95; *Hope v. Contractors' State License Bd.* (1964) 228 C.A.2d 414, 417, 39 C.R. 514.)

One of the strongest statements appears in *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27, 37: "We deal ... with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs."

In *Ferguson v. Skrupa* (1963) 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, the statute was concerned with the business of debt adjusting by a contract under which a debtor pays the adjuster periodic sums, and he or she for a consideration undertakes its distribution to specified creditors in accordance with a plan. Some states regulate it (e.g., *Fin.C. 12200* et seq.), others outlaw it. In this case, a Kansas statute prohibited the business except as an incident to the lawful practice of law. A three-judge district court held it unconstitutional as prohibitory or unreasonably regulatory of a "lawful business." *Held*, the statute was valid.

"The doctrine that prevailed in the *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." (83 S.Ct. 1031, 10 L.Ed.2d 97.)

In *Doyle v. Board of Barber Examiners* (1963) 219 C.A.2d 504, 33 C.R. 349, infra, §1080, the court, upholding a statute regulating apprentice barbers, commented on the uncertainty of the constitutional test for regulations in the field of occupational licensing. The requirement must have a "rational connection" with fitness to practice the particular vocation or profession; but "[t]hese verbal formulae, which assume to express judicial criteria of constitutionality, are as loose as they are pliable. What seem to be standards turn out to be only admonitions, reflections of attitude." (219 C.A.2d 510.) "The tide of judicial supervision over regulatory legislation ran high during the first three decades of the century." (219 C.A.2d 511.) California decisions "voiced the notion that regulatory restrictions on private liberty will be balanced against the benefit to the public." (219 C.A.2d 514.) Then the tide turned; and, although our Supreme Court continued to speak in terms of statutory reasonableness, its decisions demonstrated a high degree of judicial self-restraint. Thus the old approach is gone. "If the judicial arm stops swinging upon postulation of any rationally acceptable hypothesis for the statute, without regard to the real facts which motivated its enactment, there is little elbow room for balancing private burdens against public benefits. The process stops as soon as any public benefit is hypothesized." (219 C.A.2d 515.)

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XII. POLICE POWER

A. In General.

2. Other Powers Distinguished.

8 Witkin Sum. Cal. Law Const Law § 980

[§ 980] Other Powers Distinguished.

(1) *Eminent Domain*. This is the power to take property for public use on payment of just compensation. (See *infra*, §1112.) Under the police power, property is not taken for use by the public; its use by private persons is regulated or prohibited where necessary for the public welfare. (See *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 C. 640, 662, 137 P. 1119; *O'Hara v. Los Angeles County Flood Control Dist.* (1941) 19 C.2d 61, 63, 119 P.2d 23; *House v. Los Angeles County Flood Control Dist.* (1944) 25 C.2d 384, 388, 153 P.2d 950; 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §318.)

In *Hunter v. Adams* (1960) 180 C.A.2d 511, 4 C.R. 776, a municipal council resolution froze building permits during a period in which a comprehensive redevelopment plan was being devised. *Held*, this was an exercise of the police power, and a property owner who had incurred expenses in preparing plans for his own structure was not deprived of property within eminent domain principles. (180 C.A.2d 518.)

Because of the element of compensation, it has been suggested that interference with private property under eminent domain might be sanctioned in cases where an exercise of police power would be deemed unreasonable and not justified. (See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322; *Jones v. Los Angeles* (1930) 211 C. 304, 320, 295 P. 14.) (For discussion of theory of *Pennsylvania Coal*, see *Penn Cen. Trans. Co. v. New York* (1978) 438 U.S. 104, 98 S.Ct. 2646, 2665, 57 L.Ed.2d 631, 656, *infra*, §981; on regulatory taking of property, see *infra*, §1153 et seq.)

(2) *Federal Government's Implied Powers*. It was long contended that the federal government has no police power, as such, except in the District of Columbia. As stated in the Tenth Amendment, it has only those powers that are granted to it. But under the Necessary and Proper Clause (U.S. Const., Art. I, §8; *infra*, §1293), the federal government exercises *implied powers* incidental to the express powers, and the nature of legislation enacted under these powers is frequently regulatory in character and therefore similar to legislation enacted by a state under its police power. (On federal government's police power in District of Columbia, see *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27, 37.)

Hence, it is recognized that "in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations." (*Kentucky Whip & Collar Co. v. Illinois Cen. R. Co.* (1937) 299

U.S. 334, 57 S.Ct. 277, 280, 81 L.Ed. 270, 274, infra, §1320; see United States v. Darby (1941) 312 U.S. 100, 61 S.Ct. 451, 462, 85 L.Ed. 609, 622, infra, §1321 [Tenth Amendment is not limitation; federal power over interstate commerce is same as that of state over intrastate commerce]; Wickard v. Filburn (1942) 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, infra, §1322; 16A Am.Jur.2d (1998 ed.), Constitutional Law §328.)

(3) *Taxing Power.* The relatively unlimited power to select property to be taxed for revenue (see 9 *Summary* (10th), *Taxation*, §41) furnishes the chief distinction between the two powers, because an exercise of the police power must meet stricter tests of due process and equal protection (*infra*, §983). But a tax may also be used for regulatory purposes, i.e., as an implement of the police power. (See *infra*, §982; 16A *Am.Jur.2d* (1998 ed.), *Constitutional Law* §318.)

In *Cupertino v. San Jose* (1995) 33 C.A.4th 1671, 40 C.R.2d 171, the regional welfare doctrine of *Associated Home Builders of the Greater Eastbay v. Livermore* (1976) 18 C.3d 582, 135 C.R. 41, 557 P.2d 473, *infra*, §1031, used in evaluating the validity of land use regulations, was held not applicable as a limitation on a city's power to impose a tax. Defendant city passed an ordinance that raised the tax on landfill operators from about \$ 2 or \$ 3 per ton to \$ 13 per ton. It was stipulated that the tax was passed to raise revenue, not for land use regulation. The landfill operators elected to pass the increase along to their customers, one of whom was defendant. Defendant absorbed the increase instead of raising its customers' rates, but plaintiffs, 10 surrounding cities that used defendant's landfills, passed the increase along to their customers. Plaintiffs, whose customers thus paid higher garbage rates than defendant's, then sought mandamus on the ground that the result of defendant's action would be an increase in illegal dumping and environmental pollution. The trial judge sustained defendant's demurrer. *Held*, affirmed.

(a) Under *Livermore*, whether an ordinance is a proper exercise of the police power depends on whether it is reasonably related to the welfare of those it affects. This means that if an ordinance affects a whole region, instead of just the city that enacted it, whether it is reasonably related to the welfare of the entire region has to be considered. For many reasons, this regional impact test does not apply to the power to tax:

(1) The power to tax and the police power are derived from different constitutional provisions. A charter city, such as defendant, has the power to tax under the Municipal Affairs Clause of Cal. Const., Art. XI, §5(a), while the ability to enact land use regulations is based on the police power found in Cal. Const., Art. XI, §7. The power to tax permits cities to raise revenue for local purposes, while the police power permits cities to promote the health and safety of their residents. (33 C.A.4th 1677.)

(2) The ordinance involved in *Livermore*, which placed a moratorium on building permits in that city, could have forced surrounding communities to accept, involuntarily, Livermore's share of regional growth. Here, the only persons who paid the tax in question are those who use defendant's landfills, and no one was forced to do so. (33 C.A.4th 1677.)

(3) Conditioning the power to tax on a regional impact test could result in needed revenue not being raised, due to delay caused by attempts to determine whether the tax did, or did not, have a regional impact. No court has adopted this contention in California, and *Livermore* does not require or suggest otherwise. (33 C.A.4th 1678.)

(4) The fact that one plaintiff had a long-term contract requiring it to use defendant's landfills does not change the result. Nothing required it to execute a contract, which, in hindsight, might not have been wise. In fact, the record shows that other landfills were available. In any event, defendant's ordinance is judged by constitutional and statutory principles, not by whether one of the plaintiffs executed what turns out not to have been a good deal. (33 C.A.4th 1678.)

(5) Plaintiffs relied on *Los Angeles v. Shell Oil Co.* (1971) 4 C.3d 108, 93 C.R. 1, 480 P.2d 953, 9 *Summary* (10th), *Taxation*, §51, and *Alameda v. San Francisco* (1971) 19 C.A.3d 750, 97 C.R. 175, 9 *Summary* (10th), *Taxation*, §52. However, *Shell Oil* simply held that a business tax must be fairly apportioned to the amount of business actually done within the taxing jurisdiction. *Alameda* held that a city's attempt to impose a commuter tax on residents who lived in other cities violated equal protection principles. The present tax is based on activities done solely within defendant's borders and involves no equal protection challenge. (33 C.A.4th 1679.)

(b) Plaintiffs also contended that if the present tax is held valid, there is nothing to prevent defendant from imposing a construction tax that is so large that it would force development to move into other communities, similar to the situation in *Livermore*. This argument is not decided here, whatever force it might have in another case. As mentioned, it was stipulated that the purpose of defendant's tax was to raise revenue, not to regulate the use of land. (33 C.A.4th 1679.)

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XII. POLICE POWER

A. In General.

3. Methods of Exercising Power.

a. Prohibition and Regulation.

8 Witkin Sum. Cal. Law Const Law § 981

[§ 981] Prohibition and Regulation.

The two common methods of exercising the police power are *prohibition* and *regulation*.

(1) *Regulation*. A business or activity that is lawful and not inherently harmful ordinarily may only be *regulated*. (See *Adams v. Tanner* (1917) 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336; *Jones v. Los Angeles* (1930) 211 C. 304, 309, 295 P. 14; *People v. El Dorado* (1979) 96 C.A.3d 403, 406, 157 C.R. 815 [county ordinance banning rafting and boating on section of navigable river because of property owners' complaints of noise, litter, pollution, and trespassing; regulation is proper solution to problem].) Prohibitive legislation may be so drastic and arbitrary as to be unconstitutional, although some form of regulation would have been proper. (*People v. Goodspeed* (1948) 85 C.A.2d Supp. 821, 824, 192 P.2d 130, *infra*, §1062.) It has been held, however, that imposition of liability without fault is a permissible form of regulation. (*Sandstrom v. California Horse Racing Bd.* (1948) 31 C.2d 401, 407, 189 P.2d 17 [race horse trainer's license was made subject to suspension if horse was drugged].)

(2) *Prohibition*. If an activity is inherently dangerous, or by reason of local conditions or the manner in which it is conducted it becomes harmful, and ordinary means of regulation are insufficient to overcome the evil, it may be wholly prohibited. (*Murphy v. California* (1912) 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229; *Ex parte Hadacheck* (1913) 165 C. 416, 419, 132 P. 584; see *infra*, §1060.)

In *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130, *supra*, §978, appellant owned a 38-acre tract within a town, used for mining sand and gravel since 1927. Operations went to the water table, leaving a 20-acre lake, 25 feet deep, in a residential area. The town, in a series of steps to regulate this activity, finally adopted an ordinance prohibiting excavation below the water table, imposing a duty to refill any excavation below that, and requiring certain safety precautions such as slope and fence requirements. On violation of the ordinance, the city obtained an injunction against further mining. *Held*, affirmed. The ordinance completely prohibited the beneficial use to which the property had previously been devoted; but this did not render it unconstitutional, nor was it significant that the use prohibited was "of" the soil rather than "upon" it. (82 S.Ct. 989, 8 L.Ed.2d 133.) No set formula answers the question of when a regulation becomes a *taking* so as to require compensation under *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, *supra*, §980, and the record contained nothing to show that prohibiting mining would reduce the value of the lot. (82 S.Ct. 990, 8 L.Ed.2d 133.)

In *Penn Cen. Trans. Co. v. New York* (1978) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, New York City's Landmark Preservation Law was applied by the city's commission in refusing approval of a 50-story office building over Grand Central Terminal (the "landmark"). *Held*, there was no "taking" of property requiring compensation under eminent domain principles. The Court first observed that no "set formula" has been developed for determining when "justice and fairness" require compensation for economic injuries caused by public action. (98 S.Ct. 2659, 57 L.Ed.2d 648.) Then, after a detailed analysis of *Pennsylvania Coal*, *Goldblatt*, and other cases, the Court declared that the law involved does not restrict present uses of the Terminal, and hence, it does not interfere with Penn Central's "primary expectation concerning the use of the parcel," and permits it to obtain a "reasonable return" on its investment. (98 S.Ct. 2665, 2666, 57 L.Ed.2d 655, 666.)

Three justices dissented. (98 S.Ct. 2674, 57 L.Ed.2d 666.) (See 91 *Harv. L. Rev.* 402; 92 *Harv. L. Rev.* 222; 18 *A.L.R.4th* 990 [validity and construction of statute or ordinance protecting historical landmarks].)

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3. Methods of Exercising Power.

b. Taxation and Eminent Domain.

8 *Witkin Sum. Cal. Law Const Law* § 982

[§ 982] Taxation and Eminent Domain.

(1) *Taxation*. "Taxation may be made the implement of the exercise of the state's police power." Hence, where a state desires to mitigate the evils of unequal competition between single and chain stores, it may either regulate the latter directly or resort to discriminatory taxation. (*Great Atlantic & Pac. Tea Co. v. Grosjean* (1937) 301 U.S. 412, 57 S.Ct. 772, 777, 81 L.Ed. 1193, 1201; see *Rast v. Van Deman & Lewis Co.* (1916) 240 U.S. 342, 36 S.Ct. 370, 374, 60 L.Ed. 679, 687 [prohibitive license fees on merchants using trading stamps]; *Glendale v. Trondsen* (1957) 48 C.2d 93, 101, 308 P.2d 1; 9 *Summary* (10th), *Taxation*, §42.)

(2) *Eminent Domain*. The same is true of eminent domain; i.e., the Legislature may conclude that the public welfare object should be attained with compensation for persons whose property is taken or damaged. (See *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27, 37, *infra*, §1063 [slum clearance and redevelopment]; *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186, 198, *infra*, §1123; 90 *Harv. L. Rev.* 637 [urban park preservation through transferable development rights].) (On regulatory taking of property, see *infra*, §1153 et seq.)

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A. In General.

4. Limitations on Power.

8 Witkin Sum. Cal. Law Const Law § 983

[§ 983] Limitations on Power.

(1) *Due Process*. The Due Process Clause of the Fourteenth Amendment is the chief limitation on the exercise of police power. If the attempted exercise of power is unreasonable or arbitrary, i.e., not sufficiently justified by public necessity, or too drastic in its methods, it is a violation of due process. (*Ex parte Whitwell* (1893) 98 C. 73, 78, 32 P. 870; *Jones v. Los Angeles* (1930) 211 C. 304, 309, 295 P. 14; *Hale v. Morgan* (1978) 22 C.3d 388, 398, 399, 149 C.R. 375, 584 P.2d 512, 12 Summary (10th), *Real Property*, §614 [arbitrary or oppressive civil penalties].) But the notions of fairness and reasonableness that make up the content of substantive due process (see *supra*, §615) are too general to offer a definite test, and the doctrine is applied by the familiar method of "judicial exclusion and inclusion" as particular cases are presented. (See *Davidson v. New Orleans* (1877) 96 U.S. 97, 24 L.Ed. 616; *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 516, 78 L.Ed. 940, 956; 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §§329 et seq., 353.)

Procedural due process may also be invoked. In *Friedman v. Los Angeles* (1975) 52 C.A.3d 317, 125 C.R. 93, fire damaged an apartment building. Defendant city's Department of Building and Safety ordered it repaired or demolished, and gave notice with a date for compliance to the record owner. The owner then sold to H, which obtained a permit to repair, but did not do so; instead it sold to plaintiff. Thereafter, defendant proceeded to demolish the building without notice to either H or plaintiff. *Held*, plaintiff was entitled to damages measured by the value of the unrepaired building that he had intended to rehabilitate and sell. Under its police power the city could destroy the building without liability, but destruction without notice to the owner was an unlawful exercise of the power and a denial of due process. Reliance on the notice to the owner of record 16 months before the demolition was wholly unjustified; the city should have made some attempt to investigate current ownership, or, after its original title search, it should have recorded notice of its intention to demolish. (52 C.A.3d 322.)

(2) *Equal Protection*. The Equal Protection Clause of the Fourteenth Amendment is the other limitation commonly invoked on the exercise of the police power. If certain activities are singled out and subjected to regulation, the classification must not be improperly discriminatory. (See *In re Richardson* (1915) 170 C. 68, 70, 148 P. 213; 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §354; *supra*, §694 et seq.)

(3) *Express Constitutional Provisions*. Another limitation, although rarely encountered, is that the Legislature cannot, under the police power, do something that is expressly or impliedly forbidden by the Constitution. (See *Wood v. Hamaguchi* (1929) 207 C. 79, 89, 277 P. 113.)

(4) *Excessive Fines Provisions*. A civil penalty assessed for housing and building code violations is a fine for purposes of constitutional protection under both the Eighth Amendment to the U.S. Constitution and Cal. Const., Art. I, §17. In determining whether a fine is constitutionally excessive, a court must compare the amount of the fine with the gravity of the offense. A defendant's ability to pay is a critical factor. (*San Francisco v. Sainez* (2000) 77 C.A.4th 1302, 1319, 1321, 92 C.R.2d 418 [fine of \$ 663,000 was not excessive where defendants ignored and disobeyed for almost 2 years numerous orders to abate substandard housing conditions that seriously affected their tenants' health and safety, and defendants had net worth of \$ 2.3 million; substantive due process allows inquiry into defendant's full net worth, and not just value of particular property at issue].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Due Process*. See *D & M Financial Corp. v. Long Beach* (2006) 136 C.A.4th 165, 178, 38 C.R.3d 562 [city violated due process in demolishing substandard building without notice to holder of recorded trust deed; recording Declaration of Substandard Property was not sufficient notice to trust deed holder that building would be demolished]; *Santa Monica v. Gonzalez* (2008) 43 C.4th 905, 925, 76 C.R.3d 483, 182 P.3d 1027 [distinguishing *D & M Financial Corp.*; in action challenging appointment of receiver to undertake repair or demolition of substandard property, city's failure to comply with statutory requirements that city post notice on property and that tenants receive notice that lessors are prohibited from retaliating could not be used to invalidate receivership order; city had personally served landowner and retaliation provision was for benefit of tenants]. (2) *Equal Protection*. See *Hernandez v. Hanford* (2007) 41 C.4th 279, 59 C.R.3d 442, 302, 159 P.3d 33, Supp., infra, §1020 [permitting only large department stores, but with square footage limitation, to sell furniture in particular district did not violate equal protection; one of purposes of ordinance was to attract large department stores and retain them in district].

(3) *Express Constitutional Provisions*. In *Mendoza v. California* (2007) 149 C.A.4th 1034, 57 C.R.3d 505, the court affirmed the trial court's invalidation of the Romero Act. The Act (a) transferred substantial control over the Los Angeles Unified School District from the board of education to the district superintendent, while granting the mayor the authority to ratify the appointment of the district superintendent, and (b) transferred control over part of the school system from the board of education to a partnership led by the mayor. These provisions were in violation of Cal. Const., Art. IX, §16, which guarantees to charter cities the right to provide for the method of selection of members of boards of education, and Cal. Const., Art. IX, §6, which prohibits the transfer of schools from the public school system to an outside authority. (149 C.A.4th 1052, 1057.)

(4) *Excessive Fines Provisions*. See *People v. R.J. Reynolds Tobacco Co.* (2005) 37 C.4th 707, 730, 36 C.R.3d 814, 124 P.3d 408 [defendant's good faith or bad faith is relevant to evaluation of constitutionality of fine assessed against defendant].



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CHAPTER X - Constitutional Law

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XII. POLICE POWER

B. Exercise of Police Power by Local Subdivision.

1. In General.

a. Constitutional Authorization.

8 Witkin Sum. Cal. Law Const Law § 984

[§ 984] Constitutional Authorization.

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., Art. XI, §7.) Because the Constitution mentions only cities and counties, the Legislature cannot confer police power on other public or quasi-municipal corporations, e.g., sanitary or port districts. (*Gilgert v. Stockton Port Dist.* (1936) 7 C.2d 384, 387, 60 P.2d 847.)

Although the exercise of the police power must be confined to *local* regulations and is subject to general laws, it is otherwise as broad as that of the Legislature. (See *In re Maas* (1933) 219 C. 422, 424, 27 P.2d 373; *In re Martinez* (1943) 22 C.2d 259, 262, 138 P.2d 10 [rates of taxicabs are not subject to jurisdiction of PUC]; *Carlin v. Palm Springs* (1971) 14 C.A.3d 706, 711, 92 C.R. 535, *infra*, §1063; *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 140, 130 C.R. 465, 550 P.2d 1001, 12 Summary (10th), *Real Property*, §577; *Loska v. Superior Court* (1986) 188 C.A.3d 569, 575, 233 C.R. 213; *Crown Motors v. Redding* (1991) 232 C.A.3d 173, 178, 283 C.R. 356 [city council had power to adopt urgency ordinance banning particular outdoor advertising].) But it is no broader. The grant is only of police power, to be invoked under the conditions that call for, and subject to the limitations on, the exercise of legislative police power. (*Roussey v. Burlingame* (1950) 100 C.A.2d 321, 324, 223 P.2d 517.) (See 116 *Harv. L. Rev.* 2255 [Reclaiming Home Rule]; 25 *Hastings Const. L. Q.* 187 [analyzing cases interpreting Cal. Const., Art. XI, §7]; on Local Agency Formation Commission Law, see *Govt.C.* 54773 et seq.)

West's Key Number Digest, Constitutional Law k. 81

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

b. Subjects of Regulation.

8 Witkin Sum. Cal. Law Const Law § 985

[§ 985] Subjects of Regulation.

The following are typical subjects of local regulation:

(1) *Use of Land*. (See *People v. Johnson* (1954) 129 C.A.2d 1, 5, 277 P.2d 45 [zoning]; *Thain v. Palo Alto* (1962) 207 C.A.2d 173, 187, 24 C.R. 515 [weed abatement]; *Colusa v. Strain* (1963) 215 C.A.2d 472, 481, 30 C.R. 415 [ordinance regulating leveling of land of more than five acres, to protect against injury from surface drainage]; *People v. Greene* (1968) 264 C.A.2d 774, 778, 70 C.R. 818 [ordinance directed toward nuisance of excavation or fill that endangers safety]; *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 140, 130 C.R. 465, 550 P.2d 1001 [rent control]; *Gregory v. San Juan Capistrano* (1983) 142 C.A.3d 72, 79, 191 C.R. 47 [same]; *Great Western Shows v. Los Angeles* (2002) 27 C.4th 853, 873, 118 C.R.2d 746, 44 P.3d 120, 1 Cal. Crim. Law (3d), *Introduction to Crimes, Supp.*, §57 [county may regulate sale of firearms on its own property located in incorporated city within borders of county]; 92 A.L.R.2d 1283 [regulation of private swimming pools]; 43 A.L.R.3d 916 [destruction of unsafe buildings]; 79 A.L.R.3d 716 [regulations requiring bathroom facilities in dwelling units]; 63 A.L.R.5th 517 [statute or ordinance requiring installation of automatic sprinklers].)

(2) *Use of Streets*. (See *Skyline Materials v. Belmont* (1961) 198 C.A.2d 449, 455, 18 C.R. 95 [gross weight of eight tons for vehicles on city streets]; *Loska v. Superior Court* (1986) 188 C.A.3d 569, 579, 581, 233 C.R. 213 [prohibition of commercial sale of tickets on public street or sidewalk other than from fixed booth]; 83 A.L.R.2d 464 [regulation of moving buildings on highway]; 14 A.L.R.3d 896 [regulation of selling merchandise on streets]; 43 A.L.R.3d 1394 [regulation of streets]; 70 A.L.R.3d 1323 [regulations providing for reserved parking space on public property].)

(3) *Occupations and Businesses*. (See *Matula v. Superior Court* (1956) 146 C.A.2d 93, 99, 303 P.2d 871 [garbage disposal]; *Lynch Meats of Oakland v. Oakland* (1961) 196 C.A.2d 104, 107, 16 C.R. 302 [closing hours for sale of uncured and uncooked meat, to facilitate inspection]; *Silver v. Los Angeles* (1963) 217 C.A.2d 134, 137, 31 C.R. 545 [municipal garbage and rubbish collection service]; *Harriman v. Beverly Hills* (1969) 275 C.A.2d 918, 923, 80 C.R. 426 [regulation of telephone answering services]; *People v. Stuller* (1970) 10 C.A.3d 582, 591, 89 C.R. 158 [fingerprinting of bartenders]; *Antonello v. San Diego* (1971) 16 C.A.3d 161, 167, 93 C.R. 820 [regulation of "peep" shows to protect against fire and public health dangers]; *Sunset Amusement Co. v. Board of Police Commrs.* (1972) 7 C.3d 64, 72, 101 C.R. 768, 496 P.2d 840 [licensing of skating rink to promote public peace, health, safety, convenience, and good

morals]; 7978 *Corp. v. Pitchess* (1974) 41 C.A.3d 42, 46, 115 C.R. 746 [ordinance prohibiting dance and entertainment licensees from operating between 2 a.m. and 6 a.m.]; *Perez v. San Bruno* (1980) 27 C.3d 875, 885, 168 C.R. 114, 616 P.2d 1287, supra, §684; *People v. Morone* (1983) 150 C.A.3d Supp. 18, 22, 198 C.R. 316 [licensing of health club]; *Crown Motors v. Redding* (1991) 232 C.A.3d 173, 178, 283 C.R. 356 [urgency legislation to prohibit automobile dealer's electronic advertising reader board was within city's power to eliminate visual blight]; 73 A.L.R.3d 1105 [statute or ordinance requiring return deposits on soft drink or similar containers]; 97 A.L.R.3d 495 [vehicle towing business]; 38 A.L.R.4th 930 [regulation of commercial video games].)

(4) *Animals*. (See *Simpson v. Los Angeles* (1953) 40 C.2d 271, 278, 253 P.2d 464 [ordinance providing that animals impounded and unclaimed be surrendered to institutions for medical research]; *Markus v. Justice's Court* (1953) 117 C.A.2d 391, 396, 255 P.2d 883 [ordinance prohibiting dogs from running at large]; *San Diego County Veterinary Med. Assn. v. San Diego* (2004) 116 C.A.4th 1129, 1135, 10 C.R.3d 885 [county is not limited to vaccinating animals for rabies, which is threat to humans; preventing other animal diseases is matter of legitimate county concern because of effect on animal control costs, and county may provide service even if it might decrease demand for pet owners to pay private veterinarians for same service].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Use of Land*. See 19 A.L.R.6th 335 [municipal restrictions on location or operations of facilities for sale or use of firearms].(3) *Occupations and Businesses*. See *Wal-Mart Stores v. Turlock* (2006) 138 C.A.4th 273, 301, 41 C.R.3d 420 [city did not exceed authority in enacting ordinance that prohibited development of discount superstores within city limits; ordinance was reasonably related to public welfare and did not improperly target plaintiff]; *Hernandez v. Hanford* (2007) 41 C.4th 279, 295, 59 C.R.3d 442, 159 P.3d 33, Supp., infra, §1020 [clarifying and affirming holding of *Wal-Mart Stores*].



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B. Exercise of Police Power by Local Subdivision.

2. Where State Legislates on Same Subject.

a. Test of Valid Regulation.

8 *Witkin Sum. Cal. Law Const Law* § 986

[§ 986] Test of Valid Regulation.

The fact that the state has legislated on the same subject does not necessarily exclude the municipal power. The municipality may make additional regulations, different from those established by the state and not inconsistent with the purpose of the general law. It is only where the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field, so that any local regulations will necessarily be inconsistent with state law, that municipal power is lost. (See *In re Hubbard* (1964) 62 C.2d 119, 126, 41 C.R. 393, 396 P.2d 809 [local ordinance prohibiting games of chance was not preempted]; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 C.4th 81, 89, 97, 2 C.R.2d 513, 820 P.2d 1023 [discussing implied and express preemption; local regulation valid]; *Sherwin-Williams Co. v. Los Angeles* (1993) 4 C.4th 893, 897, 904, 16 C.R.2d 215, 844 P.2d 534, *infra*, §990 [discussing general principles governing preemption analysis; local ordinance valid]; *Karrin v. Ocean-Aire Mobile Home Estates* (1991) 1 C.A.4th 1066, 1071, 2 C.R.2d 581; *Korean Amer. Legal Advocacy Foundation v. Los Angeles* (1994) 23 C.A.4th 376, 28 C.R.2d 530, *infra*, §989 [city planning approval process for rebuilding following major civil disturbance was not expressly or impliedly preempted]; *Baldwin v. Tehama* (1994) 31 C.A.4th 166, 172, 36 C.R.2d 886 [groundwater]; *Water Quality Assn. v. Santa Barbara* (1996) 44 C.A.4th 732, 738, 52 C.R.2d 184 [water softener ordinances were explicitly and implicitly preempted by *Health & Saf.C. 116775 et seq.*]; *Water Quality Assn. v. Escondido* (1997) 53 C.A.4th 755, 766, 61 C.R.2d 878 [same]; *Gilbert v. San Jose* (2003) 114 C.A.4th 606, 616, 7 C.R.3d 692 [Gambling Control Act only provides minimum standards and does not preempt more stringent local controls]; 40 *Hastings L. J.* 87 [constitutional infirmities in local procurement ordinances blacklisting producers of nuclear weapons components]; 22 *U.S.F. L. Rev.* 561 [local nuclear-free zone legislation].)

But even if the state has not occupied the field, if the matter is one of exclusive statewide concern there is no room for municipal regulation. (See *infra*, §1000.)

In determining whether the state has, in fact, occupied the field, the courts not only look for an abstract legislative intent but also examine concrete provisions for the design--either so extensive as to disclose a purpose to exclude all local regulation, or so confined as to show a purpose to leave room for it. (*In re Farrant* (1960) 181 C.A.2d 231, 234, 5 C.R.171, *infra*, §990.)

In *Cohen v. Board of Supervisors* (1985) 40 C.3d 277, 219 C.R. 467, 707 P.2d 840, San Francisco adopted an

ordinance requiring the operators of "escort services" to obtain a permit from the chief of police and pay an annual license fee. "Escort" is defined as a person who charges a fee for accompanying other persons to social affairs or places of amusement "or consorts with others about any place of public resort or within any private quarters." Plaintiffs contended that the ordinance was in substance a criminal statute enacted to curb sex-related offenses such as prostitution that are often associated with escort service activities. *Held*, except to the extent that the ordinance prohibited escorts from engaging in criminal conduct or from aiding and abetting that conduct, it was *not preempted* by state law.

(a) State law does not implicitly or explicitly prohibit or permit conduct regulated by the ordinance. The ordinance does not prohibit sexual or criminal activity. "It prohibits escort services and escorts from operating without permits, whether or not the escorts provide sexual favors in return for money. The law regulates the business of escort services, not their nature." (40 C.3d 295.) By contrast, the state prostitution statute does not deal with the business of escort services; it proscribes particular acts that may or may not occur while escort services are being provided. (40 C.3d 296.)

(b) "[A] local governmental body may properly determine that a particular business foster, profits from and provides an environment for activities proscribed by state law. An ordinance is not transformed into a statute prohibiting crime simply because the city uses its licensing power to discourage illegitimate activities associated with certain businesses. Most licensing ordinances have a direct impact on the enforcement of state laws which have been enacted to preserve the health, safety and welfare of state and local citizens. This fact does not deprive a municipality of the power to enact them." (40 C.3d 298.)

(c) The ordinance requires disclosure of information to aid police in investigating criminal activity that may arise in connection with the operation of escort services, and granting a permit is dependent on the absence of convictions for sexual offenses; however, these aspects of the ordinance afford no basis for preemption. (40 C.3d 299.)

In *Big Creek Lumber Co. v. San Mateo* (1995) 31 C.A.4th 418, 37 C.R.2d 159, the Forest Practice Act (FPA) regulated the conduct of timber operations throughout the state. Another state law, the California Timberland Productivity Act (TPA), required counties to zone certain described timberlands as timberland production zones (TPZs), where only timber harvesting was permitted. In accordance with the TPA, defendant county designated certain zones as TPZs. However, it had also designated that certain other rural districts be used for timber harvesting, as one of a wide variety of other, allowed uses. Concerned about the conflict between lumbering and residential use, defendant amended its zoning ordinance by generally prohibiting timber harvesting in these other districts within 1,000 feet of a residence. Plaintiff lumber company, a corporation operating on land subject to the ordinance, obtained mandamus, declaring that the ordinance was invalid in that it was preempted by state law. *Held*, reversed.

(a) Although the zoning power is left to the counties, it cannot conflict with state law. In passing the FPA, the state expressly covered the *conduct* of timber harvesting. *Pub.Res.C. 4516.5* expressly preempted local attempts to control timber operations. However, the legislative history contains no discussion of county zoning authority or its relation to the "conduct" of logging operations. Plaintiff's expansive interpretation of this statute would apparently preclude all local zoning over timber operations, so that local governments would be required, for example, to allow logging in residential districts, a result that is not supported by either the statute or the legislative history. In short, the amended ordinance addresses not *how* timber operations may be conducted, but *where* they may take place. And the TPA clearly contemplates that local zoning authority be exercised on these issues. (31 C.A.4th 424.)

(b) The TPA requires counties to designate certain areas as TPZs to protect timber harvesting from being prohibited or restricted. However, the actual designation is left to the counties. In fact, a number of important zoning decisions are deferred to the county under the Act, e.g., parcels excluded from TPZs may be zoned as suitable for uses other than timberland. Nowhere is the zoning power expressly preempted by the TPA. (31 C.A.4th 425.)

(c) The TPA does not *impliedly* preempt the county ordinance. Applying the three-part implied preemption test: (1) state law has not completely covered the subject of zoning; (2) it invites local action on this matter; and (3) there is nothing in the record showing that the adverse effect on transient citizens will outweigh possible municipal benefits. In

short, implied preemption should not be found where, as here, the statutory scheme recognizes local regulation. (31 C.A.4th 426.)

(d) Plaintiff relies on several regulations adopted under the FPA that address such issues as noise, erosion, and fire hazards, i.e., the kinds of issues that prompted the amendment to defendant's zoning ordinance. However, the fact that the state has attempted to control the same concerns as defendant does not preempt local zoning, any more than state or federal industrial air pollution control would preclude a local zoning authority from relying on air pollution as grounds for excluding industrial plants from residential districts. "Nothing in the FPA or TPA, however, precludes the County from addressing some of the same concerns by excluding logging activity from some of the non-TPZ land under its zoning jurisdiction." (31 C.A.4th 427.) (See *Westhaven Community Dev. Council v. Humboldt* (1998) 61 C.A.4th 365, 371, 71 C.R.2d 536 [distinguishing *Big Creek Lumber Co.* FPA preempts county zoning regulations requiring conditional use permit prior to harvesting timber situated on three or more acres].)

SUPPLEMENT: [This section is current through the latest supplement]

See *O'Connell v. Stockton* (2007) 41 C.4th 1061, 1068, 63 C.R.3d 67, 162 P.3d 583, citing the text; 41 U.S.F. L. Rev. 333 [futility of local gun bans].



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2. Where State Legislates on Same Subject.

b. Legislative Authorization of Local Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 987

[§ 987] Legislative Authorization of Local Regulations.

State laws occasionally declare that their provisions are not exclusive or that cities may also regulate the subject matter. For example, *Health & Saf.C.* 17958, 17958.5, and 17958.7, authorize cities to adopt more stringent residential fire sprinkler standards than those found in state law. (See *Building Industry Assn. v. Livermore* (1996) 45 C.A.4th 719, 724, 727, 52 C.R.2d 902.) And *B. & P.C.* 21637 and 21638 expressly authorize local regulation of pawnbrokers. (See *Malish v. San Diego* (2000) 84 C.A.4th 725, 729, 101 C.R.2d 18.) (See *Ratkovich v. San Bruno* (1966) 245 C.A.2d 870, 877, 884, 54 C.R. 333 [*Veh.C.* 35701, weight of commercial vehicles]; *Stewart v. San Mateo* (1966) 246 C.A.2d 273, 282, 54 C.R. 599 [former *B. & P.C.* 7523 (now *B. & P.C.* 7582.3), local regulation of private patrol operators]; *Stagg v. Municipal Court* (1969) 2 C.A.3d 318, 322, 82 C.R. 578 [*Govt.C.* 50470, operation of municipal airports]; *Graf v. San Diego Unified Port Dist.* (1988) 205 C.A.3d 1189, 1197, 252 C.R. 889 [port district ordinance prohibiting anchoring of vessels was valid where Legislature had delegated to district power to pass ordinances and declared that violation of ordinance is misdemeanor]; *Malibu v. Santa Monica Mountains Conservancy* (2002) 98 C.A.4th 1379, 1385, 119 C.R.2d 777 [*Pub.Res.C.* 33008 authorizes application of local zoning laws to use of land in state conservancy]; *Smith v. Los Angeles Board of Supervisors* (2002) 104 C.A.4th 1104, 1119, 128 C.R.2d 700 [CalWORKS regulatory scheme delegates gathering of evidence to counties to determine eligibility for benefits].)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Where State Legislates on Same Subject.

c. Local Regulations Held Valid.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 988

[§ 988] In General.

Areas in which local regulation has been upheld include the following:

(1) *Civil Rights*. (See *Citizens for Uniform Laws v. Contra Costa* (1991) 233 C.A.3d 1468, 1470, 1475, 285 C.R. 456 [county ordinance prohibiting discrimination against persons who test positive for HIV was not preempted by FEHA (Govt.C. 12900 et seq.; supra, §915 et seq.)].)

(2) *Contractors*. (See *Stacy & Witbeck v. San Francisco* (1995) 36 C.A.4th 1074, 1092, 44 C.R.2d 472 [Contractors' License Law (B. & P.C. 7000 et seq.) does not preempt ordinance providing sanctions against irresponsible bidders on city's public works contracts]; *M & B Const. v. Yuba County Water Agency* (1999) 68 C.A.4th 1353, 1362, 81 C.R.2d 231 [following *Stacy & Witbeck*; nothing in general law conflicts with agency's right to consider certain license classification in determining whether bidder is qualified].)

(3) *Employee Leave*. (See *Burns Int. Sec. Services Corp. v. Los Angeles* (2004) 123 C.A.4th 162, 180, 19 C.R.3d 776, infra, §1004 [ordinance requiring companies contracting with county to offer up to 5 days' compensation to all full time employees while serving on jury was not preempted by host of narrowly-drawn statutes covering employers' duties to provide leave].)

(4) *Firearm Sales*. (See 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §§55, 57.)

(5) *Food*. (See *Natural Milk Producers Assn. v. San Francisco* (1942) 20 C.2d 101, 109, 124 P.2d 25 [city milk ordinance]; infra, §1073.)

(6) *Gaming Clubs*. (See *Lowe v. Commerce* (1997) 59 C.A.4th 1075, 1082, 69 C.R.2d 356 [ordinance providing for exclusion from gaming clubs of persons whose presence is inimical to licensee's interests, though broader, does not conflict with, and is not preempted by, state law].)

(7) *Groundwater*. (See *Baldwin v. Tehama* (1994) 31 C.A.4th 166, 173, 36 C.R.2d 886 [county ordinance requiring permit for extraction of groundwater for use on land other than where extraction occurred was not preempted by state

laws on water use].)

(8) *Hazardous Waste Disposal*. (See *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 C.4th 81, 89, 97, 2 C.R.2d 513, 820 P.2d 1023 [Hazardous Waste Control Act (*Health & Saf.C. 25100* et seq.) does not preempt power of county to order removal of hazardous wastes deposited in violation of valid land use regulation].)

(9) *Land Development*. (See *San Mateo County Coastal Landowners' Assn. v. San Mateo* (1995) 38 C.A.4th 523, 539, 45 C.R.2d 117 [amendments to local coastal plans may be adopted by initiative and are not preempted by state Coastal Act].)

(10) *Leases of Municipal Property*. (See *Alioto's Fish Co. v. Human Rights Com. of San Francisco* (1981) 120 C.A.3d 594, 604, 606, 174 C.R. 763 [provisions prohibited discrimination in employment and required hiring of minority and women employees].)

(11) *Oil Drilling*. (See *Higgins v. Santa Monica* (1964) 62 C.2d 24, 28, 41 C.R. 9, 396 P.2d 41 [ordinance prohibiting oil drilling on tidelands granted by state; state statutes did not compel oil development].)

(12) *Pawnbroker Regulations*. (See *Miller v. Murphy* (1983) 143 C.A.3d 337, 341, 342, 191 C.R. 740 [requirement of identification of customer, including fingerprint]; *Malish v. San Diego* (2000) 84 C.A.4th 725, 730, 101 C.R.2d 18 [while several ordinances regulating pawnbrokers were preempted by state regulating statutes, city's permit system was proper means of enforcing ordinances that were not inconsistent with state law].)

(13) *Rent Control*. (See *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 142, 130 C.R. 465, 550 P.2d 1001, 12 Summary (10th), *Real Property*, §577; *Gregory v. San Juan Capistrano* (1983) 142 C.A.3d 72, 85, 191 C.R. 47 [mobilehomes]; *Pennell v. San Jose* (1988) 485 U.S. 1, 108 S.Ct. 849, 857, 99 L.Ed.2d 1, 12; on rent control regulations generally, see 12 Summary (10th), *Real Property*, §572 et seq.)

(14) *Solid Waste Reduction and Disposal*. (See *Park & Shop Markets v. Berkeley* (1981) 116 C.A.3d 78, 172 C.R. 515 [ordinance requiring retailers to collect deposit on containers]; *Waste Resource Technologies v. Department of Public Health* (1994) 23 C.A.4th 299, 304, 309, 28 C.R.2d 422 [Integrated Waste Management Act (*Pub.Res.C. 40000* et seq.) does not preempt city's authority to grant exclusive refuse collection permits]; *Empire Waste Management v. Windsor* (1998) 67 C.A.4th 714, 719, 721, 79 C.R.2d 262 [following *Waste Resource Technologies*; local referendum power is not superseded by provision of Act (*Pub.Res.C. 40059*) that vests authority to grant franchises or contracts for handling solid waste collection in local "governing body"]; *Valley Vista Services v. Monterey Park* (2004) 118 C.A.4th 881, 887, 13 C.R.3d 433 [ordinance preventing waste disposal company from soliciting new business after it has received notice that its franchise will be terminated within 5 years was not preempted by California Integrated Waste Management Act].)

(15) *Taxation*. (See *State Bd. of Equalization v. Cenicerros* (1998) 63 C.A.4th 122, 133, 73 C.R.2d 539 [local rule governing exchange of information prior to assessment appeal hearing did not conflict with state law granting broad power to assessor to demand information of real property owners].)

(16) *Timber Harvesting*. (See *Big Creek Lumber Co. v. San Mateo* (1995) 31 C.A.4th 418, 428, 37 C.R.2d 159, *supra*, §986 [county ordinance prohibiting timber harvesting within 1,000 feet of residence].)

(17) *Transportation*. (See *Stagg v. Municipal Court* (1969) 2 C.A.3d 318, 320, 82 C.R. 578 [ordinance prohibiting takeoff of jet aircraft between 11 p.m. and 7 a.m., except in emergency]; *Bell v. Mountain View* (1977) 66 C.A.3d 332, 338, 136 C.R. 8 [ambulance licensing, conditioned on finding of public convenience and necessity]; 17 *Hastings L. J.* 571 [freeway problems]; 17 *Hastings L. J.* 642 [municipal regulation of railroad crossings]; 17 *Hastings L. J.* 647 [vehicle repair ordinance].)

(18) *Welfare Programs*. (See *Smith v. Los Angeles Board of Supervisors* (2002) 104 C.A.4th 1104, 1117, 128

C.R.2d 700 [county's home visit pilot program to verify eligibility for state welfare benefits].)

SUPPLEMENT: [This section is current through the latest supplement]

(2a) (*New*) *Cruelty to Animals*. See *California Veterinary Med. Assn. v West Hollywood* (2007) 152 C.A.4th 536, 549, 557, 61 C.R.3d 318 [ordinance prohibiting non-therapeutic declawing of animals was not preempted by state laws regulating licensing and practice of veterinary medicine]. (12a) (*New*) *Premises Liability*. See *Gonzales v. San Jose* (2004) 125 C.A.4th 1127, 1135, 1137, 23 C.R.3d 178 [ordinance providing for liability of abutting property owner who fails to maintain city-owned sidewalk in nondangerous condition for injuries to third persons is not preempted by Government Tort Claims Act; fact that state law does not impose liability on adjacent landowners for injuries to pedestrians does not mean that state intends to fully occupy this area of law].

(14) *Solid Waste Reduction and Disposal*. See *Casteel v. San Joaquin* (2005) 134 C.A.4th 918, 924, 36 C.R.3d 395 [county could apply mandatory solid waste collection ordinance against nonresident landlord who had not contracted for service].

(16) *Timber Harvesting*. See *Big Creek Lumber Co. v. Santa Cruz* (2006) 38 C.4th 1139, 1151, 1162, 45 C.R.3d 21, 136 P.3d 821 [agreeing with *Big Creek Lumber Co. v. San Mateo* (1995) 31 C.A.4th 418, 924, 37 C.R.2d 159, text, §986; Forest Practice Act and Timberland Productivity Act did not preempt local regulations limiting locations for timber harvesting and helicopter support operations].



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2. Where State Legislates on Same Subject.

c. Local Regulations Held Valid.

2. Alcoholic Beverages.

8 Witkin Sum. Cal. Law Const Law § 989

[§ 989] Alcoholic Beverages.

(1) *Health Warnings*. In *California Restaurant Assn. v. Los Angeles* (1987) 192 C.A.3d 405, 237 C.R. 415, an ordinance of defendant city required the posting of health warnings wherever alcoholic beverages are sold, cautioning that drinking alcohol during pregnancy can cause birth defects. *Held*, the ordinance was valid.

(a) There was no express preemption by Cal. Const., Art. XX, §22 (exclusive power of state to regulate liquor production and sale, etc.) because the ordinance did not restrict the sale or purchase of alcoholic beverages. Municipal ordinances prohibiting a liquor licensee from engaging in sales if certain entertainment exists on the premises have been upheld in a number of decisions. (192 C.A.3d 410.) "[A] common thread that runs throughout these cases is that Article XX, section 22, will not be held to preempt a local ordinance where, as here, the ordinance does not directly affect the licensee's ability to sell alcoholic beverages to a willing purchaser." (192 C.A.3d 411.)

(b) There was no implied preemption by state statutes regulating advertising signs; these laws are unrelated to health warnings. (192 C.A.3d 412, 413.) And there was no implied preemption on the theory that one of the purposes of the state Alcoholic Beverage Control Act is to promote temperance. That statute prohibits furnishing liquor to persons who lack the capacity to make a socially responsible decision on whether to drink; the Los Angeles ordinance merely warns a group of potential consumers that the decision to drink has potentially dire consequences. (192 C.A.3d 413, 414.) (See *Rancho Cucamonga v. Warner Consulting Services, Ltd.* (1989) 213 C.A.3d 1338, 1345, 262 C.R. 349 [city's authority for ordinance making topless dancing in places serving alcohol a misdemeanor derives from general police power, not from delegation of state's power to regulate sale and possession of alcohol under Cal. Const., Art. XX, §22].)

(2) *Location of Business*. In *Korean Amer. Legal Advocacy Foundation v. Los Angeles* (1994) 23 C.A.4th 376, 28 C.R.2d 530, the City of Los Angeles enacted a new plan approval process to be followed for the rebuilding of businesses destroyed or damaged during a major civil disturbance. The process allowed for revocation hearings regarding businesses that had become a nuisance or law enforcement problem. Plaintiffs, owners and operators of retail stores licensed to sell alcoholic beverages, brought the present action, claiming that the plan approval process was preempted by state law. The trial judge denied plaintiffs' request for a preliminary injunction and sustained defendant's demurrer to the preemption claim. *Held*, plaintiffs' petition for writ relief denied.

(a) The plan approval process is not expressly preempted by Cal. Const., Art. XX, §22, granting the state the exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages, because the city's ordinance has a different purpose and effect than the state provision. The city's ordinance is a geographic limitation imposing conditions on restricted businesses allowed to operate within a particular area. It focuses on the negative conduct that tends to occur on premises immediately surrounding retail establishments selling alcoholic beverages. "That the conditions imposed under the ordinance may have some indirect impact on the sale of alcoholic beverages does not transmute the purpose and scope of the ordinance into a regulation merely seeking to control alcohol sales." (23 C.A.4th 389.)

(b) Even though application of the ordinance and several provisions of the Alcoholic Beverage Control Act (*B. & P.C. 23000* et seq.) may result in the abatement or eradication of nuisance activities, the ultimate outcome of each procedure is different. The state's action may result in the revocation of a license to sell alcohol, while the city's action may result, not in the loss of a license, but in the loss of the right to sell alcoholic beverages on particular premises. Thus, the ordinance neither duplicates nor contradicts state law. (23 C.A.4th 391.)

(c) The state statutory scheme evidences no intent to occupy the field by implication. Indeed, *B. & P.C. 23790* prohibits the issuance of a license for premises located in any territory where use of the license would be contrary to a valid zoning ordinance, and *B. & P.C. 23791* provides that nothing in the Act interferes with the powers of cities conferred on them by the Government Code provisions authorizing local governments to impose reasonable land use and zoning restrictions. (23 C.A.4th 393.)

(d) *B. & P.C. 23790* does allow for the continued operation of premises in existence at the time a zoning ordinance is enacted, but this "grandfathering" applies only to continuously operated businesses. Although, for purposes of the statute, breaks in operation do not include closures for not more than 30 days for purposes of repair, and closures for restoration necessitated by an act of God or a toxic accident, plaintiffs qualify for neither exception. As there is no preemption and *B. & P.C. 23790* does not immunize plaintiffs from compliance with the new procedure, the trial judge properly sustained defendant's demurrer without leave to amend. (23 C.A.4th 384, 394.) (See *Boccatto v. Hermosa Beach* (1994) 29 C.A.4th 1797, 1804, 1807, 35 C.R.2d 282 [following *Korean Amer. Legal Foundation*].)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Local Regulations Held Valid.

3. Criminal Activities.

8 Witkin Sum. Cal. Law Const Law § 990

[§ 990] Criminal Activities.

(1) *In General.* Local regulation of criminal activities has been upheld in a number of cases. (See *In re Hubbard* (1964) 62 C.2d 119, 41 C.R. 393, 396 P.2d 809; *Galvan v. Superior Court* (1969) 70 C.2d 851, 855, 76 C.R. 642, 452 P.2d 930; *In re Benson* (1985) 172 C.A.3d 532, 535, 537, 218 C.R. 384; *Rancho Cucamonga v. Warner Consulting Services, Ltd.* (1989) 213 C.A.3d 1338, 1345, 262 C.R. 349 [topless dancing in places serving alcohol]; *Horton v. Oakland* (2000) 82 C.A.4th 580, 586, 98 C.R.2d 371 [ordinance authorizing forfeiture of vehicles involved in soliciting prostitution or acquiring drugs did not conflict with *Health & Saf.C. 11470(e)* (forfeiture of vehicles used in manufacture or sale of drugs) or *Veh.C. 22659.5* (authorizing pilot programs to impound vehicles used to pimp, pander, or solicit prostitution as public nuisances); neither statute expresses intent to preempt field]; *Foley v. Superior Court* (2004) 117 C.A.4th 206, 210, 11 C.R.3d 505 [ordinance making it crime for spectator to be knowingly present at illegal speed contest or exhibition is valid; ordinance is complimentary to, and not in conflict with Vehicle Code sections dealing with speed contests and exhibitions]; 1 *Cal. Crim. Law (3d)*, *Introduction to Crimes*, §56 et seq.)

(2) *Gambling.* *In re Farrant* (1960) 181 C.A.2d 231, 5 C.R.171, involved a charge of playing "with dice for money," in violation of a Contra Costa County ordinance prohibiting all gambling. Petitioner sought habeas corpus, contending that P.C. 330, prohibiting certain specified gambling games including "banking or percentage" games played with dice, preempted the field. *Held*, the ordinance was valid because it covered some games not prohibited by state law. "[W]hile we recognize the rather fine line drawn here between state prohibition of gambling with dice in a banking or percentage game and a county regulation of gambling with dice in general, and while we are cognizant of the power of the Legislature to preempt the whole field of gambling and thereby simplify the problem of enforcement, we deal here in a historical setting of both statute and precedent long on the books." (181 C.A.2d 239.)

(3) *Sale of Cigarettes.* In *Bravo Vending v. Rancho Mirage* (1993) 16 C.A.4th 383, 20 C.R.2d 164, the sole issue was whether P.C. 308, prohibiting the sale of cigarettes to minors (see 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §167), preempted a city ordinance that forbade the sale of cigarettes through vending machines. (16 C.A.4th 391.) *Held*, the ordinance was valid.

(a) P.C. 308(e) provides: "It is the Legislature's intent to regulate the subject matter of this section. As a result, no

city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section." Although this language is far from clear, the better interpretation is that the Legislature intended to regulate the subject matter of the section to the exclusion of local regulation. (16 C.A.4th 398.) The text of P.C. 308 "clearly indicates that the subject matter of that section is the penal aspects of the sale of cigarettes to minors." (16 C.A.4th 402.) Vending machines are mentioned in only one sentence, and the sole purpose of that sentence is to identify the person responsible for sales to a minor by vending machine. (16 C.A.4th 400.)

(b) The ordinance covers two related subjects--persons who may sell cigarettes, and the means by which cigarettes can be sold--neither of which is touched on by P.C. 308. (16 C.A.4th 403.) However, the legislative history of the ordinance makes clear that its purpose was to deter the sale of cigarettes to minors by prohibiting the method of sale most often used by minors. (16 C.A.4th 408, 409.)

(c) Because the purpose of the ordinance is to discourage violation of P.C. 308, does the ordinance intrude into the field preempted by the statute? "No. Case law establishes that an ordinance designed to discourage criminal acts is not necessarily preempted by the statute proscribing those acts." (16 C.A.4th 409.) Under *Cohen v. Board of Supervisors* (1985) 40 C.3d 277, 219 C.R. 467, 707 P.2d 840, supra, §986, "when the state has preempted the regulatory field regarding the criminal aspects of a particular activity, a local government may nevertheless impose substantive regulations concerning the manner of operation of a lawful business which facilitates violations of the state's prohibitory regulations so long as the ordinance (1) is intended to discourage the activity proscribed by state law and (2) does not attempt to either expand or reduce the degree to which the particular activity regulated by state law is criminally proscribed." (16 C.A.4th 412.) Accordingly, the ordinance is not preempted; it is intended to discourage violations of P.C. 308, but it neither expands nor limits the prohibitions of the statute. (16 C.A.4th 412.)

(4) *Graffiti*. In *Sherwin-Williams Co. v. Los Angeles* (1993) 4 C.4th 893, 16 C.R.2d 215, 844 P.2d 534, the court rejected a claim that P.C. 594.1, which restricts the sale to or possession by minors of aerosol paint, and also requires retailers to post a notice that vandalism is illegal, preempted a city ordinance requiring aerosol paint containers to be displayed in an area inaccessible to the public.

(a) P.C. 594.1 is a graffiti-prevention measure; it seeks to accomplish its goal primarily by regulating transfer and possession of aerosol paint and also by requiring posted warnings against vandalism. When added in 1981, the statute covered only aerosol containers larger than six ounces, and the enacting statute contained an uncodified section declaring the Legislature's intent to preempt local regulations of these containers. The section was amended in 1988 to cover *all* aerosol paint containers, but the amending statute had no provision concerning intent to preempt local legislation. (4 C.4th 900, 901.)

(b) The Los Angeles ordinance is also a graffiti-prevention measure; it seeks to accomplish its goal by requiring that retailers of aerosol paint and broad-tipped marker pens display these items out of the public's reach. (4 C.4th 901, 902.)

(c) Local legislation is preempted when it is duplicative of or contradictory to, or enters an area expressly or impliedly fully occupied by, general law. (4 C.4th 897, 898.) Like the statute, the ordinance is a graffiti-prevention measure, but it is different in scope and substance and neither duplicates nor contradicts the statute. (4 C.4th 902.) Nor does the ordinance enter an area fully occupied by the statute. Express preemptive intent was stated in the original act but not in the 1988 act. Hence, express preemptive intent is absent. (4 C.4th 903.)

(d) Implied preemption is also absent. Under P.C. 594.5, aerosol paint legislation is generally nonpreemptive. Hence, both in 1981 and 1988, the Legislature knew it was obligated to take affirmative steps if it intended to preempt; it did so in 1981, but not in 1988. (4 C.4th 904.) Moreover, the statute does not exclusively cover the field, nor does it partially cover the field in preclusive terms, regardless of whether the subject matter is specified as graffiti prevention or as regulation of the retail display of aerosol paint. (4 C.4th 904, 905.)

One justice dissented, arguing that the uncodified preemption provision of the 1981 act was unaffected by the 1988 amendment of P.C. 594.1. (4 C.4th 907, 908.) (See 21 *Pepperdine L. Rev.* 1034; on vandalism and graffiti generally, see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §244 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *O'Connell v. Stockton* (2007) 41 C.4th 1061, 1072, 63 C.R.3d 67, 162 P.3d 583 [disapproving *Horton v. Oakland* (2000) 82 C.A.4th 580, 98 C.R.2d 371, text, p. 559; state's comprehensive regulation of drug offenses as a whole impliedly preempted city ordinance providing for forfeiture of vehicles used in acquiring controlled substances, and Vehicle Code provision expressly preempted ordinance providing for forfeiture of vehicles used to solicit prostitution].



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4. Activity on State-Owned Land.

8 *Witkin Sum. Cal. Law Const Law* § 991

[§ 991] Activity on State-Owned Land.

In *Board of Trustees v. Los Angeles* (1975) 49 C.A.3d 45, 122 C.R. 361, plaintiff, the board of trustees of a state university, owned a parcel of real property in Los Angeles adjoining the campus, which it leased to the general public for shows, fairs, and similar purposes. It leased the property for 16 days to the M Circus, and M failed to comply with the Los Angeles regulatory ordinance requiring a permit. Plaintiff board contended that the university property was in effect a state enclave in which the state was immune from local regulations (as the federal government is immune from state regulations in its enclaves; see *supra*, §27). *Held*, the ordinance was validly applied to the activity involved.

(a) Although the governmental-proprietary activity distinction has been abrogated in tort liability cases (see 5 *Summary* (10th), *Torts*, §210 et seq.), it should be applied in the field of local regulation, so as to limit the immunity of the state to situations in which the state is acting in a governmental capacity. (49 C.A.3d 49.) In the instant case, the leasing of the land is for revenue purposes alone; the activities conducted by the lessees have no relation to the governmental function of the university. (49 C.A.3d 50.)

(b) State laws on construction of school buildings, the board's statutory power to adopt rules, land regulations for the government of state colleges, and similar statutes, do not amount to preemption of the field, so as to nullify local regulation of circuses and other exhibitions in the interests of safety and health. (49 C.A.3d 51.) (See *Malibu v. Santa Monica Mountains Conservancy* (2002) 98 C.A.4th 1379, 1384, 119 C.R.2d 777 [commercial use of land in conservancy was subject to local zoning regulation because Conservancy Act specifically provides that Act is "complement" to exercise of local police power].)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Local Regulations Held Void.

8 *Witkin Sum. Cal. Law Const Law* § 992

[§ 992] Local Regulations Held Void.

The following are illustrative of areas held preempted by state law:

(1) *Alcoholic Beverages*. (See *Mussalli v. Glendale* (1988) 205 C.A.3d 524, 527, 252 C.R. 299 [ordinance prohibiting sale of alcoholic beverages at automobile service stations conflicted with Cal. Const., Art. XX, §22, giving state exclusive power to regulate liquor sales, and B. & P.C. 23790, exempting premises with liquor licenses from zoning ordinances prohibiting sales]; *People v. Ramirez* (1994) 25 C.A.4th Supp. 1, 3, 30 C.R.2d 626 [Cal. Const., Art. XX, §22, giving state exclusive power to regulate possession of alcoholic beverages, preempts ordinance prohibiting possession of alcoholic beverages in public buildings and parks]; 65 A.L.R.4th 555 [zoning regulation of intoxicating liquor as preempted by state law].)

(2) *Court Fees*. (See *Hogoboom v. Superior Court* (1996) 51 C.A.4th 653, 668, 59 C.R.2d 254 [local court rule authorizing mediation fee in family law and domestic violence matters was preempted by state statutory scheme limiting allowable charges in conciliation court].)

(3) *Criminal Activities*. (See *People v. Villarino* (1955) 134 C.A.2d Supp. 893, 899, 286 P.2d 86 [ordinance prohibiting use of or addiction to narcotics]; *Abbott v. Los Angeles* (1960) 53 C.2d 674, 681, 3 C.R. 158, 349 P.2d 974 [state criminal registration law precludes local ordinance requiring registration of criminals generally]; *Younger v. Berkeley City Council* (1975) 45 C.A.3d 825, 831, 119 C.R. 830 [control over state criminal offender records]; *Doe v. San Francisco* (1982) 136 C.A.3d 509, 513, 515, 517, 518, 186 C.R. 380 [municipal ordinance banning possession of handguns]; *Gates v. Municipal Court* (1982) 135 C.A.3d 309, 320, 185 C.R. 330 [ordinance regulating sexual conduct]; *Ventura v. San Jose* (1984) 151 C.A.3d 1076, 1078, 199 C.R. 216 [municipal ordinance banning sale of fireworks; subject is fully covered by state fireworks law]; *A & B Cattle Co. v. Escondido* (1987) 192 C.A.3d 1032, 1042, 238 C.R. 580 [state law banning manufacture and distribution of drug paraphernalia nullified local ordinance regulating sale of those materials]; 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §55.)

(4) *Elections*. (See *Younger v. Board of Supervisors* (1979) 93 C.A.3d 864, 155 C.R. 921 [Govt.C. 24001, setting forth eligibility requirements for local office, expresses legislative intent to preempt local regulation aimed at adding further eligibility requirements]; *Polis v. La Palma* (1992) 10 C.A.4th 25, 12 C.R. 322 [state law preempts power of

general law cities to impose term limits on local elected officials].)

(5) *Housing Occupancy Standards*. (See *Briseno v. Santa Ana* (1992) 6 C.A.4th 1378, 1382, 1383, 8 C.R.2d 486, 12 Summary (10th), *Real Property*, §826 [Uniform Housing Code preempts most local ordinances regarding occupancy standards].)

(6) *Labor Relations*. (See *Chavez v. Sargent* (1959) 52 C.2d 162, 177, 339 P.2d 801; *Stephenson v. Palm Springs* (1959) 52 C.2d 407, 340 P.2d 1009; 3 Summary (10th), *Agency and Employment*, §531 et seq.)

(7) *Land Development*. (See *Glenbrook Dev. Co. v. Brea* (1967) 253 C.A.2d 267, 278, 61 C.R. 189 [ordinance that subdivider obtain water from city conflicted with *Water C. 31053* where county water district incurred bonded indebtedness to provide same service]; *Wells Fargo Bank v. Woodside* (1983) 33 C.3d 379, 384, 189 C.R. 41, 657 P.2d 819 [local subdivision ordinance requiring surviving widow to obtain local approval for division of land resulting from setting apart to her of probate homestead was preempted by state probate homestead law]; *L.I.F.E. Committee v. Lodi* (1989) 213 C.A.3d 1139, 1146, 262 C.R. 166 [initiative ordinance establishing "green belt" and requiring amendments to land use element of general plan to be approved in citywide election conflicted with state annexation law]; *Los Angeles Lincoln Place Investors, Ltd. v. Los Angeles* (1997) 54 C.A.4th 53, 64, 62 C.R.2d 600 [ordinance that sought to restrain landowners from obtaining demolition permits by requiring future land use approvals and by imposing penalties for lack of approval was preempted by Ellis Act (*Govt.C. 7060* et seq.).]

(8) *Licensed Trades and Professions*. (See *Agnew v. Los Angeles* (1952) 110 C.A.2d 612, 615, 243 P.2d 73, *infra*, §996 [local fee and bond for electrical contractors was void]; *Robillwayne Corp. v. Los Angeles* (1966) 241 C.A.2d 57, 62, 50 C.R. 1 [local ordinance licensing fire insurance adjusters conflicted with *B. & P.C. 7520* et seq.]; *Verner, Hilby & Dunn v. Monte Sereno* (1966) 245 C.A.2d 29, 34, 53 C.R. 592 [local ordinance regulating civil engineers and surveyors conflicted with *B. & P.C. 6700* et seq.].)

(9) *Lien Priority*. (See *Isaac v. Los Angeles* (1998) 66 C.A.4th 586, 600, 77 C.R.2d 752 [uniformity in lien priority on real property is essential, making it matter of statewide concern].)

(10) *Mobilehome Residency Regulations*. (See *Karrin v. Ocean-Aire Mobile Home Estates* (1991) 1 C.A.4th 1066, 1071, 2 C.R.2d 581 [C.C. 798.31, prohibiting fees other than rent, utilities, and charges for services rendered, preempts ordinance permitting capital improvement assessment fee for repaving roads in mobilehome park]; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 C.A.4th 32, 45, 41 C.R.2d 393 [C.C. 798.17, exempting certain mobilehome leases from local rent control, preempts city ordinance imposing requirements for exempt status].)

(11) *Pawnbroker Regulations*. (See *Malish v. San Diego* (2000) 84 C.A.4th 725, 734, 737, 101 C.R.2d 18 [while several ordinances regulating pawnbrokers were valid, others were preempted, including those that authorized denial or revocation of local permit based on violation not showing pattern of misconduct, as required by state regulatory law, and that set holding requirements other than those set forth in state law].)

(12) *Public Safety Officers*. (See *Jackson v. Los Angeles* (2003) 111 C.A.4th 899, 906, 4 C.R.3d 325 [statutory limitations period stated for bringing disciplinary action against officer prevails over limitations period stated in city charter].)

(13) *Public Utilities*. (See *California Water & Tel. Co. v. Los Angeles* (1967) 253 C.A.2d 16, 28, 61 C.R. 618 [ordinance regulating investor-owned water utilities conflicted with Public Utilities Act]; *San Diego Gas & Elec. Co. v. Carlsbad* (1998) 64 C.A.4th 785, 802, 75 C.R.2d 534 [city's floodplain ordinance, which placed conditions on exercise of utility's right to dredge and dispose of dredging spoils, went beyond city's police power into field fully occupied by PUC].)

(14) *Remediation of Hazardous Substance Contamination*. (See *Lodi v. Randtron* (2004) 118 C.A.4th 337, 345, 13 C.R.3d 107 [administrative abatement order issued pursuant to city ordinance directing defendant to clean up site was

preempted by state Hazardous Substance Account Act; city is site listed by Department of Toxic Substances Control for which state has exclusive jurisdiction over all remedial response actions].)

(15) *Rent Control*. (See *Tri County Apartment Assn. v. Mountain View* (1987) 196 C.A.3d 1283, 1298, 242 C.R. 438, 12 Summary (10th), *Real Property*, §573 [ordinance restricting effective date of rent increases was preempted by state landlord-tenant law].)

(16) *Sewage and Waste Disposal*. (See *Del Norte Disposal v. Department of Corrections* (1994) 26 C.A.4th 1009, 1013, 1015, 31 C.R.2d 746 [ordinances giving solid waste disposal company exclusive franchise over state prison site conflicted with state's sovereign right to maintain its own buildings; rejecting argument that California Integrated Waste Management Act (*Pub.Res.C. 40000, 40050 et seq.*) authorized local regulation of waste disposal at state facilities]; *Laidlaw Waste Systems v. Bay Cities Services* (1996) 43 C.A.4th 630, 635, 638, 50 C.R.2d 824 [following *Del Norte*; school districts, as state agencies, were immune from local regulations granting exclusive franchise for hauling trash; immunity was not waived by *Pub.Res.C. 40059*]; *Rodeo Sanitary Dist. v. Board of Supervisors* (1999) 71 C.A.4th 1443, 1446, 1450, 84 C.R.2d 601 [sanitary districts are creatures of state law and county has no power to regulate collection and disposal of garbage within their boundaries; Integrated Waste Management Act did not alter districts' authority]; *Home Gardens Sanitary Dist. v. Corona* (2002) 96 C.A.4th 87, 91, 116 C.R.2d 638 [following *Rodeo*; even though area of sanitary district had been annexed by general-law city, district still had exclusive authority under state law to provide sewer service to property within its territorial boundaries].)

(17) *State Employees*. (See *In re Means* (1939) 14 C.2d 254, 258, 93 P.2d 105 [municipal regulation of state civil service employees]; *Bowen v. Los Angeles* (1952) 39 C.2d 714, 715, 249 P.2d 285 [oath for teachers].)

(18) *Taxation*. (See *Bame v. Del Mar* (2001) 86 C.A.4th 1346, 1355, 104 C.R.2d 183 [distinguishing *Board of Trustees v. Los Angeles* (1975) 49 C.A.3d 45, 122 C.R. 361, *supra*, §991; city may not impose admissions tax on entities that contract with state agricultural district to operate product exhibitions and shows; state agricultural district has broad purpose to promote California industries and products, and its sovereign immunity extends to private entities contracting with it to operate consumer product exhibitions and shows].)

(19) *Timber Harvesting*. (See *Westhaven Community Dev. Council v. Humboldt* (1998) 61 C.A.4th 365, 371, 71 C.R.2d 536 [distinguishing *Big Creek Lumber Co. v. San Mateo* (1995) 31 C.A.4th 418, 37 C.R.2d 159, *supra*, §986; county zoning ordinance requiring conditional use permit prior to harvesting timber was preempted by Forest Practice Act as applied to land area of three or more acres].)

(20) *Tobacco Smoking*. (See *Lab.C. 6404.5* [specifically preempting local regulation of smoking in workplace].)

(21) *Towing Fees*. (See *People v. PKS* (1994) 26 C.A.4th 400, 406, 31 C.R.2d 543 [*Veh.C. 22658(i)*, establishing standard for determining whether towing charge is excessive, preempts ordinance establishing conflicting standard].)

(22) *Traffic*. (See *Barajas v. Anaheim* (1993) 15 C.A.4th 1808, 1811, 1814, 1817, 19 C.R.2d 764 [*Veh.C. 22455*, regulating vending from vehicles in residential districts, preempts ordinance banning vending from vehicles parked on public streets].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Criminal Activities*. See *O'Connell v. Stockton* (2007) 41 C.4th 1061, 1072, 63 C.R.3d 67, 162 P.3d 583 [comprehensive regulation of drug offenses as whole by California Uniform Controlled Substances Act impliedly preempted city ordinance providing for forfeiture of vehicles used in acquiring controlled substances; provision allowing forfeiture of vehicles used to solicit prostitution was expressly preempted by state law providing for local adoption of pilot program that would declare motor vehicle used to solicit prostitution as nuisance, and providing for abatement of nuisance, but not forfeiture]; 33 A.L.R.6th 293 [Preemptive Effect of Uniform Controlled Substances Act upon Local Ordinances].

(4a) *(New) Firearm Regulations.* See *Fiscal v. San Francisco* (2008) 158 C.A.4th 895, 906, 911, 70 C.R.3d 324 [ordinance prohibiting virtually all possession of handguns by city residents and banning, without exception, sale, manufacture, transfer, or distribution of firearms and ammunition was preempted by state law].(10) *Mobilehome Residency Regulations.* See *Santa Cruz v. Waterhouse* (2005) 127 C.A.4th 1483, 1492, 26 C.R.3d 543 [Mobilehome Parks Act, *Health & Saf.C. 18300* et seq., preempts county ordinance restricting height of mobilehomes].

(11a) *(New) Predatory Lending Practices.* See *American Financial Services Assn. v. Oakland* (2005) 34 C.4th 1239, 1252, 23 C.R.3d 453, 104 P.3d 813 [state law seeking to combat predatory practices in home mortgage lending preempted city ordinance with same goal despite absence of preemption language in state statute; state law is comprehensive, regulation of mortgage lenders has historically occurred at state level, and uniform regulation throughout state is necessary].(15a) *(New) Scrap Metal Regulations.* See *Tosi v. Fresno* (2008) 161 C.A.4th 799, 804, 806, 74 C.R.3d 727 [purchase and sale of scrap metal is comprehensively regulated by state law; hence, ordinances that were more restrictive than state law regarding record keeping and cash transactions were preempted].

(16) *Sewage and Waste Disposal.* See *County Sanitation Dist. No. 2 of Los Angeles v. Kern* (2005) 127 C.A.4th 1544, 1619, 1622, 27 C.R.3d 28 [statute prohibiting local agencies from imposing tax, fee, or other charge for use of streets or highways "other than a permit fee for extra legal loads" preempted part of county fee used to mitigate impact to county infrastructure caused by transportation of legal loads of biosolids].



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CHAPTER X - Constitutional Law

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XII. POLICE POWER

B. Exercise of Police Power by Local Subdivision.

3. Exclusive Power Over Municipal Affairs.

a. Constitutional Provisions and Theory.

8 Witkin Sum. Cal. Law Const Law § 993

[§ 993] Constitutional Provisions and Theory.

(1) *Charter Cities*. The California Constitution provides that a city, or city and county, may adopt a charter giving it the power to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." (Cal. Const., Art. XI, §§5(a), 6(b); see Cal. Const., Art. XI, §5(b) [authorizing cities to adopt charter provisions covering city police, subgovernment, city elections, city officers and employees].)

Under this theory of "municipal home rule," municipalities have supreme authority in the field of "municipal affairs," i.e., matters of internal or local concern, free from interference by the Legislature. (See *Butterworth v. Boyd* (1938) 12 C.2d 140, 146, 82 P.2d 434; *Bishop v. San Jose* (1969) 1 C.3d 56, 61, 81 C.R. 465, 460 P.2d 137, *infra*, §996; *Sonoma County Organization of Public Employees v. Sonoma* (1979) 23 C.3d 296, 314, 152 C.R. 903, 591 P.2d 1; *Fresno v. Pinedale County Water Dist.* (1986) 184 C.A.3d 840, 844, 845, 229 C.R. 275, citing the text; *Johnson v. Bradley* (1992) 4 C.4th 389, 397, 14 C.R.2d 470, 841 P.2d 990, *infra*, §998 [partial public funding of city political campaigns]; *Cawdrey v. Redondo Beach* (1993) 15 C.A.4th 1212, 19 C.R.2d 179, *infra*, §999 [term limits for city council members]; *Rider v. San Diego* (1998) 18 C.4th 1035, 1054, 77 C.R.2d 189, 959 P.2d 347 [Joint Exercise of Powers Act (Govt.C. 6500 et seq.), by allowing joint powers agency to issue bonds without complying with city charter's two-thirds vote requirement, does not violate "home rule" doctrine]; 68 Cal. L. Rev. 829 [Sonoma]; 7 Hastings Const. L. Q. 643 [General Laws and Municipal Affairs]; 16 U.S.F. L. Rev. 603 [Charter City Financing in California].)

The municipal affairs doctrine merely allows an area in which the local government may freely operate, *subject to basic constitutional limitations*. Thus, in *Wilson v. Los Angeles Bd. of Civil Service Commrs.* (1960) 54 C.2d 61, 4 C.R. 489, 351 P.2d 761, defendant asserted complete power to disqualify an applicant for municipal employment, on the ground that this employment is a matter of local concern. The court said: "[W]e are referred to no case in which it is suggested that where a matter is of local concern only, the authorities may administer such matters in an arbitrary and capricious manner. We are bound by those decisions of the United States Supreme Court which impose the requirements of due process on all governmental action, including the determination of loyalty as a qualification for municipal employment." (54 C.2d 65.) (See *Howard Jarvis Taxpayers Assn. v. San Diego* (2004) 120 C.A.4th 374, 385, 394, 15 C.R.3d 457, quoting the text [city proposition requiring new or increased general tax to be approved by two-thirds majority vote conflicted with Cal. Const., Art. XIII C, §2(b), requiring majority vote].)

(2) *Charter Counties*. The constitutional provision relating to charter counties (Cal. Const., Art. XI, §4) contains no general reservation of local autonomy. A charter county possesses only those powers specifically enumerated in the Constitution. (*Cawdrey v. Redondo Beach*, *supra*, 15 C.A.4th 1221; see *Dibb v. San Diego* (1994) 8 C.4th 1200, 36 C.R.2d 55, 884 P.2d 1003 [under Cal. Const., Art. XI, §§3(a), 4(e), 4(h), charter county has authority to create citizens' law enforcement review board and to confer on board power to issue subpoenas]; *Giles v. Horn* (2002) 100 C.A.4th 206, 222, 123 C.R.2d 735 [county charter provisions requiring economy and efficiency determinations prior to contracting out case management functions under welfare-to-work program superseded state law allowing contracting out]; *People v. Orange* (2003) 106 C.A.4th 914, 922, 931, 131 C.R.2d 274 [county charter that, with one exception, incorporates general state law to govern county operations does not violate Cal. Const., Art. XI, §4, and is valid].)

(3) *City Charter*. The *charter* is the "constitution" of a municipality; and ordinances, whether adopted by the city council or by the initiative process, are invalid to the extent that they conflict with governing charter provisions. (*Brown v. Berkeley* (1976) 57 C.A.3d 223, 231, 129 C.R. 1.)

In *Domar Elec. v. Los Angeles* (1994) 9 C.4th 161, 36 C.R.2d 521, 885 P.2d 934, defendant city's charter provided that, with certain exceptions, a public contract bid must be let to the lowest and best responsible bidder. However, under an executive order, defendant's Board of Public Works adopted an outreach program, requiring that all bidders make an equal effort to utilize minority-owned businesses (MBE), women-owned businesses (WBE), and other business enterprises (OBE). One of the provisions of the program was that all bidders had to show that they had made a good faith effort to comply. Plaintiff was the lowest bidder on a project, but did not get the bid because it did not file a timely response showing that it had in good faith complied with the outreach program. The trial judge denied plaintiff's petition for mandamus. The Court of Appeal reversed, holding that the requirement that the bid comply with the outreach program was contrary to defendant's charter. *Held*, judgment of the Court of Appeal reversed.

(a) The charter does not specifically authorize defendant to create an outreach program. However, "[t]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation." (9 C.4th 170, quoting *Grass Valley v. Walkinshaw* (1949) 34 C.2d 595, 212 P.2d 894, 9 Summary (10th), *Taxation*, §310.) Unless there are clear limitations and restrictions in the charter, which may not be implied, the city has all powers over municipal affairs, including the awarding of public contracts. "[T]he mere failure of the City's charter to expressly grant the power to require bidders to conduct subcontractor outreach does not render the outreach program void." (9 C.4th 171.)

(b) The charter lists certain exceptions to the requirement that the bid be awarded to the lowest and best bidder, such as allowing a preference for local bidders and excluding bidders who do business in South Africa. To determine whether this list was meant to be exclusive, the purpose of competitive bidding, which is to prevent corruption and favoritism while ensuring that the lowest bid is accepted, must be looked at. When this is done, it is seen that there is no conflict between the outreach program, which increases competition, and the bidding process. (9 C.4th 173.)

(c) Plaintiff argued that the outreach program, instead of opening the competitive bidding process to everyone, had the effect of stifling competition and simply substituting the more expensive MBEs and WBEs for the existing parties. However, plaintiff offered no evidence to this effect. The board concluded that the program would open the process, ensuring the lowest possible bid, and the board's conclusion is subject to deference, even though there is no evidence to support it. Moreover, even though awarding the contract may not save money in this case, the board is entitled to conclude that in the long run the outreach program will do so. (9 C.4th 174.)

(d) The outreach program poses none of the evils that plaintiff identifies. The program does not require a bidder to contract with a particular business. It does not compel bidders to set aside a percentage of a contract to MBEs or WBEs. And, although a participation level of one percent is normal, a bidder gets no advantage based on whether he does or does not meet this level. "Hence, mindful as we must be of the principle that a charter must not be given such a construction as to defeat the objectives of competitive bidding ... , we conclude that the outreach program is not void

under the charter. By working to ensure that bids for municipal projects reflect the lowest prices practicable, the program is fully compatible with the charter requirement that contracts be awarded to the lowest and best regular responsible bidders." (9 C.4th 175.)

(e) Because defendant may require bidders to conduct the outreach program without violating the charter, it follows that the board may reject bids that do not comply. If bidders had the option to disregard the program, because the board could take no action to enforce it, the program itself would be undermined. (9 C.4th 175.) The board's rejection of plaintiff's bid is consistent with the principle that bidding requirements must be strictly adhered to in order to avoid any potential for abuse in the competitive bidding process. (9 C.4th 175.)

(f) Plaintiff argued that the charter's enumeration of various exceptions to the rule that the bid go to the lowest and best bidder was meant to be exclusive. However, all of the exceptions are, in effect, anticompetitive. For example, the provisions giving preference to local bidders, requiring domestic goods, and disqualifying those who do business with South Africa, all have the effect of limiting the eligible bidders and are anticompetitive in this respect. "That the charter expressly authorizes the City and its contracting agencies to consider these anticompetitive factors during the bid process (pursuant to lawfully enacted ordinances) does not logically lead to the conclusion that bid requirements intended to stimulate and promote competition may not be considered." (9 C.4th 176.)

One justice dissented. (9 C.4th 179.) (See 23 *Pepperdine L. Rev.* 378 [Domar]; on California constitutional provision prohibiting affirmative action by public entities, and statute permitting outreach programs, see *supra*, §967.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Exclusive Power Over Municipal Affairs.

b. Unlawful Surrender of Control.

8 Witkin Sum. Cal. Law Const Law § 994

[§ 994] Unlawful Surrender of Control.

In *County Mobilehome Positive Action Committee v. San Diego* (1998) 62 C.A.4th 727, 73 C.R.2d 409, plaintiff, an association of mobilehome owners and renters of spaces at mobilehome parks, challenged the constitutionality of a county ordinance imposing a moratorium on the enactment of rent control legislation for 15 years, pursuant to an accord reached between defendants, the county and an association of mobilehome park owners. The accord created a 15-year lease to be offered to renters by defendant association members, containing certain rent stabilization and related measures conditioned on defendant county refraining from enacting rent control legislation affecting defendant association members who signed the accord. *Held*, summary judgment for defendants reversed. The ordinance is facially unconstitutional and the accord is invalid to that extent. (62 C.A.4th 741.)

(a) "[O]ne legislative body cannot restrict the powers of its successors by enacting legislation which is purported to be nonrepealable." (62 C.A.4th 734.) Further, in contractually agreeing not to enact rent control legislation for 15 years, the county would be exposed to potential breach of contract damages if the accord were breached. (62 C.A.4th 735.)

(b) As stated in *Avco Community Developers v. South Coast Regional Com.* (1976) 17 C.3d 785, 800, 132 C.R. 386, 553 P.2d 546, "the government may not contract away its right to exercise the police power in the future." (62 C.A.4th 736.) This rule voids contracts that surrender or bargain away a municipality's control of a properly municipal function. (62 C.A.4th 736.)

(c) As stated in *Mounts v. Uyeda* (1991) 227 C.A.3d 111, 122, 277 C.R. 730, the test for facial unconstitutionality of a statute or ordinance is whether "its provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (62 C.A.4th 740.) Cal. Const., Art. XI, §7, provides that a county "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Here, the ordinance seeks to delay for 15 years any discretionary compliance with those obligations that might be warranted in the coming years. (62 C.A.4th 740.) (Cf. *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors* (2000) 84 C.A.4th 221, 232, 100 C.R.2d 740, *infra*, §1020 [agreement under Govt.C. 65865 between developer and county that would freeze zoning on parcel for 5 years during development of major real estate project in accordance with general plan was not unconstitutional surrender of county's right to exercise its police power in future].)

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See *108 Holdings, Ltd. v. Rohnert Park* (2006) 136 C.A.4th 186, 195, 38 C.R.3d 589 [distinguishing *County Mobilehome Positive Action Committee v. San Diego* (1998) 62 C.A.4th 727, 73 C.R.2d 409, text, p. 570; in entering into settlement agreement and stipulated judgment, city did not unlawfully surrender its police power; city retained power to alter or amend general plan as future circumstances might require]; *Trancas Property Owners Assn. v. Malibu* (2006) 138 C.A.4th 172, 181, 41 C.R.3d 200 [settlement agreement between developer and city that exempted developer from density requirements and from future zoning or other ordinances that would prohibit construction of residences shown in final map was unlawful surrender of city's zoning authority]; *Cotta v. San Francisco* (2007) 157 C.A.4th 1550, 1561, 69 C.R.3d 612 [following *County Mobilehome Positive Action Committee, supra*; resolutions providing incentives for using clean air vehicles for taxis were clearly experimental regulatory acts adopted pursuant to city's police power; even if resolution that failed to reserve authority to change incentives formed contract, it would be unenforceable because city could not contract away police power over taxicab industry].



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c. Determination of Issue.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 995

[§ 995] In General.

(1) *Difficulty of Determination.* The cases have not developed a formula or test for determining whether a particular subject is a municipal affair, over which the municipality has full authority (infra, §997), or is a matter of "statewide" or "general" concern as to which the legislative authority is paramount (infra, §996.) (See *Bishop v. San Jose* (1969) 1 C.3d 56, 62, 81 C.R. 465, 460 P.2d 137, infra, §996; *Smith v. Riverside* (1973) 34 C.A.3d 529, 534, 110 C.R. 67; *Fresno v. Pinedale County Water Dist.* (1986) 184 C.A.3d 840, 845, 229 C.R. 275; *California Fed. Savings & Loan Assn. v. Los Angeles* (1991) 54 C.3d 1, 5, 283 C.R. 569, 812 P.2d 916, infra, §1000.)

An instructive analysis appears, however, in the borderline case of *Perez v. San Jose* (1951) 107 C.A.2d 562, 237 P.2d 548. The city of San Jose and the state made an agreement for the improvement of a street within the city, part of the state highway, by a central dividing strip with electrical traffic signals and a central highway lighting system, for which the city was to pay a part of the cost. *Held*, city tax funds, which may be expended only for municipal purposes, could be used. Although highways are projects of the state and not municipal affairs, the improvement of a *city street or state highway within its borders* is a city affair. "San Jose and its inhabitants receive a special benefit, as compared with the rest of the state, in the improvement of The Alameda within the city limits. It facilitates local as well as through traffic. The lighting, the signals, and the general safety advantages of the improvement are for the benefit of the local citizens as well as others. There could be no possible question that this improvement on any other city street would be a municipal purpose. The fact that this city street is also a state highway makes it no less a city street and makes its improvement no less a matter of city concern." (107 C.A.2d 569.)

In *Baggett v. Gates* (1982) 32 C.3d 128, 136, 185 C.R. 232, 649 P.2d 874, the court held that the Public Safety Officers Procedural Bill of Rights Act (supra, §960) is a matter of statewide concern.

(a) The court will accord great weight to the Legislature's evaluation of this question, and the Legislature has expressly declared that "the right and protections provided ... constitute a matter of statewide concern." (*Govt.C. 3301.*) Also, the Legislature has set forth findings underlying that conclusion; effective law enforcement depends on maintenance of stable employer-employee relations between public safety employees and their employers, wherever situated within the state. (*Govt.C. 3301.*) (32 C.3d 136, 137.)

(b) The act does not impinge on the plenary authority of cities to provide in their charters for appointment, compensation, and removal of officers. The interference is minimal, and in *Professional Fire Fighters v. Los Angeles* (1963) 60 C.2d 276, 32 C.R. 830, 384 P.2d 158, *infra*, §1000, the court rejected the notion that an intrusion on matters connected with public employment is necessarily an intrusion on "municipal affairs." (32 C.3d 138.) As in *Professional Fire Fighters*, "the total effect of the legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves." (32 C.3d 140.) (See *Los Angeles County Safety Police Assn. v. Los Angeles* (1987) 192 C.A.3d 1378, 1385, 237 C.R. 920; *Runyan v. Ellis* (1995) 40 C.A.4th 961, 967, 47 C.R.2d 356 [Public Safety Officers Procedural Bill of Rights Act, under which officer is entitled to administrative appeal when punitive action is taken, does not conflict with "home rule" provision of Art. XI, §5].)

(2) *Public Contracts*. The Public Contract Code "is the basis of contracts between most public entities in this state and their contractors and subcontractors. With regard to charter cities, this code applies in the absence of an express exemption or a city charter provision or ordinance that conflicts with the relevant provisions of this code." (*Pub.Contr.C. 1100.7*; see *Domar Elec. v. Los Angeles* (1995) 41 C.A.4th 810, 820, 822, 48 C.R.2d 822, *supra*, §993 [*Pub.Contr.C. 2000*, permitting local agencies to require that bidders on public contracts meet goals for participation by minorities and women, is concerned with statewide issue of discrimination; thus, charter city's outreach program for public contract bidding was not concerned solely with "municipal affair" of competitive bidding and was not exempt from compliance with *Pub.Contr.C. 2000*]; on government contracts generally, see 1 *Summary* (10th), *Contracts*, §976 *et seq.*)

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c. Determination of Issue.

2. Consideration of Purpose.

8 Witkin Sum. Cal. Law Const Law § 996

[§ 996] Consideration of Purpose.

(1) *Legislative Purpose.* Although the legislative purpose is entitled to great weight, the issue is one for judicial determination. "[T]he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." (*Bishop v. San Jose* (1969) 1 C.3d 56, 63, 81 C.R. 465, 460 P.2d 137; see footnote 6, disapproving contrary statements in *Redwood City v. Moore* (1965) 231 C.A.2d 563, 580, 42 C.R. 72, and *In re Hubbard* (1964) 62 C.2d 119, 127, 41 C.R. 393, 396 P.2d 809.)

However, a legislative determination *not* to impose a limitation of a general law on charter cities is effective. (See *Rees v. Layton* (1970) 6 C.A.3d 815, 821, 86 C.R. 268; *Fresno v. Pinedale County Water Dist.* (1986) 184 C.A.3d 840, 846, 847, 229 C.R. 275 [Health and Safety Code recognizes need of local government to exercise control over solid waste collection services within its boundaries].)

(2) *Purpose of Local Regulation.* The purpose of the local regulation may be determinative. Thus, in *Agnew v. Los Angeles* (1952) 110 C.A.2d 612, 243 P.2d 73, Los Angeles sought to impose a \$ 100 fee on electrical contractors, and a \$ 1,000 surety bond before a permit would be issued to install wiring. *Held*, the regulation was void. "[T]he state ... has adopted a broad and comprehensive plan for licensing contractors throughout the state, for examination as to their qualifications and fitness to engage in their various activities, for licensing only those who prove themselves qualified by satisfactorily passing examinations, and for punishing those who prove themselves incompetent or unfaithful to the trust imposed in them. ... The state license implies permission to the licensee to conduct his business at any place in the state, and this permission should not be circumscribed by local authorities." (110 C.A.2d 617.) (See *Lynch v. Los Angeles* (1952) 114 C.A.2d 115, 117, 249 P.2d 856 [following *Agnew*]; *In re Groves* (1960) 54 C.2d 154, 156, 4 C.R. 844, 351 P.2d 1028 [\$ 100 yearly fee for operation of ice cream plant was valid as license fee for revenue only]; *Agnew v. Los Angeles* (1961) 190 C.A.2d 820, 828, 12 C.R. 507 [following *Groves*; amended ordinance was valid].)

In *Pacific Tel. & Tel. Co. v. San Francisco* (1959) 51 C.2d 766, 771, 336 P.2d 514, the court cautioned that "the constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state."

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d. What Are Municipal Affairs.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 997

[§ 997] In General.

The following are illustrations of matters held to be municipal affairs:

(1) *Bidding Procedures for Work in City.* (See *Piledrivers' Local Union v. Santa Monica* (1984) 151 C.A.3d 509, 511, 198 C.R. 731; *R & A Vending Services v. Los Angeles* (1985) 172 C.A.3d 1188, 1191, 218 C.R. 667; *MCM Const. v. San Francisco* (1998) 66 C.A.4th 359, 372, 78 C.R.2d 44 [city had power to impose requirements "above and beyond" Subletting and Subcontracting Fair Practices Act].)

(2) *Contracting.* (See *First Street Plaza Partners v. Los Angeles* (1998) 65 C.A.4th 650, 661, 76 C.R.2d 626 [manner in which city contracts is "municipal affair" that can be controlled by terms of charter].)

(3) *Juvenile Crime Prevention.* (See *Harrahill v. Monrovia* (2002) 104 C.A.4th 761, 764, 770, 128 C.R.2d 552 [ordinance prohibiting school age children from being in public places during particular hours when school is in session was valid juvenile crime prevention law, and not truancy law, which would have been preempted by state law].)

(4) *Local Public Employees.* (See *Butterworth v. Boyd* (1938) 12 C.2d 140, 148, 82 P.2d 434 [health service system]; *Bellus v. Eureka* (1968) 69 C.2d 336, 345, 71 C.R. 135, 444 P.2d 711 [employee pension plan adopting part of State Pension Act is not subject to all of Act's provisions]; *Bishop v. San Jose* (1969) 1 C.3d 56, 64, 81 C.R. 465, 460 P.2d 137, supra, §996 [wages of city employees were not controlled by state law requiring "prevailing wages" for contracted public work]; *Ector v. Torrance* (1973) 10 C.3d 129, 133, 109 C.R. 849, 514 P.2d 433 [qualification for city employment, including residence requirement]; *Sonoma County Organization of Public Employees v. Sonoma* (1979) 23 C.3d 296, 317, 152 C.R. 903, 591 P.2d 1 [determination of wages paid to employees]; *Riverside v. Superior Court* (2003) 30 C.4th 278, 285, 291, 132 C.R.2d 713, 66 P.3d 718 [statute requiring counties to submit to binding arbitration certain economic issues, including compensation, that arise during negotiations with unions representing public safety officers violated both Cal. Const., Art. XI, §11(b), as unlawful delegation of county affairs to private body, and Cal. Const., Art. XI, §1(b), as unlawful delegation of county's authority to set compensation of its employees]; 68 Cal. L. Rev. 829 [Sonoma].)

(5) *Local Revenue and Taxation*. (See *Glendale v. Trondsen* (1957) 48 C.2d 93, 98, 308 P.2d 1 [levy and collection of taxes for revenue]; *In re Groves* (1960) 54 C.2d 154, 156, 4 C.R. 844, 351 P.2d 1028 [license fee for revenue purposes was valid]; *Fisher v. Alameda* (1993) 20 C.A.4th 120, 124, 130, 24 C.R.2d 384 [city's real estate transfer tax conflicted with Govt.C. 53725(a), restricting imposition of ad valorem, transaction, or sales tax on sale of real property (see 9 Summary (10th), *Taxation*, §§131, 135); however, subject of statute is not of statewide concern (infra, §1000), and thus conflicting tax was municipal affair]; *Community Memorial Hosp. of San Buena Ventura v. Ventura* (1996) 50 C.A.4th 199, 207, 56 C.R.2d 732 [county hospital's competition with private hospitals for paying medical patients to help defray costs of treating indigents is within county's police power].)

(6) *Local Utilities*. (See *Mefford v. Tulare* (1951) 102 C.A.2d 919, 924, 228 P.2d 847 [ordinance regulating furnishing and installation of sewer and water facilities by subdividers of land within city]; *Stagg v. Municipal Court* (1969) 2 C.A.3d 318, 320, 82 C.R. 578 [regulation of municipal airport]; *Smith v. Riverside* (1973) 34 C.A.3d 529, 534, 110 C.R. 67 [contracting for construction of extension of water and electric systems]; 41 A.L.R.3d 384 [community television].)

(7) *Municipal Elections*. (See *Rees v. Layton* (1970) 6 C.A.3d 815, 820, 86 C.R. 268; *Johnson v. Bradley* (1992) 4 C.4th 389, 401, 14 C.R.2d 470, 841 P.2d 990, infra, §998; *Traders Sports v. San Leandro* (2001) 93 C.A.4th 37, 46, 112 C.R.2d 677 [following *Johnson*; number of votes required to put local tax measure on ballot is municipal affair].)

(8) *Parking*. (See *Sipperly v. San Diego Yellow Cabs* (1949) 89 C.A.2d 645, 651, 201 P.2d 543.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Local Public Employees*. See *Curcini v. Alameda* (2008) 164 C.A.4th 629, 640, 643, 645, 79 C.R.3d 383 [Labor Code statutes regulating overtime, meals, and rest breaks did not apply to charter county; those statutes address matters of employee "compensation," which is within charter county's exclusive constitutional purview]; *Dimon v. Los Angeles* (2008) 166 C.A.4th 1276, 1279, 1283, 83 C.R.3d 576 [following *Curcini* regarding meal periods].



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d. What Are Municipal Affairs.

2. Financing of Local Political Campaigns.

8 Witkin Sum. Cal. Law Const Law § 998

[§ 998] Financing of Local Political Campaigns.

Johnson v. Bradley (1992) 4 C.4th 389, 14 C.R.2d 470, 841 P.2d 990, deals with Proposition 73, a 1988 statewide initiative, which added Chapter 5 to the Political Reform Act of 1974 (*Govt.C. 81000* et seq., supra, §271 et seq.). Article 3 imposed restrictions on contributions to and by candidates and political committees or parties. Two years later the voters of Los Angeles amended the city charter by adopting Measure H, a comprehensive campaign, election, and ethics reform plan, that, unlike Proposition 73, imposed *spending* limitations. To comply with *Buckley v. Valeo* (1976) 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, supra, §256, Measure H, as codified in §313 of the city charter, provided for partial public funding of city political campaigns, and, correspondingly, spending limits on candidates who accept public funds. Petitioners, including sponsors of Proposition 73, brought an original mandamus proceeding in the Supreme Court to invalidate and enjoin enforcement of §313. The Court of Appeal denied relief, concluding that the charter city's decision to provide its own public funds to finance city political campaigns was a municipal affair. *Held*, judgment of Court of Appeal affirmed.

(a) *Govt.C. 85300*, in Proposition 73, states: "No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office." Petitioners contend that *Govt.C. 85300* prohibits the use of public money to fund political campaigns in local as well as statewide elections. Their major premise, that the integrity of the electoral process, at both the state and local level, is a statewide concern, is sound. (4 C.4th 409.)

(b) The question remains, however, whether *Govt.C. 85300* is "reasonably related and narrowly tailored to resolution of that statewide concern." (4 C.4th 409.) Petitioners cite nothing to support the proposition that public funding of political campaigns advances in any way the goal of enhancing the integrity of the electoral process. "In fact, the opposite appears to be true. As the high court observed in *Buckley v. Valeo*, ... concerning the federal 'matching funds' program for Presidential candidates, 'It cannot be gainsaid that public financing as a means of eliminating improper influence of large private contributions furthers a significant governmental interest. ... In addition, the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions.' " (4 C.4th 410.)

(c) The drafters of the charter amendment provided for partial public financing of campaigns so that they could impose spending limitations consistently with *Buckley v. Valeo*. *"It follows that, assuming spending limitations may enhance the integrity of the electoral process, a ban on public funding would actually frustrate achievement of that goal."* (4 C.4th 411.)

(d) *Govt.C. 85300* "is not reasonably related to the statewide concern of enhancing the integrity of the electoral process. Having reached this conclusion, we need not address whether the statute is also narrowly tailored to avoid unnecessary incursion into legitimate areas of local concern." (4 C.4th 411.)

One justice filed a concurring opinion disagreeing with the reasoning of the majority (4 C.4th 411), and another justice, concurring and dissenting at length, asserted that the majority's "advisory opinion" deals with a state initiative measure "that has been declared essentially a dead letter on federal constitutional grounds by the Ninth Circuit Court of Appeals." (4 C.4th 414.) (See 21 *Pepperdine L. Rev.* 653.)

SUPPLEMENT: [This section is current through the latest supplement]
Govt.C. 85300 was repealed in 2008.



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3. Term Limits for Elected Officials.

8 Witkin Sum. Cal. Law Const Law § 999

[§ 999] Term Limits for Elected Officials.

In *Cawdrey v. Redondo Beach* (1993) 15 C.A.4th 1212, 19 C.R.2d 179, defendant city amended its charter by adding a section limiting the number of terms city council members and the mayor could serve to no more than two terms, whether consecutive or not. Plaintiff, seeking reelection to a third term on the city council, petitioned for mandamus and injunctive relief when defendant city clerk refused to accept the nomination papers. The trial court denied the petition. *Held*, affirmed.

(a) In *Younger v. Board of Supervisors* (1979) 93 C.A.3d 864, 155 C.R. 921, a term limit provision of a *county* charter was held unconstitutional; but no cases have been found dealing with the power of *cities* to impose term limits on elected officials. (15 C.A.4th 1218.)

(b) *Johnson v. Bradley* (1992) 4 C.4th 389, 14 C.R.2d 470, 841 P.2d 990, *supra*, §998, and *California Fed. Savings & Loan Assn. v. Los Angeles* (1991) 54 C.3d 1, 283 C.R. 569, 812 P.2d 916, *infra*, §1000, explore the breadth of Cal. Const., Art. XI, §5(a), and set forth a framework for ascertaining whether a given provision is within the plenary powers granted charter cities. (15 C.A.4th 1219.)

(c) There is a fundamental distinction between charter counties and charter cities. (1) The constitutional provision relating to charter counties (Cal. Const., Art. XI, §4) contains no general reservation of local autonomy, and no grant of plenary authority over local election measures. A charter county possesses only those powers specifically enumerated in the *Constitution*. (15 C.A.4th 1221, 1222, discussing *Younger*.) (2) A city charter is not a grant of powers; it is an instrument that accepts the privilege granted by the Constitution of complete autonomous rule with respect to municipal affairs, and which otherwise serves merely to specify the limitations and restrictions on the exercise of the powers so granted and accepted. Hence, those powers not expressly forbidden may be exercised. (15 C.A.4th 1221.)

(d) Term limits are not of statewide concern. The fact that this charter provision conflicts with the state statutory scheme governing local elections (15 C.A.4th 1223, 1224) is not determinative of the issue as between state and municipal affairs. The inquiry concerning statewide concern focuses not on the legislative body's intent, but on the identification of a convincing basis for legislative action originating in extramunicipal concerns, one justifying

legislative supersession based on sensible, pragmatic considerations. (15 C.A.4th 1226, citing *Johnson v. Bradley*.)

(e) The charter provision regulates only the number of terms a candidate may serve as city council member or mayor. It does not preclude plaintiff, a former city council member, from seeking election to other city offices, including that of mayor; and city voters retain the right to vote for any qualified candidates. (15 C.A.4th 1229.) On balance, therefore, the interests of the city in incumbency reform outweigh any injury to incumbent officeholders and those who would vote for them. (15 C.A.4th 1231.) (On term limits generally, see *supra*, §§268, 269.)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Matters of Statewide Concern.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1000

[§ 1000] In General.

If the matter is one of general or statewide concern, the Legislature has paramount authority. The following are illustrations:

(1) *Annexation of Territory by City.* (See *Ferrini v. San Luis Obispo* (1983) 150 C.A.3d 239, 246, 197 C.R. 694.)

(2) *Assessment of Public Property.* A city cannot levy a special assessment on county property for a local improvement such as a parking district; i.e., creation of a parking district is a municipal affair, but assessment of the county property publicly used is a matter of statewide concern. (*Santa Barbara v. Santa Barbara* (1976) 59 C.A.3d 364, 370, 371, 130 C.R. 615.)

(3) *Cable Television.* (See *Cox Cable San Diego v. San Diego* (1987) 188 C.A.3d 952, 965, 966, 233 C.R. 735; 41 A.L.R.3d 384 [community antenna television service].)

(4) *Charter Amendment Procedures.* (See *District Election of Supervisors Committee for 5% v. O'Connor* (1978) 78 C.A.3d 261, 272, 274, 144 C.R. 442; *Howard Jarvis Taxpayers Assn. v. San Diego* (2004) 120 C.A.4th 374, 387, 394, 15 C.R.3d 457 [following *O'Connor*; city propositions requiring two-thirds majority for certain charter amendments were preempted by Cal. Const., Art. XI, §3(a)].)

(5) *Criminal Records.* (See *Younger v. Berkeley City Council* (1975) 45 C.A.3d 825, 830, 119 C.R. 830; *Rivero v. Superior Court* (1997) 54 C.A.4th 1048, 1059, 63 C.R.2d 213 [district attorney's criminal investigation files].)

(6) *Franchise for Telephone or Power Service Lines.* The authority to grant a franchise to engage in the telephone business is in the state; i.e., the business of supplying the people with telephone service is a matter of statewide concern. (*Pacific Tel. & Tel. Co. v. Los Angeles* (1955) 44 C.2d 272, 279, 282 P.2d 36; *Pacific Tel. & Tel. Co. v. San Francisco* (1959) 51 C.2d 766, 774, 776, 336 P.2d 514 [requirement of municipal franchise for maintenance of poles, wires, and other equipment in city streets was invalid].) The same reasoning applies to *power lines*. (*Modesto Irr. Dist. v. Modesto* (1962) 210 C.A.2d 652, 654, 27 C.R. 90.)

(7) *Government Subsidized Rental Housing Units*. (See *Bruce v. Alameda* (1985) 166 C.A.3d 18, 21, 212 C.R. 304.)

(8) *Horse Racing*. (See *Desert Turf Club v. Board of Supervisors of Riverside* (1956) 141 C.A.2d 446, 450, 296 P.2d 882 [county cannot, in guise of zoning ordinance, wholly exclude track from county].)

(9) *Intercity Sewage System*. Ordinarily, treatment and disposal of city sewage, and sewage bonds, are municipal affairs. (See *supra*, §997.) But where the sewage system transcends the boundaries of the city, affects navigable waters or tidelands, or otherwise touches public health generally, the system becomes a matter of statewide concern and is subject to regulation under the general laws. (*Santa Clara v. Von Raesfeld* (1970) 3 C.3d 239, 246, 90 C.R. 8, 474 P.2d 976 [revenue bonds ordered issued under state law, not in accord with conflicting charter provisions].)

(10) *Labor Relations Affecting Municipal Employees*. In *Professional Fire Fighters v. Los Angeles* (1963) 60 C.2d 276, 32 C.R. 830, 384 P.2d 158, defendant city contended that its regulations concerning dealings with members of the fire department prevailed over the Labor Code provisions recognizing the right of municipal employees, including fire fighters, to organize or join labor unions (*Lab. C. 1960 et seq.*). *Held*, the legislative object was to create uniform fair labor practices throughout the state, and "[l]abor relations are of the same statewide concern as workmen's compensation, liability of municipalities for tort, perfecting and filing of claims, and the requirement to subscribe to loyalty oaths." (60 C.2d 295.)

(11) *Licensed Trades or Professions*. Where the state has provided a comprehensive scheme for examining and licensing members of a particular trade or profession, municipalities may not impose additional qualifications before issuing licenses to exercise the trade or profession within the city. (*Horwith v. Fresno* (1946) 74 C.A.2d 443, 447, 168 P.2d 767 [electrical contractors]; *San Francisco v. Boss* (1948) 83 C.A.2d 445, 446, 189 P.2d 32 [painting contractors]; *Agnew v. Los Angeles* (1952) 110 C.A.2d 612, 617, 243 P.2d 73, *supra*, §996 [electrical contractors]; *Baron v. Los Angeles* (1970) 2 C.3d 535, 540, 541, 86 C.R. 673, 469 P.2d 353, 1 Cal. Proc. (4th), Attorneys, §357 [ordinance regulating local lobbying cannot apply to acts of attorney constituting practice of law].)

(12) *Milk Industry*. (See *Dairy Belle Farms v. Brock* (1950) 97 C.A.2d 146, 154, 217 P.2d 704 [state milk control law, regulating milk prices, prevailed over the municipal power to let purchase contracts]; 14 A.L.R.2d 103 [requirements on outside producers of milk to be sold in city].)

(13) *Psychiatric Treatment*. (See *Northern Calif. Psychiatric Soc. v. Berkeley* (1986) 178 C.A.3d 90, 102, 106, 223 C.R. 609, citing the text [city ordinance prohibiting electroconvulsive therapy].)

(14) *Statutory Liability*. Where liability is imposed by a state statute, or, as in the case of damage to property by a public improvement, by the constitutional provision on eminent domain (*infra*, §1112), enforcement is a matter for statutory regulation and cannot be validly affected by local procedural restrictions. (*Wilson v. Beville* (1957) 47 C.2d 852, 859, 306 P.2d 789.)

(15) *Tax on Financial Corporations*. In *California Fed. Savings & Loan Assn. v. Los Angeles* (1991) 54 C.3d 1, 283 C.R. 569, 812 P.2d 916, defendant city imposed an annual license tax on most businesses within its municipal boundaries. It attempted to collect the tax from plaintiff financial corporation despite the provision in Rev.C. 23182 that a state income tax on financial corporations was in lieu of all other taxes and licenses (see 9 *Summary* (10th), *Taxation*, §337). Defendant argued that its tax was a local revenue measure qualified as a "municipal affair," and therefore immune from state legislative interference by virtue of Cal. Const., Art. XI, §5(a). *Held*, the tax was invalid.

(a) "Although municipal taxation is a 'municipal affair' ... in that it is a necessary and appropriate power of municipal government, aspects of local taxation may under some circumstances acquire a 'supramunicipal' dimension, transforming an otherwise intramural affair into a matter of statewide concern warranting legislative attention." (54 C.3d 7.)

(b) "In the event of a true conflict between a state statute reasonably tailored to the resolution of a subject of

statewide concern and a charter city tax measure, the latter ceases to be a 'municipal affair' to the extent of the conflict and must yield." (54 C.3d 7.)

(c) Under the circumstances of this case, "the trial court correctly concluded that the aggregate intrastate tax burden on financial corporations--including local taxes such as the City's business license tax--is a subject of statewide concern." (54 C.3d 7.) (See 19 Pepperdine L. Rev. 838.)

(16) *Veterans*. (See *Cunningham v. Hart* (1947) 80 C.A.2d 902, 907, 183 P.2d 75 [state statute governing reinstatement to position in public employment].)

SUPPLEMENT: [This section is current through the latest supplement]

(5a) *(New) Firearm Regulation*. See *Fiscal v. San Francisco* (2008) 158 C.A.4th 895, 918, 70 C.R.3d 324 [creation of uniform statutory scheme to regulate handgun possession, licensing, and sales is matter of statewide concern].(11)
Licensed Trades or Professions.

Baron case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §341.



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2. District Formation and Dissolution.

8 *Witkin Sum. Cal. Law Const Law* § 1001

[§ 1001] District Formation and Dissolution.

In *Las Tunas Beach Geologic Hazard Abatement Dist. v. Superior Court* (1995) 38 C.A.4th 1002, 45 C.R.2d 529, defendant city formed plaintiff geologic hazard abatement district (GHAD). The formation resolution contained a condition permitting defendant to dissolve the district if it found that the district's plan was not feasible. Defendant attempted to do this, but plaintiff filed an action for declaratory relief to prevent dissolution. Plaintiff's motion for summary judgment was denied, and plaintiff sought mandamus. *Held*, mandamus granted, directing the trial judge to vacate the order denying summary judgment, and to enjoin defendant from taking any action to dissolve plaintiff except in compliance with the Cortese-Knox Local Government Reorganization Act of 1985 (now the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000) (*Govt.C. 56000 et seq.*).

(a) Cortese-Knox generally preempts local law regarding the formation of districts. However, it does not preempt more specific state laws regarding various types of districts. The *formation* of GHADs is governed by *Pub.Res.C. 26500 et seq.* Other special statutes, for example, authorize mosquito abatement districts and the formation of sanitary districts. These special statutes govern over the more general *Cortese-Knox Act*. (38 C.A.4th 1009.)

(b) Although controlling the formation of GHADs, *Pub.Res.C. 26500* is silent on their dissolution. In this event, Cortese-Knox, not common law, is turned to. "The City's reliance on these common law theories is misplaced. A GHAD is purely a creature of statute, unknown at common law. Further, Cortese-Knox expressly states it is 'the sole and exclusive authority and procedure' for changes of organization, including district dissolution. ... The Legislature thus has evidenced its intention that Cortese-Knox provide the exclusive method for such changes of organization. ... Therefore, the City's effort to enforce its home-grown formation condition pursuant to common law doctrines 'interferes with and frustrates state [dissolution] procedures and cannot be sustained.' " This conclusion that Cortese-Knox governs the dissolution, but not the formation, is consistent with other statutory schemes. (38 C.A.4th 1012.)

(c) The fact that plaintiff convinced defendant that it would abide by the condition reserving to defendant the right to order dissolution, did not estop plaintiff from asserting the invalidity of that condition. "[T]he comprehensiveness of the statutory scheme bars the City from invoking the equitable doctrine of estoppel to achieve dissolution of the District. ... The City could not disregard Cortese-Knox and purport to improvise its own dissolution procedure in the formation

resolution. To allow the City to maintain it was induced by the proponents into adopting the resolution of formation in reliance on their representations the City would retain the power to order dissolution would wreak havoc with the statutory scheme, which prescribes the exclusive authority and procedure for dissolution." (38 C.A.4th 1014.)

(d) Defendant relied on the Validating Act, which allows 6 months to attack the *formation* of a public body, a condition not met here. This argument is also without merit. "The District is not challenging its own validity. Rather, it is the City which is now attacking the validity of the District by arguing the conditions of formation are not severable from the rest of the formation resolution and if the formation conditions are invalid so is the entire formation resolution. It is that challenge by the City to the validity of the formation of the District which is time-barred. Under the Validating Act, the City had six months to bring an action contesting the validity of the formation of the District. Having failed to bring such an action during that period, the City cannot now challenge the District's status as a legally organized entity." (38 C.A.4th 1015.)

(e) The summary judgment sought by plaintiff tried to enjoin defendant from taking *any action* to interfere with plaintiff's status or activities. This request is overbroad. Because Cortese-Knox provides a mechanism for dissolving GHADs, defendant cannot be prevented from relying on it. Although defendant is time-barred from attacking the validity of plaintiff's formation, it is not foreclosed from starting the Cortese-Knox procedure for dissolution. (38 C.A.4th 1016.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. School System.

8 Witkin Sum. Cal. Law Const Law § 1002

[§ 1002] School System.

Education and public schools historically have been, and remain, matters of statewide rather than local concern. (*California Teachers Assn. v. Hayes* (1992) 5 C.A.4th 1513, 1522, 1524, 7 C.R.2d 699; see *Govt.C. 53094* [regulating compliance with local zoning ordinances]; *Whitmore v. Brown* (1929) 207 C. 473, 480, 279 P. 447; *Atherton v. Superior Court* (1958) 159 C.A.2d 417, 421, 324 P.2d 328 [school site location; school district's determination supersedes local zoning ordinance].)

California Teachers Assn. involved an attack on the state's power to control funds allocated under Proposition 98. That initiative, adopted in 1988, added Cal. Const., Art. XVI, §8(b), setting a minimum level for "monies to be applied by the state for the support of school districts and community college districts." As part of its Proposition 98 funding, the Legislature included funds for the Child Care and Development Services Act (*Educ.C. 8200 et seq.*), which is under the general supervision of the Superintendent of Public Instruction. This was challenged by the California Teachers Association and others, who argued that only funds allocated to and administered by school districts satisfy Proposition 98. The trial court agreed and entered judgment for plaintiffs. *Held*, reversed.

(a) As a result of various events, including *San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, *supra*, §805, and *Serrano v. Priest* (1976) 18 C.3d 728, 135 C.R. 345, 557 P.2d 929, *supra*, §806, and the adoption of Proposition 13 (9 *Summary* (10th), *Taxation*, §125 et seq.), the state over the past 20 years has been forced to assume a greater share of responsibility for school financing. Proposition 98 was adopted against this background. (5 C.A.4th 1526, 1528.)

(b) Proposition 98 must be considered in light of other constitutional provisions, including those relating to school districts and their relationship to the state. (5 C.A.4th 1532.) Because "Proposition 98 did not alter the state's role in education, the Constitution continues to make education and the operation of the public schools a matter of statewide rather than local or municipal concern." (5 C.A.4th 1533.)

(c) Cal. Const., Art. XVI, §8(b), in establishing a minimum sum for "monies to be applied by the state," would appear to retain, rather than divest, the state of its authority over education funds. (5 C.A.4th 1533, 1534.)

(d) "Given plaintiffs' facial attack, it is enough to hold, as we do, that legislative programs which advance, and hence support, the educational mission of school districts and community college districts may constitutionally be included within the funding guarantee of Proposition 98." (5 C.A.4th 1534.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Cobb v. O'Connell* (2005) 134 C.A.4th 91, 97, 36 C.R.3d 170 [statute allowing state temporarily to run city schools during fiscal crisis did not violate home rule provision; statute was not overbroad and did not conflict with charter provision regulating election of school board]; *Mendoza v. California* (2007) 149 C.A.4th 1034, 1056, 57 C.R.3d 505, Supp., supra, §983 [distinguishing *Cobb*; unique challenges facing school district did not justify constitutional violation].



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4. Traffic.

8 Witkin Sum. Cal. Law Const Law § 1003

[§ 1003] Traffic.

Traffic, even within a city, is of statewide concern. (See *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 C.2d 779, 783, 108 P.2d 430 [municipal ordinance prohibiting one-man streetcar operation was void where it was contrary to valid Public Utilities Commission regulations]; *Holman v. Viko* (1958) 161 C.A.2d 87, 93, 326 P.2d 551 [Vehicle Code provisions on pedestrian crossing supersede local regulations except to extent authorized by Code]; *People v. Moore* (1964) 229 C.A.2d 221, 228, 40 C.R. 121 [ordinance requiring "Driver's Permit" to operate public transportation vehicle was invalid; statutes authorize only local licensing of vehicles, not drivers]; *Union City v. Southern Pac. Co.* (1968) 261 C.A.2d 277, 279, 67 C.R. 816 [railroad grade crossing]; *Lafayette v. Contra Costa* (1979) 91 C.A.3d 749, 755, 154 C.R. 374; *Rumford v. Berkeley* (1982) 31 C.3d 545, 553, 183 C.R. 73, 645 P.2d 124 [traffic barriers]; *Barajas v. Anaheim* (1993) 15 C.A.4th 1808, 1811, 1814, 1817, 19 C.R.2d 764 [Veh.C. 22455, regulating vending from vehicles in residential districts, preempts ordinance banning vending from vehicles parked on public streets]; *Citizens Against Gated Enclaves v. Whitley Heights Civic Assn.* (1994) 23 C.A.4th 812, 819, 822, 28 C.R.2d 451 [citing *Lafayette*; Veh.C. 21101.6 precluded homeowners association from erecting gates on streets in neighborhood to exclude public, because city had no authority to withdraw streets from public use]; 23 *Santa Clara L. Rev.* 331 [*Rumford*].)

Veh.C. 22508, authorizing local authorities to provide by ordinance for parking zones and meters, is not an abandonment of the field to local control; it is an occupation of the field by the state and a limited delegation to the local legislative body. Hence, a local initiative measure to repeal a parking meter ordinance was improper. (*Mervynne v. Acker* (1961) 189 C.A.2d 558, 561, 11 C.R. 340; see *Los Angeles v. Alhambra* (1980) 27 C.3d 184, 192, 165 C.R. 440, 612 P.2d 24 [parking meter regulation].)

The Legislature has authorized adopting local ordinances to regulate the closure of roads, under specified conditions. (See *Veh.C. 21101*; *Hawaiian Gardens v. Long Beach* (1998) 61 C.A.4th 1100, 1111, 72 C.R.2d 134 [city's proposed closure of road at border with other city for traffic control purposes was inconsistent with *Veh.C. 21101(f)*, because it would have significant negative impact on residents of other city as well as on provision of emergency services]; *Save the Sunset Strip Coalition v. West Hollywood* (2001) 87 C.A.4th 1172, 1177, 105 C.R.2d 172 [*Veh.C. 21101(a)(1)* and *21101(f)* are separate provisions; thus, city did not need to find that street was no longer needed for vehicular traffic before changing it to cul-de-sac where this change was consistent with general plan circulation

element; distinguishing *Hawaiian Gardens*]; *Citizens for Improved Access v. San Diego* (2004) 118 C.A.4th 808, 814, 13 C.R.3d 259 [city had authority to close road based on legislative determination that it was no longer necessary for vehicular traffic].)

SUPPLEMENT: [This section is current through the latest supplement]



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XII. POLICE POWER

B. Exercise of Police Power by Local Subdivision.

4. Extraterritorial Municipal Regulations.

8 Witkin Sum. Cal. Law Const Law § 1004

[§ 1004] Extraterritorial Municipal Regulations.

(1) *Local Inspection.* Municipal inspection of food in the interest of health is a recognized exercise of local police power but ordinarily this regulation cannot be given an extraterritorial operation.

In *Oakland v. Brock* (1937) 8 C.2d 639, 67 P.2d 344, a city ordinance authorized municipal inspection of meat in slaughterhouses outside the city when the meat was sold inside. There already existed a comprehensive federal, state, or municipal inspection service covering the state, and no showing was made of its inadequacy to protect the health of the city. *Held*, the ordinance was void. Where necessary to protect its residents, the city might have authority to grant *licenses* conditioned on the right of inspection; but here there was merely the unauthorized attempt to impose an extraterritorial regulation without licensing, and with no showing of necessity. (8 C.2d 642.) The court also commented on the danger of "a race to claim fees for inspection" from outside establishments already subject to inspection under state law. (8 C.2d 643.)

(2) *Prohibition of Outside Competition.* Municipalities sometimes seek to prevent free competition from businesses having plants or establishments located outside the city limits. The attempt to do so by discriminatory license fees or taxes, i.e., the practical erection of a "tariff barrier," is sometimes upheld under the *taxing power*, the classification being deemed reasonable. (See 9 *Summary* (10th), *Taxation*, §51.)

But the attempt wholly to exclude these businesses under the *police power* will fail. In *LaFranchi v. Santa Rosa* (1937) 8 C.2d 331, 65 P.2d 1301, an ordinance made it unlawful to distribute, within the city, milk that had been pasteurized outside. Petitioner's plant complied with all standards of the state Department of Agriculture; it was located in the same state inspection district; and city inspection of the plant would not unduly burden the inspector. *Held*, the ordinance was unconstitutional. Assuming that the municipality may impose higher standards than the state and zone plants within the city, this was not the purpose of the ordinance; and, although reasonable restrictions of distance for convenience of inspection may be justified, prohibition of the product of outside plants bears no reasonable relationship to a proper legislative object. (8 C.2d 338.) (See *In re Lyons* (1938) 27 C.A.2d 182, 186, 80 P.2d 745 [ordinance prohibiting bringing garbage into county was invalid]; 14 A.L.R.2d 103 [validity of ordinance imposing requirements on outside producers of milk to be sold in city].)

(3) *Requiring County Contractors to Pay Compensation for Employees on Jury Duty.* In *Burns Int. Sec. Services*

Corp. v. Los Angeles (2004) 123 C.A.4th 162, 180, 19 C.R.3d 776, the court held that a county ordinance requiring companies contracting with the county to offer up to 5 days' compensation to all full-time employees while serving on a jury was not invalid despite its extraterritorial effect. Private companies increasingly were reducing or eliminating paying employees' salaries while they served on juries, thus reducing the number of potential jurors because of financial hardship, and increasing the burden on the county and other employers who do make those payments. Here, defendant was acting as a market participant, not a regulator. (123 C.A.4th 178.) It was not seeking "to enlarge its powers or regulate outside its boundaries," or to force employers to change their behavior outside the county. Further, the remedies provided are effective only within the county's territorial boundaries. (123 C.A.4th 172.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) (New) *Requiring City Contractor To Comply With Living Wage Ordinance.* Although a municipal corporation generally has no extraterritorial power of regulation, it may exercise certain extraterritorial powers when necessary to the proper conduct of its own affairs. In *Amaral v. Cintas Corp. No. 2* (2008) 163 C.A.4th 1157, 78 C.R.3d 572, the court held that application of a city's living wage ordinance to defendant, who contracted with the city to provide laundry services, but whose employees performed those services in other cities, was an appropriate exercise of the city's contracting power. The ordinance does not purport to regulate conduct outside the city's boundaries; rather, it specifies conduct it wants its contracting partners to follow. For constitutional purposes, it does not matter whether a contractor might have to perform the required conduct outside the city. (163 C.A.4th 1177.) Neither does it matter that the ordinance gives employees a private right of action against their contracting employer for a violation. The requirements of the living wage ordinance and its enforcement mechanisms reach outside the city's boundaries only to the extent that outside parties choose to contract with the city. The fact that some enforcement measures go beyond traditional contract remedies does not convert the city's exercise of its contracting power into a prohibited extraterritorial regulation. (163 C.A.4th 1178.)



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C. Zoning.

1. In General.

a. Nature of Power.

8 Witkin Sum. Cal. Law Const Law § 1005

[§ 1005] Nature of Power.

Early cases upheld the validity of zoning laws as police power measures to promote safety, health, or order. The power to zone is not limited, however, to cases where a particular business or structure is dangerous and amounts to a nuisance. Zoning laws attempt to make an orderly distribution of activities throughout the community, with the resulting benefits of safety and convenience to those who live in purely residential districts. Thus, apartment houses, stores, hospitals, etc., may be zoned by a comprehensive ordinance. (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 47 S.Ct. 114, 118, 71 L.Ed. 303, 310; see *Miller v. Board of Public Works of Los Angeles* (1925) 195 C. 477, 484, 234 P. 381; *Jones v. Los Angeles* (1930) 211 C. 304, 307, 295 P. 14; *Sunny Slope Water Co. v. Pasadena* (1934) 1 C.2d 87, 92, 33 P.2d 672; *Banville v. Los Angeles* (1960) 180 C.A.2d 563, 570, 4 C.R. 458; *Consolidated Rock Products Co. v. Los Angeles* (1962) 57 C.2d 515, 521, 20 C.R. 638, 370 P.2d 342, *infra*, §1007.)

"It is well settled that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power, and that the establishment, as part of a comprehensive and systematic plan, of districts devoted to strictly private residences or single family dwellings, from which are excluded business or multiple dwelling structures, is a legitimate exercise of the police power." (*Wilkins v. San Bernardino* (1946) 29 C.2d 332, 337, 175 P.2d 542.) Thus, if "the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." (*Euclid v. Ambler Realty Co.*, *supra*.) "The courts will, of course, inquire as to whether the scheme of classification and districting is arbitrary or unreasonable, but the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power." (*Lockard v. Los Angeles* (1949) 33 C.2d 453, 461, 202 P.2d 38.) (See *Clemons v. Los Angeles* (1950) 36 C.2d 95, 98, 103, 222 P.2d 439; *Beverly Oil Co. v. Los Angeles* (1953) 40 C.2d 552, 557, 254 P.2d 865; *McCarthy v. Manhattan Beach* (1953) 41 C.2d 879, 885, 264 P.2d 932; *Minney v. Azusa* (1958) 164 C.A.2d 12, 25, 330 P.2d 255; *Ewing v. Carmel-By-The-Sea* (1991) 234 C.A.3d 1579, 1586, 286 C.R. 382, *infra*, §1034; *Placer Ranch Partners v. Placer* (2001) 91 C.A.4th 1336, 1343, 111 C.R.2d 577 [1-mile buffer between landfill and residential development had reasonable relation to public welfare and was valid exercise of county's police powers].)

West's Key Number Digest, Constitutional Law k. 228.2

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

1. In General.

b. Commentary and Practice Works.

8 Witkin Sum. Cal. Law Const Law § 1006

[§ 1006] Commentary and Practice Works.

The literature on zoning is voluminous, and much text and other commentary is available on all of its aspects.

(1) *Texts and Practice Works.* (See Anderson, American Law of Zoning; C.E.B., Zoning Practice; 83 *Am. Jur.2d* (2003 ed.), *Zoning and Planning*; *Cal. Civil Practice*, 2 Real Property Litigation, §14:1 et seq. [text and forms for actions involving land use and zoning litigation]; 32 Proof of Facts 3d 531 [proof of bias or conflict of interest in zoning decision]; 41 Proof of Facts 3d 443 [proof of change in character of neighborhood sufficient to justify rezoning]; 91 *Am. Jur. Trials* 233 [right to cross-examine witnesses at zoning board of appeals hearings].)

(2) *Law Reviews.* (See 91 *Harv. L. Rev.* 1247 [Developments in Law--Zoning]; 108 *Harv. L. Rev.* 1127 [state-sponsored growth management as remedy for exclusionary zoning]; 89 *Cal. L. Rev.* 1847 [effect of Costa-Hawkins Act (C.C. 1954.50 et seq.), restricting local rent control, on local inclusionary zoning programs]; 31 *Cal. Western L. Rev.* 127 [arguing that nonzoning is best zoning]; 8 *Ecology L. Q.* 655 [agricultural districts and zoning]; 23 *Hastings L. J.* 1427 [zoning for population control]; 2 *Pepperdine L. Rev.* 1 [Symposium on Land Use Planning and Control]; 10 *San Diego L. Rev.* 887 [rural zoning]; 33 *San Diego L. Rev.* 291 [aesthetic regulation of architectural design of private single-family houses impinges on First Amendment right of expression, and thus must advance substantial governmental interest]; 38 *San Diego L. Rev.* 693 [Smart Growth and Other Infirmities of Land Use Controls]; 20 *Santa Clara L. Rev.* 285 [consistency doctrine]; 45 *So. Cal. L. Rev.* 335 [land use regulation in lieu of zoning]; 54 *So. Cal. L. Rev.* 1167 ["inclusionary zoning"--requiring developer of new housing units to set aside fraction for occupancy at reduced prices for moderate income and low income families]; 33 *Southwestern U. L. Rev.* 285 [Congress' attempts to rein in discriminatory state zoning practices]; 26 *Stanf. L. Rev.* 585 [Phased Zoning: Regulation of the Tempo and Sequence of Land Development]; 10 *U.C. Davis L. Rev.* 1 [Land Use Planning]; 34 *U.C. Davis L. Rev.* 929 [regulating home-based voyeur websites through land use laws]; 21 *U.C.L.A. L. Rev.* 1432 [ordinance requiring developer to devote part of development to low income housing]; 10 *U.S.F. L. Rev.* 361 [judicial review of zoning agency decisions]; 13 *U.S.F. L. Rev.* 945 [proposed architectural controls in San Francisco neighborhoods].)

(3) *American Law Reports.* (See 21 *A.L.R.3d* 1222 [aesthetics]; 37 *A.L.R.3d* 1018 [rights as between landlord and tenant when zoning restricts contemplated use]; 41 *A.L.R.3d* 636 [zoning with compensation]; 48 *A.L.R.3d* 1210 [exclusionary zoning]; 48 *A.L.R.3d* 1303 [buffer provision as applicable to abutting land in adjoining municipality]; 58

A.L.R.3d 1241 [validity and construction of regulation as affected by division of lot by zone boundary lines]; 62 *A.L.R.3d 880* [ordinance requiring developer to devote part of development to low and moderate income housing]; 63 *A.L.R.3d 1184* [validity of ordinance deferring residential development until establishment of public services in area]; 70 *A.L.R.3d 125* [creating special restrictions or conditions not applicable to other property similarly zoned]; 83 *A.L.R.3d 1084* [zoning for senior citizens communities]; 84 *A.L.R.3d 1187* [applicability of zoning regulation to nongovernmental lessee of Government-owned property]; 87 *A.L.R.3d 1265* [applicability of zoning regulation to public utilities]; 92 *A.L.R.3d 1073* [ban on construction until public facilities comply with specific standards]; 7 *A.L.R.4th 732* [validity and construction of provisions of zoning statute or ordinance regarding protest by neighboring property owners]; 8 *A.L.R.4th 1087* [standing of civic or property owners association to challenge zoning board decision]; 26 *A.L.R.5th 736* [zoning authority as estopped from revoking legally issued building permit]; 63 *A.L.R.5th 607* [zoning regulations on golf courses, swimming pools, tennis courts, or the like]; 103 *A.L.R.5th 445* [zoning ordinances regulating display of noncommercial flags or banners].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Texts and Practice Works*. C.E.B., *Zoning Practice* has been superseded by C.E.B., *Land Use Practice*.

(2) *Law Reviews*. See 118 *Harv. L. Rev.* 2291 [making regionalism work]; 35 *Pepperdine L. Rev.* 835 [agencies and zoning of public lands and seas]; 57 *Stanf. L. Rev.* 1 [Ordering (and Order in) the City]. (3) *American Law Reports*. See 22 *A.L.R.6th* 295 [inclusionary zoning ordinances and programs; superseding 62 *A.L.R.3d 880*, text, p. 588].



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C. Zoning.

1. In General.

c. Prohibiting Removal of Natural Products.

8 Witkin Sum. Cal. Law Const Law § 1007

[§ 1007] Prohibiting Removal of Natural Products.

In *Consolidated Rock Products Co. v. Los Angeles* (1962) 57 C.2d 515, 20 C.R. 638, 370 P.2d 342, plaintiff owned a 348-acre alluvial cone of rock, sand, and gravel in Los Angeles. The area was zoned for agricultural and residential use. In this action to enjoin enforcement of the zoning ordinance, plaintiff contended that it was unconstitutional to wholly prohibit the use of the property for its primarily valuable purpose; and the trial judge found that its value for other permissible purposes was minimal. But defendant city showed that, despite safeguards, extraction of sand and gravel would create appreciable quantities of dust, which prevailing winds would carry to residences and sanitarium areas, causing personal injury and adversely affecting property values. *Held*, judgment for defendant affirmed.

"Too many cases have been decided upholding the constitutionality of comprehensive zoning ordinances prohibiting the removal of natural products from lands in certain zones for us now to accept at full value the suggestion that there is such an inherent difference in natural products of the property that in a case where reasonable minds may differ as to the necessity of such prohibition the same power to prohibit the extraction of natural products does not inhere in the legislative body as it has to prohibit uses of other sorts." (57 C.2d 529.) (See 50 Cal. L. Rev. 896 [criticizing decision]; 10 A.L.R.3d 1226 [regulating removal of oil and gas, minerals, soil, or other natural products within municipal limits]; C.E.B., Zoning Practice, §8.42 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. On conservation element, see C.E.B., 1 Land Use Practice, §2.20; on conservation easement, see C.E.B., 1 Land Use Practice, §5.43.



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C. Zoning.

1. In General.

d. Taking of Property.

8 *Witkin Sum. Cal. Law Const Law* § 1008

[§ 1008] Taking of Property.

In *Southern Pac. Co. v. Los Angeles* (1966) 242 C.A.2d 38, 51 C.R. 197, plaintiff applied for a permit to build a 31/2-acre warehouse in a proper zone--the major produce terminal. The city's master plan of community development, facing the continually increasing pressure of vehicles on an inadequate street system, called for widening highways, by an ordinance requiring dedication of a portion of the property for street widening, as a condition for issuing the permit. *Held*, the ordinance was constitutional and properly applied to plaintiff.

Bringle v. Board of Supervisors of Orange (1960) 54 C.2d 86, 4 C.R. 493, 351 P.2d 765, *infra*, §1055, is authority for dedicating part of a parcel as a condition of subdivision or zoning variance. Although in that case the property owner was seeking advantages, while here he merely sought to use property already zoned for the use, the distinction is not controlling. (242 C.A.2d 43.) A flexible police power may require the dedication of additional access when the need arises; the evidence showed that an enormous increase in traffic would result from operation of the new warehouse; and dedicating the small portion needed (less than one-fifth acre from a parcel of 50 acres) would work no undue hardship. (242 C.A.2d 48.) (See *Sommers v. Los Angeles* (1967) 254 C.A.2d 605, 613, 62 C.R. 523 [following *Southern Pac. Co.* and *Bringle*]; 20 *Hastings L. J.* 735; 4 *San Diego L. Rev.* 233.)

Southern Pac. Co., *Bringle*, and *Sommers* were distinguished in *Mid-Way Cabinet Fixture Mfg. v. San Joaquin* (1967) 257 C.A.2d 181, 65 C.R. 37. Petitioner, operating a cabinet shop with access to a highway, applied for a building permit to construct an addition and another building. The county imposed conditions calling for conveyance of some of his land for highway purposes, pursuant to its "Precise Plan." *Held*, the conditions were invalid. The new construction would not result in any traffic congestion, and the county was merely attempting to use its zoning plan as a device to avoid payment of compensation in eminent domain. (257 C.A.2d 189.)

In *Rohn v. Visalia* (1989) 214 C.A.3d 1463, 263 C.R. 319, plaintiffs owned property at the corner of an intersection that had been misaligned during the area's original development. Plaintiff's property had a single family house but was zoned for single or multifamily residences. They sought an amendment to the general plan to permit use of the property as professional offices, intending to convert the house to an office building. The city planning commission concluded that the proposed use would generate less traffic than would apartments, and the city council passed the requested amendment and approved the rezoning. However, plaintiffs' request for a building permit was approved on the condition

that they dedicate 14% of their land for realignment of the misaligned intersection. Plaintiffs sought mandamus to compel the city to delete the condition, and the trial court granted the writ, finding that there was no reasonable relationship between the dedication and the proposed use. *Held*, affirmed.

(a) *Govt.C. 65803* (infra, §1021) exempts charter cities from the prohibition of unreasonable conditional dedication in *Govt.C. 65909* (infra, §1055). (*214 C.A.3d 1469*.) However, to avoid a taking that requires compensation, a dedication requirement must be reasonably related to the proposed use of the property. (*214 C.A.3d 1470*.)

(b) Here, the need for realignment was due to poor initial planning of the intersection, not to traffic problems arising from the proposed use; and substantial evidence supported the trial court's conclusion that there was no reasonable relationship between the required dedication and the proposed use. (*214 C.A.3d 1474, 1475*.) The city's action "is merely an attempt to 'disguise under the police power its actual exercise of the power of eminent domain.' " (*214 C.A.3d 1476*.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

1. In General.

e. Invalid Regulations.

8 Witkin Sum. Cal. Law Const Law § 1009

[§ 1009] Invalid Regulations.

(1) *Discriminatory Zoning.* The Planning and Zoning Law prohibits the following discriminatory acts in zoning:

(a) An action that denies residence, land ownership, tenancy, or other land use because of (1) race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, familial status, disability, or age; (2) the method of financing of a residential development; or (3) the intended occupancy of a residential development by low, moderate, or middle income persons or families. (*Govt.C. 65008(a).*)

(b) An act that prohibits or discriminates against a residential development or emergency shelter because of (1) the method of financing; (2) the race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, familial status, disability, or age of the intended occupants; (3) the intended occupancy by those with low, moderate, or middle incomes; (4) the consistency of a multifamily residential project with both the zoning ordinance and general plan as they existed when the application was deemed complete (*Govt.C. 65008(b)*); (5) federal or state assistance; or (6) the race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, familial status, disability, or age, or the low, moderate, or middle income of the intended occupants of a development or shelter that receives federal or state assistance (*Govt.C. 65008(d)*). (See *Govt.C. 65008(e)* [preferential treatment to assisted projects permitted]; *Govt.C. 65008(f)* ["residential development"]; *Edmonds v. Oxford House (1995) 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801*, *infra*, §1030 [group home for disabled individuals was not within Fair Housing Act's exemption for local zoning restrictions on number of persons who may inhabit dwelling unit]; *63 So. Cal. L. Rev. 1151* [Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a "Racial Inclusionary Ordinance"].)

(2) *Restricting Use of Solar Energy Systems.* The Solar Rights Act of 1978 (see *12 Summary (10th), Real Property*, §385) declares the state policy to promote and encourage the use of solar energy systems. Accordingly, cities and counties may not enact ordinances that have the effect of unreasonably restricting the installation and use of solar energy systems. Local requirements are limited to the standards and regulations necessary for the preservation or protection of the public health or safety. (*Govt.C. 65850.5*; see *Health & Saf.C. 17959.1* [to same effect].)

(3) *Other Restrictions.* Zoning ordinances may be invalidated on a number of other grounds:

(a) *Denial of equal protection by discrimination.* (See *infra*, §1046 et seq.)

(b) *Denial of due process by unreasonable retroactive zoning.* (See *infra*, §1040.)

(c) *Violation of right to privacy in home.* (See *Tom v. San Francisco (2004) 120 C.A.4th 674, 680, 16 C.R.3d 13*, *supra*, §597 [ordinance that attempted to discourage conversion of rental housing into owner occupied housing by prohibiting tenants in common from making agreements giving them exclusive rights in individual units violated state privacy right]; *infra*, §1032.)

(d) *Uncontrolled discretion or bias in agency.* (See *People v. Perez (1963) 214 C.A.2d Supp. 881, 886, 29 C.R. 781* [uncontrolled discretion in planning commission]; *75 Harv. L. Rev. 423* [voting council member with personal interest]; *10 A.L.R.3d 694* [disqualification of biased officer].)

(e) *Matter of statewide concern.* (See *supra*, §1000.)

(f) *Invalid exclusionary zoning.* (See *infra*, §1032.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Discriminatory Zoning.* *Govt.C. 65008*, as amended in 2006, now prohibits discrimination on any basis listed in *Govt.C. 12955(a)* or (d) (see text, §947). With respect to familial status, the statute does not apply to housing for older persons or senior citizens. *Govt.C. 65008* also now prohibits discrimination based on a person's or family's very low income.



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C. Zoning.

2. Planning and Zoning Ordinances.

a. In General.

1. Local Power and State Law.

8 Witkin Sum. Cal. Law Const Law § 1010

[§ 1010] Local Power and State Law.

Zoning is within the constitutional police power of a municipality and is normally accomplished by local ordinances. (See Cal. Const., Art. XI, §7, *supra*, §984; *Scrutton v. Sacramento* (1969) 275 C.A.2d 412, 417, 79 C.R. 872; *DeVita v. Napa* (1995) 9 C.4th 763, 772, 38 C.R.2d 699, 889 P.2d 1019, *infra*, §1017 [review of planning law]; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §499 et seq.) Exercise of the power is, however, subject to the provisions of governing state law. (See *Big Creek Lumber Co. v. San Mateo* (1995) 31 C.A.4th 418, 423, 37 C.R.2d 159, *supra*, §986; *Friends of Davis v. Davis* (2000) 83 C.A.4th 1004, 1014, 100 C.R.2d 413 [state law does not require cities to have design review ordinances; thus, where city chooses to impose this level of review, it is for city to determine scope of review; city properly refused to use ordinance providing for review of siting, exterior appearance, and landscaping to exclude particular tenant from new development]; 26 *Hastings Const. L. Q.* 621 [California Counties: Second-Rate Localities or Ready-Made Regional Governments?]; 26 *A.L.R.5th* 736 [zoning authority as estopped from revoking legally issued building permit].)

The Planning and Zoning Law (*Govt.C. 65000* et seq.) governs the adoption and contents of general and specific plans (*infra*, §1012 et seq.), and the organization and financing of city and county planning agencies, departments, and commissions (*Govt.C. 65100* et seq.) The law specifies that there is in each city and county a "planning agency with the powers necessary to carry out the purposes" of the Planning and Zoning Law. The local legislative body must assign the functions of the planning agency to a "planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof, as it deems appropriate and necessary." In the absence of an assignment, the legislative body must carry out the functions of the planning agency. (*Govt.C 65100.*)

The planning agency prepares, reviews, revises, and implements the *general plan*, and performs other related functions. (*Govt.C. 65103*; see *infra*, §1012 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

2. Planning and Zoning Ordinances.

a. In General.

2. Statutes of Limitation on Attack.

8 *Witkin Sum. Cal. Law Const Law* § 1011

[§ 1011] Statutes of Limitation on Attack.

Finding that actions challenging local governmental decisions under the Planning and Zoning Law contribute to the state housing crisis by delaying the completion of projects, the 1983 Legislature enacted *Govt.C. 65009* to provide certainty for specified planning and zoning decisions, by requiring attacks on them to be initiated within designated time periods. (*Govt.C. 65009*.)

(1) *Ninety-Day Statute*. The general statute of limitations is 90 days after the decision, where the action or proceeding is brought to (a) challenge a decision adopting or amending a general or specific plan; (b) challenge a decision adopting or amending a zoning ordinance; (c) determine the reasonableness, legality, or validity of a decision adopting or amending a regulation attached to a specific plan; (d) challenge a decision adopting, amending, or modifying a development agreement; (e) challenge a decision on an application for a permit or variance under *Govt.C. 65901* or *Govt.C. 65903*; or (f) where the action or proceeding concerns proceedings, acts, or determinations made prior to these decisions. (*Govt.C. 65009(c)*.)

The statute has been applied in many cases. (See *Beresford Neighborhood Assn. v. San Mateo* (1989) 207 C.A.3d 1180, 1187, 255 C.R. 434 [under *Govt.C. 65009(c)*, adoption, rather than introduction, of zoning amendment is "decision" commencing statutory period]; *Garat v. Riverside* (1991) 2 C.A.4th 259, 289, 290, 3 C.R.2d 504 [attack on adequacy of general plan must be brought within specified days of adoption or amendment of plan, and only those portions of plan that are affected by adoption or amendment are subject to challenge]; *Freeman v. Beverly Hills* (1994) 27 C.A.4th 892, 896, 897, 32 C.R.2d 731 [action for declaratory relief, damages, or inverse condemnation based on city's adoption of conditional-use permit procedure for drive-in restaurants was untimely; it was not commenced within prescribed number of days of adoption of interim procedure, and plaintiffs did not amend complaint after adoption of final ordinance]; *Wagner v. South Pasadena* (2000) 78 C.A.4th 943, 948, 93 C.R.2d 91 [service of writ petition under *Govt.C. 65009(c)* is complete on day clerk executes acknowledgement of receipt; service by mail does not extend 90-day period]; *Howard Jarvis Taxpayers Assn. v. Los Angeles* (2000) 79 C.A.4th 242, 247, 93 C.R.2d 742 [90-day limitations period applied to action claiming zoning ordinance violated constitutional spending limit]; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 C.A.4th 342, 388, 110 C.R.2d 579 [*Govt.C. 65009(c)* should not be interpreted as permitting attack on general plan 90 days after decision adopting or amending specific plan];

90-day period only attaches to decision under attack]; *Save Our NTC v. San Diego* (2003) 105 C.A.4th 285, 292, 129 C.R.2d 306 [where zoning ordinances would not take effect until certified by Coastal Commission, limitations period for challenging ordinances did not begin to run until city adopted modifications Commission required as condition of its approval]; *Travis v. Santa Cruz* (2004) 33 C.4th 757, 766, 16 C.R.3d 404, 94 P.3d 538 [action brought within 90 days of final administrative action on plaintiff's permit was timely under Govt.C. 65009(c); fact that plaintiff challenged permit conditions as invalid based on facially unconstitutional or preempted ordinance did not affect timeliness of action even though ordinance could have been facially attacked at earlier time].)

(2) *One-Year Statute*. There is a 1-year statute of limitations after the accrual of the cause of action if the action or proceeding meets both of the following requirements: (a) it is brought in support of the development of housing for persons of very low, low, moderate, or middle incomes (see Govt.C. 65915) and (b) it is brought with respect to an action pursuant to Govt.C. 65580 et seq. (housing elements), Govt.C. 65589.5 (local agency's disapproval of housing development project), Govt.C. 65863.6 (effect of zoning regulations on housing needs), Govt.C. 65915 (bonus for constructing units for persons of low or moderate incomes), Govt.C. 66474.2 (ordinances applicable in determining whether to approve tentative subdivision map), or Govt.C. 65913 et seq. (housing development approvals). (Govt.C. 65009(d).) A cause of action under Govt.C. 65009(d) accrues 60 days after the filing of notice with the city or clerk of the board of supervisors specifying the deficiencies of the general or special plan or zoning ordinance, or after the legislative body takes final action in response to the notice, whichever occurs first. (Govt.C. 65009(d).)

(3) *Sixty-Day Statute*. An action or proceeding brought to challenge the adequacy of a housing element must be brought within 60 days after the Department of Housing and Community Development reports its findings under Govt.C. 65585(h). (Govt.C. 65009(c)(2).)

(4) *Effect of Expiration*. After expiration of these statutes of limitation, all further actions or proceedings are barred. (Govt.C. 65009(e).) (On Govt.C. 65009(b), limiting issues that may be raised, see *infra*, §1047.)

SUPPLEMENT: [This section is current through the latest supplement]

Govt.C. 65009 does not apply to an action challenging a local government decision based on events that occurred after that decision took place and, therefore, that could not have been brought during the statutory time limit. (*Urban Habitat Program v. Pleasanton* (2008) 164 C.A.4th 1561, 1577, 80 C.R.3d 300, 3 Cal. Proc. (5th), Actions, Supp., §23 [time limits of C.C.P. 338(a) applied to action alleging that, with passage of time, city's Housing Cap and Growth Management Ordinance now conflicted with city's obligations under state law to meet Regional Housing Needs Allocations; failure to comply with duties required by law was not "action" or "decision" under Govt.C. 65009].)

(1) *Ninety-Day Statute*. See *Honig v. San Francisco Planning Dept.* (2005) 127 C.A.4th 520, 527, 25 C.R.3d 649 [Govt.C. 65009 applied to petition challenging issuance of building permit issued in conjunction with zoning variance even though challenged Board of Appeals' decision did not originate with zoning board or zoning administrator as specified in Govt.C. 65003, where gravamen of petition was that variance was improperly granted]. (2) *One-Year Statute*. Govt.C. 65589.5, as amended in 2007, applies to both housing development projects and emergency shelters.

Although Govt.C. 65009(d) does not provide a time limit within which notice of a complaint regarding an erroneous decision must be given to a local agency, the general 90-day time limit of Govt.C. 65009(c) applies. The claim then accrues 60 days after the notice is given. (*Urban Habitat Program v. Pleasanton*, *supra*, 164 C.A.4th 1573, 1579 [action alleging that housing element adopted by city did not comply with state Housing Element Law challenged decision of local authority and was subject to Govt.C. 65009(d)].)



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2. Planning and Zoning Ordinances.

b. General Plan.

1. Nature and Scope.

8 Witkin Sum. Cal. Law Const Law § 1012

[§ 1012] Nature and Scope.

(1) *Statutory Requirement.* Each planning agency must prepare, and the legislative body of each county and city must adopt, a "comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (*Govt.C. 65300*; see *Selby Realty Co. v. San Buenaventura* (1973) 10 C.3d 110, 116, 109 C.R. 799, 514 P.2d 111; *Friends of "B" Street v. Hayward* (1980) 106 C.A.3d 988, 997, 165 C.R. 514; *Neighborhood Action Group v. Calaveras* (1984) 156 C.A.3d 1176, 1183, 203 C.R. 401; *Garat v. Riverside* (1991) 2 C.A.4th 259, 296, 297, 3 C.R.2d 504, *infra*, §1014 [there is no statutory requirement that general plan be organized or kept in particular format or location]; 31 *Ecology L. Q.* 117 [coordinating long-term land use and water planning].)

(2) *Mandatory Elements.* The general plan must consist of a statement of development policies including diagrams and text "setting forth objectives, principles, standards, and plan proposals." (*Govt.C. 65302*.) It must include the following elements:

(a) Land use element. (*Govt.C. 65302(a)*.)

(b) Circulation element. (*Govt.C. 65302(b)*); see *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 C.A.3d 90, 99, 212 C.R. 273 [correlation with land use element].)

(c) Housing element. (See *infra*, §1013.)

(d) Conservation element. (*Govt.C. 65302(d)*.)

(e) Open-space element. (*Govt.C. 65302(e)*; see *Govt.C. 65560 et seq.*)

(f) Noise element. (*Govt.C. 65302(f)*); see *Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 C.A.3d 584, 592, 197 C.R. 303.)

(g) Safety element. (*Govt.C. 65302(g)*.)

(3) *Required Findings for New-Housing Limitation.* A mandatory plan element that limits the number of new housing units constructed annually must include findings that "justify reducing the housing opportunities of the region." These must include (a) a description of the local government's "appropriate share of the regional need for housing," (b) a description of specific housing programs and activities undertaken to fulfill the requirements of the housing element, (c) a description of how the restriction promotes public health, safety, and welfare, and (d) the fiscal and environmental resources available to the local jurisdiction. (*Govt.C. 65302.8.*) (See *Ev.C. 669.5, 3 Cal. Evidence (4th), Burden of Proof and Presumptions*, §97 [shifting burden of proof in action challenging growth control ordinance]; *Govt.C. 65863.6* [housing needs must be balanced against public service needs before growth control ordinance is adopted]; *Building Industry Assn. v. Camarillo (1986) 41 C.3d 810, 226 C.R. 81, 718 P.2d 68*, *infra*, §1027 [*Ev.C. 669.5*, but not *Govt.C. 65862.6*, is applicable to initiative measures].)

(4) *Optional Subjects.* "The general plan may include any other elements or address any other subjects, which, in the judgment of the legislative body, relate to the physical development of the county or city." (*Govt.C. 65303.*)

(5) *Characteristics.* Statutes deal with the following characteristics of the general plan:

(a) *Accommodation of local conditions.* Because of the diversity of the state's communities and its residents, the general plan requirements must be implemented in "ways that accommodate local conditions and circumstances, while meeting its minimum requirements." (*Govt.C. 65300.7.*)

(b) *Consistency.* (See *infra*, §1014.)

(c) *Coordination.* The Planning and Zoning law must provide an opportunity for local governments to coordinate their local land use planning process with their budget planning for federal and state program activities. (*Govt.C. 65300.9.*)

(d) *Review by mandamus.* The general plan and its parts, elements, and amendments are legislative acts reviewable by mandamus. (*Govt.C. 65301.5*; see *infra*, §1016.)

(e) *Coordination with airport land use plan.* The general plan and specific plans must be consistent with airport land use plans (*Pub.Util.C. 21675, 21676.*) (*Govt.C. 65302.3*; see *California Aviation Council v. Ceres (1992) 9 C.A.4th 1384, 1388, 1395, 12 C.R.2d 163* [under *Pub.Util.C. 21676(b)*, local agency decision overruling airport land use commission finding of inconsistency requires specific findings; declaration of general conclusion is insufficient]; *C.E.B., Zoning Practice §8.6 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Mandatory Elements.* See *C.E.B., 1 Land Use Practice, §2.6 et seq.*(5) *Characteristics.*

(e) *Coordination with airport land use plan.* *C.E.B., Zoning Practice* has been superseded by *C.E.B., Land Use Practice*. See *C.E.B., 1 Land Use Practice, §6.67 et seq.*

See *Muzzy Ranch Co. v. Solano County Airport Land Use Com. (2008) 164 C.A.4th 1, 11, 78 C.R.3d 691* [requirement in *Pub.Util.C. 21675(b)* that Airport Land Use Compatibility Plan be "consistent with" safety and noise standards in Air Installation Compatible Use Zone (AICUZ) study prepared for military airport does not require precise conformity; standards in plans only need to be compatible, which means that land use plan must be at least as protective of airport operations as AICUZ].



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2. Housing Element.

8 Witkin Sum. Cal. Law Const Law § 1013

[§ 1013] Housing Element.

The general plan must include a housing element as provided in *Govt.C. 65580 et seq. (Govt.C. 65302(c))*. This element includes identifying "existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing." Further, the housing element must "identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and ... make adequate provision for the existing and projected needs of all economic segments of the community." (*Govt.C. 65583*.)

Many decisions have involved the housing element. (See *Black Property Owners Assn. v. Berkeley* (1994) 22 C.A.4th 974, 982, 28 C.R.2d 305 [city's update of housing element satisfied *Govt.C. 65583* where it analyzed physical, economic, and governmental constraints faced by city in meeting housing goals; discussion of rent control repeal was not necessary as direct repeal was impossible and in city's view undesirable]; *Hernandez v. Encinitas* (1994) 28 C.A.4th 1048, 1059, 33 C.R.2d 875 [housing elements of city's general plan substantially complied with *Govt.C. 65583(a)*]; *San Mateo County Coastal Landowners' Assn. v. San Mateo* (1995) 38 C.A.4th 523, 542, 45 C.R.2d 117 [initiative measure did not conflict with state requirement that housing element be reviewed at least every 5 years]; *Hoffmaster v. San Diego* (1997) 55 C.A.4th 1098, 1117, 64 C.R.2d 684 [plan that failed to identify sites to meet needs of homeless violated *Govt.C. 65583(c)(1)*]; 10 *Golden Gate L. Rev.* 729; 39 *Santa Clara L. Rev.* 503 [strengthening California law to ensure adequate locations for affordable housing].)

SUPPLEMENT: [This section is current through the latest supplement]

Govt.C. 65583, as amended in 2006 and 2007, further provides for identifying adequate sites for emergency shelters. (See *Govt.C. 65582.1* [statutory incentives to facilitate and expedite construction of affordable housing]; 38 *McGeorge L. Rev.* 188 [2006 amendment of *Govt.C. 65583*].)

See *Action Apartment Assn. v. Santa Monica* (2008) 166 C.A.4th 456, 470, 82 C.R.3d 722 [city's affordable housing ordinance was not housing element, or amendment to housing element, subject to review by Department of Housing and Community Development].



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3. Consistency Requirement.

8 Witkin Sum. Cal. Law Const Law § 1014

[§ 1014] Consistency Requirement.

(1) *In General.* The general plan and its parts must be "an integrated, internally consistent and compatible statement of policies for the adopting agency." (*Govt.C. 65300.5*; see *Karlson v. Camarillo* (1980) 100 C.A.3d 789, 161 C.R. 260; *deBottari v. Norco* (1985) 171 C.A.3d 1204, 1210, 217 C.R. 790, *infra*, §1029 [referendum inconsistent with general plan is invalid]; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors of El Dorado* (1998) 62 C.A.4th 1332, 1336, 1341, 74 C.R.2d 1 [although given project need not be in perfect conformity with each and every general plan policy, it must be compatible with objectives, policies, general land uses, and programs specified in general plan; some general plans are more specific than others, leaving less room for discretion].)

"If a general plan is to fulfill its function as a 'constitution' guiding 'an effective planning process,' a general plan must be reasonably consistent and integrated on its face. A document that, on its face, displays substantial contradictions and inconsistencies cannot serve as an effective plan because those subject to the plan cannot tell what it says should happen or not happen. When the court rules a facially inconsistent plan unlawful and requires a local agency to adopt a consistent plan, the court is not evaluating the merits of the plan; rather, the court is simply directing the local agency to state with reasonable clarity what its plan is." (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 C.A.3d 90, 97, 212 C.R. 273.)

(2) *Charter Cities.* In *Garat v. Riverside* (1991) 2 C.A.4th 259, 3 C.R.2d 504, the court made the following comments:

(a) A charter city's zoning enactments need not be consistent with its general plan. *Govt.C. 65860(a)* (*infra*, §1021) imposes a general requirement of zoning and general plan consistency. (2 C.A.4th 281.) However, under *Govt.C. 65803* (*infra*, §§1019, 1021), a charter city is exempt from this requirement unless it has adopted it by charter or ordinance. (2 C.A.4th 281, 284.)

(b) A charter city's general plan must be internally consistent. Under *Govt.C. 65700(a)*, a charter city's general plan must contain the mandatory elements required by *Govt.C. 65300 et seq. Govt.C. 65300 and 65700*, construed together, require not only that a charter city's general plan have the mandatory elements of *Govt.C. 65302*, but also that these

elements be internally consistent as required by *Govt.C. 65300.5*. (2 *C.A.4th* 285, 287.) (See *Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 *C.A.4th* 868, 875, 876, 879, 30 *C.R.2d* 797 [*Govt.C. 65860(a)* prohibition of inconsistent zoning ordinances applied to charter city that had enacted ordinance requiring zoning and general plan consistency; hence, proposed referendum inconsistent with general plan was properly declared invalid].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Federation of Hillside & Canyon Assn. v. Los Angeles* (2004) 126 *C.A.4th* 1180, 1196, 24 *C.R.3d* 543 [city has broad discretion to weigh and balance competing interests in formulating development policies; there is no requirement that city or county limit population growth or provide traffic management measures to accommodate future population growth].



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4. Adoption and Implementation.

8 Witkin Sum. Cal. Law Const Law § 1015

[§ 1015] Adoption and Implementation.

(1) *Adoption.*

(a) During the preparation of the general plan, the planning agency must provide opportunities for the involvement of citizens, California Indian tribes, public agencies and utilities, and civic, education, and other community groups, through public hearings and other means. (*Govt.C. 65351*; see *Govt.C. 65352.3* [requiring consultation with certain Indian tribes before adoption or amendment of plan].) The planning agency must refer the proposed action to specified entities. (*Govt.C. 65352, 65919 et seq.*) (On adoption or amendment of general plan as requiring compliance with California Environmental Quality Act, *Pub.Res.C. 21000 et seq.*, see *Santa Ana v. Garden Grove (1979) 100 C.A.3d 521, 526, 160 C.R. 907; 12 Summary (10th), Real Property, §831 et seq.*)

(b) If there is a planning commission authorized to review and recommend action on the proposed general plan, the commission must hold at least one public hearing before approving a recommendation. (*Govt.C. 65353.*) The commission must make a written recommendation to the legislative body, based on a vote by a majority of the commission's total membership. (*Govt.C. 65354.*)

(c) The legislative body must hold at least one public hearing with notice pursuant to *Govt.C. 65090*, prior to adopting the general plan. (*Govt.C. 65355.*) Adoption requires the affirmative vote of not less than a majority of the legislative body's total membership. The legislative body may approve, modify, or disapprove the recommendation of the planning commission; but a modification not previously considered by the commission must first be referred to it for a report and recommendation. The commission's failure to report within 45 days after the reference, or within the time set by the legislative body, is deemed a recommendation for approval. (*Govt.C. 65356.*) (On amendment, see *infra, §1017.*)

(2) *Implementation.* When a plan, or a part of it, is adopted, the planning agency must investigate and make recommendations for its implementation to the legislative body, and report annually on the status of the plan and the progress of the implementation. (*Govt.C. 65400.*) All proposed public works, acquisitions and disposals of public property, and construction of public buildings must be submitted to the planning agency for its report on the conformity

of the proposal to the general plan. (*Govt.C. 65401, 65402.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Implementation.* *Govt.C. 65400*, as amended in 2008, further requires that the housing element portion of the annual report includes a section describing the actions taken by local government towards completion of the programs and the status of compliance with the deadlines in the housing element. This report must be considered at an annual public meeting before the legislative body where members of the public are permitted to provide oral testimony and written comments.



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5. Judicial Review.

8 *Witkin Sum. Cal. Law Const Law* § 1016

[§ 1016] Judicial Review.

(1) *Actions Challenging Plan.* Because a court action challenging a general plan may have a chilling effect on the completion of housing projects, *Govt.C. 65750* et seq. "provide methods to expedite judicial review of challenges to a general plan and to insure that a court decision holding a general plan inadequate does not unnecessarily inhibit the provision of affordable housing." (Stats. 1982, Chap. 27, §2; see *14 Pacific L. J. 690.*)

(a) Challenges to a general plan must be given preference over all other civil actions (*Govt.C. 65752*), and are subject to other provisions expediting resolution of the action. (See *Govt.C. 65753* [failure to request trial or hearing within 90 days may lead to dismissal]; *Govt.C. 65756* [experts, masters, etc., must report within 90 days]; *Govt.C. 65758* [final judgment within 180 days of temporary relief].)

(b) If a challenge is sustained, and the court finds that the general plan or any of its mandatory elements are not in substantial compliance with *Govt.C. 65300* et seq., the governing body must correct its deficiencies within 120 days, and local zoning ordinances must be brought into consistency with the amended general plan within 120 days thereafter. (*Govt.C. 65754.*)

(c) A court is prohibited from enjoining a housing development during the pendency of an action under *Govt.C. 65754*, or on entering a final judgment that the plan or an element of it does not conform to *Govt.C. 65300* et seq., if the development meets specified conditions. (*Govt.C. 65754.5*; see *Govt.C. 65760* [determination of housing development's effect on housing element].)

(d) An order entered pursuant to *Govt.C. 65754* must include remedial provisions doing one or more of the following:

(1) Suspending the local government's authority to issue building permits, or a category of building permits, and related permits that are not essential to its continuing to function as an enforcement agency, its authority to grant zoning changes or variances, or its authority to grant subdivision map approvals. (*Govt.C. 65755(a)(1), (a)(2), (a)(3).*)

(2) Mandating its approval under specified circumstances of permits, final subdivision maps, or tentative subdivision maps for residential housing projects that will not affect the local government's ability to properly adopt and implement an adequate general plan. (*Govt.C. 65755(a)(4), (a)(5), (a)(6).*)

(e) On a proper showing, the court must exclude from remedies entered under *Govt.C. 65754(a)(1), (a)(2), (a)(3)* projects that are consistent with portions of the plan, that have been found to substantially comply, and that will not significantly impair the local government's ability to correct the portions not in substantial compliance (see *Govt.C. 65760*). (*Govt.C. 65755(b)*; see *Committee for Responsible Planning v. Indian Wells (1989) 209 C.A.3d 1005, 1013, 257 C.R. 635* ["significant," as used in *Govt.C. 65755(b)*, permitting projects that do not "significantly impair" city's ability to adopt complying plan, means "substantial or potentially substantial, adverse change" in ability].)

(f) The remedies in *Govt.C. 65755* may be ordered as temporary relief during the pendency of the action, but housing projects that will not affect the adoption of a proper housing element may not be enjoined, and if permitted to continue may not be subjected to restrictions in a final judgment. (*Govt.C. 65757.*)

(g) Permits for residential housing projects that were issued prior to filing the action may not be revoked. (*Govt.C. 65761.*)

(2) *Review by Mandamus.* Adoption of the general plan, or the adoption or amendment of any of its parts or elements, is a "legislative act" reviewable by mandamus under *C.C.P. 1085* (see 8 *Cal. Proc. (4th), Extraordinary Writs*, §72 et seq.). (*Govt.C. 65301.5*; see *Concerned Citizens of Calaveras County v. Board of Supervisors (1985) 166 C.A.3d 90, 95, 212 C.R. 273.*) Hence, findings are not required, and the action is reviewable by ordinary mandamus, not administrative mandamus (*C.C.P. 1094.5*). (*Cormier v. San Luis Obispo (1984) 161 C.A.3d 850, 855, 207, C.R. 880.*)

(3) *Plan Is Presumed Valid.* Violating *Govt.C. 65300.5* (supra, §1014), requiring internal integration and consistency, may invalidate the land use elements of a general plan. However, a general plan is presumed to be valid, and it will not be set aside unless the council acted arbitrarily, capriciously, or without an evidentiary basis. (See *Karlson v. Camarillo (1980) 100 C.A.3d 789, 161 C.R. 260*; *Garat v. Riverside (1991) 2 C.A.4th 259, 293, 3 C.R.2d 504* [to be legally adequate, plan need only show substantial compliance with statutory requirements].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Review by Mandamus.*

Cross-Reference: 8 *Cal. Proc. (5th), Extraordinary Writs*, §74 et seq.(3) *Plan Is Presumed Valid.* See *Federation of Hillside & Canyon Assn. v. Los Angeles (2004) 126 C.A.4th 1180, 1195, 24 C.R.3d 543* [court cannot disturb general plan based on violation of internal consistency and correlation requirements unless, based on evidence before city council, reasonable person could not conclude that plan is internally consistent or correlative].



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6. Amendment.

8 Witkin Sum. Cal. Law Const Law § 1017

[§ 1017] Amendment.

Statutes relating to the amendment of the general plan provide the following:

(1) The local legislative body may amend all or part of an adopted general plan, and it may specify the manner in which amendments are initiated. (*Govt.C. 65358(a).*)

(2) Amendments may make multiple changes and may be made at any time. (*Govt.C. 65358(b).*) However, a mandatory element of the plan (*supra*, §1012) must not be amended more than four times in a calendar year *unless* necessary to (a) develop a single residential project with 25% or more of the units going to those with low or moderate incomes (*Govt.C. 65358(b)*), or (b) comply with a court order in an action challenging the plan or with statutes governing specified developments and programs (*Govt.C. 65358(d)*). (*Govt.C. 65358(b).*)

(3) The statutes governing the preparation and adoption of general plans are also applicable to amendments. (See *Govt.C. 65350 et seq.*; *Govt.C. 65354.5* [procedure for interested party to request hearing on amendment acted on by planning agency]; *supra*, §1015.) Amendments are legislative acts subject to review by mandamus. (See *supra*, §1016.)

In *Leshar Communications v. Walnut Creek* (1990) 52 C.3d 531, 277 C.R. 1, 802 P.2d 317, the general plan of defendant city was originally growth oriented. In November 1945, Measure H, an initiative ordinance, was adopted to prohibit buildings or structures that aggravated traffic congestion. Plaintiffs contended that the measure was in conflict with the general plan. *Held*, the measure was inconsistent with the general plan and could not be construed as an amendment to it.

(a) "We cannot at once accept the function of a general plan as a 'constitution,' or perhaps more accurately a charter for future development, and the proposition that it can be amended without notice to the electorate that such amendment is the purpose of an initiative. ... The Planning and Zoning Law itself precludes consideration of a zoning ordinance which conflicts with a general plan as a pro tanto repeal or implied amendment of the general plan. The general plan stands. A zoning ordinance that is inconsistent with the general plan is invalid when passed, ... and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan." (52 C.3d

540.)

(b) "The analysis of Measure H prepared by the city attorney informed the voters that 'existing law' permitted construction consistent with the general plan, zoning ordinance and building code, and that Measure H would change 'existing law' by prohibiting construction under the specified circumstances. The analysis therefore informed the voters only that the adoption of Measure H would change the existing law that permitted construction consistent with the general plan, not that it would amend the general plan itself." (52 C.3d 543.) Hence, Measure H could not be deemed a general plan amendment. (52 C.3d 544.)

One justice dissented on the ground that while the appeal was pending, defendant city amended the general plan in an effort to incorporate Measure H, and that the case was moot and the appeal should be dismissed. (52 C.3d 547.) (See 18 *Pepperdine L. Rev.* 1169.)

In *DeVita v. Napa* (1995) 9 C.4th 763, 38 C.R.2d 699, 889 P.2d 1019, an initiative measure amended the land use element of the county's general plan and prohibited redesignation of existing agricultural land without voter approval for a period of 30 years. *Held*, the initiative was valid.

(a) Cal. Const., Art. II, §11 (supra, §157), guarantees the local electorate's right to initiative and referendum, and it is presumed, absent a clear showing to the contrary, that legislative decisions of local bodies are subject to initiative and referendum. (9 C.4th 775.)

(b) Prior Court of Appeal decisions have either held or assumed that a general plan could be amended by local initiative. (9 C.4th 774.) Moreover, *Elec.C. 9111*, by providing for reports on a proposed initiative's effect on the general plan, specifically recognizes that general plans can be amended by initiative. (9 C.4th 777, 779.)

(c) The planning law itself reflects the Legislature's conclusion that land use planning, including adoption and amendment of a general plan, is primarily a local matter, and hence, that the land use element of a general plan can be amended by initiative. (9 C.4th 779, 782, 784.)

(d) Various arguments are advanced against initiative amendments to the general plan--that the general plan process is subject to numerous procedural requirements not imposed on initiatives, that *Govt.C. 65358(a)* requires flexibility in the general plan amendment process, a flexibility that is eliminated when amendments are adopted by initiative, and that general plan amendments are subject to environmental review, while initiatives are not--but none is persuasive. The existence of procedural requirements for adoption of local ordinances does not imply a restriction on the power of initiative or referendum (9 C.4th 785); all initiatives place limits on the capacity to legislate in areas that are otherwise statutorily authorized (9 C.4th 788); and *Elec.C. 9111*, considered in conjunction with rejected attempts to impose more stringent environmental review requirements on land use initiatives, reflects a legislative compromise that permits these initiatives while permitting voters to be informed about possible environmental consequences (9 C.4th 793, 795).

A lengthy dissent, joined by two justices, argues that the planning law vests the power to adopt and amend the general plan exclusively in local legislative bodies, to the exclusion of the electorate acting through the initiative process. (9 C.4th 799, 823.) (See *Harroman Co. v. Tiburon* (1991) 235 C.A.3d 388, 395, 396, 1 C.R.2d 72 [where extension of time had been granted under *Govt.C. 65361* to revise general plan, town properly considered "draft" general plan rather than existing plan in determining under *Govt.C. 65589.5* that proposed housing development project did not comply with "applicable general plan"]; *Garat v. Riverside* (1991) 2 C.A.4th 259, 295, 296, 3 C.R.2d 504 [no statutory requirement that general plan be updated at particular time]; *San Mateo County Coastal Landowners' Assn. v. San Mateo* (1995) 38 C.A.4th 523, 553, 45 C.R.2d 117 [amendments to local coastal plan, as part of general plan, may be adopted by initiative]; on zoning by initiative or referendum, see *infra*, §1027 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See 108 *Holdings, Ltd. v. Rohnert Park* (2006) 136 C.A.4th 186, 197, 38 C.R.3d 589 [stipulated judgment that merely

set forth manner in which city would interpret certain provisions of general plan did not effect improper amendment of general plan]; *St. Vincent's School for Boys, Catholic Charities CYO v. San Rafael* (2008) 161 C.A.4th 989, 1002, 75 C.R.3d 213 [amendment of general plan to remove plaintiff's property from defendant city's sphere of influence was not arbitrary or discriminatory; property was never subject to defendant's police power, it was never annexed to defendant, and defendant never approved development proposal for property; amendment maintained status quo and did not change property's prevailing land use designation or preclude development].



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c. Specific Plans.

8 Witkin Sum. Cal. Law Const Law § 1018

[§ 1018] Specific Plans.

(1) *Authority and Scope.* The planning agency (see *supra*, §1010) is authorized, and if directed by the legislative body is required, to prepare specific plans to implement the adopted general plan in all or part of the area covered. (*Govt.C. 65450.*)

Specific plans must include text and diagrams specifying the following in detail: (a) the distribution, location, and extent of land uses; (b) the proposed distribution, location, and extent and intensity of transportation, sewage, water, drainage, disposal, energy, and other facilities needed to support the land uses; (c) standards and criteria for development, and standards for the conservation, development, and utilization of natural resources; and (d) a program to implement the foregoing. (*Govt.C. 65451(a).*) A specific plan must also include a statement of its relationship to the general plan. (*Govt.C. 65451(b).*) It may cover other subjects the planning agency deems necessary or desirable for the implementation of the general plan. (*Govt.C. 65452.*)

Specific plans must be consistent with the general plan (*Govt.C. 65454*), and all public works projects, tentative maps, parcel maps, and zoning ordinances must be consistent with an adopted specific plan for the area (*Govt.C. 65455*). (See *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 C.A.4th 342, 386, 110 C.R.2d 579 [inadequacies of environmental impact report necessarily invalidated adoption of updated specific plan, and inconsistencies between general and specific plans required finding that county abused its discretion in adopting updated specific plan].)

(2) *Adoption, Amendment, and Repeal.* Specific plans are adopted and amended in the same manner as general plans (*Govt.C. 65350 et seq.*; see *supra*, §§1015, 1017), except that specific plans may be adopted by resolution or by ordinance, and may be amended as often as the legislative body deems necessary. (*Govt.C. 65453(a).*) A specific plan may be repealed in the same manner as is required for amendment. (*Govt.C. 65453(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1019

[§ 1019] In General.

(1) *Limited Statutory Control.* The provisions governing local zoning are in *Govt.C. 65800* et seq. (See 7 *Ecology L. Q.* 753; C.E.B., *Zoning Practice*; on authority of cities and counties to enter into local development agreements, see *Govt.C. 65864* et seq.) These sections do not apply to charter cities, except to the extent that the city adopts them. (*Govt.C. 65803.*)

Except for open-space zoning and zoning vacant land for residential use, the legislative purpose is "to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." (*Govt.C. 65800.*) A curative statute provides that procedural errors are not grounds for invalidating an ordinance unless the complaining party "suffered substantial injury from that error *and* that a different result would have been probable if the error had not occurred." (*Govt.C. 65010.*) (See *Govt.C. 65850.3* [codifying "Federal Communication Commission's limited federal preemption of local regulations governing amateur radio station facilities"].)

(2) *Open-Space Zoning.* Every city and county must prepare and adopt an open-space zoning ordinance. (*Govt.C. 65910*; see *Govt.C. 65560* et seq. [local open-space plans]; *infra*, §1038.) Variances may be granted only "when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." The grant of authority for variances must be "literally and strictly interpreted and enforced." (*Govt.C. 65911.*)

(3) *Zoning Vacant Land for Residential Use.* Every city and county must "designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use, and in relation to growth projections of the general plan to meet housing needs for all income categories as identified in the housing element of the general plan." (*Govt.C. 65913.1*; see *Hernandez v. Encinitas* (1994) 28 C.A.4th 1048, 1075, 33 C.R.2d 875 [city's density and other land use standards regarding vacant land for residential use were sufficient to satisfy statutory requirement of meeting housing needs as identified in general plan].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Limited Statutory Control*. C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice.(3) *Zoning Vacant Land for Residential Use*. See *Fonseca v. Gilroy* (2007) 148 C.A.4th 1174, 1209, 56 C.R.3d 374 [Govt.C. 65913.1, part of Least Cost Zoning Law, does not require immediate rezoning on adoption of revised housing element].



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2. Scope of Zoning Power.

8 Witkin Sum. Cal. Law Const Law § 1020

[§ 1020] Scope of Zoning Power.

(1) *Authorized Subjects.* The local legislative body may adopt ordinances that:

(a) Regulate the use of buildings, structures, and land as between industry, business, residences, and open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, etc. (*Govt.C. 65850(a).*)

(b) Regulate signs and billboards. (*Govt.C. 65850(b).*)

(c) Regulate (1) the location, height, bulk, number of stories, and size of buildings and structures; (2) the size and use of lots, yards, courts, and other open spaces; (3) the percentage of a lot that may be occupied by a building or structure; and (4) the intensity of land use. (*Govt.C. 65850(c).*)

(d) "Establish requirements for offstreet parking and loading." (*Govt.C. 65850(d).*)

(e) "Establish and maintain building setback lines." (*Govt.C. 65850(e).*)

(f) "Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts." (*Govt.C. 65850(f).*)

(g) Regulate, subject to the protection of First Amendment rights, "the time, place, and manner of operation of sexually oriented businesses." (*Govt.C. 65850.4(a)*; see *Govt.C. 65850.4(b)* [defining "sexually oriented business" as one the primary purpose of which is "sale or display of matter that, because of its sexually explicit nature, may, pursuant to state law or local regulatory authority, be offered only to persons over the age of 18"]; 49 *U.C.L.A. L. Rev.* 1139 [zoning "pornography peddlers" and live nude shows].)

(2) *Uniformity Within Zone.* Local zoning must be "uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones." (*Govt.C. 65852.*) The uniformity requirement of *Govt.C. 65852* is not violated by use limitations imposed by contract; e.g., where the landowner acquiesces in the new zoning classification. (*J-Marion Co. v. Sacramento* (1977) 76 *C.A.3d* 517,

523, 142 C.R. 723, citing *Imperial v. McDougal* (1977) 19 C.3d 505, 138 C.R. 472, 564 P.2d 14, *infra*, §1050.)

(3) *Prezoning*. Cities adjoining unincorporated territory may prezone. (Govt.C. 65859.) (On interim zoning, see *infra*, §1023.)

(4) *Development Agreement To Freeze Zoning*. Cities and counties may enter into development agreements with property owners to develop properties. (Govt.C. 65865.) The purpose of this provision is to permit "a city or county to freeze zoning and other land use regulation applicable to specified property to guarantee that a developer will not be affected by changes in standards for government approval during the period of development." (*Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors* (2000) 84 C.A.4th 221, 232, 100 C.R.2d 740 [development agreement complied with statute even though project was not fully designed and approved; statute should be construed to permit agreements "as soon as the government and developer are required to make significant financial and personnel commitments to a project"].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Authorized Subjects*. In *Hernandez v. Hanford* (2007) 41 C.4th 279, 59 C.R.3d 442, 159 P.3d 33, plaintiff owners of a stand-alone home furnishing and mattress store challenged a zoning ordinance that restricted the sale of furniture to stores located in the downtown business district, but which allowed large department stores, with square footage limitations, to sell furniture in the planned commercial (PC) district. The trial court upheld the ordinance, but the Court of Appeal invalidated it on equal protection grounds. *Held*, reversed. The Court of Appeal failed to recognize that the zoning ordinance here had two purposes: to protect the economic viability of the downtown business district, and to attract and retain large department stores in the PC district.

(a) *Regulating economic competition*. The court clarified ambiguous language in a number of decisions of the Courts of Appeal on which the plaintiffs based their argument that a city does not have the power to regulate or restrict economic competition through its zoning ordinance. As the circumstances underlying the decisions in *Ensign Bickford Realty Corp. v. Livermore* (1977) 68 C.A.3d 467, 137 C.R. 304, text, §1046, and *Wal-Mart Stores v. Turlock* (2006) 138 C.A.4th 273, 301, 41 C.R.3d 420, "demonstrate, even when the regulation of economic competition reasonably can be viewed as a direct and intended effect of a zoning ordinance or action, so long as the primary purpose of the ordinance or action--that is, its principal and ultimate objective--is not the impermissible *private* anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate *public* purpose--such as the preservation of a municipality's downtown business district for the benefit of the municipality as a whole--the ordinance reasonably relates to the general welfare of the municipality and constitutes a legitimate exercise of the municipality's police power." (41 C.4th 296.) Here, the ordinance restricting the sale of furniture in the outlying district was not an invalid limitation on competition; it was enacted to promote the legitimate public purpose of preserving the economic viability of the downtown district, rather than to serve an impermissible anticompetitive purpose. (41 C.4th 298.)

(b) *Attracting and retaining large department stores*. The Equal Protection Clause "does not preclude a governmental entity from adopting a legislative measure that is aimed at achieving multiple objectives, even when such objectives in some respects may be in tension or conflict." (41 C.4th 300.) Here, the differential treatment of large department stores and other retailers "is rationally related to one of the legitimate legislative purposes of the ordinance--the purpose of attracting and retaining large department stores in the PC district." Extending the square footage exception to all retail stores in the PC district would have undermined the overall objective of the ordinance to permit the sale of furniture in the PC district only to the extent "necessary to serve the city's interest in attracting and retaining large department stores in that district." (41 C.4th 302.) (2) *Uniformity Within Zone*. "If a zoning scheme is like a contract, the uniformity requirement is like an enforcement clause, allowing parties to the contract to challenge burdens unfairly imposed on them or benefits unfairly conferred on others." The development agreement statutes, Govt.C. 65854 et seq., do not create an exemption to the uniformity requirement. (*Neighbors in Support of Appropriate Land Use v. Tuolumne* (2007) 157 C.A.4th 997, 1009, 1014, 68 C.R.3d 882) [issue of first impression; county violated uniformity requirement of Govt.C. 65852 by approving application to use property in agricultural zone for commercial

purposes, which created ad hoc exception to benefit one parcel in zone; exception was not created through rezoning or other amendment of ordinance, or by granting conditional use permit in conformance with ordinance or proper variance].



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3. Consistency With General Plan.

8 *Witkin Sum. Cal. Law Const Law* § 1021

[§ 1021] Consistency With General Plan.

Zoning ordinances must be consistent with the general plan. (*Govt.C. 65860(a)*.) An action or proceeding brought to enforce compliance with the consistency requirement must be commenced and service made on the legislative body within 90 days of the enactment or amendment of a zoning ordinance. (*Govt.C. 65860(b)*.) (See *Neighborhood Action Group v. Calaveras* (1984) 156 C.A.3d 1176, 1187, 203 C.R. 401, *infra*, §1051 [*Govt.C. 65860(b)* is not applicable if ordinance is in conformity with general plan but general plan does not conform to state statutes, or if action challenges use permit rather than seeking amendment of zoning ordinance]; *Friends of H Street v. Sacramento* (1993) 20 C.A.4th 152, 169, 24 C.R.2d 607 [residents complaining about city's failure to reduce traffic speed and volume on their street could not state cause of action to enforce conformity with general plan; street was completed before enactment of *Govt.C. 65860(a)*, which addresses future growth]; *Building Industry Assn. v. Oceanside* (1994) 27 C.A.4th 744, 766, 767, 33 C.R.2d 137 [growth control initiative was inconsistent with general plan; it conflicted with plan's policies of avoiding direct controls on number or location of new housing units and adequately providing for needs of all economic segments]; *Chandis Sec. Co. v. Dana Point* (1996) 52 C.A.4th 475, 485, 60 C.R.2d 481 [election rejecting proposed specific plan for portion of city designated as specific plan area under general plan maintained status quo pending preparation of approved specific plan for area and did not violate consistency requirement]; 17 Southwestern U. L. Rev. 1.)

Govt.C. 65803 exempts charter cities from the requirement that zoning ordinances comply with general plans. (See *Garat v. Riverside* (1991) 2 C.A.4th 259, 281, 284, 3 C.R.2d 504, *supra*, §1014 [under *Govt.C. 65803*, charter city's zoning enactments need not be consistent with its general plan]; *Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 C.A.4th 868, 875, 876, 30 C.R.2d 797 [consistency requirement of *Govt.C. 65860(a)* applies to charter city that has enacted ordinance requiring zoning and general plan consistency]; on special rule for charter city of 2,000,000 or more population, see *Govt.C. 65860(d)*; *Los Angeles v. California* (1982) 138 C.A.3d 526, 532, 187 C.R. 893 [also rejecting contentions that *Govt.C. 65860(d)* violates Cal. Const., Art. XI, §5(a) ("home rule" provision) and Art. IV, §16(b) (special or local legislation)].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Endangered Habitats League v. Orange* (2005) 131 C.A.4th 777, 785, 32 C.R.3d 177 [project that failed to use specified method of evaluating traffic impact, which would have shown impermissible increase in traffic on particular road, was inconsistent with general plan and would be set aside; contributions to fee program to fund road improvements was insufficient mitigation where program did not require improving road to level stated in general plan and there was no evidence that mitigation would occur]; *Friends of Lagoon Valley v. Vacaville* (2007) 154 C.A.4th 807, 817, 65 C.R.3d 251 [distinguishing *Endangered Habitats League*; residential and commercial development was consistent with general plan that stressed flexibility and ability of planning officials to balance competing policies; payment of traffic impact fees was reasonable mitigation program].



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4. Zoning Procedure.

8 *Witkin Sum. Cal. Law Const Law* § 1022

[§ 1022] Zoning Procedure.

Zoning ordinances and amendments for rezoning or to impose new, or remove existing, regulations listed in *Govt.C. 65850* must comply with *Govt.C. 65854* et seq. Other zoning amendments "may be adopted as other ordinances are adopted." (*Govt.C. 65853*.) Local zoning agencies must establish and publish rules for the conduct of their hearings and for a record, on written request, in contested matters. Rules for conducting hearings must incorporate the procedures set out in *Govt.C. 65854*. (*Govt.C. 65804(a)*.)

The planning commission must hold a public hearing on a proposed zoning ordinance or amendment. This hearing requires 10 days' notice under *Govt.C. 65090* or *Govt.C. 65091*. (*Govt.C. 65854*.) The planning commission then submits its written recommendations to the legislative body, including its reasons, and the relationship of the proposal to local general and specific plans. (*Govt.C. 65855*.) The legislative body must then hold a public hearing, unless the commission has recommended against a proposed rezoning, when a hearing is required only on the written request of an interested party. (*Govt.C. 65856(a)*.) Notice of the hearing pursuant to *Govt.C. 65090* is required. (*Govt.C. 65856(b)*.) (See *Sounhein v. San Dimas* (1992) 11 C.A.4th 1255, 1259, 14 C.R.2d 656 [lack of required public notice and hearing rendered ordinance void]; 6 *Hastings Const. L. Q.* 1011 [Procedural Due Process and Zoning Decisions]; 66 *A.L.R.4th* 1012 [construction and effect of statute requiring that zoning application be treated as approved if not acted on within specified time].)

If there is no local planning commission, the legislative body must perform the prescribed functions. (*Govt.C. 65861*.) (On procedure when legislative body requests report on ordinance or amendment, see *Govt.C. 65853*.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Environmental Defense Project of Sierra County v. Sierra* (2008) 158 C.A.4th 877, 888, 70 C.R.3d 474 [10-day notice of legislative body's hearing required by *Govt.C. 65856* must be given after planning commission's recommendation has been received, and notice must include that recommendation as part of "general explanation of the matter to be considered" required by *Govt.C. 65094*; hence, streamlined zoning process in which county gave notice of hearing before planning commission had made its recommendation on proposed zoning amendment violated Planning and Zoning Law].



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5. Interim Ordinance.

8 *Witkin Sum. Cal. Law Const Law* § 1023

[§ 1023] Interim Ordinance.

(1) *Nature and Authority To Adopt.* The local legislative body may, to protect the public health, safety, and welfare, adopt a temporary interim (or "stop-gap" or "incubation period") ordinance, as an emergency measure, without complying with the usual procedure for notice and hearing (*supra*, §1022). (*Govt.C. 65858*; see *Mang v. Santa Barbara* (1960) 182 C.A.2d 93, 97, 5 C.R. 724 [unzoned agricultural land; trailer parks prohibited]; *Metro Realty v. El Dorado* (1963) 222 C.A.2d 508, 511, 35 C.R. 480 [subdivision map was rejected where interim ordinance zoned property for agricultural and recreational purposes only]; *Consaul v. San Diego* (1992) 6 C.A.4th 1781, 1797, 8 C.R.2d 762 [issuance of dwelling unit allocations under interim ordinance created no vested rights; hence, new zoning ordinance adopted before developer applied for building permits was properly applied to developer]; 216 *Sutter Bay Associates v. Sutter* (1997) 58 C.A.4th 860, 871, 68 C.R.2d 492 [new board of supervisors acted legally in adopting ordinances rescinding legislative acts of predecessor board that encompassed plaintiff's development agreement where new board made adequate findings concerning need for urgency and plaintiff's development agreement was not complete at time of rescission]; *Building Industry Legal Defense Foundation v. Superior Court* (1999) 72 C.A.4th 1410, 1420, 85 C.R.2d 828 [nothing in *Govt.C. 65858* permits cities to prohibit formal processing of development applications, such as tentative subdivision maps]; 29 *McGeorge L. Rev.* 715 [Interim Ordinances in California: Restoring Balance Between the Rights of Individual Landowners and the Rights of the Public]; 30 *A.L.R.3d* 1196 [validity and effect of interim ordinance]; 32 *Proof of Facts* 3d 485 [proof of unreasonableness of interim zoning and building moratoria]; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §115 et seq.)

This interim ordinance must be approved by a four-fifths vote and remains in effect for only 45 days unless extended for 10 months and 15 days, and subsequently for one year, by four-fifths votes, after notice and hearing. Only two extensions are permitted. (*Govt.C. 65858(a)*.) Alternatively, if the interim ordinance is approved by a four-fifths vote following notice and hearing, it may in a similar manner be extended for 22 months and 15 days. (*Govt.C. 65858(b)*.) (See *Bank of the Orient v. Tiburon* (1990) 220 C.A.3d 992, 1003, 1005, 1006, 269 C.R. 690 [*Govt.C. 65858* applies to all zoning moratorium ordinances, including initiative measures; statutory prohibition on third extension applied where town council adopted two extensions and third extension was adopted by initiative].)

(2) *Effect of Subsequent Ordinance.* When an interim ordinance has been adopted, a subsequent interim ordinance

covering the whole or a part of the same property, "shall automatically terminate and be of no further force or effect upon the termination of the first interim ordinance or any extension of the ordinance." (*Govt.C. 65858(e)*.) Thus, *Govt.C. 65858(a)* and *65858(e)* "allow the City Council to utilize the moratorium ordinance process only once for an aggregate period of two years. ... The City therefore cannot obtain a new two-year moratorium limitation by rezoning or awaiting the expiration of an earlier ordinance." (*Martin v. Superior Court (1991) 234 C.A.3d 1765, 1771, 286 C.R. 513.*)

Notwithstanding *Govt.C. 65858(e)*, on "termination of a prior interim ordinance, the legislative body may adopt another interim ordinance pursuant to this section provided that the new interim ordinance is adopted to protect the public safety, health, and welfare from an event, occurrence, or set of circumstances different from the event, occurrence, or set of circumstances that led to the adoption of the prior interim ordinance." (*Govt.C. 65858(f)*.)

(3) *Distinction: Invalid Ordinance Permitting Use.* In *Silvera v. South Lake Tahoe (1970) 3 C.A.3d 554, 83 C.R. 698*; K applied for a variance to build a structure violating the maximum height limit of the area. The variance was denied for lack of a showing of legal ground, but then the city council adopted an interim ordinance permitting the structures in the zone. Neighboring property owners sought an injunction. *Held*, they were entitled to relief. The statute authorizes an emergency regulation to *limit* land uses during the changeover from one type of zoning to another; it does not authorize an interim ordinance to *permit* a party to erect a permanent structure otherwise prohibited, bypassing the usual requirement of notice and hearing. (*3 C.A.3d 557, 558.*) The challenged ordinance was therefore not a proper interim measure but an invalid attempt to circumvent the statutory scheme. (*3 C.A.3d 556.*)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Exemptions.

8 Witkin Sum. Cal. Law Const Law § 1024

[§ 1024] Exemptions.

"Local agency" is defined in *Govt.C. 53090* as an agency of the state for local performance of governmental or proprietary functions. This definition implicitly exempts cities and counties from the requirement of *Govt.C. 53091* that local agencies must comply with city and county building and zoning ordinances. (*Lawler v. Redding* (1992) 7 C.A.4th 778, 782, 784, 9 C.R.2d 392 [*Govt.C. 65402(b)* requires city to report to county on proposed public work, but city may disregard county's adverse determination]; see *Zack v. Marin Emergency Radio Authority* (2004) 118 C.A.4th 617, 627, 638, 13 C.R.3d 323 [local zoning regulations did not apply to joint powers agency made up of county and 25 local public agencies located in county; because county, as designated party in joint powers agreement, was not subject to local regulations, neither was joint powers agency].) The statute also provides an absolute exemption for "facilities for the production, generation, storage, or transmission of water, wastewater, or electrical energy by the local agency." (*Govt.C. 53091(d)*.) A qualified exemption is provided for facilities "related to storage or transmission of water or electrical energy, including warehouses, administrative buildings, or automotive storage and repair buildings." (*Govt.C. 53096*; see *Lafayette v. East Bay Mun. Util. Dist.* (1993) 16 C.A.4th 1005, 1014, 20 C.R.2d 658 [to be exempt under *Govt.C. 53096*, facilities must have "connection with" and be integral to proper operation of storage and transmission functions of water district].)

Govt.C. 53091 does not apply to private commercial projects. (*Delta Wetlands Properties v. San Joaquin* (2004) 121 C.A.4th 128, 137, 142, 16 C.R.3d 672 [state law does not preempt field, and trial court did not err in refusing to set aside county ordinance that might apply to plaintiff's commercial water storage project].)

A school district may render certain zoning ordinances inapplicable by a two-thirds vote. (*Govt.C. 53094*, *infra*, §1036.)

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1. Administration.

8 *Witkin Sum. Cal. Law Const Law* § 1025

[§ 1025] Administration.

(1) *Agencies*. Local planning ordinances are administered by a board of zoning adjustment or zoning administrator, and a board of appeals. (*Govt.C. 65900 et seq.*) In the absence of these agencies, the local planning commission (or area planning commission) acts as the adjustment board or administrator, and the local legislative body acts as the appeals board. (*Govt.C. 65902, 65904.*) These agencies determine applications for, and appeals concerning, variances (see *infra*, §1053) and conditional use (see *infra*, §1050) and other permits. (*Govt.C. 65901(a), 65903.*) (On review by board of appeals, see *San Francisco v. Superior Court* (1959) 53 C.2d 236, 247, 1 C.R. 158, 347 P.2d 294; *Broadway, Laguna, Vallejo Assn. v. Board of Permit App. of San Francisco* (1967) 66 C.2d 767, 772, 59 C.R. 146, 427 P.2d 810; *Cow Hollow Imp. Club v. Board of Permit App. of San Francisco* (1966) 245 C.A.2d 160, 169, 171, 53 C.R. 610 [board's review of decision of zoning administrator; trial judge's review of board's decision; appellate court's review of trial judge's decision]; *San Francisco v. Padilla* (1972) 23 C.A.3d 388, 395, 100 C.R. 223, 2 Cal. Proc. (4th), *Jurisdiction*, §339; *San Francisco v. Board of Permit App.* (1989) 207 C.A.3d 1099, 1109, 255 C.R. 307 [board action overruling zoning administrator was in excess of jurisdiction; its findings were legally irrelevant and contrary to city planning code]; *Guinnane v. San Francisco City Planning Com.* (1989) 209 C.A.3d 732, 736, 742, 257 C.R. 742 [under ordinance providing for discretionary review by planning commission and board of permit appeals, applicant's compliance with zoning laws and building codes did not automatically entitle him to building permit; evidence was sufficient to support denial of permit on ground that large house was "not in character" with surrounding homes]; 12 *U.C.L.A. L. Rev.* 937 [judicial control over zoning boards of appeal].)

(2) *Variances or Permits*. Public hearings, on notice prescribed by *Govt.C. 65091*, are generally required before action is taken on variances, conditional use permits, or equivalent development permits. (*Govt.C. 65905*; see *Drum v. Fresno County Dept. of Public Works* (1983) 144 C.A.3d 777, 782, 192 C.R. 782 [wholly inaccurate notice was ineffective].) However, the board of zoning adjustment or zoning administrator may be permitted, by ordinance, to decide applications for specified kinds of variances without a public hearing on the application. (*Govt.C. 65901(b).*)

Except as otherwise provided by statute, an action or proceeding to challenge a decision on an application for a permit or variance under *Govt.C. 65901* or *Govt.C. 65903* must be commenced and the legislative body must be served within 90 days. (*Govt.C. 65009(c)*, *supra*, §1011; see *Hawkins v. Marin* (1976) 54 C.A.3d 586, 592, 126 C.R. 754

[untimely attack barred]; *Beresford Neighborhood Assn. v. San Mateo* (1989) 207 C.A.3d 1180, 255 C.R. 434 [same]; *Ching v. San Francisco Bd. of Permit App.* (1998) 60 C.A.4th 888, 894, 70 C.R.2d 700 [statute contains no exceptions and uses unqualified language manifesting plain intent to limit time to seek review of agency decision; there is no exception for actions filed under Political Reform Act].)

In *Concerned Citizens of Murphys v. Jackson* (1977) 72 C.A.3d 1021, 140 C.R. 531, Calaveras County adopted an ordinance giving the right of appeal to the Board of Supervisors only to a dissatisfied applicant. An application for a conditional use permit to construct an aggregate and mineral recovery plant was granted by the Planning Commission over objection by plaintiff property owners in the area. On refusal of the clerk of the board to accept their notice of appeal, they sought mandamus and declaratory relief. *Held*, the restrictive ordinance was invalid and they were entitled to appeal. *Govt.C. 65033* recognizes the importance of public participation in the planning process, and declares a policy favoring public hearings; and former *Govt.C. 65854.5* (now *Govt.C. 65091(a)(3)*) provides for notice of hearings to adjacent property owners. (72 C.A.3d 1025, 1026.) This legislative intent to involve property owners in the hearing "inherently carries the right of appeal and such right of appeal may not be restricted by local ordinance." (72 C.A.3d 1026.) (On judicial review of variance decision, see *infra*, §1056.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Agencies.*

Padilla case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §348.

(2) *Variances or Permits.* *Govt.C. 65091(a)(3)*, providing for notice of hearing to adjacent property owners, was renumbered *Govt.C. 65091(a)(4)* in 2006.



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2. Judicial Enforcement.

8 Witkin Sum. Cal. Law Const Law § 1026

[§ 1026] Judicial Enforcement.

(1) *Action by City.* A city may enjoin the violation of an ordinance; and, because it is a continuing violation, the statute of limitations does not run and there is no estoppel from failure to take steps to enforce the regulation. (*Fontana v. Atkinson* (1963) 212 C.A.2d 499, 508, 28 C.R. 25; see 73 A.L.R.4th 870 [laches as defense to governmental agency's suit to enjoin zoning violation].) A city may also sue to enforce a condition to a variance, i.e., to enjoin the violation of the condition (see *infra*, §§1055, 1056). (*Santa Clara v. Paris* (1977) 76 C.A.3d 338, 341, 142 C.R. 818.)

The showing necessary for issuance of a preliminary injunction and the court's weighing function were set forth in *People v. Synanon Foundation* (1979) 88 C.A.3d 304, 151 C.R. 757. "We hold that absent a clear showing that the ordinance is being violated, the court must weigh the relative harm to the defendant if the injunction is issued as against the harm to the plaintiff if it is not issued; that only when the harm to the plaintiff outweighs the harm to the defendant should the injunction issue. Stated otherwise, it is only upon a clear showing that the zoning ordinance is being violated that a conclusive presumption of irreparable injury to the public arises so as to justify the injunction without balancing the relative harm to the parties." (88 C.A.3d 309.)

In a proper case, an action may be brought by one city against an adjacent city for violating a zoning ordinance. (See *Nestle v. Santa Monica* (1972) 6 C.3d 920, 940, 101 C.R. 568, 496 P.2d 480 [alleged violation of Los Angeles ordinances by Santa Monica].)

(2) *Action by Private Parties.* In *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 C.A.3d 1147, 224 C.R. 380, plaintiff homeowners association sought to enjoin defendant from violating a conditional use permit that allegedly limited the height of trees on its property. *Held*, plaintiff has standing to sue. A private individual may enjoin a zoning violation as a nuisance when the individual (a) suffers a special injury to his or her person or property of a character different in kind from that suffered by the general public, or (b) suffers an injury greater than that suffered by the public generally, or (c) is a member of the community for whose particular welfare the ordinance was enacted. (178 C.A.3d 1152.) The complaint met these conditions by alleging that the permit limitation was imposed particularly for the benefit of the uphill landowners, including plaintiff. (178 C.A.3d 1153.)

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3. Zoning by Initiative or Referendum.

a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1027

[§ 1027] In General.

In *San Diego Bldg. Contractors Assn. v. San Diego* (1974) 13 C.3d 205, 118 C.R. 146, 529 P.2d 570, a 4-3 decision, a charter city with exclusive power over municipal affairs (see *supra*, §993), adopted a zoning ordinance by initiative, in full compliance with statutory procedure, establishing a 30-foot height limitation for buildings within a specified coastal zone. Plaintiffs, building contractor associations, challenged the validity of the ordinance as beyond the charter's grant of power and as a denial of due process. The charter argument was summarily rejected. Nothing in its provisions indicated an intention to exempt zoning ordinances from the initiative process. The due process contention was based on general statements in U.S. Supreme Court decisions that an individual must be given an opportunity for a hearing before he or she is deprived of a significant property interest. *Held*, there is no denial of due process in the adoption of a zoning ordinance by the initiative process.

(a) The basic principle, now "black letter constitutional law," is that notice and a hearing are required only in quasi-judicial or adjudicatory settings, and not where general legislation is adopted. As Justice Holmes said in *Bi-Metallic Inv. Co. v. State Bd. of Equalization* (1915) 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." (13 C.3d 211.)

(b) This principle applies to a general zoning measure as distinguished from an administrative zoning decision. The general zoning initiative in question is a legislative act; hence, it requires no notice and hearing as a prerequisite for adoption. However, notice and a hearing are required for adjudicatory determinations that grant a variance or a conditional use permit. (13 C.3d 212, and footnote 5.)

(c) The argument that an exception to the principle should be declared for zoning legislation because of its substantial impact on real property values is untenable because (1) other legislative enactments have an equally important impact on land values; e.g., the location of public improvements, standards of building and health and safety codes, the level of property tax rates, and even the level of educational expenditures (13 C.3d 213); (2) legislation may

have significant effects on other values protected by the Due Process Clause (life and liberty); e.g., regulations limiting the liberty to engage in a trade or profession, or imposing criminal sanctions on sharp business practices; and (3) the U.S. Supreme Court has made it clear that legislation affecting the value of real property (e.g., an order of the State Board of Equalization increasing the valuation of all taxable property, or a law authorizing the establishment of maximum rents) is governed by the general constitutional principle. (13 C.3d 214.)

(d) Dicta in *Hurst v. Burlingame* (1929) 207 C. 134, 277 P. 308, involving a general law, not a charter city, "sowed the seeds" of the present confusion in plaintiffs' argument that where the statute requires notice and hearing, the action of the legislative body becomes quasi-judicial in character. Subsequent cases contain similar dicta; and "[t]o the extent that such statements are inconsistent with our present opinion they are disapproved." (13 C.3d 216.)

(e) *Scott v. Indian Wells* (1972) 6 C.3d 541, 99 C.R. 745, 492 P.2d 1137, *infra*, §1052, is distinguishable. It involved an administrative determination of a local planning commission on an application for a conditional use permit for a particular parcel of land; hence, the proceeding was adjudicatory, and the city could not deny notice to adjoining owners outside the city. (13 C.3d 217.)

(f) Other California decisions that directly faced the constitutional issue uniformly concluded that zoning legislation may constitutionally be enacted without affording all affected individuals notice and a hearing. (13 C.3d 217.)

The dissenting opinion took strong issue with the majority. (13 C.3d 219.) (See 64 Cal. L. Rev. 74; 12 Loyola L.A. L. Rev. 903; 19 Pepperdine L. Rev. 99 [problems with application of initiatives and referenda to zoning process]; 61 So. Cal. L. Rev. 497 [zoning by initiative]; 21 Southwestern U. L. Rev. 1 [land use planning through initiative process in California]; 26 U.C. Davis L. Rev. 1005 [amending general plan through initiative process]; 72 A.L.R.3d 991 [adopting zoning ordinance or amendment through initiative process].)

In *Associated Home Builders of the Greater Eastbay v. Livermore* (1976) 18 C.3d 582, 135 C.R. 41, 557 P.2d 473, the court again sustained the initiative power, this time 5-2, overruling *Hurst v. Burlingame*, *supra*, and its progeny. The supposed conflict between state zoning statutes and the initiative law does not exist. The Legislature drafted the notice and hearing provisions for city council action, and never intended that they should apply to the enactment of zoning initiatives. Further, although the initiative procedure is set forth in the implementing statute, the right itself is guaranteed by the Constitution. (18 C.3d 594.) (See 66 Cal. L. Rev. 373; 70 Cal. L. Rev. 151; 12 Loyola L.A. L. Rev. 90; 14 San Diego L. Rev. 1227; 51 So. Cal. L. Rev. 265; 61 So. Cal. L. Rev. 497; 12 U.S.F. L. Rev. 357.)

The statement in *Associated Home Builders of the Greater Eastbay*, that the notice and hearing provisions do not apply to zoning initiatives, was cited in *Building Industry Assn. v. Camarillo* (1986) 41 C.3d 810, 226 C.R. 81, 718 P.2d 68, in support of its holding that Govt.C. 65863.6, requiring a city to consider the effect of ordinances on the housing needs of the region (see *supra*, §1013), is likewise inapplicable to initiative measures. (41 C.3d 823, 824.) The court pointed out, however, that growth control initiatives must be substantially and reasonably related to the welfare of the region, cannot unfairly discriminate against a particular parcel, and cannot be arbitrary or capricious. (41 C.3d 824.) (See 14 Pepperdine L. Rev. 194.)

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b. Valid Initiative or Referendum Measures.

8 Witkin Sum. Cal. Law Const Law § 1028

[§ 1028] Valid Initiative or Referendum Measures.

(1) *Referendum*. In *Eastlake v. Forest City Enterprises* (1976) 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132, the city of Eastlake, Ohio, adopted a charter requirement that changes in land use agreed to by the city council had to be approved by a 55% vote in a referendum. Respondent sought a zoning change to permit construction of an apartment building, and the city council approved it, but the voters did not. The Ohio court held the charter provision unconstitutional as a delegation of legislative power without standards, exercisable by the voting public on a whim. *Held*, the provision was valid. (a) A referendum is not a delegation of power; it is "a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." (96 S.Ct. 2362, 49 L.Ed.2d 137.) (b) If the referendum result is unreasonable, it may be challenged under state law as well as under Fourteenth Amendment standards. (96 S.Ct. 2363, 49 L.Ed.2d 139.) (See 91 Harv. L. Rev. 1373; 64 Cal. L. Rev. 74; 7 Ecology L. Q. 51; 19 Pepperdine L. Rev. 99; 51 So. Cal. L. Rev. 265; 29 Stanf. L. Rev. 819; 72 A.L.R.3d 1030 [adoption of zoning ordinance or amendment as subject to referendum].)

In *Yost v. Thomas* (1984) 36 C.3d 561, 205 C.R. 801, 685 P.2d 1152, the Santa Barbara City Council adopted a land use measure affecting the coastal zone, after the Coastal Commission's approval of the land use plan. *Held*, the measure was subject to referendum. The adoption of a specific plan, like the adoption of a general plan, is a legislative act (36 C.3d 570); and "the Coastal Act does not transform the exercise of legislative power into administrative action by virtue of a Commission certification of a land use plan" (36 C.3d 574). "The Legislature left wide discretion to local governments to formulate land use plans for the coastal zone and it also left wide discretion to local governments to determine how to implement certified LCPs." (36 C.3d 574.)

(2) *Initiative*. In *Arnel Dev. Co. v. Costa Mesa* (1980) 28 C.3d 511, 169 C.R. 904, 620 P.2d 565, defendant city approved development of plaintiff's project to construct 127 single-family residences and 539 apartment units on about 50 acres of land. Shortly thereafter, a homeowners association was successful in having an initiative adopted to rezone plaintiff's tract and two other parcels for single-family residences. The city then refused to process plaintiff's final tract map or issue building permits, and plaintiff sought injunctive and declaratory relief. *Held*, the initiative measure was valid.

(a) Administrative decisions, such as variances and use permits, are adjudicative and call for notice and a hearing.

But zoning or rezoning by initiative or referendum are legislative; and the cases draw no distinctions based on the size of the area or the number of owners. (28 C.3d 516, 517.)

(b) The contention that characterizing rezoning as a legislative act operates in the present case to deny due process to plaintiff is unsound. The U.S. Supreme Court rejected this challenge under the federal Constitution in *Eastlake*; and *San Diego Bldg. Contractors Assn. v. San Diego* (1974) 13 C.3d 205, 118 C.R. 146, 529 P.2d 570, supra, §1027, reached the same conclusion under the *California Constitution*. (28 C.3d 519, 521.) To hold that whenever a legislative body enacts legislation affecting relatively few persons, those persons are entitled to notice and a hearing before the enacting body would be a radical and unjustifiable curtailment of legislative authority. (28 C.3d 521.)

(c) The present case illustrates the problems courts would face if, abandoning precedent, they attempted to devise a new test, under which rezoning of a "relatively small" parcel of land would be an adjudicative act. (1) It is not self-evident that 68 acres is a "relatively small parcel," and the size of the parcel has very little relationship to land-use policy. (2) Although the initiative affects only three landowners, the proposed construction of housing is for thousands of people; and the number of landowners is as unsuitable a test as the size of the property rezoned. (28 C.3d 523.) (3) To embark on a case-by-case determination would involve substantial administrative cost, would expose the municipality to the uncertainty of whether a proposed measure would be held legislative or adjudicative, and would burden litigants and courts with the resolution of these issues. (28 C.3d 523.)

(d) Rights of landowners are adequately protected under existing law. They may challenge zoning that is arbitrary, unreasonable, or deprives them of substantially all use of their land (see *infra*, §§1047, 1048); when zoning is enacted by the legislative body, landowners are entitled to notice and a hearing; and when zoning is enacted by initiative, they have the same opportunity as their opponents to present their case to the electorate. (28 C.3d 524.)

Two justices joined in a strong dissent, arguing that a landowner is constitutionally entitled to notice and a hearing before either the people or its government may substantially change the uses of the property. (See *Merritt v. Pleasanton* (2001) 89 C.A.4th 1032, 1035, 1040, 107 C.R.2d 675 [following *Arnel*; zoning ordinances are legislative acts, and electorate has coextensive power with city to make zoning decisions by initiative, including whether to prezone unincorporated property within city's sphere of influence according to its general plan]; 70 Cal. L. Rev. 1107 [Arnel]; 34 *Hastings L. J.* 425 [suggested response to *Arnel*].)

An initiative that directs a legislative body to enact necessary laws to permit a land use project to take effect and to amend the general plan and the zoning ordinance to ensure consistency with the initiative is within the scope of the electorate's power. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 C.A.4th 565, 578, 63 C.R.2d 148 [distinguishing *Marblehead v. San Clemente* (1991) 226 C.A.3d 1504, 277 C.R. 550, *infra*, §1029, where proposed amendments did not state how specific elements of general plan would be changed].)

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c. Invalid Initiative or Referendum Measures.

8 *Witkin Sum. Cal. Law Const Law* § 1029

[§ 1029] Invalid Initiative or Referendum Measures.

A zoning ordinance that is inconsistent with the general plan is invalid. Thus, in *deBottari v. Norco* (1985) 171 C.A.3d 1204, 217 C.R. 790, defendant city council properly refused to submit a referendum that would, by repeal of a valid ordinance, enact an inconsistent ordinance. "[T]he requirement of consistency is the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law. We are not persuaded that this principle must now be sacrificed on the altar of an invalid referendum." (171 C.A.3d 1213.) (See *Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 C.A.4th 868, 875, 876, 879, 30 C.R.2d 797 [*deBottari* prohibition of referendum that is inconsistent with general plan applies to charter city that has enacted ordinance adopting Govt.C. 65860(a) requirement of zoning and general plan consistency]; *Building Industry Assn. v. Oceanside* (1994) 27 C.A.4th 744, 766, 767, 33 C.R.2d 137 [growth control initiative conflicted with general plan and could not be deemed implied amendment of it].)

In *Wiltshire v. Superior Court* (1985) 172 C.A.3d 296, 218 C.R. 199, petitioner sought to block local agency approval of the construction of a solid waste disposal facility by an initiative measure requiring voter approval of the construction. *Held*, the proposed initiative was invalid in two respects: (a) It attempted to lodge adjudicatory powers in the electorate, and (b) it was preempted by state law. (172 C.A.3d 302, 305.)

In *Marblehead v. San Clemente* (1991) 226 C.A.3d 1504, 277 C.R. 550, an initiative measure aimed at changing the general plan did not directly amend it but ordered the city council to make the amendment. *Held*, the measure was invalid. "In effect, it constitutes a resolution by the voters declaring that the city's general plan should be revised to reflect the 'concepts' expressed in the measure. The actual amendment of the general plan is left to the city council. Which elements of the general plan are affected and how the substantive terms of Measure E are to be incorporated into these elements is unexplained." (226 C.A.3d 1510.) (See *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 C.A.4th 565, 578, 63 C.R.2d 148, *supra*, §1028 [distinguishing *Marblehead*].)

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4. Exclusionary Zoning.

a. In General.

1. United States Supreme Court Decisions.

8 Witkin Sum. Cal. Law Const Law § 1030

[§ 1030] United States Supreme Court Decisions.

In *Belle Terre v. Boraas* (1974) 416 U.S. 797, 94 S.Ct. 1536, 39 L.Ed.2d 797, the U.S. Supreme Court upheld an ordinance of the village of Belle Terre, on Long Island, consisting of 1 square mile, with 220 homes and 700 people. The ordinance restricted land use to one-family dwellings, and defined "family" as a single housekeeping unit consisting of (1) any number of persons related by blood, adoption, or marriage, or (2) not more than two persons not so related. The owners of a house leased it to a college student who later brought in five other students, none related. When the authorities notified them of violation of the ordinance, they sued under the Civil Rights Act to enjoin enforcement. *Held*, the ordinance was valid, under the general principles set forth in *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, *supra*, §1005, and *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, *infra*, §1063.

(a) *Constitutional challenges are untenable.* (1) The ordinance is not aimed at transients, involves no procedural disparity inflicted on some but not others, and deals with no fundamental constitutional right. (2) The line drawn between a "family" of two unrelated persons and a family of three or more is a matter of legislative discretion; lines must be drawn. (3) The ordinance places no ban on association of unmarried persons; a "family" may entertain whomever they like. (94 S.Ct. 1540, 1541, 39 L.Ed.2d 803, 804.)

(b) *Proper zoning purpose.* "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." (94 S.Ct. 1541, 39 L.Ed.2d 804.)

The only justice to dissent on the merits maintained that freedom of association and the right of privacy include the right to establish a home and choose household companions. (94 S.Ct. 1545, 39 L.Ed.2d 808.) (See 108 Harv. L. Rev. 1127 [state-sponsored growth management as remedy for exclusionary zoning]; 31 Hastings L. J. 122 [exclusionary zoning]; 8 Hastings Const. L. Q. 585 [same]; 13 Loyola L.A. L. Rev. 921 [same]; 52 So. Cal. L. Rev. 1239, 1671 [same]; 8 Southwestern U. L. Rev. 910 [same]; 11 Southwestern U. L. Rev. 509 [same]; 48 A.L.R.3d 1210 [same]; 54 A.L.R.3d

1282 [ordinance zoning entire municipality for residential use]; 71 *A.L.R.3d* 693 [what constitutes "family" within meaning of zoning regulation]; 12 *A.L.R.4th* 238 [ordinance restricting number of unrelated persons who can live together in residential zone]; 24 Proof of Facts 3d 543 [invalidity of single-family zoning ordinance].)

In *Moore v. East Cleveland, Ohio* (1977) 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531, an arbitrary definition of family was held invalid. The city of East Cleveland had a single-family occupancy ordinance under which only restricted categories of related individuals could qualify. Appellant lived with two grandsons, and was convicted of violating the ordinance. *Held*, it was unconstitutional. The city relied on *Belle Terre*, but that case dealt with unrelated individuals; here, the ordinance prohibits relatives from living together. This interferes with the freedom of personal choice in matters of family life, a liberty protected by the *Due Process Clause*. (97 S.Ct. 1935, 52 L.Ed.2d 537.) (See 91 *Harv. L. Rev.* 128; 5 *Pepperdine L. Rev.* 547; 10 *Southwestern U. L. Rev.* 651.)

In *Edmonds v. Oxford House* (1995) 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801, defendant group home consisted of 10 to 12 admittedly handicapped recovering alcoholics and drug addicts living in a single-family residence zone in violation of plaintiff city's zoning ordinance, which defined "family" as people related by genetics, adoption, or marriage (without regard to number), *plus 5 or fewer unrelated persons*. Although it was in obvious violation of this ordinance, defendant countered by relying on the provision of the Fair Housing Act (FHA) prohibiting discrimination in housing against the handicapped (42 U.S.C., §3602(k)). However, in a federal declaratory relief action, plaintiff claimed that the FHA was not applicable, because its definition of family came within the scope of 42 U.S.C., §3607(b)(1), excluding from the FHA local restrictions regarding the maximum number of persons allowed to occupy a dwelling. Defendant cross-complained that plaintiff, by not allowing it to maintain a group home in a single-family zone, violated 42 U.S.C., §3604(f)(3)(B), which required plaintiff to make such reasonable accommodation to its rules as was necessary to afford the handicapped equal opportunity in housing. The trial judge granted summary judgment for plaintiff, holding that its definition of family was within the exemption, and, therefore, excluded from the FHA. The Ninth Circuit Court of Appeals reversed, thereby creating a conflict between the Ninth and Eleventh Circuits. *Held*, judgment of the Ninth Circuit Court of Appeals affirmed.

(a) Congress enacted the exemption, 42 U.S.C., §3607(b)(1), against the backdrop of a distinction between land use control and maximum occupancy restrictions. Land use controls preserve the character of neighborhoods by limiting land use to single-family residences, it thus being necessary to define a "family." Occupancy restrictions limit the number of occupants per dwelling. Plaintiff's ordinance is concerned with preserving the quality of the neighborhood, even though, unlike the other parts of the ordinance (where the number is unlimited if the people are related in the required way), the part in question uses a number to define "family." The maximum number of people per dwelling is the subject of another of plaintiff's ordinances. The language of 42 U.S.C., §3607(b)(1), which imposes restrictions regarding the maximum number of persons permitted to occupy a home, surely encompasses maximum occupancy restrictions, but not rules tied to land use control. "In sum, rules that cap the total number of occupants in order to prevent overcrowding of a dwelling 'plainly and unmistakably' ... fall within §3607(b)(1)'s absolute exemption from FHA's governance; rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not." (115 S.Ct. 1782, 131 L.Ed.2d 811, citing *Moore*.)

(b) Plaintiff argued that its ordinance was exempt from the FHA because it capped at five persons the number of unrelated persons allowed to occupy a single-family home. However, the ordinance does not answer how many persons may occupy a single home. Indeed, as seen, any number can do so, if they are related in the required biological or legal way. "Family living, not living space per occupant, is what ECDC §21.30.010 describes. ... It is curious reasoning indeed that converts a family values preserver into a maximum occupancy restriction once a town adds to a related persons prescription 'and also two unrelated persons.' " (115 S.Ct. 1783, 131 L.Ed.2d 812.)

(c) Plaintiff's ordinance is not within the exemption; hence, the FHA applies. Whether plaintiff actually violated the FHA is a question to be left to the lower courts. (115 S.Ct. 1783, 131 L.Ed.2d 812.)

Three justices dissented, arguing that plaintiff's ordinance was within the exemption as a reasonable local restriction regarding the maximum number allowed to occupy a dwelling. (*115 S.Ct. 1783, 131 L.Ed.2d 813.*) (See *109 Harv. L. Rev. 309; 26 Golden Gate L. Rev. 737.*)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

4. Exclusionary Zoning.

a. In General.

2. Tests for Validity.

8 Witkin Sum. Cal. Law Const Law § 1031

[§ 1031] Tests for Validity.

The power to limit an area to single-family dwelling houses, excluding apartments and flats, hospitals, etc., has been established. (See *supra*, §1005; *Brady v. Superior Court* (1962) 200 C.A.2d 69, 80, 19 C.R. 242; *San Francisco v. Burton* (1962) 201 C.A.2d 749, 752, 20 C.R. 378; *Sechrist v. Municipal Court* (1976) 64 C.A.3d 737, 746, 134 C.R. 733; 23 *Hastings L. J.* 1459 [excluding communes]; 99 A.L.R.2d 873 ["garden-type apartments" and "row housing"]; 23 A.L.R.3d 1210 [motels]; 25 A.L.R.3d 921 [college fraternities and sororities]; 27 A.L.R.3d 1022 [hospitals, sanitariums, nursing homes]; 28 A.L.R.3d 1240 [hotels]; 83 A.L.R.3d 1103 [homes for the elderly]; 95 A.L.R.3d [outside storage of trailers, etc.]; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §164 et seq.; on zoning of mobilehomes, second units, residential care facilities, etc., see *infra*, §1039.)

In *Los Altos Hills v. Adobe Creek Properties* (1973) 32 C.A.3d 488, 108 C.R. 271, plaintiff city, about 81/2 square miles of land, was incorporated in 1956. To preserve its rural character, zoning ordinances were adopted restricting occupancy to one-family residences of at least 1 acre in area, and preventing commercial uses. B, owner of a 90-acre parcel operated commercially as a public picnic ground, was allowed to continue only as a nonconforming use without the right to repair or change. *Held*, the ordinances were valid.

(a) The elimination of virtually all commercial uses of property is not a denial of equal protection; i.e., zoning need not provide for multiple uses. (32 C.A.3d 502.)

(b) B is seeking to protect only a commercial amusement area. Hence, "[w]hatever merit there may be for breaking down the exclusionary practices in order to enable the less affluent, including racial minorities, to find a home out of the city, this case does not appear to be the vehicle for pursuing such theories." (32 C.A.3d 507.)

(c) There was no denial of equal protection in the allowance of similar uses to nonprofit clubs or recreational facilities. (32 C.A.3d 516.)

In *Associated Home Builders of the Greater Eastbay v. Livermore* (1976) 18 C.3d 582, 135 C.R. 41, 557 P.2d 473, the voters of defendant, a general law city, enacted an initiative ordinance prohibiting issuance of further residential

building permits until local educational, sewage disposal, and water supply facilities complied with specified standards. Plaintiff, an association of contractors and others interested in residential construction in the area, challenged the constitutionality of the ordinance, and the trial judge granted a permanent injunction. The ground relied on, that the initiative ordinance was invalid because it conflicted with the state zoning law, was held to be without substance. (See *supra*, §1027.) The more serious challenge, on which the trial judge did not rule, was that the ordinance was not a proper exercise of the police power. The court pointed out that the limited record, with no factual determinations below, prevented resolution of the constitutional issue on this appeal; but it nevertheless proceeded, in an elaborate opinion for the guidance of the trial court, to state the controlling principles. (18 C.3d 601.)

(a) *Strict judicial scrutiny test is inapplicable.* Writers have contended that exclusionary land use ordinances tend primarily to exclude racial minorities and the poor, and therefore should be subject to strict judicial scrutiny and upheld only on a showing of a compelling interest. (18 C.3d 601.) This is not the proper test for the Livermore ordinance because there is no discrimination on the basis of race or wealth. The ordinance does not ban or limit inexpensive housing while permitting expensive single-family residences on large lots; it impartially bans all residential construction until the standards are met. (18 C.3d 602.)

(b) *No burden on right to travel.* The indirect burden on the right to travel does not warrant application of the compelling interest standard. Cases holding legislation invalid because of a direct burden, e.g., by discriminating against nonresidents or newly arrived residents (see *supra*, §734 et seq.) are distinguishable. (18 C.3d 602.) Legislation that does not penalize travel and resettlement, but merely makes it more difficult for the outsider to establish a residence in a desired place, is subject to the liberal standards that have traditionally tested the validity of land use restrictions under the police power. (18 C.3d 603, 604, citing *Belle Terre v. Boraas* (1974) 416 U.S. 797, 94 S.Ct. 1536, 39 L.Ed.2d 797, *supra*, §1030, and other federal cases.) The strict test would change the presumption of validity to a presumption of invalidity, and would result in wholesale invalidation of land use controls. (18 C.3d 603.)

(c) *Traditional test of reasonable relation to public welfare is applicable.* When an exclusionary ordinance is challenged under federal due process, leading federal decisions, followed in California cases, apply the test set forth in *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, *supra*, §1005: "[I]f it is fairly debatable that the ordinance is reasonably related to the public welfare, the ordinance is constitutional." (18 C.3d 606.)

(d) *Regional welfare test where nonresidents are affected.* The present ordinance significantly affects the interests of nonresidents, and presents a special problem. An ordinance with an effect only in the municipality need only relate to the welfare of its residents; but "if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region." (18 C.3d 607, citing *Scott v. Indian Wells* (1972) 6 C.3d 541, 99 C.R. 745, 492 P.2d 1137, *infra*, §1052.) The trial judge must apply this test as follows:

(1) The first step is to forecast the probable effect and duration of the restriction. "[T]he court must ascertain the extent to which public facilities currently fall short of the specified standards, must inquire whether the city or appropriate regional agencies have undertaken to construct needed improvements, and must determine when the improvements are likely to be completed." (18 C.3d 608.)

(2) The second step is to identify the competing interests affected by the restriction. "We touch in this area deep social antagonisms. We allude to the conflict between the environmental protectionists and the egalitarian humanists; a collision between the forces that would save the benefits of nature and those that would preserve the opportunity of people in general to settle. Suburban residents who seek to overcome problems of inadequate schools and public facilities to secure 'the blessing of quiet seclusion and clean air' and to 'make the area a sanctuary for people' ... may assert a vital interest in limiting immigration to their community. Outsiders searching for a place to live in the face of a growing shortage of adequate housing, and hoping to share in the perceived benefits of suburban life, may present a countervailing interest opposing barriers to immigration." (18 C.3d 608.)

(3) The third step is to determine whether the ordinance represents a reasonable accommodation of the competing interests. The court may defer to the judgment of a municipality's legislative body, but must still find that the ordinance has a real and substantial relation to the public welfare. (18 C.3d 609.)

(e) *Evidence necessary for determination of issue.* (1) The burden is on the party challenging the ordinance to present the necessary evidence and documentation, and plaintiff did not shoulder that burden. It presented no evidence on the likely duration or effect of the restriction, on whether the city has undertaken to construct the needed improvements, on when those improvements will be completed, or on the existence of an acute housing shortage and its relation to the probable effect of the Livermore ordinance. (2) Defendant maintains that the city has severe problems of air pollution and inadequate public facilities, which make it reasonable to divert new housing temporarily to other communities, but offered no evidence to support the claim. "Without an evidentiary record to demonstrate the validity and significance of the asserted interests, we cannot determine whether the instant ordinance attempts a reasonable accommodation of those interests." (18 C.3d 610.)

A single dissenting justice launched a devastating attack on the majority's approach to this problem, and pointed out that the ordinance provides no timetable for building up the public services, so that the building moratorium is likely to continue for decades. (18 C.3d 616.) (See 67 Cal. L. Rev. 1154; 70 Cal. L. Rev. 151; 29 Hastings L. J. 803; 31 Hastings L. J. 133; 14 San Diego L. Rev. 1227; 19 Santa Clara L. Rev. 777 [impact on neighboring communities]; 10 U.C. Davis L. Rev. 59 [Municipal Services Moratoria]; 92 A.L.R.3d 1073 [ban on construction until public facilities comply with specific standards].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

4. Exclusionary Zoning.

a. In General.

3. Invalid Ordinances.

8 Witkin Sum. Cal. Law Const Law § 1032

[§ 1032] Invalid Ordinances.

In *Santa Barbara v. Adamson* (1980) 27 C.3d 123, 164 C.R. 539, 610 P.2d 436, the California constitutional right of privacy (*supra*, §575) was invoked to nullify an exclusionary ordinance. Santa Barbara and some 37 other cities have zoning ordinances that provide several residence zones--for one-family, two-family, and multiple-family units. "Family" is defined as (1) the traditional family of persons related by blood, marriage, or adoption, or (2) a group of not over 5 persons (excluding servants). Defendant A, owner of a 24-room house, entered into a living arrangement with 11 other adults, who shared expenses and enjoyed social and recreational activities together. This "alternate family" violated the ordinance's "rule of 5," and the city obtained an injunction prohibiting the 12 from living together in the home. *Held*, reversed.

(a) The California constitutional right of privacy, as construed in *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, *supra*, §575, protects "freedom to associate with the people we choose." (27 C.3d 130.) Hence, even if *Belle Terre v. Boraas* (1974) 416 U.S. 797, 94 S.Ct. 1536, 39 L.Ed.2d 797, *supra*, §1030, does not recognize a federal right of privacy protecting defendants' rights, the broader California provision does. (27 C.3d 130, footnote 3, commenting on uncertainty of federal law.)

(b) As *White* declares, the right of privacy should be abridged only when there is a compelling public interest. Plaintiff city has not demonstrated that there is such an interest. The rule of 5 does not inhibit transiency, or prevent overcrowding (crowding is permissible where members are related), or have any effect on noise, traffic, or other important characteristics of a residential district. (27 C.3d 132.)

(c) The residential character of a district can be preserved by means less restrictive of freedom; e.g., by restrictions on transient and institutional uses. Population density can be controlled by floor space and similar regulations. Noise and morality can be dealt with by law enforcement. Traffic and parking can be handled by nondiscriminatory limitations on the number of cars and by off-street parking requirements. "In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users." (27 C.3d 133.)

(d) Some courts have defined "family" to specify a concept more rationally related to the legitimate aim of

maintaining a family style of living; e.g., in New Jersey a valid regulation of single-family dwellings would be "a reasonable number of persons who constitute a *bona fide* single housekeeping unit." (27 C.3d 134.)

Three justices dissented. (27 C.3d 139.) (See *Chula Vista v. Pagard* (1981) 115 C.A.3d 785, 171 C.R. 738 [following *Adamson* in invalidating similar ordinance, but encouraging cities to continue drafting regulations to promote family needs and values]; 69 Cal. L. Rev. 1052 [*Adamson*]; 32 *Hastings L. J.* 1687 [same]; 14 *Loyola L.A. L. Rev.* 359 [same]; 71 A.L.R.3d 693 [what is "family" for purposes of zoning restriction]; 12 A.L.R.4th 238 [ordinance restricting number of unrelated persons who can live together in residential zone]; 24 Proof of Facts 3d 543 [invalidity of single-family zoning ordinance].)

The reasoning of *Adamson* was followed in *Elysium Institute v. Los Angeles* (1991) 232 C.A.3d 408, 283 C.R. 688. Los Angeles County adopted a zoning ordinance under which nudist camps were restricted to areas zoned for heavy agriculture, while other recreational clubs were allowed in areas zoned for light agriculture. Under the ordinance, a nudist camp was any area where three or more persons, not members of the same family, engaged in activity involving nudity. The court found these restrictions unconstitutional.

(a) Under the ordinance, three unrelated nudists could not gather together in a private home. There is no compelling interest for including private homes within the definition of nudist camp, and the definition thus violates the right to privacy guaranteed by the *California Constitution*. (232 C.A.3d 426.)

(b) Operation of a nudist camp in a particular zone does not involve a fundamental right. (232 C.A.3d 427.) Hence, for equal protection analysis, the question is whether the exclusion of nudist camps while allowing other recreational uses in the light agriculture zone bears a rational relationship to a legitimate state purpose. (232 C.A.3d 429.) The County cited various concerns, such as the possibility of curiosity seekers and increased traffic resulting from use of property as a nudist camp. However, the ordinance requires recreational groups to obtain conditional use permits, and factors such as increased traffic and the health, welfare, and comfort of surrounding residents can be considered through the conditional use permit procedure. Thus, "the distinction between nudist camps and recreational clubs bears no rational relationship to a conceivable legitimate purpose." (232 C.A.3d 432.)

In *College Area Renters & Landlord Assn. v. San Diego* (1996) 43 C.A.4th 677, 50 C.R.2d 515, an ordinance limited the number of adult occupants of a *rented* one-family dwelling unit based on the square footage of bedroom areas, the number and size of bathrooms, and the amount of off-street parking. *Held*, the ordinance was invalid on equal protection grounds. "[T]he purpose of the law is to address problems associated with excessive occupancy of detached homes in a single-family residence zone. Owners and tenants are similarly situated with respect to the overcrowding problem--i.e., both groups can overcrowd a neighborhood. Assuming *arguendo* (without addressing the issue) that this case only requires use of the rational relationship test, we are not persuaded that there is a sufficient relationship between the non-owner-occupied classification and the overcrowding problem, so as to justify imposing occupancy restrictions on tenant residents that do not apply to neighboring owner residents." (43 C.A.4th 686.) (See *Coalition Advocating Legal Housing Options v. Santa Monica* (2001) 88 C.A.4th 451, 458, 462, 105 C.R.2d 802 [following *Adamson* and *College Area Renters*; ordinance limiting occupancy of second units in single family residential zones to property owner or his or her dependent or caregiver violated both privacy and equal protection rights].)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Business and Commercial Activity.

8 *Witkin Sum. Cal. Law Const Law* § 1033

[§ 1033] Business and Commercial Activity.

(1) *In General.* The power to exclude businesses or other commercial activities from residential areas is unquestioned. (See *Govt.C. 65850(a)*; *Friel v. Los Angeles* (1959) 172 C.A.2d 142, 157, 342 P.2d 374 [oil well drilling prohibited in residential district in unincorporated area]; *Hart v. Beverly Hills* (1938) 11 C.2d 343, 349, 79 P.2d 1080 [ordinance prohibiting auction sales in a residential district was upheld on theory that assembling of curious crowds attracted by auctions furnishes opportunity for petty frauds and crimes]; *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 C.A.4th 1487, 1496, 1497, 83 C.R.2d 455 [use by business of easement on residentially zoned property to serve commercial property was commercial use in violation of zoning; private agreement on use of property was immaterial]; *supra*, §1005.)

Floresta v. San Leandro (1961) 190 C.A.2d 599, 12 C.R. 182, upheld the power of a city council to prohibit a cocktail lounge in a shopping center. The court rejected the argument of state preemption of the field of liquor control, pointing out that zoning seeks the planning of uses on a community scale, not the regulation or control of liquor. (190 C.A.2d 605.)

(2) *Exception for Home Occupation.* In *Butte v. Bach* (1985) 172 C.A.3d 848, 218 C.R. 613, an ordinance contained a "home occupation" exception allowing a home occupation to be conducted by persons who "reside" on the premises. Defendant, an attorney, had his law office in his home. *Held*, an injunction would lie against this use. The exception is an accommodation between conflicting values, and "is implicitly premised upon expectations that the number and distribution of such encroachments will not be intolerable and that persons who live where they work are likely to have less detrimental impact than nonresidents." (172 C.A.3d 865.) Here, defendant's "use of the property for 'residential' purposes is, at best, accessory to and incidental to the primary use of the premises for law office purposes." A person whose residential use of a house is so disproportioned to its commercial use is not "residing on the premises" within the meaning the ordinance. (172 C.A.3d 865.)

In *Los Altos v. Barnes* (1992) 3 C.A.4th 1193, 5 C.R.2d 77, plaintiff city's zoning ordinance permitted home occupations in residential zones, provided that no assistants were employed and that the use was carried on by occupants of the property. Defendant was enjoined from carrying on her home occupation because she employed assistants who did not reside at her home. *Held*, affirmed.

(a) In the cases relied on by defendant, the government sought to intrude into private areas of individual lives. However, this ordinance does not intrude into defendant's private affairs. "It does not regulate with whom she resides, inquire into whom she employs or force her to divulge information about whom her associates are. All the ordinance does is regulate the use of her home." (3 *C.A.4th* 1201.)

(b) Prior cases have recognized the validity of ordinances limiting home occupations in residential neighborhoods. The restrictions on home occupations have been crafted to ensure that the occupation remains unobtrusive and does not detract from an otherwise residential neighborhood. "In this respect, ordinances restricting home occupations represent a compromise between removing incompatible commercial use from residential neighborhoods and the social necessity of permitting some home occupations to continue." (3 *C.A.4th* 1205, 1206.) The Los Altos ordinance strikes a reasonable compromise between the competing interests. (3 *C.A.4th* 1206.) (See 33 Proof of Facts 3d 547 [validity under zoning ordinance of home occupation accessory use of residential property].)

(3) *Texts and Law Reviews*. Much has been written on the exclusion of business or commercial activity from specified areas. (See 22 *Hastings L. J.* 587 [power lines]; 9 *San Diego L. Rev.* 355 [service stations]; 61 *So. Cal. L. Rev.* 1373 [criticizing zoning ordinances limiting liquor stores or sales as inappropriate to combat alcohol abuse]; 9 *A.L.R.2d* 683 [exclusion of industrial activities inconsistent with residential character]; 73 *A.L.R.2d* 439 ["home occupation" as accessory use]; 75 *A.L.R.2d* 168 [gasoline filling stations]; 76 *A.L.R.2d* 1172 [shopping centers]; 82 *A.L.R.2d* 989 [restaurants, drive-ins, etc.]; 11 *A.L.R.3d* 1004 [vending machines]; 24 *A.L.R.3d* 1128 [accessory use of dwelling for professional office]; 50 *A.L.R.3d* 837 [junkyards and scrap metal plants]; 81 *A.L.R.3d* 1086 [radio or television facilities]; 92 *A.L.R.3d* 328 [funeral homes]; 96 *A.L.R.3d* 921 [cemeteries]; 100 *A.L.R.3d* 252 [billiard rooms and bowling alleys]; 100 *A.L.R.3d* 876 [halfway house for former patients of mental hospital]; 54 *A.L.R.4th* 1034 [incidental and accessory uses of property zoned for residential purposes]; 63 *A.L.R.5th* 607 [golf, swimming, tennis]; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §226 et seq.; C.E.B., *Zoning Practice*, Chap. 6.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Texts and Law Reviews*. C.E.B., *Zoning Practice* has been superseded by C.E.B., *Land Use Practice*. See C.E.B., 1 *Land Use Practice*, §5.36 et seq.



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4. Exclusionary Zoning.

c. Transient Commercial Use of Residential Property.

8 Witkin Sum. Cal. Law Const Law § 1034

[§ 1034] Transient Commercial Use of Residential Property.

In *Ewing v. Carmel-By-The-Sea* (1991) 234 C.A.3d 1579, 286 C.R. 382, defendant city enacted an ordinance prohibiting transient commercial use of residential property for remuneration for less than 30 consecutive days. The crucial term was defined as the commercial use "for bed and breakfast, hostel, hotel, inn, lodging, motel, resort." The city council, in its findings, declared that commercial use of property in the single-family district would "create unmitigable, adverse impacts on surrounding residential uses, including, but not limited to, increased levels of commercial and residential vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the City," and that it might "increase demand for public services, including, but not limited to, police, fire, and medical emergency services, and neighborhood watch programs." (234 C.A.3d 1589.) *Held*, the ordinance was valid.

(a) "It stands to reason that the 'residential character' of a neighborhood is threatened when a significant number of homes--at least 12 percent in this case, according to the record--are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other 'unmitigable adverse impacts' cited by the council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow--without engaging in the sort of activities that weld and strengthen a community." (234 C.A.3d 1591.)

(b) "Blessed with unparalleled geography, climate, beauty, and charm, Carmel naturally attracts numerous short-term visitors. Again, it stands to reason that Carmel would wish to preserve an enclave of single-family homes as the heart and soul of the city." (234 C.A.3d 1591.) It cannot be said that the ordinance adopted for this purpose is without a substantial relation to the public health, safety, morals, or general welfare. (234 C.A.3d 1592.)

(c) The ordinance leaves plaintiffs with several economically viable uses of their property. "Plaintiffs may live in their homes permanently or occasionally. They may rent their homes for remuneration for at least 30 days. They may allow others to use their homes, without remuneration, for any length of time. They may sell their homes or otherwise encumber them." (234 C.A.3d 1592.) Thus, the diminution of their ownership rights is minimal, "and far outweighed by

the public interest in enhancing and maintaining permanent residential areas." (234 C.A.3d 1592.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Churches.

8 *Witkin Sum. Cal. Law Const Law* § 1035

[§ 1035] Churches.

In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville* (1949) 90 C.A.2d 656, 203 P.2d 823, an ordinance creating a zone for strictly residential uses, excluding use for church purposes, was upheld. "It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather. This would be true particularly in areas limited to single family dwellings." (90 C.A.2d 659.) (See *Minney v. Azusa* (1958) 164 C.A.2d 12, 24, 330 P.2d 255; *Garden Grove Congregation of Jehovah's Witnesses v. Garden Grove* (1959) 176 C.A.2d 136, 142, 1 C.R. 65 [denial of conditional use permit to church affirmed]; 74 A.L.R.2d 377 [zoning regulations as affecting churches]; 62 A.L.R.3d 197 [what constitutes "church" or "religious use"]; 11 A.L.R.4th 1084 [what constitutes accessory or incidental use of religious property within zoning ordinance]; 83 Am.Jur.2d (2003 ed.), *Zoning and Planning* §350 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See 31 A.L.R.6th 395 [validity and construction of exclusion or inclusion of religious uses or places of worship in single-family residential zoning districts].



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e. Schools.

8 *Witkin Sum. Cal. Law Const Law* § 1036

[§ 1036] Schools.

An ordinance discriminating against private schools was held invalid in *Roman Catholic Welfare Corp. of San Francisco v. Piedmont* (1955) 45 C.2d 325, 289 P.2d 438. Defendant city established a residential zone covering 98.7% of the total area and 98.2% of the total population. In that zone the ordinance allowed public schools, but private schools were only permitted in small, unimproved areas of other zones. Petitioner sought mandamus to compel issuance of a building permit for a private school immediately adjacent to a Catholic Church in the residential zone. *Held*, writ granted; the ordinance was unconstitutional. (a) The right of parents to send their children to private rather than public schools (see *infra*, §1071) includes the right to send them to a school located in the general neighborhood, rather than outside the city or state. (45 C.2d 329.) (b) Private schools have no more harmful effect on a locality than public schools, and a zoning ordinance cannot exclude one from an area in which the other is allowed. (45 C.2d 332.) (c) *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville* (1949) 90 C.A.2d 656, 203 P.2d 823, *supra*, §1035, is distinguishable, because there *all* churches were excluded from the area. (45 C.2d 334.)

Piedmont was effectively undermined by the application of a different governing principle in *Tustin Heights Assn. v. Board of Supervisors of Orange* (1959) 170 C.A.2d 619, 339 P.2d 914. A county ordinance excluded *all* schools from the residential area. The Roman Catholic Archbishop, seeking to establish a church and parochial school, pointed out that, because the public school system is a matter of statewide concern that cannot be regulated by local authorities (*supra*, §1002), public schools were in fact allowed while private schools were excluded. *Held*, the ordinance was valid. It was not, like that in *Piedmont*, discriminatory in terms; and the fact that the state public schools were actually free from the restriction did not make it unconstitutional. "The list of state activities which are not subject to local zoning is long and varied and the law does not prohibit the regulation of the counterpart of each of these activities in private ownership. Equal protection of the law does not require an equating of private rights with those of the sovereign." (170 C.A.2d 632.)

The 1959 Legislature solved the problem of these cases by the enactment of *Govt.C. 53094*, providing that the governing board of a school district may, by a two-thirds vote, render a zoning ordinance inapplicable to school district use (with exceptions for nonclassroom uses). The city, however, may seek judicial review of the board's decision, and the court may set it aside if it is determined to be "arbitrary and capricious." (See *Santa Clara v. Santa Clara Unified School Dist.* (1971) 22 C.A.3d 152, 160, 99 C.R. 212 [trial court's judgment that district acted arbitrarily and

capriciously was reversed for lack of evidentiary support]; 64 *A.L.R.3d* 1087 [what constitutes "school" or "educational use"]; 64 *A.L.R.3d* 1138 [regulations as applied to colleges or universities]; 74 *A.L.R.3d* 14 [private and parochial schools below college level]; 74 *A.L.R.3d* 136 [elementary and high schools]; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §336 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

4. Exclusionary Zoning.

f. Miscellaneous Classifications.

8 Witkin Sum. Cal. Law Const Law § 1037

[§ 1037] Miscellaneous Classifications.

The following are illustrative of the wide variety of other land uses that have been subjected to zoning regulations:

(1) *Agricultural zones.* (See *Gisler v. Madera* (1974) 38 C.A.3d 303, 307, 112 C.R. 919 [exclusive agricultural zoning with minimum 18-acre parcel size]; 38 A.L.R.5th 357 [construction and application of terms "agricultural," "farm," "farming," etc., in zoning regulations]; C.E.B., Zoning Practice, §6.13 et seq.)

(2) *Industrial zones.* (See 98 A.L.R.2d 225 [research and laboratory facilities]; 11 A.L.R.3d 1187 [meaning of "garage" in zoning regulation]; C.E.B., Zoning Practice, §6.22.)

(3) *Public facilities, etc.* (See 85 Harv. L. Rev. 574 [preservation of urban landmarks]; 7 A.L.R.3d 1443 [bomb or fallout shelters]; 59 A.L.R.3d 1244 [applicability of regulations to waste disposal facilities of governmental entities]; 53 A.L.R.5th 1 [applicability of zoning regulations to governmental projects or activities]; C.E.B., Zoning Practice, §8.59 et seq.)

(4) *Signs, billboards, and outdoor advertising.* (See *infra*, §1066 et seq.)

(5) *Timberland preserve zones.* (See *Govt.C. 51100* et seq.; C.E.B., Zoning Practice, Supp., §6.21A.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Agricultural zones.* C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §5.38.

(2) *Industrial zones.* C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §5.37.

(3) *Public facilities, etc.* C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §5.44 et seq.

(5) *Timberland preserve zones.* C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. On

regulation of state land, see C.E.B., 1 Land Use Practice, §6.61 et seq.



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C. Zoning.

5. Type of Lot or Dwelling.

a. Lot Area and Open Space.

8 Witkin Sum. Cal. Law Const Law § 1038

[§ 1038] Lot Area and Open Space.

One of the evils attacked by residential zoning regulations is the small lot that produces an undersize house, encouraging crowds to dwell together without adequate light and living space, and creating congestion in the streets--in brief, slum conditions. Ordinances that prescribe a minimum lot area for single-family dwellings are usually upheld. (See *Govt.C. 65850(c)*, supra, §1020 [authorizing these regulations]; *Hill v. Manhattan Beach* (1971) 6 C.3d 279, 286, 98 C.R. 785, 491 P.2d 369, infra, §1041; *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 751, 29 C.R.2d 804, 872 P.2d 143 [zoning ordinance requiring undersized parcels to be merged to comply with density standards was impliedly preempted by statewide merger provisions (*Govt.C. 66451.10* et seq.)]; 94 A.L.R.2d 398, 491 [open yards]; 96 A.L.R.2d 1367 [minimum width or frontage requirements]; 80 A.L.R.3d 95 ["floating zones"]; 1 A.L.R.4th 373 [fences, hedges, walls]; 1 A.L.R.5th 622 [validity of zoning laws setting minimum lot size requirements]; 2 A.L.R.5th 553 [construction of regulations setting minimum lot size requirements]; 83 Am.Jur.2d (2003 ed.), *Zoning and Planning* §127 et seq.)

In *Clemons v. Los Angeles* (1950) 36 C.2d 95, 222 P.2d 439, a Los Angeles zoning ordinance prescribed an area requirement in residential zones of 5,000 square feet with frontage of not less than 50 feet. Plaintiff bought an old bungalow court of nine units, subdivided it into nine lots of 925 square feet with bungalow, and conveyed to separate individuals. *Held*, the ordinance was valid and the conveyances were void. Small lots tend to create slum conditions and overcrowding, add noise and other irritations, and make it more difficult to enforce health and sanitary regulations. Larger lots cut down on congestion in the streets, facilitate transportation and other utilities, provide recreational space for children to play, and encourage cultivation of flowers and shrubs. Moreover, the benefits of the Subdivision Map Act (see 12 Summary (10th), *Real Property*, §809) would be lost if, after compliance by the subdivider, purchasers could erect multiple dwellings and then cut up the units for separate resale. (36 C.2d 99.)

One of the methods of preserving open space is the "cluster development," which groups dwellings on a portion of the development area, leaving other portions open. "Control of density in the area to be developed is an essential part of the plan. The reservation of green, or at least open, spaces, in a manner differing from the conventional front or back yard, is another ingredient. Conformity to good landscaping, as the planners devise it, is also an objective." (*Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 C.A.3d 768, 772, 90 C.R. 88; see 43 A.L.R.3d 888 [planned unit, cluster, or greenbelt zoning].)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Type of Lot or Dwelling.

b. Other Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 1039

[§ 1039] Other Regulations.

(1) *Setback Lines and Parking Space.* Building setback lines and off-street parking requirements are commonly upheld unless wholly unreasonable. (See *Govt.C. 65850(d)* [off-street parking and loading]; *Govt.C. 65850(e)* [setback lines]; *Thille v. Board of Public Works of Los Angeles* (1927) 82 C.A. 187, 189, 255 P. 294 [30-foot setback valid]; *Weiner v. Los Angeles* (1968) 68 C.2d 697, 703, 68 C.R. 733, 441 P.2d 293 [331/2-foot setback valid]; *Hoshour v. Contra Costa* (1962) 203 C.A.2d 602, 21 C.R. 714, *infra*, §1048 [arbitrary setback requirement is invalid]; 74 A.L.R.2d 418 [parking space]; 71 A.L.R.4th 529 [residential off-street parking requirements]; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §139 et seq.; C.E.B., *Zoning Practice* §§5.23, 6.53 et seq.)

(2) *Minimum Dwelling Size and Cost.* Land planning on a bolder scale sometimes seeks to maintain better living conditions in residential districts by requiring adequate minimum square footage in a dwelling. Although the cases are in conflict, there is some authority to support this type of regulation. (See 66 *Harv. L. Rev.* 1051, 1059; 87 A.L.R.4th 294 [minimum floor space or cubic footage inside residence]; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §138.) But a requirement of minimum cost of dwellings is probably unconstitutional. (See 66 *Harv. L. Rev.* 1055.)

(3) *Architectural Style or Design.* There are conflicting decisions on the validity of ordinances regulating architectural style or design of structures. (See *Briggs v. Rolling Hills Estates* (1995) 40 C.A.4th 637, 642, 47 C.R.2d 29 ["neighborhood compatibility" ordinance requiring that design of new or remodeled structures "respect the existing privacy of surrounding properties" was not unconstitutionally vague]; 30 *Hastings Const L. Q.* 395 [Freedom of Speech and the Language of Architecture]; 33 *San Diego L. Rev.* 291 [arguing that aesthetic regulation of architectural design of private single-family houses impinges on First Amendment right of expression and thus must advance substantial governmental interest]; 28 *Stanf. L. Rev.* 179 [Architecture, Aesthetic Zoning, and the First Amendment]; 41 A.L.R.3d 1397; 83 *Am.Jur.2d* (2003 ed.), *Zoning and Planning* §148 et seq.; *infra*, §1063.)

(4) *Mobile- and Manufactured Homes.* Several statutes deal with zoning of mobile- and manufactured homes. (See *Govt.C. 65583* [housing element of general plan (*supra*, §1013) must identify adequate sites]; *Govt.C. 65852.3* [manufactured homes must be permitted on lots zoned for single-family dwellings]; *Govt.C. 65852.4* [applications to install manufactured homes on lots zoned for single-family dwellings may not be subjected to requirements other than those imposed on conventional dwellings]; *Govt.C. 65852.7* [mobilehome park as permitted use on land zoned for

residential use]; *Health & Saf.C. 18300(a)* [zoning regulations]; *16 U.C. Davis L. Rev. 167* [*Govt.C. 65852.3*]; *42 A.L.R.3d 598* [validity and application of zoning regulations to mobile home or trailer parks]; *17 A.L.R.4th 106* [restricting mobilehomes or trailers to established mobilehome or trailer parks]; *83 Am.Jur.2d (2003 ed.)*, *Zoning and Planning* §193 et seq.; *41 Proof of Facts 3d 495* [proof necessary to challenge zoning regulation of mobile- and manufactured homes]; C.E.B., *Zoning Practice* §8.93 et seq.)

(5) *Second Units*. Local ordinances may be enacted to provide for second units in single-family and multifamily residential zones. (*Govt.C. 65852.2(a)*; see *Govt.C. 65852.2(d)* [permits minimum and maximum unit size requirements, so long as they permit at least an efficiency unit]; *Govt.C. 65852.2(e)* [limiting parking restrictions for second units].) However, an ordinance totally precluding second units in these zones must not be adopted unless specified findings are made. (*Govt.C. 65852.2(c)*.) If the local government does not adopt either ordinance, it must accept applications for conditional use permits and approve or disapprove them ministerially without discretionary review. A variance or special use permit must be granted if the second unit complies with specified criteria. (*Govt.C. 65852.2(b)* [providing for adoption of ordinance on second units within 120 days of receiving application for second unit]; see *Desmond v. Contra Costa* (1993) *21 C.A.4th 330, 340, 341, 25 C.R.2d 842* [county board of supervisors properly denied application for second unit; county's second-unit ordinance was adopted under and complied with *Govt.C. 65852.2(a)*, and thus "maximum standards" of *Govt.C. 65852.2(b)* were inapplicable]; *Sounhein v. San Dimas* (1996) *47 C.A.4th 1181, 1187, 55 C.R.2d 290* [conditions of use permit granted under *Govt.C. 65852.2(b)* run with land and apply to subsequent owner-occupants]; on conditional use permits, see *infra*, §1050 et seq.; on *Govt.C. 65852.1*, permitting zoning variances or permits for attached units to house persons 60 years of age or over, see *infra*, §1053.)

(6) *Residential Care Facilities*. *Health & Saf.C. 1500* et seq. deal with various types of care facilities. A residential facility serving six or fewer persons must be considered a residential use in local ordinances, and no conditional use permit or zoning variance can be required that would not be required for a family dwelling of the same type in the same zone. (*Health & Saf.C. 1566.3*; see *Health & Saf.C. 1569.85* [residential care facilities for elderly]; *Health & Saf.C. 1520.5* [policy to avoid "overconcentration" of residential care facilities]; *Health & Saf.C. 1597.40* [restriction on use of single-family residence as family day care home is prohibited].)

(7) *Reconstruction or Restoration of Multifamily Dwelling*. Except as specifically provided, no local agency may prohibit the reconstruction, restoration, or rebuilding of multifamily dwellings that have been involuntarily damaged or destroyed. (*Govt.C. 65852.25*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Setback Lines and Parking Space*. C.E.B., *Zoning Practice* has been superseded by C.E.B., *Land Use Practice*. On design provisions generally, see C.E.B., *1 Land Use Practice*, §5.25 et seq.; on parking requirements for density bonus units, see C.E.B., *1 Land Use Practice*, §6.15.(4) *Mobile- and Manufactured Homes*. C.E.B., *Zoning Practice* has been superseded by C.E.B., *Land Use Practice*. See C.E.B., *1 Land Use Practice*, §11.19 et seq.(5) *Second Units*. *Govt.C. 65852.1*, providing for second units for seniors, became inoperative on January 1, 2007, except that any zoning variance or special or conditional use permit issued before that date remains valid.



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C. Zoning.

6. Retroactive Zoning.

8 Witkin Sum. Cal. Law Const Law § 1040

[§ 1040] Retroactive Zoning.

(1) *In General.* Zoning ordinances have generally been prospective; i.e., the regulatory bodies have not attempted to eradicate existing nonconforming uses immediately, but have sought to eliminate them gradually by prohibiting alteration and repair. (See *infra*, §1042.)

In *Jones v. Los Angeles* (1930) 211 C. 304, 295 P. 14, an ordinance restricting sanitariums to certain districts was expressly made retroactive, and an action was brought to enjoin its enforcement. The court held that nonconforming uses could not be eliminated by a retroactive ordinance unless they amounted to a nuisance. (211 C. 321.) (See *Biscay v. Burlingame* (1932) 127 C.A. 213, 219, 15 P.2d 784; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 C.A.2d 776, 791, 194 P.2d 148, *supra*, §626; *Armistead v. Los Angeles* (1957) 152 C.A.2d 319, 324, 313 P.2d 127; *McCaslin v. Monterey Park* (1958) 163 C.A.2d 339, 346, 329 P.2d 522; on elimination of nuisance, see *Livingston Rock & Gravel Co. v. Los Angeles* (1954) 43 C.2d 121, 128, 272 P.2d 4, *infra*, §1044.)

The claim of invalid retroactive application (or "estoppel to change") has been rejected, however, where the landowner merely relied on a prior zoning plan, or succeeded in freely violating the plan for some time. (See *Donovan v. Santa Monica* (1948) 88 C.A.2d 386, 395, 199 P.2d 51 [violation commenced in 1926, enforcement in 1945]; *Price v. Schwafel* (1949) 92 C.A.2d 77, 82, 206 P.2d 683 [reliance on prior plan].) In justification of this result, the court said in *Wilkins v. San Bernardino* (1946) 29 C.2d 332, 342, 175 P.2d 542: "If this were not so then any landowner could violate a zoning ordinance with impunity, secure in the knowledge that, by just going far enough, by devoting his land to unrestricted uses, and by creating a situation in which enforcement would result in hardship to him, he could obtain a judgment that the ordinance is unconstitutional as applied to the *then existing* circumstances as changed by his actions." (29 C.2d 342.)

(2) *Building Permit Application or Issuance.* In *Russian Hill Imp. Assn. v. Board of Permit App. of San Francisco* (1967) 66 C.2d 34, 56 C.R. 672, 423 P.2d 824, the city Planning Commission approved a maximum height limit, and the Board of Supervisors enacted it, to take effect March 23, 1964. Four days before its effective date, the permit bureau approved a developer's application for an above-height limit apartment building. The Board of Permit Appeals approved, but the superior court ordered the permit revoked. *Held*, judgment affirmed.

(a) Formerly, a change in zoning law could be retroactively applied unless the permittee had constructed a

substantial portion of the building in good faith reliance on the old law. To eliminate uncertainty and waste in this rule, municipalities enacted ordinances like the one involved here, giving immunity from the time of some clearly defined action, e.g., the "lawful granting" of a permit. But this does not protect a mere hope. The permit must be lawfully granted, not merely issued by the permit bureau; and issuance confers only a conditional immunity because the Board of Permit Appeals retains the power to order a denial due to a pending change in the law. (66 C.2d 40.)

(b) By holding that a permit is not "lawfully granted" until all administrative action is completed, municipal power to prevent circumvention of newly enacted zoning laws is preserved. In light of this policy, the lure of statutory immunity should not be extended to all who might obtain a permit bureau preliminary approval during the inevitable interval between enactment and the effective date of a change. (66 C.2d 43.) (See *San Francisco Planning & Urban Renewal Assn. Com. v. Central Permit Bureau* (1973) 30 C.A.3d 920, 927, 106 C.R. 670 [distinguishing *Russian Hill*; permit granted before final administrative action adopting interim controls]; 49 A.L.R.3d 13 [retroactive effect of regulation, in absence of saving clause, on validly issued building permit]; 49 A.L.R.3d 1150 [saving provisions protecting landowners who applied for or received permit prior to change]; 50 A.L.R.3d 596 [retroactive effect of regulation, in absence of saving clause, on pending application for permit].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

7. Nonconforming Uses.

a. In General.

8 Witkin Sum. Cal. Law Const Law § 1041

[§ 1041] In General.

The most formidable obstacles to successful land planning are the existing nonconforming property uses--usually businesses in a newly created residential district. As the court observed in *Los Angeles v. Gage* (1954) 127 C.A.2d 442, 274 P.2d 34: "Until recently zoning ordinances have made no provision for any systematic and comprehensive elimination of the nonconforming use. The expectation seems to have been that existing nonconforming uses would be of little consequence and that they would eventually disappear. ... The contrary appears to be the case. ... It is said that the fundamental problem facing zoning is the inability to eliminate the nonconforming use." (127 C.A.2d 454.)

Because the immediate prohibition of nondangerous business causes serious hardship and may be deemed so destructive of property interests as to constitute a denial of due process (see *supra*, §1040), less drastic methods have been devised and are generally upheld. (See *San Diego v. McClurken* (1951) 37 C.2d 683, 686, 234 P.2d 972 ["There is a growing tendency to guard against the indefinite continuance of nonconforming uses by providing for their liquidation within a prescribed period"]; *Livingston Rock & Gravel Co. v. Los Angeles* (1954) 43 C.2d 121, 127, 272 P.2d 4; 80 A.L.R.3d 630 [advertising structure as nonconforming use]; 89 A.L.R.3d 1051 [building under construction as vested right to nonconforming use]; 38 A.L.R.5th 737 [activities in preparation for building as establishing valid nonconforming use or vested right to engage in construction for intended use]; 44 Proof of Facts 3d 531 [circumstances justifying termination of lawful nonconforming use]; 62 Am.Jur. Trials 1 [landowner's right to maintain nonconforming use under zoning ordinance]; 83 Am.Jur.2d (2003 ed.), *Zoning and Planning* §555 et seq.; C.E.B., *Zoning Practice*, Chap. 9.)

The principle for methods for terminating nonconforming uses is (a) prohibition against rebuilding or expansion (*infra*, §1042), and (b) amortization provisions that terminate the use within a reasonable period (*infra*, §1044). It also has been suggested that the power of eminent domain might be exercised to eliminate the use without hardship by purchase of the property for its fair value. (See *Jones v. Los Angeles* (1930) 211 C. 304, 319, 295 P. 14; on nature of power of eminent domain, see *infra*, §1112.)

The protection against retroactive application of ordinances (*supra*, §1040) is extended only to a lawful use existing on the effective date of the restriction. If the land has not actually been used for the nonconforming purpose the ordinance will apply; i.e., "[n]onuse is not a nonconforming use." (*Hill v. Manhattan Beach* (1971) 6 C.3d 279, 286, 98

C.R. 785, 491 P.2d 369; see Hansen Bros. Enterprises v. Board of Supervisors (1996) 12 C.4th 533, 48 C.R.2d 778, 907 P.2d 1324, infra, §1043 [existing use must be similar to use existing when ordinance became effective]; Stokes v. Board of Permit App. (1997) 52 C.A.4th 1348, 1355, 1357, 61 C.R.2d 181 [distinguishing Hansen; use of property as bathhouse had been discontinued as unlawful health hazard for several years before plaintiff purchased building]; Bauer v. San Diego (1999) 75 C.A.4th 1281, 1292, 1296, 89 C.R.2d 795 [following Hansen; plaintiff who had grandfathered right to sell alcoholic beverages but whose liquor license was temporarily suspended was entitled to administrative hearing, including adjudication of termination of grandfathered rights, before city could apply new zoning ordinance to require plaintiff to obtain land use permit to resume selling alcoholic beverages]; 56 A.L.R.3d 14 [right to resume use after involuntary break in continuity caused by difficulties unrelated to governmental activity]; 56 A.L.R.3d 138 [right to resume where break was caused by governmental activity]; 57 A.L.R.3d 279 [right to resume where break was voluntary or unexplained]; 40 A.L.R.4th 1012 [occupation of less than all units as abandonment or discontinuance of multifamily dwelling nonconforming use].)

SUPPLEMENT: [This section is current through the latest supplement]

C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, Chap. 8.



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7. Nonconforming Uses.

b. No Rebuilding or Expansion.

8 Witkin Sum. Cal. Law Const Law § 1042

[§ 1042] No Rebuilding or Expansion.

It is permissible to allow the nonconforming structure to become obsolete and be removed in time, by prohibiting expansion of its use, rebuilding, or repair that will keep it operating indefinitely. (See *Rehfeld v. San Francisco* (1933) 218 C. 83, 84, 21 P.2d. 419; *San Diego v. McClurken* (1951) 37 C.2d 683, 686, 234 P.2d 972 ["Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement"]; *Manhattan Sepulveda, Ltd. v. Manhattan Beach* (1994) 22 C.A.4th 865, 870, 27 C.R.2d 565 [city improperly denied application to rebuild nonconforming use following fire, on basis of ordinance allowing reconstruction only where extent of damage was not more than 50% of building's value; proper interpretation of "value" was fair market value, not cost of replacing entire building]; 57 A.L.R.3d 419 [right to repair or reconstruct after damage or destruction by fire or other casualty]; 10 A.L.R.4th 1122 [construction of new building or structure]; 56 A.L.R.4th 769 [change in area or location of nonconforming use]; 63 A.L.R.4th 275 [alteration, extension, reconstruction, or repair of nonconforming use]; 26 Proof of Facts 3d 467 [circumstances warranting expansion of nonconforming use]; 83 Am.Jur.2d (2003 ed.), *Zoning and Planning* §583 et seq.; C.E.B., *Zoning Practice* §9.8 et seq.)

In *San Diego v. McClurken*, the ordinance allowed for the continuance of existing uses, which in this case was the intermittent storage above ground of gasoline and other fuels. After the ordinance, four new tanks were added to increase the storage capacity more than five times, and the tanks were permanently affixed on concrete bases, as part of a service station. *Held*, this was not continuance of the old use but an unwarranted enlargement amounting to a new nonconforming use. (37 C.2d 688.) The defendant's mere prior *intention to expand his future business* did not give him a right to expand a nonconforming use. There was no showing of legally undertaken construction, or a permit and substantial expenditure in reliance, prior to the effective date of the ordinance. (37 C.2d 690.)

In *Orange v. Goldring* (1953) 121 C.A.2d 442, 263 P.2d 321, the existing right was to use the land as a resting place for defendant's cattle. Defendant, however, constructed feeding pens on permanent foundations, and used them to fatten cattle for a number of persons, causing noises, stench, etc. An injunction was upheld on the principle that the existing use must not be substantially changed. (121 C.A.2d 446.) (See *Edmonds v. Los Angeles* (1953) 40 C.2d 642, 651, 255 P.2d 772 [attempt to enlarge trailer camp from 20 to 50 trailers].)

SUPPLEMENT: [This section is current through the latest supplement]

C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §8.10 et seq.



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C. Zoning.

7. Nonconforming Uses.

c. Distinction: Mining Operations.

8 Witkin Sum. Cal. Law Const Law § 1043

[§ 1043] Distinction: Mining Operations.

In *Hansen Bros. Enterprises v. Board of Supervisors* (1996) 12 C.4th 533, 48 C.R.2d 778, 907 P.2d 1324, plaintiff mining company conducted aggregate mining, which had been a nonconforming use since 1954. Most of the materials were mined from the banks and bed of a river, but some rock was quarried from a neighboring hillside. To comply with the Surface Mining and Reclamation Act (*Pub.Res.C. 2710 et seq.*; see 12 *Summary* (10th), *Real Property*, §888), plaintiff submitted a reclamation plan showing the right to quarry all the hillside areas on its land. The plan was denied by the county on two grounds: (1) any vested right to quarry the hillside had been lost by discontinuance of quarrying operations in excess of the 180 days permitted by statute; and (2) the plan constituted an improper intensification of a nonconforming use. The trial judge denied plaintiff's petition for mandamus and the Court of Appeal affirmed. *Held*, reversed and remanded for further proceedings.

(a) A zoning ordinance usually exempts existing nonconforming uses because of hardship and the doubtful constitutionality of compelling immediate discontinuance. However, when an existing use is permitted to continue as a nonconforming use, it must be similar to the use existing when the zoning ordinance became effective. (12 C.4th 551, 552.)

(b) An exception exists when the nonconforming use is a mining operation. Progression of the mining into other areas of the property is not a prohibited expansion or change of location of the nonconforming use, if there is objective evidence that the owner, at the time the zoning ordinance was enacted, intended to so expand the mining operation. (12 C.4th 553.) The rationale for this "diminishing asset" doctrine is that the very nature of an excavating business is continuing use of the land, and the nonconforming use therefore may involve a vested right to use the entire tract even though only a portion was used when the ordinance was adopted. (12 C.4th 557.)

(c) The diminishing asset doctrine was applied in California in *McCaslin v. Monterey Park* (1958) 163 C.A.2d 339, 329 P.2d 522. (12 C.4th 559.) The argument for a contrary rule is based on *Paramount Rock Co. v. San Diego* (1960) 180 C.A.2d 217, 4 C.R. 317, *infra*, §1045. However, that case did not reject the doctrine; it found that the proposed use of the property was not substantially the same as its prior use. Recognition of the doctrine is consistent with the Act, which seeks to minimize ecological damage from mining operations. "Were the diminishing asset doctrine inapplicable, a mining enterprise would be required to immediately initiate mining on all areas of its property lest, under a subsequent

zoning change, its right to further mining be extinguished." (12 C.4th 559.)

(d) Here, the property was acquired at several times from several owners, and it is not clear which land was being used for mining operations in 1954. The extent of the property on which the right to a nonconforming use may be asserted must be determined on remand. (12 C.4th 561, 564.) However, it is clear that whatever land was being used for mining purposes in 1954 was being used for a single, aggregate business, composed of riverbed gravel mining and hillside rock quarrying, not for two separate operations. (12 C.4th 565.) "We have found no authority for refusing to recognize a vested right to continue a component of a business that itself has a vested right to continue using the land on which it is located for operation of the business. An aggregate business does not differ from other land uses simply because mining for some or all of the materials that comprise aggregate is a component of the business. Unless an independent aspect of the business has been discontinued, the use may not be broken down into component parts and vested rights recognized for less than the entire business operation." (12 C.4th 566.)

(e) The discontinuance of quarrying operations for greater than 180 days does not result in loss of the right to conduct future quarrying. The 180-day provision applies to the nonconforming use itself, i.e., aggregate mining, not to the various components of the business. (12 C.4th 570.)

(f) The land may be used for rock quarrying, but it may not be used to a degree that would constitute an expansion or intensification of the nonconforming use. However, the natural and reasonable expansion of a quarry business to meet increased demand is not an impermissible enlargement or change in use. Here, the conclusion that there was an improper enlargement was based on an estimate of the upper range of the amount of rock quarrying that was to be done over a 100-year period, as was presented in the reclamation plan. There was no evidence fixing the amount of rock that was quarried per year. Hence, whether there has been an impermissible intensification is an issue that is more appropriately addressed at the time increased production actually occurs. (12 C.4th 571, 575.)

Three justices dissented in two opinions. (12 C.4th 577, 581, 592.) (See 24 Pepperdine L. Rev. 1148 [Hansen].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Zoning.

7. Nonconforming Uses.

d. Amortization Provisions.

8 Witkin Sum. Cal. Law Const Law § 1044

[§ 1044] Amortization Provisions.

(1) *In General.* Prohibition of rebuilding, extension, or expansion (see *supra*, §1042) is hardly calculated to yield results in any reasonable time. Accordingly, a more realistic and economically sound method has been devised to get rid of the existing nonconforming use--amortization. A definite period of time is given for the continuation of the use, based in part on a calculation of the normal remaining useful life of the structures, and thereafter the use is prohibited. Amortization provisions of various types are found in zoning enabling laws and ordinances enacted under them. (See *National Advertising Co. v. Monterey* (1962) 211 C.A.2d 375, 380, 27 C.R. 136; *National Advertising Co. v. Monterey* (1970) 1 C.3d 875, 878, 83 C.R. 577, 464 P.2d 33; *People v. Adco Advertisers* (1973) 35 C.A.3d 507, 513, 110 C.R. 849; *People v. Gates* (1974) 41 C.A.3d 590, 603, 116 C.R. 172 [period was reasonable]; 8 A.L.R.5th 391 [validity of provisions for amortization of nonconforming uses]; 83 Am.Jur.2d (2003 ed.), *Zoning and Planning* §621 et seq.; C.E.B., *Zoning Practice* §9.25 et seq.)

(2) *Validity.* The desirability and constitutional validity of these provisions was declared in *Los Angeles v. Gage* (1954) 127 C.A.2d 442, 455, 274 P.2d 34. "Every zoning ordinance effects some impairment of vested rights either by restricting prospective uses or by prohibiting the continuation of existing uses, because it affects property already owned by individuals at the time of its enactment." There is no real distinction between requiring the discontinuance of a nonconforming use within a reasonable period and provisions that (a) deny the right to add to or extend buildings devoted to an existing nonconforming use, (b) deny the right to resume a nonconforming use after a period of nonuse, (c) deny the right to extend or enlarge an existing nonconforming use, or (d) deny the right to substitute new buildings for those devoted to an existing nonconforming use, "all of which have been held to be valid exercises of the police power." (127 C.A.2d 459.) The use of a reasonable amortization scheme provides an equitable means of reconciling the "conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any, is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public." (127 C.A.2d 460.)

In *Gage*, defendant had a two-story residential building in an unlimited zone, which he used, together with the garage, partly for a wholesale and retail plumbing supply business. The subsequent residential zoning ordinance

required discontinuance of nonconforming uses according to a graduated periodic schedule, ranging from 5 to 40 years, depending on the zone and nature of the structure and use. For this zone and building the period was 5 years. *Held*, the application of the ordinance to defendant's property was not a denial of due process. Its effect was to require removal of his business to a zone located within a half mile away, at a cost of \$ 5,000, which was less than one percent of his minimum gross business for 5 years; and his property remained usable for residential purposes.

It is also permissible to add a provision for the immediate elimination of the use if it becomes a nuisance. In *Livingston Rock & Gravel Co. v. Los Angeles* (1954) 43 C.2d 121, 272 P.2d 4, plaintiffs built a concrete aggregates batching plant for loading readymix trucks, in an unrestricted zone. The county rezoned the area to light manufacturing by an ordinance with an automatic exception for 20 years' nonconforming use, except where the Regional Planning Commission (a local board with quasi-judicial powers) revoked the permit for a use detrimental to the public health or safety or a nuisance. *Held*, the Commission's action in revoking plaintiffs' permit on this ground was constitutional and could not be enjoined, although its determination was subject to judicial review by mandamus or certiorari in the usual manner. (43 C.2d 128.)

Tahoe Regional Planning Agency v. King (1991) 233 C.A.3d 1365, 285 C.R. 335, rejected the claim that a sign ordinance providing a 5-year amortization period for nonconforming uses was a taking without just compensation. *First English Evangelical Lutheran Church of Glendale v. Los Angeles, Calif.* (1987) 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250, *infra*, §1160, does not preclude the use of amortization as a constitutionally permissible method of eliminating nonconforming uses. (233 C.A.3d 1397.) *First English* focused solely on the issue of the required remedy for a temporary taking; the case did not address whether a taking actually had occurred and did not discuss the concept of amortization. (233 C.A.3d 1397, 1399.) Whether a particular ordinance is a valid regulation or an invalid taking can only be determined after a detailed factual analysis. (233 C.A.3d 1402.) (See 80 A.L.R.3d 630 [advertising structure as nonconforming use].)

(3) *Unreasonably Short Period*. An amortization provision giving too short a period to discontinue the nonconforming use may be invalidated. (See *La Mesa v. Tweed & Gambrell Planing Mill* (1956) 146 C.A.2d 762, 770, 304 P.2d 803 [requirement that defendants terminate use of buildings, not suitable for residential use, within 5 years]; *cf. National Advertising Co. v. Monterey* (1970) 1 C.3d 875, 880, 83 C.R. 577, 464 P.2d 33 [only 1 year to remove advertising signs, but evidence showed that they had been fully amortized].)

SUPPLEMENT: [This section is current through the latest supplement]

C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §8.23 et seq.



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7. Nonconforming Uses.

e. Uses Not Protected.

8 Witkin Sum. Cal. Law Const Law § 1045

[§ 1045] Uses Not Protected.

The constitutional protection of nonconforming uses cannot be invoked in the following situations:

(1) *Use Founded on Illegal Acts.* *San Marino v. Roman Catholic Archbishop of Los Angeles* (1960) 180 C.A.2d 657, 4 C.R. 547, involved a city's action to enjoin zoning violations. Defendant contended that the improper use of the land had continued for years with knowledge of the city that it was needed for that use. *Held*, long-continued illegal use of property, without more, creates no vested right in the owner, and does not justify an estoppel against enforcement of zoning provisions. Here, there was no showing that defendant was ignorant of the zoning restrictions, nor that the city intended defendant to rely on the inaction; the facts pleaded did nothing more than admit the violations sought to be enjoined. (180 C.A.2d 677.)

(2) *Substantial Change in Use.* In *Paramount Rock Co. v. San Diego* (1960) 180 C.A.2d 217, 4 C.R. 317, plaintiff owned a concrete premixing plant. The land was later zoned for agricultural purposes, but the nonconforming use was allowed to continue. Subsequently, plaintiff installed a rock-crushing plant. *Held*, this was a substantial change in the nonconforming use and the ordinance was enforceable.

(a) Rock-crushing was not an integral part of the ready-mix business (many of these businesses do not operate a rock-crusher on site). The fact that plaintiff had bought and contemplated installation of the rock-crusher before the ordinance was passed was immaterial. Installation was not commenced until 1 year after the ordinance became effective. The owner's use of the property "at the time it becomes subject to a zoning ordinance and not his plans regarding the future use of that property determines the scope of the nonconforming use excepted from the restrictions imposed by the ordinance." (180 C.A.2d 232.)

(b) The equitable doctrine of relative hardship was likewise inapplicable. It applies where the plaintiff seeks to vindicate a technical and unsubstantial right, not where there is a substantial right involved (see 13 *Summary* (10th), *Equity*, §169); and the right of a city to enforce its zoning restrictions is substantial. (180 C.A.2d 678.) (See *Mang v. Santa Barbara* (1960) 182 C.A.2d 93, 102, 5 C.R. 724 [few days prior to the enactment of an interim ordinance, plaintiff graded, excavated, and did similar work for construction of trailer park, expending \$ 3,400, but without obtaining building permit]; *Los Altos v. Silvey* (1962) 206 C.A.2d 606, 609, 24 C.R. 200.)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Individual Hardship.

a. As Defense Against Enforcement.

1. Where General Plan Is Reasonable.

8 Witkin Sum. Cal. Law Const Law § 1046

[§ 1046] Where General Plan Is Reasonable.

A zoning ordinance is often attacked on grounds of discrimination or denial of due process. But in most cases it is recognized that zoning necessarily results in some inequalities and hardship to persons in a zoned district. Hence, if the general scheme is reasonable and fair, individual hardship is not a basis for constitutional attack on the legislative or administrative determination. (See *Zahn v. Board of Public Works of Los Angeles* (1925) 195 C. 497, 512, 234 P. 388; *Rehfeld v. San Francisco* (1933) 218 C. 83, 21 P.2d 419; *Lockard v. Los Angeles* (1949) 33 C.2d 453, 466, 202 P.2d 38; *Johnston v. Claremont* (1958) 49 C.2d 826, 838, 323 P.2d 71; *Consolidated Rock Products Co. v. Los Angeles* (1962) 57 C.2d 515, 530, 20 C.R. 638, 370 P.2d 342, supra, §1007; *Hamer v. Ross* (1963) 59 C.2d 776, 787, 31 C.R. 335, 382 P.2d 375, infra, §1049; *Friel v. Los Angeles* (1959) 172 C.A.2d 142, 157, 342 P.2d 374 [ordinance prohibiting oil well drilling in residential district in unincorporated area was upheld, though adjacent areas were industrially zoned]; *Cormier v. San Luis Obispo* (1984) 161 C.A.3d 850, 855, 207 C.R. 880; 17 A.L.R.3d 743 [standing of purchaser to attack validity of regulation existing at time of purchase].)

In *Ensign Bickford Realty Corp. v. Livermore* (1977) 68 C.A.3d 467, 137 C.R. 304, defendant city council rezoned an area from residential to commercial, and denied plaintiff's application for similar rezoning of another area in the same section. Plaintiff contended that the council's purpose was to eliminate a competitive economic threat to the rezoned area, and therefore was a denial of equal protection. *Held*, the denial was a proper exercise of police power. If the sole purpose of the legislative decision were to restrict business competition, it would be subject to challenge. (68 C.A.3d 475.) But where the primary purpose is to accomplish a valid objective, an indirect impact on competition does not invalidate the regulation. (68 C.A.3d 476.) Here, the council determined that there was a need for one shopping center, and to further the long-range development plan, it should be located in a particular area. This would have the effect of encouraging development in that area and also would decrease the value of plaintiff's property. However, "[b]y its very nature, a zoning ordinance may be expected to depress the value of some land while it operates, in its total effect, to achieve an end which will benefit the whole community." (68 C.A.3d 477.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hernandez v. Hanford* (2007) 41 C.4th 279, 293, 59 C.R.3d 442, 159 P.3d 33, Supp., supra, §1020 [clarifying

language in *Ensign Bickford Realty Corp. v. Livermore* (1977) 68 C.A.3d 467, 137 C.R. 304, text, p. 645, regarding use of zoning ordinance to restrict business competition].



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8. Individual Hardship.

a. As Defense Against Enforcement.

2. Where Provision Is Arbitrary.

aa. In General.

8 Witkin Sum. Cal. Law Const Law § 1047

[§ 1047] In General.

(1) *Nature of Defects.* Occasionally, an ordinance is held void in its application to a property owner by reason of arbitrary inclusions or exclusions. (See *Reynolds v. Barrett* (1938) 12 C.2d 244, 251, 83 P.2d 29; *Munns v. Stenman* (1957) 152 C.A.2d 543, 551, 314 P.2d 67 [hastily adopted ordinance to bolster unwarranted denial of building permit]; *Kissinger v. Los Angeles* (1958) 161 C.A.2d 454, 460, 327 P.2d 10, *infra*, §1048 [hastily adopted ordinance to enable city to acquire zoned property at artificially depressed price]; *Hoshour v. Contra Costa* (1962) 203 C.A.2d 602, 608, 21 C.R. 714, *infra*, §1048; *Scrutton v. Sacramento* (1969) 275 C.A.2d 412, 416, 79 C.R. 872, *infra*, §1048; *Viso v. California* (1979) 92 C.A.3d 15, 22, 154 C.R. 580 [spot zoning]; *Arnel Dev. Co. v. Costa Mesa* (1981) 126 C.A.3d 330, 336, 178 C.R. 723 [discriminatory initiative zoning ordinance]; *Northwood Homes v. Moraga* (1989) 216 C.A.3d 1197, 1204, 1206, 265 C.R. 363 [distinguishing *Arnel Dev. Co.*; no improper discrimination where purpose of ordinance was to limit hillside development and not merely to rezone particular property]; 36 A.L.R.3d 751 ["freezing" ordinances preventing prospective condemnee from improving or changing condition of property]; 18 A.L.R.4th 542 [zoning regulations limiting use of property near airport as taking]; 25 Proof of Facts 3d 541 [circumstances warranting relief from zoning enforcement]; cf. *Beverly Hills v. Brady* (1950) 34 C.2d 854, 857, 215 P.2d 460 [ordinance construed as not prohibiting doctor from writing syndicated health column and circulating health pamphlets from residence, where activity did not interfere with appearance of home or character of district].)

(2) *Remedies.* Several remedies have been invoked in challenging a zoning ordinance's application to a particular property as arbitrary. (On declaratory relief, see *McCarthy v. Manhattan Beach* (1953) 41 C.2d 879, 882, 264 P.2d 932; *Hill v. Manhattan Beach* (1971) 6 C.3d 279, 287, 98 C.R. 785, 491 P.2d 369 [declaratory relief is proper to test constitutionality of zoning ordinance, but not to review administrative decision; complaint construed as petition for mandamus]; *Agins v. Tiburon* (1979) 24 C.3d 266, 272, 157 C.R. 372, 598 P.2d 25, *infra*, §1058; on mandamus, see *Arnel Dev. Co. v. Costa Mesa* (1980) 28 C.3d 511, 522, 169 C.R. 904, 620 P.2d 565, *supra*, §1028 [zoning ordinance is reviewable by ordinary mandamus, and administrative decision is reviewable by administrative mandamus]; on requirement of exhaustion of administrative remedies (as by application for variance or conditional use permit), see *Mountain View Chamber of Commerce v. Mountain View* (1978) 77 C.A.3d 82, 93, 143 C.R. 441; *Pan Pac. Properties*

v. *Santa Cruz* (1978) 81 C.A.3d 244, 249, 146 C.R. 428; on remedies of inverse condemnation or action for damages, see *infra*, §§1058, 1059; on statute of limitations, see *supra*, §1011.) (See 16 Am.Jur. Trials, Relief From Zoning Ordinance §1 et seq.; 25C Am.Jur. P.P. Forms (2001 ed.), Zoning and Planning §14 et seq.; C.E.B., Zoning Practice, Chap. 12.)

(3) *Statutory Limitation*. If the challenged action has followed a public hearing on proper notice, including notice of application of the statute, a subsequent legal challenge is limited to *issues raised* at the hearing or in correspondence delivered at or prior to the hearing. However, another issue may be raised if the court finds either that (a) the issue could not have been raised by persons exercising reasonable diligence, or (b) the body conducting the hearing prevented the issue from being raised. (*Govt.C. 65009(b)*; see *Corona-Norco Unified School Dist. v. Corona* (1993) 17 C.A.4th 985, 993, 21 C.R.2d 803 [as provided in *Govt.C. 65009(b)(2)*, statutory exhaustion requirement does not apply unless agency warns of requirement in its public notice of hearing]; *Park Area Neighbors v. Fairfax* (1994) 29 C.A.4th 1442, 1444, 1450, 35 C.R.2d 334 [neither lack of legal representation in administrative proceedings, nor misadvice by agency official on proper method of taking administrative appeal, excuses failure to exhaust administrative remedies as required by *Govt.C. 65009(b)(1)*]; C.E.B., Zoning Practice, §12.1; on legislative history of *Govt.C. 65009*, see *supra*, §1011.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Remedies*. C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 2 Land Use Practice, Chap. 21.



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a. As Defense Against Enforcement.

2. Where Provision Is Arbitrary.

bb. Illustrations.

8 Witkin Sum. Cal. Law Const Law § 1048

[§ 1048] Illustrations.

In *Hoshour v. Contra Costa* (1962) 203 C.A.2d 602, 21 C.R. 714, plaintiffs owned a triangular corner lot zoned residential and subject to setback ordinances. If strictly enforced, the setback lines would have reduced the useful area of the lot to about 10 square feet. If variances were permitted (and only 22 1/2 % of the lots in the neighborhood conformed to the strict requirements), a useful house could be built. Plaintiffs' application for a variance was denied. *Held*, judgment for declaratory relief and mandatory injunction to compel issuance of a building permit without the necessity of a variance affirmed. "Confiscation, or virtual confiscation, of lands by zoning cannot be upheld. ... Virtual confiscation occurs when set-back ordinances applying to a corner lot reduce the theoretically usable surface to an absurdly small size." (203 C.A.2d 608.)

Skalko v. Sunnyvale (1939) 14 C.2d 213, 93 P.2d 93, invalidated a residential zoning ordinance where the petitioner merely showed individual inconvenience. The adjacent property was zoned for industrial uses and was occupied by a large cannery, so that petitioner's land was unsuited for residential purposes. (14 C.2d 214.) But *Skalko* was sharply limited in *Wilkins v. San Bernardino* (1946) 29 C.2d 332, 175 P.2d 542, involving spot commercial zoning in the midst of a surrounding single family residential area. This was sustained against the attack of an adjacent property owner desiring to use residential property commercially. (29 C.2d 345.)

Wilkins states that there are four situations in which California courts will invalidate a zoning ordinance as applied to particular property: (a) Where the ordinance prohibits existing established uses that are not nuisances. (See *Jones v. Los Angeles* (1930) 211 C. 304, 295 P. 14, supra, §1040.) (b) Where the restrictions create a monopoly. (c) "Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance." (See *Skalko v. Sunnyvale*, supra.) (d) "Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses." (See *Reynolds v. Barrett* (1938) 12 C.2d 244, 251, 83 P.2d 29.) (29 C.2d 340.) (See *Safeway Stores v. San Mateo* (1948) 86 C.A.2d 277, 284, 194 P.2d 720 [same facts and holding]; 73 A.L.R.5th 223 [illegal spot zoning].)

Kissinger v. Los Angeles (1958) 161 C.A.2d 454, 327 P.2d 10, adds another situation: Where the legislative purpose is to depress the market value of plaintiff's land, which the governmental agency intends to condemn. Plaintiffs' lots, zoned "R-3" for multiple dwellings from 1932 to 1946, were suddenly restricted by defendant city to "R-1"--single-family dwellings. The reclassification of these lots was accomplished by an emergency "spot zoning" ordinance, without notice or hearing, and against the recommendation of the city planning commission. Surrounding property similarly situated remained "R-3." The declared legislative purpose of this ostensible police power measure was to prevent undue population congestion in the area of an airfield a mile away; the true purpose, the court found, "was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes." (161 C.A.2d 462.) *Held*, the ordinance was void. "A zoning ordinance may not be used as a device to take property for public use without payment of compensation." (161 C.A.2d 462.) (See *supra*, §1008.)

In *Scrutton v. Sacramento* (1969) 275 C.A.2d 412, 79 C.R. 872, plaintiff owned land in suburban Sacramento, with 350 feet fronting on W Avenue, and 650 feet fronting on F Way. She sought rezoning from agricultural to multiple family residential, in order to develop apartment units. The Board of Supervisors approved the request subject to the condition that she pave F Way at her own expense. She sued for declaratory relief, contending that this was not necessary for her development and that its purpose was to accommodate other public needs. *Held*, summary judgment for defendant county reversed.

(a) The same police power that supports the imposition of reasonable conditions on other kinds of change of land use (e.g., approval of subdivision, grant of building permits) sustains the power of a county to engage in "conditional rezoning." (275 C.A.2d 418.) The condition is valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use; e.g., the community's protection against potentially deleterious effects of the landowner's proposal or the community's need for facilities to meet public service demands created by the proposal. (275 C.A.2d 421.)

(b) Here, the relationship between the condition and the use called for a factual inquiry, and the county's affidavits were silent on the unrelated issues; hence, summary judgment was improperly granted. (275 C.A.2d 422.)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Individual Hardship.

a. As Defense Against Enforcement.

3. Where Required Use Is Uneconomic.

8 Witkin Sum. Cal. Law Const Law § 1049

[§ 1049] Where Required Use Is Uneconomic.

Hamer v. Ross (1963) 59 C.2d 776, 31 C.R. 335, 382 P.2d 375, furnishes an illustration of the modern analysis of a hardship problem. Plaintiff owned an irregularly shaped 2.2-acre parcel of land fronting on an arterial highway, with her home on part of it. The area was zoned for 1-acre lots and single-family dwellings. By application for a variance, plaintiff sought to construct garden apartments, and, on denial, sought mandamus to compel issuance of a building permit. *Held*, judgment granting writ reversed.

(a) The decision of zoning authorities will not be set aside unless (1) the regulations have no reasonable relation to the public welfare, or (2) the physical facts show oppressive or unwarranted interference with property rights. (59 C.2d 781, 782.) Here, the entire surrounding area was composed of residential property of smaller size, leaving plaintiff with an "island" in an ocean of substantially less restrictive zoning. (59 C.2d 782.) But granting the variance would have resulted in an island of multiple-dwelling use in the midst of single-family dwellings. (59 C.2d 783.) The fact that different uses were made across the boundary boulevard was immaterial; the authorities could draw the line at the town boundary. (59 C.2d 784.)

(b) Because of flood conditions, the trial judge found that plaintiff would have to spend so much for control devices and site improvement that the balance of the property not occupied by her home could not be economically used except for multiple dwellings, and hence, that the ordinance rendered the property valueless. But plaintiff purchased her property with full knowledge of its topography, and a "right accorded to plaintiff to construct multiple dwellings upon her property would result in her foisting upon her neighbors the detriment of the loss of a one-family dwelling area in order to relieve her from disadvantages inherent in the composition of her land." (59 C.2d 788.)

(c) The invalid one-acre provision is severable from the rest of the ordinance, and the trial judge may frame a judgment that will permit the city to impose a minimum lot-size classification no greater than that imposed on neighboring parcels. Because the majority of them contain from 10,000 to 20,000 square feet, the judgment should contain a 10,000-foot limit. (59 C.2d 790.) Plaintiff may construct several single-family dwellings on the property with that limitation, and the trial judge may incorporate in the judgment a declaration of her right to the variances, etc., that are necessary for this purpose. (59 C.2d 791.)

In *Ross v. Yorba Linda* (1991) 1 C.A.4th 954, 2 C.R.2d 638, plaintiffs owned a 1.117-acre lot. The area was zoned for 1 acre per dwelling, but only 4 of 53 lots in the area actually conformed to the zoning, and the average lot size was about half an acre. Plaintiffs applied to the city to divide their property and rezone the property, so that they could build a second dwelling. The planning commission recommended approval of the zoning change and subdivision, but the city council denied the request. Plaintiffs then sought mandamus, which the trial court granted. *Held*, affirmed.

(a) This case, like *Hamer*, involves discriminatory "spot zoning." (1 C.A.4th 960.) The subject property is virtually surrounded by parcels of lesser size, and the one-acre restriction prevents plaintiffs from developing the property consistent with the surrounding area. Even after the proposed division of plaintiffs' property, the two remaining lots will still be larger than many in the area. (1 C.A.4th 961.)

(b) "The land use restrictions here are as arbitrary and discriminatory as the land use restrictions in *Hamer*." (1 C.A.4th 962, 963.) The city argues that it needs to prevent "encroaching urbanization." But "the prevention of 'urbanization' ... cannot be a rational basis where 'urbanization' has *already* taken place." (1 C.A.4th 962.) The city also argues that it may have to grant zoning concessions to others if it grants one here. "The City appears to be afraid it will be forced to treat other landowners in a nondiscriminatory manner if it treats the Rosses in a nondiscriminatory manner. This is not an idea with much persuasive force." (1 C.A.4th 962.) Further, the fact that the smaller lots were preexisting nonconforming uses, that plaintiffs bought the property with the one-acre restriction, and that plaintiffs are seeking a zoning change rather than a variance, fail to distinguish it from *Hamer*. (1 C.A.4th 962, 963.)

(c) The city also justifies its denial of the request for rezoning on the ground of neighborhood opposition. (1 C.A.4th 964.) Public opinion may reveal a rational basis for action and to that extent is a permissible factor to consider. (1 C.A.4th 965, 966.) But public opinion *by itself* cannot be a rational basis for discriminatory and arbitrary government action. (1 C.A.4th 964, 967.) (See 73 A.L.R.5th 223 [Determination Whether Zoning or Rezoning of Particular Parcel Constitutes Illegal Spot Zoning]; 39 Proof of Facts 3d 433 [proof necessary to invalidate rezoning action as impermissible spot zoning].)

SUPPLEMENT: [This section is current through the latest supplement]



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aa. Nature and Purpose.

8 Witkin Sum. Cal. Law Const Law § 1050

[§ 1050] Nature and Purpose.

(1) *In General.* The statutes and ordinances provide for two kinds of relief to persons whose nonconforming uses ought to be allowed; variances (*infra*, §1053 et seq.) and conditional use permits. A conditional use permit is an exception for a particular use that promotes the public welfare and will not impair the character of the district. (See *Govt.C. 65901*; *Govt.C. 65589.4* [exemption from requirement of conditional use permit for multifamily residential housing project where specified percentage of units will be made available for low-income households]; *Essick v. Los Angeles* (1950) 34 C.2d 614, 623, 213 P.2d 492; *Garden Grove Congregation of Jehovah's Witnesses v. Garden Grove* (1959) 176 C.A.2d 136, 140, 1 C.R. 65 [discretion to deny permit upheld]; *Shell Oil Co. v. San Francisco* (1983) 139 C.A.3d 917, 920, 189 C.R. 276 [standing of lessee to apply]; *Smith v. Los Angeles* (1989) 211 C.A.3d 188, 197, 259 C.R. 231 [substantial evidence test applies on review of grant or denial of conditional use permit; fact that permit is denied to adult entertainment business does not require different standard]; *Goat Hill Tavern v. Costa Mesa* (1992) 6 C.A.4th 1519, 1531, 8 C.R.2d 385 [denial of tavern's application to renew conditional use permit for adjoining game room, based on complaints from neighbors, was improper, where evidence failed to distinguish whether noise and property damage in area were due to tavern or other causes]; *Wilson v. Laguna Beach* (1992) 6 C.A.4th 543, 560, 7 C.R.2d 848, 12 Summary (10th), *Real Property*, §825 [owners of single-family dwellings with second units were entitled to mandamus to compel city to process applications for conditional use permits as required by "granny flat" statute (*Govt.C. 65852.2(b)*)]; 89 A.L.R.2d 663 [who may apply]; 25C Am.Jur. P.P. Forms (2001 ed.), *Zoning and Planning*, §61 et seq.; 16 Am.Jur. Trials 99 [relief from zoning ordinance]; 83 Am.Jur.2d (2003 ed.), *Zoning and Planning* §775 et seq.; C.E.B., *Zoning Practice* §7.55 et seq. [grounds], §10.46 et seq. [procedure]; on administration, see *supra*, §1025.)

In *Imperial v. McDougal* (1977) 19 C.3d 505, 138 C.R. 472, 564 P.2d 14, plaintiff county issued a conditional use permit to defendant's predecessor, authorizing the commercial sale of water from a well on his property, with the limitation that it could be sold for use only within the county. Defendant greatly increased the development, employing as many as 44 tank trucks a day, and sold most of it for use in Mexico. In this action for an injunction, the court held that the increased use was not a violation of the permit, which contained no limitation on the amount that could be taken. But defendant was estopped to challenge the validity of the condition against sale outside the county, because his

predecessor had acquiesced in it and had accepted the benefits of the permit. (19 C.3d 510, 511.)

(2) *Permit as Property Right*. A conditional use permit is a property right that runs with the land. (*Imperial v. McDougal*, *supra*, 19 C.3d 510; *Malibu Mountains Recreation v. Los Angeles* (1998) 67 C.A.4th 359, 368, 79 C.R.2d 25.)

(3) *Required Findings*. Although variances differ from conditional use permits, granting a conditional use permit is an exercise of quasi-judicial powers, and is subject to the requirement of administrative findings laid down in *Topanga Assn. for Scenic Community v. Los Angeles* (1974) 11 C.3d 506, 113 C.R. 836, 522 P.2d 12, *infra*, §1056. (*Jacobson v. Los Angeles* (1977) 69 C.A.3d 374, 389, 137 C.R. 909 [findings were sufficient].)

(4) *Second Unit Housing for Seniors*. Local governments may issue a conditional or special use permit for a dwelling unit to be constructed, or attached to a primary residence, on a parcel zoned for a single-family residence, if the unit is to be occupied solely by one or two persons aged 62 or above, and the unit's floor space does not exceed 30% of the existing living area or 1200 square feet. This section does not limit the requirements of Govt.C. 65852.2, or the power of local governments to permit second units. (Govt.C. 65852.1; see *supra*, §1039.)

(5) *Revocation of Permit*. When an owner has incurred material expense in reliance on the permit, the owner gains a vested right to continue using the property in accordance with it; and it may be revoked only if the owner breaches the reasonable terms or conditions, or if there is a compelling public necessity. (See *O'Hagen v. Board of Zoning Adjustment* (1971) 19 C.A.3d 151, 158, 165, 96 C.R. 484 [revocation of permit is improper when injunction against specific conduct protects public interest].) Revocation of the permit is then subject to judicial review under the independent judgment test. (*Malibu Mountains Recreation v. Los Angeles*, *supra*, 67 C.A.4th 369.)

In *Rezai v. Tustin* (1994) 26 C.A.4th 443, 31 C.R.2d 559, defendant city revoked plaintiff property owner's building permit and conditional use permit after he had embarked on substantial construction. The ground for revocation was that several nearby property owners had not received notice of plaintiff's project. After plaintiff and the other property owners worked out a compromise, the city approved a new conditional use permit significantly scaling back the project. Plaintiff brought the present action for damages arising from revocation of the original conditional use and building permits. The trial judge granted defendant's motion for judgment on the pleadings. *Held*, affirmed.

(a) As a general rule, a property owner may not challenge a condition imposed on the granting of a permit after acquiescence in the condition by either specifically agreeing to it or failing to challenge its validity, and accepting the benefits afforded by the permit. An exception to this requirement of exhaustion of administrative remedies has been applied where permits are to be obtained in phases as the project progresses, and a new law imposes a fee condition on one of the subsequent permits under circumstances where even the time necessary to challenge the legality of the fee by petition for mandamus is economically impractical. (26 C.A.4th 450.)

(b) Although plaintiff's situation is similar, the exception is inapplicable. Plaintiff did not allege that the time necessary for an administrative challenge was economically impractical. Furthermore, plaintiff is seeking damages and not merely the refund of a fee. Those damages were uncertain at the time of the permit revocation and became irrevocable once the project was built. To allow damages under these circumstances without a decision by way of administrative mandamus would have a chilling effect on planning decisions. (26 C.A.4th 451.) Thus, judgment on the pleadings for defendant on the ground of plaintiff's failure to pursue his administrative remedies was proper. (26 C.A.4th 453.) (On rule of exhaustion of administrative remedies generally, see 3 Cal. Proc. (4th), Actions, §308.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §7.10 et seq.(4) *Second Unit Housing for Seniors*. Govt.C. 65852.1 became inoperative on January 1, 2007, except that a special or conditional use permit issued before that date remains valid.(5) *Revocation of Permit.Exhaustion of administrative remedies:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §325.



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bb. Conditions and Criteria.

8 Witkin Sum. Cal. Law Const Law § 1051

[§ 1051] Conditions and Criteria.

(1) *Criteria.* Conditional use permits can be issued only if the local zoning ordinance "establishes criteria for determining those matters." (*Govt.C. 65901.*) But specific standards have uniformly been upheld, and "general welfare" standards are not unconstitutionally vague. (See *Stoddard v. Edelman* (1970) 4 C.A.3d 544, 548, 84 C.R. 443; *Van Sicklen v. Browne* (1971) 15 C.A.3d 122, 127, 92 C.R. 786 [denial of permit]; *Mitcheltree v. Los Angeles* (1971) 17 C.A.3d 791, 797, 95 C.R. 76 [grant of permit]; *Hawkins v. Marin* (1976) 54 C.A.3d 586, 591, 126 C.R. 754 ["general welfare" standard is sufficient]; *Smith v. Los Angeles* (1989) 211 C.A.3d 188, 201, 259 C.R. 231 [denial of permit for adult entertainment business; county properly considered impact of requested use on neighboring cities]; *Smith v. Los Angeles* (1994) 24 C.A.4th 990, 996, 1001, 29 C.R.2d 680 [to avoid being unconstitutional prior restraint on expression, ordinance governing conditional use permits for adult entertainment businesses must contain standards that are narrow, objective, and definite]; cf. *Hunter v. Whittier* (1989) 209 C.A.3d 588, 598, 257 C.R. 559 [ordinance under which only criteria for permit for satellite television antenna were that use be compatible and not unreasonably interfere with uses of surrounding properties, was too broad to satisfy FCC order requiring local regulations of these antennas to have "clearly defined health, safety or aesthetic" objectives].)

(2) *Consistency With Lawful General Plan.* In *Neighborhood Action Group v. Calaveras* (1984) 156 C.A.3d 1176, 203 C.R. 401, a conditional use permit was challenged on the ground that the county's general plan did not conform to the mandatory statutory criteria. *Held*, this kind of plan is ultra vires.

(a) "Although use permits are not explicitly made subject to a general plan meeting the requirements of state law, that condition is necessarily to be implied from the hierarchical relationship of the land use laws. To view them in order: a use permit is struck from the mold of the zoning law (§ 65901); the zoning law must comply with the adopted general plan (§ 65860); the adopted general plan must conform with state law (§§ 65300, 65302). The validity of the permit process derives from compliance with this hierarchy of planning laws. These laws delimit the authority of the permit issuing agency to act and establish the measure of a valid permit. 'Since consistency with the general plan is required, absence of a valid general plan, or valid relevant elements or components thereof, precludes enactment of zoning ordinances, and the like.' " (156 C.A.3d 1184, quoting *Resource Defense Fund v. Santa Cruz* (1982) 133 C.A.3d 800,

806, 184 C.R. 371.)

(b) "Zoning ordinances are regulations governed by the superior enactments in the hierarchy of planning laws. Thus, the validity of a conditional use permit, which is governed by the zoning regulations, depends (derivatively) on the general plan's conformity with statutory criteria. Where the adopted general plan lacks elements required by state law, relevant to the uses sought, the ordinance fails to provide criteria mandated by such law for the measurement of the propriety of the uses to be authorized by the permit. These criteria are essential to evaluation of the proposed uses and the conditions which should be imposed. Put another way, the scope of authority of the agency to enact a general plan and zoning ordinances and to apply them is governed by the requirements of state law. A permit action taken without compliance with the hierarchy of land use laws is ultra vires as to any defect implicated by the uses sought by the permit." (156 C.A.3d 1184.)

(c) Dictum in *Hawkins* states that Govt.C. 65860 (supra, §1021) does not require that conditional use permits be reviewed for this consistency. *Hawkins* reasoned that because use permits issued pursuant to a zoning ordinance must necessarily conform to its requirements, it follows that if the zoning ordinance is kept consistent with the general plan, use permits issued thereunder will also be consistent. "The flaw in the argument is the conditional 'if.' If the general plan is not consistent with state law, the zoning ordinance may fail to provide criteria by which to measure the propriety of the uses sought by the permit. The *Hawkins* reasoning opens the door to defeat of the purpose of a general plan to provide enforceable standards by which the administering agency must measure the propriety of the permits." (156 C.A.3d 1186.) (See *Cadiz Land Co. v. Rail Cycle, L.P.* (2000) 83 C.A.4th 74, 114, 115, 99 C.R.2d 378 [designating desert landfill as resource conservation land and changing site to solid waste landfill facility was not inconsistent with general plan that recognized need for landfills, noted that desert area may be ideal for them, and expressly allowed them to be classified as open space land uses].)

(3) *Imposition of Conditions*. No local government or agency may condition the issuance of a conditional use permit on the following:

(a) Dedication of land for a purpose *not reasonably related* to the use of the property for which the permit is requested. (Govt.C. 65909(a).)

(b) Posting a bond to guarantee installation of public improvements *not reasonably related* to the use of the property for which the permit is requested. (Govt.C. 65909(b).)

SUPPLEMENT: [This section is current through the latest supplement]



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cc. Challenge by Nonresident.

8 Witkin Sum. Cal. Law Const Law § 1052

[§ 1052] Challenge by Nonresident.

In *Scott v. Indian Wells* (1972) 6 C.3d 541, 99 C.R. 745, 492 P.2d 1137, defendant city council, following a recommendation of the planning commission, granted a conditional use permit for construction of a large development in a residential area just within the city limits. The project included a golf course and tennis courts, clubhouses, condominiums, an apartment building, commercial shops, and a heliport. The large structures were placed so as not to obstruct the view of members of an adjacent country club outside the city, but they would obstruct the view of other homeowners in adjacent land outside. Plaintiffs brought a class action on behalf of the homeowners for a declaratory judgment annulling the permit. *Held*, judgment for defendant on demurrer reversed. Treating the declaratory relief complaint as a petition for administrative mandamus to review the council's action, the court answered two questions in favor of plaintiffs. *First*, whether a nonresident landowner has standing to contest a city's zoning, and *second*, whether the city owes that landowner any duty to consider his or her views or the effect of a proposed development on his or her property.

(a) In the early days of zoning there were large undeveloped areas at the borders of contiguous towns, but today municipal boundary lines rarely indicate where an urban development ceases. The development of a parcel on a city's edge may substantially affect the value and usability of an adjacent parcel on the other side of the line. To allow zoning with no concern for adjacent nonresident landowners would "make a fetish out of indivisible municipal boundary lines and a mockery of the principles of zoning." (6 C.3d 548, quoting New Jersey case.)

(b) The city "owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents, a duty to hear their views, and a duty to consider the proposed development with respect to its effect on *all* neighboring property owners. ... [A]djoining landowners who are not city residents may enforce these duties by appropriate legal proceedings and have standing to challenge zoning decisions of the city which affect their property." (6 C.3d 549.) (See 69 A.L.R.3d 805 [standing of adjacent owner not in zoned territory to attack zoning]; cf. 49 A.L.R.3d 1126 [standing of municipal corporation to attack zoning of land outside its borders].)

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2. Variance.

aa. Nature and Grounds.

8 Witkin Sum. Cal. Law Const Law § 1053

[§ 1053] Nature and Grounds.

A variance allows a nonconforming use on a showing of an individual hardship. (See *Essick v. Los Angeles* (1950) 34 C.2d 614, 623, 213 P.2d 492; *Jackson v. San Mateo* (1957) 148 C.A.2d 667, 307 P.2d 451; *Minney v. Azusa* (1958) 164 C.A.2d 12, 28, 330 P.2d 255; *Tustin Heights Assn. v. Board of Supervisors of Orange* (1959) 170 C.A.2d 619, 627, 339 P.2d 914; *Dunham v. Westminster* (1962) 202 C.A.2d 245, 249, 20 C.R. 772 [application for variance as condition to challenge of unconstitutionality of ordinance, under doctrine of exhaustion of administrative remedies]; *Cow Hollow Imp. Club v. Board of Permit App. of San Francisco* (1966) 245 C.A.2d 160, 167, 53 C.R. 610 [power to grant and review]; *Broadway, Laguna, Vallejo Assn. v. Board of Permit App.* (1967) 66 C.2d 767, 773, 59 C.R. 146, 427 P.2d 810 [same]; *Moss v. Board of Zoning Adjustment of Los Angeles* (1968) 262 C.A.2d 1, 8, 68 C.R. 320 [charter requirement of written findings as prerequisite to granting variance by zoning administrator]; *Craik v. Santa Cruz* (2000) 81 C.A.4th 880, 890, 890, 96 C.R.2d 538 ["physical" disparity is not precondition for variance; defendant county could reasonably accept that there was disparity among properties based on fact that FEMA and related county regulations in reality only applied to land of real parties and a few other vacant lots]; 89 A.L.R.2d 663 [who may apply]; 38 A.L.R.3d 167 [statute or ordinance requiring notice as prerequisite to granting variance]; 49 A.L.R.3d 492 [imposition of conditions regarding highway and traffic changes]; 52 A.L.R.3d 494 [granting variance after prior denial]; 83 Am.Jur.2d (2003 ed.), *Zoning and Planning* §749 et seq.; 23 Proof of Facts 3d 563 [hardship necessary for zoning variance]; 72 Proof of Facts 3d 257 [compelling hearing on variance or special permit]; on administration, see *supra*, §1025.)

The *grounds and conditions* for a variance are now specified by statute:

(1) A variance from the terms of a zoning ordinance is granted only when, because of special circumstances applicable to the property, including its *size, shape, topography, location, or surroundings*, strict application of the ordinance deprives the property of privileges enjoyed by other property in the vicinity that is under an identical zoning classification. (Govt.C. 65906.)

(2) A variance is subject to those conditions that will assure that the authorized adjustment *does not constitute a grant of special privileges* inconsistent with the limitations on other properties in the vicinity and zone in which the

property is situated. (*Govt.C. 65906.*) (See *Orinda Assn. v. Board of Supervisors* (1986) 182 C.A.3d 1145, 1165, 1167, 227 C.R. 688 [invalid special privilege]; *Stolman v. Los Angeles* (2003) 114 C.A.4th 916, 924, 929, 8 C.R.3d 178 [zoning administrator erred in granting variance to gasoline station that was nonconforming use to expand services in residential area where station owner failed to show that denial of variance would work unnecessary hardship on him and that he would be deprived of use afforded to other properties in same zone and vicinity, as required by city code; "same zone and vicinity" language required that comparable properties be within reasonably close proximity].)

(3) A variance must not be granted for a property that authorizes a *use or activity that is not otherwise expressly authorized* by the zone regulation governing the parcel of property. (*Govt.C. 65906.*) (See *Topanga Assn. for Scenic Community v. Los Angeles* (1974) 11 C.3d 506, 511, 113 C.R. 836, 522 P.2d 12, *infra*, §1056 [*Govt.C. 65906* permits harmonious local legislation]; for variances from terms of open-space regulation, see *supra*, §1019.)

Local governments may issue a zoning variance for a dwelling unit to be constructed, or attached to a primary residence, on a parcel zoned for a single-family residence, if the unit is to be occupied solely by one or two persons aged 62 or above, and the unit's floor space does not exceed 30% of the existing living area or 1,200 square feet. This section does not limit the requirements of *Govt.C. 65852.2*, or the power of local governments to permit second units. (*Govt.C. 65852.1*; see *supra*, §1039.)

SUPPLEMENT: [This section is current through the latest supplement]

Second unit housing for seniors: *Govt.C. 65852.1* became inoperative on January 1, 2007, except that a variance issued before that date remains valid.



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bb. Discretion of Governing Body.

8 Witkin Sum. Cal. Law Const Law § 1054

[§ 1054] Discretion of Governing Body.

The grant or denial of a variance "rests primarily in the discretion of the body designated by the applicable ordinance or statute; no vested right is affected by either the denial or the grant; where a variance is granted it is presumed that official duty was performed in investigating the matter and that the existence of the necessary facts was found; and the decision of the municipal body to grant or deny a variance will not be disturbed by the courts in the absence of a clear and convincing showing of an abuse of discretion." (*Siller v. Board of Supervisors of San Francisco* (1962) 58 C.2d 479, 484, 25 C.R. 73, 375 P.2d 41; see *San Marino v. Roman Catholic Archbishop of Los Angeles* (1960) 180 C.A.2d 657, 673, 4 C.R. 547 [discretion to deny variance upheld]; 75 Proof of Facts 3d 209 [requirement that zoning board consider statutory factors in deciding request for area variance].) (On power of zoning administrator to decide application without hearing, see *supra*, §1025; on judicial review, see *infra*, §1056.)

In *Zakessian v. Sausalito* (1972) 28 C.A.3d 794, 105 C.R. 105, the court rejected the contention that a variance should be denied because the owners were financially able to comply with the ordinance. "It is true that financial hardship alone, at least ordinarily, will not constitute unnecessary hardship. But where the unique condition of one's property causes the financial hardship the rule is otherwise." (28 C.A.3d 802.)

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cc. Imposition of Conditions.

8 Witkin Sum. Cal. Law Const Law § 1055

[§ 1055] Imposition of Conditions.

(1) *Reasonable Conditions.* No local government or agency may condition the issuance of a variance on the following:

(a) Dedication of land for a purpose *not reasonably related* to the use of the property for which the variance is requested. (*Govt.C. 65909(a).*)

(b) Posting a bond to guarantee installation of public improvements *not reasonably related* to the use of the property for which the variance is requested. (*Govt.C. 65909(b).*)

In *Bringle v. Board of Supervisors of Orange* (1960) 54 C.2d 86, 4 C.R. 493, 351 P.2d 765, plaintiff owned four acres fronting on an avenue zoned for agricultural purposes. In 1952, he was granted a 5-year variance for an excavating business. On its expiration, he applied for another, which was granted on condition that he dedicate to the county without compensation an easement 30 feet wide and 132 feet long for a right-of-way to widen the avenue. This proceeding was brought to have the condition declared invalid and to compel issuance of the variance without it. *Held*, mandamus properly denied. (a) One of the general purposes of a zoning ordinance is to provide for adequate streets and highways, and a street that might be adequate for an agricultural area might be inadequate if part of the area is to be used for another purpose. (b) Plaintiff failed to make an evidentiary showing that the condition was not necessary or not related to his proposed use. (c) The condition was reasonable although it required dedication of a perpetual easement when the variance was for only 5 years. The board could decide that widening should be a permanent improvement, but that anticipated development of the surrounding areas might make it desirable in 5 years to reconsider the permitted variance. (54 C.2d 89.) (On judicial enforcement of conditions, see *supra*, §1026.)

(2) *Waiver of Right To Challenge.* In *Pfeiffer v. La Mesa* (1977) 69 C.A.3d 74, 137 C.R. 804, plaintiff property owners sued defendant city in inverse condemnation. The complaint alleged that the city refused to issue a building permit for improvements unless they complied with invalid conditions (easement and storm drain across their property); that they were required by a lease agreement with the state to construct the improvements or suffer possible cancellation

of the lease; that they therefore elected to comply with the conditions "under protest and without waiving their rights to demand compensation," and suffered damages in the amount of the cost of compliance. *Held*, no cause of action was stated. Under *Selby Realty Co. v. San Buenaventura* (1973) 10 C.3d 110, 116, 109 C.R. 799, 514 P.2d 111, the proper remedy to attack an invalid condition is a proceeding in administrative mandamus under C.C.P. 1094.5; by failing to avail themselves of this procedure, they waived the right to assert invalidity of the condition. Their unilateral announcement that they reserved the right to seek damages did not make this rule inapplicable; they simply decided that it was to their economic advantage to proceed with the construction rather than to invoke the legal procedure for challenge. (69 C.A.3d 78.) (See *Santee v. Superior Court* (1991) 228 C.A.3d 713, 718, 279 C.R. 22 [failure to seek administrative mandamus].)

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dd. Judicial Review of Findings.

8 Witkin Sum. Cal. Law Const Law § 1056

[§ 1056] Judicial Review of Findings.

In *Topanga Assn. for Scenic Community v. Los Angeles* (1974) 11 C.3d 506, 113 C.R. 836, 522 P.2d 12, a Los Angeles County ordinance zoned an area for light agriculture and single-family residences. T obtained a variance from the County Regional Planning Commission, upheld by the Board of Supervisors, to establish a 93-space mobilehome park. Petitioner, a nonprofit organization of taxpayers and property owners in the area, sought mandamus in the superior court, and appealed from the order of denial. *Held*, order reversed with directions to issue the writ.

(a) *Judicial review of variance decision.* (1) Although adoption of zoning regulations is a legislative function, granting a variance is a quasi-judicial act. (11 C.3d 517.) (2) If the judiciary were to review the grant superficially, administrative boards could subvert the decisionmaking structure and, in effect, amend the zoning code in the guise of a variance. (11 C.3d 517.) (3) Meaningful review is also necessary to protect the interests of those in adjacent property. "A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare." (11 C.3d 517.)

(b) *Insufficiency of findings.* The factual data contained in the Planning Commission's report consists of a showing of the characteristics and qualities of the particular property. It does not show that surrounding properties differ. Hence, it does not meet the requirement of "special circumstances." This language in *Govt.C. 65906* (supra, §1053) "emphasizes *disparities* between properties, not treatment of the subject property's characteristics in the abstract. ... It also contemplates that at best, only a small fraction of any one zone can qualify for a variance." (11 C.3d 520.) So large a parcel as 28 acres is suspect. (11 C.3d 522.)

(c) *Conclusion.* This case illuminates two important principles. "First, by requiring that administrative findings must support a variance, we emphasize the need for orderly legal process and the desirability of forcing administrative agencies to express their grounds for decision so that reviewing courts can intelligently examine the validity of administrative action. Second, by abrogating an unsupported exception to a zoning plan, we conduct orderly and planned utilization of the environment." (11 C.3d 522.)

A number of other decisions deal with judicial review of variances. (See *Carmel-By-The-Sea v. Board of Supervisors* (1977) 71 C.A.3d 84, 92, 139 C.R. 214 [findings insufficient; mere recitation of statutory language]; *Orinda Assn. v. Board of Supervisors* (1986) 182 C.A.3d 1145, 1160, 1167, 227 C.R. 688 [findings insufficient]; *Parkmerced Residents Organization v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (1989) 210 C.A.3d 1235, 1243, 1244, 258 C.R. 774 [board's factual findings that landlord, by reason of its timely implementation of prior method for determining rent, would lose over \$ 300,000 annually if new method was imposed, was sufficient to justify waiver; factual findings followed by conclusion that waiver is based on rule governing hardships were sufficient]; *Dore v. Ventura* (1994) 23 C.A.4th 320, 327, 328, 28 C.R.2d 299 [county's findings supported denial of planned development permit for construction of commercial building even if they paraphrased language of applicable ordinances; they also incorporated findings from staff reports and from public testimony]; *Saad v. Berkeley* (1994) 24 C.A.4th 1206, 1216, 30 C.R.2d 95 [flaw in one finding of detriment supporting denial of permit was irrelevant, as two other findings of detriment were supported by substantial evidence, and only one finding of detriment was required for denial]; *Craik v. Santa Cruz* (2000) 81 C.A.4th 880, 885, 96 C.R.2d 538 [following *Topanga Assn.*]; for statutory limitation on issues, see *Govt.C. 65009(b)*, *supra*, §1047.)

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C. Zoning.

8. Individual Hardship.

c. As Basis for Compensation.

1. Nature of Problem.

8 Witkin Sum. Cal. Law Const Law § 1057

[§ 1057] Nature of Problem.

The theory of *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, that a police power regulation may become a taking so as to require compensation (see *supra*, §980), was applied in *Eldridge v. Palo Alto* (1976) 57 C.A.3d 613, 129 C.R. 575. Plaintiffs owned unimproved land in the foothills of defendant city. The city adopted ordinances rezoning the property from single-family residential to "permanent open space and conservation lands," on which dwellings were limited to lots of a minimum of 10 acres. Plaintiff B sued for damages in inverse condemnation or for a declaration of unconstitutionality of the ordinance as applied to his property; plaintiff E conceded the validity of the ordinances and sought only damages in inverse condemnation. *Held*, judgment for defendant on demurrer reversed; each complaint stated a cause of action.

(a) *Inverse condemnation where ordinance is oppressive.* The first question is whether the sole remedy of a property owner is to invalidate the ordinance on constitutional or other grounds. There is no controlling decision in California, but expressions in *Klopping v. Whittier* (1972) 8 C.3d 39, 104 C.R. 1, 500 P.2d 1345, *infra*, §1235, *HFH, Ltd. v. Superior Court* (1975) 15 C.3d 508, 125 C.R. 365, 542 P.2d 237, *Aaron v. Los Angeles* (1974) 40 C.A.3d 471, 115 C.R. 162, *infra*, §1128, and other decisions indicate approval of the view that a regulation may be so harsh as to constitute a taking of property that requires compensation. (57 C.A.3d 618 et seq.) Lower federal courts have taken the same position. (57 C.A.3d 620.) Hence, "a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." (57 C.A.3d 621.)

(b) *Oppressive nature of ordinance.* The history of the adoption of the ordinance and its provisions (57 C.A.3d 621 et seq.) support the allegation of plaintiffs that they are denied any substantial or reasonable use of their property. Although the court in *HFH, Ltd.* held that a zoning regulation that merely decreases the market value of property does not call for compensation, the opinion distinguished the situation where the regulation has the substantial effect of depriving the landowner of any reasonable or beneficial use. (57 C.A.3d 624.) Similar statements, following the general principle set forth in *Pennsylvania Coal Co.*, are made in other California cases, e.g., *Kissinger v. Los Angeles* (1958) 161 C.A.2d 454, 327 P.2d 10, *supra*, §1048. (57 C.A.3d 626.) Also, open-space legislation (*Govt.C. 16140* et seq., 51070 et seq., 65910 et seq.; see *supra*, §1019), expressly disclaims an intention to permit taking or damaging private property for public use without the payment of compensation. (57 C.A.3d 627; see *Govt.C. 65912*.)

(c) *Unreasonableness is question of fact.* Whether a zoning restriction is so unreasonable as to constitute an invasion of property rights under these authorities, is ordinarily a question of fact that cannot be resolved on demurrer. (57 C.A.3d 628.)

(d) *Ordinance is valid.* The open-space zoning ordinance is a proper exercise of police power and is not subject to constitutional challenge except insofar as it may support an action in inverse condemnation by a particular owner. (57 C.A.3d 631.) (See 28 *Hastings L. J.* 1569 [*Eldridge*]; 31 *Hastings L. J.* 112 [same]; for disapproval of *Eldridge* view, see *infra*, §1058.)

Pinheiro v. Marin (1976) 60 C.A.3d 323, 131 C.R. 633, presents the ordinary situation governed by *HFH, Ltd.* The complaint alleged that an ordinance rezoned property to provide open space, and that the effect was to reduce the market value from \$ 960,000 to \$ 210,000. Thus, the property admittedly had a remaining beneficial and substantial use, and no action in inverse condemnation would lie. (See *Sierra Terreno v. Tahoe Regional Planning Agency* (1978) 79 C.A.3d 439, 442, 144 C.R. 776; *Friedman v. Fairfax* (1978) 81 C.A.3d 667, 675, 146 C.R. 687; *Helix Land Co. v. San Diego* (1978) 82 C.A.3d 932, 943, 946, 147 C.R. 683; 22 *Ecology L. Q.* 89 [criticizing *Pennsylvania Coal Co.* and arguing that regulatory takings doctrine should be abolished]; 19 *A.L.R.4th* 756 [local use zoning of wetlands or floodplain as taking without compensation]; 31 *Proof of Facts* 3d 563 [proof of inverse condemnation from excessive land use regulation]; on regulatory takings generally, see *infra*, §1153 et seq.)

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2. Agins Case.

8 Witkin Sum. Cal. Law Const Law § 1058

[§ 1058] Agins Case.

In *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, plaintiffs acquired five acres of unimproved land in defendant city's ridgeland area for residential development. Defendant prepared a general plan envisaging "open space" in the ridgeland, and adopted a zoning ordinance that limited plaintiff to a maximum of five dwelling units or a minimum of one. Subsequently, the city filed a condemnation action to acquire plaintiffs' property, but within a year abandoned it on payment of costs. Plaintiffs then filed the present action seeking declaratory relief against the allegedly unconstitutional zoning ordinance, and damages in inverse condemnation. *Held*, the remedy of declaratory relief was appropriate, but no action in inverse condemnation would lie.

(a) *Unreasonable regulation as unconstitutional taking*. The general principle is stated by Nichols on Eminent Domain: "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*" (24 C.3d 272.)

(b) *Declaratory relief and administrative mandamus as remedies*. *California v. Superior Court (Veta Co.)* (1974) 12 C.3d 237, 115 C.R. 497, 524 P.2d 1281, approved the remedy of declaratory relief where a statute controlling development of coastal lands was facially unconstitutional, and further held that constitutionality of the *application* of the statute to particular land could be reviewed by administrative mandamus. (24 C.3d 272, 273.) The same is true here. "A landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation" in violation of the Fifth Amendment to the U.S. Constitution and Cal. Const., Art. I, §19. (24 C.3d 273.)

(c) *No remedy by inverse condemnation*. The statement in *Eldridge v. Palo Alto* (1976) 57 C.A.3d 613, 129 C.R. 575, *supra*, §1057, that a valid zoning ordinance may nevertheless operate so oppressively as to give rise to an action for damages in inverse condemnation, is *disapproved*. (24 C.3d 273.) The suggestion in *Pennsylvania Coal Co. v. Mahon*

(1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (see supra, §980) has been misunderstood. The court declared void the exercise of police power limiting the company's right to mine its land; but it did not attempt "to transmute the illegal governmental infringement into an exercise of eminent domain and the possibility of compensation was not even considered." (24 C.3d 274.) In *HFH, Ltd. v. Superior Court* (1975) 15 C.3d 508, 125 C.R. 365, 542 P.2d 237 (see supra, §1057), the question of compensation where a zoning regulation forbids substantially all use of land was left open (15 C.3d 518, footnote 16), and it is now decided that the remedy of inverse condemnation is undesirable for a number of policy reasons. These reasons include (1) a lack of flexibility for community planners, (2) the chilling effect the remedy would have on the exercise of regulatory powers "because the expenditure of public funds would be to some extent within the power of the judiciary," and (3) the fiscal chaos that would result if voters inadvertently committed public funds through the exercise of zoning by initiative. (24 C.3d 276.)

(d) *No right to declaratory relief in this case.* Under *HFH, Ltd.*, an ordinance that results in a mere diminution in the value of property is not per se improper; and, although the question is one of degree and the answer turns on individual facts, "we hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property." (24 C.3d 277.) The ordinance here does not have this effect. It allows plaintiffs to build one to five residences on their property, and the trial judge was justified in finding that there was no unconstitutional interference with the entire use or an impermissible decrease in value. (24 C.3d 277.)

One justice dissented, distinguishing *HFH, Ltd.*, and arguing that many other decisions support the opposing view. (See *Furey v. Sacramento* (1979) 24 C.3d 862, 871, 874, 157 C.R. 684, 598 P.2d 844 [following *Agins*]; *Rancho La Costa v. San Diego* (1980) 111 C.A.3d 54, 62, 168 C.R. 491 [same]; *Gregory v. San Juan Capistrano* (1983) 142 C.A.3d 72, 88, 191 C.R. 47 [following *Agins*; ordinance requiring mobilehome park owner to give right of first refusal was unconstitutional taking]; 31 *Hastings L. J.* 114; 13 *Loyola L.A. L. Rev.* 157; 27 *Pacific L. J.* 1657 [conjunctive application of *Agins* disjunctive test].)

In *Agins v. Tiburon* (1980) 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106, the U.S. Supreme Court affirmed the California decision, holding that, although the ordinances limit development, "they neither prevent the best use of appellants' land, ... nor extinguish a fundamental attribute of ownership." (100 S.Ct. 2142, 65 L.Ed.2d 113.) However, "[b]ecause no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." (100 S.Ct. 2143, 65 L.Ed.2d 114.) (See 8 *Pepperdine L. Rev.* 839; 8 *Hastings Const. L. Q.* 491, 517; 15 *U.C. Davis L. Rev.* 741.)

The suggestion in the California Supreme Court decision in *Agins*, that a compensable taking requires a total deprivation of substantially all reasonable use of the property, was disapproved in *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 C.4th 761, 774, 66 C.R.2d 672, 941 P.2d 851, *infra*, §1155.

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3. Subsequent Decisions.

8 Witkin Sum. Cal. Law Const Law § 1059

[§ 1059] Subsequent Decisions.

In *Toso v. Santa Barbara* (1980) 101 C.A.3d 934, 162 C.R. 210, the court reexamined the question whether inequitable zoning actions undertaken by a public agency as a prelude to public acquisition may give rise to an action for damages for inverse condemnation, citing the dictum in *HFH, Ltd. v. Superior Court* (1975) 15 C.3d 508, footnote 14, 125 C.R. 365, 542 P.2d 237 (see supra, §1057). The opinion holds that *Agins v. Tiburon* (1980) 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106, supra, §1058, did not eliminate this cause of action (101 C.A.3d 951, 952), but that the precondemnation activities in the present case were not so unreasonable as to warrant damages. "[T]here was no announcement of intent to condemn, nor was there any official act by the city towards acquiring the property. While an absence of a formal resolution of condemnation is not crucial, there must be some official act or official expression of intent to acquire. In the case at bench there were public meetings, negotiations, planning, debates and an advisory ballot proposition calling for acquisition but there was no official act done by the city towards acquiring the property. We have here no more than general planning that is noncompensable." (101 C.A.3d 957.)

In *San Diego Gas & Elec. Co. v. San Diego* (1981) 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551, the Court was asked to decide the question left open in *Agins*--whether the state must provide a monetary remedy to a landowner whose property allegedly has been "taken" by a regulatory ordinance. The Court refused to do so on the ground that the California Court of Appeal in an unpublished opinion had reversed the trial court judgment on the authority of *Agins*, but had not invalidated either the zoning ordinance or the open-space plan because factual disputes precluded relief. Because the Court of Appeal decision contemplated further trial proceedings, the appeal was dismissed for lack of a final judgment. (101 S.Ct. 1293, 1294, 67 L.Ed.2d 559, 561.) Four justices dissented, arguing the Holmes theory of *Pennsylvania Coal Co.*, and criticizing the California Supreme Court's *Agins* opinion. (101 S.Ct. 1308, 67 L.Ed.2d 563.) (See *Gilliland v. Los Angeles* (1981) 126 C.A.3d 610, 615, 179 C.R. 73 [zoning ordinance establishing low density of approved development on property was valid under *Agins*]; *North Sacramento Land Co. v. Sacramento* (1983) 140 C.A.3d 576, 189 C.R. 739 [pleading was sufficient for relief under *Agins*]; *Smith v. San Francisco* (1990) 225 C.A.3d 38, 45, 275 C.R. 17 [complaint must allege facts showing that regulation deprived them of substantially all value and use of property]; 19 *Loyola L.A. L. Rev.* 685 [*San Diego*]; 15 *U.C. Davis L. Rev.* 371 [Uncertain Regulatory Standards]; 15 *U.C. Davis L. Rev.* 741 [Valuing the Regulatory Taking].)

In *Ramona Convent of the Holy Names v. Alhambra* (1993) 21 C.A.4th 10, 26 C.R.2d 140, plaintiff operated a Catholic girls' school in defendant city on a parcel of land measuring 19.17 acres. To remedy a deficiency in the amount of open space in the city, defendant changed the zoning and general plan designation of the parcel from multiple family to open space. After an earthquake, plaintiff decided to sell 1.97 acres of the parcel, then used for a softball diamond, to raise money to pay for earthquake repairs. A private developer was given an option to purchase the 1.97-acre site on which it would build senior citizen housing. Defendant denied plaintiff's application to subdivide the parcel, and plaintiff brought the present action, filing a petition for a writ of mandamus and a complaint for inverse condemnation and violation of civil rights. The trial judge denied the petition for writ relief, and the denial was affirmed on appeal, the Court of Appeal finding that because the 1.97-acre parcel would have been too small to be conducive to any of the uses permitted for open space, there was no abuse of discretion in denying the application to divide the parcel. The trial judge granted defendant's motion for summary adjudication on the other claims, finding that the cause of action for inverse condemnation was not ripe because plaintiff had not pursued all available remedies to develop the use of the property commensurate with existing permissible uses and had failed to show that defendant's actions had prevented all beneficial use of the property. *Held*, affirmed.

(a) Contrary to the trial judge's conclusion, the inverse condemnation claim is ripe for adjudication. Although the application for senior citizen housing has been withdrawn, defendant has made clear that it will permit only specific open-space uses and no others. (21 C.A.4th 20.)

(b) The Court of Appeal's decision denying the petition for writ relief established that the denial of the lot split application was proper. Thus, there is only one undivided 19.17-acre parcel, which continues to be used for school purposes and has not been taken by defendant. (21 C.A.4th 20.)

(c) Even if the 1.97-acre portion is viewed as a discrete area, there has been no compensable taking. *Twain Harte Associates, Ltd. v. Tuolumne* (1990) 217 C.A.3d 71, 265 C.R. 737, *infra*, §1157, and *Aptos Seascape Corp. v. Santa Cruz* (1982) 138 C.A.3d 484, 188 C.R. 191, relied on by plaintiff, are distinguishable. "In each of those cases, the governing entity created *different* zones within a single parcel and restricted development in part of the property. Here, the zoning of the entire 19.17-acre parcel is *uniform*." (21 C.A.4th 22.) Furthermore, the denial of the highest and best use of property does not constitute an unconstitutional taking, and the preservation of some open space amidst populated areas is a legitimate exercise of the police power. The core issue is whether defendant "went too far," and it cannot be said that it did; plaintiff continues to be able to use the 1.97-acre portion, even if it cannot resolve its internal financial situation through a sale. (21 C.A.4th 23, 24.) (See *Del Oro Hills v. Oceanside* (1995) 31 C.A.4th 1060, 1079, 37 C.R.2d 677 [growth control initiative did not deprive developer of all beneficial use]; for discussion of when rent control, development fees, building moratoriums, and other land use regulations become regulatory takings requiring compensation, see *infra*, §1153 et seq.)

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D. Other Restrictions on Use of Property.

1. Regulation or Prohibition of Inimical Activity.

8 Witkin Sum. Cal. Law Const Law § 1060

[§ 1060] Regulation or Prohibition of Inimical Activity.

(1) *Dangerous Property or Activity.* The state may prohibit or restrict the ownership, use, or possession of certain kinds of property deemed inimical to the public welfare; e.g., opium (*In re Yun Quong* (1911) 159 C. 508, 511, 114 P. 835), intoxicating liquor (*Mugler v. Kansas* (1887) 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205), and deadly weapons (*People v. Ferguson* (1933) 129 C.A. 300, 304, 18 P.2d 741). (See *Allied Properties v. Department of Alcoholic Beverage Control* (1959) 53 C.2d 141, 148, 346 P.2d 737, *infra*, §1081 [fair trade statute on liquor prices was upheld in part as discouraging excessive purchases]; 22 *Hastings Const. L. Q.* 441 [constitutional protection against state or local regulation of liquor licensing]; 65 *A.L.R.4th* 1205 [validity, construction, and application of nonsmoking regulations]; 80 *A.L.R.4th* 70 [statute, ordinance, or regulation applying to specific dog breeds such as "pit bulls" or "bull terriers"]; on state power to regulate liquor traffic under the Twenty-First Amendment, see *infra*, §1311; on forfeiture or destruction of drugs, dangerous weapons, or other property used in commission of crime, see 3 *Cal. Crim. Law* (3d), *Punishment*, §202 et seq.)

The state may also prohibit business activities deemed inimical. (See *Murphy v. California* (1912) 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229 [public billiard halls]; *Sternall v. Strand* (1946) 76 C.A.2d 432, 437, 172 P.2d 921 [ordinance prohibiting possession of coin-operated pinball or marble machines].)

(2) *Vehicle or Vessel Used in Illegal Activity.* Provisions for forfeiture of a vehicle that is not itself dangerous but that is used to facilitate the illegal transportation of dangerous property, such as narcotics, are common. (See *Health & Saf.C.* 11470 et seq.; 3 *Cal. Crim. Law* (3d), *Punishment*, §209 et seq.; 14 *A.L.R.3d* 128 [federal statute; forfeiture for violation of liquor laws].) These laws are constitutional. (See *Van Oster v. Kansas* (1926) 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354; *People v. One 1940 Ford V-8 Coupe* (1950) 36 C.2d 471, 476, 224 P.2d 677.) It is also constitutional to forfeit the car of an owner who, although without knowledge of the illegal object, consents to another's use of the car. (*People v. One 1941 Ford 8 Stake Truck* (1945) 26 C.2d 503, 505, 159 P.2d 641; *People v. One 1940 Ford V-8 Coupe*, *supra*, 36 C.2d 476; *People v. One 1951 Ford Sedan* (1954) 122 C.A.2d 680, 685, 265 P.2d 176.) But forfeiture cannot be justified where the car of an innocent owner is taken without his or her consent. (*People v. One 1941 Buick Sport Coupe* (1946) 28 C.2d 692, 694, 171 P.2d 719.)

In *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974) 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452, the theory of the vehicle cases was applied to seizure by Puerto Rican officers of a leased pleasure yacht found with marijuana on

board. The innocent lessor invoked the doctrine of *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556. The Court, quoting *Fuentes*, characterized this as one of the exceptional circumstances permitting seizure without a prior hearing: an important governmental purpose was involved, preseizure notice and hearing might frustrate the interests served, and the seizure was by government officers, not self-interested private parties. (94 S.Ct. 2089, 40 L.Ed.2d 466.) (See *Bennis v. Michigan* (1996) 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68, 3 Cal. Crim. Law (3d), *Punishment*, §206 [refusal to recognize "innocent-owner" defense in action for forfeiture of automobile does not violate Due Process Clause; following *Van Oster*, *Calero-Toledo*, and related cases].)

A former statute provided for summary forfeiture of a vehicle if its identification numbers were removed or altered. In *Hughes v. Neth* (1978) 80 C.A.3d 952, 146 C.R. 37, this statute was held to violate due process, and the Legislature responded with an extensive revision of the section, providing for notice and a postseizure hearing. (See *Veh.C.* 10751.)

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2. Regulation of Nondangerous Activity.

a. General Principles.

8 *Witkin Sum. Cal. Law Const Law* § 1061

[§ 1061] General Principles.

Under the Fourteenth Amendment and Cal. Const., Art. I, §1, everyone has a right to acquire and use property, and to engage in a lawful calling or business, subject to regulations that are necessary for the public welfare. (*Angelopoulos v. Bottorff* (1926) 76 C.A. 621, 625, 245 P. 447; *Whitcomb v. Emerson* (1941) 46 C.A.2d 263, 273, 115 P.2d 892; see *Bautista v. Jones* (1944) 25 C.2d 746, 749, 155 P.2d 343 ["right to work, either in employment or independent business, is fundamental and, no doubt, enjoys the protection of the personal liberty guarantee of the Fourteenth Amendment ... as well as the more specific provisions of our state Constitution"].)

But the state may impose reasonable restrictions or conditions, for the protection of others, on an owner's use of nondangerous property, or on engaging in a legitimate business. (See *In re Sidebotham* (1938) 12 C.2d 434, 436, 85 P.2d 453 [provision of Real Estate Act requiring subdivider of land to furnish certain information to Real Estate Commissioner]; *Simpson v. Los Angeles* (1935) 4 C.2d 60, 65, 47 P.2d 474 [closing street to vehicular traffic, restricting owner's right of use]; *Clemons v. Los Angeles* (1950) 36 C.2d 95, 222 P.2d 439; *supra*, §1005 et seq. [zoning], *infra*, §1072 et seq. [regulation of business].)

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2. Regulation of Nondangerous Activity.

b. Invalid Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 1062

[§ 1062] Invalid Regulations.

Nondangerous businesses cannot be legislated out of existence. Thus, an ordinance prohibiting the maintenance of a hospital for the treatment of contagious diseases within the city limits was held invalid on the ground that there was no possible danger in its presence. (*San Diego Tuberculosis Assn. v. East San Diego* (1921) 186 C. 252, 200 P. 393; see *Jardine v. Pasadena* (1926) 199 C. 64, 248 P. 225.) And it has been said that an owner of property cannot be affirmatively compelled to do certain specified things with property if the owner prefers to abandon it instead of complying with the regulations. (*Department of Public Works of Calif. v. San Diego* (1932) 122 C.A. 159, 10 P.2d 102; on rule against compelling public utility to operate at loss, see *infra*, §1105.)

In *People v. Goodspeed* (1948) 85 C.A.2d Supp. 821, 192 P.2d 130, a statute prohibiting a person from negligently or wilfully draining or permitting the flow of waters from his or her land onto an adjacent public highway was held unconstitutional. The statute not only condemned harmful practices, but covered a multitude of harmless acts, and could subject to prosecution a person who washed his or her car or watered his or her lawn and allowed the excess water to drain into the gutter. Its broad prohibitive form was unnecessary to reach the evil, and this interference with the use of property may be invalid where a less drastic regulation would accomplish the purpose. (85 C.A.2d Supp. 826.)

In *Bernstein v. Bush* (1947) 29 C.2d 773, 177 P.2d 913, several noncontiguous parcels of property were located over an oil field. Because of their size (each less than one acre) and location, drilling was prohibited by *Pub.Res.C. 3600* et seq. (regulating the spacing of oil wells), although the parcels were surrounded by oil-producing land. *Held*, the statute was a denial of due process to these owners because it did not protect their coequal right with surrounding property owners to recover a fair share of oil from the underlying basin. (29 C.2d 780.) (See *Bernstein v. Smutz* (1947) 83 C.A.2d 108, 120, 188 P.2d 48; *Sindell v. Smutz* (1950) 100 C.A.2d 10, 21, 222 P.2d 903.) Subsequently the statutes (*Pub.Res.C. 3606* et seq.) were amended in an attempt to protect the rights of overlying owners of small tracts without giving them the unqualified right to drill.

The following have also been held invalid as unwarranted interferences with the right to acquire and use property: A statute preventing a disbarred attorney from appearing in his or her own behalf on an assigned claim (*O'Connell v. Judnich* (1925) 71 C.A. 386, 388, 235 P. 664); a provision in the former Corporate Securities Act that required an individual to obtain a broker's license before selling personally owned securities (*People v. Pace* (1925) 73 C.A. 548,

551, 238 P. 1089; *People v. Davenport* (1937) 21 C.A.2d 292, 294, 69 P.2d 862; see 9 *Summary* (10th), *Corporations*, §406).

SUPPLEMENT: [This section is current through the latest supplement]



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D. Other Restrictions on Use of Property.

3. Aesthetic Regulations.

a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1063

[§ 1063] In General.

(1) *Earlier Cases.* Traditionally it was held that the police power could not be exercised for purely aesthetic objectives. (See *Santa Barbara v. Modern Neon Sign Co.* (1961) 189 C.A.2d 188, 197, 11 C.R. 57.) But regulations were sustained on other grounds, despite the incidental aesthetic object. Thus, regulations governing size, approach to the street, etc., were sustained where they had some effect in preventing recognized evils such as fire or immorality. (See *St. Louis Poster Advertising Co. v. St. Louis* (1919) 249 U.S. 269, 39 S.Ct. 274, 63 L.Ed. 599; *People v. Norton* (1930) 108 C.A. Supp. 767, 771, 288 P. 33.) Further, the height of buildings could be limited. (*Welch v. Swasey* (1909) 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923; see 8 A.L.R.2d 963 [building height regulations].) And building setback lines are valid zoning regulations. (*Gorieb v. Fox* (1927) 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228; *Thille v. Board of Public Works of Los Angeles* (1927) 82 C.A. 187, 189, 255 P. 294; supra, §1038.)

Ordinances that prohibit throwing advertising handbills and circulars on streets, yards, porches, etc., have been upheld on the ground that they prevent the littering of public places and are merely regulatory, in that it is still possible to deliver advertising matter to mail boxes or to the individuals in person. (See *People v. St. John* (1930) 108 C.A. Supp. 779, 784, 288 P. 53; *Sieroty v. Huntington Park* (1931) 111 C.A. 377, 379, 295 P. 564; *Pittsford v. Los Angeles* (1942) 50 C.A.2d 25, 31, 122 P.2d 535, supra, §324.)

(2) *Modern View.* There is now a general acceptance of the view that the police power may be used to regulate the physical appearance of the environment. (See *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772, 787, infra, §1068 [posting signs on public property]; *Schroeder v. Municipal Court* (1977) 73 C.A.3d 841, 848, 141 C.R. 85 [limitation on height of radio or television antennae in residential zone was valid]; *Kucera v. Lizza* (1997) 59 C.A.4th 1141, 1149, 69 C.R.2d 582 [ordinance seeking to preserve views and sunlight by regulating obstructing trees and tree growth was valid exercise of police power]; *Echevarrieta v. Rancho Palos Verdes* (2001) 86 C.A.4th 472, 478, 103 C.R.2d 165 [following *Kucera*]; 33 *San Diego L. Rev.* 291 [aesthetic regulation of architectural design of private single-family houses as impingement on First Amendment right of expression]; 21 A.L.R.3d 1222 [aesthetic considerations as affecting validity of zoning ordinance]; 30 A.L.R.5th 549 [validity and construction of zoning regulations relating to illuminated signs]; 29 *Proof of Facts* 3d 491 [proof of unreasonableness of aesthetic zoning regulation]; 42 *Proof of Facts* 3d 531 [proof necessary to challenge or enforce zoning and covenant restrictions on placement of television satellite dishes and radio antennas on residential

property]; on billboards and other outdoor advertising, see *infra*, §1066 et seq.)

Berman v. Parker (1954) 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27, 37, declared: "The concept of the public welfare is broad and inclusive. ... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (75 S.Ct. 102, 99 L.Ed. 37.)

However, an aesthetic regulation must be carefully drawn to avoid arbitrary discrimination. Thus, in *Carlin v. Palm Springs* (1971) 14 C.A.3d 706, 92 C.R. 535, plaintiff, operator of a small hotel, used a "rate sign" consisting of its fictitious name, "6.50 Hotel." Defendant ordered removal of the sign under an ordinance prohibiting outside rate signs, reciting various objectionable characteristics and classifying them as public nuisances per se. *Held*, the ordinance was unconstitutional. The city's justification for regulating only rate signs was that these are ugly and deceptive, create an atmosphere of "bargain basement commercialism," and cause adverse reactions from tourists at luxury hotels. But "[a] rate sign is ugly only in the eye of a competitor." (14 C.A.3d 714.) "From an aesthetic standpoint, there is no difference between a sign which reads 'sam's Hotel,' and 'Hotel 6.50,' or between one which reads 'swim suits' and 'swim suits \$ 5.88.' " (14 C.A.3d 714.) Where signs permit other types of advertising, a prohibition against advertising an attractive rate discriminates against small hotels to benefit luxury hotels, and cannot stand. (14 C.A.3d 713.)

On the other hand, in *Burk v. Municipal Court* (1964) 229 C.A.2d 696, 40 C.R. 425, an ordinance prohibited use of a "For Rent" or "For Sale" sign on a home by a realtor (with his or her business address and phone). It allowed these signs by the owner, and also permitted "open house" signs and signs on lots in a new tract. *Held*, the distinction was reasonable, even though the same aesthetic objections might apply to both. The major object was to prevent advertising of the commercial enterprise of the broker, as distinguished from merely noticing that the property was for sale or rent. (229 C.A.2d 702.)

In *Novi v. Pacifica* (1985) 169 C.A.3d 678, 215 C.R. 439, defendant city adopted land use ordinances precluding uses that would be detrimental to the "general welfare" and developments that would be "monotonous" in design and external appearance. Plaintiff developer, whose proposed 48-unit condominium project was to consist of eight 4-story buildings, refused to comply with a city planning commission requirement of "reduction of project density" to achieve the "small scale village atmosphere characteristic of Pacifica." *Held*, the ordinances were not unconstitutionally vague and did not lack objective criteria; hence, the city's denial of a permit for construction of the project was proper. (169 C.A.3d 682, 683.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Modern View*. See 33 *Ecology L. Q.* 203 [aesthetic restrictions as violating symbolic speech].



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D. Other Restrictions on Use of Property.

3. Aesthetic Regulations.

b. Billboards and Other Outdoor Advertising.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1064

[§ 1064] In General.

(1) *Development of Law.* An absolute prohibition of billboards was held invalid in *Varney & Green v. Williams* (1909) 155 C. 318, 100 P. 867. And an attempt to prohibit exterior advertising on streetcars was held invalid in *Pacific Railways Advertising Co. v. Oakland* (1929) 98 C.A. 165, 170, 173, 276 P. 629, on the ground that this advertising was neither dangerous nor immoral. But the U.S. Supreme Court sustained a state statute that prohibited cigarette advertisements on billboards. (*Packer Corp. v. Utah* (1932) 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643.)

In *National Advertising Co. v. Monterey* (1962) 211 C.A.2d 375, 379, 27 C.R. 136, the court upheld a comprehensive zoning ordinance prohibiting construction and maintenance of billboards in certain districts, on the theory that it was a reasonable economic measure designed to protect the "tourist industry" of the community. (See *Escondido v. Desert Outdoor Advertising* (1973) 8 C.3d 785, 790, 106 C.R. 172, 505 P.2d 1012 [ordinance banning billboards on property adjacent to freeways promoted highway safety as well as enhancing community aesthetic values]; 58 A.L.R.2d 1314 [municipal power relating to billboards and outdoor advertising]; 56 A.L.R.3d 1207 [height of freestanding advertising signs]; 80 A.L.R.3d 687 [prohibition of regulation of advertising sign overhanging street or sidewalk]; 81 A.L.R.3d 564 [prohibition of billboards within specified distance of street or highway].)

(2) *Outdoor Advertising Act.* The Outdoor Advertising Act (B. & P.C. 5200 et seq.) applies generally to outdoor advertising displays within the view of highways in unincorporated areas, and to advertising displays in incorporated areas that are visible from interstate or primary highways. (B. & P.C. 5271, 5408.1.) The Act substantially conforms to the federal Highway Beautification Act of 1965 (23 U.S.C., §131). (See *Metromedia v. San Diego* (1980) 26 C.3d 848, 871, 164 C.R. 510, 610 P.2d 407, infra, §1066; *People v. Desert Outdoor Advertising* (1977) 68 C.A.3d 440, 447, 137 C.R. 221 [valid exercise of police power]; *United Outdoor Advertising Co. v. Business, Trans. & Housing Agency* (1988) 44 C.3d 242, 246, 242 C.R. 738, 746 P.2d 877 [area zoned for residential and agricultural use and requiring conditional use permit for commercial or industrial use is not zoned *primarily* for industrial or commercial activities as required under B. & P.C. 5205 for billboard permit]; 15 *Pepperdine L. Rev.* 711 [*United Outdoor Advertising*]; C.E.B., Zoning Practice §8.52.)

Permits from the Director of Transportation are required for covered signs (B. & P.C. 5350 et seq.) and the types of

permitted signs are regulated (*B. & P.C. 5400 et seq.*). A permit is required for moving a billboard, which constitutes a new "placing" rather than "customary maintenance," under *B. & P.C. 5225*. (*People v. Ad Way* (1992) 8 C.A.4th 309, 314, 315, 11 C.R.2d 407; *People v. Ad Way Signs* (1993) 14 C.A.4th 187, 196, 17 C.R.2d 496.) (See *Traverso v. People* (1996) 46 C.A.4th 1197, 1204, 54 C.R.2d 434 [in *B. & P.C. 5358*, phrase "any other law of the state" does not include local ordinances; thus, it was improper to deny billboard permit because it failed to comply with local zoning ordinance].)

In accordance with federal law, the Act requires compensation pursuant to the eminent domain law for the removal of lawfully erected advertising displays. (*B. & P.C. 5412*; see *Salinas v. Ryan Outdoor Advertising* (1987) 189 C.A.3d 416, 425, 234 C.R. 619; *Metropolitan Outdoor Advertising Corp. v. Santa Ana* (1994) 23 C.A.4th 1401, 1404, 1405, 28 C.R.2d 664 [corporation was not entitled to compensation for removal of billboard; statute was inapplicable to displays erected pursuant to written agreement with government entity providing for removal after fixed period of time].) However, removal of certain types of advertising displays in certain areas without compensation is authorized. (See *B. & P.C. 5412.1* [residential areas]; *B. & P.C. 5412.2* [incorporated agricultural areas]; *B. & P.C. 5412.3* [unincorporated agricultural areas]; *B. & P.C. 5412.6* [circumstances constituting compelled removal].)

Although the Legislature has stated its intention to occupy this whole field of regulation (*B. & P.C. 5227*) and its regulations are said to be exclusive in unincorporated areas (*B. & P.C. 5270*), much local control is permitted: (a) Counties may enact reasonable land use or zoning regulations (see *supra*, §1010 *et seq.*). (*B. & P.C. 5227*.) (b) The Act must not be construed to permit advertising displays prohibited by local ordinance. (*B. & P.C. 5229*.) (c) Local governments may not permit advertising displays that violate the Act, but may impose restrictions "equal to or greater" than those imposed by the Act if there is compliance with *B. & P.C. 5412*. (*B. & P.C. 5230*.) (d) Local governments may require licenses or permits. (*B. & P.C. 5231*.) (See *Tahoe Regional Planning Agency v. King* (1991) 233 C.A.3d 1365, 1386, 1390, 285 C.R. 335 [power of planning agency created by Tahoe Regional Planning Compact to regulate outdoor advertising was not preempted by either federal Highway Beautification Act or state Outdoor Advertising Act; hence, agency could enact ordinance prohibiting outdoor advertising signs without complying with just compensation clause of federal act].)

In *Traverso v. People* (1993) 6 C.4th 1152, 26 C.R.2d 217, 864 P.2d 488, plaintiff constructed a billboard in 1959. The billboard became nonconforming after the 1967 amendments to the Act, but plaintiff was allowed to maintain it under a grandfather clause in former *B. & P.C. 5408(d)* (now *B. & P.C. 5408(e)*). In 1984, the billboard fell down, and the Department of Transportation (Caltrans) gave plaintiff 30 days' notice that its permit would be cancelled unless it informed Caltrans of its repair plans. The permit was subsequently revoked. Two years later, plaintiff, without obtaining approval or a new permit, rebuilt the billboard. Caltrans posted and mailed a notice of violation in accordance with *B. & P.C. 5463*, which permits removal of an unlawful advertising display after 10 (now 30) days' written notice posted on the structure and mailed to the owner. Approximately 2 months later, Caltrans began to remove the billboard. Plaintiff filed an action challenging the constitutionality of *B. & P.C. 5463*, but the trial court granted summary judgment to Caltrans. The Court of Appeal, concluding that the statute was unconstitutional on its face for failure to provide an opportunity to be heard, reversed. *Held*, judgment of the Court of Appeal reversed.

(a) A billboard, even if erected in violation of the Act, constitutes a protectable property interest; so too does a permit to erect a billboard. (6 C.4th 1160, 1161.) Hence, due process requires some form of notice and hearing before removal of a billboard or revocation of a permit under the Act. (6 C.4th 1161, 1163.)

(b) *B. & P.C. 5463* requires 10 (now 30) days' notice before revocation of a permit or license or removal of a billboard. This is a short but sufficient notice period, because a billboard owner is usually a sophisticated business entity. (6 C.4th 1164.)

(c) *B. & P.C. 5463* does not contain an express right to a hearing. However, if the statutory language permits, a right to a hearing may be inferred when constitutional problems would otherwise arise. (6 C.4th 1164, 1165.) Here, the statute does not prohibit a hearing, and its requirement of notice before revocation or removal indicates that the

Legislature intended the right to a hearing. The 10-day period gives the billboard owner sufficient time to investigate and, if appropriate, to contest Caltrans' determination of a violation. (6 C.4th 1166.)

(d) Thus, because *B. & P.C. 5463* "(1) provides for 10 days' notice prior to revocation or removal, (2) contemplates a fact-finding determination by Caltrans that a violation of the Act has occurred, and (3) contains no express provision precluding a hearing," the statute contains an implicit right to a hearing, satisfies the requirements of due process, and is valid. (6 C.4th 1167.)

One justice dissented, arguing that the right to a hearing, standing alone, is insufficient; a property owner has a due process right to be given *notice* of its right to a hearing. (6 C.4th 1168, 1172.) (See 22 *Pepperdine L. Rev.* 276 [Traverso].)

B. & P.C. 5463 has since been amended to increase the notice period to 30 days, and to delete the provision for posting notice on the structure. A copy of the required notice must be sent to the display owner, property owner, or advertiser when no permit has been issued.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Outdoor Advertising Act*. See *Regency Outdoor Advertising v. Los Angeles* (2006) 39 C.4th 507, 524, 46 C.R.3d 742, 139 P.3d 119, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §84 [Act did not apply to visual impairment of billboards caused by municipal landscaping project on main thoroughfare adding mature palm trees on public property; project did not remove billboards or limit their "customary maintenance or use"]; *Viacom Outdoor v. Arcata* (2006) 140 C.A.4th 230, 246, 44 C.R.3d 300 [Act did not preempt local ordinance requiring permit to rebuild billboards destroyed by wind].

C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §6.31.B. *B. & P.C. 5463*: See *Pallco Enterprises v. Beam* (2005) 132 C.A.4th 1482, 1493, 34 C.R.3d 490 [property owners properly used 30-day notice period of *B. & P.C. 5463* to correct offending signs, thus defeating competing sign company's action against them for public nuisance].



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2. On-Site Advertising.

8 Witkin Sum. Cal. Law Const Law § 1065

[§ 1065] On-Site Advertising.

B. & P.C. 5490 et seq. and *B. & P.C. 5499.1* govern local control over "on-premises advertising displays." These include a "structure, housing, sign," etc., with a useful life of 15 years or more that advertises the name or business of the property owner or occupant or advertises on-site businesses, services, or goods. (*B. & P.C. 5490(b)*; see *19 Pacific L. J. 501*; C.E.B., Zoning Practice §8.52.)

Compensation is required before lawfully erected displays may be removed or abated. (*B. & P.C. 5491*; see *B. & P.C. 5490(a)* [lawfully erected]; *B. & P.C. 5492* [fair market value]; *B. & P.C. 5493* [alternative of actual replacement cost].) The compensation requirement is inapplicable to certain signs, to signs removed pursuant to qualifying ordinances, or to signs within specified areas or districts. (*B. & P.C. 5491*; see *B. & P.C. 5494* et seq.) The right of local governments to regulate additional on-premises signs, modifications, or alterations to existing signs on a change of ownership, and the height or size of on-premises signs is limited. (See *B. & P.C. 5498.1, 5498.2, 5499*; *Denny's v. Agoura Hills* (1997) *56 C.A.4th 1312, 1326, 66 C.R.2d 382* [use of term "special" in *B. & P.C. 5499*, in describing topographic circumstances that would disallow city to enforce ordinance limiting height of pole signs, means "particular" or "individual" topographic circumstance that would make conforming sign inadequate].)

When a local government adopts or amends an ordinance governing existing on-premises advertising displays, *illegal and abandoned* displays must be inventoried within 120 days of adoption and must be completed in a timely manner. (*B. & P.C. 5491.1*; see *B. & P.C. 5491.2* [fees].) Illegal signs may be declared public nuisances and abated pursuant to the specified procedure. (*B. & P.C. 5499.2* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

C.E.B., Zoning Practice has been superseded by C.E.B., Land Use Practice. See C.E.B., 1 Land Use Practice, §6.32.



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3. Off-Site Advertising.

aa. Invalid Restrictions.

8 Witkin Sum. Cal. Law Const Law § 1066

[§ 1066] Invalid Restrictions.

In *Metromedia v. San Diego* (1980) 26 C.3d 848, 164 C.R. 510, 610 P.2d 407, defendant city's ordinance prohibited all off-site advertising billboards, and required removal of existing billboards on expiration of amortization periods ranging from 1 to 4 years. The court upheld the ordinance as a valid exercise of police power (except as preempted by the *Outdoor Advertising Act*, *supra*, §1064, requiring compensation for removal of billboards within 660 feet of federal interstate or primary highways). The opinion makes two points:

(a) Prohibition of billboards is a *valid exercise of the police power*; and the holding in *Varney & Green v. Williams* (1909) 155 C. 318, 100 P. 867, that aesthetic considerations cannot justify the prohibition, "is unworkable, discordant with modern thought as to the scope of the police power." (26 C.3d 861.) Accordingly, *Varney* was overruled, and language in several court of appeal decisions was disapproved. (26 C.3d 865, footnote 12.)

(b) Prohibition of billboards is not an abridgement of freedom of speech. (1) Many state and federal decisions, in part relying on the early notion that commercial speech was not protected, rejected First Amendment challenges. (27 C.3d 866.) The present constitutional view is that commercial speech is protected (see *supra*, §325 et seq.), but the New York Court of Appeals nevertheless concluded that prohibition of off-site billboards did not violate the First Amendment, and dismissal of the appeal by the U.S. Supreme Court settled the federal constitutional issue. (26 C.3d 867.) (2) The same conclusion must be reached under the California Constitution. The ordinance does not suppress the content of an advertiser's message, it promotes significant governmental interests, and it leaves open adequate alternative means of communication. (26 C.3d 868.) (See 69 Cal. L. Rev. 1027 [*Metromedia*]; 9 Ecology L. Q. 295 [same]; 10 Ecology L. Rev. 125 [same]; 15 U.C. Davis L. Rev. 493 [same].)

In *Metromedia v. San Diego* (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800, the Court by a plurality reversed the California judgment on a narrow ground, but the several opinions left the effect of the holding unclear. The plurality (four justices) upheld billboard regulation generally and found the ordinance free from all constitutional challenges except for its discriminatory exemption of on-site billboards carrying commercial messages:

"[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. There is a broad exception for on-site commercial advertisements, but there is no similar exception for noncommercial speech. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." (101 S.Ct. 2895, 69 L.Ed.2d 818.)

Two justices, concurring in the judgment of reversal, asserted that the plurality's "bifurcated approach itself raises serious First Amendment problems and relies on a distinction between commercial and noncommercial speech unanticipated by our prior cases." (101 S.Ct. 2900, 69 L.Ed.2d 824.) Three justices dissented in separate opinions; one observed that "it is a genuine misfortune to have the court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." (101 S.Ct. 2924, 69 L.Ed.2d 854.) (See 95 Harv. L. Rev. 211 [critical analyses of decision and five opinions].)

On remand, the California Supreme Court in *Metromedia v. San Diego* (1982) 32 C.3d 180, 185 C.R. 260, 649 P.2d 902, quoted the U.S. Supreme Court opinion on the task of the California court. Because "our judgment is based essentially on the inclusion of noncommercial speech within the prohibitions of the ordinance, the California courts may sustain the ordinance by limiting its reach to commercial speech, assuming the ordinance is susceptible to this treatment." (32 C.3d 184.) However, neither construction nor severability could save the ordinance. "San Diego intended a comprehensive ban on off-site advertising signs, subject only to the exceptions set in section F of the ordinance. Its ordinance, enacted to achieve that goal, has been held facially unconstitutional by the United States Supreme Court. Although the court said that the ordinance could be saved by severance or a limiting construction, confining its prohibition to commercial signs, such a prohibition would be inconsistent with the language and original intent of the ordinance. It would, moreover, leave the city with an ordinance different than it intended, one less effective in achieving the city's goals, and one which would invite constitutional difficulties in distinguishing between commercial and noncommercial signs." (32 C.3d 191.)

Two justices joined in a dissent, arguing that a construction limiting the ordinance's prohibition to commercial billboards was permissible. (32 C.3d 191.) (See *Tahoe Regional Planning Agency v. King* (1991) 233 C.A.3d 1365, 1406, 1408, 285 C.R. 335 [where ordinance prohibited off-premises commercial signs, exception for temporary political signs was unconstitutional, but ordinance could be saved by severing exception; following *Metromedia* and *San Francisco v. Eller Outdoor Advertising* (1987) 192 C.A.3d 643, 237 C.R. 815, *infra*, §1067].)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 678, line 4, 10 Ecology L. Rev. 125 should be 10 Ecology L. Q. 125.



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3. Off-Site Advertising.

bb. Valid Restrictions.

8 Witkin Sum. Cal. Law Const Law § 1067

[§ 1067] Valid Restrictions.

In *San Francisco v. Eller Outdoor Advertising* (1987) 192 C.A.3d 643, 237 C.R. 815, the court upheld an ordinance prohibiting off-site signs within specified districts.

(a) "A critical distinction created by the ordinance is that between a 'General Advertising Sign' which directs attention to a 'business, commodity, industry or other activity which is sold, offered, or conducted *elsewhere than on the premises* upon which such sign is located' ... and a 'Business Sign,' which 'directs attention to a business, commodity, service, industry or other activity which is sold, offered, or conducted, other than incidentally, *on the premises* upon which such sign is located. ...' The distinction is one that is frequently made in the enactment of local sign ordinances and is commonly referred to as the difference between 'offsite' signs and 'onsite' signs." (192 C.A.3d 650.)

(b) Local sign and billboard legislation has met with mixed reviews by the courts. (192 C.A.3d 656.) But it is recognized that outdoor signs, because of their intrusive nature, may be subjected to governmental regulation to promote aesthetics and traffic safety. "The approach taken in virtually every case where outdoor sign regulations are challenged as impermissible restraints on free speech is for the court to 'strike the proper balance between the right of free expression and legitimate governmental interests.' " (192 C.A.3d 657.)

(c) In *Metromedia v. San Diego* (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800, supra, §1066, "a clear majority--seven of the nine justices--expressly concluded that the city's substantial and weighty interests in minimizing unpleasant formats for expression and promoting safety and aesthetics justified an absolute ban on all *commercial offsite* outdoor signs." Both *Metromedia* and *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772, infra, §1068, support the prohibition in the ordinance involved here. "San Francisco's indisputable interests in reducing traffic hazards and beautifying a vital area of the City clearly justify a content-neutral ban on offsite signs and billboards. Furthermore, because the prohibition is restricted only to certain sections of town deemed to be of special cultural, historic, or scenic importance, the City's interests clearly outweigh any incidental infringement on First Amendment rights. ... Respondent billboard companies can, and do, maintain numerous general advertising signs throughout other sections of the City which are not affected by the offsite ban. The

sign ordinance thus leaves abundant alternative forums for the same communication; it is a legitimate exercise of police power controlling time, place and manner of expression in a limited, constitutionally permissible fashion." (192 C.A.3d 659.)

(d) By permitting all forms of on-site signs, both commercial and noncommercial, the San Francisco ordinance also avoids a major flaw that the *Metromedia* plurality found in the San Diego ordinance. San Diego permitted only on-site signs referring to commercial goods and services offered on the property, and this resulted in an "inversion" of First Amendment values. "Because no reasonable justification for a regulation impacting more heavily on ideological expression than on commercial expression could be found, the *Metromedia* court found that the ordinance 'reaches too far into the realm of protected speech' and was therefore unconstitutional on its face." (192 C.A.3d 660.) San Francisco's ordinance does not suffer from this taint. "By definition, a permissible onsite sign is one which directs attention to a 'business, commodity, service, industry or *other activity* which is sold, offered, or *conducted* other than incidentally, on the premises.' ... Thus, messages of any kind are permissible as long as they relate to some activity taking place on the property. Unlike San Diego's ordinance, San Francisco's does not require City officials to determine whether an offending sign is 'commercial' or 'noncommercial,' only whether it is 'onsite' or 'offsite.' By making the distinction turn upon a content-neutral factor, the City has maintained equanimity between commercial and noncommercial expression in a limited area of the City. In this respect the ordinance is consistent with the principles articulated in *Vincent*." (192 C.A.3d 661.)

(e) The citywide exemptions in the San Francisco ordinance designed to lessen the hardship on noncommercial forms of speech violate *Metromedia*'s prohibition against content-based discrimination. "Under *Metromedia*, the City cannot place itself in the position of evaluating between the strengths of various noncommercial communicative interests." (192 C.A.3d 663.) However, this ordinance differs from that involved in *Metromedia*: The San Diego ordinance was intended to *ban* most noncommercial signs, while the San Francisco ordinance was intended to *allow* most noncommercial signs. (192 C.A.3d 664.) Hence, little violence is done to the legislative purpose to interpret the exceptions in the ordinance "to embrace all categories of noncommercial messages, thereby preserving the ordinance's neutrality and saving it from the constitutional problem raised ... in *Metromedia*. Given the high degree of tolerance for noncommercial communication exhibited by San Francisco's sign legislation, we believe that, had the board of supervisors foreseen the First Amendment difficulties created by section 603, they would have chosen an interpretation which broadened, rather than narrowed permissible areas of ideological expression." (192 C.A.3d 664.) As so construed, the ordinance is constitutional. (192 C.A.3d 665.)

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D. Other Restrictions on Use of Property.

3. Aesthetic Regulations.

b. Billboards and Other Outdoor Advertising.

4. Posting Signs on Public Property.

8 Witkin Sum. Cal. Law Const Law § 1068

[§ 1068] Posting Signs on Public Property.

In *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772, a Los Angeles Municipal Code provision (§28.04) prohibited posting signs on public property. Vincent was a candidate for election to the city council, and his supporters (Taxpayers) contracted with a political sign service company (COGS) to fabricate and attach signs to utility pole cross-arms. City workers regularly removed signs posted in violation of the Code, whether political or commercial in character. Taxpayers and COGS sought injunctive relief against enforcement on First Amendment grounds; the district court ruled in favor of the city; and the Court of Appeals held that the provision was unconstitutional. *Held*, reversed.

(a) "It is well settled that the state may legitimately exercise its police powers to advance esthetic values." (104 S.Ct. 2129, 80 L.Ed.2d 787.) The critical inquiries are whether the city's interest in improvement of its appearance is sufficiently substantial to justify the effect on defendants' expression, and whether that effect is no greater than necessary to accomplish the city's purpose. (104 S.Ct. 2129, 80 L.Ed.2d 787.)

(b) In *Metromedia v. San Diego* (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800, *supra*, §1066, the Court concluded that the city's interest in avoiding visual clutter was sufficient to justify a prohibition of billboards, and that conclusion is reaffirmed here. "The problem addressed by this ordinance--the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property--constitutes a significant substantive evil within the City's power to prohibit." (104 S.Ct. 2130, 80 L.Ed.2d 789.)

(c) The incidental restriction on expression is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest. In *Metromedia*, the plurality opinion declared that billboards by their very nature can be perceived as an aesthetic harm, and the same is true of posted signs. (104 S.Ct. 2130, 2131, 80 L.Ed.2d 789.) The theory of *Schneider v. New Jersey* (1939) 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, *supra*, §350, is inapplicable here. In *Schneider* an antilittering statute could have addressed the substantive evil without prohibiting expressive activity; here, the substantive evil--visual blight--is not merely a possible by-product of the activity, but is created by the medium of expression itself. Thus, the ordinance curtails no more speech than is necessary to accomplish its purpose. (104 S.Ct. 2132, 80 L.Ed.2d 790.)

(d) The validity of the aesthetic interest in elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his or her own property justifies the different treatment, and private owners' aesthetic concerns will keep the posting of signs on their property within reasonable bounds. (104 S.Ct. 2132, 80 L.Ed.2d 791.)

(e) Defendants' reliance on the public forum doctrine is misplaced. The First Amendment does not guarantee access to property simply because it is owned or controlled by the Government. Public property that is not by tradition or designation a forum for public communication may be reserved by the state for its intended purposes. (104 S.Ct. 2134, 80 L.Ed.2d 793.)

(f) To create an exception to the ordinance for defendants' political speech and not for other types of speech might create a risk of engaging in constitutionally forbidden content discrimination; and the volume of permissible postings under this kind of a mandated exemption might so limit the ordinance's effect as to defeat its aim of combating visual blight. (104 S.Ct. 2135, 80 L.Ed.2d 794.)

(g) "The character of the environment affects the quality of life and the value of property in both residential and commercial areas. We hold that on this record these interests are sufficiently substantial to justify this content neutral, impartially administered prohibition against the posting of appellee's temporary signs on public property and that such an application of the ordinance does not create an unacceptable threat to the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " (104 S.Ct. 2135, 80 L.Ed.2d 795.)

Three justices dissented. (See 37 *Hastings L. J.* 439.)

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4. Conservation and Prevention of Waste.

8 *Witkin Sum. Cal. Law Const Law* § 1069

[§ 1069] Conservation and Prevention of Waste.

The state has an interest in the preservation of its natural resources, and may regulate their taking and use to prevent waste. Early examples were measures to protect wildlife, such as game birds (see *Geer v. Connecticut* (1896) 161 U.S. 519, 16 S.Ct. 600, 604, 40 L.Ed. 793, 797, later overruled; see *infra*, §1299); the California "Fish Reduction Act," prohibiting excessive use of food fish for purposes other than human consumption (see *People v. Monterey Fish Products Co.* (1925) 195 C. 548, 563, 234 P. 398; *Bayside Fish Flour Co. v. Gentry* (1936) 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772); and the California constitutional amendment limiting the riparian owner to a reasonable use of water (see *Gin S. Chow v. Santa Barbara* (1933) 217 C. 673, 700, 22 P.2d 5; 12 *Summary* (10th), *Real Property*, §937).

The most extensive measures have been enacted to prevent wasteful production of oil and gas. The following are illustrative:

(1) *Waste of Gas*. (See *Pub.Res.C.* 3300 et seq. [waste of natural gas in operation of oil wells is unlawful]; *Bandini Petroleum Co. v. Superior Court* (1931) 284 U.S. 8, 52 S.Ct. 103, 106, 76 L.Ed. 136, 144; *Stevenot v. Associated Oil Co.* (1931) 211 C. 93, 105, 294 P. 717.)

(2) *Oil Well Spacing*. (See *Pub.Res.C.* 3600 et seq.; *Hunter v. Justice's Court* (1950) 36 C.2d 315, 317, 223 P.2d 465; *Wotton v. Bush* (1953) 41 C.2d 460, 465, 261 P.2d 256.)

(3) *Pooling, Unitization, or Proration*. (See *Pub.Res.C.* 3315 et seq.; *Long Beach v. Vickers* (1961) 55 C.2d 153, 160, 10 C.R. 359, 358 P.2d 687; 37 A.L.R.2d 434 [compulsory drilling or unitization statute requiring owners or lessees of oil and gas lands to develop their holdings as single drilling unit]; 12 *Summary* (10th), *Real Property*, §888.)

In more recent years, protective legislation has greatly increased in volume and scope, covering such subjects as conservation of water, timber, petroleum, natural gas, agricultural land, aquatic resources (see 12 *Summary* (10th), *Real Property*, §831 et seq.), and wildlife (see 12 *Summary* (10th), *Real Property*, §885 et seq.).

P.C. 653o et seq., prohibiting the importation and sale of products of listed as endangered species, is a valid exercise of the police power. "It is now generally recognized that the destruction or disturbance of vital life cycles or of the balance of a species of wildlife, even though initiated in one part of the world, may have a profound effect upon the

health and welfare of people in other distant parts. We have come to appreciate the interdependence of different forms of life. We realize that by killing certain species in one area we may sound our own death knell." (*People v. K. Sakai Co.* (1976) 56 C.A.3d 531, 535, 128 C.R. 536, quoting federal case.)

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E. Restrictions on Freedom of Contract.

8 Witkin Sum. Cal. Law Const Law § 1070

[§ 1070] Restrictions on Freedom of Contract.

One of the liberties protected by the Fourteenth Amendment is freedom of contract. (See *Allgeyer v. Louisiana* (1897) 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832.) This freedom to make new contracts, protected against unreasonable legislative restraint, should be distinguished from the protection against impairment of the obligation of an existing contract by retrospective legislation. (See *infra*, §1278.)

Some of the older cases asserted that freedom of contract is the rule, and restraint the exception. But this position has long been abandoned. Many kinds of restrictions on freedom of contract have been upheld in the field of employer-employee relations; e.g., hours of labor, wages in cash, payment on basis of mined and not screened coal, forbidding payment of seamen's wages in advance, workers' compensation, and employers' liability laws. (*West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, *infra*, §1111; see *Day-Brite Lighting v. Missouri* (1952) 342 U.S. 421, 72 S.Ct. 405, 407, 96 L.Ed. 469, 472; *Ferguson v. Skrupa* (1963) 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, *supra*, §979; *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 C.2d 481, 486, 171 P.2d 21; *Hersch v. Boston Ins. Co.* (1959) 175 C.A.2d 751, 755, 346 P.2d 796 [statute giving judgment creditor of plaintiff lien on cause of action and prohibiting settlement without his consent was valid]; 95 A.L.R.2d 1354 [legislation regulating business of debt adjusting]; 18 A.L.R.3d 944 [requirement that workers on public works be paid prevailing wages].)

The Legislature may, in proper situations, regulate the consideration for a contract, as in usury laws (see 1 *Summary* (10th), *Contracts*, §455 et seq.) and restrictions on assignments to heir hunters (*Burchell v. Strube* (1955) 43 C.2d 828, 836, 279 P.2d 1; see 14 *Summary* (10th), *Wills and Probate* §723 et seq.).

Legislation also may validly require the inclusion of particular provisions; e.g., a statute requiring an arbitration clause in a standard fire insurance policy is valid because it is a regulation that merely changes the remedy available to the parties. (*Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.* (1931) 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214; see *California State Auto. Assn. Inter-Ins. Bureau v. Maloney* (1951) 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788, *infra*, §1072 [Compulsory Assigned Risk Law, compelling liability insurers to accept share of undesired applicants for automobile liability insurance]; *Castleman v. Scudder* (1947) 81 C.A.2d 737, 740, 185 P.2d 35 [statute prohibiting business opportunity brokers from claiming fees under contract lacking definite termination date].) (For other illustrations of these statutes, see 4 *Summary* (10th), *Sales*, §§235 et seq. [motor vehicles]; 262 [vessels]; 263 et seq. [retail installment sales]; 290 et seq. [home improvement and swimming pool contracts]; 295 et seq. [consumer protection laws]; 355 [fine prints]; 362 et seq. [health and dance services]; 371 [membership camping contracts].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hess Collection Winery v. Agricultural Lab. Rel. Bd.* (2006) 140 C.A.4th 1584, 1600, 45 C.R.3d 609 [upholding statutory scheme mandating arbitration of collective bargaining agreements between agricultural workers and growers].



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F. Regulation of Personal Rights.

8 Witkin Sum. Cal. Law Const Law § 1071

[§ 1071] Regulation of Personal Rights.

(1) *In General*. The rights of free speech, press, and assembly may be subjected to reasonable police power regulations, such as ordinances preventing littering, commercial advertising, or the obstruction of traffic. (See *supra*, §405 et seq.)

(2) *School Attendance*. The right to attend private or parochial schools, and to teach foreign languages there, cannot be prohibited by a statute requiring compulsory attendance at public schools. (*Meyer v. Nebraska* (1923) 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 [statute forbidding teaching of any modern language, other than English, to children below eighth grade was void]; *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 [statute requiring attendance at public school].)

However, the usual statute requiring compulsory attendance at some school, public or private, or instruction under a private tutor possessing prescribed qualifications, is constitutional. (*People v. Turner* (1953) 121 C.A.2d Supp. 861, 865, 263 P.2d 685 [upholding conviction of parents lacking teaching credentials who insisted on teaching their children themselves at home]; but cf. *Wisconsin v. Yoder* (1972) 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15, *supra*, §519 [requiring Amish to send their children to school until age 16 violated free exercise of their religion]; see 19 *Hastings Const. L. Q.* 963 [removing judicial barriers for parental governance of local schools]; 18 *A.L.R.4th* 649 [validity of state regulation of curriculum and instruction in private and parochial schools]; 8 *A.L.R.5th* 875 [validity of state or local regulation requiring private school to report attendance or similar information to government; cases after *Wisconsin*]; 70 *A.L.R.5th* 169 [home schooling].)

(3) *Curfew*. A curfew ordinance prohibiting minors from loitering in a public street or place is valid if reasonable in terms. (See *supra*, §778.)

(4) *Vaccination*. Compulsory vaccination statutes are valid. (*Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; see 19 *Pepperdine L. Rev.* 29 [Vaccines and the Law].)

(5) *Sterilization*. Sexual sterilization of persons afflicted with assumed hereditary insanity or imbecility was upheld in *Buck* (1927) 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000. (See 103 *Harv. L. Rev.* 1201 [legacy of *Buck*: law, politics and mentally retarded parent].) But statutes providing for sterilization of *criminals* have generally been held invalid. (See *Skinner v. Oklahoma* (1942) 316 U.S. 535, 62 S.Ct. 1110, 1113, 1115, 86 L.Ed. 1655, 1658, 1662 [majority opinion

relies on equal protection, concurring opinion on due process].) (See 93 *Harv. L. Rev.* 1296 [involuntary sterilization]; 49 Proof of Facts 3d 101 [proof of qualification for sterilization of person with mental disability]; 2 *Tribe*, §15-10; 3 *Rotunda*, §18.27.)

(6) *AIDS Testing*. In *Love v. Superior Court* (1990) 226 C.A.3d 736, 276 C.R. 660, petitioners, convicted of violating P.C. 647(b) (soliciting an act of prostitution), were ordered to undergo AIDS counseling and testing pursuant to P.C. 1202.6 (see 4 *Cal. Crim. Law* (3d), *Introduction to Criminal Procedure*, §114). *Held*, the testing requirement is constitutional.

(a) The control of a communicable disease is a valid exercise of the police power; and testing for AIDS may be upheld against a Fourth Amendment challenge under the "special needs" doctrine. (226 C.A.3d 741, discussing *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639, 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §321.) P.C. 1202.6 "addresses the problem of the awareness of members of a high-risk group of their HIV status for their own protection and that of those to whom they could transmit the virus." (226 C.A.3d 743.)

(b) "We have balanced the Fourth Amendment interests of those persons convicted of prostitution against the promotion of the government's goal of preventing the spread of AIDS. With the minimal intrusion of a blood test and the disclosure restrictions, we conclude that the Fourth Amendment balancing must be struck in favor of the testing requirement." (226 C.A.3d 746.)

(7) *Mandatory Helmet Law*. In a case of first impression, *Buhl v. Hannigan* (1993) 16 C.A.4th 1612, 1627, 20 C.R.2d 740, upheld the Mandatory Motorcycle Helmet Law (*Veh.C.* 27802 et seq.) as a proper exercise of the police power, rationally related to the Legislature's express purpose of insuring the safety and welfare of persons traveling on public highways. (See *Bianco v. California Highway Patrol* (1994) 24 C.A.4th 1113, 1122, 29 C.R.2d 711 [Highway Patrol's authority to determine which helmets are approved, and its bulletin stating that "beanie" helmet failed to meet minimum requirements, were not preempted by federal law]; 72 *A.L.R.5th* 607 [mandatory helmet laws].)

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(2) *School Attendance*. Although the Legislature has not acted to supersede *People v. Turner* (1953) 121 C.A.2d Supp. 861, 263 P.2d 685, text, p. 685, it has acted as though home schooling is permitted in California. After discussing the history of home schooling, the court in *Jonathan L. v. Superior Court* (2008) 165 C.A.4th 1074, 81 C.R.3d 571, concluded that a home school can fall within the private school exception to the general compulsory education law. (165 C.A.4th 1096, 1099.) "This does no violence to the language of the private school exemption, which is ambiguous and therefore capable of the interpretation." (165 C.A.4th 1099.) However, parents do not have an absolute constitutional right to home school their children. Instead, "parents possess a constitutional liberty interest in directing the education of their children, but the right must yield to state interests in certain circumstances," e.g., the compelling state interest in the safety of children. (165 C.A.4th 1101.) (See 96 *Cal. L. Rev.* 123 [constitutional constraints on homeschooling].)(4) *Vaccination*. See 121 *Harv. L. Rev.* 1820 [vaccine law].

(5) *Sterilization*. See 4 *Rotunda* 4th, §18.27.



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G. Regulation of Business.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1072

[§ 1072] In General.

(1) *Early Doctrine of Public Service Businesses.* It has long been recognized that businesses may be subjected to some regulations, such as health measures, statutes preventing certain types of fraud, etc. (See *infra*, §1073 et seq.) But two important types of regulation were formerly deemed to be unwarranted interferences with property rights as applied to ordinary businesses. They were (a) the regulation of prices or rates, and (b) restrictions on the right to engage in business, as by requiring a certificate of public convenience and necessity. (See *infra*, §§1080, 1082.) To justify this type of regulation, it was necessary to show that the particular business was "affected with a public interest." The doctrine was given its first significant statement in *Munn v. Illinois* (1876) 94 U.S. 113, 24 L.Ed. 77, where maximum rates were imposed for grain elevators found to be under monopoly control. And in *Brass v. North Dakota* (1894) 153 U.S. 391, 14 S.Ct. 857, 38 L.Ed. 757, the principle was extended to include businesses that were not monopolistic. (See *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas* (1923) 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 [classifying businesses affected with public interest].)

Under this restricted theory, price control and similar regulations were held improper where, despite proof of evils, the business was deemed private. (See *Tyson & Brother--United Theatre Ticket Offices v. Banton* (1927) 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718 [ticket-selling business]; *Ribnik v. McBride* (1928) 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913 [employment agencies]; *Williams v. Standard Oil Co. of Louisiana* (1929) 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287 [sale of gasoline]; *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 [sale of ice].)

(2) *No Immunity for Private Businesses.* In *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, the New York Legislature determined that, as a result of price cutting and unfair trade practices, conditions in the milk industry were deplorable, that the industry was of paramount economic importance, and that the conditions threatened the health and economic welfare of the people. Accordingly, it created a board with the power to fix minimum and maximum retail prices of milk. Appellant sold milk below the minimum price and was convicted. *Held*, the statute was valid. The milk industry is not a public utility, and there was no showing of monopoly or public franchise; but it may nonetheless be so regulated. The term "affected with a public interest" means no more than "subject to the exercise of police power." There is no closed class or category of these businesses, and the private character of a business does not render it immune from price regulation. Decisions such as *Tyson & Brother* and *Williams v. Standard Oil Co. of Louisiana*, *supra*, must rest on the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. "But there can be no doubt that upon proper occasion and by appropriate

measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." (54 S.Ct. 516, 78 L.Ed. 957.) (See *Olsen v. Nebraska* (1941) 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 [overruling *Ribnik* and disapproving *Tyson & Brother*]; *infra*, §1081.)

California State Auto. Assn. Inter-Ins. Bureau v. Maloney (1951) 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788, is an illustration of the modern approach. The Compulsory Assigned Risk Law (*Ins.C. 11620 et seq.*) supplements the financial responsibility law by requiring all liability insurance companies to participate in an equitable apportionment of policies of applicants classified as poor risks but in good faith entitled to insurance (see 2 *Summary* (10th), *Insurance*, §15). Plaintiff contended that this violated its freedom to contract and compelled an alteration of its business from a cooperative with a select membership to a general insurance business. The California court upheld the statute in *California State Auto. Assn. Inter-Ins. Bureau v. Downey* (1950) 96 C.A.2d 876, 899, 216 P.2d 882, and the U.S. Supreme Court did likewise. The Court pointed out that insurance, like banking, is a business long subject to regulation in many aspects; that in both fields the state has broad enough power to take over the entire business, leaving no part for private enterprise; and therefore, that the state may hold its hand on condition that local needs are serviced by the business. The situation was similar to that in *Noble State Bank v. Haskell* (1911) 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, which sustained a law assessing state banks for a depositors' guaranty fund. "The case in its broadest reach is one in which the state requires in the public interest each member of a business to assume a *pro rata* share of a burden which modern conditions have made incident to the business." (71 S.Ct. 603, 95 L.Ed. 792.) (See *Massingill v. Department of Food & Agriculture* (2002) 102 C.A.4th 498, 507, 125 C.R.2d 561 [statute requiring service stations to supply free air and water to customers buying gasoline did not subject air and water vendors or station owners to regulatory takings; air and water vendors could charge station owners directly, and station owners could pass their costs on to gasoline customers].)

Nevertheless, in reaching the conclusion that a regulatory measure is "arbitrary," courts have sometimes used the language of the public service business test. (See *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 C.2d 436, 442, 445, 254 P.2d 29, *infra*, §1082; *People v. Asamoto* (1955) 131 C.A.2d 22, 30, 279 P.2d 1010, *infra*, §1082 ["The circumstances of its alleged change from the status of private business and its freedom from regulation into one in which the public have come to have an interest, are always a subject of judicial inquiry"].)

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G. Regulation of Business.

2. Health and Safety.

a. Food, Drugs, and Water.

8 *Witkin Sum. Cal. Law Const Law* § 1073

[§ 1073] Food, Drugs, and Water.

Regulation of the business of supplying food and drugs, to safeguard health and prevent fraud, is a traditional and common exercise of the police power.

(1) *Food Sanitation and Labeling*. (See *Pacific Coast Dairy v. Police Court of San Francisco* (1932) 214 C. 668, 673, 8 P.2d 140 [type of milk containers]; *In re McNeal* (1939) 32 C.A.2d 391, 396, 89 P.2d 1096 [label identifying manufacturer of bread]; *Affonso Bros. v. Brock* (1938) 29 C.A.2d 26, 32, 84 P.2d 515 [testing and destruction of tubercular cattle]; *Natural Milk Producers Assn. v. San Francisco* (1942) 20 C.2d 101, 114, 124 P.2d 25 [pasteurization of milk]; *Lewis Food Co. v. California Dept. of Public Health* (1952) 110 C.A.2d 759, 763, 243 P.2d 802 [statute prohibiting labels on canned dog food giving impression of fitness for human consumption, e.g., "Horse meat stew," "Packed with gravy"]; 19 A.L.R.2d 1013 [regulating sale of horse meat for human consumption]; 70 A.L.R.2d 852 [regulations for protection of vegetation against disease or infection]; 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §282 et seq.)

In *Coffee-Rich v. Fielder* (1972) 27 C.A.3d 792, 104 C.R. 252, out-of-state manufacturers of nondairy products resembling milk attacked a number of sections of the Food and Agricultural Code, as violations of the Due Process and Equal Protection Clauses and as burdens on interstate commerce (infra, §1300). Regulations on the labeling, listing of ingredients, registration, and records were sustained, but the following were held unconstitutional: (a) prohibiting the sale of products resembling milk products to state prisons and state-supported charitable institutions, despite the wholesome nature of the products (not a reasonable health regulation); (27 C.A.3d 811) and (b) requiring that restaurants post signs or provide menu notices of specified size that "beverages and products which are not milk products are served here" (unreasonable burden). (27 C.A.3d 819.)

(2) *Drugs and Medical Supplies*. (See *In re Gray* (1929) 206 C. 497, 499, 274 P. 974 [pharmacy act licensing and regulating sale of drugs]; *People v. Ryan* (1951) 101 C.A.2d Supp. 927, 931, 226 P.2d 376 [Pure Drugs Act, prohibiting false advertisements of curative effects of drugs]; *Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 [statute making it unlawful for optician to fit or duplicate eyeglasses without prescription from ophthalmologist or optometrist]; *People v. Woody* (1964) 61 C.2d 716, 718, 40 C.R. 69, 394 P.2d 813, supra, §523 [prohibition of peyote is within police power, but is invalid as applied to Indian group using it for religious rites];

Magan Med. Clinic v. California Board of Med. Examiners (1967) 249 C.A.2d 124, 131, 57 C.R. 256 [statute prohibiting doctor-owned pharmacies]; 26 *Loyola L.A. L. Rev.* 39 [civil commitment for drug dependency]; 15 *U.C. Davis L. Rev.* 801 [controlling genetic diseases]; 12 *A.L.R.5th* 89 [state laws imposing tax or license fee on possession, sale, etc., of illegal narcotics].)

(3) *Water*. Water pollution is comprehensively regulated in California. (See *Water C. 13000* et seq.; 12 *Summary* (10th), *Real Property*, §891 et seq.)

A significant development in this field has been the fluoridation of the water supply of a community, by adding fluoride to the water, as a means of preventing tooth decay in children. In *De Aryan v. Butler* (1953) 119 C.A.2d 674, 681, 260 P.2d 98, a San Diego fluoridation measure was upheld, despite strongly conflicting evidence on the merits and dangers of the practice. The constitutionality of this kind of regulation is now regarded as settled. (*Beck v. City Council of Beverly Hills* (1973) 30 C.A.3d 112, 115, 106 C.R. 163 [American courts "have uniformly held that fluoridation of water is a reasonable and proper exercise of the police power in the interest of public health"].)

(4) *Pest Control*. (See *Churchill v. Parnell* (1985) 170 C.A.3d 1094, 1098, 216 C.R. 876 ["state may abate or eradicate any species of insect, animal, plant, bird or fish when necessary to protect the public interest"]; *Teresi v. California* (1986) 180 C.A.3d 239, 353, 225 C.R. 517 [Mediterranean Fruit Fly Eradication Program, involving quarantine and fumigation of crops]; 17 *Pacific L. J.* 1301 [State Mandated Pesticide Application].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Water*. See *Coshov v. Escondido* (2005) 132 C.A.4th 687, 709, 711, 34 C.R.3d 19 [right to drinking water free of fluoride is not fundamental right guaranteed by Constitution, and introducing fluoride additive containing arsenic into public water system did not constitute forced medication in violation of right of privacy]; *Watsonville v. State Dept. of Health Services* (2005) 133 C.A.4th 875, 883, 35 C.R.3d 216 [to extent measure regulating additives to public water supplies applied to fluoridation, it was preempted by state law].



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2. Health and Safety.

b. Air Pollution.

8 *Witkin Sum. Cal. Law Const Law* § 1074

[§ 1074] Air Pollution.

Laws against industrial nuisances, and the zoning of factories and other smoke-producing businesses, are traditional police power measures. (See *Northwestern Laundry v. Des Moines* (1916) 239 U.S. 486, 36 S.Ct. 206, 60 L.Ed. 396 [smoke abatement law]; *Ex parte Hadacheck* (1913) 165 C. 416, 419, 132 P. 584; *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 [brick kilns restricted to certain districts]; *Huron Portland Cement Co. v. Detroit* (1960) 362 U.S. 440, 80 S.Ct. 813, 815, 4 L.Ed.2d 852, 855, *infra*, §1312 ["Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power"]; 78 *A.L.R.2d* 1305 [regulation of smoke and other air pollution]; 13 *Summary* (10th), *Equity*, §139.)

The modern evil in this field is smog, and legislative efforts at control in California have been continuous for some years. Statutes seek to coordinate state, regional, and local efforts in the field of air pollution control. (See *Health & Saf.C. 39000 et seq.*; 12 *Summary* (10th), *Real Property*, §898 *et seq.*; *People v. International Steel Corp.* (1951) 102 *C.A.2d Supp.* 935, 937, 226 *P.2d* 587; *People v. Plywood Mfrs. of Calif.* (1955) 137 *C.A.2d Supp.* 859, 865, 291 *P.2d* 587.) And engine exhaust standards for new and used vehicles have been set by statute. (See *Health & Saf.C. 43000*; 12 *Summary* (10th), *Real Property*, §901.)

The California Indoor Clean Air Act requires nonsmoking sections in public buildings. (See *Health & Saf.C. 118875 et seq.*; 12 *Summary* (10th), *Real Property*, §902.) And tobacco smoking in enclosed workplaces is prohibited on a statewide basis. (*Lab.C. 6404.5*; see 3 *Summary* (10th), *Agency and Employment*, §377; 65 *A.L.R.4th* 1205 [nonsmoking regulations].)

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c. Closing and Working Hours.

8 *Witkin Sum. Cal. Law Const Law* § 1075

[§ 1075] Closing and Working Hours.

Ordinances specifying hours of business, and requiring Sunday and holiday closing of *butcher shops and meat markets*, have been upheld as health measures, on the ground that inspection is facilitated, and that otherwise the quality standards could be evaded at times when inspectors are not on duty. (*Dorsa v. Board of Supervisors of Santa Clara* (1937) 23 C.A.2d 217, 219, 72 P.2d 912; *Justesen's Food Stores v. Tulare* (1941) 43 C.A.2d 616, 621, 111 P.2d 424; *Lynch Meats of Oakland v. Oakland* (1961) 196 C.A.2d 104, 111, 16 C.R. 302.) But no such reasoning justifies closing hours for barbershops (*Ganley v. Claeys* (1935) 2 C.2d 266, 269, 40 P.2d 817) or for soliciting and delivery of laundry (*In re Mark* (1936) 6 C.2d 516, 522, 58 P.2d 913). (See *Justesen's Food Stores v. Tulare* (1938) 12 C.2d 324, 330, 84 P.2d 140 [ordinance that established closing hours for stores selling food, but excepted restaurants, soda fountains, etc., was discriminatory]; 53 A.L.R.3d 942 [ordinance regulating time during which restaurant business may be conducted].)

Comprehensive Sunday closing laws may be justified as health measures in that they provide a day of rest for those who work. But the laws must have some kind of general application; neither local ordinances nor state statutes may single out particular types of business and impose Sunday or other closing regulations. (*In re Scaranino* (1936) 7 C.2d 309, 310, 60 P.2d 288; *In re Boehme* (1936) 12 C.A.2d 424, 428, 55 P.2d 559; *In re Mark, supra*; see 10 A.L.R.4th 246 [Sunday closing laws]; *supra*, §§553, 711.)

Regulation of the number of hours of labor is a valid exercise of the police power. (See *infra*, §1111.)

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d. Fire Protection.

8 *Witkin Sum. Cal. Law Const Law* § 1076

[§ 1076] Fire Protection.

In *Queenside Hills Realty Co. v. Saxl* (1946) 328 U.S. 80, 66 S.Ct. 850, 90 L.Ed. 1096, a statute required lodging houses without fireproof construction to install automatic sprinkler systems. Appellant contended that his building was already adequately safeguarded by a fire alarm system, watchman service, and other safety arrangements. *Held*, the regulation was validly applied to appellant. "Protection of the safety of persons is one of the traditional uses of the police power" and the Legislature is free to choose among possible measures of protection from the hazards of fire. (See *Ventura v. Southern Calif. Edison Co.* (1948) 85 C.A.2d 529, 534, 193 P.2d 512 [California Fire Liability Law, allowing county to recover expense of fighting fire from person responsible for its start and escape to another's property]; *People v. Sevel* (1953) 120 C.A.2d Supp. 907, 911, 261 P.2d 359 [ordinance regulating junkyards and auto wrecking establishments, requiring enclosed building or solid fence or wall to protect against fire risks from fumes of unused gasoline in tanks and greasy upholstery of secondhand cars].)

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a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1077

[§ 1077] In General.

Fraud against consumers and unfair competition against other businesses are common subjects of regulation. (See generally 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §177 et seq.) The following are important examples:

(1) *Auction and "Action" Sales*. (See *McKay Jewelers v. Bowron* (1942) 19 C.2d 595, 601, 122 P.2d 543 [ordinance prohibiting "crying" or soliciting sale of goods from store opening onto sidewalk]; *Mann's Jewelers v. San Diego* (1956) 140 C.A.2d 578, 582, 295 P.2d 468 ["action sale"--salesman through public address system gets group of customers into store offering items at fixed prices without competitive bidding]; *Hirsch v. San Francisco* (1956) 143 C.A.2d 313, 319, 300 P.2d 177 [ordinance regulating sales by public outcry of enumerated articles, e.g., jewelry, leather goods; requiring \$ 150 permit, \$ 10,000 bond, and showing of good character, etc.].) In *Mann's Jewelers*, the principal evils at which the regulation was aimed was limited opportunity to examine the goods and reflect on the representations of quality and value, the absence of individual negotiation, the opportunity to defraud, and the attraction of crowds with resulting police problems. (See 53 A.L.R.2d 1433 [jewelry auctions].)

(2) *"Blue Sky Laws" Regulating Securities*. (See *Hall v. Geiger-Jones Co.* (1917) 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480; *In re Girard* (1921) 186 C. 718, 722, 200 P. 593; 9 *Summary* (10th), *Corporations*, §401 et seq.)

(3) *Business Tie-Ups*. In *Daniel v. Family Sec. Life Ins. Co.* (1949) 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632, a statute prohibited life insurance companies and their agents from operating an undertaking business, and likewise prohibited undertakers from acting as life insurance agents. The law was upheld as a permissible regulation to meet the evil thought to exist in "funeral insurance," a plan under which the beneficiary of the policy, having obtained it from the agent-undertaker, is likely on death of the insured to pay, regardless of cost, for any type of funeral suggested by the undertaker.

Magan Med. Clinic v. California Board of Med. Examiners (1967) 249 C.A.2d 124, 57 C.R. 256, upheld the validity of a statute prohibiting licensed doctors from owning an interest in a pharmacy. The court took note of problems of conflict of interest, and possible fraud or other adverse effects on patients where doctors profit from pharmacies. The decision in *Louis K. Liggett Co. v. Baldridge* (1928) 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204, was characterized as old and discredited law. (249 C.A.2d 134.)

(4) *Container Shapes and Sizes*. (See *Pacific States Box & Basket Co. v. White* (1935) 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138; *Mattei v. Hecke* (1929) 99 C.A. 747, 753, 279 P. 470 [statute prescribing standard containers for grapes, and requiring that others be marked "Irregular Container," were invalid as not tending to protect public from fraud in sale of grapes].)

(5) *Labels and Advertising*. (See *Gregory v. Hecke* (1925) 73 C.A. 268, 279, 238 P. 787 [prohibiting adulteration, false labeling, or misrepresentation in sale of germicides for eradication of plant pests]; *In re Bear* (1932) 216 C. 536, 539, 15 P.2d 489 [requiring labeling of food prepared with imported egg products]; *Lewis Food Co. v. California Dept. of Public Health* (1952) 110 C.A.2d 759, 763, 243 P.2d 802, [misleading labels on canned dog food]; *Serve Yourself Gasoline Stations Assn. v. Brock* (1952) 39 C.2d 813, 818, 249 P.2d 545 [statute requiring gas station signs, such as "Serve Yourself and Save," to set forth in large lettering the total price, tax, and grade of gas]; 3 *Am.Jur.2d* (2002 ed.), *Advertising* §§3, 6 et seq., 14 et seq.)

In *Paraco v. Department of Agriculture* (1953) 118 C.A.2d 348, 257 P.2d 981, the court upheld a statute requiring the prominent labeling of used lubricating oil as "reclaimed motor oil." On facts pleaded and assumed to be true on demurrer, it appeared that the rectifying process produced oil of quality equal to and indistinguishable from virgin oil; hence, it was argued, the regulation called for misbranding of the product as inferior. It was held, however, that, regardless of merit of the product and the absence of any reasons for choice, people have a right to know what they are getting. (118 C.A.2d 354.)

(6) *Surrender of Tips*. A statute may require an employer to give conspicuous notice of the fact that *tips* given to employees are surrendered to the employer. (*California Drive-In Restaurant Assn. v. Clark* (1943) 22 C.2d 287, 295, 140 P.2d 657 [criticizing and distinguishing *In re Farb* (1918) 178 C. 592, 599, 174 P. 320].)

(7) *Trading Stamps*. Both regulation and prohibition of the use of trading stamps or coupons, as an objectionable business practice, have been upheld. (*Rast v. Van Deman & Lewis Co.* (1916) 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679; but cf. *Ex parte Drexel* (1905) 147 C. 763, 767, 82 P. 429 [holding regulation invalid].)

(8) *"Unfair Practices Acts" Prohibiting Sales Below Cost*. (See *Wholesale Tobacco Dealers Bureau of Southern Calif. v. National Candy & Tobacco Co.* (1938) 11 C.2d 634, 82 P.2d 3; 1 *Summary* (10th), *Contracts*, §610.)

In re Alexander (1933) 128 C.A. 651, 657, 18 P.2d 410, held unconstitutional an ordinance prohibiting "fake sales" of goods by merchants on the ground that, though the evil existed and the object of the statute was proper, the restrictive provisions were too broad and unreasonably interfered with wholly innocent and legitimate transactions.

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b. Regulation of Franchises.

8 *Witkin Sum. Cal. Law Const Law* § 1078

[§ 1078] Regulation of Franchises.

In *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361, the Court considered constitutional challenges to the California Automobile Franchise Act (*Veh.C.* 3062, 3063). The Act protects the interests of existing retail dealers (franchisees) by prohibiting automobile manufacturers from adding or relocating dealerships in the market areas of existing franchisees, where the effect would be injurious to the existing franchisees and the public interest. A manufacturer seeking to establish a new dealership, or to relocate an existing one, must first give notice of this intention to the California New Motor Vehicle Board and to each of its existing franchisees in the same "line-make" of automobile located within the "relevant market area." If an existing franchisee within the market area protests to the board within 15 (now 20) days, the proposed dealership may not be established until the board holds its hearing (which must be convened within 60 days); and if the board determines that there is good cause for not permitting the dealership, it cannot be established at all. This action arose out of an attempt by General Motors to establish one dealership and to relocate another. Protests were made, but, before the board hearing could be held, General Motors and the dealers seeking to come in filed an action in the federal district court. That Court concluded that the absence of a prior hearing requirement was a denial of due process. *Held*, reversed.

(a) *Procedural due process*. Plaintiffs contended that the Act permits a protesting dealer to obtain a summary administrative adjudication equivalent to a temporary injunction. This is unsound. The Act, not the protest and board's notice of it, curtailed the manufacturer's right to franchise at will. The board's notice was not an administrative order because no adjudicative facts had been found. (99 S.Ct. 410, 58 L.Ed.2d 373.)

(b) *Substantive due process and police power*. Plaintiffs further contended that the manufacturer has a due process protected liberty to pursue a lawful occupation--to franchise at will, without delay. This is likewise unsound. Even if the right to franchise is a protected interest, the state is constitutionally empowered to enact a general scheme of business regulation imposing reasonable restrictions on the exercise of that right. In particular, California (and several other states that have enacted similar laws), may subordinate the franchise rights of automobile manufacturers to protect rights of existing franchisees against unfair or oppressive trade practices. (99 S.Ct. 410, 411, 58 L.Ed.2d 374, citing *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, *supra*, §1072, and other cases recognizing broad power to impose economic regulations.) "Once having enacted a reasonable general scheme of business regulation, California was not required to provide for a prior individualized hearing each and every time the provisions of the Act

had the effect of delaying consummation of the business plans of particular individuals." (99 S.Ct. 411, 58 L.Ed.2d 375.)

(c) *Sherman Act and state action exemption.* Plaintiffs finally contended that the Act, by permitting existing dealers to delay the establishment of new dealerships, gives effect to privately initiated restraints on trade. The answer is that the Act's regulatory scheme is designed to displace unfettered business freedom in the establishment of automobile dealerships, and "state action" immunity (see 1 *Summary* (10th), *Contracts*, §559) is not lost merely because existing dealers are given notice and an opportunity to be heard before their franchisor establishes a new dealership. "Protests serve only to trigger Board action. They do not mandate significant delay." (99 S.Ct. 412, 58 L.Ed.2d 376.)

One justice dissented, asserting that the statute permits private parties, serving private advantage, to invoke the power of the state to restrain the liberty of new competitors, and hence, is a violation of due process. (See *Forty-Niner Truck Plaza v. Union Oil Co.* (1997) 58 C.A.4th 1261, 1274, 1275, 68 C.R.2d 532 [statute requiring service station franchisor wanting to sell to make offer to franchisee or to give franchisee right of first refusal, is not overly broad and does not constitute unconstitutional taking of private property for public use without just compensation]; *Duarte & Witting v. New Motor Vehicle Bd.* (2002) 104 C.A.4th 626, 634, 128 C.R.2d 501 [although *Veh.C.* 3067 does not mention dismissal of protest as permissible action by board, board has implied authority to dismiss protest for good cause; here, board had good cause because termination of franchise was due to vehicle line being discontinued].)

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4. Licensing for Regulatory Purposes.

8 Witkin Sum. Cal. Law Const Law § 1079

[§ 1079] Licensing for Regulatory Purposes.

The cases uniformly uphold licensing of businesses, trades, or professions on conditions deemed necessary in the particular calling, e.g., examination or other proof of qualifications, or character, giving of bond, etc. (See *Brazee v. Michigan* (1916) 241 U.S. 340, 36 S.Ct. 561, 60 L.Ed. 1034 [employment agencies]; *La Tourette v. McMaster* (1919) 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362 [insurance brokers]; *Dent v. West Virginia* (1889) 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 [practice of medicine]; *Hall v. Geiger-Jones Co.* (1917) 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480 [sale of securities]; *In re Fuller* (1940) 15 C.2d 425, 431, 102 P.2d 321 [small loan brokers]; *Riley v. Chambers* (1919) 181 C. 589, 594, 185 P. 855 [real estate brokers]; *In re Holmes* (1921) 187 C. 640, 645, 203 P. 398 [secondhand book dealers]; *Lewis v. Quinn* (1933) 217 C. 410, 412, 19 P.2d 236 [secondhand furniture dealers]; *Howard v. California* (1948) 85 C.A.2d 361, 364, 193 P.2d 11 [painting contractors]; *Gospel Army v. Los Angeles* (1945) 27 C.2d 232, 236, 163 P.2d 704 [junk and secondhand dealers]; *Moore v. California State Bd. of Accountancy* (1992) 2 C.4th 999, 9 C.R.2d 358, 831 P.2d 798, supra, §334 [licensing of public accountants].) (See supra, §629; 3 Summary (10th), *Agency and Employment*, §51 et seq.; 1 Summary (10th), *Contracts*, §485 et seq.; 9 Summary (10th), *Corporations*, §401 et seq.)

Commentary on this subject is voluminous. (See 7 A.L.R.2d 416 [photography]; 22 A.L.R.2d 816 [plumbers and plumbing]; 34 A.L.R.2d 1326 [watchmakers and watch repairing]; 39 A.L.R.2d 606 [real estate brokers]; 45 A.L.R.2d 1391 [junk dealers]; 54 A.L.R.2d 881 [collection and commercial agencies]; 70 A.L.R.2d 433 [accountants]; 77 A.L.R.2d 1216 [house-to-house solicitors and peddlers]; 81 A.L.R.2d 791 [psychologists]; 83 A.L.R.2d 799 [private garbage or rubbish removal services]; 87 A.L.R.2d 1007 [self-service laundries]; 89 A.L.R.2d 1010 [radio and television repairmen and servicemen]; 89 A.L.R.2d 1338 [funeral directors and embalmers]; 81 A.L.R.3d 1212 [regulating business of tattooing]; 86 A.L.R.3d 475 [licensing of motor vehicle operators]; 86 A.L.R.3d 691 [regulation of private detectives, private investigators, and security agencies]; 53 A.L.R.4th 689 [nursing or rest homes]; 8 A.L.R.5th 825 [physical therapy]; 66 Proof of Facts 3d 541 [damages and emotional distress award for improper revocation of teacher's license].)

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G. Regulation of Business.

5. Limitations on Right To Do Business.

8 Witkin Sum. Cal. Law Const Law § 1080

[§ 1080] Limitations on Right To Do Business.

(1) *In General.* Exclusive franchises may be given to carriers and other public utilities, and the right to engage in the transportation business may be restricted to a limited group of persons by granting certificates of convenience and necessity to them alone. (See *infra*, §1098.) Moreover, the power to impose this type of regulation may not be restricted to so-called "businesses affected with a public interest." (See *supra*, §1072.)

Doyle v. Board of Barber Examiners (1963) 219 C.A.2d 504, 33 C.R. 349, upheld a statute limiting the number of barber apprentices in each shop. Petitioner contended that apprenticeship training requirements were adequate, and that the limitation did not contribute to skill or confer other public benefits, but merely cut down employment opportunities for apprentices. The board answered that the regulation assured personal supervision of apprentices to produce a more competent practitioner, and also prevented exploitation of both the employee and the public by expanded use of low-paid apprentices. "As individuals, we might find the theories supporting the law insubstantial and unacceptable. As a court, pursuing judicially established standards, we may invalidate the statute only if these theories are devoid of any rational connection with public interest objectives as the Legislature may have conceived them. We are not able to say that the law is irrationally conceived, that the Legislature could not have accepted the board's present arguments as the basis for finding that this statute serves a public interest." (219 C.A.2d 517.)

(2) *Proration Laws.* Another drastic limitation on the free operation of business enterprise is a proration law, whereby the production or marketing of agricultural commodities is restricted to allotted quantities, to prevent waste and secure stability in the markets. (See *Agricultural Prorate Com. v. Superior Court* (1936) 5 C.2d 550, 582, 55 P.2d 495; *Brock v. Superior Court* (1937) 9 C.2d 291, 296, 71 P.2d 209.)

But a proration plan designed to benefit some private persons at the expense of others, without furthering a real public interest such as prevention of waste, will fail. In *Thompson v. Consolidated Gas Util. Corp.* (1937) 300 U.S. 55, 57 S.Ct. 364, 374, 81 L.Ed. 510, 522, a Texas statute authorized proration of production of natural gas from a great reservoir. Certain large owners had their own pipelines and markets; others had no pipelines, and hence, no outlets. An order was made cutting production of the larger owners below the amounts needed to fill existing contracts, with the obvious purpose of compelling them to buy the balance from the other owners. *Held*, the order, ostensibly to prevent waste, actually operated to take property of the complaining owners for purely private purposes, and was a denial of due process.

(3) *Protection for Domestic Partners.* Beginning with contracts executed or amended on or after January 1, 2007, no state agency may enter into a contract for the acquisition of goods or services for \$ 100,000 or more with a contractor who discriminates in the provision of benefits between employees with spouses and employees with domestic partners. (*Pub.Contr.C. 10295.3(a).*) For contracts executed on or after July 1, 2004, and before January 1, 2007, a contractor may require an employee to pay for additional benefits that are offered to comply with this section, if the employee elects to have them. (*Pub.Contr.C. 10295.3(d)(4).*)

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6. Regulation of Prices and Rates.

a. Valid Regulations.

8 Witkin Sum. Cal. Law Const Law § 1081

[§ 1081] Valid Regulations.

Following *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, supra, §1072, which rejected the view that only public service businesses could be subjected to price controls, a number of cases upheld the legislative power to regulate ordinary businesses in this respect. (See *Olsen v. Nebraska* (1941) 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 [maximum fees of employment agency]; *Highland Farms Dairy v. Agnew* (1937) 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 [milk industry]; *Jersey Maid Milk Products Co. v. Brock* (1939) 13 C.2d 620, 636, 91 P.2d 577 [milk]; *Townsend v. Yeomans* (1937) 301 U.S. 441, 57 S.Ct. 842, 81 L.Ed. 1210 [tobacco warehouses were affected with public interest and subject to regulation of maximum charges]; *21 Hastings Const. L. Q.* 635 [constitutional limits on physician price controls]; *21 Hastings Const. L. Q.* 669 [health care price controls].)

Statutory regulation of the price of liquor is generally upheld. In *Allied Properties v. Department of Alcoholic Beverage Control* (1959) 53 C.2d 141, 346 P.2d 737, the California compulsory fair-trade statute, fixing minimum prices for retail sales, was sustained. The valid statutory objectives were (a) promoting temperance and discouraging excessive purchases by eliminating bargain sales and advertising of low prices; and (b) preventing price cutting and price wars, as in other fair trade areas. The court thought that the failure to restrict wholesalers was merely another instance of selecting the greater evil for regulation (see supra, §702). It found no unlawful delegation of legislative power in the provision that the price is fixed by each producer or manufacturer, as in ordinary fair trade contracts. (53 C.2d 147.)

The statute was challenged and again upheld in *Wilke & Holzheiser v. Department of Alcoholic Beverage Control* (1966) 65 C.2d 349, 55 C.R. 23, 420 P.2d 735. The court refused to go behind the legislative declaration of objectives, distinguishing economic legislation from legislation affecting basic freedoms. (65 C.2d 359.)

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b. Invalid Regulations.

8 Witkin Sum. Cal. Law Const Law § 1082

[§ 1082] Invalid Regulations.

Occasionally a particular subject presents no problem of public health, waste of resources, or other legitimate object of police power regulation, in which case the court may deny the power to regulate prices, closing hours, advertising, and similar matters. (See *In re Kazas* (1937) 22 C.A.2d 161, 175, 70 P.2d 962 [barbers]; *People v. Osborne* (1936) 17 C.A.2d Supp. 771, 776, 59 P.2d 1083 [same]; *Allen v. California Board of Barber Examiners* (1972) 25 C.A.3d 1014, 1018, 102 C.R. 368 [state board's minimum price schedules for barbers were invalid]; 54 A.L.R.3d 916 [minimum price schedules for barbers].)

A conservative position on price regulation for ordinary businesses was taken by a split court, in *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 C.2d 436, 254 P.2d 29. The state Dry Cleaners' Act created a board that, after investigation, fixed minimum price schedules for dry cleaning on request of more than 75% of the operators in an area. Defendant charged 69 cents for a man's suit in violation of the \$ 1 minimum price. *Held*, injunction denied; the statute was unconstitutional. No legitimate health or safety objective could be shown; the statute was calculated to eliminate economical practices and ignored the interest of members of the public in a cheaper grade of cleaning; its object was to enhance the economic status of the industry and enlarge the profits of the operators; the price fixing was therefore an unreasonable restriction on the pursuit of private business activities and not a proper exercise of the police power. (40 C.2d 441.)

This position was reaffirmed in *People v. Asamoto* (1955) 131 C.A.2d 22, 279 P.2d 1010. Legislation on the marketing of agricultural commodities had been previously sustained (see *supra*, §1080), but in this case a marketing order sought to prohibit price cutting in the sale of bedding flower plants. The court upheld the trial judge's determination that the business was not so essential to the general welfare as to justify regulation of prices and destruction of the incentive of the grower to reduce costs and pass the savings on to the homeowner. (131 C.A.2d 32.)

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c. Insurance Rates.

8 Witkin Sum. Cal. Law Const Law § 1083

[§ 1083] Insurance Rates.

On November 8, 1988, Proposition 103, an initiative measure, was enacted to regulate insurance rates. (See 2 *Summary* (10th), *Insurance*, §9.) Constitutional challenges to a number of provisions were considered in *Calfarm Ins. Co. v. Deukmejian* (1989) 48 C.3d 805, 258 C.R. 161, 771 P.2d 1247, including (1) restrictions on rates, (2) restrictions on insurers' right to renew policies (infra, §1291), and (3) creation of a consumer-advocacy corporation (supra, §163). The principal attack was leveled at the rate restriction provision: "Insurance rates are to be immediately reduced to 'at least 20 percent less' than those in effect on November 8, 1987 (approximately the date when the initiative was proposed, and one year prior to its enactment). ... All rate increases require the approval of the Insurance Commissioner, who may not approve rates which are 'excessive, inadequate, unfairly discriminatory, or otherwise in violation of [the initiative].' Prior to November 8, 1989, however, rates may be increased only if the commissioner finds 'that an insurer is substantially threatened with insolvency.'" (48 C.3d 813.) *Held*, the provision was unconstitutional, but severable.

(a) *Constitutional test*. "The state and federal Constitutions are concerned not so much with the way the initial rates are set as with whether the rates as finally set are confiscatory. ... Consequently, we focus less on the rate specified in the statute than on the ability of the seller to obtain relief if that rate proves confiscatory. The face of a statute rarely reveals whether the rates it specifies are confiscatory or arbitrary, but necessarily discloses its provision, if any, for rate adjustment. Recognizing that virtually any law which sets prices may prove confiscatory in practice, courts have carefully scrutinized such provisions to ensure that the sellers will have an adequate remedy for relief from confiscatory rates." (48 C.3d 816.)

(b) *Insolvency standard*. *Ins.C. 1861.01(b)* limits rate adjustments prior to November 1989, to insurers "substantially threatened with insolvency." Under the definitions of "insolvency," a rate may be confiscatory even though it does not threaten the insurer's solvency. (48 C.3d 818.) The insolvency standard refers to the financial position of the company as a whole, not merely to the regulated lines of insurance. Many insurers do substantial business outside of California, or in lines of insurance within this state that are not regulated by Proposition 103. "If an insurer had substantial net worth, or significant income from sources unregulated by Proposition 103, it might be able to sustain substantial and continuing losses on regulated insurance without danger of insolvency. In such a case the continued solvency of the insurer could not suffice to demonstrate that the regulated rate constitutes a fair return." (48 C.3d 819.) The effect of the statute is to bar safely solvent insurers from obtaining relief from inadequate rates until November

1989. "Temporary rates which might be below a fair and reasonable level might compel insurers to return to their customers surpluses exacted through allegedly excessive past rates. But the concept that rates may be set at less than a fair rate of return in order to compel the return of past surpluses is not one supported by precedent." (48 C.3d 819.)

(c) *No temporary rate freeze.* The measure cannot be sustained as a temporary "freeze" of seller's rates while administrative machinery is set up. "Here we have a law which mandates not maintenance of a rate set by the seller, but a reduction to at least 20 percent less than former rates. The risk that the rate set by the statute is confiscatory as to some insurers from its inception is high enough to require an adequate method for obtaining individualized relief." (48 C.3d 820.)

(d) *No emergency measure.* The section cannot be sustained as an "emergency measure" of limited duration. An emergency measure that deprives persons of a fair return must be "a temporary situation of such enormity that all individuals might reasonably be required to make sacrifices for the common weal." Proposition 103 does not meet this requirement. "The asserted rise in insurance rates rendering insurance unavailable or unaffordable to many, is not a temporary problem; it is a long term chronic situation which will not be solved by compelling insurers to sell at less than a fair return for a year. Over the long term the state must permit insurers a fair return; we do not perceive any short term conditions that would require depriving them of a fair return." (48 C.3d 821.) (See 17 *Pepperdine L. Rev.* 561.)

20th Century Ins. Co. v. Garamendi (1994) 8 C.4th 216, 32 C.R.2d 807, 878 P.2d 566, held that (a) the Insurance Commissioner has the power to adopt regulations to implement the rate rollback provisions of Proposition 103 and to resolve claims that the rates set by the initiative are confiscatory (8 C.4th 280); and (b) upheld the rate regulations, including the ratemaking formula and the establishment of 10% as the lower end of the range of reasonable rates of return, that had been adopted to implement the rate rollback provisions. (8 C.4th 282, 297.) Claims that the ratemaking formula was arbitrary and confiscatory were rejected. (8 C.4th 302.) (See 23 *Pepperdine L. Rev.* 339.)

California Auto. Assigned Risk Plan v. Garamendi (1991) 232 C.A.3d 904, 283 C.R. 562, held that the rate restriction provisions do not apply to policies issued under the California Automobile Assigned Risk Plan (CAARP; see 2 *Summary* (10th), *Insurance*, §15). "Proposition 103 was intended ... to avoid excessive and arbitrary insurance rates by prohibiting companies from raising their rates without the approval of the commissioner. ... The purpose of imposing significant restrictions upon the rates charged by insurance companies, which rates previously had been only minimally regulated, does not apply to assigned-risk insurance policies. The rates charged for assigned-risk insurance were closely regulated before the passage of Proposition 103. In fact, prior to Proposition 103, the regulations promulgated by the commissioner already required CAARP's governing committee to make an annual recommendation for revision of the rates for assigned-risk insurance 'to the end that such rates and added surcharges shall be neither excessive, inadequate or unfairly discriminatory.' " (232 C.A.3d 913.)

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7. Public Utilities in California.

a. Public Utilities Commission.

8 Witkin Sum. Cal. Law Const Law § 1084

[§ 1084] Public Utilities Commission.

Public utilities constitute a limited class of public service businesses, specified by statute, usually including carriers, water companies, and gas and electric companies. Their rates and numerous other matters are governed by a regulatory commission. (See *64 Am.Jur.2d (2001 ed.)*, *Public Utilities §1* et seq.) In California, the power to regulate was established by a constitutional enabling provision (former Cal. Const., Art. XII, §§22, 23, now Cal. Const., Art. XII, §1 et seq.), and by the Public Utilities Act of 1911. The governing agency established by the Constitution was formerly called the *Railroad Commission*, but in 1946, its name was changed to the *Public Utilities Commission*. (See Cal. Const., Art. XII, §1.) In 1951, the *Public Utilities Code* was adopted, superseding the former Act. (See *Pub.Util.C. 201* et seq.)

The Constitution provides for a Public Utilities Commission of five members, appointed by the Governor (Cal. Const., Art. XII, §1), with the power to "fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction" (Cal. Const., Art. XII, §6). (See *Pub.Util.C. 301* et seq. [organization and function of Commission]; on Constitution, statute, powers, and functions of Commission, see *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 C. 640, 650, 137 P. 1119; *In re Martinez* (1943) 22 C.2d 259, 260, 138 P.2d 10; *California Motor Transport Co. v. Railroad Com. of Calif.* (1947) 30 C.2d 184, 185, 180 P.2d 912; *People v. Western Air Lines* (1954) 42 C.2d 621, 630, 268 P.2d 723; *People v. Duque* (2003) 105 C.A.4th 259, 266, 129 C.R.2d 298 [under *Pub.Util.C. 303(a)*, commissioner may not own stock in company that PUC regulates, but statute's forfeiture of office provision, as written, only applies to stock that is acquired involuntarily].) (On power to fix compensation in condemnation of public utility property, see *infra*, §1174; on public service commissions generally, see *64 Am.Jur.2d (2001 ed.)*, *Public Utilities §143* et seq.)

The Commission must create a division to represent the interests of public utility customers and subscribers in Commission proceedings. The goal of the division is to obtain the lowest possible rates for services consistent with reliable and safe service levels. For revenue and rate design matters, the division must "primarily consider the interests of residential and small commercial customers." (*Pub.Util.C. 309.5(a)*.) The Legislature has authorized various programs for the purpose of reducing energy bills, conserving energy, or both. (See *Pub.Util.C. 747.5* [assessment of whether pricing policies promote energy efficiency]; *Pub.Util.C. 749* [public utilities must develop programs in cooperation with school districts to reduce energy bills through conservation and improved efficiency].) (See *Hillsboro*

Properties v. Public Util. Com. (2003) 108 C.A.4th 246, 255, 258, 133 C.R.2d 343 [*Pub.Util.C.* 739.5, which requires utilities to discount their rates to master-meter landlords and requires landlords to charge tenants same rates utilities charge directly-served customers, prevails over city rent control ordinance that resulted in higher rates for submetered tenants of mobilehome park than were paid by other utility customers].)

The Commission must publish an annual *work plan access guide* describing the scheduled ratemaking proceedings and other decisions to be considered during the year, including information on how members of the public and ratepayers can gain access to the proceedings. (*Pub.Util.C.* 321.6.)

The Commission must authorize public utilities to engage in programs to encourage economic development. (*Pub.Util.C.* 740.4.) Reasonable expenses for economic development programs must "be allowed, to the extent of ratepayer benefit, when setting rates to be charged by public utilities electing to initiate these programs." (*Pub.Util.C.* 740.4(b).) The Commission may not establish discriminatory rates for the purpose of attracting or benefiting specific industries or business entities, except those incentives authorized by the Enterprise Zone Act in *Govt.C.* 7070 et seq. and 7080 et seq. (*Pub.Util.C.* 740.4(e).) And the Commission may authorize rate discounts to industries or business entities with facilities located within enterprise zones, recycling market development zones, or economic incentive areas. (*Pub.Util.C.* 740.4(g).)

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Work plan access guide: *Pub.Util.C.* 321.6, as amended in 2006, further requires that the annual work plan include a statement regarding the commission's proposal to reduce energy costs. (*Pub.Util.C.* 321.6(a).) The commission must produce a complete accounting of its transactions and proceedings for the preceding year with recommendations for reducing energy costs. (*Pub.Util.C.* 321.6(b).) It must create a report on the number of cases where resolution exceeded prescribed time periods and the days that commissioners presided in hearings. (*Pub.Util.C.* 321.6(c).) The commission must submit the work plan, accounting, and report to the Governor and Legislature each year by February 1. (*Pub.Util.C.* 321.6(d).)



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b. Jurisdiction of Commission.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1085

[§ 1085] In General.

All *public utilities* are subject to regulation by the Commission. (Cal. Const., Art. XII, §3.) The Commission's power of regulation supersedes that of municipalities and other local governments when in conflict with the powers of the Commission, except for granting franchises and enforcement of local police regulations. (Cal. Const., Art. XII, §8.) The authority of the Legislature to confer additional powers on the Commission respecting public utilities is *plenary and unlimited* by any provision of the Constitution. (Cal. Const., Art. XII, §5.) (See *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 C. 640, 658, 137 P. 1119; *infra*, §1088.)

Several limitations on this broad grant have been recognized:

(1) The "plenary" authority of the Legislature to confer additional powers on the Commission is subject to the limitation that the additional powers must be "cognate and germane to the regulation of public utilities." (*Morel v. Railroad Com. of Calif.* (1938) 11 C.2d 488, 492, 81 P.2d 144; see *People v. Western Air Lines* (1954) 42 C.2d 621, 634, 268 P.2d 723.)

(2) The regulatory powers cannot be exercised over a utility engaged in interstate or foreign commerce (see *infra*, §1094), or where the effect is to hamper agencies of the federal Government (*Public Util. Com. of Calif. v. United States* (1958) 355 U.S. 534, 78 S.Ct. 446, 453, 2 L.Ed.2d 470, 478; see *supra*, §8 et seq.)

(3) The Commission's jurisdiction extends only to regulation of privately owned utilities; in the absence of express statutory provision, it has no jurisdiction over municipally owned utilities. (*Inyo v. Public Util. Com.* (1980) 26 C.3d 154, 166, 161 C.R. 172, 604 P.2d 566.) (On Commission's jurisdiction over municipally owned common carriers, see *infra*, §1093.)

In *California Apartment Assn. v. Stockton* (2000) 80 C.A.4th 699, 95 C.R.2d 605, plaintiff property owners sought mandamus to compel defendant city to comply with *Pub.Util.C. 10009.6*, which prohibits a municipality that operates a public utility from recouping tenants' unpaid utility bills from property owners. Defendant had enacted ordinances permitting this recoupment. *Held*, writ of mandamus granted.

(a) Defendant is a charter city, and the statutory term "municipal corporation" includes charter cities. (80 C.A.4th 703.)

(b) The city had no vested right under its charter to permit recoupment from property owners at the time of the original enactment of Cal. Const., Art. XII, and the city could not derive this power under Cal. Const., Art. XII, §8, by virtue of the plenary authority accorded the Legislature to control a public utility implied from Cal. Const., Art. XII, §5. (80 C.A.4th 712.)

The jurisdiction of the Commission has been raised in many other cases, including the following:

Schell v. Southern Calif. Edison Co. (1988) 204 C.A.3d 1039, 1045, 1047, 251 C.R. 667 [PUC has exclusive jurisdiction over application of rate schedule to particular user].

Southern Calif. Gas Co. v. Vernon (1995) 41 C.A.4th 209, 215, 217, 48 C.R.2d 661 [PUC has exclusive power to regulate safety of gas pipelines, and city cannot regulate design or construction of proposed pipeline under guise of ensuring pipeline's safety; *Pub.Util.C.* 2902 recognizes existing municipal power to regulate location of pipelines on or beneath streets but does not grant new powers].

San Diego Gas & Elec. Co. v. Carlsbad (1998) 64 C.A.4th 785, 802, 75 C.R.2d 534 [fact that PUC failed to enact specific regulations governing disposal of utility's dredging spoils did not mean local entity could do so].

Leslie v. Superior Court (1999) 73 C.A.4th 1042, 1049, 87 C.R.2d 313 [State Housing Law and PUC rules and regulations are of equal dignity; thus, where there is no conflict because PUC has not generated rules on road maintenance or grading on utility easements, "PUC is not exempt from statewide standards governing grading and maintenance of roads"; distinguishing *Carlsbad*].

Southern Calif. Edison Co. v. Peevey (2003) 31 C.4th 781, 795, 3 C.R.3d 703, 74 P.3d 795, 9 Cal. Proc. (4th), *Administrative Proceedings, Supp.*, §10 [PUC had authority to enter into rate settlement agreement arising out of claim that rates frozen by statute were unconstitutionally confiscatory and violated federal filed-rate rule; agreement allowed postfreeze recovery of energy procurement costs, which is not prohibited by *Pub.Util.C.* 368].

Utility Consumers' Action Network v. Public Util. Com. of Calif. (2004) 120 C.A.4th 644, 655, 15 C.R.3d 597 [following *Peevey*; unless inconsistent with state law, PUC has authority to settle lawsuit against it].

Pacific Gas & Elec. Co. v. Public Util. Com. (2004) 118 C.A.4th 1174, 1195, 13 C.R.3d 630 [PUC had jurisdiction over holding companies to enforce conditions it had imposed pursuant to its statutory authority when public utilities applied to reorganize under holding company structure].

SUPPLEMENT: [This section is current through the latest supplement]

The provision in Cal. Const., Art. XII, §5, stating that the Legislature may confer additional powers on the Commission and that this power is plenary and unlimited by any provision in the Constitution, does not preclude the people from using the initiative process to grant additional powers to the Commission. (*Independent Energy Producers Assn. v. McPherson* (2006) 38 C.4th 1020, 1033, 44 C.R.3d 644, 136 P.3d 178 [numerous decisions have held that language in California Constitution establishing authority of Legislature to legislate in particular area must be interpreted to include right of people to exercise similar legislative authority through initiative process].) *Southern Calif. Edison case*:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §12.



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2. Judicial Powers of Commission.

8 Witkin Sum. Cal. Law Const Law § 1086

[§ 1086] Judicial Powers of Commission.

In *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 C.3d 891, 160 C.R. 124, 603 P.2d 41, two proceedings were brought before the Commission: (a) a proceeding for reparation, filed by a nonattorney on behalf of a consumer group consisting only of himself, alleging that a utility had shifted costs from commercial ratepayers to general ratepayers, and (b) a ratemaking proceeding in which a public interest group participated. The reparation proceeding was settled with a requirement that the utility provide a large fund to be expended for the public benefit. In the ratemaking proceeding, certain public benefits were gained. Each petitioner sought an award of attorneys' fees and costs, but the Commission decided that it lacked power to make the award. *Held*, decision annulled in part.

(a) *Award is proper in quasi-judicial reparation proceeding.*

(1) Although the Commission is not a judicial tribunal in a strict sense, it has some judicial powers, particularly those of an equitable character; e.g., it may issue injunctions in aid of its jurisdiction, direct that a trust fund be created to conserve potential refunds, and reform contracts of public utilities. (25 C.3d 906, 907.)

(2) It has express power to order public utilities that charge unlawful rates to make reparation to ratepayers. If a civil action could be brought for this purpose, the court would have equitable jurisdiction to award attorneys' fees under the common fund theory (see 7 Cal. Proc. (4th), *Judgment*, §215). There are persuasive reasons for holding that the Commission likewise has this jurisdiction. Its procedures largely parallel those of courts, and there are identifiable parties; it acts as a trier of fact; it applies rules of law to the facts; and it renders a decision adjudicating vested interests in which there are clear prevailing and losing parties. Moreover, successful reparation proceedings before the Commission may result in the creation of a common fund. (25 C.3d 907, 908.)

(b) *Award to nonattorney is proper in quasi-judicial proceeding.* Several cases have held that nonattorneys who appear in pro. per. in judicial proceedings are not entitled to recover attorneys' fees. The principal purpose of this rule is to discourage legal representation by persons not recognized as professionally competent. But nonattorneys may and do appear in proceedings before the Commission, and the inference that they are deemed competent supports the authority to award reasonable fees for their services. (25 C.3d 913, 914.)

(c) *Award is improper in quasi-legislative ratemaking proceeding.* "The fixing of a rate and the reducing of that rate are prospective in application and quasi-legislative in character." (25 C.3d 909.) There may be a number of interveners in the proceeding, and isolating the contribution of each would further burden the Commission's task of administering the already cumbersome procedure. Hence, the Commission's equitable jurisdiction to award fees in quasi-judicial reparation actions does not extend to its quasi-legislative ratemaking duties. (25 C.3d 909.)

Two concurring and dissenting opinions were filed, each with three justices supporting the views stated. The first opposed the award in reparation cases and the award to nonattorneys (25 C.3d 916); the second saw no objection to an award in ratemaking cases (25 C.3d 917). (See *Wise v. Pacific Gas & Elec. Co.* (1999) 77 C.A.4th 287, 300, 91 C.R.2d 479 [regardless of rule against retroactive ratemaking, PUC in exercise of its equitable jurisdiction must be able to fashion remedy in event of fraud committed by public utility during ratemaking process]; 69 Cal. L. Rev. 969 [Consumers Lobby].)

Where a law provides for enforcement of claims solely in the courts, the Commission has no jurisdiction to fashion a remedy thereunder. (See *Greenlining Institute v. Public Util. Com.* (2002) 103 C.A.4th 1324, 1328, 1333, 127 C.R.2d 736 [PUC has no jurisdiction to enforce Unfair Competition Law (B. & P.C. 17000 et seq.)].)

SUPPLEMENT: [This section is current through the latest supplement]

The Commission has the authority under *Pub.Util.C. 2104* and *2107* to impose fines on public utilities. It is only required to commence an action in superior court to collect those fines if not voluntarily paid. (*Pacific Bell Wireless, LLC v. Public Util. Com.* (2006) 140 C.A.4th 718, 737, 44 C.R.3d 733.) Cross-Reference: 7 Cal. Proc. (5th), Judgment, §249.



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3. Power To Obtain Injunction.

8 Witkin Sum. Cal. Law Const Law § 1087

[§ 1087] Power To Obtain Injunction.

The Commission has the power to seek injunctive relief against utilities in specified circumstances.

(1) *Utilities and Persons Covered.* Legislation permitting injunctive relief applies to passenger stage corporations (*Pub.Util.C. 1044*), household goods carriers (*Pub.Util.C. 5259*), and their officers, directors, and agents.

(2) *Activities Covered.* The Commission may seek relief when the executive director determines that a passenger stage corporation, or its officer, etc., "has engaged in, is engaged in, or is about to engage in," acts or practices violating *Pub.Util.C. 1001* et seq., or a related order, decision, regulation, direction, or requirement. (*Pub.Util.C. 1044*.)

In the case of a household goods carrier, relief may be sought when it, or an officer, etc., fails or omits, or is about to fail or omit, to do anything required of it by law, or by an order, decision, rule, direction, or requirement of the Commission, or is doing anything, is about to do anything, or is permitting anything to be done to violate a law or an order, etc., of the Commission. (*Pub.Util.C. 5259*.)

(3) *Relief Available.* In the case of a passenger stage corporation, the executive director of the Commission may apply to the superior court for an order enjoining the unlawful acts or practices or for an order directing compliance. On a showing by the executive director that the person or corporation has engaged in or is about to engage in the acts or practices, the court may grant a permanent or temporary injunction, restraining order, or other order, including an order permitting the impoundment of vehicles operating in violation of an injunction, restraining order, or other order. (*Pub.Util.C. 1044*.) In the case of a household goods carrier, the executive director may seek to have the violations or threatened violations stopped and prevented, either by mandamus or injunction, including an order permitting impoundment of vehicles used for subsequent operations subject to the order. (*Pub.Util.C. 5259*.)

(4) *Venue.* In the case of a passenger stage corporation, the statute merely requires an application to the superior court. (*Pub.Util.C. 1044*.) In the case of a household goods carrier, the action must be brought in the superior court of the county where the cause or part of it arose, or where the corporation complained of has its principal place of business, or where the person complained of resides. (*Pub.Util.C. 5259*.)

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4. Powers of Other Governmental Agencies.

8 Witkin Sum. Cal. Law Const Law § 1088

[§ 1088] Powers of Other Governmental Agencies.

(1) *Cities and Counties*. The constitutional grant of regulatory power to the Commission precludes the exercise of conflicting power by cities or counties, e.g., in the granting of franchises to operate; but the grant is subject to the proviso that it must not "affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates." (See *Pacific Tel. & Tel. Co. v. Los Angeles* (1955) 44 C.2d 272, 280, 282 P.2d 36; *Southern Pac. Pipe Lines v. Long Beach* (1988) 204 C.A.3d 660, 669, 670, 251 C.R. 411 [city has power to grant franchises to use city streets for oil pipelines, under either Cal. Const., Art. XI, §5 ("home rule" provision; supra, §993), if business is municipal affair, or under *Pub.Util.C.* 6205 (giving cities power to grant oil franchises), if matter is one of statewide concern].) Thus, where the Legislature has not acted to control taxicab rates, a city may do so. (*People v. San Francisco* (1979) 92 C.A.3d 913, 924, 155 C.R. 319.)

Some local matters are, however, of statewide concern, and subject to the paramount power vested in the Commission. (See *Pacific Tel. & Tel. Co. v. San Francisco* (1959) 51 C.2d 766, 768, 336 P.2d 514 [construction and maintenance of telephone lines]; *Union City v. Southern Pac. Co.* (1968) 261 C.A.2d 277, 279, 67 C.R. 816 [railroad grade crossings]; *California Apartment Assn. v. Stockton* (2000) 80 C.A.4th 699, 705, 712, 95 C.R.2d 605, supra, §1085 [statute prohibiting municipal corporations that own public utilities from recovering from property owners unpaid amounts owed by tenants, prevails over conflicting ordinances].)

(2) *Districts*. In *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 C.3d 945, 95 C.R. 17, 484 P.2d 1361, Southern California Edison sought to construct two steam electric generating units in Orange County. It applied to the Commission for a certificate of public convenience and necessity and to the Orange County Air Pollution Control District for a permit. The District, after extensive hearings, denied a permit on the ground of noncompliance with emission control requirements. The Commission, after a hearing in which the District participated, and with knowledge of the District's denial of a permit, granted the certificate and directed that construction begin immediately. The Commission did not contradict the District's findings, but concluded that the District was a local agency whose authority was subordinate to that of the Commission. *Held*, order annulled; the Commission acted in excess of jurisdiction.

(a) The Commission has authority to promote safe operations of utilities, but a jury may find that its standards do not meet the minimum requirement of reasonable care. (4 C.3d 951.) Although a common carrier must comply with Commission orders on health and sanitation of employees, it must also comply with pertinent orders of the Industrial Welfare Commission or Division of Industrial Safety (now Division of Occupational Safety and Health). (4 C.3d 951.)

(b) The Legislature has given the District a legal status separate from the county, and has indicated that air quality is a matter of statewide importance. Hence, as in industrial health and sanitation, the Commission must share its jurisdiction over utilities with that of the District; and, where the District has found that a proposed or existing facility does not comply with applicable regulations, the Commission may not order the utility to violate the ruling. (4 C.3d 954.) The utility may seek court review of the District's ruling under former Health & Saf.C. 24322 et seq. (now *Health & Saf.C. 40864*). (4 C.3d 954.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

8 Witkin Sum. Cal. Law Const Law § 1089

[§ 1089] In General.

A public utility that "does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful," or that omits to do an act, matter, or thing required to be done, either by the Constitution, California law, or an "order or decision of the commission, is liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person." Recovery does not "in any manner affect a recovery by the State" of statutory penalties or "the exercise by the commission of its power to punish for contempt." (*Pub.Util.C. 2106.*)

Under this statute, despite the Commission's exclusive power to regulate, a court may take jurisdiction of a dispute arising under a Commission regulation, acting in aid of the Commission's jurisdiction, or giving relief where the Commission has failed to act. Thus, in *Vila v. Tahoe Southside Water Util.* (1965) 233 C.A.2d 469, 43 C.R. 654, defendant water utility filed its tariff and the Commission approved it. Under the tariff, defendant was required to offer a "single service connection" to multiple units, and plaintiff, owner of an office building, requested this connection. Defendant refused, plaintiff's building remained vacant for lack of a water supply, and he sued for an injunction and compensatory and exemplary damages. *Held*, judgment on demurrer reversed. *Pub.Util.C. 2106*, under which the suit was brought, expressly recognizes the action. While the Commission may enforce its orders and impose fines, it cannot award damages; *Pub.Util.C. 2106* is the only statutory authority for an award of damages. The Legislature could not have intended to deprive a prospective user of that remedy by requiring him to go first before the Commission to obtain a reaffirmation of the approved tariff. (233 C.A.2d 477, 480.) (See *Product Research Associates v. Pacific Tel. & Tel. Co.* (1971) 16 C.A.3d 651, 656, 660, 94 C.R. 216 [court has jurisdiction to determine judicial question whether tariff validly limits liability of utility for negligence]; 2 *Cal. Proc.* (4th), *Courts*, §212.)

In *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 C.4th 893, 55 C.R.2d 724, 920 P.2d 669, plaintiff homeowners sued for personal injury and property damage caused by electric and magnetic fields arising from power lines operated by defendant SDG&E, a public utility, on an easement in close proximity to plaintiffs' residence. Defendant's demurrer was overruled, and it sought writ review in the Court of Appeal. That court, holding that plaintiffs

failed to state a personal injury cause of action and that the property causes of action were barred by *Pub.Util.C. 1759*, issued a writ of mandamus directing the trial court to sustain the demurrer. *Held*, judgment of the Court of Appeal affirmed.

(a) *Governing rule.*

(1) Under *Pub.Util.C. 1759*, only the Supreme Court (but now also the Court of Appeal; see *infra*, §1108), has jurisdiction to review decisions of, or otherwise to interfere with, the PUC in the performance of its duties. This provision must be reconciled with *Pub.Util.C. 2106*, which authorizes a private action in superior court for damages caused by an unlawful act of a public utility. (13 C.4th 916.)

(2) In *Waters v. Pacific Tel. Co.* (1974) 12 C.3d 1, 11, 114 C.R. 753, 523 P.2d 1161, *infra*, §1091, the court reconciled the two statutes by limiting *Pub.Util.C. 2106* to situations where an award of damages would not hinder or frustrate the Commission's declared supervisory and regulatory policies. Hence, an action for damages under *Pub.Util.C. 2106* is barred by *Pub.Util.C. 1759* if an award of damages (a) would directly contravene a specific order or decision of the Commission, or (b) would have the effect of undermining a general supervisory or regulatory policy of the Commission. (13 C.4th 918.)

(3) In applying *Waters*, the Courts of Appeal have tended to permit private damages actions when the bar raised is a Commission ruling on a single matter that does not involve "policy." But when the relief sought would interfere with a broad and continuing supervisory program of the Commission, the Courts of Appeal have held that *Pub.Util.C. 1759* bars the action. (13 C.4th 918, discussing *Cellular Plus v. Superior Court* (1993) 14 C.A.4th 1224, 18 C.R.2d 308, 1 Summary (10th), *Contracts*, §592, *Stepak v. American Tel. & Tel. Co.* (1986) 186 C.A.3d 633, 231 C.R. 37, *infra*, §1090, and *Brian T. v. Pacific Bell* (1989) 210 C.A.3d 894, 258 C.R. 707, *infra*, §1091.)

(b) *Commission's exercise of authority.*

(1) The Commission has broad authority to deal with safety aspects of equipment used by public utilities and equally broad authority over the design and siting of electric power lines. (13 C.4th 923, 924.) Hence, it has the authority to adopt a policy dealing with possible health risks associated with electric and magnetic fields arising from power lines. (13 C.4th 923.)

(2) The Commission has exercised this authority. Beginning in 1989, the Commission took various steps with respect to potential health threats posed by, and possible corrective actions with respect to, power line electric and magnetic fields. (13 C.4th 926.) In 1991, the Commission initiated a broad policy inquiry concerning health effects, and in 1993 it adopted an interim EMF policy for electric utility facilities and power lines. (13 C.4th 929, 930.) That policy generally requires utilities to implement low-cost mitigation measures in *new and upgraded* projects, but does not require action with respect to *existing* facilities. (13 C.4th 931, 934.) The interim policy remains in effect while the Commission continues its inquiry. (13 C.4th 934.)

(c) *Plaintiff's causes of action.*

(1) *Trespass*. This cause of action must fail. *First*, electric and magnetic fields arising from power lines are wholly intangible. *Second*, plaintiffs do not allege any physical damage to their property. Hence, under the rule of *Wilson v. Interlake Steel Co.* (1982) 32 C.3d 229, 185 C.R. 280, 649 P.2d 922, 13 Summary (10th), *Equity*, §136, the complaint does not state facts sufficient to constitute a cause of action for trespass. (13 C.4th 935.)

(2) *Nuisance*. This cause of action is barred. Plaintiffs do not claim that the electric and magnetic fields arising from the power lines caused them actual physical harm. Instead they claim that they *feared* that the fields would cause them harm. But the Commission has concluded (a) that the available evidence does not support a reasonable belief that the fields pose a substantial risk of physical harm, and (b) that the utilities need take no action until the time when the evidence does support this belief. Hence, to allow recovery on the basis of plaintiffs' fear of harm would interfere with

the policy adopted by the *Commission*. (13 C.4th 937.)

(3) *Inverse condemnation*. This cause of action also must fail. Here, there was neither physical damage to nor physical invasion of plaintiffs' property. (13 C.4th 940.) To recover for an intangible intrusion that does not cause physical damage, plaintiffs must meet the test of *Varjabedian v. Madera* (1977) 20 C.3d 285, 142 C.R. 429, 572 P.2d 43, *infra*, §1152, i.e., the intrusion must result in a "burden on the property that is direct, substantial, and peculiar to the property itself." (13 C.4th 940.) Plaintiffs cannot meet this requirement. They have not alleged any actual physical consequences caused by the electric and magnetic fields. And fear that an intangible intrusion may cause *future* harm is insufficient to show the direct and substantial burden that is required to satisfy the taking or damaging element of inverse condemnation. (13 C.4th 943.) (See *Ford v. Pacific Gas & Elec. Co.* (1997) 60 C.A.4th 696, 702, 70 C.R.2d 359 [following *San Diego Gas*; rejecting wrongful death claim of widow of employee who died of brain cancer allegedly caused by EMF exposure]; 24 *Pepperdine L. Rev.* 1458 [*San Diego Gas*].)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §211.



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2. Private Right of Action Allowed.

8 Witkin Sum. Cal. Law Const Law § 1090

[§ 1090] Private Right of Action Allowed.

In *Ventura County Waterworks Dist. No. 12 v. Susana Knolls Mut. Water Co.* (1970) 7 C.A.3d 672, 87 C.R. 1, plaintiff, a county waterworks district, sought a declaration of its right to furnish water in an area served by defendants, unregulated mutual water companies. *Held*, a declaratory judgment was proper; the superior court may exercise equitable jurisdiction, even though it determines the status of an unregulated utility under *Pub.Util.C. 2705*, until the Commission acts. (7 C.A.3d 679.)

In *Empire West v. Southern Calif. Gas Co.* (1974) 12 C.3d 805, 117 C.R. 423, 528 P.2d 31, plaintiff, developer of an apartment complex, was given a cost analysis of a central heating and cooling system by defendant. In this action plaintiff alleged that the cost had been misrepresented, and that he relied on defendant's figures in installing a gas system instead of an electric powered system, which would have been substantially less expensive. Defendant contended that the action sought an illegal rebate or preferential rate in violation of *Pub.Util.C. 532*. *Held*, a cause of action was stated. The dispute was not over the rate for gas service; the misrepresentation alleged was as to the quantity of gas the project would consume. This brought the case within *Pub.Util.C. 2106*, permitting damage actions based on the commission of any unlawful act. (12 C.3d 810, 811.) (See *Masonite Corp. v. Pacific Gas & Elec. Co.* (1976) 65 C.A.3d 1, 7, 135 C.R. 170 [damages for breach of contract, based on failure to keep accurate meters and overcharging for gas that was not delivered]; *Pink Dot v. Teleport Communications Group* (2001) 89 C.A.4th 407, 418, 107 C.R.2d 392 [following *Empire West*; claims against defendant telephone company for fraud in inducement relating to installation of Caller ID services and false representations regarding defendant's experience and reliability, and for intentional interference with plaintiff's economic relations by installing disconnect notice rather than forwarding number when plaintiff discontinued defendant's services, would not "hinder or frustrate" PUC's supervisory or regulatory policies, and thus are permitted under *Pub.Util.C. 2106*].)

In *Stepak v. American Tel. & Tel. Co.* (1986) 186 C.A.3d 633, 231 C.R. 37, plaintiff minority shareholder of defendant public utility brought an action for breach of fiduciary duty in connection with a merger of defendant with another utility. Prior to the suit, the PUC had approved the transaction, finding that the merger was fair to the minority shareholders; and after the Commission decision became final and the merger was consummated, defendant's motion to dismiss the action was granted. *Held*, reversed.

(a) *Waters v. Pacific Tel. Co.* (1974) 12 C.3d 1, 11, 114 C.R. 753, 523 P.2d 1161, *infra*, §1091, is distinguishable. No supervisory and regulatory policies were ever formulated by the Commission on the subject of safeguarding minority interests, and a superior court's award of damages or other relief to wronged minority shareholders would not hinder or frustrate declared Commission policy. (186 C.A.3d 640.)

(b) The Commission had no authority to adjudicate the fairness of the transaction to minority shareholders as distinct from the issue whether retention of minority shareholders was in the public interest. (186 C.A.3d 641, citing and discussing *Pacific Tel. & Tel. Co. v. Public Util. Com. of Calif.* (1950) 34 C.2d 822, 215 P.2d 441, *infra*, §1104.) Whether to retain minority shareholders as a voting voice was within the scope of its authority; but having allowed the minority shareholders' influence to disappear in the merger, consideration of the merger's fairness to the disappearing minority was beyond its regulatory powers. (186 C.A.3d 645.)

People v. Pacific Bell (2003) 31 C.4th 1132, 7 C.R.3d 315, 80 P.3d 201, held that *Pub.Util.C. 1759*, which protects the jurisdiction of the PUC, did not preclude a superior court action by several district attorneys against a public utility for false advertising and unlawful business practices. A decision of the PUC in an action based on similar complaints expressly stated that it did not adjudicate claims under the *Unfair Competition Law*. (31 C.4th 1143.) District attorneys are authorized by statute to bring actions against public utilities that have violated the law "where the PUC does not possess exclusive regulatory authority over a matter." (31 C.4th 1151.) Further, the superior court action would not interfere with the PUC's performance of its official duties. (31 C.4th 1151.) (See *Hartwell Corp. v. Superior Court* (2002) 27 C.4th 256, 276, 115 C.R.2d 874, 38 P.3d 1098 [although challenge to adequacy of standards is barred, damage claims against regulated water companies based on theory that water failed to meet federal and state drinking water standards are not preempted by *Pub.Util.C. 1759*; finding that company violated these standards does not interfere with PUC regulatory policy requiring compliance]; *Cundiff v. GTE Calif.* (2002) 101 C.A.4th 1395, 1405, 1411, 125 C.R.2d 445 [action for damages challenging manner in which defendants billed plaintiffs for rental of telephones was authorized by *Pub.Util.C. 2106* and not precluded by *Pub.Util.C. 1759*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Koponen v. Pacific Gas & Elec. Co.* (2008) 165 C.A.4th 345, 358, 81 C.R.3d 22 [following *Stepak v. American Tel. & Tel. Co.* (1986) 186 C.A.3d 633, 231 C.R. 37, text, p. 714, and *Hartwell Corp. v. Superior Court* (2002) 27 C.4th 256, 115 C.R.2d 874, 38 P.3d 1098, text, p. 715; in action based on defendant utility leasing or licensing rights in easements burdening plaintiffs' property to telecommunication companies, *Pub.Util.C. 1759* did not bar plaintiffs' claim for damages incurred as result of unauthorized uses of rights-of-way and did not prevent plaintiffs from seeking to enjoin defendant from invading their property interests by licensing or leasing defendant's facilities; finding that defendant was violating plaintiffs' property rights would not interfere with PUC's declared policy of encouraging joint use of defendant's facilities].



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8 Witkin Sum. Cal. Law Const Law § 1091

[§ 1091] Private Right of Action Rejected.

Although the courts may entertain suits for recovery of money due under established rates for transportation, they cannot ignore a prior decision of the Commission relating to transportation rates. "[N]o sensible person viewing the general situation should for a moment contend that there is an area within which the commission and the courts can legitimately reach exactly opposite and conflicting conclusions on a given set of facts. One or the other body must prevail on any given question, and it appears clear that the elimination of discrimination between carriers and the prevention of special benefits to favored shippers through ingenious devices to that end are within the exclusive supervision of the Public Utilities Commission." (*Pratt v. Coast Trucking* (1964) 228 C.A.2d 139, 149, 39 C.R. 332 [prior determination that Coast Trucking was not prime hauler but was *alter ego* of shipper].)

In *People v. Superior Court* (1965) 62 C.2d 515, 42 C.R. 849, 399 P.2d 385, the Commission ordered D Water Co. to terminate an interim rate increase. After affirmance of the order on review, it ordered the lower rates in effect and directed D Co. to formulate and advise the Commission of a plan to make refunds to customers. D Co. did not comply, and brought this action for declaratory relief to determine whether claims for refunds were assignable and whether unclaimed refunds were payable to the state. *Held*, prohibition granted. The issues raised by the suit were not yet ready for decision because D Co. had not presented its plan, and until it did and the Commission ruled on the plan and those issues, the court was prohibited by *Pub.Util.C. 1759* from adjudicating them. (62 C.2d 518.) (See *Independent Laundry v. Railroad Com.* (1945) 70 C.A.2d 816, 821, 826, 161 P.2d 827 [no jurisdiction of action for declaratory relief with respect to regulation of Commission]; *Harmon v. Pacific Tel. & Tel. Co.* (1960) 183 C.A.2d 1, 3, 6 C.R. 542 [Commission has exclusive jurisdiction over conditions under which utilities render their services--here billing for "message units"]; *Dollar-A-Day Rent-A-Car Systems v. Pacific Tel. & Tel. Co.* (1972) 26 C.A.3d 454, 462, 102 C.R. 651 [without factual determination by Commission concerning alleged discrimination in display advertising in "Yellow Pages," court lacked jurisdiction to grant injunctive relief and damages].)

In *Waters v. Pacific Tel. Co.* (1974) 12 C.3d 1, 114 C.R. 753, 523 P.2d 1161, the Commission adopted a policy limiting liability of telephone utilities for acts of ordinary negligence to a specified credit allowance set forth in approved tariff schedules which form a contract with customers. Plaintiff brought this action against defendant telephone company, claiming substantial damages for breach of contract, on allegations of improper maintenance,

installation of phones, and handling of calls. Defendant set up its tariff schedule and offered the credit allowance limited to the total charges for the period during which the phone was out of service. *Held*, the action was barred.

Pub.Util.C. 2106 (supra, §1089) must be construed in harmony with *Pub.Util.C. 1759* (infra, §1108), which deprives the superior courts of jurisdiction to review orders of the Commission. So construed, it authorizes only those actions that "would not interfere with or obstruct the commission in carrying out its own policies." (12 C.3d 11.) (See *Colich & Sons v. Pacific Bell* (1988) 198 C.A.3d 1225, 1235, 1239, 244 C.R. 714 [following *Waters*; no action for ordinary negligence, but cause of action for gross negligence could be stated]; *Los Angeles Cellular Tel. Co. v. Superior Court* (1998) 65 C.A.4th 1013, 76 C.R.2d 894 [following *Waters*; limitation of liability for negligence included in tariff was binding on public].)

In *Citizens Util. Co. v. Superior Court* (1976) 56 C.A.3d 399, 128 C.R. 582, the Attorney General brought a quo warranto proceeding to oust a privately owned public water utility of its franchise, on the ground that it was furnishing unpotable water to consumers. *Held*: (a) The proceeding was authorized by C.C.P. 803 (56 C.A.3d 405, 406); but (b) it could not be maintained when the Commission had already assumed jurisdiction over the utility and had acted on a matter germane to the subject of the quo warranto proceeding (56 C.A.3d 409, 410).

In *Brian T. v. Pacific Bell* (1989) 210 C.A.3d 894, 258 C.R. 707, parents of two minors sought injunctive relief and damages against a telephone company and various suppliers of sexually explicit messages. The complaint alleged that one minor, after listening to these messages on "976" lines, sexually assaulted the second minor. The trial court denied the motion for a preliminary injunction and dismissed the action against the telephone company. *Held*, affirmed.

(a) Under *Waters*, the jurisdiction of the superior court is limited to situations where the relief requested would not hinder or frustrate the Commission's policies. (210 C.A.3d 900.)

(b) The Commission has adopted central station blocking to implement the requirement of *Pub.Util.C. 2884* (infra, §1102) that customers be allowed to delete access to 976 service. Because the requested injunctive relief would interfere with this decision, the trial court lacked jurisdiction. (1) The request that the telephone company provide devices to prevent access to minors would require the Commission to modify its previous decisions; under *Pub.Util.C. 1759*, this challenge may only be made by mandamus in the Supreme Court (and now also the Courts of Appeal; see infra, §1108). (210 C.A.3d 900, 901.) (2) The request to restrain violations of P.C. 313.1 (distributing harmful matter to minors) is a disguised attempt to compel adoption of a customer access code rather than using blocking devices. (210 C.A.3d 901.) (3) The request to enjoin violations of P.C. 311.2 (distributing obscene matter) does not conflict with the Commission's jurisdiction but does raise difficult constitutional issues, and there was no abuse of discretion in denying the request. (210 C.A.3d 902, 903.)

(c) On the issue of damages, *Sokol v. Public Util. Com.* (1966) 65 C.2d 247, 53 C.R. 673, 418 P.2d 265, supra, §683, absolves the telephone company of liability because it acted under compulsion of the Commission's orders. (210 C.A.3d 904, 908.) (See *White v. Southern Calif. Edison Co.* (1994) 25 C.A.4th 442, 452, 453, 30 C.R.2d 431, 5 Summary (10th), Torts, §10 [rejecting claim that *Pub.Util.C. 2106*, in conjunction with Streets and Highways Code provisions requiring public entities to maintain highways in safe condition, creates statutory scheme imposing liability on public utilities to third parties for failure to maintain street lights]; *Anaheim v. Pacific Bell Tel. Co.* (2004) 119 C.A.4th 838, 845, 14 C.R.3d 725 [distinguishing *People v. Pacific Bell* (2003) 31 C.4th 1132, 7 C.R.3d 315, 80 P.3d 201, supra, §1090; PUC had exclusive authority of dispute between city and utility over who should pay to put overhead facilities underground].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Anchor Lighting v. Southern Calif. Edison Co.* (2006) 142 C.A.4th 541, 549, 47 C.R.3d 780 [following *Waters v. Pacific Tel. Co.* (1974) 12 C.3d 1, 114 C.R. 753, 523 P.2d 1161, text, p. 716; superior court lacked jurisdiction to hear unfair competition action against utility that would interfere with PUC's ratemaking powers and established financing scheme].



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1. In General.

8 Witkin Sum. Cal. Law Const Law § 1092

[§ 1092] In General.

Classes of public utilities are set forth in both the Constitution and the statute. The Constitution provides:

"Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities." (Cal. Const., Art. XII, §3; see *People v. Western Air Lines* (1954) 42 C.2d 621, 635, 641, 268 P.2d 723 [term "transportation company" includes air carriers].)

The general language of the Constitution is given specific content in the statute. The term "public utility" includes every common carrier, and every toll bridge, pipeline, gas, electrical, telephone, telegraph, water, sewer system, and heat corporation, "where the service is performed for or the commodity delivered to the public or any portion thereof." (*Pub.Util.C.* 216(a); see *Pub.Util.C.* 330 et seq. [electrical restructuring]; 28 *Loyola L.A. L. Rev.* 1453 [Commission's regulation of telecommunications toll market]; 33 *McGeorge L. Rev.* 355 [utilities told not to sell their generation assets].)

Statutes formerly required motor carriers to obtain a certificate of public convenience or a permit to operate from the PUC. These statutes were repealed after the adoption of Public Law 103-305 in 1994, which exhibited an intention to "generally preempt the states from regulating any matter related to the price, route, or service of motor carriers of property and air carriers transporting property by motor vehicle." (Stats. 1995, Chap. 915, §1; see 49 U.S.C., §13101 et seq. [motor and water carriers]; 49 U.S.C., §31131 et seq. [commercial motor vehicle safety]; 49 U.S.C., 40101 et seq. [air commerce]; 49 U.S.C., §10701 et seq. [railroads].) Many statutes governing intrastate transportation of passengers by air carriers also have been repealed. However, these carriers may still be required to register with the Commission and to procure adequate liability insurance. (See *Pub.Util.C.* 3901 et seq. [requiring household goods carriers and interstate motor carriers of passengers to register with PUC in accordance with regulations of Interstate Commerce Commission]; *Pub.Util.C.* 4000 et seq. [requiring *private carriers*, i.e., not-for-hire carriers as defined in *Veh.C.* 408, who transport passengers, to register with Commission and procure liability insurance]; *Pub.Util.C.* 5503 [requiring

adequate liability insurance for commercial air carriers].) (See *87 A.L.R.4th* 638 [regulation of incidental provision of transportation services by party not primarily in that business]; on publicly owned transportation systems, see *infra*, §1093.)

SUPPLEMENT: [This section is current through the latest supplement]

Pub.Util.C. 5800 et seq., the Digital Infrastructure and Video Competition Act, was added in 2006. The Act provides for the issuance of state franchises to provide cable and video services that would be administered by the PUC.



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2. Public Transportation Authority.

8 Witkin Sum. Cal. Law Const Law § 1093

[§ 1093] Public Transportation Authority.

The view that the Commission has no jurisdiction over a utility operated by a municipality or other public corporation (see *Pasadena v. Railroad Com. of Calif.* (1920) 183 C. 526, 529, 192 P. 25) was repudiated in *Los Angeles Metropolitan Transit Authority v. Public Util. Com.* (1963) 59 C.2d 863, 31 C.R. 463, 382 P.2d 583. The Los Angeles Metropolitan Transit Authority, a public transportation authority, operated as a common carrier of passengers, baggage, and mail in Los Angeles and three other counties. A 1961 amendment to its statute provided that it should be subject to the jurisdiction of the PUC with respect to safety rules and other regulations. The Authority, relying on statements in *Pasadena v. Railroad Com.*, contended that Cal. Const., Art. XII, §23 (now Cal. Const., Art. XII, §3), only authorizes legislation to give regulatory jurisdiction over private transportation utilities, and sought review of a Commission order directing it to comply. *Held*, order affirmed. The constitutional provision refers to "every private corporation ... and every common carrier" (now "private corporations ... and common carriers"), and a publicly operated common carrier comes within this express language, interpreted in accordance with today's conditions (which have seen many of these public transportation authorities). Contrary language in *Pasadena* is disapproved. (59 C.2d 870.) (For contrary result in case dealing with municipally owned utilities, see *Inyo v. Public Util. Com.* (1980) 26 C.3d 154, 166, 161 C.R. 172, 604 P.2d 566, *supra*, §1085.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Santa Clara Valley Trans. Authority v. Public Util. Com. of Calif.* (2004) 124 C.A.4th 346, 365, 21 C.R.3d 270 [Pub.Util.C. 1201 and 1202, which grant exclusive jurisdiction to PUC over railroad crossings in general, do not apply to local transit district's light rail crossings; PUC jurisdiction over transit district must be clearly provided by statute].



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8 Witkin Sum. Cal. Law Const Law § 1094

[§ 1094] In General.

The fact that a business is a public utility does not necessarily mean that it is regulated by the Public Utilities Commission because the Commission has jurisdiction only over the utilities specified and defined in the statute (see *supra*, §1085). (See Cal. Const., Art. XII, §3 [listed businesses are declared to be public utilities "subject to control by the Legislature"]; *In re Martinez* (1943) 22 C.2d 259, 261, 138 P.2d 10.) Public utilities are, for this or other reasons, not subject to the Commission's jurisdiction in the following important situations:

(1) *Interstate or Foreign Commerce*. The PUC lacks jurisdiction where the utility is engaged in interstate or foreign commerce. (*Pub.Util.C.* 202; see *People v. Yahne* (1925) 195 C. 683, 686, 235 P. 50; *Meyers v. Railroad Com. of Calif.* (1933) 218 C. 316, 319, 23 P.2d 26.)

(2) *Municipal Water Company*. A corporation or association organized for the purpose of delivering water to its stockholders or members at cost, and which delivers water to no others except its stockholders or members, the state or a state agency, a specified public agency, or another mutual water company, is not a public utility. (*Pub.Util.C.* 2705.) If it does deliver water to others, it becomes a public utility. (*Pub.Util.C.* 2702.)

In *Yucaipa Water Co. No. 1 v. Public Util. Com.* (1960) 54 C.2d 823, 9 C.R. 239, 357 P.2d 295, the mutual water company supplied water to *lessees* of shares, and expedited the leasing of shares to anyone who wanted water service. The court held that *Pub.Util.C.* 2702 controlled, and that the company was a public utility subject to regulation.

This rule was nullified by an amendment to *Pub.Util.C.* 2705, providing that a mutual water company may perform certain acts without becoming a public utility. These include: (a) delivery of water at cost to lessees of shares under a written lease approved by the company; (b) delivery of water at cost to land leased by a stockholder or member to a stranger under a written lease approved by the company; (c) transfer or exchange of water or water rights to or with another entity pursuant to state or federal law; (d) delivery of water to a stranger whose land is within or adjacent to the service area, under a written contract "in a bona fide water emergency, but for no longer than the existence of such emergency"; (e) delivery of water pursuant to a contract in settlement of litigation or in consideration of a water right, etc.

The Legislature has the power under Cal. Const., Art. XII, §5, to give the Commission regulatory authority over municipally owned utilities selling to outside customers; but no such legislation has been enacted, and neither statutory nor case law authority supports regulation of rates by the Commission. (*Inyo v. Public Util. Com.* (1980) 26 C.3d 154, 163, 161 C.R. 172, 604 P.2d 566.)

(3) *Activity Outside Statutory Classification.* In *Television Transmission v. Public Util. Com.* (1956) 47 C.2d 82, 85, 301 P.2d 862, petitioner operated a "community television antenna," consisting of an antenna at a high elevation to receive and transmit by coaxial cable to subscribers in a particular low area. By agreement, it used power and telephone poles for its wires. The Commission found it to be a telephone corporation, on the theory that, because the statute permits television broadcasts to be carried over telephone lines, any line carrying these broadcasts is a telephone line, and its operator is a telephone corporation. *Held*, the Commission had no jurisdiction. The community antenna is not operated "in connection with or to facilitate communication by telephone" (*Pub.Util.C.* 233), and, despite some similarities in television and telephony, their distinct differences are such that only the Legislature can bring petitioner's activity within the Commission's regulatory power. (47 C.2d 85.) (See *Pub.Util.C.* 767.5 [Commission's power to establish terms of agreement between public utility and cable television corporation concerning use of utility's equipment]; *Pub.Util.C.* 768.5 [Commission's power to regulate safety aspects of cable television operations]; 61 A.L.R.3d 1150 [community antenna television systems as subject to jurisdiction of public utility commission].)

On the other hand, in *Commercial Communications v. Public Util. Com.* (1958) 50 C.2d 512, 327 P.2d 513, the Commission took jurisdiction over the public mobile communication service (by radiotelephone) offered by Pacific Telephone and Telegraph Company. *Held*, order affirmed. The dissenters contended that the system was analogous to private interoffice or intrabuilding communication systems (50 C.2d 530), and competing private companies argued that Pacific was merely leasing radio equipment. The majority, however, thought that mobile communication was more akin to telephony than to radio broadcasting, pointing out that today a great deal of ordinary toll telephoning takes place over radio. Hence, the mobile communication is a telephone service, and if dedicated to public use is subject to the Commission's jurisdiction.

(4) *Winter Sport Activities.* The owner or operator of "any recreational conveyance such as a ski lift, ski tow, J-bar, T-bar, chair lift, aerial tramway," or other device is exempted from the definition of "common carrier." (*Pub.Util.C.* 212(c); see *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 C.A.4th 1499, 1508, 3 C.R.2d 897 [purpose of statute is to exempt ski lift operators from PUC regulation as common carriers; for purposes of tort liability, ski lift operator is common carrier as defined in C.C. 2168].)

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8 Witkin Sum. Cal. Law Const Law § 1095

[§ 1095] Exceptions Based on Source of Power.

(1) *Facilities Employing Unusual Technology.* A facility that employs "cogeneration technology or produces power from other than a conventional power source" or "landfill gas technology" is excluded from the definition of "public utility." (*Pub.Util.C. 216(d)*.) Facilities employing these technologies, or digester gas technology, are exempted from the definition of "electrical corporation" where the electricity generated is for limited use and not for general sale. (*Pub.Util.C. 218(b)*, (c), (d).) Utilities developing, transmitting, or selling any form of heat derived from geothermal or solar resources or from cogeneration technology are also excluded from the definition of "public utility." (*Pub.Util.C. 216(e)*.) (See *Pub.Res.C. 25134* [defining "cogeneration" as "sequential use of energy for the production of electrical and useful thermal energy," sequence being either "thermal use followed by power production or the reverse"].)

(2) *Sale of Compressed Natural Gas as Motor Vehicle Fuel.* A facility that "sells compressed natural gas at retail to the public for use only as a motor vehicle fuel" is excluded from the definition of "public utility." (*Pub.Util.C. 216(f)*.)

(3) *Wholesale Generator.* Facilities that are certified by the Federal Energy Regulatory Commission as exempt wholesale generators under the federal statute are exempt under the California statute. (*Pub.Util.C. 216(g)*.)

(4) *Power Exchange.* The ownership, control, operation, or management of an electric plant that is used for or participates in direct transactions to customers or sales into an independent power exchange under *Pub.Util.C. 365*, or the use or sale of electricity under *Pub.Util.C. 218(b)-(d)*, is exempted. (*Pub.Util.C. 216(h)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Facilities Employing Unusual Technology.* *Pub.Util.C. 218(e)*, added in 2008, provides an exemption from the definition of "electrical corporation" for independent solar energy producers, as defined in *Pub.Util.C. 2868* et seq.

(3) *Wholesale Generator.* *Pub.Util.C. 216(g)*, as amended in 2008, no longer specifies that facilities be certified as exempt by the Federal Energy Regulatory Commission.

(4) *Power Exchange.* *Pub.Util.C. 216(h)*, as amended in 2008, further provides an exemption of power plants for

sales into markets established and operated by the Independent System Operator or other wholesale electricity market.



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8 Witkin Sum. Cal. Law Const Law § 1096

[§ 1096] Specialized Transportation Vehicles.

Several specialized types of transportation are outside the scope of the Public Utilities Code. They include:

(1) *Vessel Loop Service*. *Pub.Util.C. 1007* requires a certificate of public convenience and necessity for the operation of a vessel for "transportation" of persons or property for compensation "between points in this State." In *Golden Gate Scenic Steamship Lines v. Public Util. Com.* (1962) 57 C.2d 373, 19 C.R. 657, 369 P.2d 257, petitioners operated sight-seeing vessels starting at a San Francisco wharf, traveling in a continuous loop around the bay, and returning to the point of origin. The Commission had long exercised unchallenged jurisdiction over this kind of service, but the court, in this first case to raise the issue, held that "transportation" means taking persons or property from one point to *another*, and "between points" means between *two places*; hence, the statute did not apply. (57 C.2d 378.) (See *St. Helena v. Public Util. Com.* (2004) 119 C.A.4th 793, 803, 14 C.R.3d 713 [following *Golden Gate Scenic Steamship Lines*; Napa Valley Wine Train, which provides round-trip excursion from Napa and is essentially "restaurant on wheels," does not provide "transportation" and is not public utility; fact that Wine Train could provide transportation in future does not entitle it to current public utility status].)

(2) *Military Transportation*. A vessel operated under contract with a federal agency, with one terminus in a military reservation, is not a common carrier. (*Pub.Util.C. 212*.)

(3) *Medical Transportation Vehicles*. These vehicles, including those used to transport developmentally disabled persons for regional centers, are expressly exempted from the regulations governing carriers. (*Pub.Util.C. 5353(i)*.)

(4) *Rental Car and Hotel Shuttles*. Vehicles used by automobile rental companies, hotels, and other places of lodging, to transport customers to and from the particular facility are exempt. (*Pub.Util.C. 5353(k), (l)*.)

(5) *Balloon Chase Vehicles*. Transportation of hot air balloon ride passengers in a balloon chase vehicle from the landing site back to the take-off site are exempt, provided that the balloon ride was conducted by a balloonist meeting specified qualifications. (*Pub.Util.C. 5353(m)*.)

(6) *Transportation Services for Youth Camps*. Transportation services incidental to the operation of qualified youth camps are exempt. (*Pub.Util.C. 5353(n)*.)

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f. Private Utilities.

8 Witkin Sum. Cal. Law Const Law § 1097

[§ 1097] Private Utilities.

A person may engage in the business of transportation to serve particular persons by private contract; and, if this is his or her clear intention and practice, the business cannot be classified as a public utility. To be subject to regulation, it must appear that there was an undertaking or "holding out" to serve the public generally or some portion of it. (See *Allen v. Railroad Com. of Calif.* (1918) 179 C. 68, 81, 175 P. 466; *Forsyth v. San Joaquin Light & Power Corp.* (1929) 208 C. 397, 404, 281 P. 620; *California Water & Tel. Co. v. Public Util. Com.* (1959) 51 C.2d 478, 490, 334 P.2d 887.)

This view is recognized in the statute. For example, *Pub.Util.C.* 216(a) adds a qualification to the enumeration of the types of public utilities regulated: "where the service is performed for, or the commodity is delivered to, the public or any portion thereof." (See *supra*, §1092.)

In 1919, the Auto Stage and Truck Transportation Act gave the Commission the power to regulate the business of carriers operating for compensation over public highways between fixed termini or over a regular route. F operated trucks on special private contract. The California court declared that the right to use the highways was a special privilege that could be withheld from anyone refusing to submit to regulation of his or her business. (*Frost v. Railroad Com. of Calif.* (1925) 197 C. 230, 237, 240 P. 26.) But the U.S. Supreme Court held this to be a violation of due process on the ground that the state could not constitutionally force a private carrier to become a public utility; and, lacking this direct power, it could not accomplish the same result by the imposition of an unconstitutional condition. (*Frost & Frost Trucking Co. v. Railroad Com. of Calif.* (1926) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101.) (On doctrine of unconstitutional conditions, see *supra*, §§812, 813.)

The statute condemned in *Frost* compelled a private carrier to become a *common carrier*, with the necessarily incident obligations of dedication of property to public use and service to the public generally. However, the state has some authority to regulate private carriers under its power over the use of its highways. (See *Pub.Util.C.* 4000 et seq. [requiring private carriers to register with Commission].)

In *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 C.2d 419, 6 C.R. 548, 354 P.2d 4, the dedication concept was reexamined, historically and analytically, and reaffirmed. Southern California Edison Co. (E Co.) needed a dependable supply of natural gas as boiler fuel for a new steam-electric generating plant in Ventura. Richfield Oil Co. (R Co.) was

able and willing to commit itself to deliver this supply. Southern Counties Gas Co. (S Co.), a regulated public utility gas corporation serving that territory, objected; but it offered only an interruptible supply subject to being shut off when its regular domestic customers needed the full supply. The Commission determined that R Co. was a public utility, and entered a cease and desist order. R Co., a private company selling only to selected contract customers, was unwilling to become a regulated public utility gas corporation and refused to apply for or accept a certificate. The court stated the issue thus arising as follows: Assuming that R Co.'s service to E Co. could be constitutionally subjected to regulation, did this single service constitute a dedication to public use under the California Constitution and statutes? The answer was *no*, and the Commission's orders were annulled.

(a) The dedication test is authoritatively established. S Co. contended that the requirement was based on the view of federal due process discarded in *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, supra, §1072, and urged a reinterpretation of the statutes to give them their full constitutionally permissible meaning today. The court thought this argument far from frivolous. "If we were called upon to decide the question for the first time in the light of modern principles of constitutional law, we would have serious doubts that the broad language of the ... Public Utilities Act should be interpreted as including the limitation of dedication that the court found in the constitutional provision." (54 C.2d 428.) However, in an unbroken line of decisions the court has consistently interpreted the statutory definitions of public utilities "as applying only to utilities that have dedicated their property to public use." (54 C.2d 429.) Despite investigations and recommendations by the Commission on the unregulated status of gas producers who sell to regulated public utilities, no legislative change was made. Accordingly, "it must be concluded that the Legislature by its repeated reenactment of the definitions of public utilities without change has accepted and adopted dedication as an implicit limitation on their terms." (54 C.2d 430.)

(b) Important policy considerations make this a legislative and not a judicial problem: (1) Abandonment of the dedication requirement would subject every oil and gas producer selling for use or resale to the public to the Commission's extensive jurisdiction, creating manifold problems in the industry; e.g., in segregating oil production, for the Act does not regulate oil corporations. (2) It would subject to regulation many small producers whose activities are too restricted to merit public concern. (3) Many major oil and gas producers are foreign corporations that cannot lawfully transact public utility business in this state and the Legislature might well have considered that, in rejecting the dedication requirement, it would have rendered unlawful a substantial part of the development of the oil and gas industry in this state. (4) Even if regulation were extended to all oil and gas producers falling within the literal language of the Act, producers who used the gas themselves or sold it for manufacture into chemical products or other uses not specified in the Act would escape regulation. (5) There has been no sufficient misuse of gas or wasteful marketing under the present law to induce the Legislature to change it, and the Legislature can best determine the economic situation. (54 C.2d 431 et seq.)

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8 Witkin Sum. Cal. Law Const Law § 1098

[§ 1098] Permission To Enter Business.

A person or corporation desiring to commence a public utility business must first obtain a *certificate of public convenience and necessity* from the Commission, which will not be granted where the field is already adequately covered. (*Pub.Util.C. 1001 et seq., 1031 et seq.*; see *Oro Elec. Corp. v. Railroad Com. of Calif.* (1915) 169 C. 466, 471, 147 P. 118; *San Diego & Coronado Ferry Co. v. Railroad Com. of Calif.* (1930) 210 C. 504, 507, 292 P. 640; *California Motor Transport Co. v. Railroad Com. of Calif.* (1947) 30 C.2d 184, 189, 180 P.2d 912.) In reaching a decision to grant or deny a certificate, the Commission should consider the antitrust implication of the contemplated project. (*Northern Calif. Power Agency v. Public Util. Com.* (1971) 5 C.3d 370, 377, 96 C.R. 18, 486 P.2d 1218; *Industrial Communications Systems v. Public Util. Com.* (1978) 22 C.3d 572, 581, 150 C.R. 13, 585 P.2d 863.)

An exception to the requirement of a certificate is found in the typical "grandfather clause," which permits utilities already in existence prior to the enactment of the regulatory statute to continue furnishing service to the extent of their prior operations, without making the ordinary showing to obtain a certificate. (See *Pub.Util.C. 1031*; *Motor Transit Co. v. Railroad Com.* (1922) 189 C. 573, 584, 209 P. 586; *Golden Gate Ferry Co. v. Railroad Com. of Calif.* (1928) 204 C. 305, 312, 268 P. 355; 4 A.L.R.2d 667 ["grandfather clause" regulating business].)

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aa. In General.

8 Witkin Sum. Cal. Law Const Law § 1099

[§ 1099] In General.

(1) *Scope of Rate Regulation.* The Commission, under various provisions of the Code, comprehensively regulates the rates of utilities within its jurisdiction. (See *Pub.Util.C.* 451 et seq.; *Pub.Util.C.* 874 [lower rates for "lifeline telephone service"]; *Pub.Util.C.* 2777 [exemption of electrical cooperative (corporation transmitting electricity exclusively to stockholders or members at cost) from Commission's rate-regulation authority]; *Pub.Util.C.* 728.7 [procedure for adjusting subscribers' rates resulting from change in amount paid by long distance telephone corporation to local corporation for use of its facilities]; *California Mfrs. Assn. v. Public Util. Com.* (1979) 24 C.3d 836, 841, 157 C.R. 676, 598 P.2d 836; *Toward Util. Rate Normalization v. Public Util. Com.* (1988) 44 C.3d 870, 878, 245 C.R. 8, 750 P.2d 787 [power to grant interim rate increases]; *Schell v. Southern Calif. Edison Co.* (1988) 204 C.A.3d 1039, 1045, 1047, 251 C.R. 667 [application of rate schedule to particular user is within exclusive jurisdiction of PUC]; on federal preemption of regulation of certain carriers, see *supra*, §1092; on rate regulation generally, see 64 *Am.Jur.2d* (2001 ed.), *Public Utilities* §60 et seq.)

In the exercise of its ratemaking authority, the Commission may construe a deed conveying real property and easements to a utility, "for the purpose of ascertaining facts relevant to the merits of the application for increased rates." (*Camp Meeker Water System v. Public Util. Com.* (1990) 51 C.3d 845, 850, 274 C.R. 678, 799 P.2d 758.) (See 18 *Pepperdine L. Rev.* 1053.)

In establishing rates, the Commission may abrogate private contracts between consumers and the utility. (*Sutter Butte Canal Co. v. Railroad Com. of Calif.* (1929) 279 U.S. 125, 49 S.Ct. 325, 73 L.Ed. 637.)

(2) *Rate Adjustments.* Neither statutory provisions nor constitutional restrictions prevent the Commission from annually adjusting rates to take into account savings to utilities from use of accelerated depreciation permitted by federal tax law. (*Los Angeles v. Public Util. Com.* (1975) 15 C.3d 680, 695, 697, 125 C.R. 779, 542 P.2d 1371; see *Southern Calif. Gas Co. v. Public Util. Com.* (1979) 23 C.3d 470, 153 C.R. 10, 591 P.2d 34 [investment tax credit benefits as justification for reduction of rate of return].)

(3) *Retroactive Ratemaking*. Retroactive ratemaking is beyond the Commission's powers. In *Pacific Tel. & Tel. Co. v. Public Util. Com.* (1965) 62 C.2d 634, 44 C.R. 1, 401 P.2d 353, the Commission in July 1962, began an investigation of petitioner's rates. After extended hearings, it made a decision in June 1964, ordering a reduction and a retroactive refund to the time of commencement of the investigation (totalling \$ 80 million). *Held*, this unprecedented order was beyond the statutory power of the Commission, and it was unnecessary to consider its constitutionality. *Pub.Util.C.* 728 only authorizes a determination of rates, after a hearing, to be thereafter in force, and the plain language of the section permits only prospective rate changes. (62 C.2d 654.) (See *Los Angeles v. Public Util. Com.* (1972) 7 C.3d 311, 357, 102 C.R. 313, 497 P.2d 785 ["Although there may be substantial policy reasons to permit retroactive rate making, there are also substantial reasons to the contrary, and it is for the Legislature to determine whether California should abandon its policy against retroactive rate making"].)

However, the Commission's requirement of billing credit to customers to amortize overcollections generated by a "fuel cost adjustment clause" is not illegal retroactive ratemaking. (*Southern Calif. Edison Co. v. Public Util. Com.* (1978) 20 C.3d 813, 817, 826, 144 C.R. 905, 576 P.2d 945 [distinguishing *Pacific Tel. & Tel. Co.*].)

(4) *Commentary*. Several annotations have commented on various aspects of rate regulation. (See 83 A.L.R.3d 963 [advertising costs as part of operating expenses for ratemaking purposes]; 16 A.L.R.4th 454 [amount paid to affiliate for goods or services as includable in utility's rate base and operating expenses]; 29 A.L.R.4th 615 [validity of preferential rates for elderly or low income persons]; 80 A.L.R.4th 280 [propriety of considering capital structure of parent or subsidiary in setting utility's rate return]; 41 A.L.R.5th 783 [public service commission's implied authority to order refund of public utility revenues].)

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8 Witkin Sum. Cal. Law Const Law § 1100

[§ 1100] Test of Reasonableness.

A rate that is too low to bring in a reasonable return to the utility is said to be "confiscatory" and a taking of its property without due process. (See *64 Am.Jur.2d (2001 ed.)*, *Public Utilities* §133 et seq.) The power of federal commissions to fix rates of interstate utilities is limited by the Fifth Amendment in the same way the power of state commissions is by the Fourteenth. The traditional approach was to see whether the property of the utility devoted to the public use had been given a fair value for the purpose of the rate base. In other words, a return of 6% or 8% on its investment might be deemed fair or confiscatory, depending on whether the investment itself had been given a fair valuation. The factors determining value were held to be the *actual cost* of the property ("original" or "historical" cost plus the cost of permanent improvements), and *reproduction or replacement cost* (the cost of replacing the plant, less depreciation). (See *Smyth v. Ames (1898)* 169 U.S. 466, 18 S.Ct. 418, 434, 42 L.Ed. 819, 849.) Later cases made reproduction cost--usually a higher value--the significant and ordinarily controlling factor. (See *McCardle v. Indianapolis Water Co. (1926)* 272 U.S. 400, 47 S.Ct. 144, 148, 71 L.Ed. 316, 324; *West v. Chesapeake & Potomac Tel. Co. of Baltimore (1935)* 295 U.S. 662, 671, 55 S.Ct. 894, 898, 79 L.Ed. 1640, 1647.)

These approaches were repudiated in favor of a *prudent investment* or "actual legitimate cost" formula in *Federal Power Com. v. Hope Natural Gas Co. (1944)* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333. A federal commission used the prudent investment theory instead of reproduction cost in determining value. In upholding the rate, the Supreme Court rejected all formulas as arbitrary and unrealistic, and substituted the loose and general test that the rate, no matter how determined, is valid if not "unjust and unreasonable from the investor or company viewpoint." (64 S.Ct. 288, 88 L.Ed. 345.) (*64 Am.Jur.2d (2001 ed.)*, *Public Utilities* §98 et seq.)

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cc. Distribution of Rate Refunds.

8 Witkin Sum. Cal. Law Const Law § 1101

[§ 1101] Distribution of Rate Refunds.

In *Assembly of Calif. v. Public Util. Com.* (1995) 12 C.4th 87, 48 C.R.2d 54, 906 P.2d 1209, Pacific Bell received reimbursement of \$ 7.9 million in 1983 from its parent corporation, AT&T, for cellular research expenses. However, Pacific Bell never refunded the money to its ratepayers. In 1993, the PUC ordered Pacific Telesis, then Pacific Bell's parent corporation, to pay \$ 7.9 million, with interest at 18% from 1983 to 1993--a total of approximately \$ 50 million--into a designated account, but reserved judgment on distribution of the funds. In 1995, the PUC ordered \$ 11.6 million (\$ 7.9 million in principal, with interest at 3.4%) refunded to current customers, with the balance to be allocated to schools and consumer education. *Held*, the 1995 order violated *Pub.Util.C. 453.5*.

(a) *Pub.Util.C. 453.5* requires that refunds be paid to current customers, and, when practicable, to prior customers, on an equitable pro rata basis, i.e., in proportion to the amount originally paid. The legislative history makes it clear that the purpose of the statute was to remove the PUC's discretion to determine how utility refunds were to be distributed. (12 C.4th 100.)

(b) The PUC argues that its order is consistent with the statute, which recognizes that refunds may be allocated to customers who actually paid the overcharges. But the 1995 order did not apportion the refund between current and past customers; it ordered the entire amount refunded to current customers. Nothing in *Pub.Util.C. 453.5* "suggests that, once having ordered the distribution of a rate refund to a utility's current customers, the Commission may refuse to refund to those customers (who are paid the refund principal) the interest that the Commission has assessed against the utility on the basis of the refund principal." (12 C.4th 101.)

(c) The interest on the refund is part of the refund. Neither *Pub.Util.C. 453.5*, nor any other statute, authorizes the PUC to order that only a portion of the interest be refunded to the ratepayers, or to use one interest rate to compute the interest that a utility must pay on rate overcharges and a different interest rate to determine the amount to be paid to customers with the refund principal. (12 C.4th 101.)

(d) The PUC argues that the difference between 3.4% and 18% should not be considered interest on the refund. The

PUC could have ordered a refund of \$ 7.9 million with 3.4% interest, and then have pursued a separate proceeding against the utility, in which it could have sought to impose a punitive fine for failing to comply with the original reimbursement order. But the PUC did not do so. Having obtained the funds as *interest* on the \$ 7.9 million principal, the PUC cannot later seek to characterize the funds as something other than interest. (12 C.4th 102, 103.)

(e) The PUC also relies on *Pub.Util.C. 701*, which confers on the PUC the power, in regulating utilities, to do all things necessary and convenient. However, it is settled that *Pub.Util.C. 701* does not circumvent express statutory directives and restrictions imposed by the Public Utilities Code. *Pub.Util.C. 453.5* clearly mandates that ratepayer refunds be paid to ratepayers, and *Pub.Util.C. 701* does not authorize diversion of a portion of the interest component of a refund for an entirely different purpose. (12 C.4th 103, 104.)

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aa. In General.

8 Witkin Sum. Cal. Law Const Law § 1102

[§ 1102] In General.

(1) *Power of Commission.* The Commission has authority to determine the kind, character, and adequacy of equipment, practices, and facilities of a utility necessary to meet public needs. (See *Pub.Util.C.* 761 et seq.; *Southern Pac. Co. v. Public Util. Com.* (1953) 41 C.2d 354, 362, 260 P.2d 70.)

Many other statutes regulate the services provided by public utilities. (See *Pub.Util.C.* 2884 [telephone corporations must give subscribers option to delete "900 or 976 service"]; *Pub.Util.C.* 728.3 [requiring 30 days' notice prior to removing public telephone]; *Pub.Util.C.* 871 et seq. [telephone corporations must provide class of universal telephone service, at reduced rates, necessary to meet minimum residential communications needs]; *Pub.Util.C.* 882 [Commission must consider ways to ensure provision of advanced telecommunications services as ubiquitously and economically as possible]; *Pub.Util.C.* 2881 et seq. [provision of telecommunications devices for deaf or hearing-impaired persons]; *Pub.Util.C.* 2883 [requiring residential access to "911" emergency service]; *Pub.Util.C.* 2884.2 [jurisdiction of Commission over services to information providers who furnish harmful matter as defined in P.C. 313(a)]; *Pub.Util.C.* 2884.5 [requiring that access to harmful matter be on subscription basis only]; *Pub.Util.C.* 2885.6 [cellular telephone carriers must provide information on service quality and customer complaints]; *Pub.Util.C.* 2896 [telephone corporations must provide specified services to telecommunication customers].)

(2) *No Discrimination.* A public utility must serve its consumers equally and cannot discriminate between new and old customers. (See *Butte County Water Users' Assn. v. Railroad Com. of Calif.* (1921) 185 C. 218, 225, 196 P. 265; 64 *Am.Jur.2d* (2001 ed.), *Public Utilities* §33 et seq.) However, although a railroad company cannot discriminate in its operations as a carrier, it may validly contract to give an exclusive right to a taxi company to solicit transportation to and from the depot. (*Demeter v. Annenson* (1947) 80 C.A.2d 48, 55, 180 P.2d 998.)

Security deposit requirements for residential customers must be based solely on the applicant's creditworthiness. (See *Govt.C.* 60375.5 [district utilities]; *Pub.Util.C.* 779.5 [electrical, gas, heat, telephone, or water corporation]; *Pub.Util.C.* 10009.6 [municipally owned utility]; *Pub.Util.C.* 12822.6 [municipal utility district]; *Pub.Util.C.* 16481.6 [public utility district]; 28 *Pacific L. J.* 939 [discussing *Pub.Util.C.* 10009.6, 12822.6].)

(3) *Termination of Service.* The procedure for terminating residential service is specified by statute. (See *Pub.Util.C. 779.1* [privately owned utilities]; *Pub.Util.C. 10010.1* [municipally owned utilities]; *Pub.Util.C. 12823.1* [municipal utility districts]; *Pub.Util.C. 16482.1* [public utility districts].) (See *Govt.C. 60370* et seq. [district utility must give notice to actual users before terminating residential service for nonpayment by owner].)

In *Tovar v. Southern Calif. Edison Co. (1988) 201 C.A.3d 606, 247 C.R. 281*, former residents of a motel sued their landlord and SoCal, a public utility, seeking damages for termination of service. The claim against SoCal was based on noncompliance with *Pub.Util.C. 777*, which requires 10 days' notice to actual users before a utility may terminate service because of nonpayment by the master customer. SoCal admittedly violated the statute by giving only 4 days' notice, but service was actually terminated the next day at the landlord's direction rather than for delinquent payment. *Held*, no cause of action was stated. The defective notice was not the cause of any damages that the users suffered because of termination of service. (*201 C.A.3d 613, 614.*) Their remedy is against the person who directed termination, not against the utility which merely complied with the direction. (*201 C.A.3d 614.*)

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8 Witkin Sum. Cal. Law Const Law § 1103

[§ 1103] Adequate Service.

(1) *In General.* When a utility undertakes to serve a particular locality, it must furnish adequate service; e.g., a water company holding a franchise to serve a city must extend its system to meet the demands of an added population. (*Lukrawka v. Spring Valley Water Co.* (1915) 169 C. 318, 332, 146 P. 640; see 64 Am.Jur.2d (2001 ed.), *Public Utilities* §36.)

In *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 C. 640, 137 P. 1119, the Commission made an order compelling a company maintaining a statewide telephone system to connect its lines with two companies maintaining local services in their respective counties. The order was invalid as a regulation beyond the scope of the dedication. (166 C. 667.) On the other hand, in *Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Com. of Calif.* (1930) 209 C. 460, 470, 288 P. 775; *Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Com. of Calif.* (1931) 283 U.S. 380, 51 S.Ct. 553, 558, 75 L.Ed. 1128, 1139, the Commission had the power to compel railroad companies to construct a union passenger station in Los Angeles. (See *Atchison, Topeka & Santa Fe Ry. Co. v. Public Util. Com.* (1953) 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 [upholding Commission order authorizing grade separation improvements and allocating costs among railroads without relation to benefits accruing to property].)

In *Southern Pac. Co. v. Public Util. Com.* (1953) 41 C.2d 354, 260 P.2d 70, petitioner filed an application to discontinue certain passenger trains. The Commission, investigating on its own motion, eventually ordered the service retained with an experimental direction to furnish modern cars and other improvements in service. *Held*, the order, based on conflicting evidence, was within the broad power of the Commission to determine matters of public convenience and necessity. (41 C.2d 366.)

(2) *Territorial Test Repudiated for Carriers.* The cases formerly declared a strict rule that the Commission cannot compel a utility to enter new territory, not embraced in its original dedication to public use. (See *Hollywood Chamber of Commerce v. Railroad Com. of Calif.* (1923) 192 C. 307, 310, 219 P. 983; *California Water & Tel. Co. v. Public Util. Com.* (1959) 51 C.2d 478, 489, 492, 334 P.2d 887 [distinguishing territorial scope of dedication of railway companies from water, gas, electric power, and similar utilities].)

In *Greyhound Lines v. Public Util. Com.* (1968) 68 C.2d 406, 67 C.R. 97, 438 P.2d 801, the court reexamined the "rubric of territoriality in utility dedication law which has persisted, and in some cases, outworn its usefulness." (68 C.2d 415.) The Commission, acting under *Pub.Util.C.* 762, ordered petitioner to extend its commuter bus service in the San Francisco Bay area. Petitioner contended that its dedication did not embrace the new routes. *Held*, the order was valid; the theory of territoriality as a limit of dedication arose with stationary utilities, and is no longer properly applicable to carriers. The opinion makes two main points:

(a) The long-established rule remains that "the perimeter of commission authority to order service modifications is staked out by the limits of a utility's dedication or devotion of its property to public use." (68 C.2d 411.)

(b) The limitation should be applied no further than logic and precedent require, and not by mechanical formulas; the scope of dedication is determined by the fact that "the utility has dedicated its resources to a particular enterprise, venture or undertaking." (68 C.2d 415.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Pacific Bell Wireless, LLC v. Public Util. Com.* (2006) 140 C.A.4th 718, 740, 44 C.R.3d 733 [requirement of *Pub.Util.C.* 451 that utility provide "adequate, efficient, just, and reasonable service" was sufficient notice to wireless company that it could be liable for reparations for charging early termination fee with no grace period, failing to disclose significant, known network problems, and making misrepresentations about service].



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8 Witkin Sum. Cal. Law Const Law § 1104

[§ 1104] Other Regulatory Powers.

(1) *In General.* The powers of the Commission have been described as falling into two classes: (a) the broad power to regulate the relationship of the utility to the consumer, e.g., services and rates (see *supra*, §1099 et seq.); and (b) specific powers to regulate the manner in which the utility provides the services in order to safeguard its ability to serve the public efficiently and economically, e.g., approval of the sale or encumbrance of operative property, and the issuance of securities and use of funds realized from them. (See *Pacific Tel. & Tel. Co. v. Public Util. Com. of Calif.* (1950) 34 C.2d 822, 827, 215 P.2d 441; *Hempy v. Public Util. Com.* (1961) 56 C.2d 214, 217, 14 C.R. 436, 363 P.2d 476 [Pub.Util.C. 851; authorization to transfer or encumber utility property]; *Pub.Util.C.* 2777 [exempting "electrical cooperative" from Commission's authority to regulate transfer or encumbrance of property].)

(2) *Contracts of Utility.* The California Commission, like others, has the authority to prevent a utility from passing on to consumers any unreasonable costs for materials and services. This is an indirect authority over utility contracts, because excessive payments under these contracts may be disallowed for rate fixing purposes. Where an operating utility makes contracts for excessive payments with a parent or holding company, some state statutes and the federal Act give direct power to disapprove the contract itself. (See *Pacific Tel. & Tel. Co. v. Public Util. Com.*, *supra*, 34 C.2d 826.)

No express grant of power over utility contracts is contained in the California Act, and in *Pacific Tel. & Tel. Co. v. Public Util. Com.*, it was held that none could be implied. The petitioner utility contracted to pay 1 percent of its gross receipts for services and materials obtained from its parent, American Tel. & Tel. Co. (owning 87.93% of the stock and dominating the utility). Petitioner conceded the Commission's power to disregard any excessive payment in fixing its rates, but challenged the Commission's order not to pay more than the reasonable cost or value. *Held*, order annulled. "If the commission is empowered to prescribe the terms of contracts and the practices of utilities and thus substitute its judgment as to what is reasonable for that of the management, it is empowered to undertake the management of all utilities subject to its jurisdiction." (34 C.2d 828.) (See 5 *Stanf. L. Rev.* 110.)

In *General Tel. Co. v. Public Util. Com.* (1983) 34 C.3d 817, 195 C.R. 695, 670 P.2d 349, an order requiring a telephone company to adopt a competitive bidding procedure for purchase of certain equipment was upheld. The court

distinguished *Pacific Tel. & Tel. Co.*, but added that later decisions "have cast serious doubt on the continuing vitality of much of the reasoning" of that case (the "invasion of management" rationale). (34 C.3d 824.)

(3) *Liability Insurance*. The Commission, in regulating private passenger carriers and commercial air carriers, may require procurement of adequate liability insurance. (*Pub.Util.C. 4010* [motor carriers]; *Pub.Util.C. 5503* [air carriers]; see *Condor Ins. Co. v. Williamsburg Nat. Ins. Co.* (1996) 49 C.A.4th 554, 559, 56 C.R.2d 693 [insured under defendant's insurance policy was additional insured under plaintiff's policy, by reason of P.U.C. endorsement to it, and its limit of \$ 250,000 was not satisfied by payment of that amount under defendant's policy].)

(4) *Solar Energy Development*. An electrical or gas corporation desiring to manufacture, lease, sell, or otherwise own or control a solar energy system must submit a description of its proposed program, which it may pursue unless the Commission, within 45 days, orders the corporation to obtain authorization. Prior authorization is required when the utility intends to pass the costs of the system along to the ratepayers. No prior authorization is required where the system is owned or controlled for experimental or demonstration purposes. (*Pub.Util.C. 2775.5* [designed to prevent privately owned public utilities from using their status as monopolies to dominate solar energy industry].)

(5) *Telephone Directories and Advertising*. The Commission has no jurisdiction over classified telephone directories or commercial advertising in them (except for consideration of revenues and expenses in establishing rates for other services). (*Pub.Util.C. 728.2(a)*.) However, subject to specified limitations, the Commission may regulate the commercial advertising if it determines "that any federal action would impair its ability to investigate and consider revenues and expenses with regard to the acceptance and publication of telephone directory advertising for the purpose of establishing rates for other services offered by any telephone corporation." (*Pub.Util.C. 728.2(b)*.)

(6) *Insulation Financing Programs*. In *Southern Calif. Gas Co. v. Public Util. Com.* (1979) 24 C.3d 653, 156 C.R. 733, 596 P.2d 1149, the court held that the Home Insulation Assistance and Financing Act, giving the Commission authority to permit insulation financing programs, did not authorize it to institute mandatory programs. (24 C.3d 657.) This decision was nullified by the enactment of *Pub.Util.C. 2789* in 1979, providing that the Commission "may permit or require any electrical or gas corporation ... to institute energy conservation programs."

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h. Right To Abandon Operation.

8 Witkin Sum. Cal. Law Const Law § 1105

[§ 1105] Right To Abandon Operation.

(1) *General Rule.* The Commission cannot force a utility to operate at a loss. The utility may withdraw, by dedicating (i.e., abandoning) its property to the public. (*Lyon & Hoag v. Railroad Com. of Calif.* (1920) 183 C. 145, 146, 190 P. 795; *Brooks-Scanlon Co. v. Railroad Com. of Louisiana* (1920) 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323; cf. *Fort Smith Light & Traction Co. v. Bourland* (1925) 267 U.S. 330, 45 S.Ct. 249, 69 L.Ed. 631 [streetcar company was compelled to continue operating part of its line, though that part operated at loss]; see 10 A.L.R.2d 1121 [right of utility to discontinue line or branch because it is unprofitable]; 64 Am.Jur.2d (2001 ed.), *Public Utilities* §§58, 59.)

(2) *Distinction: Transfer of Property.* A utility cannot transfer its property to a third person without the consent of the Commission. (*Pub.Util.C. 851*; see *Slater v. Shell Oil Co.* (1940) 39 C.A.2d 535, 547, 103 P.2d 1043.) And a municipality can dispose of a public utility owned by it only by complying with a special statutory procedure. (See *Pub.Util.C. 10051* et seq.; *Hughes v. Torrance* (1946) 77 C.A.2d 272, 278, 175 P.2d 290.)

The rule against transfer, however, is subject to two qualifications:

(a) Although a sale or other disposition without the Commission's consent is void, an executory contract of sale, made subject to Commission approval, is valid. (*Transport Clearings-Bay Area v. Simmonds* (1964) 226 C.A.2d 405, 420, 38 C.R. 116.)

(b) *Pub.Util.C. 851* requires approval only of a voluntary sale. *C.C.P. 1240.610* permits a city to take by eminent domain property already appropriated to public use for a more necessary use, and *C.C.P. 1240.650* provides that a city's use is presumed a more necessary public use. (See *infra*, §§1194, 1195.) These statutes give unrestricted power, and no Commission approval is necessary for the involuntary transfer resulting from a condemnation suit. (*People v. Fresno* (1967) 254 C.A.2d 76, 81, 62 C.R. 79 [decided under former versions of statutes].)

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1. In General.

8 Witkin Sum. Cal. Law Const Law § 1106

[§ 1106] In General.

(1) *Statutes and Rules.* The Commission operates under both statutory provisions and its own published Rules of Practice and Procedure adopted pursuant to *Pub.Util.C. 1701*. (See *Pub.Util.C. 454* [authorizing Commission to establish rules governing showing required for proposed rate increases]; *Southern Calif. Edison Co. v. Peevey* (2003) 31 C.4th 781, 804, 3 C.R.3d 703, 74 P.3d 795, 9 Cal. Proc. (4th), *Administrative Proceedings, Supp.*, §10 [settlement agreement with PUC that maintained, rather than changed, rates for specified period did not violate *Pub.Util.C. 454*]; on general law, see 64 *Am.Jur.2d* (2001 ed.), *Public Utilities* §178 et seq.)

(2) *Informal and Formal Procedures.* Some matters are handled by the staff on informal application. More serious matters follow the statutory procedure of complaint, service of notice, and formal hearing before the Commission, a commissioner, or an administrative law judge. (*Pub.Util.C. 311, 1701.1* et seq.)

The Commission may make a complaint on its own motion. And this procedure must be followed in cases involving the reasonableness of gas, electrical, water, or telephone rates, unless the Commission receives a complaint signed by a specified official of the city where the alleged violation occurred, or by not less than 25 customers of the service. (*Pub.Util.C. 1702*.)

Copies of the agenda and, on request, agenda item documents, must be made available to the public before commencement of a meeting at which commissioners vote on items on the public agenda. Publication of agenda documents, decisions, resolutions and rulings on the Internet also is mandated (*Pub.Util.C. 311.5*), as is the submission of informal complaints through electronic means (*Pub.Util.C. 311.4*). The Commission's website is <http://www.cpuc.ca.gov>.

(3) *Expedited Procedure for Small Claims.* An expedited procedure is available for complaints against electrical, gas, water, heat, or telephone companies, where the amount claimed is \$ 5,000 or less. (a) No attorney may represent a party other than himself or herself. (b) No pleading other than the complaint and answer are necessary. (c) A hearing without a reporter must be held within 30 days after the answer is filed. (d) The parties have the right to file applications for rehearing pursuant to *Pub.Util.C. 1731* (infra, §1107), and the rehearing is conducted under the regular procedure. (

Pub.Util.C. 1702.1.)

The statute contains a proviso: "[W]hen the public interest so requires, the commission or presiding officer may at any time prior to the filing of a decision, terminate the expedited complaint procedure and recalendar the matter for hearing under the commission's regular procedure." (*Pub.Util.C. 1702.1(a).*)

(4) *Expedited Emergency Procedures.* The Commission must adopt appropriate rules, regulations, or orders, consistent with existing rules and regulations, to establish expedited procedures to be followed in the event of an emergency as determined by the President under 42 U.S.C., §5191. (*Pub.Util.C. 325(b)*; see *Pub.Util.C. 325(c)* [matters to be considered in developing expedited procedures]; *Pub.Util.C. 325(d)* [utility may not be required to incur costs under emergency order until arrangements are made for payment of costs]; *Pub.Util.C. 325(e)* [emergency procedures must preserve right to notice and opportunity to be heard].)

(5) *Compensation of Intervening Customers.* Public participation in Commission proceedings is encouraged by providing compensation for reasonable costs of participation, including advocate's and expert witness fees. (*Pub.Util.C. 1801, 1801.3.*) A customer may be awarded compensation if the customer's participation materially supplements, complements, or contributes to the presentation of another party and makes a substantial contribution to the Commission order or decision, and if failure to award compensation would impose a significant hardship. (*Pub.Util.C. 1802.5, 1803.*) And an intervenor may be awarded the fees and costs of obtaining judicial review following a decision in which the intervenor has substantially contributed. (*Pub.Util.C. 1802(a).*) (See *Pub.Util.C. 1804* [procedure for requesting compensation]; *Pub.Util.C. 1806* [computation of award]; *Pub.Util.C. 1812* [group representing small agricultural customers is not rendered ineligible because it also represents large agricultural customers]; *Southern Calif. Edison Co. v. Public Util. Com. of Calif. (2004) 117 C.A.4th 1039, 1052, 12 C.R.3d 441* [advocacy group that participated in PUC ratemaking proceedings was entitled to compensation for work it performed in federal actions initiated by utilities seeking to overturn PUC decisions arising out of those proceedings].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutes and Rules.*

Peevey case:

Cross-Reference: 9 *Cal. Proc. (5th), Administrative Proceedings*, §12.(5) *Compensation of Intervening Customers.* See *Utility Reform Network v. Public Util. Com. (2008) 166 C.A.4th 522, 535, 82 C.R.3d 791* [although intervening advocacy group initially made substantial contribution to PUC decision, for which it was compensated, *Pub.Util.C. 1801* et seq. did not require PUC to award compensation to intervenor for ensuing unsuccessful challenges to PUC's settlement with utility; critical factor is whether intervenor has assisted PUC in carrying out statutory mandate to regulate public utilities in public interest, regardless of whether intervenor's position is for or against that of PUC].



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2. Hearing and Determination.

8 Witkin Sum. Cal. Law Const Law § 1107

[§ 1107] Hearing and Determination.

(1) *Conduct of Hearing.* At a formal hearing, the proceedings are reported and a record is made for purposes of review. (*Pub.Util.C. 1706*; see *infra*, §1108.) The "technical rules of evidence need not be applied," and "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate" any action taken. (*Pub.Util.C. 1701(a)*; see 1 *Cal. Evidence* (4th), *Introduction*, §§53, 55.) The Administrative Procedure Act (*Govt.C. 11400*) does not apply to hearings by the Commission. (*Pub.Util.C. 1701(b)*.)

If a computer model, i.e., a computer program involving a utility's internal or complex functions (*Pub.Util.C. 1821*), is the basis for evidence presented in a hearing, it must be made available to the Commission and the parties for cross-examination or rebuttal, "subject to applicable rules of evidence." (*Pub.Util.C. 1822(a)*.)

The parties may submit written arguments, but the Commission need not permit oral argument. (See *Dyke Water Co. v. Public Util. Com.* (1961) 56 C.2d 105, 124, 14 C.R. 310, 363 P.2d 326.)

(2) *Administrative Law Judge or Assigned Commissioner.* The evidence presented at a hearing must be taken by an administrative law judge or commissioner in accordance with the Commission's rules of practice and procedure. (*Pub.Util.C. 311(c)*; see *Pub.Util.C. 309.6* [Commission must adopt procedures on disqualification of administrative law judges due to bias or prejudice similar to those of other state agencies and superior courts, with opportunity for public review and comment].)

The proposed decision, setting forth recommendations, findings, and conclusions, must be filed with the Commission and served on the parties "without undue delay," but in no event later than 90 days after the case was submitted for decision. (*Pub.Util.C. 311(d)*.) In a case initiated by a customer complaint and involving an electrical, gas, telephone, railroad, or water corporation, or a highway carrier, the Commission may specify that no proposed decision need be prepared, unless it finds that such a decision is required in the public interest. (*Pub.Util.C. 311(f)*.)

(3) *Commission Decision.* Except for decisions filed after an expedited hearing under *Pub.Util.C. 1702.1* (*supra*, §1106), the Commission's decision must contain separately stated findings of fact and conclusions of law. (*Pub.Util.C.*

1705; see *California Motor Transport Co. v. Public Util. Com.* (1963) 59 C.2d 270, 28 C.R. 868, 379 P.2d 324; *Greyhound Lines v. Public Util. Com.* (1967) 65 C.2d 811, 813, 56 C.R. 484, 423 P.2d 556; *Southern Pac. Co. v. Public Util. Com.* (1968) 68 C.2d 243, 65 C.R. 737, 436 P.2d 889.) It takes effect 20 days after service unless the time is extended. (*Pub.Util.C. 1705.*)

In issuing its decision, the Commission may adopt, modify, or set aside the proposed decision of the administrative law judge or assigned commissioner. (*Pub.Util.C. 311(d).*)

Any item that appears on the Commission's agenda as an alternate item to a proposed decision must be served on the parties without undue delay and must be subject to public review and comment before it is voted on. The Commission is required to adopt rules providing for the time and manner of review and comment, and the rescheduling of the item on a subsequent public agenda. (*Pub.Util.C. 311(e).*) A 30-day period for public review and comment is required prior to voting on a Commission decision not subject to *Pub.Util.C. 311(e)*. (*Pub.Util.C. 311(g).*)

The final decision of the Commission has res judicata effect. (*Pub.Util.C. 1709*; see *People v. Western Air Lines* (1954) 42 C.2d 621, 630, 268 P.2d 723; 7 Cal. Proc. (4th), *Judgment*, §301.) But decisions rendered in expedited hearings under *Pub.Util.C. 1702.1* are not binding on the Commission or courts. (*Pub.Util.C. 1705.*)

(4) *Rehearing.* The Commission's decision is subject to rehearing (*Pub.Util.C. 1731 et seq.*), and an application for rehearing is a prerequisite to judicial review (*Pub.Util.C. 1731(b)*, 1756).

(5) *Rescission or Amendment of Order.* "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it." (*Pub.Util.C. 1708.*) *Pub.Util.C. 1708* is not satisfied by an invitation to comment or submit written objections; a party who requests a hearing is entitled to be heard and to offer evidence. (*California Trucking Assn. v. Public Util. Com.* (1977) 19 C.3d 240, 244, 137 C.R. 190, 561 P.2d 280.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Commission Decision.* *Pub.Util.C. 311(e)*, as amended in 2005, further requires the alternate item to be "accompanied by a digest that clearly explains the substantive revisions to the proposed decision." *Res judicata*:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §358.



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j. Review of Commission's Orders.

1. In General.

8 *Witkin Sum. Cal. Law Const Law § 1108*

[§ 1108] In General.

(1) *Review by Court of Appeal or Supreme Court.* A final decision of the Commission is subject to review in California only by a statutory writ of review in the Court of Appeal or Supreme Court. (*Pub.Util.C. 1756(a)*, 1759; see *Pub.Util.C. 1756(f)* [providing exceptions for some actions involving water corporations]; *Pub.Util.C. 1759(b)* [mandamus may issue from Supreme Court and Court of Appeal]; *Pacific Bell v. Public Util. Com.* (2000) 79 C.A.4th 269, 279, 93 C.R.2d 910 [amendment of *Pub.Util.C. 1756* to provide for petition to Court of Appeal did not change nature of review]; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §17.)

A party must seek review within 30 days after denial of the application for rehearing or, if the application was granted, after issuance of the decision on rehearing, or within 120 days after the application is granted if no decision on rehearing has been issued. (*Pub.Util.C. 1756(a)*.) Failure to seek review within the time specified cannot be remedied by filing a petition to reopen, where the review sought is of the basic decision. (*Northern Calif. Assn. to Preserve Bodega Head & Harbor v. Public Util. Com.* (1964) 61 C.2d 126, 135, 37 C.R. 432, 390 P.2d 200.)

Venue of a petition filed in the Court of Appeal is in the judicial district where the petitioner resides or has its principal place of business in California. (*Pub.Util.C. 1756(d)*.) A party may seek from the Supreme Court an order transferring related actions to a single appellate district. (*Pub.Util.C. 1756(e)*.)

(2) *Effect of Denial of Writ.* *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 C.3d 891, 160 C.R. 124, 603 P.2d 41, summarizes the law on the effect of denial of a petition for a writ without opinion.

(a) *Denial is res judicata.* Because a petition for writ of review is the sole method of obtaining judicial review of the Commission's decision (*infra*, §1109), it is the equivalent of an appeal; hence, denial of the petition is a decision on the merits both as to the law and the facts, and is *res judicata*. (25 C.3d 900, 901, discussing *People v. Western Air Lines* (1954) 42 C.2d 621, 630, 268 P.2d 723.)

(b) *Denial has no stare decisis effect.* A case is only authority for a point decided, and the *ratio decidendi* is ordinarily discovered by examining the court's opinion (see 9 *Cal. Proc.* (4th), *Appeal*, §945). Where the decision is

without opinion--as in the case of summary denial of a petition for writ of review--it cannot be said that it is a ruling on the substantive grounds presented: (1) The petition must be denied on procedural grounds if prerequisites to the court's jurisdiction are not met. (2) A petitioner may not rely on a ground that he or she did not set forth in the petition for rehearing, and the denial may be on that procedural ground. (3) The petition may be denied for failure to exhaust administrative remedies. (4) The petition may be denied because the issue has been rendered moot by supervening events. (5) The petition may be denied because it prematurely seeks review of an interlocutory ruling rather than a final order or decision of the Commission. (6) The petition may be denied because the petitioner was not a person aggrieved by the Commission's action. (25 C.3d 902, 903, 904.) "It would therefore be sheer speculation for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary; members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case allegedly raising the same question." (25 C.3d 905.) (See *Pacific Gas & Elec. Co. v. Public Util. Com.* (2004) 118 C.A.4th 1174, 1193, 13 C.R.3d 630 [following *Consumers Lobby*]; 39 *Hastings L. J.* 1147 [is court's denial of writ of review decision on merits?].)

(3) *Required Showing for Stay.* A party seeking a stay of a Commission decision must present, by verified petition, specific evidence showing that "immediate and irreparable injury, loss, or damage will result" if the decision is not stayed. (*Pub.Util.C.* 1763.) Of course some injury, loss, or damage is inherent in any adverse decision of the Commission, especially where a certificate of public convenience and necessity has been revoked, but it is not sufficient "merely to present evidence of the asset value of its permits and the revenue a petitioner might lose each day." A petitioner must help the court "to understand the details of its financial situation," such as by advising the court "of its income from all sources and expenses and reserves, how long they will last, and any measures available to cut costs or to increase income," and its prospects for borrowing money to keep the business afloat during the review period. (*North Shuttle Service v. California Public Util. Com.* (1998) 67 C.A.4th 386, 395, 79 C.R.2d 46.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Review by Court of Appeal or Supreme Court.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §17.(2) *Effect of Denial of Writ.*

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §509.



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j. Review of Commission's Orders.

2. Exclusive Method.

8 Witkin Sum. Cal. Law Const Law § 1109

[§ 1109] Exclusive Method.

In *Pacific Tel. & Tel. Co. v. Superior Court* (1963) 60 C.2d 426, 34 C.R. 673, 386 P.2d 233, S's telephone service was disconnected by petitioner, pursuant to a Commission regulation, for asserted illegal use. The Commission's general decision provided that the exclusive remedy of the aggrieved party was a complaint with the Commission, and that no action at law or equity should accrue against a utility as a result of action taken pursuant to the regulation. S instituted proceedings before the Commission, which found that his phones were not being used for any unlawful service, and ordered resumption; but it also found that petitioner acted on reasonable cause. Then S sued petitioner for damages. *Held*, prohibition granted to restrain the court from proceeding to trial; *Pub.Util.C.* 1756 et seq. restrict the power of the courts to review of Commission decisions by the Supreme Court (and now also by the Court of Appeal, *supra*, §1108). (60 C.2d 429.)

In *Pellandini v. Pacific Limestone Products* (1966) 245 C.A.2d 774, 54 C.R. 290, plaintiff trucking company made a contract with defendant manufacturer purporting to be a purchase of limestone products. The Commission found it to be a contract for transportation used as a device to undercharge defendant, and ordered plaintiff to sue defendant for the undercharge. The action was brought, and the trial judge decided, contrary to the Commission, that the contract was one of sale. *Held*, reversed. Defendant contended that it was not a party to the Commission proceeding and would be denied due process if bound by the order. But it had knowledge of the proceeding, and failed either to seek intervention or retroactive rescission of the decision. (245 C.A.2d 778.)

In *People v. Ryerson* (1966) 241 C.A.2d 115, 50 C.R. 246, the Commission ordered P, a common carrier, to sue A Corp. for undercharges. P sued A Corp., A Corp. cross-complained for reformation of the freight bills, and thereafter the parties stipulated that the bills by mistake did not show the true agreement. Accordingly, pursuant to the stipulation, the court entered judgment that A Corp. owed nothing to P, and that the bills should be reformed. The Commission, in the name of the People, filed this action to vacate the judgment for extrinsic fraud and excess of jurisdiction. *Held*, judgment for defendant carrier on demurrer reversed. The lower court's decision in effect reviewed and annulled the Commission's order, and was in excess of jurisdiction. (241 C.A.2d 122.) (See *Pratt v. Coast Trucking* (1964) 228 C.A.2d 139, 149, 39 C.R. 332; *Union City v. Southern Pac. Co.* (1968) 261 C.A.2d 277, 279, 67 C.R. 816; *Dollar-A-Day Rent-A-Car Systems v. Pacific Tel. & Tel. Co.* (1972) 26 C.A.3d 454, 460, 102 C.R. 651.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Scope of Review.

8 Witkin Sum. Cal. Law Const Law § 1110

[§ 1110] Scope of Review.

(1) *In General.* In a complaint or enforcement proceeding, or a "ratemaking or licensing decision of specific application that is addressed to particular parties," review may not extend further than to determine whether any of the following occurred:

(a) The Commission acted without, or in excess of, its powers or jurisdiction. (*Pub.Util.C. 1757(a)(1)*; see *Pacific Bell v. Public Util. Com.* (2000) 79 C.A.4th 269, 282, 93 C.R.2d 910 ["Whether utility may proceed by an advice letter or instead must file a formal application for a particular tariff change is a decision peculiarly within the PUC's expertise and judgment," and not that of Court of Appeal].)

(b) The Commission has not proceeded in the manner required by law. (*Pub.Util.C. 1757(a)(2)*.)

(c) The Commission's decision is not supported by the findings. (*Pub.Util.C. 1757(a)(3)*.)

(d) The findings in the Commission's decision are not supported by substantial evidence in light of the whole record. (*Pub.Util.C. 1757(a)(4)*.)

(e) The Commission's order or decision was procured by fraud or was an abuse of discretion. (*Pub.Util.C. 1757(a)(5)*.)

(f) The Commission's order or decision violates a right of the petitioner under the U.S. or California Constitutions. (*Pub.Util.C. 1757(a)(6)*.)

In a proceeding other than one subject to the standard of review under *Pub.Util.C. 1757*, review does not extend further than to determine, on the basis of the certified record, whether any of the following occurred:

(a) The Commission's order or decision was an abuse of discretion. (*Pub.Util.C. 1757.1(a)(1)*; see *Vernon v. Public Util. Com. of Calif.* (2001) 88 C.A.4th 672, 678, 106 C.R.2d 145 [burden was on city as opponent of rail yard expansion to show that expansion was unreasonable, and Commission did not abuse its discretion in failing to require railroad to

prepare EIR or otherwise address environmental impact of expansion and measures to mitigate that impact].)

- (b) The Commission has not proceeded in the manner required by law. (*Pub.Util.C. 1757.1(a)(2).*)
- (c) The Commission acted without, or in excess of, its powers or jurisdiction. (*Pub.Util.C. 1757.1(a)(3).*)
- (d) The Commission's decision is not supported by the findings. (*Pub.Util.C. 1757.1(a)(4).*)
- (e) The Commission's order or decision was procured by fraud. (*Pub.Util.C. 1757.1(a)(5).*)
- (f) The Commission's order or decision violates petitioner's constitutional rights. (*Pub.Util.C. 1757.1(a)(6).*)

(2) *Water Corporations.* *Pub.Util.C. 1757* does not apply to ratemaking or licensing decisions of water corporations. In reviewing decisions pertaining solely to water corporations, review is limited to determining whether the Commission has regularly pursued its authority, including whether the order or decision violated petitioner's constitutional rights. (*Pub.Util.C. 1757.1(b).*)

In *Ventura County Waterworks Dist. No. 5 v. Public Util. Com.* (1964) 61 C.2d 462, 39 C.R. 8, 393 P.2d 168, C Water Co. applied for a certificate to extend its public utility water service to an area served by petitioner district (not subject to the Commission's jurisdiction). In petitioner's hearing under *Pub.Util.C. 1005* to protest C Water Co.'s application, the Commission excluded all evidence that petitioner could provide a better service. *Held*, order annulled. Ordinarily, errors in admission or exclusion of evidence do not constitute a failure to regularly pursue authority, but when they result in an unfair hearing they do. (61 C.2d 464.) (See 38 So. Cal. L. Rev. 144.)

(3) *No New Trial or Evidence.* No new or additional evidence may be introduced on review by the court. (*Pub.Util.C. 1757(a), 1757.1(c).*) Further, the court may not hold a trial de novo, or take evidence other than as specified by the California Rules of Court, or exercise its independent judgment on the evidence. (*Pub.Util.C. 1757(b).*)

(4) *Constitutional Right.* Notwithstanding *Pub.Util.C. 1757* and *1757.1*, where the validity of an order or decision is challenged on the ground that petitioner's constitutional rights have been violated, the Court of Appeal or Supreme Court must "exercise independent judgment on the law and the facts," and the Commission's findings material to determination of the constitutional issue are not final. (*Pub.Util.C. 1760*; see *Southern Pac. Co. v. Public Util. Com.* (1953) 41 C.2d 354, 360, 260 P.2d 70 [this does not mean that court will resolve conflicts in evidence on disputed fact questions].)

(5) *Miscellaneous Findings.* Findings unsupported by any competent evidence cannot sustain an order. (See *Southern Pac. Co. v. Railroad Com. of Calif.* (1939) 13 C.2d 125, 128, 87 P.2d 1052; *California Water & Tel. Co. v. Public Util. Com.* (1959) 51 C.2d 478, 494, 334 P.2d 887.) And an order that is based on inconsistent findings on the principal issue involved, leading to an erroneous conclusion of law, will be annulled. (*California Portland Cement Co. v. Public Util. Com.* (1957) 49 C.2d 171, 176, 315 P.2d 709.) A finding that a business is a public utility may always be examined, because it goes to the basis of the Commission's jurisdiction. (See *Allen v. Railroad Com. of Calif.* (1918) 179 C. 68, 74, 175 P. 466; *Samuelson v. Public Util. Com.* (1951) 36 C.2d 722, 728, 227 P.2d 256; *supra*, §1097.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Miscellaneous Findings.* An order will be annulled if it is beyond the scope of the issues identified in the preliminary scoping memo for a rulemaking proceeding. (See *Southern Calif. Edison Co. v. Public Util. Com.* (2006) 140 C.A.4th 1085, 1104, 45 C.R.3d 485 [PUC violated own rules and failed to proceed in manner required by law by adopting prevailing wage requirement in energy utility construction projects; issue was beyond scope of preliminary scoping memo in proceeding set to address prohibitions against bid shopping and reverse auctions].)



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XII. POLICE POWER

H. Regulation of Labor Relations.

8 Witkin Sum. Cal. Law Const Law § 1111

[§ 1111] Regulation of Labor Relations.

Statutory regulation of labor relations is extensively treated in 3 *Summary* (10th), *Agency and Employment*. The constitutionality of most of these laws has been recognized for many years.

(1) *Hours of Labor*. The power to regulate hours of labor in any business or occupation is unquestioned. (See *Sturges & Burn Mfg. Co. v. Beauchamp* (1913) 231 U.S. 320, 34 S.Ct. 60, 58 L.Ed. 245 [child labor]; *Miller v. Wilson* (1915) 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628 [8-hour day for women]; *Bunting v. Oregon* (1917) 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 [10-hour day in mills or factories, with increased pay for overtime, not limited to women or children, but extended to all persons]; *Radice v. New York* (1924) 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690 [working hours for women]; 3 *Summary* (10th), *Agency and Employment*, §360 et seq.)

(2) *Minimum Wages*. For many years the Supreme Court refused to apply the principles supporting legislation on hours of labor to establishment of minimum wages, and held these measures to be an unconstitutional interference with liberty of contract. (See *Adkins v. Children's Hosp. of the Dist. of Columbia* (1923) 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785; *Morehead v. New York* (1936) 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347.) These cases were overruled in *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 708, which established the validity of minimum wage legislation for women and minors. (See 39 A.L.R.2d 740 [private employment]; 3 *Summary* (10th), *Agency and Employment*, §382 et seq.)

(3) *Payment of Wages*. Laws relating to the manner of paying wages, e.g., requiring payment in cash rather than scrip, have been upheld on the theory of the need of workers for ready purchasing power. (*Knoxville Iron Co. v. Harbison* (1901) 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55.) Similarly, the California Semi-Monthly Pay Day Law (*Lab.C.* 204), requiring 2 regular paydays each month, is valid. (*In re Moffett* (1937) 19 C.A.2d 7, 12, 64 P.2d 1190.) And a statutory requirement that miners be paid on the basis of weight of coal as originally produced in the mine was sustained. (*McLean v. Arkansas* (1909) 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315.) (See *O.G. Sansone Co. v. Department of Trans.* (1976) 55 C.A.3d 434, 447, 461, 127 C.R. 799, 3 *Summary* (10th), *Agency and Employment*, §385 [upholding *Lab.C.* 1771, requiring payment of prevailing wage to persons employed on public works]; 3 *Summary* (10th), *Agency and Employment*, §394 et seq.)

(4) *Labor Unions and Labor Disputes*. The legislative power to protect labor organizations, the unorganized worker, the union member, and the public, is firmly established, and is illustrated by the following types of statutes:

- (a) Protection of right to join labor union. (See 3 *Summary* (10th), *Agency and Employment*, §546.)
- (b) Prohibition of closed shop. (See 3 *Summary* (10th), *Agency and Employment*, §§545, 630.)
- (c) Limitations on right to engage in concerted action; e.g., statutes prohibiting jurisdictional strikes or secondary boycotts. (See 3 *Summary* (10th), *Agency and Employment*, §§632, 640.)
- (5) *Workers' Compensation Acts*. These statutes, which establish liability without fault on the theory that industry may be required to bear the burden of compensation for industrially caused disability or death, are valid. (See 2 *Summary* (10th), *Workers' Compensation*, §5.)
- (6) *Freedom From Interference With Political Activities*. Statutes protecting or furthering the exercise of the right of suffrage and political association are valid. (See *Day-Brite Lighting v. Missouri* (1952) 342 U.S. 421, 72 S.Ct. 405, 407, 96 L.Ed. 469, 472 [time off to vote, with pay]; *Benane v. International Harvester Co.* (1956) 142 C.A.2d Supp. 874, 877, 299 P.2d 750 [same]; *Kouff v. Bethlehem-Alameda Shipyard* (1949) 90 C.A.2d 322, 202 P.2d 1059 [prohibition against discharge for absence while serving as election officer on election day]; *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 C.2d 481, 486, 171 P.2d 21 [prohibition against interfering with employees' political activities].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER X - Constitutional Law

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XIII. EMINENT DOMAIN

A. In General.

1. Nature of Power.

8 Witkin Sum. Cal. Law Const Law § 1112

[§ 1112] Nature of Power.

(1) *Sovereign Power*. Eminent domain is the right of the people or government to take private property for public use. (See *C.C.P. 1240.010*, *infra*, §1175.) It is a *sovereign power* that cannot be contracted away. (*Contributors to Pennsylvania Hosp. v. Philadelphia* (1917) 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124.)

Because the power is inherent in sovereignty, the Constitutions describe it indirectly in terms of the guarantee of just compensation. (See *People v. Chevalier* (1959) 52 C.2d 299, 304, 340 P.2d 598.) And the right to compensation arises in two situations: (a) Where the governmental agency or other authorized person brings a condemnation action to take property. (See *infra*, §1170 et seq.) (b) Where public works or other governmental activities are undertaken with resulting injury to property, and the owner brings an "inverse condemnation" action to recover damages. (See *infra*, §1143 et seq.)

(2) *Necessity of Compensation*. Under the Fifth Amendment to the federal Constitution no private property shall "be taken for public use, without just compensation." And, under the California Constitution, "[p]rivate property may be taken or damaged for public use only when just compensation ... has first been paid to, or into court for, the owner." (Cal. Const., Art. I, §19.) (See *Metropolitan Water Dist. of Southern Calif. v. Adams* (1940) 16 C.2d 676, 680, 107 P.2d 618; *Needles v. Griswold* (1992) 6 C.A.4th 1881, 1888, 8 C.R.2d 753, *infra*, §1163 [temporary taking requires compensation]; 23 *Ecology L. Q.* 577 [ethical approaches to takings and compensation analysis]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §§6 et seq., 112 et seq.)

However, even in the absence of a limitation in the state Constitution, a state cannot take private property for public use *without compensation*. *Chicago, Burlington & Quincy R. Co. v. Chicago* (1897) 166 U.S. 226, 17 S.Ct. 581, 586, 41 L.Ed. 979, 984, held that such a taking would violate the Due Process Clause of the Fourteenth Amendment. (See 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §7.)

(3) *Revision of Eminent Domain Law*. Pursuant to a recommendation of the Law Revision Commission, the 1975 Legislature enacted a new Eminent Domain Law (*C.C.P. 1230.010* et seq.). (See *infra*, §1170 et seq.) Conforming amendments and repeals were made in many sections of other codes. Other statutes outside the Eminent Domain Law also may apply to the acquisition of land for various public purposes. (See, e.g., C.C. 1001, *infra*, §1178 [acquisition of appurtenant easement by eminent domain]; *Fish & Game C. 1001* [acquisition of land for access roads to coastal

waters]; *Pub.Res.C. 8030* [limiting state and federal lands in unincorporated areas that may be taken by eminent domain].)

(4) *Texts and Commentary.* The reported decisions in this field are voluminous, and the substantive law and procedure are extensively covered in textbooks, law notes, and practice works. (See Cal. Civil Practice, 2 Real Property Litigation, §15:1 et seq. [actions involving eminent domain and inverse condemnation]; C.E.B., 1 Condemnation Practice 2d, Chap. 6; Nichols on Eminent Domain (Rev. 3d ed.); 2 Rotunda, §15.10 et seq.; 2 Tribe, Chap. 9; 24 *Ecology L. Q.* 57 [Application of Takings Law to the Regulation of Unpatented Mining Claims]; 24 *Ecology L. Q.* 187 [rise of state takings legislation]; 34 *San Diego L. Rev.* 193 [identifying elements of land use regulations that present best case for government compensation]; 25 *Ecology L. Q.* 465 [strategic litigating in land use cases]; 47 *A.L.R.3d* 1267 [consideration of ecological effects]; 26 Am.Jur.2d (2004 ed.), Eminent Domain.) (For the Model Eminent Domain Code, see 13 (Part I) U.L.A. (Master Ed.), p. 5 et seq.)

West's Key Number Digest, Constitutional Law k.226 et seq., 279 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Necessity for Compensation.* Cal. Const., Art. I, §19, was amended by Proposition 99 in 2008. (See Supp., infra, §1122.) The provision quoted in the text now provides that private property "may be taken or damaged for a public use and only when just compensation ... has first been paid to, or into court for, the owner." (Cal. Const., Art. I, §19(a)).(4) *Texts and Commentary.* See 2 Rotunda 4th, §15.10 et seq.; 121 *Harv. L. Rev.* 1467 [suggesting establishment of land assembly districts]; 45 *San Diego L. Rev.* 633, 729, 761 [Symposium on meaning of Takings Clause]; 54 *U.C.L.A. L. Rev.* 1681 [What Federalism Tells Us About Takings Jurisprudence].*Correction:* Page 747, subdivision (3), line 8, "*Fish & Game C. 1001*" should be "*Fish & Game C. 1009*".



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XIII. EMINENT DOMAIN

A. In General.

2. Property That May Be Taken.

8 Witkin Sum. Cal. Law Const Law § 1113

[§ 1113] Property That May Be Taken.

(1) *General Rule.* *C.C.P. 1240.110* authorizes the acquisition of *any necessary interest in property*, except as limited by statute. (See *Johnston v. Sonoma County Agricultural Preservation & Open Space Dist. (2002) 100 C.A.4th 973, 986, 123 C.R.2d 226, infra, §1170* [eminent domain law permits condemnation of open-space property]; *infra, §1182.*)

(2) *Limitations.* A number of statutory provisions restrict the taking of property used for specified purposes. The following are illustrative:

(a) Property appropriated to a public use may only be taken for a compatible or more necessary public use. (See *C.C.P. 1240.510* et seq. [compatible use], *infra, §1192*; *C.C.P. 1240.610* et seq. [more necessary public use], *infra, §1194.*) (See *Pub.Res.C. 5006.2* [property in Aptos Forest may not be taken without specific permission of Legislature]; *Pub.Res.C. 5074.3* [limited power to acquire property for recreational trails]; *Pub.Res.C. 8030* [certain state and federal lands in unincorporated areas may not be taken by eminent domain].)

(b) An existing golf course may not be taken by a city for golf course purposes. (*Govt.C. 37353(c).*)

(c) An existing airport controlled by a political subdivision may not be taken without the consent of the political subdivision. (*Pub.Util.C. 21632.*)

(d) Cemetery land may not be taken for a right of way without consent. (*Health & Saf.C. 8134, 8560, 8560.5.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See *Bronco Wine Co. v. Jolly (2005) 129 C.A.4th 988, 1030, 29 C.R.3d 462, Supp., infra, §1153* [federal Certificate of Label Approval (COLA) authorizing bottling and packing of wine for introduction into interstate commerce does not constitute property under Takings Clause; COLA does not confer right to market wines and is simply part of bundle of rights possessed by owner of brand name]; *41 U.C. Davis L. Rev. 1897* [condemning conservation easements].



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XIII. EMINENT DOMAIN

A. In General.

3. Who May Exercise Power.

a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1114

[§ 1114] In General.

(1) *Statutory Authorization Required.* "The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use." (*C.C.P. 1240.020*, *infra*, §1177; see *Cox Cable San Diego v. Bookspan* (1987) 195 C.A.3d 22, 27, 240 C.R. 407, *infra*, §1127.) Where the power in a particular situation is conferred by statute on one state agency, that agency has the exclusive right to bring the action, and the state itself cannot sue. (*People v. Superior Court* (1937) 10 C.2d 288, 298, 73 P.2d 1221.)

(2) *Illustrations.* The codes contain numerous provisions authorizing exercise of the power by various entities. (See C.E.B., 1 Condemnation Practice 2d, §6.6 et seq.; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §17 et seq.) The following are illustrative:

(a) The state (*Govt.C. 15854*).

(b) Cities (*Govt.C. 37350.5*) and counties (*Govt.C. 25350.5*). (See *infra*, §1115.)

(c) School districts (*Educ.C. 1047*) and nonprofit educational institutions of collegiate grade (*Educ.C. 94500*). (See *University of So. Calif. v. Robbins* (1934) 1 C.A.2d 523, 527, 37 P.2d 163.)

(d) Nonprofit hospitals (*Health & Saf.C. 127050*) and cemeteries (*Health & Saf.C. 8501*).

(e) Mutual water companies (*Pub.Util.C. 2729*) and privately owned public utilities (*Pub.Res.C. 25528*; *Pub.Util.C. 610* et seq.). (See *San Bernardino Valley Mun. Water Dist. v. Meeks & Daley Water Co.* (1964) 226 C.A.2d 216, 222, 38 C.R. 51 [condemnation by municipal water district of water rights of mutual water companies under Municipal Water District Act of 1911]; *Unocal Calif. Pipeline Co. v. Conway* (1994) 23 C.A.4th 331, 335, 28 C.R.2d 429 [pipeline corporation was public utility with eminent domain power even though its only customer was its parent corporation].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

3. Who May Exercise Power.

b. Municipal Corporation.

8 *Witkin Sum. Cal. Law Const Law* § 1115

[§ 1115] Municipal Corporation.

(1) *Legislative Authority.* A city's power is not inherent, but exists only by legislative authorization. (See *Govt.C.* 37350.5; *Menlo Park v. Artino* (1957) 151 C.A.2d 261, 266, 311 P.2d 135; *San Bernardino County Flood Control Dist. v. Superior Court* (1969) 269 C.A.2d 514, 518, 75 C.R. 24 [flood control district].) And neither the city's legislative body nor the People by initiative or referendum may abrogate that power. (*Alexander v. Mitchell* (1953) 119 C.A.2d 816, 821, 260 P.2d 261 [ordinance requiring initiative or referendum on city parking lot projects was invalid].)

(2) *Property Outside Corporate Limits.* A municipal corporation may condemn property outside its corporate limits. (Cal. Const., Art. XI, §9; *C.C.P.* 1240.125; see *infra*, §1181.) (See *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.* (1946) 72 C.A.2d 638, 652, 165 P.2d 741.) In *North Sacramento v. Citizens Util. Co. of Calif.* (1961) 192 C.A.2d 482, 13 C.R. 538, plaintiff city sued to condemn defendant public utility's water system, only 25% of which was located within its municipal boundaries. *Held*, judgment of condemnation affirmed. A municipality may have implied power to perform acts outside its boundaries, as in construction of sewers and other public works. Here, the city had express power to condemn a water system within its boundaries and to condemn wells and water on adjacent lands, to provide service to persons both within and without; it therefore had implied power to condemn the portion of the system outside its territorial limits. (192 C.A.2d 484.)

(3) *Joint Powers Agency.* Cities that individually have the power to acquire property for an airport (see *Govt.C.* 50490) also have the power to delegate those powers to a joint authority through a Joint Powers Agreement (see *Govt.C.* 6500 et seq.). (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 C.A.4th 556, 561, 99 C.R.2d 729.)

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c. Federal Government Acting for State.

8 Witkin Sum. Cal. Law Const Law § 1116

[§ 1116] Federal Government Acting for State.

The Federal-Aid Highways Act (23 U.S.C., §107) authorizes the Secretary of Commerce, on request of a state, to purchase or condemn lands that the state is unable to acquire or to acquire promptly, and to transfer them to the state for the purpose of completing the National System of Interstate and Defense Highways.

In *Eden Memorial Park Assn. v. Department of Public Works* (1963) 59 C.2d 412, 29 C.R. 790, 380 P.2d 390, the California Department of Public Works sought to condemn 12 acres of plaintiff's cemetery (unused for burials) for this purpose. Plaintiff invoked *Health & Saf.C. 8560* and *8560.5*, precluding condemnation of cemetery property, and the Court of Appeal prohibited the condemnation. The department then requested federal action, and the United States filed a condemnation suit and obtained an order for immediate possession. While federal court proceedings were pending, plaintiff brought the present action to enjoin the department from constructing the freeway. *Held*, judgment for defendant affirmed.

Plaintiff's theory, which prevailed in the Court of Appeal, was that federal power should be invoked only where the state lacks power to act because of deficiencies in its condemnation law, and that it was improperly invoked here to override the state's own policy declared in its statutes. (59 C.2d 417.) The court held, however, that the federal statute did not make this distinction, and that California, in *Sts. & H.C. 820* and *820.5*, expressly assented to the operation of the federal act despite inconsistency of state laws or regulations. (59 C.2d 417, 418, 419.)

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8 *Witkin Sum. Cal. Law Const Law* § 1117

[§ 1117] Private Person.

Clark v. Nash (1905) 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085, upheld a Utah statute giving private persons the right of eminent domain to secure water for their lands or for mining. The Court thought that in these special circumstances, where mining and agriculture were of great importance, and water was scarce, the declaration of the Legislature should be followed. However, this does not constitute an approval of the broad proposition that private property may be taken by private persons in *all cases* where the taking may promote the public interest and tend to develop the natural resources of the state.

Under former C.C. 1001, any person could, "without further legislative action, acquire private property for any use specified" in former C.C.P. 1238, by proceeding under the eminent domain statutes. Although this grant appears to be exceedingly broad, it was limited by the necessary public use concept (*infra*, §1175) and was seldom invoked. (See *Pasadena v. Stimson* (1891) 91 C. 238, 248, 27 P. 604 [condemnation to connect private buildings with established water system]; *Yeshiva Torah Emeth Academy v. University of So. Calif.* (1962) 208 C.A.2d 618, 25 C.R. 422 [condemnation by private corporation to operate elementary school was not authorized]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §28.)

In *Linggi v. Garovotti* (1955) 45 C.2d 20, 286 P.2d 15, plaintiff, an apartment house owner, sought to condemn an easement across defendant's property to connect with an adequate public sewer. Although judgment for defendant on demurrer was reversed, the court declared that a private individual seeking to condemn a single piece of land must make a stronger showing of public necessity than a public or quasi-public entity. Here, plaintiff did allege that his present connection was inadequate and that the new one was necessary to abate an overflow nuisance. But the easement will be denied if the evidence shows that the public authorities have not been asked to enlarge his present public sewer connection, or that the proposed easement is not the most direct or the least injurious method of reaching the new connection. (45 C.2d 27.)

Former C.C. 1001 was repealed in 1975 and replaced with a more limited provision of the same number. The owners of real property are now authorized to exercise the power of eminent domain in two instances:

- (1) To acquire an appurtenant easement to provide utility service to their property (C.C. 1001; see *infra*, §1178).

(2) To acquire a temporary right to enter property to repair or reconstruct their land or improvements (C.C. 1002; see *infra*, §1179).

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a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1118

[§ 1118] In General.

The taking of property must be for a proper public use. (*C.C.P. 1240.010*, *infra*, §1175.) (See 53 *Hastings L. J.* 1245 [public use and original understanding of Takings Clause]; 62 *A.L.R.4th* 1183 [industrial park as public use]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §42 et seq.)

Former C.C.P. 1238 et seq. specified particular public uses in great detail. (See *Alameda v. Meadowlark Dairy Corp.* (1964) 227 *C.A.2d* 80, 84, 38 *C.R.* 474 [use for exposition or fair is public notwithstanding purpose of providing horse racing and pari-mutuel betting]; *Anaheim v. Michel* (1968) 259 *C.A.2d* 835, 839, 66 *C.R.* 543 [stadium and adjoining parking].) Under the revised Eminent Domain Law, a list of public uses is unnecessary. A statutory authorization to condemn property for a particular use is a legislative declaration that the use is a public use. (*C.C.P. 1240.010*.) And the codes contain numerous provisions identifying the purposes for which eminent domain is authorized. (See C.E.B., 1 *Condemnation Practice* 2d, §6.4 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See 40 *Loyola L.A. L. Rev.* 809 [public use and private use: there is no difference].



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4. Public Use.

b. Airport Purposes.

8 Witkin Sum. Cal. Law Const Law § 1119

[§ 1119] Airport Purposes.

The Airport Approaches Zoning Law (*Govt.C. 50485 et seq.*) authorizes local governmental agencies to eliminate airport hazards by the exercise of the police power or under the authority of *Pub.Util.C. 21652, 21653*. The prevention, removal, and mitigation of airport hazards are public purposes for which property interests may be acquired. (*Govt.C. 50485.2.*)

A person authorized to exercise the power of eminent domain for airport purposes may, by condemnation or otherwise, do the following:

(1) Acquire property "necessary to permit the safe and efficient operation of the airport" or to prevent, remove, or eliminate airport hazards. (*Pub.Util.C. 21652(a)(1).*) "Property" is broadly defined to include interests in real or personal property, including air rights, "whether within, beyond, adjacent to, or in the vicinity of" the airport. (*Pub.Util.C. 21652(b).*) (See *Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 C.A.4th 366, 374, 85 C.R.2d 28 [*Pub.Util.C. 21661.6*, requiring that acquiring entity submit plan for airport expansion to county board of supervisors or city council and that hearing be conducted prior to approval or disapproval, did not conflict with airport authority's power of eminent domain or give city "veto power"].)

(2) Acquire airspace or an airspace easement above property "necessary to permit imposition on such property of excessive noise, vibration, discomfort, inconvenience, interference with use and enjoyment, and any consequent reduction in market value, due to the operation of aircraft." (*Pub.Util.C. 21652(a)(2).*) (On inverse condemnation suits based on discomfort and damage by airport noise and vibration, see *infra*, §1128.)

(3) Provide for the removal or relocation of hazards or facilities and equipment that interfere with expansion or improvement or with safe landings and takeoffs. (*Pub.Util.C. 21653.*)

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c. Review of Legislative Determination.

8 Witkin Sum. Cal. Law Const Law § 1120

[§ 1120] Review of Legislative Determination.

The legislative declaration of public uses is subject to judicial review. (See *San Mateo v. Coburn* (1900) 130 C. 631, 634, 63 P. 78; *People v. Olsen* (1930) 109 C.A. 523, 531, 293 P. 645; C.C.P. 1250.350, *infra*, §1206.) However, it is entitled to great weight, and a far broader latitude is allowed than in the exercise of the police power; e.g., condemnation of lands for public parks, and of highways to places of natural scenery, in the interest of public recreation and enjoyment, is generally upheld. (See *Rindge Co. v. Los Angeles* (1923) 262 U.S. 700, 43 S.Ct. 689, 692, 67 L.Ed. 1186, 1192; *University of So. Calif. v. Robbins* (1934) 1 C.A.2d 523, 525, 37 P.2d 163; *Golden Gate Bridge & Highway Trans. Dist. v. Muzzi* (1978) 83 C.A.3d 707, 713, 148 C.R. 197 [plaintiff's statutory power to condemn property necessary for water transportation implicitly includes power to condemn property for environmental mitigation (tidelands to deposit dredged spoils)]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §52.)

In *Tennessee Valley Authority v. Welch* (1946) 327 U.S. 546, 66 S.Ct. 715, 90 L.Ed. 843, the Tennessee Valley Authority, an agency of the federal Government, acting pursuant to statute, built a dam that flooded a roadway and isolated some 200 families. It appeared that the cost of building a new road and of providing the isolated area with essential services (schools, police protection, etc.) would be prohibitive. Accordingly, a plan was devised under which the Authority was to purchase all the land for inclusion in an adjacent national park. In this proceeding to condemn the lands of six dissenting owners, the Court held that the entire transaction of dam building and the incidental purchase should be viewed as a single integrated effort, and that it was within the power of the Authority to make an adjustment of the respective interests involved which would save money and would benefit an independent governmental agency (the National Park Commission). The opinion repeats the familiar rule that Congress must decide what type of taking is for a public use, and that its decision "is entitled to deference until it is shown to involve an impossibility." (66 S.Ct. 718, 90 L.Ed. 848.) A concurring opinion, after noting the fact that the Court has never overturned a legislative determination of public use, nevertheless warned that "the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting." (66 S.Ct. 720, 90 L.Ed. 851.) (See 20 *Cal. L. Rev.* 99.)

In *People v. Nahabedian* (1959) 171 C.A.2d 302, 340 P.2d 1053, the Department of Public Works sued to condemn a parcel of 21/2 lots fronting on a Los Angeles street. The complaint alleged that the public interest and necessity required their taking for "freeway purposes." Defendant, in a defectively phrased answer, challenged this allegation of

purpose, alleging that the land was sought for "other purposes," namely, to lease it to a private person for an auto park. The trial judge excluded evidence on this issue on the theory that the purpose of condemnation proceedings was not a matter for judicial determination. *Held*, reversed; the judge confused necessity (*infra*, §1124) with public use. The mere declaration of the Legislature is not conclusive regarding the purpose, for the state has no constitutional authority to acquire property of a citizen for a private use. The determination of public purpose cannot be committed to the conclusive determination of an administrative agency of the condemning body. (171 C.A.2d 307.) (See *People v. Lagiss* (1963) 223 C.A.2d 23, 35, 35 C.R. 554.)

The challenge sanctioned by *Nahabedian* must be made by proper pleading. In *San Mateo v. Bartole* (1960) 184 C.A.2d 422, 434, 7 C.R. 569, plaintiff county alleged public use, and defendants merely denied the allegation, making no affirmative averments of fraud, abuse of discretion, or taking for private purposes. *Held*, judgment on the pleadings for plaintiff on this issue was properly granted. (184 C.A.2d 430.)

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4. Public Use.

d. Change of Use After Judgment.

8 Witkin Sum. Cal. Law Const Law § 1121

[§ 1121] Change of Use After Judgment.

A final judgment in a condemnation action vests the fee in the condemning agency, and the title cannot be attacked by the former owner on the ground that the contemplated public purpose was not carried out.

In *Arechiga v. Housing Authority of Los Angeles* (1958) 159 C.A.2d 657, 324 P.2d 973, a Housing Authority sued to condemn property for a low rental housing project, successfully established necessity, received judgment, and deposited the award with the county clerk, but then dropped the project and transferred the land to the city. The owners did not take the money, and brought this action to set aside or enjoin enforcement of the judgment, on the theory that the subsequent abandonment of the public purpose gave them a right of reverter. *Held*, this right did not exist; property acquired for a particular public purpose may lawfully be diverted to another use. (159 C.A.2d 660.) (See *Newport v. Los Angeles* (1960) 184 C.A.2d 229, 239, 7 C.R. 497 [following *Arechiga*]; for similar rule on dedication of public property, see 12 *Summary* (10th), *Real Property*, §253.)

SUPPLEMENT: [This section is current through the latest supplement]

For statute requiring new resolution of necessity for change in public use after property is acquired by eminent domain, see Supp., *infra*, §1121A.



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4. Public Use.

e. (New) New Resolution for Change of Use.

8 Witkin Sum. Cal. Law Const Law § 1121A

[§ 1121A] (New) New Resolution for Change of Use.

C.C.P. 1245.245, added in 2006, provides that property acquired (1) by eminent domain, (2) pursuant to a resolution of public necessity, or (3) subsequent to a written notice that a public entity may take the property by eminent domain, may only be used for the public purpose stated in the resolution unless the governing body adopts another resolution authorizing a different use. The vote to change the use must be by at least two-thirds of all members of the governing body. (*C.C.P. 1245.245(a)*.) Property that is not used for the public purpose stated in the resolution of necessity within 10 years of the adoption of the resolution must be sold unless, by at least a two-thirds vote, a resolution authorizes a new use or reauthorizes the original use. (*C.C.P. 1245.245(b)*.) If the property must be sold, the public entity must offer the former owner from whom the property was acquired the right of first refusal to purchase the property. (*C.C.P. 1245.245(f)*.) If that owner cannot be found or does not choose to purchase the property, or if giving a right of first refusal is not necessary, the property must be sold as surplus property pursuant to *Govt.C. 54220* et seq. (*C.C.P. 1245.245(g)*.)

When acquired property that was not used for the public use stated in the resolution is sold as surplus property, the public entity must pay the former owner any financial gain from the sale, with the acquisition price adjusted for inflation. (*C.C.P. 1245.245(h)*.)

On completion of the acquisition of the property or adoption of a resolution of necessity, whichever is later, the public entity must give the former owner written notice of his or her rights under the statute. (*C.C.P. 1245.245(i)*.)

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5. Public Purpose in Private Use.

a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1122

[§ 1122] In General.

(1) *General Principle.* The public use concept has been greatly liberalized in decisions upholding the elimination of slums and blighted areas by publicly financed redevelopment or urban renewal programs. The public purpose in the governmental condemnation of the land is obvious. But the property is eventually sold or leased to private persons, so that there is, strictly speaking, no taking for public use. Nevertheless, these programs have been upheld where the public need exists (health, safety, and general welfare menaced by slum) and cannot be satisfied by private enterprise or governmental action under the police power. Thus, the restricted concept of "public use" gives way to a new concept of "public purpose," and the power of eminent domain is properly exercised even though the use after the taking is a private use. (See *Redevelopment Agency of San Francisco v. Hayes* (1954) 122 C.A.2d 777, 788, 266 P.2d 105 [idea is that taking of property itself, as distinguished from subsequent use of that property, may be required in public interest]; *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 103, 99 L.Ed. 27, 38; 12 *Summary* (10th), *Real Property*, §827 et seq.)

(2) *Slum Clearance and Redevelopment.* In *Redevelopment Agency of San Francisco v. Hayes*, *supra*, the Redevelopment Agency of San Francisco, created under the Community Redevelopment Law (*Health & Saf.C. 33000* et seq.), sought mandamus to compel its chairman to execute a loan and make contracts with the United States for two programs--a slum area and a blighted area. In granting the writ, the court said: "It might be pointed out that as our community life becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized. In addition, slum clearance for redevelopment purposes is likewise so recognized. To hold that clearance of blighted areas as characterized by the act and as shown in this case and the redevelopment of such areas as contemplated here are not public uses, is to view present day conditions under the myopic eyes of years now gone." (122 C.A.2d 802.) (See *Fellom v. Redevelopment Agency of San Francisco* (1958) 157 C.A.2d 243, 246, 320 P.2d 884; 44 A.L.R.2d 1414 [urban redevelopment by private enterprise].)

(3) *Parking Facilities.* In the cases upholding redevelopment projects, the statutes prescribed a general plan with sufficient controls to assure the ultimate use of the property to carry out the public purpose. It appears that some control

retained by the governmental body is essential to the validity of a taking for ultimate transfer to private persons. This issue was presented in *San Francisco v. Ross* (1955) 44 C.2d 52, 279 P.2d 529, where plaintiff city created a Parking Authority to acquire land for lease to private persons who would build a parking structure according to the city's specifications. Several statutes authorize the formation of parking districts that may acquire property and make the leases, but they provide that rentals and other charges must be fixed by the public agency. The city did not act under these statutes, but sought to condemn under its general power of eminent domain, and to lease without rate regulation. *Held*, this was not a proper exercise of the power. "The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need. The parking facility contemplated in the present case appears to be narrowed to such an enterprise." (44 C.2d 59.) (See *Larsen v. San Francisco* (1957) 152 C.A.2d 355, 363, 313 P.2d 959 [distinguishing *Ross*, and upholding Parking Authority where sufficient controls were provided]; 8 A.L.R.2d 373 [municipal establishment or operation of public off-street parking facilities].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Principle.* In response to the holding in *Kelo v. New London, Connecticut* (2005) 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439, *infra*, this section, California voters adopted Proposition 99 in June, 2008. It amends Cal. Const., Art. I, §19. The Proposition adds the following:

(a) "State and local governments are prohibited from acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person." (Cal. Const., Art. I, §19(b).)

(b) Cal. Const., Art. I, §19(b), is not applicable when the State or local governments exercise the power of eminent domain (1) to protect public health and safety; (2) to prevent serious, repeated criminal activity; (3) to respond to an emergency; or (4) to remedy environmental contamination that poses a threat to public health and safety. (Cal. Const., Art. I, §19(c).)

(c) Cal. Const., Art. I, §19(b), is not applicable when the State or local governments exercise the power of eminent domain to acquire private property for a public work or improvement. (Cal. Const., Art. I, §19(d).)

See 10 A.L.R. Fed 2d 407 [Construction and Application of "Public Use" Restriction in Fifth Amendment's Takings Clause--United States Supreme Court Cases].(4) *(New) Economic Development.* In *Kelo v. New London, Connecticut*, *supra*, defendant city approved a development plan aimed at economic revitalization. The plan, developed over a number of years and approved by various state agencies, involved a 90-acre area consisting of seven parcels to be developed for specified residential, commercial, and recreational uses. Most of the land was acquired through purchase, but when defendant attempted to acquire the remainder by eminent domain, plaintiffs, the owners of 15 properties in parcels 3 and 4A, brought the present action, claiming that the takings violated the "public use" restriction in the Fifth Amendment's Takings Clause. While the action was pending, defendant announced that it planned to lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. The trial court granted a permanent restraining order prohibiting the taking of the properties in parcel 4A, but denied relief regarding the properties in parcel 3. Both sides then appealed to the Connecticut Supreme Court, which held that all of the takings were valid. *Held*, affirmed.

(a) The Takings Clause requires that private property be taken for a "public use," which was formerly defined as "use by the public." However, that definition was impractical and difficult to administer. The broader and more natural interpretation of "public use" adopted by the courts is "public purpose." (125 S.Ct. 2662, 162 L.Ed.2d 451.) Thus, a city cannot condemn land for the sole purpose of conferring private benefits on particular private parties, but it may transfer property from one private individual to another if future public use is the purpose of the taking. (125 S.Ct. 2661, 162 L.Ed.2d 450.) Here, although defendant was not planning to open all the condemned land to use by the general public, the takings were part of a carefully considered economic development plan, which was entitled to deference by the courts. (125 S.Ct. 2662, 2663, 162 L.Ed.2d 451, 452.)

(b) To effectuate its plan, defendant "has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us ... to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." (125 S.Ct. 2665, 162 L.Ed.2d 454.)

(c) Plaintiffs argued for a bright-line rule that economic development does not constitute a "public use." But promoting economic development is a traditional function of government. Moreover, there is no method of distinguishing economic development from the other public purposes that have been recognized, such as redevelopment of a blighted area (see *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, text, §1063), breaking up a land oligopoly that created an artificial barrier to normal functioning of the residential land market (see *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186, text, §1123), and eliminating a barrier to entry into the pesticide market (see *Ruckelshaus v. Monsanto* (1984) 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815). (125 S.Ct. 2665, 162 L.Ed.2d 454.)

(d) Plaintiffs contended that using eminent domain for economic development impermissibly blurs the distinction between public and private takings. Although the pursuit of a public purpose will often benefit private parties, the achievement of a public good is not rendered ineffective by the fact that it coincides with the immediate benefiting of private parties. Notably, the private developers here were required by contract to use the property to carry out the development plan. (125 S.Ct. 2666, 162 L.Ed.2d 455.)

(e) A state may place "further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." (125 S.Ct. 2668, 162 L.Ed.2d 457.) "[T]he necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution." (125 S.Ct. 2668, 162 L.Ed.2d 458.)

Four justices dissented, arguing that "all private property is now vulnerable to being taken and transferred to another private owner, so long as its use might be upgraded ... in the process." To reason, as the majority does, "that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property," and thereby effectively to delete the words "for public use" from the *Takings Clause*. (125 S.Ct. 2671, 162 L.Ed.2d 461.) (See 43 Cal. Western L. Rev. 363 [*Kelo*]; 33 *Ecology L. Q.* 545 [same]; 34 *Ecology L. Q.* 1 [same]; 34 *Ecology L. Q.* 443 [Planning as Public Use?]; 119 *Harv. L. Rev.* 287 [*Kelo*]; 38 *McGeorge L. Rev.* 369 [same]; 33 *Pepperdine L. Rev.* 335 [same]; 46 *Santa Clara L. Rev.* 767 [Symposium: *Kelo*, *Lingle*, and *San Remo Hotel*: Takings Law Now Belongs to the States]; 40 *U.C. Davis L. Rev.* 1997 [*Kelo*]; 21 *A.L.R.6th* 261 [application of *Kelo* to public use restrictions in federal and state constitutions' takings clauses and eminent domain statutes].)



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5. Public Purpose in Private Use.

b. Correcting Market Failure.

8 Witkin Sum. Cal. Law Const Law § 1123

[§ 1123] Correcting Market Failure.

In *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186, the question was whether the Public Use Clause of the Fifth Amendment (applicable to the states through the Fourteenth Amendment) "prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State." (104 S.Ct. 2324, 81 L.Ed.2d 191.)

In the mid-1960s, after extensive hearings, the Hawaii Legislature concluded that concentrated land ownership was responsible for skewing the state's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare. The Legislature decided to compel large landowners to break up their estates. To accommodate the needs of both lessors and lessees, the Land Reform Act of 1967 created a mechanism for condemning residential tracts and transferring ownership of the condemned fees simple to existing lessees. Under the Act, tenants living on single-family residential lots within development tracts may apply for condemnation; if the Housing Authority (HHA) finds that acquisition by the state will effectuate the purposes of the Act, it acquires the property at prices set either by condemnation trial or by negotiation between lessors and lessees; and after compensation has been set, HHA may sell the land titles to tenant applicants.

Plaintiff trustees of landholding estates brought an action in the federal district court to enjoin enforcement of a compulsory arbitration order, and challenged the constitutionality of the Act. *Held*, the Act is constitutional.

(a) "The starting point for our analysis" is the decision in *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed.2d 27, *supra*, §978, recognizing the broad power of the Legislature to determine "public use." The Court will not substitute its judgment for that of the Legislature "unless the use be palpably without reasonable foundation." (104 S.Ct. 2329, 81 L.Ed.2d 196, 197.) One person's property cannot be taken for the benefit of another private person without a justifying public purpose; "[b]ut where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." (104 S.Ct. 2329, 81 L.Ed.2d 198.)

(b) "The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the

perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." (104 S.Ct. 2330, 81 L.Ed.2d 198.)

(c) The legislative approach to the problem is not irrational. "The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning. When such a malfunction is signaled, the Act authorizes HHA to condemn lots in the relevant tract. The Act limits the number of lots any one tenant can purchase and authorizes HHA to use public funds to ensure that the market dilution goals will be achieved. This is a comprehensive and rational approach to identifying and correcting market failure." (104 S.Ct. 2330, 81 L.Ed.2d 198.) Whether the statute in fact will accomplish its objectives is not the issue; the constitutional requirement is satisfied if the Legislature rationally could have believed that the objectives would be promoted. (104 S.Ct. 2330, 81 L.Ed.2d 198.)

(d) The fact that the property taken by eminent domain is transferred in the first instance to private beneficiaries does not mean that the taking has only a private purpose; the Act advances the public purposes without the state's taking actual possession or use of the property. "[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." (104 S.Ct. 2331, 81 L.Ed.2d 199.)

(e) The fact that a state Legislature and not Congress makes the public use determination does not mean that judicial deference is less appropriate. "Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority." (104 S.Ct. 2331, 81 L.Ed.2d 200.)

(f) "[N]o purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii--a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied." (104 S.Ct. 2331, 81 L.Ed.2d 200.) (See 98 Harv. L. Rev. 225; 15 Ecology L. Q. 671; 15 Southwestern U. L. Rev. 817; 20 U.S.F. L. Rev. 121.)

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XIII. EMINENT DOMAIN

A. In General.

6. Public Necessity.

8 Witkin Sum. Cal. Law Const Law § 1124

[§ 1124] Public Necessity.

Under former case law, if the use for which property was taken was public, the question whether the taking was necessary or expedient was exclusively legislative and presented no justiciable issue for a court. (See *Los Angeles v. Bartlett* (1962) 203 C.A.2d 523, 532, 21 C.R. 776; *People v. Lagiss* (1963) 223 C.A.2d 23, 33, 35 C.R. 554; *Breiner v. Los Angeles* (1971) 22 C.A.3d 382, 387, 99 C.R. 180; C.E.B., *Condemnation Practice* 2d §22 et seq.)

In *People v. Chevalier* (1959) 52 C.2d 299, 307, 340 P.2d 598, the city of Los Angeles, pursuant to an agreement with the State Highway Commission, sued to condemn an easement over defendants' land to provide access to the state's freeway for landlocked parcels. Defendants' answers alleged fraud, bad faith, and abuse of discretion in that the city acceded to the request of the state agency, disregarding the interests of the city and refusing to hear evidence that these interests would be better served by a different road. *Held*, the defenses were properly stricken.

"[T]he questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of 'necessity' in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement." (52 C.2d 307.)

Former C.C.P. 1241 codified the principle of conclusive effect for takings by cities, counties, and specified types of local districts, but excluded the conclusive presumption where the property taken was outside the territorial limits of the condemning entity. (See *Los Angeles v. Keck* (1971) 14 C.A.3d 920, 925, 928, 92 C.R. 599 [where city had previously condemned easement for electrical lines in 250-foot wide strip running through 640-acre farm, there was no evidence of necessity for taking fee simple title to that identical strip for additional lines]; *People v. Van Gorden* (1964) 226 C.A.2d 634, 636, 38 C.R. 265 [prima facie evidence of necessity for condemnation of land for state parks; former Pub.Res.C. 5006.1].)

Under the revised Eminent Domain Law, a resolution of necessity is required before a proceeding can be commenced. (C.C.P. 1245.220, *infra*, §1199.) In takings by the state and by local public entities, the resolution is

conclusive on the issue of public necessity except where (a) a local entity takes property outside its boundaries, (b) the resolution is affected by a gross abuse of discretion, or (c) the resolution is adopted through bribery. (See *infra*, §1200.)

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1. What Constitutes Taking.
a. Acquisition of Title or Possession.

8 Witkin Sum. Cal. Law Const Law § 1125

[§ 1125] Acquisition of Title or Possession.

The typical and traditional method of exercising the power of eminent domain is to acquire the title and possession of property by a condemnation action. (See 99 *Harv. L. Rev.* 791 [jurisprudential basis for taking]; 21 *Pepperdine L. Rev.* 131 [seizure of solvent national bank under Federal Deposit Insurance Corporation Improvement Act of 1991 as violation of Takings Clause]; 76 *So. Cal. L. Rev.* 1003 [Takings Clause as comparative right]; 172 *A.L.R. Fed* 507 [Award of Costs and Attorney's Fees Under §304 of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C., §4654)]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §121 et seq.) (On condemnation of leasehold, see *infra*, §1250; on temporary taking of going business, see *infra*, §1130; on alternative procedures available to federal Government, see *United States v. Dow* (1958) 357 U.S. 17, 78 S.Ct. 1039, 1044, 2 L.Ed.2d 1109, 1114; on federal acquisition policies generally, which also apply to federally funded projects, see 42 U.S.C., §4651 et seq.)

West's Key Number Digest, Constitutional Law k.226 et seq., 279 et seq.

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See 10 *A.L.R. Fed* 2d 231 [what constitutes taking of property requiring compensation under Fifth Amendment--United States Supreme Court cases].



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1. What Constitutes Taking.

b. Damage to Property or Interests.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1126

[§ 1126] In General.

The federal Constitution, unlike that of California (*infra*, §1132), has no clause concerning *damage* to property. (See *United States v. Willow River Power Co.* (1945) 324 U.S. 499, 65 S.Ct. 761, 764, 89 L.Ed. 1101, 1107.) Nevertheless, some kinds of governmental interference with property, which cause destruction of or substantial injury to the property interests of the owner, are held compensable by an increasingly liberal recognition of property interests and a correspondingly liberal expansion of the concept of "taking." (See *United States v. General Motors Corp.* (1945) 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311, *infra*, §1271 [compensation for removal, storage, and replacement of equipment on partial taking of leasehold]; *United States v. Virginia Elec. & Power Co.* (1961) 365 U.S. 624, 81 S.Ct. 784, 787, 5 L.Ed.2d 838, 843 [flowage easement is compensable property interest even though its destruction results from federal power development under navigational servitude]; *Breda Costruzioni Ferroviarie S.P.A. v. Los Angeles County Metropolitan Trans. Authority* (1997) 56 C.A.4th 1433, 1436, 66 C.R.2d 416 [Takings Clause prohibited public entity from retaining interest earned while it held funds as stakeholder pursuant to stop notice]; 112 *Harv. L. Rev.* 997 [deterrence and distribution in law of takings]; 44 *A.L.R.4th* 366 [seizure of property for evidence in criminal case as taking]; 7 *A.L.R.5th* 113 [compensability of loss of visibility of owner's property]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §125 et seq.; on regulatory takings generally, see *infra*, §1153 et seq.)

In *Armstrong v. United States* (1960) 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554, the federal Government had a contract with R Corp. for construction of navy boats. Under the contract, the Government could terminate for default and R would then transfer title and deliver all uncompleted hulls and materials to the United States. Petitioners furnished materials and, under Maine law, had mechanics' liens on the ships. Then R Corp. defaulted and the Government took title. *Held*, petitioners were entitled to satisfaction of their lien claims.

(a) No laborer's or materialman's lien can be acquired on "public work," but the mere inchoate title the Government had in the event of the prime contractor's default did not constitute this public property immune from liens. R Corp. had title, the liens attached, and they were property protected by the *Fifth Amendment*. (80 S.Ct. 1566, 4 L.Ed.2d 1557.)

(b) The dissenters argued that there was no taking because the Government did not exercise its power of eminent domain at all, and the lien claims were unenforceable against the Government because of the independent doctrine of

sovereign immunity. But the majority held otherwise. The total destruction by the Government of all value in the liens "has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none." (80 S.Ct. 1568, 4 L.Ed.2d 1561.) Because "this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment." (80 S.Ct. 1569, 4 L.Ed.2d 1561.)

In *Moerman v. California* (1993) 17 C.A.4th 452, 21 C.R.2d 329, the state, as part of a program of relocating tule elk to their native ranges, relocated some elk close to a lake near plaintiff's property. Some of the elk came onto plaintiff's ranch and caused damage. Despite the state's efforts to scare the elk off private property, they remained on plaintiff's property almost continuously for several years. Plaintiff sought damages, claiming that the state's actions constituted a taking of his property. *Held*, the tule elk are neither instrumentalities of nor controlled by the state; hence, there was no physical taking of property. (17 C.A.4th 455.)

"The tule elk are wild animals who roam across private and public property. The state does not own wild animals ... , nor does it control wild animals that have not been reduced to possession. ... The majority of courts that have considered the question of whether the government owes compensation for damage to property caused by protected wildlife have held that the government does not." (17 C.A.4th 457, 458.)

West's Key Number Digest, Constitutional Law k.228.1

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See *Butler v. Palos Verdes Estates* (2005) 135 C.A.4th 174, 184, 37 C.R.3d 199 [following *Moerman v. California* (1993) 17 C.A.4th 452, 21 C.R.2d 329, text, p. 761; city was not liable in inverse condemnation based on presence of pea fowl in park even though city protected and controlled peafowl population; peafowl are feral animals that are not instrumentalities of city as matter of law].



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2. Insubstantial Permanent Physical Occupation.

8 Witkin Sum. Cal. Law Const Law § 1127

[§ 1127] Insubstantial Permanent Physical Occupation.

In *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868, a New York statute provided that a landlord must permit a cable television company to install its cable facilities on the property. Defendant corporation provided CATV service to plaintiff's tenants by dropping a line to the first floor down the front of plaintiff's apartment building. *Held*, this permanent physical occupation authorized by the statute was a taking, without regard to the public interests it may serve.

(a) *Penn Cen. Trans. Co. v. New York* (1978) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *supra*, §981, in its elaborate discussion of the Takings Clause, points out that there is no set formula for determining whether compensation is constitutionally due for a government restriction of property. (102 S.Ct. 3171, 3174, 73 L.Ed.2d 876, 880.) But the cases "clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." (102 S.Ct. 3173, 73 L.Ed.2d 878.)

(b) Defendant's cable installation was a taking under the traditional test. "The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." (102 S.Ct. 3177, 73 L.Ed.2d 884.)

(c) "Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains an historically-rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." (102 S.Ct. 3179, 73 L.Ed.2d 886.)

Three justices dissented, describing the decision as "anachronistic." (102 S.Ct. 3180, 73 L.Ed.2d 887.) The cable and boxes occupy a fraction of a cubic foot of space on the building's roof, and the *per se* rule constructed by the majority "represents an archaic judicial response to a modern social problem." (102 S.Ct. 3186, 73 L.Ed.2d 895.) (See

72 Cal. L. Rev. 569.)

Loretto was applied to an action by a plaintiff seeking a court injunction in *Cox Cable San Diego v. Bookspan* (1987) 195 C.A.3d 22, 240 C.R. 407. Plaintiff had a cable television system in defendant's apartment complex that was installed under a contract with defendant's predecessor. Defendant disconnected the system and contracted for a system from a different company. Plaintiff's application for a preliminary injunction was denied. *Held*, affirmed. "The physical invasion of private property is no less an invasion if it is authorized by the courts through the granting of a preliminary injunction than if authorized by the Legislature enacting a statute mandating a right of access to cable companies." (195 C.A.3d 27.)

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3. Damage From Airplanes.

8 Witkin Sum. Cal. Law Const Law § 1128

[§ 1128] Damage From Airplanes.

In *United States v. Causby* (1946) 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, Government military planes, coming in to a nearby airport, flew so low over plaintiff's poultry farm that chickens were frightened and killed, and plaintiffs themselves were so disturbed that the business was ruined. *Held*, this invasion of the lower airspace was as much the taking of an easement as an invasion of the land itself, and was compensable.

The *Causby* doctrine was extended in *Griggs v. Allegheny* (1962) 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585, to apply to commercial airliners, and to impose liability on the county that designed and constructed the airport. The county contended that because construction was in conformity with the federal statute (National Airport Plan) and subject to the approval of the Federal Aviation Agency Administrator, it was the U.S. that did the taking. Two dissenting justices agreed, but the majority declared that the county, as promoter, owner, and lessor of the airport, chose the site, determined the length and direction of runways, and the land and navigation easements needed; hence, it "took the air easement in the constitutional sense." (82 S.Ct. 534, 7 L.Ed.2d 589.) (See 22 A.L.R.4th 863 [airport operations or flight of aircraft as constituting taking or damaging of property]; 18 A.L.R.4th 542 [zoning regulations limiting use of property near airport as taking].)

In *Sneed v. Riverside* (1963) 218 C.A.2d 205, 32 C.R. 318, defendant county adopted an ordinance establishing height limits for structures in the approach area. Plaintiff, a property owner in the area, brought an action in inverse condemnation, contending that the ordinance was not a police power regulation of height limits but the taking of an air easement without compensation. *Held*, a cause of action was stated under *Griggs v. Allegheny*. The police power may be exercised to fix height limits where there is no invasion of the airspace above; where that airspace is used by aircraft, payment of compensation for the easement is the more acceptable practice. (218 C.A.2d 209.) (See *Peacock v. Sacramento* (1969) 271 C.A.2d 845, 77 C.R. 391 [following *Sneed*].)

In *Aaron v. Los Angeles* (1974) 40 C.A.3d 471, 115 C.R. 162, the court examined federal and state case law, and upheld recovery for excessive noise resulting from jet flights at a municipal airport. The court held that "the municipal operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that

the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking. Whether the interference is substantial enough to meet this standard is a mixed question of fact and law for the trial judge to determine. The owner need not prove there were direct overflights of the property. The fact that the federal government controls the flight of aircraft does not relieve the airport owner and operator of liability where the operation of the airport is a substantial cause of the property owner's damage." (40 C.A.3d 493.)

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4. Water and Power Projects.

8 Witkin Sum. Cal. Law Const Law § 1129

[§ 1129] Water and Power Projects.

In *United States v. Dickinson* (1947) 331 U.S. 745, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789, 1794, the federal Government built a dam, which raised the level of a river and not only permanently flooded part of plaintiff's land, but also damaged the new bank of the river by erosion. *Held*, plaintiffs were entitled to compensation for the erosion as well as for the easement gained by flooding. In answer to the Government's contention that the erosion was merely consequential damage, the Court said: "The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river, does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking."

In *United States v. Kansas City Life Ins. Co.* (1950) 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277, the Government maintained the Mississippi River continuously at high-water level in a certain area. Defendant's farm land was on a nonnavigable tributary 11/2 miles away, but was damaged by percolation and the raising of the water table so that the land no longer drained. *Held*: "This case comes within the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction." (70 S.Ct. 890, 94 L.Ed. 1285.)

In *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231, the Government, an upstream appropriator, built Friant Dam as part of the California Central Valley Project. The claimants, lower riparian owners, were deprived of irrigation water from the periodic overflow of the San Joaquin River. *Held*, compensation was properly awarded. Although the riparian owners could not maintain an action to enforce this "prodigal" use of water (because of the California Constitution's provision against waste--see 12 *Summary* (10th), *Real Property*, §937), there is no justification for the Government taking the water and selling it to others without compensation. "Public interest requires appropriation; it does not require expropriation." (70 S.Ct. 969, 94 L.Ed. 1250.)

In *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332, a Hawaii residential marina was developed by dredging and filling a pond. The Government then declared it to be navigable water and asserted a public right of access. *Held*, the attempt to create the right "goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic" of *Pennsylvania Coal v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322. (100 S.Ct. 392, 62 L.Ed.2d 345.) (See 94 *Harv. L. Rev.* 205.)

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1. What Constitutes Taking.

c. Temporary Taking of Going Business.

8 Witkin Sum. Cal. Law Const Law § 1130

[§ 1130] Temporary Taking of Going Business.

(1) *Compensation for Use Value.* A far-reaching decision was rendered in *Kimball Laundry Co. v. United States* (1949) 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765. The Government condemned petitioner's laundry for use by the Army, and kept it for 31/2 years. Petitioner, with no means of serving its customers, suspended business during the period. As to the principal item of damages, the Court held that the measure in the case of a temporary taking is not the difference in the value of the fee before and after the taking, but the market rental value. (69 S.Ct. 1438, 93 L.Ed. 1773.) The Court then held that in addition, petitioner was entitled to recover the value of the loss of its *trade routes*, i.e., its *going concern value*. (a) Prior cases holding that going concern value cannot be recovered where the fee is taken were approved on the theory that the owner is free to find another location for the business, and that compensation should not depend on his or her good fortune or lack of it. (b) On the other hand, where a private corporation or person operates a public utility, and this is condemned, the property taken is the going concern value, the owner is deprived of it, and this is a compensable taking. (c) The same principle should govern here. By temporarily taking petitioner's plant, the government took the trade routes, and the value of their temporary use must be paid.

The dissent pointed out that the Government was being required to pay for something that it could not and did not use. The U.S. "is being forced to pay not for what it gets but for what the owner loses." (69 S.Ct. 1447, 93 L.Ed. 1781.) (See 7 A.L.R.2d 1297 [compensation for temporary use or occupancy]; on regulatory takings generally, see *infra*, §1153 et seq.; on requirement of compensation for temporary taking of personal property, see *Needles v. Griswold* (1992) 6 C.A.4th 1881, 8 C.R.2d 753, *infra*, §1163.)

(2) *Compensation for Losses.* In *United States v. Pewee Coal Co.* (1951) 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809, the Government by Executive Order seized most of the nation's coal mines for some months. The operation of respondent's mine resulted in a loss of \$ 2,241.26, mainly attributable to increased wage payments ordered by the War Labor Board. *Held*, this was a taking, and respondent was entitled to an award of this sum. Ordinarily, under *Kimball*, fair compensation for temporary possession of a business enterprise is the reasonable value of the property's use. But a different theory was correctly applied here. Like a private person, the Government is entitled to profits and bears losses of a business operation it conducts; hence, when a private business is possessed and operated for public use, there is no reason to impose losses on the owner. It is immaterial that governmental operation resulted in a smaller loss than respondent would have sustained without seizure; the crucial fact is that when the Government took control, respondent

was not free to exercise its own business judgment. (See *30 Hastings Const. L. Q. 173* [availability of Fifth Amendment remedy for aviation businesses devastated by restrictions after September 11].)

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2. Noncompensable Injury.

8 Witkin Sum. Cal. Law Const Law § 1131

[§ 1131] Noncompensable Injury.

(1) *Destruction or Injury Under War Power.* Property destroyed under the war power is not taken, and compensation is not required. In *United States v. Caltex* (1952) 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157, the Army, retreating from Manila, destroyed the oil terminal facilities of respondent oil companies to render them useless to the enemy. *Held*, "this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use." (73 S.Ct. 203, 97 L.Ed. 163.) (See *National Bd. of Y.M.C.A. v. United States* (1969) 395 U.S. 85, 89 S.Ct. 1511, 23 L.Ed.2d 117 [damage to buildings in Canal Zone caused by rioters after buildings had been occupied by U.S. troops].)

(2) *Taking of Land Under Indian Occupancy.* If Congress by treaty or otherwise gives an Indian tribe permanent rights in lands, compensation must be made for subsequent taking. But if a mere right of occupancy without title is recognized, the taking is not compensable. (*Tee-Hit-Ton Indians v. United States* (1955) 348 U.S. 272, 75 S.Ct. 313, 322, 99 L.Ed. 314, 325.)

(3) *Injury Under Commerce Power Over Navigable Waters.* Just as the state may regulate or destroy property without compensation by a valid exercise of police power (see *infra*, §1153), so the federal Government may exercise some power under the Commerce Clause without becoming liable for compensation. Thus, the Government has a dominant servitude in a navigable stream within the bed (up to ordinary high-water mark). Hence, Congress may improve the stream in that area in the interest of navigation without liability for damage; it is not taking private property but merely exercising its servitude. (*United States v. Chicago, Milwaukee, St. Paul & Pac. R. Co.* (1941) 312 U.S. 592, 61 S.Ct. 772, 775, 85 L.Ed. 1064, 1070; *United States v. Twin City Power Co.* (1956) 350 U.S. 222, 76 S.Ct. 259, 261, 100 L.Ed. 240, 245; *United States v. Rands* (1967) 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329; cf. *United States v. Kansas City Life Ins. Co.* (1950) 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277, *supra*, §1129 [compensation awarded where land damaged was not within river bed and not subject to navigation servitude].)

The practical effect of these cases has, however, been substantially nullified by the enactment of a statutory right to compensation for the fair market value of real property taken in connection with improvements of U.S. rivers, harbors, canals, and waterways based on "all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters." (33 U.S.C., §595a.)

(4) *Taking Under Forfeiture Law*. The government is not required to compensate an owner for property acquired by the exercise of an authority other than the power of eminent domain. Hence, where ownership of an automobile was transferred to the state in a forfeiture proceeding instituted after it was used in the commission of a crime, there was no taking for public use and no requirement of compensation. (*Bennis v. Michigan* (1996) 516 U.S. 442, 116 S.Ct. 994, 1001, 134 L.Ed.2d 68, 78.)

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1. What Constitutes Damage.

a. In General.

8 Witkin Sum. Cal. Law Const Law § 1132

[§ 1132] In General.

The scope of compensable injury to property is greatly increased in a number of states, including California, that require compensation not only where property is taken but also where it is damaged. (See Cal. Const., Art. I, §19.) However, the history of the California constitutional provision and the decisions show that it was intended to compensate the owners of property taken for public improvement by the process of eminent domain. The words "or damaged" were added in 1879 to make it clear that compensation is due when, because of a public improvement, adjacent property is damaged, even though it was not taken. (*Customer Co. v. Sacramento* (1995) 10 C.4th 368, 41 C.R.2d 658, 895 P.2d 900, *infra*, §1142 [defendant was not liable for damage to plaintiff's store caused by police in attempting to apprehend criminal].) (See *Bacich v. Board of Control of Calif.* (1943) 23 C.2d 343, 349, 144 P.2d 818; *House v. Los Angeles County Flood Control Dist.* (1944) 25 C.2d 384, 388, 153 P.2d 950; *Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 C.3d 648, 658, 131 C.R. 646, 552 P.2d 430 [right to lateral support is interest in real property; when public entity causes physical injury to adjacent property by withdrawal of that support, right to recover damages is governed by constitutional provision on eminent domain]; *Orme v. California* (1978) 83 C.A.3d 178, 184, 147 C.R. 735; *Pacific Bell v. San Diego* (2000) 81 C.A.4th 596, 607, 96 C.R.2d 897 [requirement that injury be caused by deliberate act in fulfillment of public object "is satisfied by a public improvement that as designed and constructed presents inherent risks of damage to private property, and the inherent risks materialize and cause damage"]; 2 A.L.R.2d 677 [damage by negligence of governmental agents as taking]; 26 *Am.Jur.2d* (2004 *ed.*), *Eminent Domain* §§128, 129; 45 *Proof of Facts* 3d 519 [Recovery of Damages for Loss of View or Visibility Resulting from Construction of Highway or Other Public Improvement]; on inverse condemnation generally, see *infra*, §1143 *et seq.*)

The constitutional provision is self-executing; i.e., it abrogates the immunity of the government from suit to that extent. (See *Rose v. California* (1942) 19 C.2d 713, 720, 123 P.2d 505.)

A common situation occurs where the diversion of waters in the course of a public improvement causes injury to land or water rights. (See *infra*, §1146.) Another basis for an action is the impairment of access to a street or highway. (See *infra*, §1148 *et seq.*) And local regulations that restrict a landowner's use of his or her property also may be the basis for compensation. (See *infra*, §1153 *et seq.*)

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b. Limitations on Right to Compensation.

8 *Witkin Sum. Cal. Law Const Law* § 1133

[§ 1133] Limitations on Right to Compensation.

The following general limitations on the right to compensation should be noted:

(a) *No recovery without special damage.* There can be no recovery for damage that the landowner sustains in common with the public generally; he or she must show some special damage. (*Beckham v. Stockton* (1944) 64 C.A.2d 487, 502, 149 P.2d 296; *Los Angeles v. Geiger* (1949) 94 C.A.2d 180, 189, 210 P.2d 717.)

(b) *No recovery without damage to property right.* The damage must be to the land or some right appurtenant thereto, such as an easement. There is no recovery for mere injury to the *business* of the owner or occupier. (*Oakland v. Pacific Coast Lumber & Mill Co.* (1915) 171 C. 392, 398, 153 P. 705.)

(c) *No recovery for temporary damage.* Ordinarily, mere *temporary damage*, e.g., inconvenience or interference with the enjoyment of property by reason of the presence of machinery and materials used in the public work, is not compensable. But it has been suggested that compensation might be allowed where there is an actual and substantial temporary invasion of the right of possession of the owner's property during the period of construction. (See *Heimann v. Los Angeles* (1947) 30 C.2d 746, 755, 185 P.2d 597; *People v. Ayon* (1960) 54 C.2d 217, 229, 5 C.R. 151, 352 P.2d 519, *infra*, §1150; C.E.B., 2 Condemnation Practice 2d, §14.12; 23 A.L.R.4th 674 [damages resulting from temporary conditions incident to public improvements or repairs]; on temporary deprivation of access, see *infra*, §1149.)

(d) *No recovery against private contractor.* The landowner's right is against the governmental agency that authorizes the public improvement, not a private contractor who does the work. This obvious point was made in *Anderson v. Fay Imp. Co.* (1955) 134 C.A.2d 738, 286 P.2d 513, on unusual facts. Defendant private subdividers contracted for street repairs under a governmental permit for a street in front of plaintiffs' land. To gain plaintiffs' agreement to pay for curbs and sewers (thereby eliminating lengthy proceedings for assessment), defendants fraudulently represented that the street would be raised only 21/2 feet. The street as constructed was 5 feet higher and more in places, rendering plaintiffs' garages useless, giving access only by foot, and precluding sewer connections. The trial judge granted damages and a mandatory injunction to restore the street to its original condition. *Held*, reversed. (a) Plaintiffs were not entitled to removal of a completed and accepted public street built according to the government's approved plans and specifications. (b) They were not entitled to damages for injury to their easement of access from a

contractor who constructed the improvement according to these plans and specifications. The governmental agency--a city--was not made a party to the action, but should have been sued on the theory of inverse condemnation. (c) The only liability of the contractor was on the distinct cause of action for damages for fraud. (134 C.A.2d 747.)

(e) *No recovery without public use.* There can be no recovery in inverse condemnation in the absence of public use. (See *Yox v. Whittier* (1986) 182 C.A.3d 347, 351, 227 C.R. 311 [damage caused by defects in private drainage system; approval of subdivision map, without dedication to public, did not constitute public use]; *Cantu v. Pacific Gas & Elec. Co.* (1987) 189 C.A.3d 160, 165, 234 C.R. 365 [public utility's extension of gas and electric service to 16 homes under agreement with private road association and without acquisition of easement by legislative action or eminent domain was for private use and did not give rise to inverse condemnation action]; *Ullery v. Contra Costa* (1988) 202 C.A.3d 562, 570, 248 C.R. 727 [there was no public use where county approved subdivision map but rejected offer of dedication of storm drainage easement and exercised no dominion and control over creek that provided storm drainage]; *Barham v. Southern Calif. Edison Co.* (1999) 74 C.A.4th 744, 754, 88 C.R.2d 424 [transmission of electric power through public utility's facilities was for benefit of public, and utility was responsible for injury to property caused by transmission; distinguishing *Cantu*]; *DiMartino v. Orinda* (2000) 80 C.A.4th 329, 337, 343, 95 C.R.2d 16 [following *Ullery*; defendant city was not liable for presence of storm drainpipe under plaintiffs' residence in absence of evidence that defendant substantially participated in planning, construction, or maintenance of drainpipe, or accepted its dedication, or exercised dominion or control over it].)

West's Key Number Digest, Constitutional Law k.228.1

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(a) *No recovery without special damage.* See *Border Business Park v. San Diego* (2006) 142 C.A.4th 1538, 1548, 49 C.R.3d 259 [property owner could not establish inverse condemnation where city advertised plans to build airport in area in absence of evidence that airport proposal directly and specially affected owner].



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c. Compensation Without Tort Liability.

8 *Witkin Sum. Cal. Law Const Law* § 1134

[§ 1134] Compensation Without Tort Liability.

(1) *Former Rule of Nonliability.* *Archer v. Los Angeles* (1941) 19 C.2d 19, 24, 119 P.2d 1, held that the constitutional provision did not create a new right, and that recovery was limited to situations in which a common law tort was committed.

(2) *Albers Rule of Liability.* The *Archer* rule was substantially limited, and the contrary view of *Reardon v. San Francisco* (1885) 66 C. 492, 6 P. 317, was revived and reconciled in *Albers v. Los Angeles* (1965) 62 C.2d 250, 42 C.R. 89, 398 P.2d 129. Defendant county deposited 175,000 cubic yards of dirt on a corner of a road that it was developing. The spot was a prehistoric slide area, and a landslide caused stipulated damage to plaintiffs' property amounting to \$ 5.36 million. The trial judge found no negligence or nuisance, but judgment was awarded for this sum. *Held*, affirmed.

(a) *Reconsideration of the rule of nonliability.* The issue was how the court should construe the constitutional provision where physical damage is proximately caused to real property, "neither intentionally nor negligently," but as the result of the construction of a public work "deliberately planned and carried out by the public agency." (62 C.2d 262.)

(b) *The determinative factors.* "First, the damage to this property, if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote. Third, the property owners did suffer direct physical damage to their properties as the proximate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged. Fifth, ... 'the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' " (62 C.2d 263.)

(c) *Rule for compensation.* The court recognized the exceptions stated in *Archer* and *Gray v. Reclamation Dist. No. 1500* (1917) 174 C. 622, 163 P. 1024: "[A]ctual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable ... whether foreseeable or not." (62 C.2d 263.)

(d) *There was no estoppel.* Plaintiffs had granted the right of way to the county for construction of the road, and the

placement of the dirt fill was with their approval. However, this did not imply consent to damage that was not a necessary and reasonable incident to construction of the road. (62 C.2d 266.)

(e) *Recovery of mitigation costs.* Plaintiffs could recover the expense of an attempt to minimize damages. They spent \$ 283,225 in a reasonable attempt in good faith to investigate the cause and to prevent further damage. The trial judge denied recovery of this sum on the ground that these expenditures did not increase the value of their land before the slide commenced, but this expense is to be considered in computing just compensation. "[I]t would seem that the public interest would be served by allowing the possibility of such a recovery; the owner, who is ordinarily in the best position to learn of and guard against danger to his property, would thereby be encouraged to attempt to minimize the loss inflicted on him by the condemnation, rather than simply to sit idly by and watch otherwise avoidable damages accumulate. To the extent that the loss is minimized, of course, the amount of the public entity's liability to the owner is reduced; and adequate protection for the public entity would seem to be provided by the requirements of good faith and reasonableness." (62 C.2d 272.) (See *Sheffet v. Los Angeles* (1970) 3 C.A.3d 720, 732, 733, 84 C.R. 11.)

In *Holtz v. Superior Court* (1970) 3 C.3d 296, 90 C.R. 345, 475 P.2d 441, defendant District (BART) excavated Market Street in San Francisco to a depth of 80 feet as part of the planned construction of an underground rapid transit system. Plaintiffs' buildings, located adjacent to the excavation, settled and cracked. Plaintiffs sued in two counts, on theories of inverse condemnation and negligence. The trial judge thought that C.C. 832, on lateral support (see 12 Summary (10th), Real Property, §377), limited liability of public as well as private excavators, and struck out the inverse condemnation count. Held, mandamus granted to compel its reinstatement.

(a) *Albers rule controlling.* Albers explicitly rejected the notion of equating public with private liability, and emphasized the policy of distributing the loss where the owner of damaged property would otherwise contribute more than his or her proper share to the public undertaking. (3 C.3d 303.) To overcome the fear of an open-ended absolute liability that might impede beneficial public improvements, Albers was limited to actual physical injury, proximately caused by work planned and constructed; but despite the confusing use of the term "proximate cause" in this connection, there is no requirement of foreseeability of the damage. (3 C.3d 302, 303, 304, and footnote 9.)

(b) *Gray exception inapplicable.* The exception stated in Gray, for damages inflicted in the exercise of the police power, is inapplicable; it applies where the government acts under emergency conditions, e.g., destroying property to prevent the spread of a conflagration. (3 C.3d 305; see infra, §1139.)

(c) *Archer exception inapplicable.* The exception stated in Archer v. Los Angeles, supra, was developed in the limited area of water law, where a landowner was privileged to protect his or her property from floodwaters. It cannot be applied to resurrect the cases equating public and private liability, disapproved in Albers. Reardon v. San Francisco, supra, involving a sewer excavation, is in point here. (3 C.3d 307, 310.)

(d) *Conclusion.* "[P]hysical damages proximately resulting from a public improvement must be considered as direct a 'cost' as the property actually condemned or the materials actually utilized in its construction. Indeed, in most instances a public entity may be able to forestall unintended physical damage by initially employing more protective measures in the actual construction of the project; in the instant case, for example, defendant could probably have prevented the damage to plaintiffs' property by expending additional funds in shoring up its excavation. This comment does not imply, however, that defendants would necessarily be negligent in not expending such funds; the likelihood of the damage may have been so remote and the expense of the additional protection so great that it was reasonable (hence, non-negligent) for defendant to forego supplemental measures initially. Nevertheless, since the undertaking of the excavation at this lower cost created some risk, however slight, of damage to plaintiffs' property, it is proper to require the public entity to bear the loss when damage does occur." (3 C.3d 310.) (See Blau v. Los Angeles (1973) 32 C.A.3d 77, 84, 107 C.R. 727 [discussing causation tests of Albers and Holtz]; Ingram v. Redondo Beach (1975) 45 C.A.3d 628, 632, 119 C.R. 688 [same]; Yee v. Sausalito (1983) 141 C.A.3d 917, 190 C.R. 595, infra, §1147; Aetna Life & Cas. Co. v. Los Angeles (1985) 170 C.A.3d 865, 874, 216 C.R. 831 [inverse condemnation judgment was proper where design, construction, and maintenance of high voltage cables allowed intercable contact during windy conditions, resulting in

sparks that caused fire]; *Pacific Bell v. San Diego* (2000) 81 C.A.4th 596, 602, 96 C.R.2d 897 [immunities provided by Tort Claims Act do not insulate public entity from liability for inverse condemnation]; *Patel v. Southern Calif. Water Co.* (2002) 97 C.A.4th 841, 844, 119 C.R.2d 119 [because enrichment of water company by leasing its land to cell phone companies is not "public use," lessee's crossing of plaintiff's land on water company easement to service and install telecommunications equipment was trespass, not inverse condemnation].)

The characterization of a public agency's deliberate action as negligent does not automatically prevent an action for inverse condemnation. "[T]o prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action--or inaction--in the face of that known risk." (*Arreola v. Monterey* (2002) 99 C.A.4th 722, 742, 744, 122 C.R.2d 38 [following *Pacific Bell*; inadequate maintenance of flood control channel for over 20 years].)

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8 *Witkin Sum. Cal. Law Const Law* § 1135

[§ 1135] Mitigation Damages.

In *CUNA Mut. Life Ins. Co. v. Los Angeles County Metropolitan Trans. Authority* (2003) 108 C.A.4th 382, 133 C.R.2d 470, the trial court entered judgment in favor of defendant transit authority, in an inverse condemnation action seeking to recover the costs plaintiff incurred in protecting its building from anticipated damage caused by excavation for defendant's metro rail station, because it found that no actual or prospective damage had been proved. *Held*, reversed and remanded. A property owner is entitled to recover "reasonable costs incurred to mitigate damage to the property that the property owner reasonably and in good faith believed would be caused by a work of public improvement even if post-mitigation events indicate there would have been no damage." Here, the trial court prejudicially erred by requiring plaintiff to show that "but for" plaintiff's repairs, the building would have been damaged. Actual physical damage to the property "is not a prerequisite to an award of mitigation damages." (108 C.A.4th 386.)

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e. Service Duplication.

8 Witkin Sum. Cal. Law Const Law § 1136

[§ 1136] Service Duplication.

The Public Utilities Code provides for compensation of a privately owned public utility when a political subdivision extends the same type of water service to the service area of the utility. (*Pub.Util.C. 1501 et seq.*) This "constitutes a taking of the property of the private utility for a public purpose to the extent that the private utility is injured by reason of any of its property employed in providing the water service being made inoperative, reduced in value or rendered useless to the private utility for the purpose of providing water service to the service area." (*Pub.Util.C. 1503.*) If the compensation equals the value of all the property of the utility in the system employed in the service area, the political subdivision may adopt a resolution for the acquisition of that property. (*Pub.Util.C. 1504.*)

A declaration of purpose includes the legislative finding that, in view of its fixed rates, a private utility faces losses from duplication of service, and is often deterred from extending its facilities to provide necessary water to those in the service area. (*Pub.Util.C. 1501.*) (See *Cucamonga County Water Dist. v. Southwest Water Co. (1971) 22 C.A.3d 245, 256, 99 C.R. 557* [upholding validity of statute against several constitutional challenges]; *San Gabriel Valley Water Co. v. Montebello (1978) 84 C.A.3d 757, 148 C.R. 830* [valuation and damages]; *Pub.Util.C. 1507* [chapter does not apply to specified reclaimed water uses in Los Angeles County].)

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f. Violation of Deed Restriction.

8 Witkin Sum. Cal. Law Const Law § 1137

[§ 1137] Violation of Deed Restriction.

A covenant in a deed amounting to an equitable servitude is generally regarded as a property right (see 12 *Summary* (10th), *Real Property*, §§440, 441); and a majority of the states allow compensation to persons owning land not condemned who suffer damage from condemnation of other land burdened by this kind of restriction. (See *Southern Calif. Edison Co. v. Bourgerie* (1973) 9 C.3d 169, 172, 107 C.R. 76, 507 P.2d 964; *Rest., Property* §566; 4 A.L.R.3d 1137 [restrictive covenant or right to its enforcement as compensable property right]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §§153, 154.) California formerly denied an award on the theory that the interest is only a contractual right, not a property interest, and that the possible scope of compensation is too great. (See *Friesen v. Glendale* (1930) 209 C. 524, 531, 288 P. 1080; *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 C.A.2d 599, 604, 72 C.R. 240.)

In *Southern Calif. Edison Co. v. Bourgerie*, *supra*, *Friesen* was overruled and the right to an award upheld. A deed of part of a tract of land to defendant grantees contained a provision that an adjoining portion retained by the grantor should not be used for an electric transmission station. Plaintiff public utility brought a condemnation action to acquire the grantor's land for this purpose, and defendants claimed compensation for violation of the restrictive covenant. *Held*, the covenant was "property" and defendants were entitled to compensation for damage caused by its violation.

(a) Denial of compensation for violation of a deed restriction is inconsistent with the award of compensation for taking an easement (see *infra*, §1233). "Both easements and building restrictions may be created by agreements between private parties and, therefore, upon condemnation in both situations the financial burden of the condemner is increased solely by virtue of agreements made between private parties. Equally important, the violation of a building restriction could cause far greater damage in monetary value to a property owner than the appropriation of a mere right of way. To establish a substantive distinction by merely labeling one a property interest for which compensation must be made and the other a mere contractual right which may be appropriated by a condemner without any compensation is inequitable and rationally indefensible." (9 C.3d 173.)

(b) The policy objection of increased cost is unpersuasive. Although the cost of condemning property might be increased, this will not significantly burden the power of condemnation. Some takings (e.g., parks or access roads) will result in negligible damage to owners of the restriction; others (e.g., schools or fire stations) will injure only those in close proximity to the improvement. (9 C.3d 174.)

(c) The procedural difficulty (joining many owners of restrictions as necessary parties) can be overcome; e.g., by selective joinder of those whose property is most likely to be damaged. (9 C.3d 174.)

(d) The speculative possibility that landowners might in bad faith enter into restrictive covenants solely to collect compensation cannot justify refusal to allow an award to those who act in good faith, and a court can deal with those guilty of sharp practice. (9 C.3d 175.)

Two justices dissented, arguing that easements and equitable servitudes are distinguishable, that the reasoning of *Friesen* is sound, and that the decision should be followed in the absence of legislative change. (9 C.3d 175.)

Where the property interest taken is a restrictive covenant or equitable servitude, value is computed in the same way as it is when an easement is taken. "[T]he owner of the land for whose benefit the restrictions were imposed is entitled to compensation for damage to the dominant estate, measured by the diminution in value of that property as a result of the taking." (*Redevelopment Agency of Concord v. Tobriner* (1984) 153 C.A.3d 367, 375, 200 C.R. 364; see *infra*, §1233.)

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g. Compensation to Option Holder.

8 Witkin Sum. Cal. Law Const Law § 1138

[§ 1138] Compensation to Option Holder.

It was originally thought that the holder of an option to buy property had only an expectancy, and was not entitled to compensation if the property was taken in eminent domain. (See *East Bay Mun. Util. Dist. v. Kieffer* (1929) 99 C.A. 240, 248, 278 P. 476; *People v. Ocean Shore R.* (1949) 90 C.A.2d 464, 469, 203 P.2d 579; *Shaeffer v. California* (1972) 22 C.A.3d 1017, 1021, 99 C.R. 861.)

In *San Diego v. Miller* (1975) 13 C.3d 684, 119 C.R. 491, 532 P.2d 139, the court repudiated this theory and held that the optionee has a property right that entitles him or her to a share in the condemnation award, i.e., the excess of the total award above the option purchase price.

(a) The historical rule against compensation of the option holder was based on the fact that the holder had no interest in the land itself, and *Kieffer* and *Ocean Shore* followed this test of "property interest-contractual right." (13 C.3d 690.) The trend, however, is to decide compensation issues on considerations of fairness and public policy, rather than on traditional common law concepts of property (see *Southern Calif. Edison Co. v. Bourgerie* (1973) 9 C.3d 169, 107 C.R. 76, 507 P.2d 964, *supra*, §1137). (13 C.3d 691.)

(b) Under this approach, the condemnor suffers no loss when the option holder's right is recognized, for the total award is unaffected and only its allocation is involved. (13 C.3d 691.) And the optionor has no reasonable expectation of receiving anything more than the price specified in the option. (13 C.3d 692.)

(c) Public policy considerations are important. "Although the option has long been recognized in the marketplace, increased complexity and severity of land use laws and procedures has substantially enhanced the importance of its use. ... The option has become a prevalent method for securing to a potential land buyer the ability to ultimately purchase the land--while affording him the opportunity to undertake and complete the often expensive and lengthy process of determining whether his intended use of the land will be permitted. ... Such efforts by the optionee frequently increase the value of the optioned property, although legal title remains in the optionor. Given this increased importance of this option in the marketplace, frustration of the process appears unwise." (13 C.3d 692.)

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2. Noncompensable Injury.

a. Emergency Exercise of Police Power.

8 Witkin Sum. Cal. Law Const Law § 1139

[§ 1139] Emergency Exercise of Police Power.

When property is destroyed or confiscated or its use is regulated in the valid exercise of the police power, no compensation is required. The scope of this exception, however, is limited to "emergency" situations where there is a public necessity to avert an impending peril. (See *House v. Los Angeles County Flood Control Dist.* (1944) 25 C.2d 384, 391, 153 P.2d 950 [holding agency liable; flood control project, improperly constructed drainage system]; *Holtz v. Superior Court* (1970) 3 C.3d 296, 305, 90 C.R. 345, 475 P.2d 441, supra, §1134 [holding agency liable]; *Morshead v. California Regional Water Quality Control Bd.* (1975) 45 C.A.3d 442, 450, 119 C.R. 586 [compensation denied]; *Brown v. California* (1993) 21 C.A.4th 1500, 1504, 1505, 26 C.R.2d 687 [where state entered land to undertake toxic cleanup after owners abandoned it, there was no intended public use so as to support inverse condemnation action by holder of trust deed; state's conduct was legitimate exercise of police power]; *Los Osos Valley Associates v. San Luis Obispo* (1994) 30 C.A.4th 1670, 1676, 36 C.R.2d 758 [use of groundwater during drought conditions, thereby causing subsidence that leads to harm to plaintiff's buildings, is not type of "emergency" that would make defendant city immune from liability for damages]; *Massingill v. Department of Food & Agriculture* (2002) 102 C.A.4th 498, 506, 125 C.R.2d 561 [disapproving *Brown v. California* in nonemergency situations] C.E.B., 2 Condemnation Practice 2d, §15.13.) (For federal cases denying compensation, see supra, §1131; on nonemergency exercise of police power as basis for inverse condemnation, see *Rose v. Coalina* (1987) 190 C.A.3d 1627, 1634, 236 C.R. 124 [demolition of downtown area because of earthquake damage].)

In *Farmers Ins. Exchange v. California* (1985) 175 C.A.3d 494, 221 C.R. 225, plaintiff insurance companies, having paid numerous claims of policyholders for paint damage to automobiles caused by the state's aerial spraying of fruit fly-infested areas, brought this action to recover the amounts paid. On the cause of action for inverse condemnation, the court held that the police power exception applied and that a demurrer was properly sustained.

(a) Control of the Mediterranean fruit fly infestation proved to be beyond the control of the counties, and the Governor declared a state of emergency pursuant to the Emergency Services Act (Govt.C. 8625 et seq.). The wide-scale aerial spraying with malathion was undertaken pursuant to this statutory authority, and thus constituted an exercise of police power making the damages inflicted noncompensable. (175 C.A.3d 501.)

(b) Plaintiffs contended that the question whether the exercise of the police power was reasonable was one of fact

and could not be resolved at the pleading stage. This may be so where it is unclear whether the public agency is exercising a regulatory police power or an eminent domain power constituting a taking. But where there is an obvious public emergency calling for immediate action, the emergency constitutes full justification for the measures taken. And among the types of emergencies justifying action without compensation are "the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized." (175 C.A.3d 494, citing *House v. Los Angeles County Flood Control Dist.*, *supra*.)

(c) Plaintiffs further contended that legislation enacted in 1982, establishing a "Medfly Claims Fund" with a \$ 4 million appropriation as the exclusive source of payment for claims arising from the infestation, was a waiver of the immunity provision of the Emergency Services Act. However, the Medfly Claims Fund Act limits compensation for damages to automobiles to \$ 689 or 20% of the car's value; and "[w]e do not find it inconsistent that the state assert its right to exercise its police power without incurring unlimited liability for damage caused thereby, and still provide a limited fund for partial reimbursement to those so damaged." (175 C.A.3d 502.)

In *Odello Bros. v. Monterey* (1998) 63 C.A.4th 778, 73 C.R.2d 903, defendant county declared an emergency and breached a levee protecting plaintiff's farm because of the inadequacy of another levee, which protected a commercial and residential area. In holding that the emergency exception did not shield the county from liability for inverse condemnation, the court looked to factors occurring before the "emergency." The county had prior knowledge of the flood threat. If the county had implemented its flood plan and condemned part of plaintiff's property, then it would have been required to compensate plaintiff for the property taken. The emergency action was necessary due to the inadequacy of the other levee, an inadequacy that was acknowledged as early as 1989 and that had caused flooding just 2 months prior to the flooding necessitating the breach. (63 C.A.4th 791.)

"[I]t would be antithetical to the principles of our Constitution to permit a public entity to burden private property simply because the public entity's inadequate flood control measures threatened other, more populated property. If the emergency exception were applied in these circumstances, the appellants would be required to contribute a disproportionate share of the public undertaking. Such a result would be neither fair nor just, regardless of County's ... declaration of an emergency." (63 C.A.4th 791.)

The removal of structures that protect a plaintiff's property but encroach on public land is a reasonable exercise of the police power, and a consequent decrease in value of plaintiff's property does not give rise to an inverse condemnation action. (*Scott v. Del Mar* (1997) 58 C.A.4th 1296, 1307, 68 C.R.2d 317.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Thousand Trails v. California Reclamation Dist. No. 17* (2004) 124 C.A.4th 450, 464, 21 C.R.3d 196

[distinguishing *Odello Bros. v. Monterey* (1998) 63 C.A.4th 778, 73 C.R.2d 903, text, p. 778; cutting levee in one spot to prevent massive flooding elsewhere was legitimate exercise of police power].



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b. No Property Right.

8 *Witkin Sum. Cal. Law Const Law* § 1140

[§ 1140] No Property Right.

Although technical concepts of property law are not always controlling (see *Southern Calif. Edison Co. v. Bourgerie* (1973) 9 C.3d 169, 175, 107 C.R. 76, 507 P.2d 964, supra, §1137), there are a few situations in which the courts, in denying an award, characterized the asserted interest as speculative or contingent and therefore not a compensable property right. The following are examples:

(1) *License terminable at will.* (See *United States v. Fuller* (1973) 409 U.S. 488, 93 S.Ct. 801, 804, 35 L.Ed.2d 16, 22 [government is not required to compensate for value added to condemned land by revocable permit authorizing use of neighboring government land]; *Pacific Gas & Elec. Co. v. Peterson* (1969) 270 C.A.2d 434, 437, 75 C.R. 673 [neighbors "simply acquiesced" in crop dusting]; *Belmont County Water Dist. v. California* (1976) 65 C.A.3d 13, 19, 135 C.R. 163 [permit that was revocable and conditional].)

A telephone company "franchise" to locate its facilities in a public street is not a grant of a property interest in the street. The franchise is subject to an implied obligation to relocate the facilities to make way for a proper governmental use of the streets, and the utility must do so at its own expense. (*Pacific Tel. & Tel. Co. v. Redevelopment Agency of Redlands* (1977) 75 C.A.3d 957, 963, 142 C.R. 584 [action by company to recover costs on theory of inverse condemnation; judgment for defendant affirmed].)

(2) *Contract right in another's easement.* (See *Hayward v. Mohr* (1958) 160 C.A.2d 427, 433, 325 P.2d 209 [defendant granted easement for sewer line, reserving right to make sewer connections for her own land; following *Friesen v. Glendale* (1930) 209 C. 524, 288 P. 1080, since overruled, in holding that reserved right was not property within constitutional provision].)

(3) *Unreasonable use of water.* In *Joslin v. Marin Mun. Water Dist.* (1967) 67 C.2d 132, 60 C.R. 377, 429 P.2d 889, defendant impounded water of a stream for municipal water supply purposes. Plaintiffs, riparian owners about a mile downstream, sued in inverse condemnation, alleging that the stream formerly carried rock, sand, and gravel to their land, which they sold, and that the interference with the flow caused a cessation of the deposits. *Held*, the injury was not compensable. The use of water to carry and deposit materials did not meet the California constitutional requirement of reasonable use (see 13 *Summary* (10th), *Real Property*, §937); consequently, there was no legally recognized property

right taken or damaged by defendants. (67 C.2d 143.)

(4) *Speculative right*. In *People v. Hecker* (1960) 179 C.A.2d 823, 4 C.R. 334, the state sued to condemn lands lying seaward to the ocean. *Held*, as against the state, defendant littoral owner had no right of access to the ocean over the tideland parcel taken; hence, the right taken had no compensable value. (179 C.A.2d 842.)

(5) *Prior relinquishment of right*. In *People v. Wilson* (1994) 25 C.A.4th 977, 31 C.R.2d 52, the state in 1954 purchased land from defendant's parents for construction of a freeway; the 1954 deed released "any and all abutter's rights." In 1991, the state purchased an additional parcel from defendant for the purpose of widening the freeway and erecting a sound wall, and defendant sought damages for the blockage of travelers' views of his business. *Held*, the prior relinquishment of abutter's rights included the right to a view; hence, defendant was not entitled to severance damages for the loss of view. (25 C.A.4th 980.)

(6) *Right of first refusal*. In *Campbell v. Alger* (1999) 71 C.A.4th 200, 207, 83 C.R.2d 696, 1 Summary (10th), *Contracts*, §178, a case of first impression, coowners of property held a right of first refusal, which arose only if the coowners decided to sell their interests "to a third party after having received a bona fide and written offer for such purchase" or if they made an offer to sell their interest to a third party. *Held*, condemnation "does not trigger the private right of first refusal." (71 C.A.4th 208.)

(7) *Contract regarding development rights*. In *San Jose Parking v. Superior Court* (2003) 110 C.A.4th 1321, 2 C.R.3d 505, the court held that a redevelopment agency, whose condemnation powers were expressly limited to real property, had no power to acquire a parking company's rights in a parking lot. The contract between the parties made clear that it was only a contract regarding development negotiations, and it specifically stated that it did not convey any interest in the property, including any leasehold interest. (110 C.A.4th 1331.)

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c. Access to Navigable Waters.

8 Witkin Sum. Cal. Law Const Law § 1141

[§ 1141] Access to Navigable Waters.

In *Colberg v. California* (1967) 67 C.2d 408, 62 C.R. 401, 432 P.2d 3, the court refused to apply the rule of the highway cases (see *infra*, §1148 et seq.) to navigable waterways.

The Stockton Deep Water Ship Channel is a navigable tidal waterway extending from the mouth of the San Joaquin River to the Port of Stockton. The Upper Channel is accessible to oceangoing vessels. Plaintiffs C and S owned land riparian to the channel, on which they operated shipyards for the construction and repair of vessels. The state, with federal permission, proposed to construct twin stationary freeway bridges across the Upper Channel, with a vertical clearance of 45 feet. Higher clearance, to permit large vessels to reach plaintiffs' shipyards, would be prohibitively expensive, and a drawbridge would not be suitable. The proposed bridges would cut off substantial business of plaintiffs' shipyards. Accordingly, they sought a declaration that the construction would be a compensable taking or damaging. *Held*, judgment for defendant state on the pleadings affirmed.

(a) *General principle of compensable damage.* Plaintiffs must assert damage to a private right. They cannot claim compensation for damage to the right of navigation which is the same as that suffered by the general public. They want the clearance now given by the Carquinez Bridge, which is 145 feet high; hence, they claim a right in a column of air 135 feet high from their property to the sea. If they had this right, countless riparian owners along the entire channel would have a similar right. (67 C.2d 415, and footnote 8.) Plaintiffs' private right--access of a riparian owner to the waterway--is not impaired. (67 C.2d 416.)

(b) *Paramount right of state over navigable waters.* The state holds all navigable waterways and lands beneath them as trustee of a public trust for the benefit of the people. (67 C.2d 416.) It has the power to deal with these waters "in any manner consistent with the improvement of commercial intercourse, whether navigational or otherwise." (67 C.2d 419.) The federal paramount power derives from the Commerce Clause and can be exercised only to aid navigation; the California power, though subject to the superior federal power, is wider in scope. (67 C.2d 420.) Hence, just as the property owner's access is burdened with the federal "navigation servitude," so it is burdened with a servitude commensurate with the broader state power. (67 C.2d 420.)

(c) *Rejection of highway analogy.* The right of access to a land highway derives from the "land service road"

concept. Roads are conceived of as arteries constructed through condemnation of private land for the purpose of serving other land abutting on them, not for public traffic. Navigable waters, however, "constitute a natural resource retained within the public domain for the purpose of serving public traffic in accordance with the greatest common benefit." (67 C.2d 424.)

(d) *Conclusion.* "We hold that plaintiffs' right of access from their respective riparian properties to the waters of the channel, whatever its scope as against private parties, is burdened with a servitude in favor of the state and that, since there is here no direct physical invasion of, or encroachment upon, said properties by the state, plaintiffs are not entitled to compensation for the abridgement or diminution, if any, of such right of access as a result of the lawful exercise of the state's power to regulate, control and deal with its navigable waters." (67 C.2d 425.)

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d. Damage Occurring During Arrest.

8 Witkin Sum. Cal. Law Const Law § 1142

[§ 1142] Damage Occurring During Arrest.

In *Customer Co. v. Sacramento* (1995) 10 C.4th 368, 41 C.R.2d 658, 895 P.2d 900, Nash, a robbery suspect who was thought to be armed, went into plaintiff's store. Plainclothes officers staked out the store, intending to arrest Nash when he left. However, the dispatcher was not informed that the operation was a covert one, and marked police vehicles with emergency lights flashing soon arrived, dashing any hope of taking Nash by stealth. Attempts to negotiate failed, and police ultimately fired tear gas into the store, causing severe damage to plaintiff's store and inventory. Plaintiff sued defendant city, both in inverse condemnation and under the Tort Claims Act, for the property damage. The trial judge granted judgment on the pleadings in favor of defendant, and the Court of Appeal affirmed. *Held*, affirmed.

(a) Cal. Const., Art. I, §19, provides that private property "may be taken or damaged for public use only when just compensation ... has first been paid." A literal interpretation of this language could be used to support plaintiff's position. However, its history and the decisions show that it was intended to compensate the owners of property taken for public improvement by the process of eminent domain, or when, because of a public improvement, adjacent property is damaged, even though it is not taken. (10 C.4th 376, 378.)

(b) "In the present case, of course, the property damage for which Customer seeks to recover bears no relation to a 'public improvement' or 'public work' of any kind. Instead, the damage was caused by actions of public employees having 'no relation to the function' of a public improvement whatsoever. ... [P]roperty damage caused in such a manner never has been understood to give rise to an action for inverse condemnation in California, but rather has been treated as subject to the general tort principles applicable to governmental entities." (10 C.4th 383.)

(c) This is not even a case where private property, such as an automobile, is taken to apprehend a fleeing suspect. That kind of case, like one in eminent domain, involves the taking of private property for a public use and might arguably require just compensation. The present case, however, bears no resemblance to one at eminent domain. (10 C.4th 388.)

(d) Any doubt that an action for inverse condemnation will not lie under these facts is dispelled by consideration of the emergency exception to the rule that just compensation is due. The cases have consistently held that when private property has been taken or damaged by a city's exercise of its police power in an emergency, just compensation is not

due. The dissent would not apply this exception in this case because the government allegedly was a substantial cause of the emergency. However, the government did not cause the situation where an armed and dangerous felon actively fled from the police, nor did the government cause the suspect to enter plaintiff's store and refuse to leave when lawfully ordered to do so by the police. (10 C.4th 385.)

(e) To accept plaintiff's position would be to hold that the adoption of the words "or damaged" in 1879 amounted to an abolition of the then existing doctrine of governmental immunity. "There is absolutely nothing in the history of the constitutional provision to support this conclusion, however, and--from 1879 through the adoption of the Tort Claims Act in 1963--the Legislature and the courts of California uniformly interpreted the 'or damaged' clause as not effecting such a general repeal of the governmental immunity doctrine." (10 C.4th 389, citing the text.)

(f) Adoption of plaintiff's position would lead to inconsistent results. For example, plaintiff would be able to recover for his *property damage*, but had an employee been in the store, he could not have recovered for any *personal injuries* he might have received. Hence, inverse condemnation is an inappropriate vehicle for compensating innocent victims of a crime. (10 C.4th 389.)

(g) A plaintiff in an inverse condemnation action is entitled to attorneys' fees, costs, and prejudgment interest. "Allowing Customer to bring an action for inverse condemnation not only would permit Customer to seek recovery of its damages without complying with the requirements of the Tort Claims Act, including its immunity provisions, but would allow Customer as well to seek recovery of its attorney fees and an award of prejudgment interest, neither of which would be available in a negligence action under the Tort Claims Act." The amount of attorney fees and prejudgment interest here far eclipse the amount of Customer's property loss. There is no reason for a plaintiff seeking recovery for *property damage* to "be permitted to obtain the additional benefit of attorney fees and prejudgment interest by bringing an action for inverse condemnation, while a plaintiff seeking recovery for *personal injuries* sustained by the same governmental conduct would not be entitled to such remuneration." (10 C.4th 391.)

(h) Property owners in Customer's position may be able to secure reimbursement for all or part of their loss from the public entity under a program established to aid victims of crime, as authorized by Govt. C. 29631, 29632. "It is worth noting that these statutes, and the reimbursement programs they authorize, would be unnecessary if Customer were correct in its assertion that public entities are required by section 19 to compensate property owners for the damage they suffer as the result of efforts by law enforcement officers to enforce the criminal laws." (10 C.4th 393.)

A dissenting justice argued that both the language of Cal. Const., Art. I, §19, and its modern history favor compensating persons who lose property as a result of police work, when the police themselves cause the situation that leads to the loss of property. (10 C.4th 404.) (See 24 Pepperdine L. Rev. 274 [Customer Co.]; 18 Thomas Jefferson L. Rev. 175 [same]; 34 McGeorge L. Rev. 1 [same].)

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D. Inverse Condemnation.

1. In General.

a. Nature of Action.

8 *Witkin Sum. Cal. Law Const Law* § 1143

[§ 1143] Nature of Action.

(1) *In General.* The term "inverse condemnation" is applied to an action by an owner to recover damages for injury to his or her property from some public works undertaking or other activity by an agency with power to condemn. The designation was coined because the object--compensation for property damaged in connection with a public use--is the same as in a condemnation action. (See *Heimann v. Los Angeles* (1947) 30 C.2d 746, 753, 185 P.2d 597; *Cothran v. San Jose Water Works* (1962) 58 C.2d 608, 614, 25 C.R. 569, 375 P.2d 449; *Klopping v. Whittier* (1972) 8 C.3d 39, 43, 104 C.R. 1, 500 P.2d 1345; *Yox v. Whittier* (1986) 182 C.A.3d 347, 351, 227 C.R. 311; *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 C.3d 862, 866, 218 C.R. 293, 705 P.2d 866, *infra*, §1144; *Marin Mun. Water Dist. v. Mill Valley* (1988) 202 C.A.3d 1161, 1166, 249 C.R. 469 [one public entity may state cause of action for inverse condemnation against another]; *Housley v. Poway* (1993) 20 C.A.4th 801, 807, 24 C.R.2d 554 [as in eminent domain, fair market value is general measure of damages for inverse condemnation]; *Friends of H Street v. Sacramento* (1993) 20 C.A.4th 152, 167, 24 C.R.2d 607 [residents complaining of traffic speed and volume on their street could not state cause of action for inverse condemnation; changes in traffic flow do not constitute substantial impairment of right of access]; *Customer Co. v. Sacramento* (1995) 10 C.4th 368, 41 C.R.2d 658, 895 P.2d 900, *supra*, §1142; Van Alstyne, California Inverse Condemnation Law; 11 Miller & Starr 3d, §30:1 et seq.; 32 Proof of Facts 3d 405 [inverse condemnation by physical invasion]; C.E.B., 2 Condemnation Practice 2d, Chaps. 13 et seq.) (On authority of public agencies to insure against potential inverse condemnation claims, see *Govt.C. 990(a)*, 11007.4(b); on inverse condemnation class actions, see 4 *Cal. Proc.* (4th), *Pleading*, §277.)

C.C.P. 1265.110, providing that a lease terminates when the property is acquired for public use, applies to inverse condemnation actions. (*Kong v. Hawaiian Gardens Redevelopment Agency* (2002) 108 C.A.4th 1028, 1038, footnote 10, 134 C.R.2d 260.)

(2) *Invasion of Property Right.* The plaintiff must show an invasion of a property right. A potential user of water does not have this right and cannot base a cause of action for inverse condemnation on a demand that he or she be treated in the same fashion as existing water users in a district. (*Hollister Park Inv. Co. v. Goleta County Water Dist.* (1978) 82 C.A.3d 290, 293, 147 C.R. 91; see *Jordan v. Santa Barbara* (1996) 46 C.A.4th 1245, 1257, 54 C.R.2d 340 [risk of water damage is not sufficient].)

(3) *Real and Personal Property*. In *Sutfin v. California* (1968) 261 C.A.2d 50, 67 C.R. 665, plaintiff alleged that defendant state, in highway and flood control works, discharged water from a creek onto plaintiff's motor vehicles located on nearby real property. *Held*, judgment on demurrer reversed; the action lies where the damage is to either real or personal property. (261 C.A.2d 53.) (See *Marin Mun. Water Dist. v. Mill Valley*, *supra*, 202 C.A.3d 1166 [inverse condemnation action is available for damage to franchise interest].)

(4) *Distinction: Unconstitutional Regulation*. In *Fresno Police Officers Assn. v. California* (1987) 190 C.A.3d 413, 235 C.R. 474, plaintiff public employees alleged that their employment contracts were property interests that the state damaged by refusing to pay interest on salary increases that had been withheld under statutes later declared unconstitutional. *Held*, "inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." (190 C.A.3d 417, quoting *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, *supra*, §1058.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Red Mountain, LLC v. Fallbrook Public Util. Dist.* (2006) 143 C.A.4th 333, 355, 48 C.R.3d 875 [trial court did not err in allowing awards for both eminent domain and inverse condemnation where inverse condemnation award was for diminution in value of land that occurred before eminent domain was sought]; *Ventura v. Channel Islands Marina* (2008) 159 C.A.4th 615, 618, 624, 71 C.R.3d 762 [inverse condemnation is not proper remedy where wrong that was committed is nothing more than breach of lease]. *Cross-Reference:* 4 Cal. Proc. (5th), *Pleading*, §290.

(2) *Invasion of Property Right*. See *Regency Outdoor Advertising v. Los Angeles* (2006) 39 C.4th 507, 522, 46 C.R.3d 742, 139 P.3d 119, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §84 [lessee of billboards along main thoroughfare had no property right warranting compensation from impairment of visibility caused by municipal landscaping project adding mature palm trees on public property].



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1. In General.

b. Entity Without Eminent Domain Power.

8 Witkin Sum. Cal. Law Const Law § 1144

[§ 1144] Entity Without Eminent Domain Power.

Some out-of-state and federal cases have taken the position that a public entity lacking the power to condemn cannot be liable in inverse condemnation. (See *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 C.3d 862, 866, 218 C.R. 293, 705 P.2d 866.) This "mechanical view" was rejected in *Baker*. Defendant airport authority, though a public entity, was not authorized by statute to condemn air space easements. Plaintiff homeowners who lived adjacent to the airport sued for inverse condemnation and nuisance caused by noise, smoke, and vibrations from flights over their homes. The trial court entered judgment for defendant on demurrer, ruling that (a) the nuisance cause of action was barred by the statute of limitations, and (b) inverse condemnation would not lie because defendant had no power to condemn. *Held*, reversed. The nuisance cause was not barred (see 3 Cal. Proc. (4th), Actions, §553), and the inverse condemnation suit could be maintained.

(a) The authorities denying the right to sue fail to recognize that the term "inverse condemnation" describes "an action grounded not on statutory condemnation power, but on the constitutional proscription against the ... taking or damaging ... of property for public use without just compensation." (39 C.3d 866.) "A landowner whose property has been invaded by a public entity that lacks eminent domain power suffers no less a taking merely because the defendant was not authorized to take." (39 C.3d 866.)

(b) In view of the constitutional basis of inverse condemnation, the plaintiff need not prove statutory authority of the defendant entity to exercise affirmative eminent domain powers. "All that is necessary to show is that the damage resulted from an exercise of governmental power while seeking to promote 'the general interest in its relation to any legitimate object of government.'" (39 C.3d 867.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 Cal. Proc. (5th), Actions, §602.



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1. In General.

c. Recovery for Loss of Goodwill.

8 *Witkin Sum. Cal. Law Const Law* § 1145

[§ 1145] Recovery for Loss of Goodwill.

Compensation for loss of goodwill is recoverable in inverse condemnation. In enacting *C.C.P. 1263.510* (infra, §1245), making loss of goodwill compensable in eminent domain proceedings, the Legislature did not intend for that statute to apply to inverse condemnation proceedings. However, the rules that apply to eminent domain also apply, when appropriate, in inverse condemnation proceedings, and goodwill is therefore compensable in an inverse condemnation action to the same extent as in an eminent domain action. (*Chhour v. Community Redevelopment Agency of Buena Park* (1996) 46 *C.A.4th* 273, 278, 282, 53 *C.R.2d* 585; see *Barthelemy v. Orange County Flood Control Dist.* (1998) 65 *C.A.4th* 558, 568, 76 *C.R.2d* 575, infra, §1245 [discussing and distinguishing *Chhour*].)

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D. Inverse Condemnation.

2. Physical Taking or Damage.

a. Flood and Water Damage.

8 *Witkin Sum. Cal. Law Const Law* § 1146

[§ 1146] Flood and Water Damage.

In *Belair v. Riverside County Flood Control Dist.* (1988) 47 C.3d 550, 253 C.R. 693, 764 P.2d 1070, plaintiffs sued defendant flood control district and the State of California for damages caused when a flood control levee gave way and plaintiffs' lands were flooded.

(a) Under *Albers v. Los Angeles* (1965) 62 C.2d 250, 42 C.R. 89, 398 P.2d 129, supra, §1134, and *Holtz v. Superior Court* (1970) 3 C.3d 296, 90 C.R. 345, 475 P.2d 441, supra, §1134, liability in inverse condemnation may exist even though there are concurrent causes of the damage; "proximate cause is established where the public improvement constitutes a *substantial concurring cause* of the injury, i.e., where the injury occurred in substantial part because the improvement failed to function as it was intended." (47 C.3d 559, 560.)

(b) The water flow at the time of the failure was 25,000 cubic feet per second (cfs), well within the levee's design capacity of 86,000 cfs; thus, the levee failed to function as intended. That the property was subject to flooding prior to construction of the levee is not determinative; plaintiffs had made improvements to their property in reliance on protection provided by the levee, and the failure to provide this protection was a substantial cause of the damages. (47 C.3d 560.)

(c) The exception stated in *Archer v. Los Angeles* (1941) 19 C.2d 19, 24, 119 P.2d 1, to the rule of strict liability (see supra, §1134) was recognized in both *Albers* and *Holtz*. However, *Holtz* emphasized that public flood control improvements should not have the same immunity as private measures. (47 C.3d 563, 564.) The question presented here is *what* standard applies in these cases. (47 C.3d 565.) A public agency should not be made an absolute insurer of lands protected by a flood control project, but, in light of the enormous potential for damage, it must at least "*act reasonably and non-negligently*. ... [T]he fact that a dam bursts or a levee fails is not sufficient, standing alone, to impose liability. However, where the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the project's purpose is to contain the 'common enemy' of floodwaters." (47 C.3d 565.)

(d) A number of Court of Appeal decisions appear to impose absolute liability where a public improvement *diverts*

water from its natural course. (47 C.3d 566.) "It is doubtful, however, whether evidence of an unintended 'diversion' ... would elevate the test of inverse condemnation liability to absolute liability, rather than a reasonableness standard. ... It is sufficient for our purposes here to hold that when a public flood control improvement fails to function as intended, and properties historically subject to flooding are damaged as a proximate result thereof, plaintiffs' recovery in inverse condemnation requires proof that the failure was attributable to some unreasonable conduct on the part of the defendant public entities." (47 C.3d 567.)

In *Bunch v. Coachella Valley Water Dist.* (1989) 214 C.A.3d 203, 262 C.R. 513, an inverse condemnation action to recover damages to plaintiffs' apartment building substantially caused by failure of defendant district's flood control measures, the trial court entered judgment for plaintiffs without requiring them to prove the unreasonableness of defendant's actions, as required by the subsequently decided *Belair* decision. *Held*, reversed; the *Belair* standard of reasonableness is applicable in *all* flood control/inverse condemnation cases where unintended physical damage is alleged to have been substantially caused by an unintended failure of flood control facilities.

(a) *No estoppel*. Defendant is not estopped from relying on the *Belair* decision by the fact that, in its trial brief, it stated that a rule of strict liability, i.e., liability without regard to reasonableness, applies in this kind of case. Because *Belair* had not been decided when this matter was before the trial court, it makes no sense to suggest that defendant's brief induced the trial court to disregard the *Belair* decision. Defendant argued the applicability of *Belair* to the facts of this case at its earliest opportunity--on appeal. (214 C.A.3d 210.)

(b) *Belair is not limited to "common enemy doctrine" cases*. Where flood control facilities are designed only to protect against the "common enemy" of floodwaters by improving natural drainage courses or by collecting surface floodwaters and directing them into their natural means of discharge, and where there is no intentional diversion of waters from their natural course, the doctrine confers immunity from liability for any resulting damages. (214 C.A.3d 211.) Although *Belair* held that the doctrine was inapplicable where there is both substantial causation and unreasonable conduct, the entire tenor of the opinion, as well as specific language, indicate that the unreasonableness requirement is applicable beyond the limited scope of "common enemy" cases. (214 C.A.3d 212.) By focusing on constitutional principles, rather than the common law principles embodied in the doctrine, and basing its analysis on public policy and common sense, in addition to prior case law, *Belair* signaled "an intention to seek a uniform standard of liability that would apply across the entire spectrum of flood control inverse condemnation cases involving unintended physical damage to property." (214 C.A.3d 213.)

(c) *Belair is applicable to "intentional diversion" cases*. *Belair* acknowledged a line of cases imposing a rule of strict liability in "intentional diversion" cases. However, the scope of the rule is unclear, because it is not certain whether the "diversion" referred to relates to diversion *from* a particular place or *to* a particular place. For example, a flood control facility that collects waters from two natural watercourses and moves them to yet a third, produces an *intentional* diversion of waters *from* the two natural watercourses, but, were the same facility to spring a leak and spread water to an unintended area, it would produce an *unintentional* diversion of water *to* a particular location. *Belair* suggests that its focus was on unintentional diversions of water *to* a particular place. This analytical framework is logically consistent with an inquiry into both the reasonableness of the agency's conduct and whether the facility failed to function as intended. (214 C.A.3d 214.) Hence, "the appropriate focus in flood control/inverse condemnation cases involving unintended physical damage to property is on whether water is *unintentionally* diverted *to* a particular place--without regard to whether the water is intentionally diverted *from* a particular place." (214 C.A.3d 215.)

(d) *Retroactive application*. *Belair* announced a new rule of law that should be applied retroactively. (214 C.A.3d 216.)

Yue v. Auburn (1992) 3 C.A.4th 751, 4 C.R.2d 653, held that when a cause of action in inverse condemnation is based on *surface water* damage rather than *flood water* damage, *Belair* does not apply. The action is governed by the principles set forth in *Albers*, and recovery may be had for damage caused by a public improvement as deliberately planned and built, without regard to foreseeability. (3 C.A.4th 757, 759.)

A contrary holding was reached in *Locklin v. Lafayette* (1994) 7 C.4th 327, 27 C.R.2d 613, 867 P.2d 724, 12 Summary (10th), Real Property, §965, where the court applied the principles of *Belair* to surface water damage. "[T]he privilege to utilize a natural watercourse for drainage of surface waters from improved public property and to make improvements in or alterations to a natural watercourse for the purpose of improving such drainage is a conditional privilege, not an absolute privilege. ... [T]he public entity is liable only if its conduct posed an unreasonable risk of harm to the plaintiffs, and that unreasonable conduct is a substantial cause of the damage to plaintiff's property. The rule of strict liability generally followed in inverse condemnation ... is not applicable in this context." (7 C.4th 366, 367.) (See 22 Pepperdine L. Rev. 1352.)

On appeal after remand, the court in *Bunch v. Coachella Valley Water Dist.* (1997) 15 C.4th 432, 63 C.R.2d 89, 935 P.2d 796, 12 Summary (10th), Real Property, §969, affirmed that "*Belair's* reasonableness standard, as endorsed and refined by *Locklin's* balancing principles ... , should apply to flood control cases, including this one, where the failure of publicly managed flood control facilities causes property damage. ... If the public entity's conduct is unreasonable and a substantial cause of damage, the entity 'is liable for the proportionate amount of damage caused by its actions.' ... This inverse condemnation rule invokes constitutional balancing principles and is not governed by tort concepts of fault or negligence. It requires a balancing of the public need for flood control against the gravity of harm caused by unnecessary damage to private property." (15 C.4th 436, noting in footnote 1 that this case does not decide question whether reasonableness standard applies when flood control measures cause flood damage to land that is not historically subject to flooding.) The court disapproved several pre-*Belair* cases based on a strict liability standard. (15 C.4th 447, 448.)

Belair and *Bunch II* were discussed in *Akins v. California* (1998) 61 C.A.4th 1, 71 C.R.2d 314, 12 Summary (10th), Real Property, §969, and distinguished on their facts. Those cases involved a situation "where a public entity tries to protect private property owners from a risk created by nature and in doing so may alter the risks created by nature, but the entity's efforts fail. On the other hand is a situation where government appropriates private property in order to protect other property, creating a risk which would not otherwise exist." (61 C.A.4th 33.) An intentional diversion of water that "floods private property not historically subject to flooding subjects flood control agencies to inverse condemnation liability without proof of unreasonable conduct." (61 C.A.4th 33.) (See *Odello Bros. v. Monterey* (1998) 63 C.A.4th 778, 792, 73 C.R.2d 903, supra, §1139 [applying policies of *Belair*, *Locklin*, and *Bunch* to public entity's deliberate decision to breach levee]; *Pacific Bell v. San Diego* (2000) 81 C.A.4th 596, 610, 615, 96 C.R.2d 897 [ordinary rules of inverse condemnation strict liability for damages caused by failure of public improvement apply to action for damages caused by break in antiquated municipal water pipeline; distinguishing *Belair*, *Locklin*, and *Bunch*]; *Paterno v. California* (1999) 74 C.A.4th 68, 87, 87 C.R.2d 754 [to establish taking in case of shoddy maintenance of levee, plaintiff must prove unreasonable plan of maintenance, not just poor execution of maintenance; following *Bauer v. Ventura* (1955) 45 C.2d 276, 286, 289 P.2d 1]; *Arreola v. Monterey* (2002) 99 C.A.4th 722, 740, 753, 122 C.R.2d 38, supra, §1134 [distinguishing *Paterno*, reviewing cases, and applying *Locklin* reasonableness factors to counties' inadequate maintenance of flood control channel for over 20 years; reasonableness factors did not apply to state, which had duty to avoid blocking floodplain in constructing highway]; *Paterno v. California* (2003) 113 C.A.4th 998, 1019, 1027, 1033, 6 C.R.3d 854 [on remand after *Paterno I*, reviewing cases, and applying *Locklin*; state has inverse liability for foreseeable flood damage resulting from seepage that caused levee to fail where it accepted levee from county that built it, incorporated it into public flood control project, and benefited by cost savings from not correcting known structural defects; however, flood control district, which does not control levee in way that it could cure defects, is not liable]; C.E.B., 2 Condemnation Practice 2d, §14.2 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Thousand Trails v. California Reclamation Dist. No. 17* (2004) 124 C.A.4th 450, 465, 21 C.R.3d 196 [there is no cause of action for inverse condemnation based on risk of future flooding]; *California State Auto. Assn. Inter-Ins. Bureau v. Palo Alto* (2006) 138 C.A.4th 474, 483, 41 C.R.3d 503 [following *Belair v. Riverside County Flood Control Dist.* (1988) 47 C.3d 550, 253 C.R. 693, 764 P.2d 1070, text, p. 787; city was liable for property damage resulting from sewage backup into private home; once plaintiff established that backup was caused by blockage in city's sewer pipe,

burden shifted to city to show that other forces alone caused injury; plaintiff established that public improvement failed to function as it was intended, and did not need to show how and why blockage occurred]; *Tilton v. Reclamation Dist. No. 800* (2006) 142 C.A.4th 848, 859, 48 C.R.3d 366 [inadequate maintenance of levee, as opposed to faulty design or construction, is not adequate basis for inverse condemnation claim]; *Skoumbas v. Orinda* (2008) 165 C.A.4th 783, 794, 81 C.R.3d 242 [following *Belair*; city need not own entire drainage system to be liable for damages to downhill property caused by outfall of storm water diverted from city road and emanating from city-owned improvement if improvement had substantial cause-and-effect relationship to plaintiff's damage].



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b. Land Subsidence.

8 *Witkin Sum. Cal. Law Const Law* § 1147

[§ 1147] Land Subsidence.

In *Yee v. Sausalito* (1983) 141 C.A.3d 917, 190 C.R. 595, plaintiff alleged that defendant city's storm drainage system ruptured, allowing surface water to seep into subsurface soil adjacent to his property and causing massive soil subsidence; and that the damage resulted from use of the public improvement as deliberately designed, constructed, and maintained. Defendant city contended that this was a tort action for negligent maintenance of a public improvement, and barred for failure to file a claim. *Held*, a cause of action in inverse condemnation was stated.

(a) Inverse condemnation is the remedy only for that injury to private property as results from a deliberate act carrying with it the purpose of fulfilling a public object. The justification for inverse condemnation liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. (141 C.A.3d 920.)

(b) Thus, "the focus of judicial inquiry is not whether the injury was expected or foreseeable, but whether that injury was proximately caused by the use of the public improvement for its intended public purpose." (141 C.A.3d 921.) Defendant, arguing that the system was not designed or constructed in a manner that would intentionally permit underground infiltration of waters, draws an artificial and irrelevant distinction. The gutter of the system was designed to collect and divert water into a storm drain, and the damage occurred when surface water so diverted seeped into the soil of property adjacent to plaintiff's land. (141 C.A.3d 921.) Thus, the injury occurred while the improvement was operating as intended, and not as a result of use for a purpose unrelated to storm damage (e.g., as a catch basin for accumulation of debris). (141 C.A.3d 922.)

(c) "Practically speaking, the city accomplished its intended public purpose of diverting and collecting rain water in an unintended manner and at plaintiff's expense," and plaintiff should not be made to suffer a disproportionate burden for the benefit of the public as a whole. (141 C.A.3d 922.) (See *Souza v. Silver Dev. Co.* (1985) 164 C.A.3d 165, 170, 210 C.R. 146 [following *Yee*]; *Bunch v. Coachella Valley Water Dist.* (1997) 15 C.4th 432, 448, 63 C.R.2d 89, 935 P.2d 796, *supra*, §1146 [disapproving *Yee* to extent it imposes rule of strict liability in flood control cases].)

In *Wildensten v. East Bay Regional Park Dist.* (1991) 231 C.A.3d 976, 283 C.R. 13, the issue was "whether a governmental entity's mere ownership of undeveloped land and refusal to stabilize part of the land which threatens an

adjacent landowner's property with landslide supports a claim for inverse condemnation." (231 C.A.3d 979.) *Held*, it does not.

(a) "To state a cause of action for inverse condemnation, the plaintiff must allege the defendant substantially participated in the planning, approval, construction, or operation of a public project or improvement which proximately caused injury to plaintiff's property. ... In all inverse condemnation cases involving land subsidence to adjacent property, liability has resulted from affirmative actions the entity undertook to further some public project." (231 C.A.3d 980.)

(b) "All the District has done is purchase undeveloped land containing natural landslides and left it undeveloped. It did not undertake any project to improve the land, such as grading or other excavations, which exacerbated the landslide conditions and thus caused harm to Wildensten's adjacent property. The District's mere ownership and 'management' of this undeveloped property could not be the proximate cause of physical injury to Wildensten's property. Such passive ownership of raw land cannot logically be considered a governmental taking." (231 C.A.3d 981.)

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c. Impairment of Access to Street or Highway.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1148

[§ 1148] In General.

(1) *Theory of Compensable Damage.* Recovery is allowed where the property itself is not taken or directly damaged, but the court finds injury from impairment of the judicially developed *easement of access* (or "ingress and egress"). This private right of the owner to use the street as a means of access to his or her property is considered different from the right to use the street for travel in common with other members of the public, and a substantial impairment of it is therefore compensable. (See *Rose v. California* (1942) 19 C.2d 713, 719, 123 P.2d 505; *People v. Murray* (1959) 172 C.A.2d 219, 225, 342 P.2d 485; C.E.B., 2 Condemnation Practice 2d, §14.11; 43 A.L.R.2d 1072 [abutting owner's relief for loss of access because of limited-access highway or street]; 42 A.L.R.3d 13 [abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway]; 42 A.L.R.3d 148 [same; measure of damages]; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §195 et seq.; 46 Proof of Facts 3d 493 [right to compensation for loss of access caused by highway improvement].)

(2) *Grade Change.* The basic rule was established early on that an abutting owner must be compensated when a street is graded and lowered so as to make access difficult. (*Eachus v. Los Angeles Consol. Elec. Ry. Co.* (1894) 103 C. 614, 617, 37 P. 750; *McCandless v. Los Angeles* (1931) 214 C. 67, 71, 72, 4 P.2d 139; cf. *Anderson v. Fay Imp. Co.* (1955) 134 C.A.2d 738, 286 P.2d 513, supra, §1133 [private contractor with government permit raised level of road]; see 2 A.L.R.3d 985 [use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change].)

The rule was given an extended application in *Clay v. Los Angeles* (1971) 21 C.A.3d 577, 98 C.R. 582, where the impairment of access resulted from a prolonged rainstorm that washed out a city street. The injury was clear; plaintiffs could reach their home only on foot over a dangerous, unpaved slope. Their easement of access was still in existence, but was something like "a door opening on a brick wall." (21 C.A.3d 582.) The difficult question, however, was whether plaintiffs were entitled to compensation where the injury was not from affirmative action taken to construct a new public improvement, but from failure to take any action to restore an existing improvement. *Held*, the city was liable. On acceptance of the dedication of the street, it assumed a statutory duty to maintain it, and this implied the duty to maintain the grade level. (21 C.A.3d 584, 586.) Hence, it was bound either to restore plaintiff's access or to vacate the street and pay compensation for the loss of access. (21 C.A.3d 587.)

(3) *Underpass in Highway*. In *Rose v. California*, *supra*, compensation was awarded where an underpass was built along the center of a highway, not actually preventing direct access, but substantially reducing the area of access. (19 C.2d 727, 728.) (See *Goycoolea v. Los Angeles* (1962) 207 C.A.2d 729, 733, 24 C.R. 719 [following *Rose*; narrowing of pavement]; *People v. Ricciardi* (1943) 23 C.2d 390, 144 P.2d 799, *infra*, §1149.)

(4) *Cul-de-sac*. In *Bacich v. Board of Control of Calif.* (1943) 23 C.2d 343, 144 P.2d 818, the scope of the quasi-easement was extended to include free access along the entire block, to the next intersection, in each direction. Hence, obstruction of one end, creating a "cul-de-sac," was compensable even though free access still existed in the other direction. (23 C.2d 351.) (See *Beals v. Los Angeles* (1943) 23 C.2d 381, 384, 144 P.2d 839 [closing one end of alley]; *Breidert v. Southern Pac. Co.* (1964) 61 C.2d 659, 665, 39 C.R. 903, 394 P.2d 719, *infra*, §1149.)

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2. Direct Access Cut Off.

8 Witkin Sum. Cal. Law Const Law § 1149

[§ 1149] Direct Access Cut Off.

(1) *In General.* The owner's quasi-easement is only for ingress and egress; the owner has no property right in the maintenance of a flow of traffic past his or her land for the business advantage that may result, and the owner suffers no compensable damage where the right of access is merely made less convenient and requires circuitry of travel. (See *infra*, §§1150, 1151.)

It is easier to state these propositions than to apply them, however, and freeway cases have given rise to serious problems and difficult distinctions. Essentially, the freeway takes the highway frontage away from the abutting owner and substitutes a fenced-off service road. It can reasonably be argued that the only adverse effects are circuitry of travel and diversion of traffic, both noncompensable. However, in *People v. Ricciardi* (1943) 23 C.2d 390, 144 P.2d 799, a central underpass was made for through traffic, with a 30-foot surface roadway on each side. *Held*, compensable damage was suffered by reason of (a) the increased distance along the surface roadway defendant would be required to travel to reach the through traffic lane, and (b) the fact that defendant's property was no longer visible to the through traffic. (23 C.2d 399.) (See *Blumenstein v. Long Beach* (1956) 143 C.A.2d 264, 267, 299 P.2d 347 [applying *Ricciardi* rule to freeway construction, but reversing judgment for error in admission of evidence].)

In *Breidert v. Southern Pac. Co.* (1964) 61 C.2d 659, 39 C.R. 903, 394 P.2d 719, plaintiffs owned and leased property with access to intersecting streets in both directions. Defendant railroad, with approval of the Public Utilities Commission, closed its crossing, thereby depriving plaintiffs of access in one direction. In this action in inverse condemnation, a general demurrer was sustained. *Held*, reversed. Holding the complaint good against a general demurrer, the court attempted to lay down a test of *substantial* impairment, as a *question of law*, with a cul-de-sac only a significant factor, not sufficient by itself.

"In summary, the rule which emerges constitutes one of substantial impairment of the right of access. Although destruction of access to the next intersecting street in one direction constitutes a significant factor in determining whether the landowner is entitled to recovery, it alone cannot justify recovery in the absence of facts which disclose a substantial impairment of access." (61 C.2d 666.) (See *Valenta v. Los Angeles* (1964) 61 C.2d 669, 672, 39 C.R. 909, 394 P.2d 725 [unincorporated area and rural highways; judgment on demurrer reversed to allow opportunity to plead

more than bare allegation of cul-de-sac]; *People v. Giumarra Vineyards Corp.* (1966) 245 C.A.2d 309, 315, 53 C.R. 902 [road conveyed by railroad to county; defendant abutting owner had compensable right to access when county accepted]; *People v. DiTomaso* (1967) 248 C.A.2d 741, 758, 57 C.R. 293 [loss of access rights when state abandoned contract to construct road approach to proposed highway was compensable]; *People v. Wilson* (1994) 25 C.A.4th 977, 982, 31 C.R.2d 52, supra, §1140 [unlike highway, purpose of freeway is to eliminate right of access and related abutter's rights, including right to view property from freeway; hence, property owner was not entitled to severance damages for blockage of view resulting from erection of sound wall as part of freeway widening project].)

(2) *Temporary Deprivation of Access.* *Los Angeles v. Ricards* (1973) 10 C.3d 385, 389, 110 C.R. 489, 515 P.2d 585, held that a deprivation of access for 2 years could have entitled the owner to compensation, but only nominal damages were proper because the owner did not intend to use, rent, or sell the property.

Ricards was distinguished in *Jones v. People* (1978) 22 C.3d 144, 148 C.R. 640, 583 P.2d 165. Defendant Department of Transportation announced plans for a freeway that would cross plaintiffs' undeveloped property and result in substantial impairment of access. The county then refused to allow plaintiffs to subdivide, and plaintiffs recovered judgment for diminution of the market value. After judgment, the state abandoned the freeway project. *Held*, judgment reversed for determination of damages sustained from the time of disapproval of the subdivision map to the time of abandonment of the project. (22 C.3d 154.)

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3. Circuity of Travel and Loss of Traffic.

8 Witkin Sum. Cal. Law Const Law § 1150

[§ 1150] Circuity of Travel and Loss of Traffic.

Although greatly weakened in application (see *supra*, §1149), the principle still remains that improvements that result only in more circuitous and less convenient access, and that divert the main stream of traffic from the owner's business frontage, are not compensable. Thus, in *Holman v. California* (1950) 97 C.A.2d 237, 217 P.2d 448, a raised dividing strip was placed in the highway, extending across an intersecting street. This made it impossible for motorists coming from one direction to turn into plaintiff's garage and gas station. But access remained, by a short extra drive, in two directions. In denying compensation, the court distinguished prior decisions as follows:

"In all of the foregoing cases in which it was held that compensation must be paid there was either physical injury to an owner's property itself, as in the Reardon case, or a physical impairment of access from the property to the street, whether caused by change of grade, as in the Eachus cases and the Rockridge case, or by physical impairment of the property to the street by the means of the construction of a physical barrier as in the McCandless case, or by removing the property from the through highway and placing it on a side or service road as in the Ricciardi case, or by the creation of a dead end street as in the Bacich case. None of these cases involve the division of a highway into separate roadways by concrete islands or division strips and all are factually different from the case at bar." (97 C.A.2d 241.) (See *Beckham v. Stockton* (1944) 64 C.A.2d 487, 501, 149 P.2d 296 [route in one direction made more inconvenient at nearest intersection]; *Holloway v. Purcell* (1950) 35 C.2d 220, 230, 217 P.2d 665 [loss of traffic flow but no impairment of access]; *People v. Romano* (1971) 18 C.A.3d 63, 73, 94 C.R. 839 [two alternative routes provided by project, one requiring only additional block and no more than 2,400 feet]; *Hecton v. People* (1976) 58 C.A.3d 653, 657, 130 C.R. 230 [following *Holloway*].)

Holman was followed in *People v. Sayig* (1951) 101 C.A.2d 890, 226 P.2d 702, also involving a divided, and hence a one-way highway. "If a property owner is entitled to compensation because a divided highway is constructed in front of his property, then the same result would logically follow when one-way streets are created in cities to control traffic, or even where a double white line is placed in a highway which prohibits traffic from crossing that lane lawfully, and thus permits only one-way traffic in front of the property. The Vehicle Code abounds with other regulations that result in permitting the property owner to proceed only in one direction when emerging from his property." (101 C.A.2d 902.)

Contrary cases such as *Bacich v. Board of Control of Calif.* (1943) 23 C.2d 343, 144 P.2d 818, supra, §1148, *People v. Ricciardi* (1943) 23 C.2d 390, 144 P.2d 799, supra, §1149, *Holman*, and *Holloway*, are distinguishable. No general rule can be laid down to cover all situations. "The distinctions between these various situations and their impact on the actual value of the property is simply one of degree. Our case falls within the rule of the *Holman* case." (101 C.A.2d 905.) (See *People v. Russell* (1957) 48 C.2d 189, 197, 309 P.2d 10 [county road narrowed from 52 to 40 feet to provide parking strip].)

In *People v. Ayon* (1960) 54 C.2d 217, 5 C.R. 151, 352 P.2d 519, the state condemned a 10-foot strip along the eastern boundary of defendant's supermarket and parking lot to widen a highway on which it fronted. The plan called for a divider strip in the middle of the highway, which would prevent access in one direction. *Held*, neither impairment of access nor temporary damage during construction was compensable.

(a) *Ricciardi*, supra, and *Blumenstein v. Long Beach* (1956) 143 C.A.2d 264, 267, 299 P.2d 347, are distinguishable. In *Ricciardi*, the highway itself was rerouted, and no direct access to the highway remained; in *Blumenstein*, the freeway outlet passed directly in front of the property, separating it from traffic by a concrete construction five feet wide. "In each of these cases through traffic continued to travel along the street upon which the owner's property had originally abutted. But after construction of the improvement the properties involved no longer abutted on any through traffic street. As a result of the improvement they were separated from through traffic by a new street which did not carry through traffic in either direction." (54 C.2d 225.) In the instant case, direct access to through traffic in one direction still exists. (54 C.2d 226.)

(b) A temporary injury during construction ordinarily is not compensable. It is often necessary to break up pavement, narrow streets, and make ingress and egress inconvenient, and the resulting annoyance or discomfort is not compensable. On the other hand, temporary injury may be compensable where there is unnecessary and substantial interference or an actual invasion of the right of possession during construction; and this would include additional unnecessary and substantial damage caused by reason of the improvement not being constructed as originally planned. (54 C.2d 228, 229.) However, these damages cannot be recovered until they have occurred; prior to construction, they are purely speculative. If and when they occur, a subsequent action may be brought under an exception to the rule that damages in condemnation actions should be fixed completely at the time of trial. (54 C.2d 229.) (See *Rosenthal v. Los Angeles* (1961) 193 C.A.2d 29, 34, 13 C.R. 824 [east access terminated, but north access from two streets unimpaired]; 23 A.L.R.4th 674 [damages resulting from temporary conditions incident to public improvements or repairs].)

In *Breidert v. Southern Pac. Co.* (1964) 61 C.2d 659, 39 C.R. 903, 394 P.2d 719, supra, §1149, the complaint alleged that the closing required trucks servicing plaintiffs' property to use a different narrow street of access, and that access to plaintiffs' property by fire, police, and other public services would be greatly delayed. The court said that as to the first, there was only injury to the public without special injury to the landowner, and as to the second, the injury was too speculative to be compensable. (61 C.2d 668.)

In *San Diego Metropolitan Transit Dev. Bd. v. Price Co.* (1995) 37 C.A.4th 1541, 44 C.R.2d 705, plaintiff development board obtained an easement along the east side of defendant's property in conjunction with a rail transit line it was building. Because of the project, access to defendant's property was denied when traveling southbound on the north-south road that abutted the west side of the property. However, access to the property was available from the east-west road that bordered the north side of the property, as well as from the north-south road, if extra distance was traveled. In the condemnation action by plaintiff, the trial judge awarded damages, but excluded evidence of access damages as an element of severance damages. *Held*, affirmed.

(a) The trial judge determines whether there is a compensable impairment of access as an element of the damages; if so, the amount of the damages is submitted to the jury. The trial judge's finding is upheld if there is any substantial evidence to support it. (37 C.A.4th 1545.)

(b) In California, access impairment damages have been allowed, even though access to the property in question is

available from another street. The cases are in hopeless conflict, but the one common thread that has emerged is that the access impairment must be substantial, and, regardless of how the trial judge has decided this matter, there must be substantial evidence to support his finding. (37 C.A.4th 1546, citing *Brumer v. Los Angeles County Metropolitan Trans. Authority* (1995) 36 C.A.4th 1738, 1744, 43 C.R.2d 314.)

(c) Here, the trial judge considered evidence that the access impairment only increased the distance from the property to the southbound lane of the north-south road, and that the highest and best use of the property was the same before and after the impairment; there was no evidence that any particular type of vehicle was denied access to the property, nor was there evidence of a decrease in the number of vehicles to which the property was available. The evidence is sufficient to support the trial judge's determination that the access impairment was not compensable. (37 C.A.4th 1548.)

(d) Whether the impairment occurs through exercise of the police power or the condemnation power, it must be *substantial* to be compensable; the rule is not, as defendant suggests, that it need be substantial only when it occurs through exercise of the condemnation power. (37 C.A.4th 1549.) (See *Brumer v. Los Angeles County Metropolitan Trans. Authority*, *supra*, 36 C.A.4th 1744 [construction did not substantially impair plaintiff's access to street, where view of plaintiff's building remained the same, as did parking and vehicular traffic, and where major part of property abutted on another street that was unchanged]; *Perrin v. Los Angeles County Trans. Com.* (1996) 42 C.A.4th 1807, 1811, 1813, 50 C.R.2d 488 [following *Brumer*; no substantial impairment where rail line construction, which converted two-way street into one-way street, eliminated parking on one side of street, and prevented pedestrians from entering street, changed but did not eliminate access to plaintiff's property]; *Liontos v. County Sanitation Dists.* (1998) 61 C.A.4th 726, 729, 72 C.R.2d 107 [distinguishing *People v. Ayon*; summary judgment for defendants was improper where evidence showed substantial impairment of access to plaintiff's restaurant, and defendants failed to demonstrate that 7-month hiatus in construction, with barriers and heavy equipment left in place, was reasonable and necessary]; *Leonard v. People* (1998) 62 C.A.4th 1296, 1300, 73 C.R.2d 328 [fact that improved traffic access was deemed offsetting benefit in earlier condemnation action did not require compensation when traffic was later rerouted; following *People v. Ayon*, and distinguishing *Los Angeles County Metropolitan Trans. Authority v. Continental Dev. Corp.* (1997) 16 C.4th 694, 66 C.R.2d 630, 941 P.2d 809, *infra*, §1243].)

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c. Impairment of Access to Street or Highway.

4. Miscellaneous Inconveniences.

8 Witkin Sum. Cal. Law Const Law § 1151

[§ 1151] Miscellaneous Inconveniences.

Where the right of access remains in substantial form, a change in the street or highway does not give rise to a right of action for damages. (See *Constantine v. Sunnyvale* (1949) 91 C.A.2d 278, 283, 204 P.2d 922 [public street and railway grade crossing abandoned, but new street opened]; *Breidert v. Southern Pac. Co.* (1964) 61 C.2d 659, 39 C.R. 903, 394 P.2d 719, *supra*, §1149; *People v. Wasserman* (1966) 240 C.A.2d 716, 730, 50 C.R. 95 [access after project was one-third mile longer and involved heavy traffic and difficult left-hand turn].)

In *People v. Presley* (1966) 239 C.A.2d 309, 48 C.R. 672, defendants owned an apartment house on the corner of T and L Streets, and the fee underlying a part of T Street. The state, for a freeway, condemned the fee underlying T Street and the access rights of defendants to T Street. Defendants appealed, contending that the trial judge erroneously refused to include compensation for (a) the increased noise, fumes, and annoyance that would result from the more heavily trafficked freeway, and (b) the loss of street parking privileges on T Street (they now would have parking only on L Street). *Held*, judgment affirmed.

(a) *General principles.* To be compensable, the interference with access must be substantial and the right claimed must be reasonable. The decisive question is whether the owner if uncompensated would contribute more than his or her proper share to the public undertaking.

(b) *No compensation for loss of parking right.* Parking on the street is subject to local regulation, and it is only a privilege that defendants enjoy as members of the public. They had no proprietary right; hence, none was taken when the freeway was created. (239 C.A.2d 315.)

(c) *No compensation for noise from increased traffic.* This is an inconvenience general to all property owners in the neighborhood, not special to the defendants. (239 C.A.2d 317.) (See *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 C.A.2d 599, 603, 72 C.R. 240 [fumes and noise]; 51 A.L.R.3d 860 [traffic noise and vibration]; C.E.B., 2 Condemnation Practice 2d, §14.13.)

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See *Border Business Park v. San Diego* (2006) 142 C.A.4th 1538, 1555, 49 C.R.3d 259 [rerouting truck traffic to border crossing was not compensable taking of business park in absence of evidence that rerouting caused gridlock that totally impaired access to business park for several hours each day; "gridlock" denotes traffic congestion that prevents traffic from moving in any direction].



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d. Nuisance Rendering Property Uninhabitable.

8 Witkin Sum. Cal. Law Const Law § 1152

[§ 1152] Nuisance Rendering Property Uninhabitable.

In *Varjabedian v. Madera* (1977) 20 C.3d 285, 142 C.R. 429, 572 P.2d 43, defendant city operated a sewage treatment plant near plaintiffs' 80-acre vineyard and some 600 feet from their residence. The plant emitted odors that were blown onto plaintiffs' property by prevailing winds, and they sought damages on alternative theories of nuisance and inverse condemnation. *Held*, judgment for plaintiffs on the nuisance theory upheld (see 13 *Summary* (10th), *Equity*, §133 et seq.) and judgment on the pleadings for defendant on the inverse condemnation theory reversed.

(a) Physical damage is not a prerequisite to compensation; damage from invasions of water or other liquid effluents often provides the basis for recovery. And the complaint alleges that the land was made "untenantable for residential purposes"; this depicts a permanent and substantial impairment in the use of the land. (20 C.3d 296, 297.)

(b) Plaintiffs' allegations bring the case within the doctrine of *Richards v. Washington Terminal Co.* (1914) 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088, where the plaintiff complained of "inconvenience ... in the occupation of his property" caused by "gases and smoke" forced out of a railroad's tunnel by a fanning system near the house. Although in the instant case there was no device that directed the noxious gases onto plaintiffs' property, the underlying principle of *Richards* applies. This is particularly so because the California Constitution "protects a somewhat broader range of property values from government destruction than does the analogous federal provision." (20 C.3d 298.) "If a plaintiff can establish that his property has suffered a 'direct and peculiar and substantial' burden as a result of recurring odors produced by a sewage facility--that he has, as in *Richards*, been in effect 'singled out' to suffer the detrimental environmental effects of the enterprise--then the policy favoring distribution of the resulting loss of market value is strong ... and the likelihood that compensation will impede necessary public construction is relatively slight. In these circumstances, the necessity of breathing noxious sewage fumes may be a burden unfairly and unconstitutionally imposed on the individual landowner." (20 C.3d 298.) (See *Harding v. Department of Trans.* (1984) 159 C.A.3d 359, 367, 205 C.R. 561 [following *Varjabedian*]; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 C.4th 893, 940, 55 C.R.2d 724, 920 P.2d 669, supra, §1089 [applying *Varjabedian*]; *Oliver v. AT&T Wireless Services* (1999) 76 C.A.4th 521, 531, 90 C.R.2d 491 [distinguishing *Varjabedian*; unsightly but legal cellular tower that caused plaintiff's neighboring property to diminish in value could not give rise to inverse condemnation action].)

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3. Regulatory Taking.

a. In General.

1. Valid Exercise of Police Power.

8 Witkin Sum. Cal. Law Const Law § 1153

[§ 1153] Valid Exercise of Police Power.

(1) *In General.* In *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472, the Pennsylvania Legislature enacted the Subsidence Act to prohibit mining that causes subsidence damage to specified surface structures, and authorized revocation of a mining permit for failure to pay for repair of subsidence damage, despite contractual waiver by surface owners of claims to these damages. *Held*, unlike the earlier statute held invalid in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, this Act was a valid exercise of police power and a permitted impairment of the obligation of contract (see *infra*, §1289).

(a) The Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners; the Legislature found that important public interests were served by minimizing subsidence in certain areas, and the purposes set forth in the statute were genuine, substantial, and legitimate. (107 S.Ct. 1242, 94 L.Ed.2d 488.)

(b) "The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal*. Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. ... Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' ... and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts the power to enforce it." (107 S.Ct. 1245, 94 L.Ed.2d 492.)

(c) Plaintiffs' takings claim fails also because they have not shown any deprivation significant enough to satisfy the heavy burden placed on one alleging a regulatory taking. (107 S.Ct. 1246, 1249, 94 L.Ed.2d 493, 495.) Only about 75% of their underground coal can be profitably mined in any event, and there is no showing that their reasonable "investment-backed expectations" have been materially affected by the additional duty to retain the small percentage necessary to support the surface structures. (107 S.Ct. 1249, 94 L.Ed.2d 497.) (See *Golden Cheese Co. of Calif. v. Voss* (1991) 230 C.A.3d 727, 737, 739, 281 C.R. 602 [valid regulation of minimum prices to be paid by cheese manufacturers

for milk, allegedly destroying cheese company's business]; *Buena Park Motel Assn. v. Buena Park* (2003) 109 C.A.4th 302, 310, 134 C.R.2d 645 [ordinance limiting number of consecutive days guests can stay at hotels and motels in city substantially advanced city's interest in maintaining sanitary, pest free conditions and did not deprive owners of all economically viable use of property]; *NJD, Ltd. v. San Dimas* (2003) 110 C.A.4th 1428, 1448, 2 C.R.3d 818 [in regulatory takings context, issue in facial challenge is whether "mere enactment" of statute is at issue; facial challenge presents no concrete controversy regarding application of statute to property at issue; thus, trial court did not err in concluding that plaintiff's proffered evidence concerning application of statute to profitable development of its hillside property was irrelevant]; 22 *Ecology L. Q.* 89 [criticizing *Pennsylvania Coal* and arguing that regulatory takings doctrine should be abolished].)

(2) *Inclusionary Zoning*. In *Home Builders Assn. of Northern Calif. v. Napa* (2001) 90 C.A.4th 188, 108 C.R.2d 60, the court held that an ordinance requiring all new development in defendant city to incorporate affordable housing or alternatively to provide for the dedication of other property or the payment of a fee, was not facially invalid under the Takings Clauses of the U.S. or California Constitutions. The ordinance provides significant benefits to complying developers and permits application to defendant for a reduction, adjustment, or waiver of its provisions. (90 C.A.4th 194.) Further, the ordinance is not a taking of private property for public use because it substantially advances the legitimate state interest of creating housing for low and moderate income families. (90 C.A.4th 195.) (See 115 *Harv. L. Rev.* 2058 [*Home Builders*]; 36 *U.S.F. L. Rev.* 971 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. In *Bronco Wine Co. v. Jolly* (2005) 129 C.A.4th 988, 29 C.R.3d 462, the court held that *B. & P.C.* 25241, prohibiting the use of brand names on wine bottles with "Napa" on the label unless at least 75% of the grapes used were from Napa County, did not effect a compensable taking of a wine producer's brand equity. There was no physical taking of the producer's property, the producer was not barred from using the brands under all circumstances, the producer could use the brands for wine using Napa grapes, and the producer could continue selling value wine under names that are not geographically misleading. The fact that the producer's profits might diminish did not entitle it to just compensation under the *Fifth Amendment*. (129 C.A.4th 1037.)

See *Herzberg v. Plumas* (2005) 133 C.A.4th 1, 18, 34 C.R.3d 588 ["fencing out" ordinance requiring landowners in rural area to fence property at their expense if they wish to keep other people's cattle off their land does not constitute unconstitutional taking; ordinance serves legitimate governmental purpose and does not interfere with landowners' reasonable investment-backed expectations in buying property, or limit their best, or any, use of property]; *Golden Gate Water Ski Club v. Contra Costa* (2008) 165 C.A.4th 249, 267, 80 C.R.3d 876 [landowner that purchased land subject to restriction did not suffer taking when restriction was enforced]; C.E.B., 2 Land Use Practice, Chap. 17.(2) *Inclusionary Zoning*. See 22 *A.L.R.6th* 295 [Validity, Construction, and Application of Inclusionary Zoning Ordinances and Programs].



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a. In General.

2. Landlord and Tenant Regulations.

aa. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1154

[§ 1154] In General.

In *Cwynar v. San Francisco* (2001) 90 C.A.4th 637, 109 C.R.2d 233, the court addressed an issue of first impression. Plaintiffs challenged the constitutionality of an ordinance that restricted the ability of landlords to evict tenants to enable the landlord or his or her relatives to move into a rental unit. The trial court sustained defendant city's demurrer without leave to amend. *Held*, reversed and remanded.

(a) *Per se physical taking*. For there to be a physical taking, a government-authorized invasion or occupation of the property must be *direct* and *permanent*. (90 C.A.4th 653, citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868, *supra*, §1127.) Here, plaintiffs claimed direct occupation by alleging that the restrictions forced some plaintiffs to permit others to live in units plaintiffs wished to occupy, and that other plaintiffs were precluded from removing tenants from units to enable close family members to move in. (90 C.A.4th 653.) Plaintiffs may be able to satisfy the permanency requirement by showing that the ordinance "effectuates coerced lifetime tenancies which effectively extinguish plaintiffs' right to occupy substantial portions of their property." (90 C.A.4th 655.) Thus, plaintiffs are entitled to the opportunity to prove that the ordinance "is an unconstitutional taking as applied to them by showing that the challenged ordinance has the effect of compelling them to rent property or to refrain in perpetuity from terminating a tenancy." (90 C.A.4th 657, distinguishing *Yee v. Escondido, Calif.* (1992) 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153, *infra*, §1155.)

(b) *Governmental interest*. The record does not establish that the ordinance, as a matter of law, "substantially advances" a legitimate governmental interest. The ordinance is not an ordinary rent control law, nor is it a price and rate regulation. It "restricts an owner's right to use his or her property as a family home." (90 C.A.4th 661.) Thus, the governmental justification should be closely scrutinized. "It is not a straightforward, evenly applied regulation. It directly affects the possessory property rights of an apparently arbitrary category of property owners." (90 C.A.4th 661.)

(c) *Balancing test*. The complaint implicates several relevant factors supporting plaintiffs' contention that the ordinance "imposes a disproportionate burden on them by essentially requiring them to forfeit their own homes in order to create public housing." (90 C.A.4th 663.) This includes plaintiffs' contention, which defendant does not dispute, that

the ordinance does not provide them "any benefits or rights that 'mitigate whatever financial burdens the law has imposed.' " (90 C.A.4th 664, quoting *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 C.4th 761, 775, 66 C.R.2d 672, 941 P.2d 851, *infra*, §1155.) Further, plaintiffs claim that "there is no meaningful mechanism in the regulation for adequately considering or attempting to prevent possible unfair hardship to some property owners." (90 C.A.4th 664.) Defendant claims that there is no regulatory taking because (1) the abridgment of plaintiffs' rights are not so complete as to effectuate a per se physical taking, (2) plaintiffs have not been deprived of all economically beneficial use of their properties, and (3) the ordinance "preserves the historic use of plaintiffs' properties as residential properties." (90 C.A.4th 665.) However, these attempts to resist plaintiffs' claim by advancing per se rules are inconsistent with the ad hoc factor-based approach for analyzing regulatory claims. (90 C.A.4th 666.) (See *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 C.A.4th 587, 604, 608, 618, 114 C.R.2d 412 [landlords' association, challenging rent control requirement that landlords pay tenants 3% interest on security deposits when banks were paying no more than 1.5% interest, adequately pleaded cause of action for regulatory taking; provision did not advance legitimate state interest and association did not need to allege "deep financial hardship"].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Small Property Owners of San Francisco v. San Francisco* (2006) 141 C.A.4th 1388, 1406, 47 C.R.3d 121 [distinguishing *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 C.A.4th 587, 114 C.R.2d 412; requiring plaintiff landlords to pay 5% interest on security deposits when liquid bank accounts paid less than 5% did not effect regulatory taking; plaintiffs were not required to keep tenants' funds in liquid bank accounts and plaintiffs failed to show sufficient economic impact from regulation or that it interfered with their investment-backed expectations; regulation was part of broader scheme to adjust benefits and burdens of economic life between tenants and landlords for public good].



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bb. Rent Control.

8 *Witkin Sum. Cal. Law Const Law* § 1155

[§ 1155] Rent Control.

In *Yee v. Escondido* (1990) 224 C.A.3d 1349, 274 C.R. 551, a mobilehome rent control ordinance providing for a rollback of rents was upheld against the claim that it constituted a compensable taking of property without compensation. (For full discussion of California decision, see 12 *Summary* (10th), *Real Property*, §770.)

The California decision was affirmed by the U.S. Supreme Court in *Yee v. Escondido, Calif.* (1992) 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153. Petitioners (Yees) own mobilehome parks in Escondido, California. Following the enactment of the Mobilehome Residency Law (12 *Summary* (10th), *Real Property*, §761 et seq.), the voters of respondent city approved a rent control ordinance restricting rent increases. Petitioners filed a suit in the San Diego Superior Court challenging the constitutionality of the ordinance as a taking of their property without compensation. The trial court sustained a demurrer, the Court of Appeal affirmed, and the California Supreme Court denied review. Petitioners and other park owners petitioned for certiorari, and the Court granted the writ to resolve conflicts between the decision below and two decisions of the federal Courts of Appeals. *Held*, judgment of California Court of Appeal affirmed.

(a) Most of the Supreme Court cases interpreting the Takings Clause of the Fifth Amendment fall within two distinct classes. First, where the Government authorizes a physical occupation of property or actually takes title, the Clause generally requires compensation. (112 S.Ct. 1526, 118 L.Ed.2d 162, citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868, *supra*, §1127.) Second, where the Government merely regulates the use of property, compensation is required only if "considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (112 S.Ct. 1526, 118 L.Ed.2d 162, citing *Penn Cen. Trans. Co. v. New York* (1978) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *supra*, §981.)

(b) Petitioners argued that there was a physical taking by reason of the unusual economic relationship between park owners and mobilehome owners. Park owners may no longer set rents or decide who their tenants will be; and a

reduction in rent for a mobilehome pad causes a corresponding increase in the value of a mobilehome, because the mobilehome owner now owns, in addition to a mobilehome, the right to occupy a pad at a rent below the value that would be set by the free market. And because under the Residency Law the park owner cannot evict a mobilehome owner, the latter is a perpetual tenant who can receive a premium from a purchaser corresponding to the increase in value that the perpetual tenancy assures. As a result, "the rent control ordinance has transferred a discrete interest in land--the right to occupy the land indefinitely at a sub-market rent--from the park owner to the mobile home owner." (112 S.Ct. 1528, 118 L.Ed.2d 165.)

(c) The Government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his or her land. The rent control ordinance authorizes no such thing; petitioners' tenants were invited by petitioners, and a park owner who wishes to change the use of his or her land may evict the tenants on 6 or 12 months' notice. (112 S.Ct. 1528, 118 L.Ed.2d 165.) "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." (112 S.Ct. 1529, 118 L.Ed.2d 166.) "[T]he state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant." (112 S.Ct. 1529, 118 L.Ed.2d 166.) With respect to physical takings, the case is similar to *Federal Communications Com. v. Florida Power Corp.* (1987) 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282. "We explained that 'it is the invitation, not the rent, that makes the difference.' ... The Escondido rent control ordinance, even considered against the backdrop of California's Mobilehome Residency Law, does not authorize an unwanted physical occupation of petitioners' property. It is a regulation of petitioners' use of their property, and thus does not amount to a per se taking." (112 S.Ct. 1531, 118 L.Ed.2d 168.) (See 25 *Loyola L.A. L. Rev.* 1259 [Yee]; 26 *Loyola L.A. L. Rev.* 1 [same]; 24 *Pacific L. J.* 1681 [same].)

In *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 C.4th 761, 66 C.R.2d 672, 941 P.2d 851, plaintiff property owner, who had made substantial capital improvements to an apartment building, appealed denial of his claim that defendant city's 12% limit on rent increases deprived him of a "just and reasonable return" on his investment. The Court of Appeal agreed and directed the superior court to issue a writ of mandamus prohibiting application of the 12% limit to plaintiff. (See *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 C.A.4th 730, 736, 23 C.R.2d 724.) Plaintiff then filed a complaint seeking lost rental income and interest for the period in which the 12% limit was in effect, alleging that he had suffered a taking under Cal. Const., Art. I, §19, and the Fifth Amendment to the U.S. Constitution. The superior court sustained defendant's demurrer and the Court of Appeal affirmed, rejecting plaintiff's claim because he never lost all use of his property. (16 C.4th 768.) *Held*, the available remedy of future rent adjustments precludes a finding of a taking.

(a) A regulation "may effect a taking though, as is true here, it does not involve a physical invasion and leaves the property owner some economically beneficial use of his property." (16 C.4th 774; disapproving *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, *supra*, §1058, to the extent it holds to the contrary.) When a regulation does not result in a physical invasion and does not deprive the owner of all economic use of the property, a reviewing court should consider three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. (16 C.4th 775, citing *Penn Cen. Trans. Co., supra*.)

(b) However, it is not necessary to decide whether a rent regulation that violates a property owner's right to due process also constitutes a taking. "[A] remedy for the due process violation, if available and adequate, obviates a finding of a taking. ... [T]he benefits a property owner receives in conjunction with a regulation may offset the burdens and thus satisfy the takings clause." (16 C.4th 782.) Here, an adjustment of future rents that takes into consideration past confiscatory rents places the cost of compensating plaintiff roughly on those tenants who benefited from unconstitutionally low rents. (16 C.4th 783, 784.) In measuring the future rent ceiling for a particular apartment, defendant must consider any effect on plaintiff of the temporary enforcement of the confiscatory regulation with respect to that apartment. (16 C.4th 785.)

Two justices joined in a dissent. (16 C.4th 792.) (See *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 C.A.4th

1409, 1426, 73 C.R.2d 227 [following *Kavanau*; plaintiffs' remedy of seeking future rent adjustments from rent control board precluded finding of taking based on lost profits; application of rent control ordinance did not constitute physical invasion of property or cause owner to lose all economically beneficial or productive use of property]; *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 C.4th 952, 970, 81 C.R.2d 93, 968 P.2d 993 [following *Kavanau* and *Yee*; prevention of excessive and unreasonable rent increases caused by shortage of housing in city is legitimate government interest regardless of whether that goal is identified in rent control law's preamble and whether primary beneficiaries of law are low or merely moderate income tenants]; *Montclair Parkowners Assn. v. Montclair* (1999) 76 C.A.4th 784, 792, 90 C.R.2d 598 [heightened scrutiny applicable to land dedications does not apply to rent control schemes of mobilehome parks; following *Santa Monica Beach*]; 88 Cal. L. Rev. 1547 [*Santa Monica Beach*]; 21 Southwestern U. L. Rev. 1019 [Regulatory Takings Law in the 1990's: The Death of Rent Control?]; C.E.B., 2 Condemnation Practice 2d, §15.10.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hillsboro Properties v. Rohnert Park* (2006) 138 C.A.4th 379, 392, 41 C.R.3d 441 [because rate regulation is confiscatory only if it does not allow just and reasonable rate of return on investment, landowner's failure to allege that rent control ordinance that had been held unconstitutional deprived it of fair rate of return defeated any possible right to recovery].



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CHAPTER X - Constitutional Law

Witkin Summary of California Law

XIII. EMINENT DOMAIN

D. Inverse Condemnation.

3. Regulatory Taking.

a. In General.

3. Fee as Condition for Use or Building Permit.

8 Witkin Sum. Cal. Law Const Law § 1156

[§ 1156] Fee as Condition for Use or Building Permit.

In *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 C.A.4th 1459, 28 C.R.2d 734, a property owners' association sued various state agencies, claiming that a mitigation fee charged as a condition for obtaining building permits was unlawful. Plaintiff requested a preliminary injunction preventing defendants from collecting any further fees and from making expenditures from the mitigation fund pending trial. The trial judge denied the request for injunctive relief. *Held*, affirmed.

(a) Unlike *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, *infra*, §1157, this case does not involve a physical taking. "There has been no physical invasion of plaintiff's property nor is there any suggestion that landowners have been deprived of all economically beneficial or productive use of the land." Therefore, plaintiff is not entitled to the heightened scrutiny a physical taking would entail; instead, resolution of plaintiff's challenge requires a careful case-specific factual inquiry. (23 C.A.4th 1478.)

(b) The state's justification for the fee is to ameliorate the effects of pollution from plaintiff's development, and there can therefore be no doubt that justification for the regulation at issue constitutes an important state interest reasonably related to plaintiff's construction. The fee is calculated based on estimates of the quantities of nutrients entering Lake Tahoe as a result of the development and continuing maintenance of plaintiff's subdivisions, and the mitigation fund is specifically dedicated to mitigation of the effects of that source of pollution. "Thus, on the face of the regulation there appears to be a sufficient nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme." (23 C.A.4th 1480.)

(c) The other question involved in the case-specific factual inquiry, as indicated in *Yee v. Escondido, Calif.* (1992) 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153, *supra*, §1155, is whether the regulation unfairly singles out the property owner to bear a burden that should be borne by the public as a whole. While the public as a whole will benefit from preservation of the lake, plaintiff's members, who are area residents, undoubtedly receive a special benefit. This special benefit, combined with the fact that the government can act to preserve the area only through regulation of landowners such as plaintiff's members, leads to the conclusion that plaintiff and its members are not unfairly singled out. (23 C.A.4th 1480, 1481.) Plaintiff has failed to establish a significant likelihood that it will prevail on the merits after a full

trial, and indeed may be prevented from reaching the merits due to the possibility that it will be found to have agreed to imposition of the fee and to have failed to challenge it after it was imposed. The trial judge did not err in denying the request for a preliminary injunction. (23 C.A.4th 1484, 1485.)

In *San Remo Hotel v. San Francisco* (2002) 27 C.4th 643, 117 C.R.2d 269, 41 P.3d 87, the court considered whether the *Nollan/Dolan* (infra, §1157) heightened level of means/end scrutiny applied to its review of a conversion fee defendant city required plaintiffs to pay under its hotel conversion and demolition ordinance (HCO) as a condition of obtaining a conditional use permit. Under the HCO, an owner wishing to convert a residential hotel to a tourist hotel must help replace the lost rental units by supplying other units or by paying a statutory fee to a designated housing fund. *Held*, the housing replacement fee is not subject to heightened scrutiny, and is not unconstitutional on its face or as applied.

(a) There are different levels of takings scrutiny, with the strictest level applied to "requirements that property owners dedicate land as a condition of receiving a development permit" and the most lenient applied to what are essentially legislative determinations "that do not require any physical conveyance of property." (27 C.4th 667, 668, quoting *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 C.4th 952, 81 C.R.2d 93, 968 P.2d 993.) Here, unlike the recreational facilities fee in *Ehrlich v. Culver City* (1996) 12 C.4th 854, 881, 50 C.R.2d 242, 911 P.2d 429, infra, §1157, neither the imposition nor the size of the replacement fee is subject to defendant's discretion. If an applicant chooses to satisfy the replacement housing requirement through payment of a fee, its amount is determined according to a set formula. (27 C.4th 668.) Further, the HCO applies to every residential hotel in the city. (27 C.4th 669.)

(b) Under *Govt.C. 66001*, development mitigation fees "must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." (27 C.4th 675.) Thus, even without *Nollan/Dolan/Ehrlich* scrutiny, mitigation fees are subject to meaningful means/end review. (27 C.4th 671.)

(c) "In *Ehrlich*, we extended *Nollan* and *Dolan* slightly, recognizing an exception to the general rule of deference on distribution of monetary burdens because the ad hoc, discretionary fee imposed in that case bore special potential for government abuse. We continue to believe heightened scrutiny should be limited to such fees. ... Extending *Nollan* and *Dolan* generally to all government fees affecting property value or development would open to searching judicial scrutiny the wisdom of myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause." (27 C.4th 672.)

(d) "Plaintiffs fail to demonstrate from the face of the ordinance that fees assessed under the HCO bear no reasonable relationship to housing loss in the *generality* or *great majority* of cases, the minimum showing we have required for a facial challenge to the constitutionality of a statute." (27 C.4th 673.) Further, the mitigation fee is measured by the resulting loss of residential units and is thus reasonably related to the impact of the change in use. (27 C.4th 679.)

Two justices dissented in separate opinions. (27 C.4th 679, 691.)

SUPPLEMENT: [This section is current through the latest supplement]
See 46 *Santa Clara L. Rev.* 767 [*San Remo Hotel*].



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CHAPTER X - Constitutional Law

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XIII. EMINENT DOMAIN

D. Inverse Condemnation.

3. Regulatory Taking.

a. In General.

4. Taking Requiring Compensation.

aa. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1157

[§ 1157] In General.

In *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, plaintiffs owned a beachfront lot in Ventura County, with a small bungalow rented to summer vacationers. They sought a permit from defendant Coastal Commission to replace the bungalow with a three-bedroom house for their permanent residence. The Commission granted the permit subject to the condition that they allow the public an easement across their property for lateral access to the beach. They challenged the condition by administrative mandamus; the superior court directed that the condition be struck, but the Court of Appeal reversed on the authority of *Grupe v. California Coastal Com.* (1985) 166 C.A.3d 148, 212 C.R. 578, 12 Summary (10th), *Real Property*, §865. (*Nollan v. California Coastal Com.* (1986) 177 C.A.3d 719, 223 C.R. 28.) The California Supreme Court denied review, but the U.S. Supreme Court reversed the Court of Appeal decision.

(a) If the state had simply required plaintiffs to make an easement across their beachfront available to the public in order to increase public access to the beach, there would clearly have been a taking. (107 S.Ct. 3145, 97 L.Ed.2d 685.) Requiring the easement as a condition for issuing a land use permit has the same effect. (107 S.Ct. 3146, 3147, 97 L.Ed.2d 687.)

(b) If the permit condition served a legitimate police-power purpose, e.g., protecting the public's ability to see the beach by a height limitation, it would be valid. (107 S.Ct. 3147, 3148, 97 L.Ed.2d 688.) The Commission contends that the new house will interfere with "visual access" to the beach, but its argument is without substance; and every other court that has considered the question (except the California courts) has held that this kind of permit condition cannot be treated as a valid exercise of land use power. (107 S.Ct. 3149, 97 L.Ed.2d 691.)

(c) The Commission's final justification for the access requirement is that the condition is part of a comprehensive program to provide continuous public access along the beach. California is free to advance this kind of a program by using the power of eminent domain for this public purpose, "but if it wants an easement across the Nollans' property, it must pay for it." (107 S.Ct. 3150, 97 L.Ed.2d 692.)

Four justices dissented. (See *Blue Jeans Equities West v. San Francisco* (1992) 3 C.A.4th 164, 166, 171, 4 C.R.2d 114 [Nollan heightened scrutiny test applies to possessory rather than regulatory takings, and hence does not apply to Transit Impact Development Fee ordinance (supra, §627)]; 101 Harv. L. Rev. 240 [Nollan]; 102 Harv. L. Rev. 448; 39 Hastings L. J. 335, 359; 22 Loyola L.A. L. Rev. 957; 15 Pepperdine L. Rev. 345; 17 Southwestern U. L. Rev. 627; 20 Southwestern U. L. Rev. 1.)

In *Twain Harte Associates, Ltd. v. Tuolumne* (1990) 217 C.A.3d 71, 265 C.R. 737, the court made these observations:

(a) "Distilled from the many cases which have attempted to apply such a patently nebulous notion are three principles of law relevant to the issues before us: (1) A regulation has 'gone too far' when it is arbitrary or unreasonable; (2) A regulation has 'gone too far' when, as applied to a specific piece of property, it imposes upon the owner such unreasonable economic loss as to amount to a *de facto* appropriation of property; and (3) An 'as applied' inverse condemnation claim is 'ripe' for presentation to the courts when the landowner has obtained a final decision from the appropriate governmental agency regarding the application of the regulation to the specific property in issue." (217 C.A.3d 83.)

(b) " 'Bright line' precedent is not the prevailing jurisprudential norm in this area of the law. The United States Supreme Court, as it freely admits from time to time, has been unable to arrive at any articulable test to measure when a land use regulation goes so far in its economic consequences to a specific piece of property as to effect a taking. ... Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors--such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action--that have particular significance." (217 C.A.3d 83.)

In *Dolan v. Tigard* (1994) 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304, a property owner's commercial expansion was conditioned on the owner's dedication of a portion of land for a bicycle path and storm drainage improvement. *Held*, the conditions were an unconstitutional taking.

(a) *Nollan* abandoned the reasonable relationship test in favor of a stricter "essential nexus test," under which the Court must determine "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." If the requisite nexus exists, the Court "must then decide the required degree of connection between the exactions and the projected impact of the proposed development." The Court was not required to answer this question in *Nollan* because the connection there did not meet even the loosest standard. (114 S.Ct. 2317, 129 L.Ed.2d 317.)

(b) Here, the prevention of flooding and the reduction of traffic congestion qualify as legitimate government interests. (114 S.Ct. 2317, 2318, 129 L.Ed.2d 318.) A nexus exists between flood prevention and limiting development within a floodplain, and between providing a bicycle path and easing traffic congestion. (114 S.Ct. 2318, 129 L.Ed.2d 318.) But to satisfy the Fifth Amendment, there must be "rough proportionality" between the condition imposed on the landowner for obtaining a permit and the needs created by the development, i.e., "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (114 S.Ct. 2319, 2320, 129 L.Ed.2d 320.) That proportionality is lacking here. (114 S.Ct. 2320, 2321, 129 L.Ed.2d 322.)

Four justices dissented in two opinions. (114 S.Ct. 2322, 2330, 129 L.Ed.2d 323, 333.) (See 108 Harv. L. Rev. 290 [Dolan]; 27 Pacific L. J. 1657 [reexamination of *Nollan*, *Dolan*, and *Lucas* under conjunctive standard]; 36 Santa Clara L. Rev. 515 [Nollan and Dolan: end of municipal land use extortion].)

In *Ehrlich v. Culver City* (1996) 12 C.4th 854, 50 C.R.2d 242, 911 P.2d 429, the requirement that a developer who planned to replace a private tennis club with a condominium pay an art fee and a \$ 280,000 recreational mitigation fee met the *Dolan/Nollan* "essential nexus" test, but the evidence was insufficient to determine whether the amount of the

mitigation fee met the "rough proportionality" test. (12 C.4th 881, 885.) (See *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 C.A.4th 1459, 1474, 28 C.R.2d 734, supra, §1156 [discussing *Nollan*; requiring payment of mitigation fee as condition of permit was proper]; *San Mateo County Coastal Landowners' Assn. v. San Mateo* (1995) 38 C.A.4th 523, 547, 45 C.R.2d 117 [*Dolan* was not followed where determination to use certain amount of land for agricultural purposes was legislative, instead of judicial]; *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 C.4th 952, 967, 81 C.R.2d 93, 968 P.2d 993 [heightened *Nollan* and *Dolan* standard of review was inapplicable to action challenging rent control ordinance]; 24 *Pepperdine L. Rev.* 1139 [Ehrlich].)

SUPPLEMENT: [This section is current through the latest supplement]

In *Agins v. Tiburon* (1980) 447 U.S. 255, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112, text, §1058, the Court declared that government regulation of private property effects a taking if it "does not substantially advance legitimate state interests." This language has been repeated in many cases as a regulatory takings test. (See, for example, *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S.Ct. 2886, 2897, 120 L.Ed.2d 798, 817, text, §1158; *Cwynar v. San Francisco* (2001) 90 C.A.4th 637, 661, 109 C.R.2d 233, text, §1154.) However, in *Lingle v. Chevron U.S.A.* (2005) 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876, the Court explained that this test was derived from due process, not regulatory takings, precedents. (125 S.Ct. 2082, 161 L.Ed.2d 889.) It "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." (125 S.Ct. 2084, 161 L.Ed.2d 890.)

(a) The "substantially advances" test "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause." (125 S.Ct. 2084, 161 L.Ed.2d 890.) "Instead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity." But this inquiry is "distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." (125 S.Ct. 2084, 161 L.Ed.2d 891.)

(b) This holding, that the "substantially advances" formula is not a valid takings test, does not require the reversal of any prior United States Supreme Court holdings. (125 S.Ct. 2085, 2086, 161 L.Ed.2d 892.) Although many cases recited the formula, none found a compensable taking based on that inquiry. (125 S.Ct. 2086, 161 L.Ed.2d 893.) (See 119 *Harv. L. Rev.* 297 [Lingle]; 34 *Ecology L. Q.* 471 [Due Process Land Use Claims After Lingle]; 46 *Santa Clara L. Rev.* 767 [Lingle].)

See *Allegretti & Co. v. Imperial* (2006) 138 C.A.4th 1261, 1277, 42 C.R.3d 122 [placing yearly limit on groundwater extractions as condition of county's issuance of permit to drill new well on agricultural land did not effect regulatory taking; county did not physically invade or appropriate property or groundwater and landowner failed to demonstrate adverse economic impact or compensable interference with investment-backed expectations]; *Los Altos El Granada Investors v. Capitola* (2006) 139 C.A.4th 629, 651, 43 C.R.3d 434 [applying *Lingle v. Chevron U.S.A.*; reversal was required where trial court applied "substantially advances" due process test in determining takings claim]; *State Route 4 Bypass Authority v. Superior Court* (2007) 153 C.A.4th 1546, 1555, 1565, 64 C.R.3d 286 [applying test of *Dolan v. Tigard* (1994) 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304, text, p. 811, in absence of actual development application by owners of properties who were required to dedicate strip of agricultural land for highway bypass project; trial court erred in holding that requiring abutting property owners to dedicate strip of land for project was unconstitutional on equal protection grounds; state and federal laws do not require equality of burden among property owners benefiting from project]; *Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 C.A.4th 215, 230, 77 C.R.3d 432 [relying on *Ehrlich v. Culver City* (1996) 12 C.4th 854, 50 C.R.2d 242, 911 P.2d 429, text, p. 812; imposition of mitigation fee by Coastal Commission for loss of beach from planned construction of seawall did not constitute unconstitutional taking where there was nexus between projected impact of seawall and mitigation fee, and mitigation fee was roughly proportional to extent of beach and recreation that would be lost]; *Action Apartment*

Assn. v. Santa Monica (2008) 166 C.A.4th 456, 470, 82 C.R.3d 722 [two-prong *Nollan/Dolan* nexus and rough proportionality test applicable in "exaction" cases did not apply to facial challenge to land use regulation; test is applicable only in context of judicial review of individual adjudicative land use decisions, and *Lingle* did not abrogate this rule]; 10 A.L.R. Fed 2d 231 [what constitutes taking of property requiring compensation under Fifth Amendment--United States Supreme Court cases].



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XIII. EMINENT DOMAIN

D. Inverse Condemnation.

3. Regulatory Taking.

a. In General.

4. Taking Requiring Compensation.

bb. Lucas Decision.

8 Witkin Sum. Cal. Law Const Law § 1158

[§ 1158] Lucas Decision.

In *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, petitioner Lucas, in 1986, paid \$ 975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, the Legislature enacted the Beachfront Management Act, which had the direct effect of barring him from erecting any permanent habitable structures on his two parcels. He filed an action, contending that the Act effected a taking of his property without just compensation. The trial court agreed, but the state Supreme Court reversed on the ground that the Legislature had found that new construction threatened the public resource (beaches). The U.S. Supreme Court reversed.

(a) Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (see supra, §§980, 981), it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession. Justice Holmes recognized that if the uses of private property were subject to unbridled, uncompensated qualification under the police power, the qualification might be extended more and more until private property disappeared. These considerations gave birth in that case to the maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (112 S.Ct. 2892, 120 L.Ed.2d 812.)

(b) "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far. ... We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how weighty the public purpose behind it, we have required compensation." (112 S.Ct. 2893, 120 L.Ed.2d 812.)

(c) "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." (112 S.Ct. 2893, 120 L.Ed.2d 893, citing *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, supra, §1058, *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 107 S.Ct.

3141, 97 L.Ed.2d 677, supra, §1157, and other cases.) "Surely, at least, in the extraordinary circumstances when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life, ... in a manner that secures an average reciprocity of advantage' to everyone concerned. ... And the *functional* basis for permitting the government, by regulation, to affect property values without compensation--that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' ...--does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." (112 S.Ct. 2894, 120 L.Ed.2d 814.) In short, "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." (112 S.Ct. 2895, 120 L.Ed.2d 815.)

(d) Many prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without compensation. This "harmful or noxious use" analysis was simply the progenitor of contemporary statements that land-use regulation does not effect a taking if it substantially advances legitimate state interests. (112 S.Ct. 2897, 120 L.Ed.2d 817.) When this is understood, it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" which require compensation from regulatory deprivations that do not. (112 S.Ct. 2899, 120 L.Ed.2d 819.)

(e) "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which had traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers. ... And in cases of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). ... In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." (112 S.Ct. 2899, 120 L.Ed.2d 820.)

(f) "On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." (112 S.Ct. 2900, 120 L.Ed.2d 821.)

(g) "The 'total taking' inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities ... , the social value of the claimant's activities and their suitability to the locality in question ... , and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike. ... The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer). ... So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." (112 S.Ct. 2901, 120 L.Ed.2d 822.)

(h) On remand, the question to be decided is one of state law. "We emphasize that to win its case South Carolina must do more than proffer the Legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. ... Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing." (112 S.Ct. 2901, 120 L.Ed.2d 822.)

One justice filed a separate opinion, concurring in the judgment. (112 S.Ct. 2902, 120 L.Ed. 823.) Two justices filed separate dissenting opinions. (112 S.Ct. 2904, 2917, 120 L.Ed.2d 825, 842.) One justice filed a statement favoring dismissal of the writ of certiorari as having been granted improvidently. (112 S.Ct. 2925, 120 L.Ed.2d 851.) (See 106 *Harv. L. Rev.* 269 [*Lucas*]; 29 *Cal. Western L. Rev.* 209; 45 *Hastings L. J.* 1539; 25 *Loyola L.A. L. Rev.* 1221; 26 *Loyola L.A. L. Rev.* 943, 955; 22 *Ecology L. Q.* 413 [analysis of takings law in post-*Lucas* era]; 23 *Ecology L. Q.* 509 [analysis of proposed takings legislation]; 23 *Ecology L. Q.* 577 [ethical approaches to takings and compensation analysis]; 70 *So. Cal. L. Rev.* 1 [*Lucas*]; 23 *Southwestern U. L. Rev.* 177 [same]; 31 *Southwestern U. L. Rev.* 169 [when does regulation go too far]; 45 *Stanf. L. Rev.* 1369 [Symposium]; 27 *U.C. Davis L. Rev.* 186 [*Lucas* and endangered species protection]; 50 *U.C.L.A. L. Rev.* 641 [*Lucas*].)

SUPPLEMENT: [This section is current through the latest supplement]

The categorical takings rule of *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, text, p. 812, was applied in *Monks v. Rancho Palos Verdes* (2008) 167 C.A.4th 263, 84 C.R.3d 75, where defendant city's moratorium on building in an area prone to landslides was held to constitute a permanent taking. (167 C.A.4th 303.) The trial court had held that the moratorium was not a permanent taking because it was conditional and temporary, and that plaintiffs could build if they could convince defendant that the zone had a gross safety factor of 1.5 or greater. But this would have required plaintiffs to go through defendant's administrative process, which the Court of Appeal had previously excused on the grounds of futility in a prior appeal. Defendant had already decided that the zone had a gross safety factor of less than 1.5. (167 C.A.4th 303, 304.) Further, the moratorium was not justified under state nuisance law. (167 C.A.4th 305.) The stability of the area was, at best, uncertain, and defendant failed to show that the construction of homes on plaintiffs' lots would pose a significant risk of harm to persons or property. (167 C.A.4th 306.)

See 35 *Ecology L. Q.* 1 [Background Principles and the Rule of Law: Fifteen Years After *Lucas*].



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3. Regulatory Taking.

a. In General.

5. Texts and Law Reviews.

8 Witkin Sum. Cal. Law Const Law § 1159

[§ 1159] Texts and Law Reviews.

Commentary on regulatory takings is extensive.

(1) *Texts and Practice Works.* See 2 Tribe, §15.12; C.E.B., 2 Condemnation Practice 2d, §15.1 et seq.; 30 Proof of Facts 3d 503 [proof under 42 U.S.C., §1983 of wrongful land use regulation]; 31 Proof of Facts 3d 563 [proof of inverse condemnation from excessive land use regulation]; 51 Proof of Facts 3d 489 [Recovery of Damages for Temporary Conditions Ensuing From Construction or Repair of Public Improvement]; 58 Proof of Facts 3d 81 [Denial of Wetland Permit as Basis for Landowner's Regulatory Taking Claim].

(2) *Law Reviews.* See 108 Harv. L. Rev. 519 [note on Utah statutes requiring governmental entities to conduct takings impact analysis when proposing regulations]; 109 Harv. L. Rev. 1252 [Colonial Land Use Law and Its Significance for Modern Takings Doctrine]; 115 Harv. L. Rev. 2158 [balancing public good and private rights]; 72 Cal. L. Rev. 569 [economic analysis of regulatory taking]; 77 Cal. L. Rev. 1299 [The Takings Clause]; 78 Cal. L. Rev. 55 [same]; 92 Cal. L. Rev. 609 [constitutional exactions and regulatory formulas]; 29 Cal. Western L. Rev. 209; 22 Ecology L. Q. 89 [arguing that regulatory takings doctrine should be abolished]; 23 Ecology L. Q. 509 [analysis of proposed takings legislation]; 23 Ecology L. Q. 577 [ethical approaches to takings and compensation analysis]; 31 Ecology L. Q. 227 [unjustified preference for land ownership in regulatory takings law]; 55 Hastings L. J. 477 [takings jurisprudence as tool for resolving water disputes in American West]; 30 McGeorge L. Rev. 201 [role of transferable development rights in constitutional takings analysis]; 64 So. Cal. L. Rev. 1393 [The Hidden Structure of Takings Law]; 68 So. Cal. L. Rev. 885 [property rights and takings in context of environmental surveillance]; 21 Southwestern U. L. Rev. 1019; 31 Southwestern U. L. Rev. 19 [selected Supreme Court regulatory takings cases]; 49 Stanf. L. Rev. 305 [Endangered Species Act: study in takings and incentives]; 35 U.C. Davis L. Rev. 103 [effect of Supreme Court's takings jurisprudence on local land use decisions]; 43 U.C.L.A. L. Rev. 77 [Takings Clause and regulation of environmentally sensitive lands]; 36 U.S.F. L. Rev. 793 ["temporal severance" and exclusion of time in determining value of regulated property].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Law Reviews.* See 34 Ecology L. Q. 307 [takings law today]; 58 Hastings L. J. 729 [institutional context of

exactions]; 35 *Hastings Const. L. Q.* 897 [history of regulatory takings jurisprudence and relationship between state and federal courts]; 45 *San Diego L. Rev.* 633, 729, 761 [Symposium on Fifth Amendment and regulatory takings]; 27 *Thomas Jefferson L. Rev.* 187 [Will Regulations Keep Tahoe Blue? Searching for Stewardship in Property Law and Regulatory Takings Analysis].



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3. Regulatory Taking.

b. Temporary Taking.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1160

[§ 1160] In General.

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles* (1987) 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250, plaintiff owned Lutherglen, a retreat center in a forest in Los Angeles County. A forest fire created a flood hazard, and in February 1978, a flood destroyed the facility. In January 1979, defendant county adopted an ordinance prohibiting construction of any building in a flood protection area, including the place where Lutherglen had stood. Plaintiff filed a complaint for damages alleging that the ordinance denied all use of Lutherglen. The superior court, relying on *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, supra, §1058, struck the allegation, the Court of Appeal affirmed, and the Supreme Court denied review. The Court of Appeal held that a landowner who claims that property has been "taken" by a regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking." *Held*, reversed. The Just Compensation Clause requires the government to pay for "temporary" regulatory takings.

(a) "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." (107 S.Ct. 2386, 96 L.Ed.2d 265.) And the rule has been established since *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, that if a regulation goes too far, it will be recognized as a taking. (107 S.Ct. 2386, 96 L.Ed.2d 265.) The California Supreme Court in *Agins* "truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation." (107 S.Ct. 2387, 96 L.Ed.2d 265.)

(b) A governmental body may acquiesce in a judicial declaration that an ordinance has effected an unconstitutional taking; i.e., the landowner cannot insist that a "temporary" taking be deemed a permanent taking. But the issue here is whether abandonment by the Government requires payment of compensation for the period during which regulations deny an owner all use of his land. (107 S.Ct. 2387, 96 L.Ed.2d 265.)

(c) *Kimball Laundry Co. v. United States* (1949) 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765, supra, §1130, and other cases show that these kinds of temporary takings are not different in kind from permanent takings. (107 S.Ct. 2387, 2388, 96 L.Ed.2d 266.) Here, the ordinance became effective in January 1979, and the merits of plaintiff's claim had yet

to be determined when the California Supreme Court denied review in October 1985. Invalidation of the ordinance "after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." (107 S.Ct. 2388, 96 L.Ed.2d 267.)

(d) "Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function. ... Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. ... We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (107 S.Ct. 2389, 96 L.Ed.2d 267, 268.)

(e) This holding is limited to the facts presented, treating as true the allegation that the ordinance denied plaintiff all use of its property. Questions arising from normal delays in obtaining building permits, changes in zoning ordinances, variances, etc., "are not before us." (107 S.Ct. 2389, 96 L.Ed.2d 268.)

Three justices dissented. (See 101 Harv. L. Rev. 240, 359 [*First English*]; 102 Harv. L. Rev. 448; 24 Cal. Western L. Rev. 33; 26 Ecology L. J. 1 [federal courts' misguided attempts to avoid preclusion]; 39 Hastings L. J. 335 [*First English*]; 22 Loyola L.A. L. Rev. 957; 19 Pacific L. J. 931; 17 Southwestern U. L. Rev. 627; 20 Southwestern U. L. Rev. 1; 35 U.C.L.A. L. Rev. 1267; 7 A.L.R.2d 1297 [compensation for temporary use or occupancy]; C.E.B., 2 Condemnation Practice 2d, §15.12.)

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles* (1989) 210 C.A.3d 1353, 258 C.R. 893, the Court of Appeal, on remand from the U.S. Supreme Court, held that the complaint did not state a cause of action for a regulatory taking. (210 C.A.3d 1372.)

(a) *Mugler v. Kansas* (1887) 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205, supra, §1060, and later cases have established that prohibitions on the use of property, when imposed for the protection of the public health and safety, are proper exercises of the police power. (210 C.A.3d 1362, 1363.)

(b) *Agins* indicates that a land use regulation constitutes a taking if it fails to substantially advance a legitimate state interest or if it deprives the property owner of all uses of his land. *First English*, however, states that a regulation denying all uses is not a taking if it promotes public safety. (210 C.A.3d 1364, 1366.) The ordinance here survives under either test. (210 C.A.3d 1367.)

(c) The public interest is strong. "If there is a hierarchy of interests the police power serves--and both logic and prior cases suggest there is--then the preservation of life must rank at the top of the scale. ... The zoning regulation challenged in the instant case involves this highest of public interests--the prevention of death and injury. Its enactment was prompted by the loss of life in an earlier flood. And its avowed purpose is to prevent the loss of lives in future floods. Moreover, the lives it seeks to save and the injuries it strives to prevent are not only those on other properties but on appellant's property as well." (210 C.A.3d 1370.)

(d) Both the interim and the permanent ordinances prohibited construction of buildings in the flood protection area, encompassing some but not all of the Lutherglen site, but otherwise allowed the site to be used for its normal purpose, i.e., camping. Hence, the county has not prohibited all uses. (210 C.A.3d 1367, 1368, 1369.) "What *First English* can no longer do is rebuild the bunkhouses and similar permanent living structures which might house the potential victims of a future flood or if carried away by that flood cause death, injury and property damage to other properties further downstream." (210 C.A.3d 1371.)

(e) The ordinance is also justified as an interim moratorium pending a safety study on possible uses of the property. This kind of an interim measure, unless unreasonable in purpose, duration, or scope, does not constitute an unconstitutional temporary taking. (210 C.A.3d 1373; see infra, §1162.)

In *Ali v. Los Angeles* (1999) 77 C.A.4th 246, 252, 255, 91 C.R.2d 458, the court distinguished *Landgate v. California Coastal Com.* (1998) 17 C.4th 1006, 1018, 1031, 73 C.R.2d 841, 953 P.2d 1188, *infra*, §1161. Here, the delay in demolition of a fire-damaged low-income hotel was caused by the erroneous enforcement of an ordinance protecting low-income housing in violation of the Ellis Act. Because the delay temporarily deprived the owner of all use of the property and was not a delay in the development process, there was a temporary regulatory taking requiring compensation under *First English*.

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 818, third full paragraph, line 2, 26 Ecology L. J. 1 should be 26 Ecology L. Q. 1.



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b. Temporary Taking.

2. Delay in Development Process.

8 Witkin Sum. Cal. Law Const Law § 1161

[§ 1161] Delay in Development Process.

In *Guinnane v. San Francisco* (1987) 197 C.A.3d 862, 241 C.R. 787, plaintiffs, real estate developers, brought an inverse condemnation action on the theory that the city's conduct in delaying action on a building permit application was so unreasonable as to amount to a taking. *Held*, summary judgment for defendant affirmed. Under *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, *supra*, §1058, and *First English Evangelical Lutheran Church of Glendale v. Los Angeles* (1987) 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250, *supra*, §1160, the temporary suspension of land use that occurs during the normal governmental decisionmaking process does not constitute a taking. (197 C.A.3d 870.)

In *Littoral Dev. Co. v. San Francisco Bay Conservation & Dev. Com.* (1995) 33 C.A.4th 211, 221, 39 C.R.2d 266, the court held that defendant conservation commission's unsuccessful assertion of jurisdiction over a portion of plaintiff's property was facially valid and supported by a plausible, though erroneous, argument. Therefore, it did not constitute a taking, even though it resulted in delay.

Landgate v. California Coastal Com. (1998) 17 C.4th 1006, 1018, 1031, 73 C.R.2d 841, 953 P.2d 1188, adopting the view of *Littoral Dev. Co.*, held that a regulatory mistake resulting in delay is not, by itself, a taking of property. Plaintiff failed to prove that a 2-year development delay was due to anything other than a bona fide dispute over the legality of plaintiff's lot and the Coastal Commission's jurisdictional authority over a lot line adjustment. "Of course ... a governmental agency may not evade the takings clause by fabricating a dispute over the legality of a lot, or by otherwise arbitrarily imposing conditions on development in order to delay or discourage that development. The government's assertion of authority, whether or not erroneous, must advance some legitimate governmental purpose." (17 C.4th 1029.)

Many decisions have followed *Landgate*. (See *Buckley v. California Coastal Com.* (1998) 68 C.A.4th 178, 201, 80 C.R.2d 562 [commission's mistaken assertion of jurisdiction over portion of lot did not constitute either permanent or temporary taking]; *Breneric Associates v. Del Mar* (1998) 69 C.A.4th 166, 176, 81 C.R.2d 324 [agency's denial of discretionary land use permit will be upheld as long as denial "substantially advances legitimate governmental interests and is supported by substantial evidence"]; *Calprop Corp. v. San Diego* (2000) 77 C.A.4th 582, 596, 91 C.R.2d 792

["[l]iability for delay in processing a development proposal may only be imposed 'when it goes beyond that to be expected as part of the normal permit process,' " quoting *Hensler v. Glendale* (1994) 8 C.4th 1, 32 C.R.2d 244, 876 P.2d 1043, *infra*, §1166]; *Loewenstein v. Lafayette* (2002) 103 C.A.4th 718, 729, 127 C.R.2d 79 [delay of little over 2 years to resolve issue concerning availability of lot line adjustment exception to Subdivision Map Act was not unreasonable in absence of evidence that city intentionally delayed development project]; 28 *Pepperdine L. Rev.* 415 [The Abnormalcy of Normal Delay].)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Temporary Taking.

3. Building Moratorium.

8 Witkin Sum. Cal. Law Const Law § 1162

[§ 1162] Building Moratorium.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (2002) 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517, held that a 32-month moratorium on development while a regional plan was being formulated did not constitute a *per se* taking of property requiring compensation under the federal Takings Clause.

(a) The distinction between acquisition of property for public use and regulations prohibiting private uses "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa. ... Land-use regulations are ubiquitous and most of them impact property values in some tangential way--often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford." (*122 S.Ct. 1479, 152 L.Ed.2d 541.*)

(b) *Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798*, supra, §1158, stated a categorical rule that compensation is required when a regulation prevents *all* economically beneficial use of the land. Thus, the starting point in a regulatory takings case should be to ask whether there has been a total taking of the property. If not, the court must apply *Penn Cen. Trans. Co. v. New York (1978) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631. (122 S.Ct. 1483, 152 L.Ed.2d 545.)* *Penn Cen.* requires an analysis of (1) the economic effect of a regulation on the landowner, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the government action. (*122 S.Ct. 1475, 152 L.Ed.2d 536*, footnote 10, citing *Palazzolo v. Rhode Island (2001) 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592*, infra, §1165.)

(c) Because the temporary prohibition on development here constituted a permanent deprivation, the more fact-specific inquiry of *Penn Cen.* is in order. (*122 S.Ct. 1484, 152 L.Ed.2d 547.*) "In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other." (*122 S.Ct. 1486, 152 L.Ed.2d 549.*)

Three justices dissented in two opinions. (*122 S.Ct 1490, 1496, 152 L.Ed.2d 553, 561.*) (See *116 Harv. L. Rev. 321 [Tahoe-Sierra]; 30 Pepperdine L. Rev 273 [same]; 40 San Diego L. Rev. 1597 [using Penn Central analysis to solve Tahoe-Sierra controversy]; 50 U.C.L.A. L. Rev. 641 [criticizing use of investment-backed expectations].*)

SUPPLEMENT: [This section is current through the latest supplement]

See 34 *Ecology L. Q.* 381 [critique of *Tahoe-Sierra's* distinction between physical and regulatory takings]; 34 *Southwestern U. L. Rev.* 351 [*Palazzolo* and *Tahoe-Sierra*].



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b. Temporary Taking.

4. Taking During Pendency of Proceedings.

8 Witkin Sum. Cal. Law Const Law § 1163

[§ 1163] Taking During Pendency of Proceedings.

In *Needles v. Griswold* (1992) 6 C.A.4th 1881, 8 C.R.2d 753, defendants were licensees of a city-owned golf course. Plaintiff City, dissatisfied with defendants' operation of the course, terminated the lease and, after obtaining a temporary restraining order, took possession of the course and of defendants' personal property used in operating the course. In a separate proceeding, defendants' motion to compel arbitration was granted. However, the court also granted a preliminary injunction that prohibited defendants from interfering with the city's exclusive control over personal property "necessary" to operate the course, and deferred the question of compensation to the arbitrator. *Held*, the injunction constituted a taking without just compensation.

(a) A temporary taking that denies the owner all use of his or her property is a taking requiring compensation. (6 C.A.4th 1888, citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles, Calif.* (1987) 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250, *supra*, §1160.) This rule applies to a taking of property during the pendency of proceedings, and applies regardless of whether the action is one for condemnation or some other proceeding. (6 C.A.4th 1888, 1889, citing *Steinhart v. Superior Court* (1902) 137 C. 575, 70 P. 629.)

(b) The federal Constitution does not specify when compensation is to be paid, but Cal. Const., Art. I, §19, requires that compensation be paid or deposited into court *before* the taking. (6 C.A.4th 1892.) There is no exception for temporary takings; and California courts have long held that compensation must be paid in advance, even when possession rather than title is taken. (6 C.A.4th 1892, 1893.)

(c) This requirement was expressly stated in the revised Constitution of 1879. (6 C.A.4th 1893.) When the Constitution was revised in 1918, prejudgment possession was authorized, but in this case the condemnor must deposit a sum determined by the court to be reasonably adequate to compensate the property owner. Here, the city made no deposit, so this exception to the general rule does not apply. (6 C.A.4th 1894.)

(d) A condemnation action is the only legal procedure provided in California for the taking of private property for public use; this taking may not be accomplished by means of an injunction. Hence, even if a deposit had been made, the injunction here would still be improper. (6 C.A.4th 1894, 1895.) (See 51 Proof of Facts 3d 489 [Recovery of Damages

for Temporary Conditions Ensuing From Construction or Repair of Public Improvement]; on statutory action prior to taking or damage, see *infra*, §1169.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Inverse Condemnation.

4. Procedure.

a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1164

[§ 1164] In General.

(1) *Similar to Condemnation Proceeding.* Although the Eminent Domain Law (*infra*, §1170 et seq.) does not cover inverse condemnation, the general procedural rules governing eminent domain proceedings will be applied when appropriate to an inverse condemnation action. (See *Highland Realty Co. v. San Rafael* (1956) 46 C.2d 669, 683, 298 P.2d 15 [right to jury trial to ascertain compensation]; *Aetna Life & Cas. Co. v. Los Angeles* (1985) 170 C.A.3d 865, 877, 216 C.R. 831 [rules of evidence]; C.E.B., 2 Condemnation Practice 2d, Chap. 13; 17 California Lawyer 58 (November 1997) [Overcoming Takings Claims Hurdles].) (On venue, see 3 *Cal. Proc.* (4th), *Actions*, §726; on pleading, see 5 *Cal. Proc.* (4th), *Pleading*, §648 et seq.)

In *Marshall v. Department of Water & Power* (1990) 219 C.A.3d 1124, 268 C.R. 559, the issue was whether a jury trial is required when liability (i.e., inverse taking) is completely a factual question. The court, following the settled case law, held that the only issue calling for a jury is compensation, and that the liability issue is for the judge to determine. (219 C.A.3d 1139, 1140, 1141.) The jury, in reaching its verdict, may consider the credibility of the plaintiff as a witness and disregard evidence that it does not believe. (219 C.A.3d 1147.) Where the award is delayed, the judge may award prejudgment interest on the amount. (219 C.A.3d 1149.) But prejudgment interest on an attorneys' fee award is improper. "The constitutional mandate to make whole a property owner does not translate into a basis for enriching an attorney fee award." (219 C.A.3d 1149.)

(2) *No Claim Filing Requirement.* Originally, a claim had to be filed with the State Board of Control within 1 year after the cause of action accrued. (See *Pierpont Inn v. California* (1969) 70 C.2d 282, 294, 74 C.R. 521, 449 P.2d 737; *Mosesian v. Fresno* (1972) 28 C.A.3d 493, 495, 104 C.R. 655.) In 1976, the requirement was abolished for inverse condemnation actions. (See *Govt.C.* 905.1.)

(3) *Entity's Cross-Complaint Against Third Party for Equitable Indemnity.* In *San Mateo v. Berney* (1988) 199 C.A.3d 1489, 245 C.R. 738, homeowners sued defendant county, alleging that street widening destroyed the lateral support of their property. Defendant cross-complained for equitable indemnity against the real estate developer and others, alleging that the cross-defendants were responsible for negligently planning, developing, supervising, and placing fill on the property. *Held*, judgment on the pleadings for the developer reversed.

"Although we have found no case which expressly so holds, we see no logical reason which would serve to prevent a public entity subjected to liability for inverse condemnation from seeking indemnification from third parties whose negligent or fraudulent acts were causative factors in the damaging or taking of private property. ... While it is true that a public entity is liable in inverse condemnation for 'any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed' ... , where, as is here alleged, a third party's fraudulent concealment caused or contributed to the injury, the third party should indemnify the public entity to the extent such conduct has contributed to a damage award against the public entity." (199 C.A.3d 1494.)

(4) *Administrative Mandamus Is Precondition*. Prior to seeking inverse condemnation damages based on an administrative agency's regulatory taking, the landowner must challenge the agency's action through the mandamus procedure (see 8 Cal. Proc. (4th), *Extraordinary Writs*, §262 et seq.). (*Rosco Holdings v. California* (1989) 212 C.A.3d 642, 657, 260 C.R. 736 [landowner failed to employ administrative mandamus to challenge conditions imposed by California Coastal Commission on use of its land]; *Mola Dev. Corp. v. Seal Beach* (1997) 57 C.A.4th 405, 410, 67 C.R.2d 103 [by dismissing mandamus action and electing to proceed exclusively for damages, plaintiff denied defendant city opportunity to respond to adverse judicial ruling by remedying wrong or mitigating damages and, essentially, sought to force city to exercise power of eminent domain].)

(5) *Distinction: Trial and Hearing on Mandamus Petition*. Takings issues raised by an inverse condemnation action alleging a regulatory taking arising from the Coastal Commission's denial of a development permit must be determined in a court trial. If the administrative mandamus petition is heard first, the doctrine of collateral estoppel may bar relitigation of some of the facts in the subsequent takings trial. If the hearing on the mandamus petition and the trial on the takings issues are held at the same time, the process might be more efficient for both the court and the parties and the res judicata problems would be avoided. (*Healing v. California Coastal Com.* (1994) 22 C.A.4th 1158, 1176, 1178, 27 C.R.2d 758 [citing *Rosco Holdings*, *supra*, as not inconsistent].) (See 22 *Pepperdine L. Rev.* 99 [discussing *Healing*, and distinctions between administrative mandamus and inverse condemnation actions].)

(6) *Proper Defendant*. A public entity is a proper defendant in an action for inverse condemnation "if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury." This is because "in the exercise of its governmental power the entity either failed to appreciate the probability that the project would result in some damage to private property, or that it took the calculated risk that damage would result." (*Arreola v. Monterey* (2002) 99 C.A.4th 722, 742, 762, 122 C.R.2d 38, *supra*, §1134.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Similar to Condemnation Proceeding*. See *Dina v. People* (2007) 151 C.A.4th 1029, 1043, 60 C.R.3d 559 [in inverse condemnation action, trial court did not err in allowing defendant to use motion procedure of C.C.P. 1260.040 (text, §1221) for ruling on liability, which was legal issue affecting determination of compensation].

(2) *No Claim Filing Requirement*. The State Board of Control has been renamed the California Victim Compensation and Government Claims Board. (4) *Administrative Mandamus Is Precondition*.

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §263 et seq.



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b. Standing and Ripeness.

8 *Witkin Sum. Cal. Law Const Law* § 1165

[§ 1165] Standing and Ripeness.

(1) *Insurer's Standing To Join as Co-Plaintiff.* In *McMahan's of Santa Monica v. Santa Monica* (1983) 146 C.A.3d 683, 194 C.R. 582, the court held that an insurer who is subrogated to the rights of a property owner may either maintain an independent action in inverse condemnation to recover for payments made to its insured, or may join in an action by the insured. (146 C.A.3d 690, 691.) To require the insurer to proceed only after the conclusion of the insured's action would require an unnecessary second action. (146 C.A.3d 691.) (See *Aetna Life & Cas. Co. v. Los Angeles* (1985) 170 C.A.3d 865, 875, 216 C.R. 831 [insured's inverse condemnation right may be assigned to insurer].)

(2) *Case Not Ripe for Adjudication.* In *MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285, plaintiff's proposed residential subdivision plan was rejected by defendant county's Planning Commission and Board of Supervisors on a number of grounds. Plaintiff brought this action for damages for a taking, alleging that defendants were restricting the property to open-space agricultural use by denying applications for other uses, and thereby were appropriating the "entire economic use" of the property. A demurrer was sustained, and the California Court of Appeal affirmed. *Held*, the merits of this issue could not be considered.

(a) "It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." (106 S.Ct. 2566, 91 L.Ed.2d 294.) *Agins v. Tiburon* (1979) 24 C.3d 266, 157 C.R. 372, 598 P.2d 25, *supra*, §1058, *San Diego Gas & Elec. Co. v. San Diego* (1981) 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551, *supra*, §1059, and *Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." (106 S.Ct. 2567, 91 L.Ed.2d 295.)

(b) Plaintiff has submitted one subdivision proposal and has received the board's response, but it has yet to receive the board's final definitive position on how it will apply the regulations to the particular land. And "the holdings of both courts below leave open the possibility that some development will be permitted, and thus again leave us in doubt regarding the antecedent question whether appellant's property has been taken." (106 S.Ct. 2568, 91 L.Ed.2d 296.)

Four justices dissented, asserting that the factual allegations of the complaint did state a takings claim. (See *Twain Harte Associates, Ltd. v. Tuolumne* (1990) 217 C.A.3d 71, 265 C.R. 737, supra, §1157; 27 *Hastings Const. L. Q.* 1 [Williamson].)

In *Long Beach Equities v. Ventura* (1991) 231 C.A.3d 1016, 282 C.R. 877, plaintiff LBE was seeking to build 249 single-family residences on a 250-acre parcel of land. This action was brought seeking damages for inverse condemnation on the theory that the land use regulations of defendant county and defendant city, on their face and as applied, would so greatly delay its development plans as to render them economically infeasible. "LBE states that City and County's actions in rescinding the area plan, forbidding all development in the urban reserve overlay, downzoning the property, imposing a de facto or actual moratorium (on development) and imposing a growth-control plan to preclude large scale residential development has resulted in a de facto taking." The complaint alleged that "these actions deprived the subject property of substantially all its value, renders it unmarketable and forbids substantially all reasonable economic beneficial use of the property, thereby thwarting its reasonable investment-backed expectations." (231 C.A.3d 1028.) Held, judgment for defendants on demurrer affirmed; the suit was not ripe for adjudication.

(a) An action for inverse condemnation will not lie unless the plaintiff shows that the regulation has gone so far that it has accomplished a taking. Hence, the developer "must establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, and that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied." (231 C.A.3d 1032.)

(b) "In the instant case, LBE has not submitted an application for annexation to City even though the Guidelines, since 1969, have urged developers who propose projects like this one to do so. LBE did not follow through on its application for a specific plan, nor has LBE alleged that it applied for a zoning change, or sought other favored uses such as senior and affordable housing." (231 C.A.3d 1034.)

(c) "LBE has sued City and County because of disappointed expectations concerning its development plans. LBE states no cause of action even if it has expended substantial sums of infrastructure and preapproval planning, and even though there will be some delay in bringing some development proposal to fruition. These expenditures and delays are the normal incidents of development projects and are not actionable, per se." (231 C.A.3d 1042.) (See *Ramona Convent of the Holy Names v. Alhambra* (1993) 21 C.A.4th 10, 19, 26 C.R.2d 140, supra, §1059 [case was ripe for adjudication]; *Toigo v. Ross* (1998) 70 C.A.4th 309, 324, 82 C.R.2d 649 [taking claim was not ripe for adjudication where town had not taken final, definitive position on how it would ultimately apply its land use policies to hypothetical well-designed proposal]; *Calprop Corp. v. San Diego* (2000) 77 C.A.4th 582, 598, 91 C.R.2d 792 [following *Toigo v. Ross*; fact that city rejected conditional use permit to operate private landfill did not establish that city would prevent plaintiff from developing its land in economically valuable manner]; *Shea Homes Ltd. Partnership v. Alameda* (2003) 110 C.A.4th 1246, 1268, 2 C.R.3d 739 [for claim to be ripe, plaintiff must have applied for, and been denied, development rights; county must have had opportunity to exercise its discretion in considering plans for property before plaintiff can challenge zoning restrictions on property].)

(3) *Futility Exception*. "The futility exception to the ripeness doctrine relieves a developer from submitting 'multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.' ... When the regulatory authority has 'drawn the line, clearly and emphatically,' as to the permissible use of the property, the developer is not required to submit additional development applications." (*Milagra Ridge Partners, Ltd. v. Pacifica* (1998) 62 C.A.4th 108, 120, 72 C.R.2d 394 [quoting federal cases; exception was not applicable where general plan did not preclude all development of property and developer was free to propose conforming development; city had demonstrated support for development by approving prior project and general plan amendment that was later rejected by voters]; see *Toigo v. Ross*, supra, 70 C.A.4th 327 [following *Milagra Ridge*]; *Calprop Corp. v. San Diego*, supra, 77 C.A.4th 599 [land use regulators must have been presented with specific development proposal from which final decision as to permissible level of development can be formally adopted or at least inferred under particular circumstances; following *Toigo v. Ross*].)

(4) *Acquisition of Property After Regulation Is Adopted*. A landowner is not precluded from challenging the constitutionality of a regulation merely because he or she acquired the property after the regulation was enacted. It would be unfair "to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner." (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 121 S.Ct. 2448, 2458, 2463, 150 L.Ed.2d 592, 607, 614 [takings claim was ripe given unequivocal nature of wetland regulations and coastal management council's prior denials of plaintiff's applications to fill wetlands].) (See 115 Harv. L. Rev. 447 [*Palazzolo*]; 29 Ecology L. Q. 137 [same]; 43 Santa Clara L. Rev. 337 [same]; 50 U.C.L.A. L. Rev. 1259 [same; regulatory takings notice debate].)

SUPPLEMENT: [This section is current through the latest supplement]

(1a) (*New*) *Standing of Holder of Deed of Trust*. The beneficiary of a deed of trust has a sufficient ownership interest in the property to be entitled to recover compensation in inverse condemnation. Normally the compensable interest of the trust deed holder "derives from the owner/mortgagor's recovery," but "an agreement between parties to the trust deed creating the security interest can permit the trust deed holder to recover an inverse condemnation award directly." (*D & M Financial Corp. v. Long Beach* (2006) 136 C.A.4th 165, 176, 38 C.R.3d 562 [trust deed required that miscellaneous proceeds, which included condemnation award, be applied to reduce secured debt].)

(2) *Case Not Ripe for Adjudication*. See *Charles A. Pratt Const. Co. v. California Coastal Com.* (2008) 162 C.A.4th 1068, 1080, 76 C.R.3d 466 [regulatory takings claim was not ripe for adjudication where plaintiff only presented one plan and defendant commission only made one decision, which did not settle question of what development would be allowed or indicate that it would be futile to submit other plans]. (3) *Futility Exception*. See *Alameda v. Superior Court* (2005) 133 C.A.4th 558, 569, 34 C.R.3d 895 [following *Milagra Ridge Partners, Ltd. v. Pacifica* (1998) 62 C.A.4th 108, 72 C.R.2d 394, text, p. 827; exception was not applicable where landowner had not submitted development proposal and county had not had opportunity to explain reach of challenged regulation, which did not restrict all uses of property].

(4) *Acquisition of Property After Regulation Is Adopted*. See 34 Southwestern U. L. Rev. 351 [*Palazzolo*]. (5) (*New*) *Case Ripe for Adjudication*. In *Dunn v. Santa Barbara* (2006) 135 C.A.4th 1281, 38 C.R.3d 316, the court held that a takings claim arising out of a request to subdivide a parcel into two buildable lots was ripe for adjudication even though plaintiff had not sought permission to build a home. The county had made it clear that wetland and other environmental regulations effectively limited development of the property to one home, and the county had repeatedly indicated that it would allow one home to be constructed. (135 C.A.4th 1299.)



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c. Statute of Limitations.

8 Witkin Sum. Cal. Law Const Law § 1166

[§ 1166] Statute of Limitations.

The action must be filed within 3 years if the plaintiff's property is damaged (*C.C.P.* 338(j)), or within 5 years if it is taken (*Garden Water Corp. v. Fambrough* (1966) 245 C.A.2d 324, 327, 53 C.R. 862 [5-year statute applies to taking of water system]). (See 26 A.L.R.4th 68 [action for compensation for direct appropriation of land without institution of formal proceedings]; C.E.B., 2 Condemnation Practice 2d, §16.4; 3 *Cal. Proc.* (4th), *Actions*, §556.)

Where there is no direct physical invasion of the landowner's property and the fact of taking is not immediately apparent, the 5-year limitations period is tolled until the damage is sufficiently appreciable to a reasonable person. But where the taking is immediately apparent and could be seen by a reasonable person inspecting the property, the period is not tolled. (*Otay Water Dist. v. Beckwith* (1991) 1 C.A.4th 1041, 1049, 3 C.R.2d 223.) (See *Brown v. California* (1993) 21 C.A.4th 1500, 1505, 1506, 26 C.R.2d 687 [whether 3-year or 10-year statute was applicable, action by holder of trust deed against state was untimely, because complaint alleged that state entered land more than 10 years earlier]; *Kong v. Hawaiian Gardens Redevelopment Agency* (2002) 108 C.A.4th 1028, 1047, 134 C.R.2d 260 [5-year statute of limitations began to run when plaintiff sublessee was required to vacate premises, not when defendant acquired title to property].)

In *Hensler v. Glendale* (1994) 8 C.4th 1, 32 C.R.2d 244, 876 P.2d 1043, the issue was which statute of limitations was applicable to a complaint in inverse condemnation alleging a taking of real property resulting from the adoption, or application to the plaintiff's property, of an ordinance enacted pursuant to the Subdivision Map Act (*Govt.C.* 66410 et seq.; see 12 *Summary* (10th), *Real Property*, §809). Three years after plaintiff purchased a large tract of land zoned for single-family residential use, the city, under the authority of the Act, enacted an ordinance prohibiting construction on major ridge lines within the city. The city approved construction of 588 residential units on plaintiff's property, but rejected use or encroachment on the ridge lines within the tract. More than 3 years after approval of the development plan, plaintiff brought the present action for inverse condemnation, claiming that the ordinance precluded development of 40% of the tract. The city demurred on the ground that the action was brought beyond the 90-day limitations period of *Govt.C.* 66499.37. The trial judge sustained the demurrer and dismissed the action, and the Court of Appeal affirmed. *Held*, the action was untimely.

(a) Plaintiff asserts that, as a matter of federal constitutional right, he can sue for inverse condemnation without first

challenging the application of the city's ordinance to his property. He ignores the distinction between takings resulting from physical invasion and those resulting from regulation. Where the alleged taking is a regulatory one, compensation is available only if the regulation "goes too far," and this cannot be determined until an administrative agency applies the ordinance or regulation to the property and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction. "A final administrative decision includes exhaustion of any available review mechanism." (8 C.4th 11, 12.)

(b) "California provides such a process by making available an action for inverse condemnation if, after exhausting administrative remedies to free the property from the limits placed on development and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted. In that action the court determines whether the restriction on development 'goes too far' and will be constitutionally impermissible unless just compensation is paid for the taking brought about by the restriction." (8 C.4th 13.)

(c) Although plaintiff seeks to avoid application of *Govt.C. 66499.37* by arguing that he does not challenge the validity of the city ordinance, and is seeking only compensation for the taking effected by it, the gravamen of his cause of action is a claim that an ordinance enacted under the authority of the Subdivision Map Act, or administrative actions taken pursuant to the ordinance, have had the effect of taking his property without compensation. He thus necessarily challenges the validity of either the ordinance or the city's acts pursuant to it. Because he must establish that the ordinance or action is not lawful or constitutionally valid in the absence of compensation, his cause of action comes within the application of *Govt.C. 66499.37*. The longer limitations periods of *C.C.P. 318* and *319* (see 12 *Summary* (10th), *Real Property*, §227) or *C.C.P. 338*, supra, apply only if no different limitation is prescribed by statute, and in this case *Govt.C. 66499.37* provides a different limitation. (8 C.4th 24, 25.)

(d) "We conclude that an action in inverse condemnation, whether or not joined with an action in administrative mandamus ... challenging the ordinance or its application to the plaintiff's property, is governed" by *Govt.C. 66499.37* "unless it alleges the existence of a final judgment establishing that there has been a compensable taking of the plaintiff's land." (8 C.4th 6, 7.) (See *Serra Canyon Co., Ltd. v. California Coastal Com.* (2004) 120 C.A.4th 663, 672, 16 C.R.3d 110 [following *Hensler*; where prior owner failed to challenge irrevocable offer to dedicate land that was extracted by city as condition for development, subsequent owner who accepted title to property with knowledge that it was burdened by recorded offer to dedicate could not claim that acceptance of offer was taking; federal law making onerous permit conditions unconstitutional did not revive takings claim that was waived by inaction]; 22 *Pepperdine L. Rev.* 99, 1746 [*Hensler*].)

SUPPLEMENT: [This section is current through the latest supplement]

In *Uniwill L.P. v. Los Angeles* (2004) 124 C.A.4th 537, 21 C.R.3d 464, plaintiff developer was not precluded from bringing an inverse condemnation action by its failure to challenge defendant city's imposition of conditions on a project within the 90-day limitations period of *Govt.C. 66499.37*. Generally, a property owner cannot comply with a condition imposed on a building permit and then sue for the cost of compliance. However, here defendant had demanded the granting of an easement, the payment of a fee, and the performance of other costly work after approval of the Tentative Tract Map and after plaintiff's performance of substantial work on the project. Plaintiff chose to comply with the conditions, rather than to stop work and challenge them, as a matter of economic necessity. The action was filed within 5 years of the date of the alleged taking. (124 C.A.4th 543.)

Cross-Reference: 3 Cal. Proc. (5th), Actions, §605.



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d. Interest.

8 *Witkin Sum. Cal. Law Const Law* § 1167

[§ 1167] Interest.

(1) *When Interest Begins To Run.* Interest ordinarily runs from the date of damage, not merely from the time of judgment. (See *Heimann v. Los Angeles* (1947) 30 C.2d 746, 758, 185 P.2d 597; *Youngblood v. Los Angeles County Flood Control Dist.* (1961) 56 C.2d 603, 611, 15 C.R. 904, 364 P.2d 840; *Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 C.3d 648, 657, 131 C.R. 646, 552 P.2d 430; *Smith v. Los Angeles* (1989) 214 C.A.3d 266, 290, 262 C.R. 754 [interest was properly awarded from date damage reached level that substantially interfered with owner's use and enjoyment].) However, special circumstances may require that interest run only from the valuation or trial date, e.g., where damages are measured from the trial date and the property has appreciated since the date of the taking. (See *Leaf v. San Mateo* (1984) 150 C.A.3d 1184, 1192, 198 C.R. 447.)

C.C.P. 1268.310(b), allowing prejudgment interest when property is taken before judgment, includes a constructive taking and thus allows interest based on an inverse condemnation claim. (*People v. Gardella Square* (1988) 200 C.A.3d 559, 574, 246 C.R. 139, *infra*, §1258.)

(2) *Calculation of Interest.* There was formerly some uncertainty about the prejudgment rate of interest in inverse condemnation. (See *Imperial Cattle Co. v. Imperial Irr. Dist.* (1985) 167 C.A.3d 263, 274, 213 C.R. 622 [interest limited to legal rate]; *Aetna Life & Cas. Co. v. Los Angeles* (1985) 170 C.A.3d 865, 879, 216 C.R. 831 [interest at prevailing market rate]; *Salton Bay Marina v. Imperial Irr. Dist.* (1985) 172 C.A.3d 914, 950, 218 C.R. 839 [distinguishing *Imperial Cattle Co.*; award of market rate based on Moody's Composite Index of Corporate Bond Rates].) However, the 1986 Legislature added *C.C.P. 1268.311*, providing that interest is computed as prescribed by *C.C.P. 1268.350*. Thus, interest is calculated semiannually for the first 6 months and the last 6 months of the calendar year. The rate for a 6-month period is the rate calculated by the Controller as the rate of earnings on the Surplus Money Investment Fund for the preceding 6-month period. (*C.C.P. 1268.350*; see *infra*, §1259.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Calculation of Interest.* *C.C.P. 1268.350*, as amended in 2006, provides for the quarterly calculation of interest.



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e. Costs and Attorneys' Fees.

8 Witkin Sum. Cal. Law Const Law § 1168

[§ 1168] Costs and Attorneys' Fees.

(1) *Reimbursement Authorized.* A property owner who obtains judgment or settlement in an inverse condemnation action is entitled to reimbursement for "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or *in any appellate proceeding* in which the plaintiff prevails on any issue in that proceeding." (*C.C.P. 1036.*) (See *Heimann v. Los Angeles* (1947) 30 C.2d 746, 758, 185 P.2d 597 [right to costs from time of actual taking or damage, not merely from time of judgment]; *Frustuck v. Fairfax* (1964) 230 C.A.2d 412, 415, 41 C.R. 56 [statute governing litigation expenses on dismissal or defeat of right to take in eminent domain proceeding (*infra*, §1265), is not applicable to inverse condemnation]; *Leaf v. San Mateo* (1984) 150 C.A.3d 1184, 1189, 198 C.R. 447 [attorney acting pro se in prosecuting inverse condemnation action is entitled to reasonable value of professional services necessarily rendered]; *Aetna Life & Cas. Co. v. Los Angeles* (1985) 170 C.A.3d 865, 881, 216 C.R. 831 [20% contingent attorney's fee was unreasonably high in relation to actual amount of award and number of hours worked]; *Salton Bay Marina v. Imperial Irr. Dist.* (1985) 172 C.A.3d 914, 957, 218 C.R. 839 [award of contingent fee remanded for redetermination; "Legislature contemplated an award of attorney fees based on the amount of time spent on the case and other factors and not based solely on a contingent fee arrangement between attorney and client"]; *Ferrell v. San Diego* (2001) 90 C.A.4th 537, 543, 108 C.R.2d 681 [use of words "costs, disbursements, and expenses" in *C.C.P. 1036* does not mean that statute provides for costs that are not considered to be ordinary costs under *C.C.P. 1033.5*]; Model Eminent Domain Code, §213, 13 (Part I) U.L.A. (Master Ed.), p. 26; 11 Miller & Starr 3d, §30:31.)

C.C.P. 1036 authorizes the recovery of the prevailing plaintiff's litigation expenses incurred in enforcing an inverse condemnation judgment under *Govt.C. 970 et seq.* (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §401). (*Downen's v. Hawaiian Gardens Redevelopment Agency* (2001) 86 C.A.4th 856, 860, 103 C.R.2d 644 [issue of first impression].) However, a fee award is limited to fees actually incurred; "fees may be reduced because they are unreasonable and pose an unnecessary burden on public funds, but they cannot be increased beyond what was 'actually incurred.'" (*Andre v. West Sacramento* (2001) 92 C.A.4th 532, 537, 111 C.R.2d 891.)

(2) *Action for Taking or Damaging.* *C.C.P. 1036* formerly applied to an action "brought for the taking of any interest in real property." This provision was deleted in 1995. The statute now applies in "any inverse condemnation proceeding." (*C.C.P. 1036.*) (On interpretation of "taking" under former version of statute, see *Stone v. Los Angeles*

(1975) 51 C.A.3d 987, 998, 124 C.R. 822 [no taking of legally recognized interest in property]; *Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 C.3d 648, 658, 131 C.R. 646, 552 P.2d 430 [right to lateral support is interest in real property]; *Orme v. California* (1978) 83 C.A.3d 178, 184, 147 C.R. 735, [damage to crops caused by flooding was taking within meaning of C.C.P. 1036]; *Imperial Cattle Co. v. Imperial Irr. Dist.* (1985) 167 C.A.3d 263, 276, 213 C.R. 622 [following *Orme*; fee award was proper for damage caused by temporary flooding of feed lot, including damage to personal property]; *Salton Bay Marina v. Imperial Irr. Dist.*, *supra*, 172 C.A.3d 952 [following *Orme*; fee award was proper for flood damage caused by rising level of water in lake].)

(3) *Prevailing Defendant*. In *Smith v. Los Angeles* (1989) 214 C.A.3d 266, 262 C.R. 754, an inverse condemnation action involving the destruction of residences in a landslide, the trial judge denied costs to defendant waterworks even though it was the prevailing party. *Held*, this was error.

(a) *Blau v. Los Angeles* (1973) 32 C.A.3d 77, 107 C.R. 727, and *Drennen v. Ventura* (1974) 38 C.A.3d 84, 112 C.R. 907, held that unsuccessful plaintiffs in inverse condemnation actions were constitutionally entitled to be free of costs. (214 C.A.3d 298.) However, "the holdings in *Blau* and *Drennen* are unsupported by the authority cited and contrary to the reasoning expressed" in *Los Angeles v. Ricards* (1973) 10 C.3d 385, 389, 110 C.R. 489, 515 P.2d 585. (214 C.A.3d 298, and footnote 14.)

(b) "The constitutional guarantee of full compensation for property taken or damaged for public use does not apply where a property owner sued a public entity for inverse condemnation but is unable to prove the subject property was taken or damaged by that entity. In such circumstances, the prevailing party's statutory right to costs applies without constitutional limitation." (214 C.A.3d 297.)

Smith was cited with approval in *Locklin v. Lafayette* (1994) 7 C.4th 327, 27 C.R.2d 613, 867 P.2d 724, 12 *Summary* (10th), *Real Property*, §965. Successful public entity defendants were entitled to costs even though the plaintiffs brought the inverse condemnation action in good faith. An inverse condemnation plaintiff must establish a compensable taking or damage before Cal. Const., Art. I, §19, "may be invoked to shield the unsuccessful plaintiff from assessment of costs" under C.C.P. 1032. "Nothing in the constitutional provision or our past cases suggests that a governmental entity must bear the expense of all litigation by property owners who in good faith, but without sufficient evidence or legal support, claim damage to their property." (7 C.4th 377.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Reimbursement Authorized*. Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §430 et seq.



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f. Action Prior to Taking or Damage.

8 Witkin Sum. Cal. Law Const Law § 1169

[§ 1169] Action Prior to Taking or Damage.

It was formerly the rule that the property owner's remedy by inverse condemnation did not arise until there was an actual taking or damage. (See *Silva v. San Francisco* (1948) 87 C.A.2d 784, 787, 198 P.2d 78 [city board of supervisors adopted resolution authorizing condemnation of particular property but had not commenced proceedings; no right of action in inverse condemnation]; cf. *Hilltop Properties v. California* (1965) 233 C.A.2d 349, 356, 43 C.R. 605 [dictum that action would lie if governmental agency did unequivocal act evidencing intention to open street or similar improvement, and commenced work].)

However, under the Eminent Domain Law, a property owner has a right of action prior to actual taking or damage as follows: If the public entity (1) adopts a resolution establishing the necessity for the taking, and (2) does not bring its proceeding within 6 months, the owner may sue in inverse condemnation. In this action, the judgment may (a) require the taking of the land and award compensation; (b) in addition, or in the alternative, award damages for interference with the owner's rights. (C.C.P. 1245.260, *infra*, §1202; see *Pacific Outdoor Advertising Co. v. Burbank* (1978) 86 C.A.3d 5, 14, 149 C.R. 906 [no right of action where there is no unequivocal act or intent to condemn]; *Langer v. Redevelopment Agency of Santa Cruz* (1999) 71 C.A.4th 998, 1006, 84 C.R.2d 19 [following *Pacific Outdoor Advertising*; no right of action by tenants where there was no substantial equivalent of condemnation; plans for developing properties were initiated by owner and developer who only sought assistance from agency in acquiring other properties in area]; C.E.B., 2 Condemnation Practice 2d, §13.2.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Statutory Eminent Domain Law.

1. In General.

a. Nature, Organization, and Scope.

8 Witkin Sum. Cal. Law Const Law § 1170

[§ 1170] Nature, Organization, and Scope.

(1) *In General.* The Eminent Domain Law (*C.C.P. 1230.010* et seq.), modeled after the Model Eminent Domain Code and the Uniform Eminent Domain Code, was enacted in 1975. (See 12 Cal. Law Rev. Com. Reports, p. 1627; 13 (Part I) U.L.A. (Master Ed.), p. 5 et seq.) The usual general principles of construction are set forth in *C.C.P. 1235.010* et seq., and important definitions are given in *C.C.P. 1235.110* et seq. (see *infra*, §1171). Enactment of the new law was accompanied by extensive conforming legislation, repealing and amending many sections in various codes dealing with condemnation. (For list of conforming revisions, see 12 Cal. Law Rev. Com. Reports, p. 1878 et seq.)

(2) *Organization.* The Eminent Domain Law is set out in Title 7 of the Code of Civil Procedure, in 12 Chapters:

(a) Chapter 1, General Provisions. (See *infra*, §§1172, 1174.)

(b) Chapter 2, Principles of Construction; Definitions. (See *infra*, §1171.)

(c) Chapter 3, The Right To Take. (See *infra*, §1175 et seq.)

(d) Chapter 4, Precondemnation Activities. (See *infra*, §1196 et seq.)

(e) Chapter 5, Commencement of Proceeding. (See *infra*, §1204 et seq.)

(f) Chapter 6, Deposit and Withdrawal of Probable Compensation; Possession Prior to Judgment. (See *infra*, §1212 et seq.)

(g) Chapter 7, Discovery; Exchange of Valuation Data. (See *infra*, §1211.)

(h) Chapter 8, Procedures for Determining Right To Take and Compensation. (See *infra*, §1219 et seq.)

(i) Chapter 9, Compensation. (See *infra*, §1223 et seq.)

(j) Chapter 10, Divided Interests. (See *infra*, §1250 et seq.)

(k) Chapter 11, Postjudgment Procedure. (See *infra*, §1254 et seq.)

(l) Chapter 12, Arbitration of Compensation in Acquisitions of Property for Public Use. (See *infra*, §1268 et seq.)

(3) *Scope*. "Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided in this title." (*C.C.P. 1230.020*.) However, nothing in Title 7 "requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property." (*C.C.P. 1230.030*; on acquisition by negotiation, see *infra*, §1186.)

The Eminent Domain Law is triggered by the threat of condemnation, which means "an unequivocal expression of intent to condemn." When property is conveyed under the threat of condemnation, the conveyance is described as "in lieu of condemnation." (*Johnston v. Sonoma County Agricultural Preservation & Open Space Dist. (2002) 100 C.A.4th 973, 987, 123 C.R.2d 226* [Eminent Domain Law applied to conveyance of utility easement over preserved open-space property transferred to city as part of negotiated settlement prior to commencement of condemnation proceedings].)

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1. In General.

b. Definitions.

8 Witkin Sum. Cal. Law Const Law § 1171

[§ 1171] Definitions.

The Eminent Domain Law contains the usual standard definition section: "Unless the provision or context otherwise requires, these definitions govern the construction of this title." (*C.C.P. 1235.110.*) A few special definitions apply to particular articles, but the principal definitions, of general application, are as follows:

(1) *Final judgment*: A "judgment with respect to which all possibility of direct attack by way of appeal, motion for a new trial, or motion" under *C.C.P. 663* "to vacate the judgment has been exhausted." (*C.C.P. 1235.120.*)

(2) *Interest*: "When used with reference to property, 'interest' includes any right, title, or estate in property." (*C.C.P. 1235.125.*)

(3) *Judgment*: The "judgment determining the right to take the property by eminent domain and fixing the amount of compensation to be paid by the plaintiff." (*C.C.P. 1235.130.*)

(4) *Litigation expenses*: These include both (a) all expenses reasonably and necessarily incurred in preparing for trial, during trial, and in subsequent judicial proceedings, and (b) reasonable attorneys' and appraisal fees, and fees for the services of other experts, where those fees were reasonably and necessarily incurred to protect the defendant's interests in the proceeding in preparing for trial, during trial, and in subsequent judicial proceedings, whether those fees were incurred for services rendered before or after filing the complaint. (*C.C.P. 1235.140*; see *Oakland v. Oakland Raiders* (1988) 203 C.A.3d 78, 85, 249 C.R. 606, *infra*, §1265 [litigation expenses include attorneys' fees on appeal].)

The expenses must be "incurred." Thus, an owner, whether testifying as an expert or otherwise, is not entitled to reimbursement for the time spent in preparing and presenting his or her own testimony. (*Madera v. Forrester* (1981) 115 C.A.3d 57, 62, 170 C.R. 896.)

(5) *Local public entity*: A "public entity other than the state." (*C.C.P. 1235.150.*)

(6) *Nonprofit, special use property*: This means property that "is operated for a special nonprofit, tax-exempt use such as a school, church, cemetery, hospital, or similar property." It "does not include property owned by a public entity." (*C.C.P. 1235.155.*)

(7) *Person*: This "includes any public entity, individual, association, organization, partnership, trust, limited liability company, or corporation." (C.C.P. 1235.160.)

(8) *Proceeding*: An "eminent domain proceeding under this title." (C.C.P. 1235.165.) (See Law Rev. Com. Comment, pointing out that definition excludes matters before Public Utilities Commission.)

(9) *Property*: This "includes real and personal property and any interest therein." (C.C.P. 1235.170.) An authorized condemnor may acquire property of any type necessary for public use except where the power is limited by the particular statutory grant. (C.C.P. 1240.110, *infra*, §1182.)

(10) *Property appropriated to public use*: This means "property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time." (C.C.P. 1235.180; for principal applications of statute, see C.C.P. 1240.510 *et seq.*, 1240.610 *et seq.*, *infra*, §1192 *et seq.*) The Law Revision Commission Comment, citing controlling cases, points out that (a) actual physical use is not required; a formal dedication, or facts indicating a reasonable prospect of use within a reasonable time, is sufficient; (b) property may be appropriated to public use even though it is owned by a private individual or corporation; and (c) conversely, it may be owned by a public entity but not appropriated to public use.

(11) *Public entity*: This "includes the state, a county, city, district, public authority, public agency, and any other political subdivision in the state." (C.C.P. 1235.190.)

(12) *Electric, gas, or water public utility property*: This means property appropriated to a public use by a defined public utility. (C.C.P. 1235.193.)

(13) *Resolution*: This "includes ordinance." (C.C.P. 1235.195.)

(14) *State*: This means "the State of California" including "the Regents of the University of California." (C.C.P. 1235.200.)

(15) *Statute*: This means "a constitutional provision or statute, but does not include a charter provision or ordinance." (C.C.P. 1235.210.)

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d. BAJI and CACI Instructions.

8 Witkin Sum. Cal. Law Const Law § 1173

[§ 1173] BAJI and CACI Instructions.

(1) *BAJI Instructions*. The eminent domain instructions in BAJI are as follows:

(a) *Introductory*:

No. 11.70: Power of Eminent Domain.

No. 11.71: Just Compensation.

(b) *Fair Market Value*:

No. 11.72: Just Compensation--Fair Market Value--Valuation Date.

No. 11.72.3: Land and Improvements To Be Valued as a Whole.

No. 11.72.5: Compensation for Machinery or Equipment.

No. 11.72.7: Compensation for Improvements Removed or Destroyed.

No. 11.72.9: Improvements Made After Service of Summons.

No. 11.73: Fair Market Value--Defined.

No. 11.75: Value of Use to Parties Not Test.

No. 11.77: Exclusion of Increase or Decrease in Value Caused by Extraneous Factors.

No. 11.78: Fair Market Value--Easement.

No. 11.79: Value Depreciation Caused by Cloud of Condemnation.

(c) *Expert Witnesses:*

No. 11.80: Eminent Domain--Opinion of Witnesses as to Value.

No. 11.81: Eminent Domain--Weighing Expert Opinion--Evidence of Comparable Sales.

No. 11.82: Eminent Domain--Weighing Expert Opinion--Evidence of Matters Relied Upon.

(d) *Severance Damages:*

No. 11.85: Severance Damages--Fee Being Taken.

No. 11.85.3: Severance Damages--Easement Being Taken.

No. 11.86: Elements Not Included in Severance Damages.

No. 11.87: Loss of Access.

No. 11.88: Diversion of Traffic.

No. 11.89: Inconvenience of Traffic Regulation.

No. 11.90: Freeway Access Excluded.

No. 11.91: Loss of Goodwill.

(e) *Special Benefits:*

No. 11.95: Benefits.

No. 11.96: Separate Assessment of Elements of Compensation.

(f) *Burden of Proof--Costs:*

No. 11.98: Eminent Domain--Burden of Proof.

No. 11.99: Eminent Domain--Costs.

(2) *CACI Instructions.* Jury instructions relating to eminent domain are stated in CACI, No. 3500 et seq., as follows:

No. 3500: Right To Take.

No. 3501: Fair Market Value.

No. 3502: Highest and Best Use.

No. 3503: Change in Zoning or Land Use Restriction.

No. 3504: Project Enhanced Value.

No. 3505: Information Discovered After Date of Valuation.

No. 3506: Effect of Improvements.

No. 3507: Personal Property and Inventory.

No. 3508: Bonus Value of Leasehold Interest.

No. 3509: Precondemnation Damages.

No. 3510: Value of Easement.

No. 3511: Severance Damages.

No. 3512: Severance Damages--Offset for Benefits.

No. 3513: Goodwill.

No. 3514: Burden of Proof.

No. 3515: Valuation Testimony.

No. 3516: View by Jury.

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e. Jurisdiction of Public Utilities Commission.

8 Witkin Sum. Cal. Law Const Law § 1174

[§ 1174] Jurisdiction of Public Utilities Commission.

Nothing in the Eminent Domain Law "affects any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission." (*C.C.P. 1230.060.*) This provision recognizes the jurisdiction of the Public Utilities Commission under specific statutory grants. (Law Rev. Com. Comment.)

The Legislature is constitutionally authorized to enable the Public Utilities Commission "to fix just compensation for utility property taken by eminent domain." (Cal. Const., Art. XII, §5.) Pursuant to this authorization, the Public Utilities Code provides that a political subdivision or public corporation seeking to condemn the property of a public utility may petition the Commission to fix the compensation. (*Pub.Util.C. 1401* et seq.) In this proceeding, the Commission acts as a special *judicial tribunal*. It has powers similar to those of a trial court and its findings are like those of the court or a general verdict of a jury. (See *Southern Calif. Edison Co. v. Railroad Com. of Calif.* (1936) 6 C.2d 737, 741, 749, 59 P.2d 808; *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.* (1946) 72 C.A.2d 638, 648, 165 P.2d 741.)

A governmental subdivision may bring a general eminent domain proceeding under *C.C.P. 1230.010* et seq. But when it elects to proceed under *Pub.Util.C. 1401* et seq., the Commission fixes the compensation. If the condemnee utility does not accept the amount, the governmental subdivision may then commence an eminent domain proceeding (*Pub.Util.C. 1413*), and the court is bound by the Commission's determination of compensation (*Pub.Util.C. 1416*).

In *North Sacramento v. Citizens Util. Co. of Calif.* (1963) 218 C.A.2d 178, 32 C.R. 308, this happened, and the court entered its interlocutory judgment of condemnation with an award of \$ 2,206,000, the amount fixed by the Commission. Defendant utility, appealing, contended that it was entitled to interest on the award from the date of the interlocutory judgment to the date of possession, as in an ordinary condemnation proceeding (infra, §1258). *Held*, the utility was not entitled to the interest. The statute governing recovery on interest in ordinary condemnation proceedings does not apply to the special proceedings under *Pub.Util.C. 1401* et seq. The result is not unjust; during the entire period until the city took possession, the utility continued to receive revenues under rates established to yield a fair return on its investment. (218 C.A.2d 190.) (See *Sacramento v. Citizens Util. Co. of Calif.* (1965) 239 C.A.2d 109, 113, 48 C.R. 547 [subsequent appeal determining that supplemental award under *Pub.Util.C. 1417* should carry interest from date of possession].)

The Public Utilities Act formerly attempted to give the Commission the additional power to fix the compensation to be awarded to private persons where property was condemned for grade crossings. In *S.H. Chase Lumber Co. v. Railroad Com. of Calif.* (1931) 212 C. 691, 706, 300 P. 12, the pertinent section of the Act was held unconstitutional on the ground that this power was beyond the scope of the constitutional enabling provision and was impliedly forbidden by it. (See *Great Northern Ry. Co. v. Superior Court* (1932) 126 C.A. 575, 580, 14 P.2d 899.)

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1. Public Use Limitations.

aa. In General.

8 Witkin Sum. Cal. Law Const Law § 1175

[§ 1175] In General.

(1) *Constitutional Limitation.* "The power of eminent domain may be exercised to acquire property only for a public use." (*C.C.P. 1240.010*, restating the limitation of Cal. Const., Art. I, §19, and U.S. Const., Amend. XIV.) (See *Patel v. Southern Calif. Water Co. (2002) 97 C.A.4th 841, 844, 119 C.R.2d 119* [enrichment of water company by leasing its land to cell phone companies is not "public use"]; 32 *Southwestern U. L. Rev.* 569 [meaningful judicial scrutiny of "public use"]; *BAJI*, No. 11.70; *CACI*, No. 3500.)

(2) *Legislative Determination.* "Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use." (*C.C.P. 1240.010*.) This statement avoids the need to provide in each condemnation authorization statute that the taking is one for public use. Judicial review to determine the issue of public use is not precluded by the statement, but under the case law, the legislative declaration will be accepted unless clearly erroneous. (*Law Rev. Com. Comment.*) (See *supra*, §1120.)

(3) *Statutory Authorizations.* The Eminent Domain Law sets forth general limitations on the exercise of the power of eminent domain (see *infra*, §1177 et seq.) and restrictions governing the right to take in various circumstances, including the following:

(a) *C.C.P. 1240.110* et seq. (rights included in grant of authority; see *infra*, §1182 et seq.).

(b) *C.C.P. 1240.210* et seq. (future use; see *infra*, §1187).

(c) *C.C.P. 1240.310* et seq. (substitute condemnation; see *infra*, §1188 et seq.).

(d) *C.C.P. 1240.410* et seq. (excess condemnation; see *infra*, §1191).

(e) *C.C.P. 1240.510* et seq. (compatible use; see *infra*, §§1192, 1193).

(f) *C.C.P. 1240.610* et seq. (more necessary public use; see *infra*, §§1194, 1195).

Neither the general limitations nor the particular restrictions limit the other limitations and restrictions, each of which "is a separate and distinct authorization." (*C.C.P. 1240.160*.) Thus, for example, the authority to condemn for a compatible use is independent of the authority to condemn for a more necessary public use. (Law Rev. Com. Comment.)

(4) *Nonprofit, Special Use Property*. Before initiation of negotiations for the acquisition of nonprofit, special use property, as defined in *C.C.P. 1235.155* (*supra*, §1171), a public entity or public utility must "make every reasonable effort to seek alternative property." (*Govt.C. 7267.9(a)*.) This requirement does not apply to (a) properties acquired by public entities for transportation purposes, including construction, expansion, or improvement of streets, highways, or railways (*Govt.C. 7267.9(a)*); or (b) actions or proceedings to acquire real property or an interest in real property for water, sewer, electricity, telephone, natural gas, or flood control facilities or rights of way where the acquisitions do not require removal or destruction of existing improvements and do not render the property unfit for the owner's use (*Govt.C. 7267.9(b)*).

West's Key Number Digest, Constitutional Law k.226 et seq., 279 et seq.

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1. Public Use Limitations.

bb. Condemnation of Sport Franchise.

8 Witkin Sum. Cal. Law Const Law § 1176

[§ 1176] Condemnation of Sport Franchise.

In *Oakland v. Oakland Raiders* (1982) 32 C.3d 60, 183 C.R. 673, 646 P.2d 835, defendant was a limited partnership owning a professional football team as a franchise member of the National Football League (NFL). In 1966, defendant and a nonprofit corporation entered into a 5-year licensing agreement for use of the Oakland Coliseum, and renewed the agreement until 1980, when defendant announced its intention to move the football team to Los Angeles. Plaintiff city then brought this action in eminent domain to acquire defendant's property rights, and the trial judge granted summary judgment for defendant. *Held*, reversed.

(a) *Condemnation of intangible property involved.* There is no constitutional restriction on the nature of the property that may be taken by the general government under its inherent power; but a municipal corporation can exercise the power only when expressly authorized by law. (32 C.3d 64.) Under *Govt.C. 37350.5*, a city may acquire "any property," and the eminent domain law defines "property" in the broadest terms (*C.C.P. 1235.170*). (32 C.3d 65; see *supra*, §1171.) Although the contractual rights involved in this action have never previously been the subject of condemnation, there is substantial precedent for the condemnation of intangible property, including franchises. (32 C.3d 66, 67, 68.) "Bearing in mind that the Law Revision Commission, after an extensive national study, made its legislative recommendations, including a definition of condemnable property which it characterized as 'the broadest possible,' we conclude that our eminent domain law authorizes the taking of intangible property." (32 C.3d 68.)

(b) *Valid public use.* *Govt.C. 37350.5* authorizes the acquisition of property necessary to carry out municipal powers or functions, and the general statutory scheme affords cities considerable discretion in identifying and implementing public uses. (32 C.3d 69, 70.) No prior case has held that a city can acquire and operate a professional football team; but acquisitions of lands to be used for recreational purposes have been sustained. (32 C.3d 70.) Municipal sports stadiums are common. (32 C.3d 71.) "Is the obvious difference between managing and owning the facility in which the game is played, and managing and owning the team which plays in the facility, legally substantial? To date, respondents have not presented a valid legal basis for concluding that it is, but we do not foreclose the trial court's reaching a different conclusion on a fuller record." (32 C.3d 72.) Further, there is no provision in the present law that precludes condemning an established team. (32 C.3d 73.)

(c) *Property Outside Territorial Limits.* Defendant contended that the city is barred by *C.C.P. 1240.050* from condemning property outside its territorial limits; hence, it cannot acquire the partnership rights here that are not "located" in Oakland. (1) It is questionable whether this statute is relevant to intangible property, which has no permanent situs. (32 C.3d 74.) (2) Assuming its applicability, prima facie the restriction would appear to be met, for Oakland is the principal place of business of the partnership, the designated NFL-authorized site for the team's "home games," and the primary locale of the team's tangible personalty. (32 C.3d 74.) (3) Even the statutory limitation is subject to an exception permitting extraterritorial condemnation when necessary to implement local condemnation. (32 C.3d 75; see infra, §1181.)

(d) *Conclusion.* The facts and circumstances brought out in a trial on the merits should determine the issue of proper public use, and the city should be given an opportunity to prove its case in accordance with the principles outlined in the opinion. (32 C.3d 75, 76.)

One justice filed a concurring and dissenting opinion and another justice concurred in a substantial portion of that opinion. This opinion points to the "novel" and virtually unlimited power claimed by the city as involving a great potential for abuse. (32 C.3d 77.) (See 74 Cal. L. Rev. 1329; 20 Cal. Western L. Rev. 82; 17 U.C. Davis L. Rev. 963; 30 A.L.R.4th 1226 [public taking of sports or entertainment franchise as taking for public purpose].) (For decision on remand, holding that acquisition of National Football League franchise would violate Commerce Clause, see *Oakland v. Oakland Raiders* (1985) 174 C.A.3d 414, 220 C.R. 153, infra, §1303.)

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2. Statutory Authorization Required.

aa. In General.

8 Witkin Sum. Cal. Law Const Law § 1177

[§ 1177] In General.

"The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use." (*C.C.P. 1240.020*; see *supra*, §1114 et seq.) Thus, (1) if the statutory grant is limited to property of a certain type (e.g., "natural, open," areas or "blighted" areas), taking of other property is precluded; and (2) if the statutory grant is limited to an easement, an attempt to take the fee is precluded. (Law Rev. Com. Comment.) (See BAJI, No. 11.70; CACI, No. 3500.)

The former broad delegation of the right of eminent domain to a private person (see *supra*, §1117) has been eliminated; but special statutes continue the right of some types of private persons to condemn for certain public uses; e.g., privately owned public utilities, mutual water companies, limited dividend housing corporations, nonprofit hospitals, and nonprofit educational institutions of collegiate grade. (Law Rev. Com. Comment.) (On quasi-public entities, see *infra*, §1203; on limited condemnation rights of private persons, see *infra*, §§1178, 1179.)

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2. Statutory Authorization Required.

bb. Private Person's Utility Easement.

8 Witkin Sum. Cal. Law Const Law § 1178

[§ 1178] Private Person's Utility Easement.

The Eminent Domain Law eliminated the broad power of private persons under former C.C. 1001 (see supra, §1117); but in 1976, pursuant to a Law Revision Commission recommendation, new C.C. 1001 was enacted to restore a limited power. "Any owner of real property may acquire by eminent domain an appurtenant easement to provide utility service to the owner's property." (C.C. 1001(b).) "Utility service" is defined as "water, gas, electric, drainage, sewer, or telephone service." (C.C. 1001(a).) (See Law Rev. Com. Comment; *19 A.L.R.4th* 1026 [factors determining power company's location of transmission line].)

In lieu of the requirements of *C.C.P. 1240.030* regarding a showing of public necessity (see infra, §1180), C.C. 1001 requires that the following be established:

(1) "There is a great necessity for the taking." (C.C. 1001(c)(1).)

(2) "The location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property." (C.C. 1001(c)(2).)

(3) "The hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property." (C.C. 1001(c)(3).)

The resolution of necessity is governed by *C.C.P. 1245.325*. (See infra, §1203.)

In *L & M Professional Consultants v. Ferreira* (1983) 146 C.A.3d 1038, 194 C.R. 695, the local city council consented to private condemnation by plaintiff developer of an appurtenant sewage easement across defendant's property. Defendant petitioned to invalidate the council's resolution of consent and to declare C.C. 1001 and *C.C.P. 1245.325* unconstitutional. *Held*, condemnation judgment for plaintiff affirmed.

(a) *Requirement of "great necessity."* Under C.C. 1001(c)(1) and *C.C.P. 1245.325(b)(1)*, "great necessity" must exist for private condemnation of a utility easement. "This limitation replaces the usual 'public interest and necessity'

requirement ... with a stricter standard applicable only to the private condemnation." (146 C.A.3d 1049.) The term is not unconstitutionally vague. "[D]etermining whether a 'great necessity' exists for the private condemnation of a utility easement does not turn on a comparative evaluation of condemnation and noncondemnation alternatives. 'Great necessity' does not exist when a condemnation alternative is more preferable than a reasonably acceptable noncondemnation alternative. ... 'Great necessity' exists only when a condemnation alternative is the sole reasonably acceptable means for providing utility service to a piece of property." (146 C.A.3d 1050, 1051, noting that this interpretation is consistent with *Linggi v. Garovotti* (1955) 45 C.2d 20, 286 P.2d 15, supra, §1117.) Here, the noncondemnation alternative suggested by defendant would have violated development and environmental guidelines established by city planners and "would have been inordinately expensive in light of total project development costs." (146 C.A.3d 1050.)

(b) *Condemnation for utility easement is public use.* The private condemnation statutes do not authorize condemnation of private property for private use (146 C.A.3d 1052), and it is clear that the ordinary taking of private property for a sewage easement is a taking for public use, even though private persons may benefit (146 C.A.3d 1053). C.C. 1001 and C.C.P. 1245.325 "constitute a legislative declaration that the private condemnation of utility easements is for a public use," and do not "abrogate the fundamental public use limitation applicable to all takings by public and quasi-public entities." Thus, a specific requirement of public use in those statutes is unnecessary. (146 C.A.3d 1052.)

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2. Statutory Authorization Required.

cc. Private Person's Repair Easement.

8 Witkin Sum. Cal. Law Const Law § 1179

[§ 1179] Private Person's Repair Easement.

The owner of real property may exercise the power of eminent domain "to acquire a temporary right to enter upon adjacent or nearby property to repair or reconstruct land or improvements." (C.C. 1002(a).) "Adjacent" or "nearby" refers to land that is "contiguous with the property needing repair or reconstruction, or land through which the party granted temporary access must pass to reach adjacent land." (C.C. 1002(d).) C.C. 1002 does not apply to temporary entries on lands used primarily for the commercial production of agricultural commodities and forest products. (C.C. 1002(e).) (See *14 Pacific L. J. 686.*)

The entry is conditioned on meeting all the following requirements:

(1) There must be necessity to do the repair or reconstruction work. (C.C. 1002(a)(1).)

(2) There must be a "great necessity" to enter the adjacent or nearby property to do the work because (a) it cannot be done safely otherwise, or its cost would be substantially higher; and (b) the property, without repair or reconstruction, adversely affects the surrounding community. (C.C. 1002(a)(1).)

(3) The right of entry must be exercised so as to provide the least property damage and inconvenience consistent with satisfactory completion of the work. (C.C. 1002(a)(2).)

(4) The hardship of the person seeking the right of entry, if not granted, must clearly outweigh the hardship to the owner or occupant of the adjacent or nearby property. (C.C. 1002(a)(3).)

Entry may be made only after an eminent domain proceeding has been commenced and a court order permitting entry has been issued or judgment has been entered for the plaintiff. (C.C. 1002(b).)

To protect the owner of the condemned property, a deposit of security must be made to the court in an amount sufficient to permit the owner to restore the property to the condition it was in prior to entry (C.C. 1002(b)), and the court may order the person acquiring the right of entry to pay the owner reasonable rent for the use of the land (C.C.

1002(c)).

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3. Public Necessity Required.

8 Witkin Sum. Cal. Law Const Law § 1180

[§ 1180] Public Necessity Required.

Three requirements must be satisfied before the power of eminent domain may be exercised to acquire property for a proposed project:

(1) *Public Interest and Necessity*. "The public interest and necessity require the project." (*C.C.P. 1240.030(a)*.) These involve "all aspects of the public good including but not limited to social, economic, environmental, and esthetic considerations." The necessity of the proposed improvement is subject to judicial review. (Law Rev. Com. Comment.) (See *Saratoga v. Hinz* (2004) 115 C.A.4th 1202, 1225, 9 C.R.3d 791 [fact that project involving paving and widening private dead-end street and cul-de-sac, so that they could be dedicated to city, did not confer any general benefit to surrounding community did not detract from inherently public nature of project; thus, trial court did not err in finding public interest and necessity even though it found no general benefit from project].)

(2) *Plan and Location Compatible With Public Good*. The project must be "planned or located in the manner that will be most compatible with the greatest public good and the least private injury." (*C.C.P. 1240.030(b)*.) This limitation--the necessity for adopting a particular plan--involves a comparison between two or more sites; and the condemnor's choice is proper unless another site would involve an equal or greater public good and a lesser private injury. "A lesser public good can never be counterbalanced by a lesser private injury to equal a more proper location. ... Nor can equal public good and equal private injury combine to make the condemnor's choice an improper location." (Law Rev. Com. Comment.) (See *SFPP, L.P. v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 C.A.4th 452, 469, 17 C.R.3d 96 [referee did not err in considering availability of alternative locations when determining whether project was located in proper manner under *C.C.P. 1240.030(b)*].)

(3) *Particular Property or Interest Necessary*. The property sought to be acquired must be necessary for the project. (*C.C.P. 1240.030(c)*.) The evidence must show (a) that the particular property is suitable and desirable for the project, and (b) that it is necessary to take a particular interest in the property. (Law Rev. Com. Comment.) (See *San Bernardino County Flood Control Dist. v. Grabowski* (1988) 205 C.A.3d 885, 899, 252 C.R. 676 [public interest and necessity was established where project was needed as result of redevelopment, greatest public good and least private injury was shown where site was smallest and least expensive one which would accommodate project, and necessity was shown

where site was especially topographically suitable and desirable]; *Shell Calif. Pipeline Co. v. Compton* (1995) 35 C.A.4th 1116, 1125, 41 C.R.2d 753 [trial judge's finding that public pipeline utility's acquisition of pipeline easement was required for public interest and necessity was supported by evidence that acquisition of easement allowed utility to provide lower priced gasoline and gave it ability to transport by pipeline, instead of by polluting trucks]; 71 Proof of Facts 3d 97 [lack of reasonable necessity for taking property].)

In addition to the requirements of *C.C.P. 1240.030*, other statutes may set forth additional prerequisites, such as environmental statements and hearings, relocation plans, or consent of various public agencies. (Law Rev. Com. Comment.)

A public entity must adopt a resolution of public necessity under *C.C.P. 1245.210* et seq. (infra, §1199 et seq.) before it may exercise the power of eminent domain. (*C.C.P. 1240.040*.)

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a. General Limitations on Exercise of Power.

4. Extraterritorial Condemnation.

8 Witkin Sum. Cal. Law Const Law § 1181

[§ 1181] Extraterritorial Condemnation.

"A local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers." (*C.C.P. 1240.050*; see *C.C.P. 1240.125* [local public entity may condemn extraterritorially for water, gas, or electric supply purposes, or for airports, drainage, or sewer purposes].) The "necessity" required to justify extraterritorial condemnation is only a reasonable, not an absolute or imperative, necessity. (Law Rev. Com. Comment.)

In *Kenneth Mebane Ranches v. Superior Court* (1992) 10 C.A.4th 276, 12 C.R.2d 562, the issue was whether a flood control district had statutory authority to take property outside its boundaries to mitigate the environmental effects of a project constructed within its boundaries. *Held*, it lacked the power.

(a) "Because the Legislature intended to codify prior law when it enacted section 1240.050, it must have incorporated the prevailing standard applicable to determine when the power of extraterritorial condemnation will be necessarily implied as an incident to a local public entity's other enumerated powers. That standard requires the power of extraterritorial condemnation to be a matter of 'urgency of extreme expediency or necessity,' or 'manifestly desirable,' or 'essential to the declared objects' of the local public entity ... , or indicated by 'clear implication.' " (*10 C.A.4th 286*.)

(b) "Sound policy reasons exist to construe narrowly a local public entity's power to take land outside its boundaries." (*10 C.A.4th 286*.) This policy is implemented in *C.C.P. 1240.250(b)*. Under *C.C.P. 1245.250(a)*, "if the property to be taken by eminent domain is located within the boundaries of the condemning entity, the resolution of necessity adopted by the public entity conclusively establishes the necessary findings to the exercise of eminent domain, namely: (a) the public interest and necessity require the project, (b) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, and (c) the property sought to be acquired is necessary for the project." (*C.C.P. 1240.030*, *supra*, §1180.) "However, if the property to be taken is not located entirely within the boundaries of local public entity, the resolution of necessity merely creates a presumption that the matters referred to" in *C.C.P. 1240.030* are true. This presumption is one affecting the burden of producing evidence. (*C.C.P. 1245.250(b)*; see *infra*, §1200.) (*10 C.A.4th 287*.)

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1. Necessary Interests in Property.

8 Witkin Sum. Cal. Law Const Law § 1182

[§ 1182] Necessary Interests in Property.

Except as limited by statute, a person authorized to acquire property for a particular use by eminent domain may exercise the power "to acquire any interest in property necessary for that use including, but not limited to, submerged lands, rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, right of temporary occupancy, public utility facilities and franchises, and franchises to collect tolls on a bridge or highway." (*C.C.P. 1240.110(a)*.) Where a statute only authorizes the acquisition of specified interests in or types of property, *C.C.P. 1240.110* does not expand the scope of that authority. (*C.C.P. 1240.110(b)*.) (See *Contra Costa Water Dist. v. Vaquero Farms* (1997) 58 C.A.4th 883, 893, 68 C.R.2d 272 [windpower rights are substantial rights that may be excluded from condemnation]; on effect of resolution of necessity, see *C.C.P. 1245.250*, *infra*, §1200.)

The Law Revision Commission Comment explains the purpose and scope of the statute as follows:

(1) The initial proviso in *C.C.P. 1240.110(a)* refers to various statutes making certain property exempt from condemnation. (See *supra*, §1113.)

(2) *C.C.P. 1240.110(b)* recognizes that the interest authorized to be taken may be limited by the statutory grant.

(3) The authorization to take an interest necessary for a particular use follows case law and supersedes the former provision, which listed the types of interests.

South San Francisco v. Mayer (1998) 67 C.A.4th 1350, 1352, 79 C.R.2d 704, a case of first impression, addressed whether a city, in its condemnation action, must compensate a landowner for the value of the city's preexisting leasehold interest in the property. The lease included a condemnation clause that only provided for reimbursement to plaintiff city for loss of or damage to plaintiff's fixtures or personal property, with the remainder of any award to go to defendant landowner "whether as compensation for reduction in the value of the leasehold, the taking of the fee, or otherwise." In seeking to condemn the property, plaintiff did not condemn its own preexisting leasehold interest. *Held*, defendant was not entitled to compensation for plaintiff's leasehold interest.

Three strands of eminent domain law support the judgment: "(1) the requirement that property be condemned only for a 'necessary' public purpose, (2) the general notion that a public agency cannot be required to either purchase an interest it already owns or purchase more property than is 'necessary,' and (3) the prohibition against reading a contract as containing any obligation on the part of a public agency to exercise its power of eminent domain in any particular way." (67 *C.A.4th* 1356.)

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2. Property To Make Principal Use Effective.

8 Witkin Sum. Cal. Law Const Law § 1183

[§ 1183] Property To Make Principal Use Effective.

Subject to other statutes relating to the acquisition of property, a "person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project." (*C.C.P. 1240.120(a)*.) Subject to applicable procedures governing the disposition of property, a person may acquire property under *C.C.P. 1240.120(a)* "with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project." (*C.C.P. 1240.120(b)*.)

The Law Revision Commission Comment describes the dual coverage of *C.C.P. 1240.120* as follows:

(1) *Protection of a public work or improvement from detrimental uses on adjoining property.* "[T]he condemnor has the option either (1) to acquire an easement-like interest in the adjoining property that will preclude the detrimental use or (2) to acquire the fee or some other interest and then--if the condemnor desires--lease, sell, exchange, or otherwise dispose of the property to some other public entity or a private person subject to carefully specified permitted uses."

(2) *Preservation or protection of the attractiveness, safety, and usefulness of the improvement.* Some former specific grants of authority for this protective condemnation were repealed, and those that remain do not limit the general authority given by *C.C.P. 1240.120*, except to the extent that they contain restrictions applicable to particular types of projects.

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3. Acquisition of Remainder With Consent.

8 Witkin Sum. Cal. Law Const Law § 1184

[§ 1184] Acquisition of Remainder With Consent.

"Whenever a part of a larger parcel of property is to be acquired by a public entity for public use and the remainder, or a portion of the remainder, will be left in such size, shape, or condition as to be of little value to its owner or to give rise to a claim for severance or other damages, the public entity may acquire the remainder, or portion of the remainder, by any means (including eminent domain) expressly consented to by the owner." (*C.C.P. 1240.150*; see *C.C.P. 1240.240*, *infra*, §1187 [acquisition by consent for future use].)

The Law Revision Commission comments as follows: "Where a structure is located partly on property needed for a public use and partly on other property, there are a number of alternatives available to the parties which may be less costly or more convenient than taking only part of the structure and paying severance damages on this basis. In some cases, severance may so destroy a structure that total demolition in one operation is the only economically or practically feasible alternative." Pursuant to *C.C.P. 1240.150*, "the parties may agree that the public entity will acquire the entire structure and demolish it, leaving the property owner with the remainder in a cleared condition" *C.C.P. 1240.150* "also permits the parties to agree that the public entity will purchase the structure to relocate it."

If the parties cannot agree, the court may order acquisition of the entire improvement. (*C.C.P. 1263.270*.)

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4. Joint Exercise of Power.

8 Witkin Sum. Cal. Law Const Law § 1185

[§ 1185] Joint Exercise of Power.

"Two or more public agencies may enter into an agreement for the joint exercise of their respective powers of eminent domain, whether or not possessed in common, for the acquisition of property as a single parcel." (*C.C.P. 1240.140(b)*.)

This provision permits "public agencies," as defined in *Govt.C. 6500*, to acquire a particular parcel under the Joint Powers Agreements Act (*Govt.C. 6500 et seq.*). (*C.C.P. 1240.140.*) The power may be exercised "not only where the particular parcel is needed for a joint project but also where each of the agencies requires a portion of the parcel for its own purposes." (Law Rev. Com. Comment.)

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5. Acquisition by Gift, Purchase, Lease, or Other Means.

8 Witkin Sum. Cal. Law Const Law § 1186

[§ 1186] Acquisition by Gift, Purchase, Lease, or Other Means.

(1) *Authorized Acquisition Methods.* Subject to other statutes relating to the acquisition of property, a public entity authorized to acquire property for a particular use by eminent domain may also acquire the property for that use "by grant, purchase, lease, gift, devise, contract, or other means." (*C.C.P. 1240.130.*) This section authorizes the acquisition of property or a property interest by negotiation or other means in lieu of condemnation. (Law Rev. Com. Comment.) (See *Shell Calif. Pipeline Co. v. Compton* (1995) 35 C.A.4th 1116, 1121, 41 C.R.2d 753 [Boughton Act, which applies to franchises generally, and Franchise Act of 1937, which applies to pipelines specifically, provide manner in which entity may obtain franchise, but they do not provide only way that street easement may be acquired; thus, public utility pipeline may still acquire land by eminent domain].)

A property owner also may donate the property or a part of it, an interest in it, or the compensation paid for it, to a public entity. (*Govt.C. 7267.7(b).*)

(2) *Duty of Public Entity To Negotiate.* "[T]o encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable," make every reasonable effort to acquire real property by negotiation. (*Govt.C. 7267, 7267.1(a)*; see 21 A.L.R.4th 765 [sufficiency of required negotiations prior to taking].) (For acquisition policies similar to those stated in *Govt.C. 7267* et seq., see Model Eminent Domain Code in 13 (Part I) U.L.A. (Master Ed.), pp. 18 et seq., 36, 37.)

(3) *Appraisal by Public Entity.* Before the initiation of negotiations the public entity must appraise the property, and the owner or his or her representative must be permitted to accompany the appraiser during the inspection. However, the appraisal may be waived in cases involving the sale or donation of property with a low market value. (*Govt.C. 7267.1(b).*)

(4) *Offer and Written Statement.* After the appraisal, the public entity must (a) establish the amount it believes to be just compensation; (b) make an offer to acquire the property for that amount, unless the owner cannot be located with

reasonable diligence (*Govt.C. 7267.2(a)*); and (c) provide the owner with "a written statement of, and summary of the basis for," the amount so established (*Govt.C. 7267.2(b)*). (See *People v. Cole* (1992) 7 C.A.4th 1281, 1282, 1286, 9 C.R.2d 750 [property owners waived objection to adequacy of written statement by failing to object to statement during administrative proceedings].)

The statement and summary must contain sufficient detail to show the basis for the offer, including the following:

(a) "The date of valuation, highest and best use, and applicable zoning." (*Govt.C. 7267.2(b)(1)*.)

(b) "The principal transaction, reproduction or replacement cost analysis, or capitalization analysis, supporting the determination of value." (*Govt.C. 7267.2(b)(2)*.)

(c) "Where appropriate, the just compensation for the real property acquired and for damages to remaining real property" must be separately stated and must include "the calculations and narrative explanation supporting the compensation, including any offsetting benefits." (*Govt.C. 7267.2(b)(3)*.)

In the case of owner-occupied residential property of one-to-four units, the public entity may satisfy the written statement, summary, or review requirements by providing the owner with a copy of the appraisal on which the offer is based. (*Govt.C. 7267.2(c)*.)

The requirements of *Govt.C. 7267.2* are mandatory. (See *San Jose v. Great Oaks Water Co.* (1987) 192 C.A.3d 1005, 1011, 1012, 237 C.R. 845 [dismissal of condemnation action for failure of plaintiff city to provide written summary of basis for determination of value of property before adoption of resolution of necessity]; *C.C.P. 1245.230* [resolution of necessity must contain declaration that the offer *required* by *Govt.C. 7267.2* has been made or that owner cannot be located]; *C.C.P. 1250.410(c)* [in determining litigation expenses, court must consider offer *required to be made* under *Govt.C. 7267.2*]; *infra*, §1208.)

(5) *Minimum Amount of Offer*. Ordinarily, the offer may not be less than the public entity's approved appraisal of the fair market value of the property, and an increase or decrease in fair market value before the date of valuation must be disregarded, if caused by the improvement for which the property is acquired or the likelihood that the property would be acquired for the improvement. (*Govt.C. 7267.2(a)*.) However, a public entity may make an offer for less than the amount it believes to be just compensation if (a) the owner offers the property for sale at a specified price, (b) the public entity offers that price, and (c) no federal funds are involved in acquisition, construction, or project development. (*Govt.C. 7267.2(d)*.)

(6) *Coercive Action Prohibited*. "In no event shall the public entity either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property." (*Govt.C. 7267.5*.)

(7) *Required Offer To Take Entire Property*. "If the acquisition of only a portion of a property would leave the remaining portion in such a shape or condition as to constitute an uneconomic remnant, the public entity shall offer to acquire the entire property if the owner so desires." (*Govt.C. 7267.7(a)*.)

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(4) *Offer and Written Statement*. *Govt.C. 7267.2(a)(2)*, added in 2007, requires the public entity making the offer to provide the property owner with an informational pamphlet detailing the eminent domain process and the owner's rights under the Eminent Domain Law.



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c. Future Use.

8 *Witkin Sum. Cal. Law Const Law* § 1187

[§ 1187] Future Use.

(1) *In General.* Under prior case law, a statutory grant of the power of eminent domain carried with it the power to condemn in anticipation of the condemnor's future needs, and several statutes expressly recognize the power in particular entities. However, the issue of reasonable probability of public use within a reasonable time was regarded as part of the issue of necessity, and ordinarily nonjusticiable; i.e., the resolution of necessity was conclusive. (Law Rev. Com. Comment on *C.C.P. 1240.220, 1240.230.*) The Eminent Domain Law makes a substantial change, by stating a limited power to take for future use and a procedure for determining the issue where the owner contests the taking. (*C.C.P. 1240.210* et seq.) If the owner expressly consents, the public entity may take the property for a future use free from the restrictions of *C.C.P. 1240.010* et seq. (*C.C.P. 1240.240.*)

(2) *Limited Power To Take.* "Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property to be used in the future for that use, but property may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable." (*C.C.P. 1240.220(a).*)

For this purpose, "the 'date of use' of property taken for public use is the date when the property is devoted to that use or when construction is started on the project for which the property is taken with the intent to complete the project within a reasonable time. In determining the 'date of use,' periods of delay caused by extraordinary litigation or by failure to obtain from any public entity any agreement or permit necessary for construction shall not be included." (*C.C.P. 1240.210.*)

(3) *Probable Use Within 7 Years.* The right to take is clear where the date of use will be within 7 years from the date the complaint is filed; i.e., the statute makes this a reasonable time, and the only defense is that there is no reasonable probability that the date of use will be within 7 years. (*C.C.P. 1240.220, 1240.230.*)

(4) *Probable Use Within Longer Reasonable Period.* If the date of use will not be within the 7-year period, the taking is authorized only if there is a "reasonable probability" that the use will be within a "reasonable" longer period. "What constitutes a reasonable time depends upon all the circumstances of the particular case: Is there a reasonable probability that funds for the construction of the project will become available? Have plans been drawn and adopted? Is

the project a logical extension of existing improvements? Is future growth likely, and should the condemnor anticipate and provide for that growth?" (Law Rev. Com. Comment on *C.C.P. 1240.220*.)

(5) *Pleading and Burden of Proof.*

(a) Unless the plaintiff plans a date of use within the 7-year period, "the complaint, and the resolution of necessity if one is required, shall refer specifically to this section and shall state the estimated date of use." (*C.C.P. 1240.220(b)*.) This required information puts the defendant on notice that there is a potential issue of authorization to take. (Law Rev. Com. Comment.)

(b) If the complaint is silent on the date (i.e., the plaintiff contemplates a use within 7 years), the defendant has the burden of proof that there is no reasonable probability of use within the period. (*C.C.P. 1240.230(b)*.) The defendant must plead this defense. (*C.C.P. 1250.360(d)*.) Unless the court finds in defendant's favor on the issue, the defense fails. (See Law Rev. Com. Comment on *C.C.P. 1240.230*.)

(c) If the complaint states an estimated date of use that is longer than 7 years, or if it is silent on the period and the defendant prevails on the issue (proving no reasonable probability of use within 7 years), the burden shifts to the plaintiff, to prove that there is a reasonable probability of use within a "reasonable" time. (*C.C.P. 1240.230(c)*.)

(6) *Property Taken Under Federal Aid Highway Act.* The period is enlarged where property is taken under the Federal Aid Highway Act of 1973. "A date of use within 10 years from the date the complaint is filed shall be deemed reasonable." (*C.C.P. 1240.250*.) The resolution of necessity and the complaint must state that the taking is pursuant to that statute, and must state the estimated date of use. (*C.C.P. 1240.250(b)*.) The provisions on burden of proof are similar to those in *C.C.P. 1240.230*. (*C.C.P. 1240.250(c)*.)

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d. Substitute Condemnation.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1188

[§ 1188] In General.

(1) *Nature and Purpose of Substitute Condemnation.* The provisions on substitute condemnation, *C.C.P. 1240.310* et seq., operate in the following situation: "The potential condemnor determines that it needs certain property (the 'necessary property') for its use. It agrees to compensate the owner of the necessary property in whole or in part by other property (the 'substitute property') rather than money. It then condemns the 'substitute property' and exchanges it for the 'necessary property.'" (Law Rev. Com. Comment on *C.C.P. 1240.310*; see *C.C.P. 1240.310* [defining "necessary property" and "substitute property"].) These provisions apply to all public entities with the power to condemn. (See *C.C.P. 1240.320(a)*.)

(2) *Conditions.* The power may be exercised if all of the following conditions are established:

(a) The owner of the necessary property has agreed in writing to the exchange. (*C.C.P. 1240.320(a)(1)*.)

(b) The necessary property is devoted to or held for public use and the substitute property will be devoted to or held for the same public use. (*C.C.P. 1240.320(a)(2)*.)

(c) "The owner of the necessary property is authorized to exercise the power of eminent domain to acquire the substitute property for such use." (*C.C.P. 1240.320(a)(3)*.)

The Law Revision Commission Comment explains the reasons for the two important conditions--agreement by owner, and owner's power to condemn the substitute property: "In this situation, the same end can be reached no matter which party to the exchange exercises the power of condemnation so that the authority provided here is simply a shortcut to an identical result."

(3) *Resolution and Complaint.* The resolution of necessity and the complaint filed pursuant to the resolution must specifically refer to *C.C.P. 1240.320* and must include a statement that the property is necessary for the purpose specified in *C.C.P. 1240.320*. "The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed" in *C.C.P. 1245.250* (see *infra*, §1200). (*C.C.P. 1240.320(b)*.)

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2. To Relocate Public Use.

8 Witkin Sum. Cal. Law Const Law § 1189

[§ 1189] To Relocate Public Use.

(1) *In General.* Under *C.C.P. 1240.320* (supra, §1188), the owner of the necessary property relocates the public use on the substitute property. *C.C.P. 1240.330* provides for the different situation: Where necessary property is devoted to public use, a "public entity authorized to exercise the power of eminent domain to acquire such property for a particular use may exercise the power of eminent domain to acquire substitute property in its own name, relocate on such substitute property the public use to which necessary property is devoted, and thereafter convey the substitute property to the owner of the necessary property." (*C.C.P. 1240.330(a)*.)

(2) *Conditions.* Three conditions must be established for this kind of taking:

(a) "The public entity is required by court order or judgment in an eminent domain proceeding, or by agreement with the owner of the necessary property, to relocate the public use to which the necessary property is devoted and thereafter to convey the property upon which the public use has been relocated to the owner of the necessary property." (*C.C.P. 1240.330(a)(1)*.)

(b) "The substitute property is necessary for compliance with the court order or judgment or agreement." (*C.C.P. 1240.330(a)(2)*.)

(c) "The owner of the necessary property will devote the substitute property to the public use being displaced from the necessary property." (*C.C.P. 1240.330(a)(3)*.)

(3) *Resolution and Complaint.* The resolution of necessity and the complaint filed pursuant to the resolution must specifically refer to *C.C.P. 1240.330* and must include a statement that the property is necessary for the purpose specified in *C.C.P. 1240.330*. "The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed" in *C.C.P. 1245.250* (see infra, §1200). (*C.C.P. 1240.330(b)*.)

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3. To Provide Utility Service or Access to Road.

8 Witkin Sum. Cal. Law Const Law § 1190

[§ 1190] To Provide Utility Service or Access to Road.

When a public entity acquires property for public use and exercises or could have exercised the power of eminent domain to acquire the property for that use, "the public entity may exercise the power of eminent domain to acquire such additional property as appears reasonably necessary and appropriate (after taking into account any hardship to the owner of the additional property) to provide utility service to, or access to a public road from, any property that is not acquired for such public use but which is cut off from utility service or access to a public road as a result of the acquisition by the public entity." (*C.C.P. 1240.350(a)*; see *Fresno v. Shelton* (1998) 66 C.A.4th 996, 1012, 78 C.A.2d 272 [*C.C.P. 1240.350* authorized county to initiate eminent domain proceeding to provide access to part of parcel that would become landlocked even though county had not completed acquisition of other part of parcel].)

The Law Revision Commission Comment explains the purpose and nature of the provision: "Frequently, where property is acquired for an engineering-oriented project (such as a freeway or irrigation canal), parcels not acquired will be deprived of utility service or access to a public road. To restore these parcels to a useful life and, in doing so, to avoid claims of substantial severance damage, a condemnor is authorized to provide substitute utility service or access in connection with the improvement itself. Although the agreement of the owner of the landlocked parcel will generally be obtained, this is not a prerequisite here." In this situation, the "owner is not being compensated for property taken; the condemnor is simply minimizing the damage to property retained by the owner." And this mitigating factor must be considered in determining compensation for the damage to property not acquired (see *C.C.P. 1263.450*, *infra*, §1236). However, the authority is discretionary. "Where the condemnor does not choose to avail itself of this authority, an owner of property has no right to force such a physical solution upon it but is limited to the recovery of damages except as provided" in *C.C.P. 1240.410(c)* (see *infra*, §1191).

The resolution of necessity and the complaint filed pursuant to the resolution must specifically refer to *C.C.P. 1240.350* and must include a statement that the property is necessary for the purpose specified in *C.C.P. 1240.350*. "The determination in the resolution that the taking of the substitute property is necessary has the effect prescribed" in *C.C.P. 1245.250* (see *infra*, §1200). (*C.C.P. 1240.350(b)*.)

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8 *Witkin Sum. Cal. Law Const Law* § 1191

[§ 1191] Excess Condemnation.

(1) *Nature of Power and Test.* A remnant is a remainder or portion that will be left in a size, shape, or condition that has little market value. (*C.C.P. 1240.410(a)*.) When acquisition of "part of a larger parcel" will leave a remnant, the public entity may acquire the remnant. (*C.C.P. 1240.410(b)*.) (See 6 *A.L.R.3d* 297 [right to condemn property in excess of needs]; on condemnation of remnant by Department of Public Works under former Sts. & H.C. 104.1 et seq., see *People v. Superior Court (Rodoni)* (1968) 68 *C.2d* 206, 210, 65 *C.R.* 342, 436 *P.2d* 342 [upholding authority to condemn 54 acres landlocked by taking of .65 acres for freeway where severance damages might have equalled fair market value].)

The test, derived from *People v. Superior Court (Rodoni)*, is explained at length in the Law Revision Commission Comment: "The 'of little market value' concept is a flexible one; whether the excess property may be taken is to be determined in light of the circumstances of the particular case. Thus, the project may result in the excess property having relatively little market value in situations such as, for example, where (1) it will be totally 'landlocked' and no physical solution will be practical, (2) it will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change, (3) it will be of significant value to only one or few persons (such as adjoining landowners), or (4) it will be landlocked and have primarily a speculative value dependent upon access being provided when adjacent land is developed and the time when the adjacent land will be developed is a matter of speculation. ... The test is the objective one of marketability and market value generally of the excess property."

The Comment refers to two contrasting situations:

(a) "[A] usable and generally salable piece of property is neither a physical nor financial remnant even though its 'highest and best use' has been downgraded by its severance or a serious controversy exists as to its best use and value after severance."

(b) The statute does not authorize a taking of excess property "(1) to avoid the cost and inconvenience of litigating the issue of damages, (2) to preclude the payment of damages, including damages substantial in amount in appropriate cases, (3) to coerce the condemnee to accept whatever price the condemnor offers for the property actually needed for

the public project, or (4) to afford the condemnor an opportunity to 'recoup' damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project."

(2) *Resolution and Complaint.* When property is sought to be acquired pursuant to *C.C.P. 1240.410*, the resolution of necessity and the complaint filed pursuant to it must specifically refer to that section. It is presumed from the adoption of the resolution that the taking is authorized under *C.C.P. 1240.410*. This presumption is one "affecting the burden of producing evidence." (*C.C.P. 1240.420*.) Thus, in the absence of a contest of the issue, the plaintiff is entitled to judgment; but the presumption only places the burden of producing evidence on the defendant, with the ultimate burden of proof on the plaintiff. (Law Rev. Com. Comment.) (On distinction between the burdens, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §1 et seq.)

(3) *Contest Where Physical Solution Is Available.* Property may not be acquired under *C.C.P. 1240.410* "if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to prevent the property from becoming a remnant." (*C.C.P. 1240.410(c)*.)

The Law Revision Commission Comment explains: "The condemnee may be able to demonstrate that, given construction of the public improvement in the manner proposed, the public entity is able to provide substitute access or take other steps that would be equitable under the circumstances of the particular case. ... In most cases, some physical solution would be possible; but subdivision (c) requires that the solution also be 'reasonable, practicable, and economically sound.' To be 'economically sound,' the proposed solution must, at a minimum, reduce the overall cost to the condemnor of the taking. Thus, the total of the cost of the solution, the compensation paid for the part taken, and the damages to the remainder must be less than the amount that would be required to be paid if the entire parcel were taken. The court should, moreover, consider questions of maintenance, hardship to third persons, potential dangers, risk of tort liability, and similar matters in determining whether the solution is also 'reasonable and practicable.' If the physical solution might interfere with or impair the public project, it would not be reasonable."

(4) *Disposal of Acquired Remnants.* "A public entity may sell, lease, exchange, or otherwise dispose of property" taken under the Eminent Domain Law and "may credit the proceeds to the fund or funds available for acquisition of the property being acquired for the public work or improvement." Nothing in this provisions "relieves a public entity from complying with any applicable statutory procedures governing the disposition of property." (*C.C.P. 1240.430*.)

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aa. Nature of Power.

8 Witkin Sum. Cal. Law Const Law § 1192

[§ 1192] Nature of Power.

(1) *In General.* Property already devoted to public use may be taken for a more necessary public use and the existing use displaced. (See *C.C.P. 1240.610*, *infra*, §1194; for definitions, see *supra*, §1171.) An independent and less drastic authority exists to condemn the property for a compatible joint use by both parties. The property may be taken "if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future." (*C.C.P. 1240.510*.)

The statute continues, clarifies, and broadens the authority given by former statutes and recognized by case law. It has no effect on the respective rights of the owner of the underlying fee or easement holders to compensation for the additional burdens imposed. (Law Rev. Com. Comment.)

The complaint and any required resolution of necessity must refer specifically to *C.C.P. 1240.510*. The burden of proof is allocated as follows: (a) If the defendant objects to the taking, the defendant has the burden of proof that the property is appropriated to public use. (b) If this is established, the plaintiff has the burden of proof that its proposed use satisfies the compatible use requirement. (*C.C.P. 1240.520*.)

(2) *Wildlife Conservation Easements.* A governmental agency may not condemn a wildlife conservation easement acquired by a state agency without notice to the easement holder and an opportunity to consult with the governmental agency. *C.C.P. 1240.510* et seq. apply to the condemnation proceedings, and the condemning agency must "prove by clear and convincing evidence that its proposed use satisfies the requirements" of those sections. (*Fish & Game C. 1348.3*.)

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8 *Witkin Sum. Cal. Law Const Law* § 1193

[§ 1193] Terms and Conditions of Joint Use.

(1) *Agreement of Parties*. The parties may agree on "the terms and conditions upon which the property is taken and the manner and extent of its use by each of the parties." (*C.C.P. 1240.530(a)*.)

(2) *Court Determination*. If the parties are unable to agree, the court fixes the terms and conditions and the manner and extent of the use of the property by each of the parties. (*C.C.P. 1240.530(a)*.)

(3) *Court Determination When Proposed Use Is Contrary to C.C.P. 1240.510*. If the court finds that the proposed use would not satisfy the requirement of compatibility (see *supra*, §1192), the court must determine whether modified terms and conditions will meet the test, and, if it does, it must permit the plaintiff to take under the modified terms and conditions. (*C.C.P. 1240.530(b)*.)

(4) *Removal or Relocation*. The court may order necessary removal or relocation of structures or improvements if the removal or relocation would not require "significant alteration of the use to which the property is appropriated." Unless otherwise provided by statute, costs and damages that result from the relocation or removal must be paid by the plaintiff. (*C.C.P. 1240.530(c)*.)

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aa. Nature of Power.

8 *Witkin Sum. Cal. Law Const Law* § 1194

[§ 1194] Nature of Power.

(1) *Displacement of Existing Use*. A person authorized to acquire property for a particular use by eminent domain may exercise the power to acquire "property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated." (*C.C.P. 1240.610*.) This section allows the condemnor to displace an existing use. (For uses *presumed* more necessary, see *infra*, §1195.)

What constitutes a more necessary public use was the subject of a number of decisions under the former eminent domain law. (See *Marin v. Superior Court* (1960) 53 C.2d 633, 637, 2 C.R. 758, 349 P.2d 526; *Woodland School Dist. v. Woodland Cemetery Assn.* (1959) 174 C.A.2d 243, 245, 344 P.2d 326 [school district was entitled to condemn cemetery property; question of more necessary public use was one of fact]; *People v. Los Angeles* (1960) 179 C.A.2d 558, 564, 4 C.R. 531 [state was allowed to condemn city park property for freeway]; *Beaumont v. Beaumont Irr. Dist.* (1965) 63 C.2d 291, 293, 46 C.R. 465, 405 P.2d 377 [domestic water use as more necessary than irrigation]; *San Bernardino County Flood Control Dist. v. Superior Court* (1969) 269 C.A.2d 514, 523, 75 C.R. 24; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §103 et seq.; 80 *A.L.R.3d* 833 [ownership or use by private educational, charitable, or religious organization as public use]; 49 *A.L.R.5th* 769 [construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated--state takings]; cf. *United States v. Carmack* (1946) 329 U.S. 230, 67 S.Ct. 252, 257, 91 *L.Ed.* 209, 217 [federal government condemned city park property as site for post office; power based on Supremacy Clause, *supra*, §8].)

(2) *Complaint and Burden of Proof*. The complaint and any required resolution of necessity must refer specifically to *C.C.P. 1240.610*. The burden of proof is allocated as follows: (a) If the defendant objects to the taking, the defendant has the burden of proof that the property is appropriated to public use. (b) If this is established, the plaintiff has the burden of proof that its proposed use is a more necessary public use. (*C.C.P. 1240.620*.)

(3) *Prior User's Right to Joint Use*. "[T]he defendant is entitled to continue the public use to which the property is appropriated if the continuance of such use will not unreasonably interfere with or impair, or require a significant

alteration of, the more necessary public use as it is then planned or exists or may reasonably be expected to exist in the future." (*C.C.P. 1240.630(a)*.)

The issue is raised by defendant's objection to the taking on this ground, and, on motion of either party, the court determines whether the defendant is entitled to continue the use. (*C.C.P. 1240.630(b)*.) The test of the right to joint use, and the determination of terms and conditions by agreement or court order (*C.C.P. 1240.630(b)*), are similar to those in the statute dealing with compatible use (*supra*, §1193).

(4) *Wildlife Conservation Easements*. A governmental agency may not condemn a wildlife conservation easement acquired by a state agency without notice to the easement holder and an opportunity to consult with the governmental agency. *C.C.P. 1240.610* et seq. apply to the condemnation proceedings, and the condemning agency must "prove by clear and convincing evidence that its proposed use satisfies the requirements" of those sections. (*Fish & Game C. 1348.3*.)

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[§ 1195] Uses Presumed To Be More Necessary.

(1) *Use by State.* Where property has been appropriated to public use by a person other than the state, its use by the state for the same or any other public use is presumed to be a more necessary use than the use to which the property has already been appropriated. (*C.C.P. 1240.640(a).*) Where property has been appropriated to public use by the state, its use by the state is presumed to be a more necessary use than the use to which it might be put by another person. (*C.C.P. 1240.640(b).*) These presumptions affect the burden of proof. (*C.C.P. 1240.640(c).*) (See 35 *A.L.R.3d* 1293 [power as between state and political subdivision or between subdivisions].)

(2) *Use by Public Entity.* *C.C.P. 1240.650* is a similar provision on the preferred use of a public entity, but is expressed in conclusive terms rather than as a rebuttable presumption: Where property has been appropriated to public use by a person other than a public entity, its use by a public entity for the same or any other public use is a more necessary use than the use to which the property has already been appropriated. (*C.C.P. 1240.650(a).*) Where property has been appropriated to public use by a public entity, its use by the public entity is a more necessary use than any use to which it might be put by a person other than a public entity. (*C.C.P. 1240.650(b).*)

However, where property that has been appropriated to a public use is electric, gas, or water public utility property that the public entity intends to put to the same use, the presumption of a more necessary use established by *C.C.P. 1240.650(a)* "is a rebuttable presumption affecting the burden of proof, unless the acquiring public entity is a sanitary district exercising the powers of a county water district" pursuant to *Health & S.C. 6512.7*. (*C.C.P. 1240.650(c).*)

There is also a rebuttable presumption favoring use by a local entity where property has been appropriated to public use by a local public entity. Its use by the local public entity is presumed to be a more necessary use than the use to which the property might be put by another local public entity. This presumption affects the burden of proof. (*C.C.P. 1240.660.*)

(3) *Property Preserved in Natural Condition by Nonprofit Organization.* There is a rebuttable presumption that property has been appropriated to the best and most necessary public use where the following are established:

(a) "The property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the laws of this state and of the United States and having the primary purpose of preserving areas in their natural condition." (*C.C.P. 1240.670(a)(1).*)

(b) "The property is open to the public subject to reasonable restrictions and is appropriated, and used exclusively, for the preservation of native plants or native animals including, but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest." (*C.C.P. 1240.670(a)(2).*)

(c) The property is irrevocably dedicated to those uses so that, on liquidation, dissolution, or abandonment of or by the owner, the "property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses." (*C.C.P. 1240.670(a)(3).*)

(4) *Property Appropriated to Park or Similar Areas.* There is a similar presumption where property is appropriated to public use as (a) a state, regional, county, or city park or recreation area; (b) a wildlife or waterfowl management area; (c) an historic site; (d) an ecological reserve. (*C.C.P. 1240.680.*)

(5) *Highway, Road, or Street.* A procedure is provided for determining the issue of most necessary public use where the property comes within *C.C.P. 1240.670* or *C.C.P. 1240.680*, and condemnation is sought for highway, road, or street purposes:

(a) When property described in *C.C.P. 1240.670* or *1240.680* "is sought to be acquired for *state highway purposes*, and the property was dedicated or devoted to a use described in those sections prior to the initiation of highway route location studies, an action for declaratory relief may be brought by the public entity or nonprofit organization owning the property in the superior court to determine the question of which public use is the best and most necessary public use for the property." (*C.C.P. 1240.690(a).*) When this declaratory relief action may not be brought, *C.C.P. 1240.670* and *1240.680* do not apply. (*C.C.P. 1240.690(d)(2).*)

(b) When property described in *C.C.P. 1240.680* is sought to be acquired for *city or county road, street, or highway purposes*, and the "property was dedicated or devoted to regional park or recreational purposes prior to the initiation of road, street, or highway route location studies, an action for declaratory relief may be brought in the superior court by the regional park district which operates the park or recreational area to determine the question of which public use is the best and most necessary public use for such property." (*C.C.P. 1240.700(a).*) When this declaratory relief action may not be brought, *C.C.P. 1240.680* does not apply. (*C.C.P. 1240.700(c)(2).*)

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1. Right To Enter.

8 Witkin Sum. Cal. Law Const Law § 1196

[§ 1196] Right To Enter.

A "person authorized to acquire property for a particular use by eminent domain may enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use." (*C.C.P. 1245.010*; see Model Eminent Domain Code, §301, 13 (Part I) U.L.A. (Master Ed.), p. 30; 29 *A.L.R.3d* 1104 [right to enter land for preliminary survey or examination].)

If the entry will involve no actual injury to or substantial interference with the owner's possession and use, no permission or court order is required. However, where the entry could cause actionable damage (see *C.C.P. 1245.060*, *infra*, §1198), the condemnor, before making entry and undertaking these activities, must secure the written consent of the owner or a court order. (*C.C.P. 1245.020*; see *infra*, §1197.)

Although normally the entry for this purpose will precede the commencement of the eminent domain proceeding, the statute does not preclude these studies after commencement. (Law Rev. Com. Comment on *C.C.P. 1245.010*.)

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2. Entry Under Court Order.

8 Witkin Sum. Cal. Law Const Law § 1197

[§ 1197] Entry Under Court Order.

The condemnor may petition for an order permitting entry on the property, giving prior notice to the owner as the court deems appropriate. (*C.C.P. 1245.030(a)*.) The court must then "determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner for the actual damage to the property and interference with its possession and use." (*C.C.P. 1245.030(b)*.) (See Model Eminent Domain Code, §302 et seq., 13 (Part I) U.L.A. (Master Ed.), p. 31 et seq.)

After this determination, the court may issue its order. "The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation." (*C.C.P. 1245.030(c)*.) (See *Los Angeles v. Schweitzer* (1962) 200 C.A.2d 448, 452, 19 C.R. 429 [order under predecessor statute was not appealable]; on management of amount deposited, see *C.C.P. 1245.050*.)

The court, on notice and hearing, may modify the provisions of the order; and if the modification directs an increase in the deposit, a stay of further activities may be ordered. (*C.C.P. 1245.040*.) The power to modify also extends to a decrease in the amount of the deposit, in which event the excess can be disbursed at once to the depositor. (Law Rev. Com. Comment on *C.C.P. 1245.040*.)

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3. Owner's Action for Damages.

8 Witkin Sum. Cal. Law Const Law § 1198

[§ 1198] Owner's Action for Damages.

(1) *Right To Recover.* If the entry and activities "cause actual damage to or substantial interference with the possession or use of the property," the owner may recover either in a civil action or by an application to the court for payment out of the funds deposited. No claim need be filed. (*C.C.P. 1245.060(a)*; see Model Eminent Domain Code, §305, 13 (Part I) U.L.A. (Master Ed.), p. 34; 5 *Summary* (10th), *Torts*, §224; 15 *U.C. Davis L. Rev.* 763 [inequitable precondemnation activity].) If an eminent domain proceeding is filed, the defendant's "action" will be a cross-complaint in the proceeding. (Law Rev. Com. Comment.)

(2) *Costs and Litigation Expenses.* The prevailing claimant is entitled to costs. He or she is also entitled to litigation expenses where (a) the condemnor's entry was unlawful; (b) though the entry was lawful, the activities "were abusive or lacking in due regard for the interests of the owner"; or (c) the condemnor failed to comply with the terms of an order (see *supra*, §1197). (*C.C.P. 1245.060(b)*.) This provision does not affect the availability of other remedies the owner may have. (*C.C.P. 1245.060(d)*.)

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b. Resolution of Necessity.

1. Requirement.

8 Witkin Sum. Cal. Law Const Law § 1199

[§ 1199] Requirement.

"A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of" *C.C.P. 1245.210* et seq. (*C.C.P. 1245.220*.) (See Model Eminent Domain Code, §309, 310, 13 (Part I) U.L.A. (Master Ed.), pp. 38, 39.) Unless a greater vote is required by statute, charter, or ordinance, a vote of two-thirds of all members of the governing body is sufficient. (*C.C.P. 1245.240*.)

The term "governing body" is defined for various kinds of public entities. (See *C.C.P. 1245.210*; *Long Beach Community Redevelopment Agency v. Morgan* (1993) 14 C.A.4th 1047, 1085, 18 C.R.2d 100.) The contents of the resolution are also specified. (See *C.C.P. 1245.230*.)

The resolution may be adopted only after notice to the owner and a reasonable opportunity to appear and be heard on the matters set forth in *C.C.P. 1245.230*. (*C.C.P. 1245.235*; see *Lincoln v. Barringer* (2002) 102 C.A.4th 1211, 1224, 126 C.R.2d 178 [*C.C.P. 1245.235(b)* does not require 15 days' notice of public hearing if city has utilized another procedure to give reasonable written notice and opportunity to appear and be heard, as authorized by *C.C.P. 1245.235(d)*].)

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b. Resolution of Necessity.

2. Effect of Resolution.

8 Witkin Sum. Cal. Law Const Law § 1200

[§ 1200] Effect of Resolution.

(1) *Presumptions.* Except as otherwise provided by statute, the resolution is conclusive on the issue of public necessity in all takings in the state. (*C.C.P. 1245.250(a).*) If the taking is by a local public entity, other than a sanitary district exercising the powers of a county water district under *Health & Saf.C. 6512.7*, and the property is electric, gas, or water public utility property, the resolution creates a rebuttable presumption affecting the burden of proof. (*C.C.P. 1245.250(b).*) If the taking is by a local public entity of property outside its boundaries, the resolution creates a rebuttable presumption merely affecting the burden of producing evidence. (*C.C.P. 1245.250(c).*) (See *San Bernardino County Flood Control Dist. v. Grabowski* (1988) 205 C.A.3d 885, 898, 252 C.R. 676 [once resolution is challenged by contradictory evidence, condemnor has burden to establish by preponderance of evidence that conditions required for condemnation exist]; *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 C.A.4th 141, 43 C.R.2d 366, *infra*, §1220 [despite conclusive effect of resolution on some issues, defendant property owner may still introduce evidence on other issues].)

(2) *Exception: Gross Abuse of Discretion.* A resolution of necessity does not have the effect prescribed in *C.C.P. 1245.250* "to the extent that its adoption or contents were influenced or affected by gross abuse of discretion in the governing body." (*C.C.P. 1245.255(b)*; see *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 C.A.3d 17, 25, 190 C.R. 744 [gross abuse of discretion is established by showing lack of substantial evidence to support resolution]; *Redevelopment Agency of Huntington Park v. Norm's Slauson* (1985) 173 C.A.3d 1121, 1127, 219 C.R. 365 [gross abuse of discretion was established by showing that, at time of hearing to determine necessity of taking, condemning agency had, by virtue of contract with developer and issuance of revenue bonds, irrevocably committed itself to taking property, regardless of evidence that might be presented]; *Anaheim Redevelopment Agency v. Dusek* (1987) 193 C.A.3d 249, 255, 257, 258, 239 C.R. 319 [legislative history of *C.C.P. 1245.255* and its standard of review]; *Saratoga v. Hinz* (2004) 115 C.A.4th 1202, 1226, 9 C.R.3d 791 [*Norm's Slauson* did not apply in absence of evidence that city had rubberstamped project].) (On review by mandamus, see *infra*, §1201.)

Once a gross abuse of discretion is established, the resolution of necessity is not entitled to its ordinary conclusive effect. The burden is on the governmental agency to prove the elements for the taking by a preponderance of the evidence. (*Redevelopment Agency v. Norm's Slauson*, *supra*, 173 C.A.3d 1128, 1 Cal. Evidence (4th), *Burden of Proof*

and Presumptions, §17.)

(3) *Exception: Bribery.* A resolution of necessity is not sufficient if the defendant establishes by a preponderance of the evidence both (a) that a member of the governing body who voted in favor of the resolution received or agreed to receive a bribe, as defined in P.C. 7(6), involving adoption of the resolution (*C.C.P. 1245.270(a)(1).*), and (b) that, but for the bribe, the resolution would not have been adopted (*C.C.P. 1245.270(a)(2).*).

Where the member has been prosecuted for conduct relating to the bribe, proof of conviction is conclusive evidence that the requirement of *C.C.P. 1245.270(a)(1)* is satisfied, and proof of acquittal or other dismissal of the prosecution is conclusive evidence that the requirement of the statute is not satisfied. Where there is a pending criminal prosecution of the member for the conduct described in *C.C.P. 1245.270(a)(1)*, the court may take action that is just under the circumstances of the case. (*C.C.P. 1245.270(b).*)

(4) *New Resolution Authorized.* Neither *C.C.P. 1245.255* (gross abuse of discretion) nor *C.C.P. 1245.270* (bribery) precludes a public entity from rescinding a resolution and adopting a new one, subject, after commencement of an eminent domain proceeding, to the same consequences as a conditional dismissal under *C.C.P. 1260.120* (*infra*, §1220). (*C.C.P. 1245.255(c), 1245.270(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Judicial Review.

8 Witkin Sum. Cal. Law Const Law § 1201

[§ 1201] Judicial Review.

Before commencement of an eminent domain proceeding, the property owner may challenge the resolution by mandamus pursuant to *C.C.P. 1085* (see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §§6, 72). (*C.C.P. 1245.255(a)(1)*.) Because the resolution is a legislative rather than a quasi-judicial act, the review is by ordinary mandamus, not administrative mandamus. (See 14 *Law Rev. Com. Reports*, p. 88; *Anaheim Redevelopment Agency v. Dusek* (1987) 193 *C.A.3d* 249, 258, 239 *C.R.* 319 [specific findings are not required].)

If the eminent domain proceeding is commenced while a mandamus petition is pending, the court, on a party's motion, must order the mandamus action dismissed without prejudice, unless it determines that dismissal will not be in the interests of justice. (*C.C.P. 1245.255(a)(1)*.) After commencement of proceedings, judicial review is by objection to the right to take. (*C.C.P. 1245.255(a)(2)*.)

C.C.P. 1245.255(a) does not purport to prescribe the exclusive means of challenge; e.g., declaratory relief and injunction may still be available in appropriate cases. (*Law Rev. Com. Comment.*)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§23, 74.



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8 *Witkin Sum. Cal. Law Const Law* § 1202

[§ 1202] Remedies If Proceeding Is Not Promptly Commenced.

(1) *In General.* Eminent domain proceedings must be commenced within 6 months after adoption of the resolution of necessity, or, once commenced, must diligently attempt to serve the complaint and summons within 6 months. Sanctions are provided for failure to do so. (*C.C.P. 1245.260.*) Service by mail under *C.C.P. 415.30* (see 3 *Cal. Proc.* (4th), *Actions*, §930) constitutes "a diligent attempt at service." (*C.C.P. 1245.260(a)*; see *California v. Western Natural Rubber* (1991) 235 *C.A.3d* 1495, 1499, 1501, 1 *C.R.2d* 495 [single attempt at service by mail under *C.C.P. 415.30* is sufficient; public entity is not required to make further attempts during 6-month period].)

(2) *Inverse Condemnation Suit by Owner.* If the public entity has not commenced or pursued the proceeding within the prescribed time limit, the owner may, by an action in inverse condemnation, "do either or both of the following": (a) Require the public entity to take the property and pay compensation for it; (b) Recover damages from the public entity for "interference with the possession and use of the property resulting from adoption of the resolution." (*C.C.P. 1240.260(a)*.) No claim need be filed, but the action must be brought within 18 months after the date of adoption of the resolution. (*C.C.P. 1245.260(b)*.)

C.C.P. 1245.260 does not affect an owner's fundamental right to bring an inverse condemnation action under *Cal. Const.*, Art. I, §19. (*Tilem v. Los Angeles* (1983) 142 *C.A.3d* 694, 703, 191 *C.R.* 229 [*Klopping* rule (*infra*, §1235) requires owner to show *either* unreasonable delay or other unreasonable conduct].)

(3) *Mandamus Proceeding by Owner.* In lieu of bringing an action under *C.C.P. 1240.260(a)*, or if the limitations period provided in *C.C.P. 1240.260(b)* has run, the property owner may obtain a writ of mandamus to compel the public entity, within the time the court deems appropriate, "to rescind the resolution of necessity or to commence an eminent domain proceeding to acquire the property." (*C.C.P. 1245.260(f)*.)

(4) *Commencement of Proceeding or Rescission by Public Entity.* (a) If the public entity commences a proceeding or rescinds the resolution before the owner commences an action, the owner's right of action is lost. (*C.C.P. 1245.260(c)*.) (b) After the owner has commenced an action, the public entity may rescind and abandon the taking "only under the same circumstances and subject to the same conditions and consequences as abandonment of an eminent

domain proceeding." (*C.C.P. 1245.260(d)*.) (On abandonment, see *C.C.P. 1268.510*, *infra*, §1264.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1015.



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5. Consent to Proceeding by Quasi-Public Entity.

8 Witkin Sum. Cal. Law Const Law § 1203

[§ 1203] Consent to Proceeding by Quasi-Public Entity.

(1) *"Quasi-Public Entity" Defined.* For purposes of *C.C.P. 1245.310* et seq., a quasi-public entity includes certain collegiate institutions, nonprofit hospitals, cemetery authorities, limited-dividend housing cooperatives, and mutual water companies. (*C.C.P. 1245.320.*) A property owner seeking a utility easement under *C.C. 1001* (supra, §1178) or a repair easement under *C.C. 1002* (supra, §1179) is also deemed to be a quasi-public entity. (*C.C.P. 1245.325, 1245.326.*)

(2) *Consent Requirement.* Notwithstanding "other requirements imposed by law," including the conditions for exercising the power of eminent domain set forth in *C.C.P. 1240.030* (*C.C.P. 1245.380*; see supra, §1180), an eminent domain proceeding by a quasi-public entity requires the prior consent of the legislative body of the city or county in which the property is located (*C.C.P. 1245.330*). (See *C.C.P. 1245.310* [defining "legislative body"]; *C.C.P. 1245.370* [payment by quasi-public entity of costs incurred by legislative body].)

The consent is expressed in a resolution, the content of which is specified in *C.C.P. 1245.340*. In the case of a property owner's condemnation of a utility or repair easement, however, the resolution of the legislative body must declare that it has found and determined each of the elements required by *C.C. 1001* or *C.C. 1002*, respectively. (*C.C.P. 1245.325* [utility easement under *C.C. 1001*]; *C.C.P. 1245.326* [repair easement under *C.C. 1002*].) The resolution must be approved by a two-thirds vote of all members of the legislative body. (*C.C.P. 1245.360.*) (See *C.C.P. 1245.250* [notice and hearing requirements]; *C.C.P. 1245.390* [city or county is not liable for damages caused by acquisition of property or by project for which property is acquired]; *L & M Professional Consultants v. Ferreira* (1983) 146 C.A.3d 1038, 194 C.R. 695, supra, §1178 [constitutionality of *C.C.P. 1245.325*].)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Jurisdiction and Venue.

8 Witkin Sum. Cal. Law Const Law § 1204

[§ 1204] Jurisdiction and Venue.

(1) *Jurisdiction in Superior Court.* Except as otherwise provided in *C.C.P. 1230.060* (Public Utilities Commission's jurisdiction, *supra*, §1174) and *C.C.P. 1273.010 et seq.* (arbitration, *infra*, §1268), "all eminent domain proceedings shall be commenced and prosecuted in the superior court." (*C.C.P. 1250.010*; see *C.E.B.*, 1 Condemnation Practice 2d, §8.3.)

(2) *Venue in County Where Land Is Located.* Where the property is all located in one county, the action must be brought in that county; i.e., the venue is jurisdictional. (*C.C.P. 1250.020(a)*.) Where the property is located in more than one county, the plaintiff must bring a single action in any one of the counties. (*C.C.P. 1250.020(b)*.) (See 3 *Cal. Proc.* (4th), *Actions*, §§703, 716, 717; *C.E.B.*, 1 Condemnation Practice 2d, §8.4.)

(3) *Change of Venue.* The county in which the proceeding is commenced is the proper county for trial, unless a change of venue is granted. (*C.C.P. 1250.030*.) Change of venue is governed by the general provisions of the Code of Civil Procedure. (*C.C.P. 1250.040*; on scope and effect of *C.C.P. 394*, thus incorporated by reference, see *Law Rev. Com. Comment on C.C.P. 1250.040*; 3 *Cal. Proc.* (4th), *Actions*, §794; on effect of withdrawal of probable compensation on right to change of venue, see *infra*, §1215.)

West's Key Number Digest, Constitutional Law k.228, 281

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Venue in County Where Land Is Located.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§781, 793, 794.

(3) *Change of Venue.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §879.



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b. Parties.

8 *Witkin Sum. Cal. Law Const Law* § 1205

[§ 1205] Parties.

(1) *Plaintiffs*. Each person seeking to take property by eminent domain must be named as a plaintiff (*C.C.P.* 1250.210), unless the proceeding is brought by a separate legal entity created under a joint powers agreement (*Govt.C.* 6508). (See 5 *Cal. Proc.* (4th), *Pleading*, §645.)

(2) *Defendants*. All persons who appear of record or are known to have or claim an interest in the property must be joined as defendants. (*C.C.P.* 1250.220(a).) Unknown parties claiming an interest must also be named, as specified. (*C.C.P.* 1250.220(c).) (See 5 *Cal. Proc.* (4th), *Pleading*, §645.) The holder of a special assessment lien also must be named but a taxing agency whose only interest is a lien for ad valorem taxes need not be. (*C.C.P.* 1250.250.) (See *C.C.P.* 1250.220(b) [naming personal representative or heirs and devisees of deceased claimant]; *C.C.P.* 1250.220(d) [conclusive effect of judgment on persons named and properly served].)

(3) *Appearance by Unnamed Claimants*. A person who claims a legal or equitable interest in the property may appear. The person does so as a defendant, whether or not named as a defendant in the complaint. (*C.C.P.* 1250.230; see *San Diego v. Miller* (1980) 102 C.A.3d 424, 431, 162 C.R. 480.)

West's Key Number Digest, Constitutional Law k.228, 281

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Plaintiffs*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §686.

(2) *Defendants*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §686.



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c. Pleading.

8 *Witkin Sum. Cal. Law Const Law* § 1206

[§ 1206] Pleading.

(1) *Complaint.* Filing a complaint commences an eminent domain proceeding, and gives the court subject matter jurisdiction. (*C.C.P. 1250.110.*) The complaint must contain specified substantive allegations. (See *C.C.P. 1250.310*; *C.E.B.*, 1 Condemnation Practice 2d, §§8.1, 8.2; 5 *Cal. Proc.* (4th), *Pleading*, §644 et seq.) (On signing of pleadings by attorney, see *C.C.P. 1250.330*, supra, §1172; on amendment of pleadings, see *C.C.P. 1250.340*, supra, §1172; on stay where another proceeding involving same property is pending, see *San Bernardino Valley Mun. Water Dist. v. Gage Canal Co.* (1964) 226 *C.A.2d* 206, 37 *C.R.* 856, 5 *Cal. Proc.* (4th), *Pleading*, §1069.)

"The plaintiff may join in one complaint all property located within the same county which is sought to be acquired for the same project." (*C.C.P. 1250.240.*)

(2) *Answer.* The answer must state the nature and extent of the defendant's interest in the property. (*C.C.P. 1250.320(a).*) If the defendant seeks compensation for the loss of goodwill (see *C.C.P. 1263.510*, infra, §1245), the answer must state that the defendant claims this compensation, but need not specify the amount claimed. (*C.C.P. 1250.320(b).*) (See *C.E.B.*, 1 Condemnation Practice 2d, §8.25 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §1041.)

(3) *Objection to Right To Take.* A defendant may, by demurrer or answer, object to the plaintiff's right to take, stating the specific ground for objection and the specific facts on which the objection is based. (*C.C.P. 1250.350*; see *San Bernardino County Flood Control Dist. v. Grabowski* (1988) 205 *C.A.3d* 885, 896, 252 *C.R.* 676 [objection to right to take may be raised by answer only on grounds specified in *C.C.P. 1250.350*; challenge based on claimed violation of Political Reform Act (supra, §271 et seq.) must be made by compulsory cross-complaint]; *C.E.B.*, 1 Condemnation Practice 2d, §8.25 et seq.) Failure to object constitutes a waiver. (*C.C.P. 1250.345.*) The statute lists the grounds for objection. (See *C.C.P. 1250.360* [where resolution of necessity is conclusive]; *C.C.P. 1250.370* [where resolution of necessity is not conclusive].)

(4) *Signing or Verification.* "Where a party is represented by an attorney, his pleading *need not be verified* but shall be *signed by the attorney* for the party. The signature of the attorney constitutes a certificate by him that he has read the pleading and that to the best of his knowledge, information, and belief there is ground to support it. If the pleading is not signed or is signed with intent to defeat the purposes of this section, it may be stricken." (*C.C.P. 1250.330.*)

(5) *Amended or Supplemental Pleadings.* The court may allow an amendment or supplement to a pleading on those "terms and conditions as may be just." In the case of the complaint, these "terms and conditions may include a change in the applicable date of valuation for the proceeding and an award of costs and litigation expenses which would not have been incurred had the proceeding as originally commenced been the same as the proceeding following such amendment or supplement." (*C.C.P. 1250.340.*) The authority to permit these changes is, however, limited as follows: (a) A public entity may add to the property sought to be taken only if it has adopted a resolution of necessity satisfying the requirements of *C.C.P. 1245.210* et seq. (*supra*, §1199) for the property to be added. (*C.C.P. 1250.340(b).*) (b) Property previously sought to be taken may be deleted only if the plaintiff has followed the procedure for partial abandonment as to that property. (*C.C.P. 1250.340(c).*)

(6) *Disclaimer.* A defendant may, at any time, file a disclaimer stating that he or she claims no interest in the property or in compensation that may be awarded. A disclaimer supersedes an answer previously filed. It need not be in a particular form, but must be signed by the defendant. (*C.C.P. 1250.325(a).*)

A disclaimer ends the defendant's right to participate in the proceeding (*C.C.P. 1250.325(b)*), and the court may implement it by appropriate orders, including an award of costs and litigation expenses (*C.C.P. 1250.325(c)*). This provision gives the court authority to facilitate the use of disclaimers in aiding the settlement of claims of relatively slight value. (Law Rev. Com. Comment.) (See C.E.B., 1 Condemnation Practice 2d, §§8.23, 8.24; Model Eminent Domain Code, §503, 13 (Part I) U.L.A. (Master Ed.), p. 53.)

(7) *Character of Proceeding.* "An action in eminent domain is not an adversary proceeding in the conventional sense, for the condemning entity is not required to assert any prior title or interest in the property. By filing the action the condemner, in effect, serves notice that it is taking title and possession of certain property, and that defendant must assert his title or interest, not to prove a right to possession, but to prove a right to be compensated for the taking. Furthermore, unnamed persons may appear as defendants and answer the complaint by asserting an interest in the property." (*San Bernardino Valley Mun. Water Dist. v. Gage Canal Co.*, *supra*, 226 C.A.2d 209.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Complaint.*

Specified allegations:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §685 et seq.

San Bernardino Valley Mun. Water Dist. case:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1143.

(2) *Answer.*

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1115.



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d. Process.

8 *Witkin Sum. Cal. Law Const Law § 1207*

[§ 1207] Process.

(1) *Form and Contents of Ordinary Summons.* The summons normally follows the form and contents of summons in civil actions. (*C.C.P. 1250.120(a)*.) (See 3 *Cal. Proc.* (4th), *Actions*, §896 et seq.; C.E.B., 1 Condemnation Practice 2d, §8.5.)

(2) *Published Summons.* The summons need not contain a description of the property; this is in the complaint served with the summons. But a copy of the complaint is not included in a published summons; hence, "[w]here process is served by publication, in addition to the summons, the publication shall describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding." (*C.C.P. 1250.120(b)*); see 3 *Cal. Proc.* (4th), *Actions*, §906.) The publication may name only the defendants to be served and describe only the property of these defendants. (*C.C.P. 1250.125*.)

In service by publication, the court also must order posting of the summons and complaint on the property and recordation of a *lis pendens*, within 10 days after the order. (*C.C.P. 1250.130*; on service by publication, see 3 *Cal. Proc.* (4th), *Actions*, §949 et seq.)

(3) *Failure To Appear After Published Summons.* A judgment against the defendant for failure to appear is conclusive only to property described in the publication. (*C.C.P. 1250.125(b)*.) However, a defendant who was served by publication and failed to appear may contest the amount of compensation within 1 year of the judgment and for good cause shown, if the defendant did not receive the offer of compensation because he or she could not be located with reasonable diligence (see *supra*, §1186). (*C.C.P. 1250.125(c)*.)

(4) *Service on Attorney General.* Where the state is a defendant, the summons and complaint must be served on the Attorney General. (*C.C.P. 1250.140*.)

(5) *Dismissal for Failure To Serve Summons.* The mandatory dismissal statute for failing to serve the summons (*C.C.P. 583.250*; see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §287 et seq.) applies in eminent domain proceedings. (*Dresser v. Superior Court* (1964) 231 C.A.2d 68, 78, 41 C.R. 473.)

(6) *Lis Pendens*. Where the service is by publication, a lis pendens must be recorded. (C.C.P. 1250.130.) In other cases, the plaintiff must record the notice "at the time of the commencement of the proceeding," and a copy of the notice must be served with the summons and complaint. (C.C.P. 1250.150.) (See C.E.B., 1 Condemnation Practice 2d, §§8.6, 8.7; 3 Cal. Proc. (4th), Actions, §344.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Form and Contents of Ordinary Summons*.

Cross-Reference: 3 Cal. Proc. (5th), Actions, §981 et seq.

(2) *Published Summons*.

Cross-References: 3 Cal. Proc. (5th), Actions, §987; 3 Cal. Proc. (5th), Actions, §1032 et seq.

(5) *Dismissal for Failure To Serve Summons*.

Cross-Reference: 6 Cal. Proc. (5th), Proceedings Without Trial, §319 et seq. (6) *Lis Pendens*.

Cross-References: 3 Cal. Proc. (5th), Actions, §371.



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e. Pretrial Settlement Offers.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1208

[§ 1208] In General.

(1) *Written Offer and Demand Are Required.* At least 20 days prior to the date of trial on issues related to compensation, the plaintiff must file and serve on the defendant its final offer of compensation and the defendant must file and serve on the plaintiff his or her final demand for compensation. (*C.C.P. 1250.410(a)*); see *Santa Clara Valley Water Dist. v. Gross* (1988) 200 C.A.3d 1363, 1369, 246 C.R. 580 [conflict of interest provision of *Govt.C. 1090* does not excuse property owner who is board member of condemnor from complying with *C.C.P. 1250.410*]; Model Eminent Domain Code, §708, 13 (Part I) U.L.A. (Master Ed.), p. 76.) The original, rather than the actual, trial date is the proper one for measuring the statutory period. (See *San Leandro v. Highsmith* (1981) 123 C.A.3d 146, 154, 176 C.R. 412; *Community Redevelopment Agency of Santa Ana v. Matkin* (1990) 220 C.A.3d 1087, 1095, 1097, 272 C.R. 1 [where trial date is continued, offer and demand are timely if filed at least 30 (now 20) days before *actual* trial date, regardless of whether earlier offer or demand was made].) (On permissible lump sum demand for both direct and inverse condemnation actions, see *People v. Sunshine Canyon* (1979) 94 C.A.3d 599, 602, 156 C.R. 552; on duty of public entity to negotiate and make precondemnation offer, see *Govt.C. 7267 et seq.*, *supra*, §1186.)

(2) *Scope of Offer and Demand.* The offer and demand must include all compensation prescribed by statute, including any compensation for loss of goodwill, and must state whether interest and costs are included. (*C.C.P. 1250.410(a)*); on costs, see *infra*, §1267; on interest, see *infra*, §1258.)

(3) *Time of Offer and Demand.* In *People v. Callahan Bros.* (1977) 69 C.A.3d 541, 544, 138 C.R. 239, decided under a predecessor statute, it was held that the requirement of filing 30 (now 20) days before trial is mandatory, and the benefits of the statute are not available to a party who files during the trial. "As a means of encouraging negotiations before trial, the Legislature put incentives into the statute. The condemnee who makes a timely final demand and goes to trial only when the offer is unreasonable has the potential of being reimbursed for expenses which he could not otherwise recover; likewise, the condemnor who makes a timely reasonable offer, whether it is accepted by the condemnee or not, may avoid having to pay the condemnee's extraordinary costs. The property owner, by not filing a final demand when he thinks the condemnor's offer is unreasonable, forfeits the possibility of recovering costs; the condemnor, by not filing a final offer, may be liable for the property owner's extraordinary costs where the owner has made a final demand." (69 C.A.3d 544.)

People v. Societa Di Unione E Beneficenza Italiana (1978) 87 C.A.3d 14, 150 C.R. 706, disagreed with the Callahan conclusion. (87 C.A.3d 22, footnote 5.) Neither party complied with the mandatory time limits, and the court held that the trial judge should determine whether the condemnor's final offer, and whether the condemnee's final demand, were reasonable. (87 C.A.3d 22.) (See *Community Redevelopment Agency of Santa Ana v. Krause* (1984) 162 C.A.3d 860, 865, 209 C.R. 1 [revised demand served 33 days before trial and filed 28 days before trial was in substantial compliance with 30 (now 20) day requirement]; *Redevelopment Agency v. Salvation Army* (2003) 103 C.A.4th 755, 773, 127 C.R.2d 30 [demand for fees and costs made within 20 days of trial on issue of agency's entitlement, under Polanco Redevelopment Act, to costs expended in removing hazardous substances from property taken was untimely under C.C.P. 1250.410(a); eminent domain action had been settled several months before and this action was not related to recovering just compensation].)

In *People v. Patton Mission Properties, Ltd.* (1979) 89 C.A.3d 204, 152 C.R. 485, plaintiff made its final offers over 6 months before trial, but defendants waited until 31 days before trial to make their demands, thus giving plaintiff only 1 day to evaluate and respond with revised offers. *Held*, under these circumstances defendants' demands should not be considered in determining reasonableness of the offers. (89 C.A.3d 212.) The court took note of the assertion of defendants' counsel that it is "common practice" for the parties to wait until the 31st day to make their offers and demands, and added: "Whether it is or is not, such practice does not demonstrate good faith, care and accuracy in determining the amount of the demand or offer. Moreover, since in this case the respondent had made its offer prior to the first trial date, appellant's adherence to such practice was incompatible with that spirit of compromise anticipated by the statute." (89 C.A.3d 213.)

(4) *Time of Acceptance.* A demand that is not revised, revoked, or superseded by a subsequent demand and that includes no time limitation may be accepted any time before trial commences. (*San Diego Gas & Elec. Co. v. Moreland Inv. Co.* (1986) 186 C.A.3d 1151, 1157, 231 C.R. 274 [demand accepted 18 months after filing].)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 876, line 10 of first full paragraph, the date of *Redevelopment Agency of San Diego v. Salvation Army* should be 2002.



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4. Commencement of Proceeding.

e. Pretrial Settlement Offers.

2. Award of Litigation Expenses.

8 Witkin Sum. Cal. Law Const Law § 1209

[§ 1209] Award of Litigation Expenses.

(1) *Basis for Award.* The defendant may move for an award of litigation expenses within 30 days after entry of the judgment. If the court finds that the plaintiff's offer was unreasonable and the defendant's demand was reasonable viewed in "light of the evidence admitted and the compensation awarded in the proceeding," it must include the defendant's litigation expenses in its award of costs. (*C.C.P. 1250.410(b)*; see *C.C.P. 1268.710*, *infra*, §1267.) In determining litigation expenses, the court must consider (a) the plaintiff's offer required by *Govt.C. 7267.2* (*supra*, §1186), (b) deposits plaintiff made pursuant to *C.C.P. 1255.010* (*infra*, §§1212, 1213), and (c) other written offers and demands filed and served before or during trial. (*C.C.P. 1250.410(c)*.) (See *Poway Unified School Dist. v. Chow* (1995) 39 *C.A.4th* 1478, 1483, 46 *C.R.2d* 651 [trial judge had discretion under *C.C.P. 473* to permit motion for litigation expenses under *C.C.P. 1250.410(b)* to be filed 1 day late, where plaintiff was not prejudiced by late filing]; for definition of "litigation expenses," see *C.C.P. 1235.140*, *supra*, §1171; on waiver of defendant's protection against assessment of costs and expenses on election of trial *de novo* after nonbinding arbitration, see *infra*, §1210.)

(2) *Demand Accepted After Trial Commenced.* In *Coachella Valley County Water Dist. v. Dreyfuss* (1979) 91 *C.A.3d* 949, 154 *C.R.* 467, after the jury had been impaneled and sworn, plaintiff accepted defendants' final statutory demand. *Held*, defendants were entitled to litigation expenses. "If the purpose of the statute is to make whole a property owner who has been required to litigate because of the condemnor's unreasonable offer, the right to recover litigation costs should hinge, not on whether the amount of compensation has been determined by a jury verdict or court finding, but on whether the property owner has been unreasonably required to litigate." (91 *C.A.3d* 957.)

(3) *Demand Accepted After Trial Date Is Continued.* In *People v. Gardella Square* (1988) 200 *C.A.3d* 559, 246 *C.R.* 139, defendant made a final demand, which plaintiff did not accept. However, after the original trial date was continued, and more than 30 days before the continued date, plaintiff accepted the original demand. *Held*, under *C.C.P. 1250.410*, the original, rather than the continued, trial date was the relevant one. However, the reasonableness of the offer and demand must be determined in light of the facts known when they were made. (200 *C.A.3d* 577, 578.) (See *Community Redevelopment Agency of Santa Ana v. Matkin* (1990) 220 *C.A.3d* 1087, 1095, 1097, 272 *C.R.* 1 [failure to make offer or demand before original trial date does not preclude offer or demand before *actual* trial date].)

(4) *Reasonableness of Offer*. A determination that the offer was reasonable, based on the fact that it was closer to the jury's award than was the defendant's final demand, is improper; reasonableness depends not only on the monetary amounts or the percentage of difference, but on the good faith, care, and accuracy in arriving at the offer and demand. (*People v. Societa Di Unione E Beneficenza Italiana* (1978) 87 C.A.3d 14, 23, 150 C.R. 706 [decided under predecessor statute]; *San Diego Metropolitan Transit Dev. Bd. v. Cushman* (1997) 53 C.A.4th 918, 62 C.R.2d 121 [great disparity between amount offered and amount awarded was less important than good faith where parties settled most of lawsuit and differed on purely legal issue of whether severance damages were owed]; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 C.A.4th 1210, 1214, 4 C.R.3d 519 [in determining reasonableness of pretrial offer, trial court must evaluate evidence relating to offer independently, rather than merely comparing jury's award with amount of pretrial offer].)

The offer was reasonable in the following cases: *Placer County Water Agency v. Hofman* (1985) 165 C.A.3d 890, 898, 211 C.R. 894 [offer was reasonable despite reservation of question of compensation for possible future damage]; *Glendale Redevelopment Agency v. Parks* (1993) 18 C.A.4th 1409, 1416, 1418, 23 C.R.2d 14 [common thread of cases is deference that reviewing court gives to trial court's decision; where final offer was 89% of award and 92% of final demand, finding of reasonableness was proper].

The offer was unreasonable in the following cases: *Community Redevelopment Agency of Santa Ana v. Krause* (1984) 162 C.A.3d 860, 866, 209 C.R. 1 [offer equal to 82% of verdict was unreasonable where agency refused to negotiate, ignored defendant's qualified expert, and used noncomparable property for valuation]; *People v. Zivelonghi* (1986) 183 C.A.3d 187, 192, 228 C.R. 72 [offer reserving right to appeal judgment on size of easement taken was unreasonable as precluding final resolution; distinguishing *Hofman*]; *People v. Andresen* (1987) 193 C.A.3d 1144, 1167, 238 C.R. 826 [offer that was less than 10% of final verdict was unreasonable]; *Contra Costa v. Pinole Point Properties* (1994) 27 C.A.4th 1105, 1115, 33 C.R.2d 38 [defendant's \$ 1 million demand was unreasonable where amount actually awarded was \$ 200,000]; *People v. Yuki* (1995) 31 C.A.4th 1754, 1764, 1767, 37 C.R.2d 616 [cases indicate that final offers of 60% or less of award are unreasonable, offers above 85% are reasonable, and offers in middle range can fall within either group, depending on other factors; where final offer was 77% of award, trial court was within its discretion in finding that offer was unreasonable]; *Ventura County Flood Control Dist. v. Campbell* (1999) 71 C.A.4th 211, 224, 83 C.R.2d 725 [district's unwillingness to consider any value for aggregate it intended to sell after acquiring parcel was unreasonable as attempt to construct flood control project at defendant's expense]; *People v. Woodson* (2001) 93 C.A.4th 954, 960, 113 C.R.2d 559 [defendant's final offer, based on appraisal of property as mobilehome park, was unreasonable under good faith, care, and accuracy test where zoning ordinance required this use to be terminated].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Basis for Award*. C.C.P. 1250.410(e), added in 2006, defines "litigation expenses" as "the party's reasonable attorney's fees and costs, including reasonable expert witness and appraiser fees."

(*New*) *Presumption of validity*: When supported by the evidence, the trial court's factual determination under C.C.P. 1250.410 is entitled to a broad presumption of validity on appeal. (*Long Beach Redevelopment Agency v. Morales* (2007) 157 C.A.4th 287, 295, 68 C.R.3d 604 [presumption of validity was inappropriate where court mistakenly calculated actual and percentage difference between offer and compensation awarded and improperly focused on conduct of agency's appraiser rather than on conduct of agency in evaluating agency's good faith, care, and accuracy in formulating final offer].)(4) *Reasonableness of Offer*. See *Inglewood Redevelopment Agency v. Aklilu* (2007) 153 C.A.4th 1095, 1117, 1118, 64 C.R.3d 519 [for owner to recover litigation expenses under C.C.P. 1250.410(b), trial court must find both that owner's demand was reasonable and that agency's offer was unreasonable; trial court may consider all aspects of bargaining posture assumed by owner prior to trial].

Offer was reasonable: See *Escondido Union School Dist. v. Casa Suen os De Oro* (2005) 129 C.A.4th 944, 986, 29 C.R.3d 89 [offer was reasonable despite significant difference between amount deposited and final award where crux of parties' disagreement was legal issue of whether manufactured homes were improvements pertaining to realty under C.C.P. 1263.210, rather than amount of offer].



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f. Alternative Dispute Resolution.

8 Witkin Sum. Cal. Law Const Law § 1210

[§ 1210] Alternative Dispute Resolution.

The parties may agree to resolve a dispute in an eminent domain proceeding through mediation or arbitration. (*C.C.P. 1250.420.*) Binding arbitration is subject to *C.C.P. 1273.010* et seq. (*C.C.P. 1250.420(b)*; see *infra*, §1268 et seq.)

Nonbinding arbitration is final unless a party moves the court for a trial within 30 days after service of the arbitrator's decision. If the party then does not obtain a more favorable judgment, that party becomes liable to the other parties for certain nonrefundable costs and fees, absent a showing of substantial economic hardship. (*C.C.P. 1250.420(c)*; on defendant's protection against assessment of costs and fees generally, see *supra*, §1209.)

The trial date of an eminent domain proceeding may be postponed to enable a party to use alternative dispute resolution procedures when the court is satisfied that (a) the parties are actively engaged in those procedures, (b) they appear to be making progress, and (c) they agree that additional time is desirable. (*C.C.P. 1250.430.*)

SUPPLEMENT: [This section is current through the latest supplement]



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g. Discovery and Exchange of Valuation Data.

8 Witkin Sum. Cal. Law Const Law § 1211

[§ 1211] Discovery and Exchange of Valuation Data.

The discovery provisions of the Eminent Domain Law (*C.C.P. 1258.010* et seq.) are fully discussed in California Evidence. (See 2 *Cal. Evidence (4th), Discovery*, §200 et seq.) They supplement and do not replace, restrict, or limit the discovery provisions available in civil actions generally. (On discovery in general, see 2 *Cal. Evidence (4th), Discovery*, §1 et seq.)

The provisions of the Eminent Domain Law are primarily concerned with the exchange of lists of expert witnesses and statements of valuation data. (On time for exchange, see 2 *Cal. Evidence (4th), Discovery*, §202; on demand and compliance, see 2 *Cal. Evidence (4th), Discovery*, §201 et seq.; on failure to comply, see 2 *Cal. Evidence (4th), Discovery*, §§207, 208.) (See Model Eminent Domain Code, §§701 et seq. [discovery], 1101 et seq. [valuation data], 13 (Part I) U.L.A. (Master Ed.), pp. 71 et seq., 108 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Deposit and Possession Before Judgment.

a. Deposit of Probable Compensation.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1212

[§ 1212] In General.

"At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. ... The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so." (*C.C.P. 1255.010(a)*; see Model Eminent Domain Code, §601, 13 (Part I) U.L.A. (Master Ed.), p. 61; for procedure, see *infra*, §1213.) The deposit does not affect the plaintiff's rights to appeal from the judgment, to move to abandon, or to move for a new trial. (*C.C.P. 1255.080*.)

To encourage the plaintiff to make an adequate deposit, the plaintiff is protected from the defendant's use of evidence at trial on the issue of compensation, as follows:

(1) The amount deposited or withdrawn "may not be given in evidence or referred to in the trial." (*C.C.P. 1255.060(a)*.)

(2) An appraisal report, written statement and summary of an appraisal, or other statements made in connection with the deposit or withdrawal may not be considered an admission of a party. (*C.C.P. 1255.060(b)*.)

(3) The person who made the report or statement and summary cannot, over objection, be called as an opinion witness by the other party. (*C.C.P. 1255.060(c)*.)

(4) If the person who prepared the report or other statement is called to testify on compensation, the report or other statement may be used for impeachment. (*C.C.P. 1255.060(c)*.) (See *Contra Costa v. Pinole Point Properties* (1994) 27 C.A.4th 1105, 1112, 33 C.R.2d 38 [where condemnor made deposit on basis of higher of two appraisals, trial judge properly determined that lower appraisal was made "in connection with" deposit, for purposes of statute's prohibition of impeachment by reference to appraisal report].)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Procedure.

8 Witkin Sum. Cal. Law Const Law § 1213

[§ 1213] Procedure.

(1) *Appraisal and Statement or Summary.* Before making a deposit, the plaintiff must have an expert qualified to express an opinion on the value of the property (a) "make an appraisal of the property," and (b) "prepare a written statement of, or summary of the basis for, the appraisal." (*C.C.P. 1255.010(b)*.) The statement or summary is necessary to enable the plaintiff to comply with the notice requirement (see *infra*, this section), and may be made either by a member of the condemnor's appraisal staff or by an independent appraiser. (Law Rev. Com. Comment.)

The statement and summary must contain sufficient detail to show the basis for the appraisal, including the following:

(a) "The date of valuation, highest and best use, and applicable zoning." (*C.C.P. 1255.010(b)(A)*.)

(b) "The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the appraisal." (*C.C.P. 1255.010(b)(B)*.)

(c) "If the appraisal includes compensation for damages to the remainder, the compensation for the property and for damages to the remainder separately stated, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits." (*C.C.P. 1255.010(b)(C)*.)

(2) *Deposit Without Statutory Compliance.* A deposit may be made on order of the court, without an appraisal report or statement and summary, on noticed motion or on *ex parte* application in an emergency. The plaintiff must present "facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the probable amount of compensation that the plaintiff, in good faith, estimates will be awarded in the proceeding." In its order, the court must require that the plaintiff comply with *C.C.P. 1255.010(b)* "within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by" the statute be deposited within that time. (*C.C.P. 1255.010(c)*.)

(3) *Service of Notice of Deposit.* The plaintiff must serve a notice of deposit, stating the date and amount, on all parties who have appeared, and on those who appear thereafter. Proof of service and notice of deposit must be filed with the court. (C.C.P. 1255.020(a).)

The notice must be accompanied by the written statement or summary required by C.C.P. 1255.010. (C.C.P. 1255.020(b).) If the plaintiff has obtained an order deferring completion of the statement or summary, the plaintiff, on making the deposit, must include a copy of all affidavits on which the order was based. (C.C.P. 1255.020(c)(1).) Thereafter, on completion of the written statement or summary, it must be served. (C.C.P. 1255.020(c)(2).)

(4) *Increase or Decrease in Amount.* At any time after a deposit has been made, the court must, on motion of the plaintiff or of a "party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding." The motion must be supported with sufficient detail to show the basis for the motion. This detail is essentially the same as that required to support an appraisal pursuant to C.C.P. 1255.010. (C.C.P. 1255.030(a).) (On redetermination where prejudgment possession continues after judgment, see *People v. Zivelonghi* (1986) 181 C.A.3d 1035, 1045, 1046, 226 C.R. 748 [redetermination includes judgment and interest but excludes costs and litigation expenses].)

If the plaintiff *has not taken possession* and "the court determines that the probable amount of compensation exceeds the amount deposited, the court may order the plaintiff to increase the deposit or may deny possession" until the increase has been made. (C.C.P. 1255.030(b).)

If the plaintiff *has taken possession* and the court determines that the probable amount of compensation exceeds the amount deposited, the court must order an increase in the deposit. If this is not done within 30 days (or such longer time as the court allowed), the defendant may serve on the plaintiff a notice of election to treat the failure as an abandonment; and, if the plaintiff does not cure its failure within 10 days after receipt of the notice, the court, on motion of the defendant, must enter judgment dismissing the proceeding and awarding the defendant litigation expenses and damages as provided in C.C.P. 1268.610 and 1268.620 (infra, §§1265, 1266). (C.C.P. 1255.030(c).)

After a defendant withdraws any amount deposited (see infra, §1215), the plaintiff's remedy for excessive withdrawal is postponed until the final determination of the award in the proceeding. (C.C.P. 1255.280, infra, §1215.) For this reason, a determination or redetermination that the amount of probable compensation is less than the sum already withdrawn is prohibited. However, nothing prevents the court from determining that probable compensation is greater than the amount withdrawn. (C.C.P. 1255.030(d).)

If the court determines that the amount deposited should be decreased, it may permit the plaintiff to withdraw the excess not already withdrawn by the defendant. (C.C.P. 1255.030(e).)

The plaintiff may increase the amount deposited at any time without a motion. Notice of the increase must be served. (C.C.P. 1255.030(f).) (See *San Diego v. Rancho Vista Del Mar* (1993) 16 C.A.4th 1046, 1067, 20 C.R.2d 675 [interest may be included in order increasing amount of deposit]; *Whittier Redevelopment Agency v. Oceanic Arts* (1995) 33 C.A.4th 1052, 1055, 1058, 1060, 39 C.R.2d 396 [under C.C.P. 1255.030, trial judge may order increase in deposit "at any time," including after judgment and pending appeal; agreeing with result in *People v. Zivelonghi*, supra].)

(5) *Deposit in Treasury.* The court orders the money deposited in the State Treasury or, on written request of the plaintiff, in the county treasury. (C.C.P. 1255.070.) (See *Santa Clara v. Santa Clara* (1969) 1 C.A.3d 493, 496, 81 C.R. 643 [county clerk and county treasurer were not liable for loss of interest suffered by reason of deposit in county treasury where court order did not specify place of deposit].)

(6) *Investment of Deposit.* Prior to entry of judgment and on notice to the other parties, a defendant who has an interest in the property for which a deposit has been made may move the court to have the deposit invested for the benefit of all the defendants. (C.C.P. 1255.075(a).) The court has discretion to grant the motion subject to appropriate

terms and conditions. (*C.C.P. 1255.075(b)*.) The court also specifies the manner of investment, which is limited to U.S. Government obligations or interest-bearing accounts in an institution with federally insured accounts (even though the investment, e.g., a certificate of deposit, is not covered by such insurance). (*C.C.P. 1255.075(c)*); see Law Rev. Com. Comment.) (See *Redevelopment Agency of Fresno v. Erganian* (1989) 211 C.A.3d 166, 173, 259 C.R. 213 [property owner who chooses to leave money on deposit rather than withdraw it is entitled to legal rate rather than market rate of interest].)

The investment has the same consequences as a withdrawal of the deposit (waiver of defenses, right of plaintiff to take possession, cessation of interest). (See *infra*, §1215.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Increase or Decrease in Amount.* See *Santa Clarita v. NTS Technical Systems* (2006) 137 C.A.4th 264, 271, 40 C.R.3d 244 [date of valuation under early possession statutes is date on which contemnor deposits probable amount of compensation, and subsequent supplemental deposit does not change valuation date].



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a. Deposit of Probable Compensation.

3. Deposit on Demand of Homeowner or Lessor.

8 Witkin Sum. Cal. Law Const Law § 1214

[§ 1214] Deposit on Demand of Homeowner or Lessor.

(1) *Demand of Homeowner.* A special procedure is provided for a homeowner's demand of a deposit for the probable amount of compensation, where the property is a dwelling containing not more than two residential units, and the dwelling or one of its units is the defendant's residence. (See *C.C.P. 1255.040*; Law Rev. Com. Comment.)

(a) The defendant serves a notice on the plaintiff, requiring a deposit and specifying the date he or she desires it to be made, which may not be earlier than 30 days after the date of service of the notice. (*C.C.P. 1255.040(a)*.) Service is made as provided by *C.C.P. 1255.020(a)* (see *supra*, §1213). (*C.C.P. 1255.040(f)*.)

(b) If the plaintiff makes a timely deposit it may, on an *ex parte* application, obtain an order authorizing possession 30 days after the date specified by the defendant or a later date requested by the plaintiff. (*C.C.P. 1255.040(b)*.)

(c) If the deposit is not made on the specified date or a later date specified by the court on motion and good cause shown, the compensation awarded the defendant draws legal interest from that date, without offset for rents or other income or the value of continued possession. (*C.C.P. 1255.040(c)*.)

(d) If the proceeding is abandoned, the defendant may recover interest as costs. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded, the interest is computed on the amount of that award; otherwise, it is computed on the probable amount of compensation as determined by the court. (*C.C.P. 1255.040(d)*.)

(e) Service of a notice constitutes a waiver by operation of law, conditioned on subsequent deposit by the plaintiff of the probable amount of compensation, of all claims and defenses in favor of the defendant except his or her claim for greater compensation. (*C.C.P. 1255.040(e)*.)

(f) No notice may be served after entry of judgment unless the judgment is reversed, vacated, or set aside and no other judgment has been entered. (*C.C.P. 1255.040(g)*.)

(2) *Demand of Lessor.* A special procedure is provided by statute for a lessor's demand of a deposit for the probable

amount of compensation, where the property to be taken is subject to a leasehold interest. The purpose of this statute is to protect the lessor from the hardship that may result from rental losses during the condemnation proceedings. (See *C.C.P. 1255.050*; Law Rev. Com. Comment.)

The procedure is the same as that provided in *C.C.P. 1255.040* for a homeowner's demand. However, if the plaintiff fails to make the deposit, the interest is subject to an offset of the lessor's net rental profits. (*C.C.P. 1255.050*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Demand of Homeowner.*(b) *C.C.P. 1255.040(b)*, as amended in 2006, no longer provides for obtaining the order of possession on an ex parte application.



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4. Withdrawal of Deposit.

8 Witkin Sum. Cal. Law Const Law § 1215

[§ 1215] Withdrawal of Deposit.

(1) *Application.* Prior to entry of judgment, a defendant may apply for withdrawal of all or part of the amount deposited. A verified application must set forth the applicant's interest in the property and request a stated amount. (*C.C.P. 1255.210.*) (On withdrawal of deposit after entry of judgment, see *C.C.P. 1268.140*, *infra*, §1256.) The applicant must serve a copy of the application on the plaintiff. (*C.C.P. 1255.210.*)

(2) *Undertaking.* If the court determines that an applicant is entitled to withdraw a portion of a deposit claimed by another party or to which another person may be entitled, it may require an undertaking to secure payment of an excess withdrawal. If withdrawal is authorized without personal service of the application on a party, the court may also require the undertaking to indemnify the plaintiff against any liability it may incur under *C.C.P. 1255.230* (*infra*, this section). The amount of the undertaking is fixed by the court, but may not exceed (a) the amount of the excess, if executed by an admitted surety insurer, or (b) twice the amount of the excess, if executed by two or more sufficient sureties. (*C.C.P. 1255.240.*) If the original deposit is increased under *C.C.P. 1255.030* (*supra*, §1213) and the amount sought to be withdrawn exceeds the amount of the original deposit, an applicant must file an undertaking to secure repayment of any excess withdrawal, with interest. Two or more applicants may jointly file a single undertaking. (*C.C.P. 1255.250.*)

(3) *Objection by Plaintiff: Undertaking Insufficient.* Within 20 days after service of the application, the plaintiff may file an objection on the ground that the amount of an undertaking is insufficient, the sureties are insufficient, or an undertaking is required but has not been filed. (*C.C.P. 1255.230(b)(2), (3).*)

(4) *Objection by Plaintiff: Other Persons Have Interests.* Within 20 days after service of the application, the plaintiff may file an objection on the ground that other parties are known or believed to have an interest in the property. (*C.C.P. 1255.230(b)(1).*) The plaintiff must attempt to personally serve them with a 10-day notice to appear or waive their rights. The plaintiff must also file and serve on the applicant a list of parties served and not served, and the applicant may serve those whom the plaintiff has been unable to serve. (*C.C.P. 1255.230(c).*)

(5) *Appearance and Objection by Others.* If a party objects to the withdrawal, or if the plaintiff requests, the court

holds a hearing and determines the amount, if any, to be withdrawn, and by whom. (*C.C.P. 1255.230(d)*.)

(6) *Effect of Withdrawal.* (a) Parties properly served have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. However, the plaintiff remains liable to parties with an interest of record who are not served. (*C.C.P. 1255.230(c)*.) (b) If part of the deposit is withdrawn, the receipt constitutes "a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation." (*C.C.P. 1255.260*.) (See Model Eminent Domain Code, §§605, 606, 13 (Part I) U.L.A. (Master Ed.), pp. 65, 66.)

Defendant condemnee's withdrawal of deposited probable compensation under *C.C.P. 1255.260* does not waive his or her right to request a transfer of the proceeding to a neutral county. (*Clayton v. Superior Court* (1998) 67 C.A.4th 28, 31, 34, 78 C.R.2d 750 [right to have monetary issues litigated in neutral forum is not equivalent of "claim" or "defense" to condemnation action].)

(7) *Order.* The court orders payment of the amount to which the applicant is entitled. (*C.C.P. 1255.220*.) Withdrawal may not be ordered until 20 days after service of the application on the plaintiff or until the time for all objections has expired, whichever is later. (*C.C.P. 1255.230(a)*.)

(8) *Return of Excess After Judgment.* If a party has withdrawn more than the amount to which he or she is entitled as finally determined in the proceeding, the excess is paid to the parties entitled to it, and the court must enter judgment accordingly. (*C.C.P. 1255.280(a)*.) An excess amount paid to one defendant includes legal interest from the date of withdrawal by another defendant, and an excess amount paid to the plaintiff includes interest from the date of withdrawal to the extent the amount is attributable to an increase in the original deposit under *C.C.P. 1255.030* (supra, §1213) on motion of the party obligated to pay. (*C.C.P. 1255.280(b)*.) (See 99 A.L.R.2d 886 [condemnor's right to interest on excess deposit].) If the judgment is not paid within 30 days, the court may enter judgment against the sureties, if any. (*C.C.P. 1255.280(c)*.) The court may also grant a stay of execution, up to 1 year, of any excess withdrawal to be paid to the plaintiff. (*C.C.P. 1255.280(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Effect of Withdrawal.* See *Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 C.4th 648, 666, 54 C.R.3d 752, 151 P.3d 1166 [waiver rule of *C.C.P. 1255.260* does not impair owner's constitutional right to prompt release of deposited funds or impose unconstitutional choice on owner]; *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 C.A.4th 1111, 1139, 65 C.R.3d 372 [property owner's consent to bank's withdrawal of portion of deposit to pay off loan on property mandated waiver of owner's future right to object to taking].



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5. Deposit and Possession Before Judgment.

b. Possession Prior to Judgment.

1. Application and Order.

8 Witkin Sum. Cal. Law Const Law § 1216

[§ 1216] Application and Order.

(1) *Constitutional Authority.* "The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." (Cal. Const., Art. I, §19.)

A condemnation action is the only legal procedure provided in California for the taking of private property for public use. Hence, even if a deposit is made, the taking may not be accomplished by means of an injunction. (See *Needles v. Griswold* (1992) 6 C.A.4th 1881, 1894, 1895, 8 C.R.2d 753, supra, §1163.)

(2) *Power of Court.* "The court in which a proceeding in eminent domain is brought has the power to: (a) Determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with this title. (b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order for possession as a matter of right." (C.C.P. 1230.050.) The "appropriate process" includes writs of possession (see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §317 et seq.), and orders for possession under C.C.P. 1255.410 et seq. (Law Rev. Com. Comment.) (On order for possession after judgment, see infra, §1257.)

(3) *Application and Conditions.* The plaintiff may apply ex parte for an order for possession at the time of filing the complaint or at any time after filing the complaint but prior to entry of judgment. The two conditions are that the plaintiff (a) is entitled to take the property by eminent domain, and (b) has made a deposit that satisfies C.C.P. 1255.010 et seq. (see supra, §1212). (C.C.P. 1255.410(a).) The plaintiff is also entitled to possession in either of two special situations: (a) Each defendant entitled to possession has expressed in writing his or her "willingness to surrender possession of the property on or after a stated date." (b) Each defendant has withdrawn a portion of the deposit. (C.C.P. 1255.460(a).)

(4) *Order.* The order must describe the property, which may be by reference to the complaint, and must state the date authorized for possession. (C.C.P. 1255.410(b).) Where possession is by consent or after withdrawal of a deposit, the order must also state that it is made under C.C.P. 1255.460. (C.C.P. 1255.460(b).) Unless the plaintiff requests a later date, the date of authorized possession by consent is the date stated by the defendant, and the date of possession

after withdrawal of a deposit is the earliest date on which the plaintiff would be entitled to take possession under *C.C.P. 1255.450(c)*. (*C.C.P. 1255.460(b)*.) (On nonappealability of order, and review by extraordinary writ, see decisions cited in the Law Rev. Com. Comment on *C.C.P. 1255.410(a)*.)

(5) *Effect of Order and Possession*. The plaintiff, by taking possession, does not waive the right to appeal from the judgment, to move to abandon, or to request a new trial. (*C.C.P. 1255.470*.) The determination of the right to take by eminent domain--a condition of the order--is preliminary only. "The granting of an order for possession does not prejudice the defendants' right to demur to the complaint or to contest the taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant." (Law Rev. Com. Comment.) (See *Morgan Hill v. Alberti* (1989) 211 C.A.3d 1435, 1437, 260 C.R. 42 [landowner may seek relief from "quick-take" under *C.C.P. 1255.420* or *1255.430* (see *infra*, §1218), but order itself is not appealable].)

(6) *Emergency Situations*. "Nothing in this article limits the right of a public entity to exercise its police power in emergency situations." (*C.C.P. 1255.480*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Power of Court*.

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §325 et seq.

(3) *Application and Conditions*. *C.C.P. 1255.410(a)*, as amended in 2006, no longer provides for obtaining the order of possession on an ex parte application.

(3a) *(New) Motion*. *C.C.P. 1255.410* was substantially amended in 2006. The statute now requires that the motion for an order of possession describe the property sought to be taken, which may be by reference to the complaint, and the date after which the plaintiff is seeking to take possession. The motion must include a statement regarding the property owner's right to oppose the order, which includes notice of the 30-day time limit for filing a written opposition. (*C.C.P. 1255.410(a)*); on serving and filing opposition and response to opposition, see *C.C.P. 1255.410(c)*.) The plaintiff must serve a copy of the motion on the record owner and on any occupants. The plaintiff must set the hearing on the motion not less than 60 days after service for unoccupied property and 90 days after service for an occupied dwelling, farm, or business operation. (*C.C.P. 1255.410(b)*.)

(4) *Order*. *C.C.P. 1255.410(b)*, as amended in 2006, no longer requires that the order describe the property and state the date authorized for possession; those requirements are stated in *C.C.P. 1255.460*. The remainder of *C.C.P. 1255.460* stated in the text has been deleted.

When the motion is not opposed within 30 days of service, the court must make an order for possession if it finds that (a) the plaintiff is entitled to take the property by eminent domain, and (b) the plaintiff's deposit satisfies statutory requirements. (*C.C.P. 1255.410(d)(1)*.) When the property owner or occupant files a timely opposition to the motion, the court also must consider at the hearing (a) whether there is an overriding need for the plaintiff to possess the property prior to final judgment, and whether the plaintiff will suffer substantial hardship if possession is limited or denied, and (b) whether the plaintiff's hardship from limiting or denying possession outweighs any hardship to the property owner or occupant from granting possession. (*C.C.P. 1255.410(d)(2)*.)

(5) *Effect of Order and Possession*. *C.C.P. 1255.420* and *1255.430* were repealed in 2006.



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b. Possession Prior to Judgment.

2. Service of Order.

8 Witkin Sum. Cal. Law Const Law § 1217

[§ 1217] Service of Order.

(1) *Persons Entitled to Service.* The plaintiff must serve a copy of the order on (a) the record owner (defined in *C.C.P. 1255.450(a)*) and (b) any occupants. (*C.C.P. 1255.450(b)*.)

(2) *Manner of Service.* Personal service is required with these exceptions: (a) Where the person has previously appeared or been served with summons; service may be made on that person and his or her attorney by mail. (b) Where the person resides out of the state or has departed or cannot with due diligence be found within the state; service may be made by registered or certified mail to the person's last known address. (*C.C.P. 1255.450(d)*.) A single service on or mailing to one of several persons with a common business or residence address is sufficient. (*C.C.P. 1255.450(f)*.) Service may be made with or following service of summons. (*C.C.P. 1255.450(b)*.)

(3) *Time of Service.* Special time provisions are made for particular situations:

(a) "If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation," not less than 90 days prior to the time possession is to be taken. (*C.C.P. 1255.450(b)*.) (See *Govt.C. 7267.3*, *infra*, §1271 [90-days' written notice is required for removal from home, business, or farm].)

(b) In all other cases, not less than 30 days prior to the time possession is to be taken. (*C.C.P. 1255.450(b)*.)

(c) If the order was made after deposit on notice of a homeowner or deposit by a lessor (*supra*, §1214), or after vacation of the property or withdrawal of the deposit (*supra*, §1216), not less than 30 days prior to the time possession is taken. (*C.C.P. 1255.450(c)*.)

(4) *Lesser Notice Where Urgent Need For Possession.* Notwithstanding the time limits for notice prescribed by *C.C.P. 1255.450*, "if the court finds that the plaintiff has an urgent need for possession of property and that possession will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken or the larger parcel of which it is a part, the court may make an order for possession of such property upon such notice, not less than three days, as the court deems appropriate under the circumstances of the case." (*C.C.P. 1255.410(c)*); see

Israni v. Superior Court (2001) 88 C.A.4th 621, 638, 106 C.R.2d 48, *infra*, §1218 ["urgent need" contemplates at least temporal or immediate need, and includes substantive component related to nature of public necessity to be served by taking; in determining "urgent need," it is appropriate to use criteria listed in *C.C.P. 1255.420* (*infra*, §1218) relating to substantial hardship from immediate taking].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Time of Service*. *C.C.P. 1255.450(b)*, as amended in 2006, requires service of the order of possession for occupied dwellings, farms, and businesses not less than 30 days prior to the time possession is to be taken under the order, and in all other cases, not less than 10 days prior to that time.

(4) *Lesser Notice Where Urgent Need for Possession*. *C.C.P. 1255.410(c)* was amended and relettered in 2006 as *C.C.P. 1255.410(e)*. The statute now provides that an emergency order of possession may be granted on ex parte application of specified utilities as appropriate under the circumstances on a finding that there is an urgent need for possession and that it "will not displace or unreasonably affect any person in actual and lawful possession." (*C.C.P. 1255.410(e)*.)

C.C.P. 1255.420 was repealed in 2006.



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b. Possession Prior to Judgment.

3. Stay and Vacation of Order.

8 Witkin Sum. Cal. Law Const Law § 1218

[§ 1218] Stay and Vacation of Order.

(1) *Stay For Hardship.* A defendant or occupant may move for relief against an ex parte order for possession on the ground that taking possession at the time specified creates a substantial hardship. The motion for relief must be made not later than 30 days after service of the order for possession. The court may grant relief on dual findings of fact: (a) that the hardship to the defendant or occupant is substantial, and (b) that it is not outweighed by the plaintiff's need for early possession. If relief is granted, it may consist of a stay of the order or the imposition of terms and conditions limiting its operation; e.g., permitting the plaintiff and defendant to have possession of portions of the property or to have joint use. (*C.C.P. 1255.420*; see Law Rev. Com. Comment.)

Relief may be denied if, on "considering all relevant facts (including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan), the court further determines (a) that the plaintiff needs possession of the property within the time specified in the order for possession and (b) that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would be substantial." (*C.C.P. 1255.420*.)

To justify a stay order, "substantial hardship," as used in *C.C.P. 1255.420*, requires the hardship to have "a specific relationship to the particular interval between the application" for the possession order "and its proposed effective date." The statute does not "require or allow a determination that a substantial hardship to the property owner may arise out of indirect effects of existing arrangements that do not depend mainly upon the effective date" of the possession order. (*Israni v. Superior Court* (2001) 88 C.A.4th 621, 642, 106 C.R.2d 48.)

(2) *Stay Where Right To Take Is Contested.* If the plaintiff has been authorized to take possession of property under *C.C.P. 1255.410* "and the defendant has objected to the plaintiff's right to take the property by eminent domain, the court, if it finds there is a reasonable probability the defendant will prevail, shall stay the order for possession until it has ruled on the defendant's objections." (*C.C.P. 1255.430*.) Because the hearing on the right to take has priority (see *C.C.P. 1260.110*, *infra*, §1220), the stay will be necessary only if the objections are not finally resolved by the date of possession. (Law Rev. Com. Comment.)

(3) *Vacation Where Conditions Are Not Satisfied.* The order for possession is issued ex parte on a showing by the plaintiff alone. (See *C.C.P. 1255.410(a)*, supra, §1216.) If, thereafter, on motion of the defendant or on its own motion, the court determines that the conditions of *C.C.P. 1255.410* were not satisfied, it must vacate the order. (*C.C.P. 1255.440.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Stay for Hardship.* *C.C.P. 1255.420* was repealed in 2006.

(2) *Stay Where Right To Take Is Contested.* *C.C.P. 1255.430* was repealed in 2006.(3) *Vacation Where Conditions Are Not Satisfied.* *C.C.P. 1255.410(a)*, as amended in 2006, no longer provides for obtaining the order of possession on an ex parte application. (See Supp., supra, §1216.)



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5A. (New) Owner's Right to Leaseback.

8 Witkin Sum. Cal. Law Const Law § 1218A

[§ 1218A] (New) Owner's Right to Leaseback.

C.C.P. 1263.615, added in 2006, requires a public entity acquiring property in eminent domain to offer a 1-year leaseback agreement to the owner, unless the public entity states in writing that development or public use of the property is scheduled to begin within 2 years. (*C.C.P. 1263.615(a)*.) This offer is subject to the owner's payment of fair market rent and compliance with statutory conditions, including paying a reasonable security deposit and maintaining adequate insurance. (*C.C.P. 1263.615(a), (c)*.)

Subject to the scheduled development or public use of the property, a leaseback agreement may be renewed for additional 1-year terms. The public entity must give notice at least 60 days prior to the lease termination date. The public entity's failure to extend the lease or give the required notice of termination extends the lease for 60-day periods. (*C.C.P. 1263.615(d)*.) A lessee who holds over after expiration of the lease is subject to an unlawful detainer action and for holdover damages. (*C.C.P. 1263.615(e)*.)

A leaseback agreement does not affect the amount of compensation otherwise payable for taking the property. (*C.C.P. 1263.615(f)*.) Additional goodwill does not accrue during the lease period. (*C.C.P. 1263.615(c)(5)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Trial.

a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1219

[§ 1219] In General.

(1) *Trial Preference*. For trial setting purposes, proceedings under the Eminent Domain Law "take precedence over all other civil actions" so that they can be "quickly heard and determined." (*C.C.P. 1260.010*.) (See *Swartzman v. Superior Court* (1964) 231 C.A.2d 195, 199, 41 C.R. 721 [cause specifically set to give trial date within 1 year, thus establishing valuation as of date of summons]; 7 *Cal. Proc.* (4th), *Trial*, §76 et seq.)

(2) *Issues Triable by Court and Jury*. The action is triable by a jury unless a jury is waived. (Cal. Const., Art. I, §19.) The only issue for the jury is valuation; all others are tried by the court. (*People v. Volz* (1972) 25 C.A.3d 480, 487, 102 C.R. 107; see *Coachella Valley Water Dist. v. Western Allied Properties* (1987) 190 C.A.3d 969, 976, 235 C.R. 725 [evidentiary rulings preventing defendant from introducing evidence of alternative flood control proposals for property taken for flood control channel precluded jury access to all relevant evidence on fair market value of property, thus denying jury trial on issue of just compensation].)

(3) *Procedure at Trial*. The ordinary rules of practice govern eminent domain proceedings (*C.C.P. 1230.040*, supra, §1172), except that the defendant commences and concludes the argument (*C.C.P. 1260.210(a)*, infra, §1221). (On expert testimony, and evidence admissible on direct and cross-examination, see *Ev.C. 810* et seq.; 1 *Cal. Evidence* (4th), *Opinion Evidence*, §98 et seq.; on jury instructions, see supra, §1173; see generally, C.E.B., 1 *Condemnation Practice* 2d, §9.20 et seq.)

The provisions on deposit of probable compensation (see supra, §1212 et seq.) contain a restriction on trial evidence. The amount deposited or withdrawn may not be given in evidence or referred to at trial on the issue of compensation. (*C.C.P. 1255.060*, supra, §1212.)

(4) *Consolidated Proceedings: Issues of Compatibility and More Necessary Public Use*. Where two proceedings to acquire the same property are consolidated under *C.C.P. 1048* (see 4 *Cal. Proc.* (4th), *Pleading*, §306), *C.C.P. 1260.020* sets the following procedure:

(a) First, the court must determine whether the public uses are compatible within the meaning of *C.C.P. 1240.510* et seq. (supra, §1192). If so, it must permit the proceeding to continue with the plaintiffs acting jointly, and must

"apportion the obligation to pay any award in proportion to the use, damage, and benefits attributable to each plaintiff." (C.C.P. 1260.020(a).)

(b) If the court determines that the uses are not all compatible, it must further determine which is the more necessary public use within the meaning of C.C.P. 1240.610 et seq. (supra, §1194). It must then (1) permit the plaintiff alleging the more necessary public use, and other plaintiffs alleging compatible uses, to continue the proceeding, and (2) dismiss the proceeding as to the other plaintiffs. (C.C.P. 1260.020(b).)

(5) *Issue of Character of Improvements.* If the parties are unable to agree on whether particular property is an improvement pertaining to the realty, the issue may be promptly resolved by a hearing on noticed motion. (a) The motion may be made by either party, not later than 30 days before the date specified in an order for possession. (b) It must be heard no sooner than 10 days and no later than 20 days after service of the notice of motion. (c) The court may consider "any relevant evidence, including a view of the premises and property." (C.C.P. 1260.030.)

West's Key Number Digest, Constitutional Law k.228, 281

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Trial Preference.*

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §66 et seq.(4) *Consolidated Proceedings: Issues of Compatibility and More Necessary Public Use.*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §342.



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6. Trial.

b. Contesting Right To Take.

8 Witkin Sum. Cal. Law Const Law § 1220

[§ 1220] Contesting Right To Take.

(1) *Prior Hearing and Special Setting.* Where objections to the right to take are raised (see *C.C.P. 1250.350* et seq., supra, §1206), they must be heard and determined prior to determining compensation, unless the court orders otherwise. (*C.C.P. 1260.110(a)*.) The court may, after a hearing on a party's noticed motion, specially set these objections for trial. (*C.C.P. 1260.110(b)*.) (On special setting under C.R.C., Rule 375, see 7 *Cal. Proc. (4th)*, Trial, §83.)

(2) *Admissible Evidence.* In *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 C.A.4th 141, 43 C.R.2d 366, plaintiff agency, desiring to acquire an easement over defendant's property, held a hearing, at which defendant introduced a four-page document as evidence. At the conclusion of the hearing, plaintiff adopted a resolution of necessity, and then filed a complaint in eminent domain. At trial, defendant made several objections on various grounds, but was allowed to introduce as evidence only the four-page document that it had produced at the hearing. *Held*, this was improper.

(a) A resolution of necessity is conclusive proof that (1) public interest and necessity require the project; (2) the project is planned or located in the manner that will be compatible with the greatest public good and the least private injury; and (3) the property sought is necessary for the project. Under *C.C.P. 1245.255*, the resolution can be judicially reviewed for gross abuse, i.e., whether it is arbitrary, capricious, or entirely lacking in evidentiary support. In other words, review of the resolution's validity is limited to a review of the agency's proceedings, and no new evidence may be admitted. (37 C.A.4th 150.)

(b) However, the property owner may raise objections at trial that do not relate to the validity of the resolution of necessity. The grounds for these objections are specified in *C.C.P. 1250.360*, and, as the legislative committee comments to this statute make clear, evidence may be introduced on these matters, as well as on other matters not covered in the *Eminent Domain Law*. (37 C.A.4th 151.)

(c) Here, defendant raised many of the objections specified in the statute, as well as other affirmative defenses. For example, defendant alleged that the stated purpose was not a public use, that the purpose of the taking was for the private benefit of a third party, and that plaintiff did not intend to devote the property to the stated purpose. Defendant was entitled to introduce evidence on these matters. The trial judge took the standard of review associated with a

resolution of necessity, and wrongly applied it, in the trial as a whole, to exclude evidence, no matter what the issue. (37 C.A.4th 152.)

(3) *Determination That Plaintiff Is Entitled.* If the court determines that the plaintiff has the right to take, it must so order. (C.C.P. 1260.120(b).)

(4) *Determination That Plaintiff Is Not Entitled: Dismissal or Conditional Dismissal.* In the absence of special circumstances, a determination that the plaintiff does not have the right to take the property is followed by *immediate dismissal* of the proceeding. (C.C.P. 1260.120(c)(1).) But the court has discretion to take the less drastic action of ordering *conditional dismissal* of the proceeding unless prescribed corrective and remedial action "has been taken within the period prescribed by the court in the order." The order may impose "such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constituted the basis of the objection to the right to take." (C.C.P. 1260.120(c)(2).) (See *Lincoln v. Barringer* (2002) 102 C.A.4th 1211, 1233, 126 C.R.2d 178 [trial court erred in entering unconditional dismissal of condemnation proceeding after finding that plaintiff's second resolution of necessity, for remainder of defendant's property, failed because remainder did not constitute uneconomical remnant under C.C.P. 1240.410; plaintiff should have been allowed to amend complaint to refer to initial resolution of necessity for partial take as permitted by C.C.P. 1260.120].)

"This authority does not permit the court to create a right to acquire where none exists, but it does authorize the court to grant leave to the plaintiff to amend pleadings or take other corrective action that is just in light of all of the circumstances of the case. The court may frame its order in whatever manner may be desirable. ... For example, if the resolution of necessity was not properly adopted, the court may, where appropriate, order that such a resolution be properly adopted within such time as is specified by the court and that, if a proper resolution has not been adopted within the time specified, the proceeding is dismissed. The plaintiff is not required to comply with an order made under paragraph (2), but a failure to comply results in a dismissal of the proceeding as to that property which the court has determined the plaintiff lacks the right to acquire." (Law Rev. Com. Comment.)

(5) *Separate Assessment of Elements.* As far as practicable, the trier of fact must assess separately each of the following:

(a) Compensation for property taken, as required by C.C.P. 1263.310 et seq. (infra, §1229). (C.C.P. 1260.230(a).)

(b) Where the property is part of a larger parcel, the amount of damage, if any, to the remainder, as required by C.C.P. 1263.410 et seq. (infra, §1236), and the amount of benefit, if any, to the remainder, as required by C.C.P. 1263.410 et seq. (infra, §1243). (C.C.P. 1260.230(b).)

(c) Compensation for the loss of goodwill, if any, as required by C.C.P. 1263.510 et seq. (infra, §1245). (C.C.P. 1260.230(c).) (See BAJI, No. 11.96.) (On right of party to request special interrogatories and obtain special findings, see Law Rev. Com. Comment.)

(6) *Compensation for Deceased and Unknown Persons.* Where unknown or deceased defendants have been joined but have not appeared personally or by a personal representative (see C.C.P. 1250.220, supra, §1205):

(a) The court must determine (1) the extent of their interests in the property taken, or in the remainder if the property is part of a larger parcel; and (2) the compensation to be awarded for those interests. (C.C.P. 1260.240.)

(b) "The court may determine the extent and value of the interests of all such defendants in the aggregate without apportionment between the respective defendants." (C.C.P. 1260.240.)

(c) In the case of deceased persons, the court must determine only the extent and value of the decedent's interest,

not those of the separate interests of the heirs and devisees. (*C.C.P. 1260.240.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Prior Hearing and Special Setting*. C.R.C., Rule 375 is now C.R.C., Rule 3.1335.

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §73.



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1. In General.

8 Witkin Sum. Cal. Law Const Law § 1221

[§ 1221] In General.

(1) *Pretrial Motion*. Either party may move the court for a ruling on a disputed legal issue affecting the determination of compensation. The motion must be made at least 60 days before trial, and must be heard by the judge assigned for trial of the case. (*C.C.P. 1260.040(a)*; see Law Rev. Com. Comment [*C.C.P. 1260.040* does not preclude use of other procedures for same purpose].) The court may postpone the date of final offers and demands, and the trial date, if necessary for the parties to engage in further proceedings in response to its ruling on the motion. (*C.C.P. 1260.040(b)*.)

(2) *Order of Proof*. The defendant must present his or her "evidence on the issue of compensation first and shall commence and conclude the argument." (*C.C.P. 1260.210(a)*.) (See Model Eminent Domain Code, §903, 13 (Part I) U.L.A. (Master Ed.), p. 83.)

(3) *No Burden of Proof*. "Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation." (*C.C.P. 1260.210(b)*.) The Law Revision Commission Comment explains the reason for this law: "Assignment of the burden of proof in the context of an eminent domain proceeding is not appropriate. The trier of fact generally is presented with conflicting opinions of value and supporting data and is required to fix value based on the weight it gives to the opinions and supporting data. ... Absent the production of evidence by one party, the trier of fact will determine compensation solely from the other party's evidence, but neither party should be made to appear to bear some greater burden of persuasion than the other." (See *Redevelopment Agency of Pomona v. Thrifty Oil Co.* (1992) 4 C.A.4th 469, 475, 5 C.R.2d 687, *infra*, §1246 [neither party has burden of proof with regard to *valuation* of good will, but landowner has burden of proof of *entitlement* to good will]; BAJI, No. 11.98; CACI, No. 3514; Model Eminent Domain Code, §904, 13 (Part I) U.L.A. (Master Ed.), p. 84.)

West's Key Number Digest, Constitutional Law k.228.1

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Pretrial Motion*. See *Dina v. People* (2007) 151 C.A.4th 1029, 1043, 60 C.R.3d 559 [in inverse condemnation action, trial court did not err in allowing defendant to move for ruling on liability under *C.C.P. 1260.040*; defendant's liability was legal issue affecting determination of compensation].

(3) *No Burden of Proof.* See *Metropolitan Water Dist. of Southern Calif. v. Campus Crusade for Christ* (2007) 41 C.4th 954, 969, 62 C.R.3d 623, 161 P.3d 1175, Supp., infra, §1231 [in eminent domain action, property owner's burden of proof is one of production, not persuasion].



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2. Valuation of Divided Interests.

8 Witkin Sum. Cal. Law Const Law § 1222

[§ 1222] Valuation of Divided Interests.

Where there are divided interests in the property acquired, *C.C.P. 1260.220* provides for a two-stage proceeding, at the plaintiff's election:

(1) Ordinarily, the value of each interest and the injury, if any, to the remainder of the interest must be separately assessed and compensation awarded for it. (*C.C.P. 1260.220(a)*.)

(2) "The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly." However, this provision does not limit "the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, the property or the defendant's interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding is not affected by the failure to exercise the right to present evidence during the first stage of the proceeding." (*C.C.P. 1260.220(b)*.) (See *94 A.L.R.3d 696* [bifurcated trial].)

Although the valuation issue should be severed from the apportionment issue, the jury should ordinarily try both, and defendants with conflicting interests in the award may also ordinarily insist on the same jury. (*Redevelopment Agency of Fresno v. Penzner* (1970) *8 C.A.3d 417, 422, 87 C.R. 183* [holding, however, that trial of apportionment issue by judge after discharge of jury was proper in absence of objection]; see *People v. Gianni* (1972) *29 C.A.3d 151, 156, 105 C.R. 248* [jury trial erroneously denied on theory that lessee had no interest at time of taking; right to jury trial in condemnation proceedings goes only to amount of compensation, but this includes apportionment stage of bifurcated trial].)

In *People v. Lynbar* (1967) *253 C.A.2d 870, 877, 62 C.R. 320*, decided under a predecessor statute, the state brought a proceeding to condemn a parcel of land for freeway purposes. Defendant condemnee's witnesses testified that they arrived at its market value by including as an element a 20-year lease for a service station to Tidewater Oil Company, at a favorable rent, with nearly 18 years left to run. The state appealed from the judgment, contending that

inclusion of that element was improper. *Held*, judgment affirmed.

(a) *Statute is procedural.* The state contended that the statute adopts the majority "undivided fee rule," that fair market value must be determined as if the property were held in single ownership. Defendant contended that it adopts the minority "aggregate of interests rule." Neither is correct. It is purely a procedural statute, dividing this type of condemnation trial into two parts; it expedites the trial and prevents the total sum being pyramided by multiple jury verdicts arrived at independently, or by expert witnesses accomplishing the same end by separate valuations. (253 C.A.2d 878.)

(b) *Principles of valuation.* The whole is the total of what the involuntary sellers (condemnees) have to sell, not the undivided fee that the condemnor is seeking to acquire. The statute requires--in the first phase of trial--a valuation of the fee as a whole, but not a valuation of the fee in an undivided state. (253 C.A.2d 879.) In determining market value, the property, with all compensable attributes, must be valued as the condemnor finds it, which includes the Tidewater lease. This value leasehold is one of the things that a buyer and seller would consider in fixing a price. (253 C.A.2d 881.) Hence, to omit the lease in determining just compensation would violate the constitutional mandate. (253 C.A.2d 883.)

(c) *Rent in excess of rental value.* The state contended that the lessee was paying more than the rental value, and that the condemnor should not suffer for that mistake. But the issue was the fair market value of the parcel taken in the condition in which it was taken, with the long term lease and high rent; a witness could properly use actual rent in lieu of fair rental value (*Ev.C. 817, 812*). (253 C.A.2d 883.) This is not unfair. Rent above fair rental value will enhance the fair market value; hence, the condemnor should pay more as just compensation. If the actual rent were less than the fair rental value, the fair market value of the land would be reduced, and the condemnor would pay less. "In either event the condemnor pays for what it takes *in the condition* the parcel was on the date of valuation or condition." (253 C.A.2d 884.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Right to Compensation.

8 Witkin Sum. Cal. Law Const Law § 1223

[§ 1223] Right to Compensation.

(1) *In General.* "The owner of property acquired by eminent domain is entitled to compensation" as provided in *C.C.P. 1263.110* et seq. (*C.C.P. 1263.110(a)*.) (See *BAJI*, Nos. 11.70, 11.71; *CACI*, No. 3500.) However, these statutes do not affect the rights the owner of property acquired by eminent domain may have under other statutes. (*C.C.P. 1263.010(b)*.) Thus, *C.C.P. 1263.110* et seq. do not limit the compensation that may be required by Cal. Const., Art. I, §19 (see *supra*, §1132). They cover only eminent domain proceedings, leaving the law of inverse condemnation (see *supra*, §1143) for judicial development. (See *Law Rev. Com. Comment.*)

"[W]here two or more statutes provide compensation for the same loss, the person entitled to compensation may be paid only once for that loss." (*C.C.P. 1263.010(b)*.) "Thus, for example, a person who suffers a business loss would not be entitled to compensation for that loss under both" *C.C.P. 1263.510* (loss of goodwill) and *Govt.C. 7262(c)* (relocation or in-lieu payment). "This prohibition on double recovery in no way limits compensation under different statutes for separate and distinct losses such as the fair market value of property taken, injury to the remainder, moving expense, court costs, and the like." (*Law Rev. Com. Comment.*)

(2) *Accrual of Right to Compensation.* Subject to statutory or judicially declared exceptions, the right to compensation is "deemed to have accrued at the date of filing the complaint." (*C.C.P. 1263.020*; see *Model Eminent Domain Code*, §1001, 13 (Part I) *U.L.A. (Master Ed.)*, p. 88.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Date of Valuation.

8 Witkin Sum. Cal. Law Const Law § 1224

[§ 1224] Date of Valuation.

(1) *Fixed by Deposit.* By making a deposit of probable compensation (see *C.C.P. 1255.010* et seq., supra, §1212 et seq.), the plaintiff establishes the valuation date as the time of deposit, unless an earlier date is applicable. (*C.C.P. 1263.110(a)*.) However, if the court orders the amount increased (see supra, §1213) and the additional amount is not deposited, the deposit does not have this effect. (*C.C.P. 1263.110(b)*.) (See *BAJI*, No. 11.72; *CACI*, No. 3501; Model Eminent Domain Code, §1003, 13 (Part I) U.L.A. (Master Ed.), p. 92.)

(2) *Fixed by Trial.* (a) If the issue of compensation is brought to trial within 1 year after commencement of the proceeding, the date of commencement is the date of valuation. (*C.C.P. 1263.120*.) (b) If this issue is not brought to trial within 1 year, the date of commencement of the trial is ordinarily the date of valuation; but if the delay is caused by the defendant, the date of commencement of the proceeding governs. (*C.C.P. 1263.130*.)

Although *C.C.P. 1263.120* provides for valuation of property taken on the date of commencement of the action if brought to trial within 1 year, the constitutional requirement of "just compensation" requires the condemnor to pay fair market value. Thus, a trial court should not be constrained to apply *C.C.P. 1263.120* when it would be unfair to do so. (*Saratoga Fire Protection Dist. v. Hackett* (2002) 97 *C.A.4th* 895, 903, 905, 118 *C.R.2d* 696 [trial court erred in excluding evidence that property had increased in value by more than one-third during period between commencement of action and time of trial].)

(3) *Fixed by New Trial.* "[I]f a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of the commencement of such new trial unless, in the interest of justice, the court ordering the new trial orders a different date of valuation." (*C.C.P. 1263.140*.) "One of the factors the court might consider in selecting an alternate valuation date under this section is any postjudgment deposit made by the plaintiff." (Law Rev. Com. Comment.)

(4) *Fixed by Mistrial.* (a) If the retrial is commenced within 1 year after commencement of the proceeding, *C.C.P. 1263.120* applies, and the date of commencement of the proceeding governs. (b) If the retrial is not commenced within 1 year after commencement of the proceeding, the date of commencement of the retrial governs. (*C.C.P. 1263.150*.) This, however, is subject to the power of the court declaring the mistrial to order a different date of valuation "in the

interest of justice." (C.C.P. 1263.150.) "Factors the court might consider in determining to grant a date of valuation other than that specified in this section include misconduct of a party and any deposits made by the plaintiff." (Law Rev. Com. Comment.)

(5) *Effect of Valuation Date on Risk of Loss.* In *Redevelopment Agency of San Francisco v. Maxwell* (1961) 193 C.A.2d 414, 14 C.R. 170, the action was brought to condemn defendant's three buildings, and summons issued in June, which fixed the valuation date under the predecessor statute. In August, a fire seriously damaged one building, and defendant (according to plaintiff's offer of proof) received \$ 17,500 from her insurer. Nevertheless, under the judge's instructions, the jury awarded defendant \$ 60,000 as the full market value, without deduction for the damage or the insurance collected. *Held*, reversed.

(a) Normally, the risk of loss would be on defendant owner, who had both title and possession at the time of destruction. (See 13 *Summary* (10th), *Equity*, §175.)

(b) Defendant argued that the predecessor statute, fixing the valuation date as the time of summons, necessarily transferred the risk of loss as of that date to the condemning plaintiff. But the court pointed out that the purpose of the statute was to protect against fluctuations in market value, not to determine the risk of loss. (193 C.A.2d 418.) Hence, the *time of valuation* is the date of summons, but the *property to be valued* is the "property to be actually taken," i.e., the property in its condition following the damage. (193 C.A.2d 419.) (See 89 A.L.R.2d 1076 [who bears risk of loss]; Model Eminent Domain Code, §1009, 13 (Part I) U.L.A. (Master Ed.), p. 100 [risk of loss on defendant until (1) right to use property is substantially limited, (2) plaintiff is authorized to take possession, or (3) title is transferred].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Fixed by Deposit.* See *Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 C.4th 648, 666, 54 C.R.3d 752, 151 P.3d 1166 [when deposit of probable compensation is properly made, value of property on date of deposit is fair amount to award owner for taking]; *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 C.A.4th 1111, 1123, 65 C.R.3d 372 [following *Mt. San Jacinto Community College Dist.*; although property values had risen since date of deposit and there had been delays in concluding proceedings, trial court erred in setting date of trial as valuation date]; *Eastern Mun. Water Dist. v. Superior Court* (2007) 157 C.A.4th 1245, 1251, 69 C.R.3d 314 [following *Mt. San Jacinto Community College Dist.*; fact that initial deposit may have been inadequate did not alter valuation date].



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c. Compensation for Improvements to Realty.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1225

[§ 1225] In General.

(1) *Improvements Must Be Valued.* "Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation." (*C.C.P. 1263.210(a)*.) Thus, the improvements are taken and paid for by the condemnor. If they enhance the value over its unimproved condition, the property receives the enhanced value; if they decrease its value, the property suffers the decreased value. (Law Rev. Com. Comment.) (See BAJI, No. 11.72.3; CACI, No. 3506.)

Where an improvement is located partially on property taken and partially on property not taken, the court may, on a party's motion "and a determination that justice so requires, direct the plaintiff to acquire the entire improvement, including the part located on property not taken, together with an easement or other interest reasonably necessary for the demolition, removal, or relocation of the improvement." (*C.C.P. 1263.270*; see Model Eminent Domain Code, §1011, 13 (Part I) U.L.A. (Master Ed.), p. 102.)

A finding of compensable "interim use," i.e., the use of improvements until the property is ready for its highest and best use, "will ordinarily require concrete evidence of circumstances that could reasonably cause a buyer of the particular property at issue to view the presence of incompatible improvements as a net economic benefit rather than a net cost." (*Emeryville Redevelopment Agency v. Harcross Pigments* (2002) 101 C.A.4th 1083, 1110, 1112, 125 C.R.2d 12, *infra*, §1234 [adopting principle of "consistent use," under which property and improvements must be valued based on same use].)

(2) *What Are Improvements Pertaining to Realty.* The obvious meaning of buildings, structures, and fixtures is augmented by a special definition. Improvements pertaining to the realty include "machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation." (*C.C.P. 1263.205(a)*.)

"In determining whether particular property can be removed 'without a substantial economic loss' within the meaning of this section, the value of the property in place considered as a part of the realty should be compared with its

value if it were removed and sold." (C.C.P. 1263.205(b).) (See *Los Angeles v. Sabatasso* (1970) 3 C.A.3d 973, 981, 83 C.R. 898 [compensation under predecessor statute for trade fixtures on remainder where business could not be continued after taking]; *Concrete Service Co. v. California* (1972) 29 C.A.3d 664, 667, 105 C.R. 721 [trade fixtures]; *Commerce v. National Starch & Chemical Corp.* (1981) 118 C.A.3d 1, 13, 173 C.R. 176 [value of fixtures]; *San Diego v. Cabrillo Lanes* (1992) 10 C.A.4th 576, 582, 12 C.R.2d 613 [discussing statute and Legislative Comment]; BAJI, No. 11.72.5; CACI, No. 3507; 73 A.L.R.3d 1122 [condemnation of billboard or other advertising sign].)

Natural growths are not compensable as improvements, but planted trees and shrubs are proper items to be considered. (*People v. Los Angeles* (1969) 273 C.A.2d 46, 58, 77 C.R. 875.)

(3) *Effect of Leasehold Interest.* Difficult problems arise where property is leased and the lessee installs the fixtures. In *Redevelopment Agency of Stockton v. Diamond Properties* (1969) 271 C.A.2d 315, 76 C.R. 269, defendant, lessee of a meat processing plant, had equipment that the lease permitted defendant to remove on termination. The lease expired and defendant continued to occupy under a month-to-month tenancy. In March, 1964, plaintiff filed a condemnation suit. Subsequently plaintiff agreed with the owner that, if the owner would terminate defendant's lease, plaintiff would purchase the property at an agreed price. The owner gave defendant notice of termination, and in May, 1966, gave plaintiff a grant deed, and the action was dismissed as to the owner. Defendant lessee claimed compensation for its equipment. *Held*, it was entitled to compensation.

(a) Where the lessee's property consists of fixtures, the lessee is a condemnee as to them and is entitled to compensation as against the condemnor, even though, as between lessor and lessee, the lessee has a right or a duty to remove them. (271 C.A.2d 319.)

(b) The trial judge denied compensation on the theory that because defendant's tenancy was terminated, there was no interference with its right of possession. Defendant's claim, however, was not of a possessory interest, but rather of an interest in the realty itself. If the lessor had owned the equipment, the lessor would have been entitled to its value; and where a tenant owns property meeting the test of the statute, the tenant has a compensable interest in it separate and apart from his or her possessory rights. (271 C.A.2d 319.)

(c) The condemnor's acquisition of the lessor's interest after service of summons did not change its relationship to defendant from that of condemnor to landlord with a right to require the tenant to remove the equipment. (271 C.A.2d 321.) (See *Concrete Service Co. v. California* (1969) 274 C.A.2d 142, 147, 78 C.R. 923 [purchase of land from lessor does not defeat month-to-month lessee's rights]; *California v. Texaco* (1972) 25 C.A.3d 514, 518, 101 C.R. 923 [oil pipe licensee is entitled to compensation]; *Concrete Service Co. v. California* (1972) 29 C.A.3d 664, 668, 105 C.R. 721 [month-to-month lessee is not limited to removal value]; *Lanning v. Monterey* (1986) 181 C.A.3d 352, 355, 226 C.R. 258 [lessee is entitled to compensation for improvements where sale of property to city was "substantial equivalent" of taking].) (On apportionment under lease, see *infra*, §1250.)

The rule in *Diamond Properties* has been codified. The requirement of valuation and payment for improvements by the condemnor applies even though a tenant, as against the owner, has the right to remove the improvements at the expiration of his or her term. (C.C.P. 1263.210(b).)

Diamond Properties, *Concrete Service Co.*, and *Lanning*, were distinguished in *Langer v. Redevelopment Agency of Santa Cruz* (1999) 71 C.A.4th 998, 1003, 84 C.R.2d 19. There was no substantial equivalent of condemnation where there was no notice or threat of condemnation or evidence that the redevelopment agency intended to condemn properties that were in a group of parcels already in the developer's control. (71 C.A.4th 1006.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *What Are Improvements Pertaining to Realty.* See *Escondido Union School Dist. v. Casa Suen os De Oro* (2005) 129 C.A.4th 944, 965, 972, 29 C.R.3d 89, citing the text [manufactured homes that were affixed to foundations on valuation date were improvements pertaining to realty under C.C.P. 1263.205 and 1263.210; fact that owner had not yet

obtained certificate of occupancy under *Health & Saf.C. 18551* did not affect compensability].



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2. Improvements Removed or Destroyed.

8 Witkin Sum. Cal. Law Const Law § 1226

[§ 1226] Improvements Removed or Destroyed.

(1) *When Improvements Are Not Valued.* The value of improvements pertaining to realty is not taken into account if the improvements are removed or destroyed "before the earliest of the following times": (a) When the plaintiff takes title. (b) When the plaintiff takes possession. (c) If the defendant moves in compliance with an order of possession, the date specified in the order. However, in this last situation, the defendant may shift the risk of loss to the plaintiff by giving the plaintiff 24 hours' written notice that he or she has moved prior to the specified date. (*C.C.P. 1263.230(a)*.) (See *San Diego v. Cabrillo Lanes* (1992) 10 C.A.4th 576, 581, 12 C.R.2d 613 [discussing statute]; BAJI, No. 11.72.7.)

Even after the risk of loss shifts to the plaintiff under these provisions, compensation is not awarded for improvements removed or destroyed by the defendant. (*C.C.P. 1263.230(b)*.)

(2) *Owner's Election To Remove.* *C.C.P. 1263.260* permits the owner to remove improvements, thereby converting them into personal property and receiving moving and relocation costs under *Govt.C. 7262* (infra, §1272). In that event, no compensation is awarded for the removed property. (See Law Rev. Com. Comment.)

The following procedure is specified: (a) The owner serves a written notice of election on the plaintiff within 60 days after service of summons. (b) If the plaintiff fails to serve written notice of refusal within 30 days thereafter, the owner may remove the improvements. (*C.C.P. 1263.260*.)

(3) *Removal Causing Damage.* Where removal or destruction damages the remaining property, a reduction in the value of the property is taken into account in determining compensation. (*C.C.P. 1263.230(b)*.) However, where the "removal will cause damage to the structure in which the improvements are located, the defendant shall cause no more damage to the structure than is reasonably necessary in removing the improvements, and the structure shall be valued as if the removal had caused no damage to the structure." (*C.C.P. 1263.260*; see BAJI, No. 11.72.7.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Improvements Made After Summons Is Served.

8 Witkin Sum. Cal. Law Const Law § 1227

[§ 1227] Improvements Made After Summons Is Served.

If the owner, after being served with summons, voluntarily makes improvements, they ordinarily will not be taken into account in determining compensation. (*C.C.P. 1263.240.*) (See *BAJI*, No. 11.72.9; *98 A.L.R.3d 504* [improvements made with knowledge of impending condemnation].) There are, however, several exceptions to this rule:

(1) Where the improvement is one required to be made by a public utility to its utility system. (*C.C.P. 1263.240(a)*; see *supra*, §1224.)

(2) Where the improvement is made with plaintiff's written consent. (*C.C.P. 1263.240(b)*.) This permits the parties to reach a reasonable solution, and makes clear the authority of the condemnor to enter into the agreement. (Law Rev. Com. Comment.)

(3) Where the improvement is authorized by the court after a noticed hearing and a finding that "the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement." (*C.C.P. 1263.240(c)*.) This provision gives the defendant the opportunity to make improvements in good faith and not to enhance the amount of compensation; e.g., "where an improvement is near completion, the date of public use of the property is distant, and the additional work will permit profitable use of the property during the period prior to the time it is actually taken for public use." (Law Rev. Com. Comment.) However the court may, at the time it makes an order "authorizing the improvement to be made, limit the extent to which the improvement shall be taken into account in determining compensation." (*C.C.P. 1263.240(c)*.) (See *Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 C.A.4th 98, 105, 11 C.R.3d 465 [taking occurred when summons was filed, and landowner who made improvements after that time without availing itself of procedure set out in *C.C.P. 1263.240* could not recover costs of improvements in inverse condemnation action].)

If improvements are necessary to protect the public, even though they are not within one of the foregoing exceptions and are consequently not valued, their cost may be recovered as a separate item of compensation under *C.C.P. 1263.620*. (See *infra*, §1249.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Escondido Union School Dist. v. Casa Suen os De Oro* (2005) 129 C.A.4th 944, 970, 29 C.R.3d 89, citing the text [in absence of bad faith, cutoff date for work on compensable improvement is date owner is served with complaint and summons, and not earlier time when owner might learn of impending condemnation proceedings].



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d. Compensation for Crops.

8 Witkin Sum. Cal. Law Const Law § 1228

[§ 1228] Compensation for Crops.

(1) *When Compensation Is Awarded.* The defendant is entitled to harvest and market crops planted either before or after service of summons, and to realize the profit from them, up to the time of actual taking of the property. "If the plaintiff takes possession of the property at a time that prevents the defendant from harvesting and marketing the crops, the fair market value of the crops in place at the date the plaintiff is authorized to take possession of the property shall be included in the compensation awarded for the property taken." (*C.C.P. 1263.250(a)*; see *11 U.C. Davis L. Rev. 555.*)

(2) *How Planting Can Be Prevented.* The plaintiff may obtain a court order precluding the defendant from planting crops after service of summons. In that event, "the compensation awarded for the property taken shall include an amount sufficient to compensate for loss caused by the limitation on the defendant's right to use the property." (*C.C.P. 1263.250(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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aa. In General.

8 Witkin Sum. Cal. Law Const Law § 1229

[§ 1229] In General.

The measure of compensation for property taken is its "fair market value." (*C.C.P.* 1263.310; see *McMahan's of Santa Monica v. Santa Monica* (1983) 146 C.A.3d 683, 700, 194 C.R. 582 [wholesale value of commercial inventory]; *Smith v. Los Angeles* (1989) 214 C.A.3d 266, 292, 262 C.R. 754 [where trustee cancelled \$ 110,000 indebtedness on home destroyed in landslide, damages were properly reduced by that amount; collateral source rule (6 *Summary* (10th), *Torts*, §1631 et seq.) was not applicable]; *BAJI*, Nos. 11.73 [fair market value defined], 11.75 [value of use to parties is not test]; *CACI*, No. 3501; 107 *Harv. L. Rev.* 686 [discussion of nonmarket value losses]; 60 *Am.Jur.* Trials 447 [landowner's evidence of market value in eminent domain proceeding]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §271 et seq.; Model Eminent Domain Code, §1004(a), 13 (Part I) U.L.A. (Master Ed.), p. 94 [fair market value defined]; C.E.B., 1 Condemnation Practice 2d, Chap. 4.)

This rule is consistent with prior case law holding that, where the fee is taken, the measure of damages is the market value of the property. (See *Redevelopment Agency of Long Beach v. First Christian Church* (1983) 140 C.A.3d 690, 189 C.R. 749 [church property].) In *Daly City v. Smith* (1952) 110 C.A.2d 524, 243 P.2d 46, the court explained "fair market value" as follows: "In a condemnation proceeding the measure of damages is the market value of the parcel taken, plus the depreciation in the market value of the area retained, if such depreciation occurs. Market value is the price that would be paid by a willing purchaser from a willing seller purchasing with a full knowledge of all the uses and purposes for which the property is reasonably adapted. It is hornbook law that it is market value that is involved, and not the value to the owner or to the condemner. For that reason it is generally held that value in terms of money for a particular use is not admissible in such cases." (110 C.A.2d 531.)

In *Kimball Laundry Co. v. United States* (1949) 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765, the Court said: "As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of the public obligation to compensate the loss. ... [L]oss to the owner of nontransferable values deriving from his unique need for property, or idiosyncratic attachment to it, like loss due to an exercise of the police power is properly treated as part of the burden of common citizenship. ... Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it

must also be rejected as a measure." (69 S.Ct. 1437, 93 L.Ed. 1772.)

In *United States v. Petty Motor Co.* (1946) 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729, 734, the Court made it clear that just compensation in federal condemnation proceedings "is not the value to the owner for his particular purposes or to the condemnor for some special use," and that "evidence of loss of profits, damage to good will, the expense of relocation and other consequential losses" is rejected.

Neither "retention value" in anticipation of a price rise, nor "scarcity profit" which could be realized from a commodity in short supply due to wartime restrictions is considered; i.e., the normal test of market value applies even though a much higher price could be obtained in a free market. (*United States v. Cors* (1949) 337 U.S. 325, 69 S.Ct. 1086, 1091, 93 L.Ed. 1392, 1399; *United States v. Commodities Trading Corp.* (1950) 339 U.S. 121, 70 S.Ct. 547, 550, 94 L.Ed. 707, 713 [government requisitioned pepper; compensation limited to O.P.A. ceiling price].)

In *United States v. 564.54 Acres of Land* (1979) 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435, the federal Government brought an action to condemn three nonprofit summer camps of respondent church organization, for a public recreational project. The Government offered \$ 485,400 as the fair market value; respondent demanded \$ 5.8 million as replacement cost, on the ground that new facilities would be subject to financially burdensome regulations from which existing facilities were exempt under grandfather provisions. *Held*, the fair market value standard applied.

(a) Just compensation under the Fifth Amendment has been considered to require indemnity of the landowner, and this loss is generally measured by the market value of the land. (99 S.Ct. 1857, 60 L.Ed.2d 441.) An exception has been recognized where application of the standard would be impracticable, e.g., where the property is infrequently traded. But that is not the case here; the evidence established a market for these camps. (99 S.Ct. 1858, 60 L.Ed.2d 442.)

(b) Another exception is recognized where the award would impermissibly deviate from the indemnity principle; but that is not the case here. Frequently, property is uniquely adapted to the owner's use, but nontransferable values arising from the owner's unique need are not compensable. To treat respondent differently from private homeowners would amount to a government subsidy for nonprofit organizations. (99 S.Ct. 1859, 60 L.Ed.2d 443.)

(c) It is likewise irrelevant that respondent's camps may have been reasonably necessary to the public welfare. Respondent is under no legal or factual obligation to replace them; it is free to use its resources to serve its own institutional objectives. Hence, awarding replacement costs on the theory that respondent would continue to operate the camps for a public purpose would provide a windfall if substitute facilities were never acquired, or, if acquired, were later sold or converted to another use. (99 S.Ct. 1859, 60 L.Ed.2d 443.) (See 92 Harv. L. Rev. 514.)

In *United States v. 50 Acres of Land* (1984) 469 U.S. 24, 105 S.Ct. 451, 83 L.Ed.2d 376, the federal Government acquired a municipal landfill for a flood control project. *Held*, where there was an ascertainable market value, that value, not the cost of a substitute facility, was the proper measure of just compensation, even though defendant municipality was obligated to provide replacement facilities. (105 S.Ct. 457, 83 L.Ed.2d 385.) (See 13 Ecology L. Q. 673; Model Eminent Domain Code, §1004(b)(c), 13 (Part I) U.L.A. (Master Ed.), p. 94 [conditions under which fair market value is deemed to be cost of functional replacement of property of public or nonprofit entity].)

SUPPLEMENT: [This section is current through the latest supplement]

See 59 Stanf. L. Rev. 871 [Taking Compensation Private]; 41 U.C. Davis L. Rev. 239 [measure of just compensation].



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bb. Determining Market Value.

8 Witkin Sum. Cal. Law Const Law § 1230

[§ 1230] Determining Market Value.

(1) *In General.* In *People v. Ocean Shore R. (1948)* 32 C.2d 406, 196 P.2d 570, the court identified the following elements to be considered in determining market value: (a) All uses to which the property is adapted or available. (b) The *highest and most profitable use* to which the property might be put "in the reasonably near future," to the extent that this probability affects the market value. In other words, the highest use is not a specific measure of value, but a factor in fixing market value. (32 C.2d 425.) (See *Sacramento Southern R. Co. v. Heilbron* (1909) 156 C. 408, 412, 104 P. 979; *People v. Silveira* (1965) 236 C.A.2d 604, 611, 46 C.R. 260 [adaptability to subdivision purposes]; *Orange County Flood Control Dist. v. Sunny Crest Dairy* (1978) 77 C.A.3d 742, 754, 143 C.R. 803; *Porterville v. Young* (1987) 195 C.A.3d 1260, 1269, 241 C.R. 349 [highest use agricultural, not commercial, where commercial development would require dedication of parcel being condemned]; *Ripon v. Sweetin* (2002) 100 C.A.4th 887, 899, 122 C.R.2d 802 ["highest and best use," which is simply part of market value, relates to use to which property might be put in reasonably near future; evidence of city's allegedly unreasonable precondemnation activity is not relevant to show "highest and best use" of property].)

In *People v. Los Angeles* (1963) 220 C.A.2d 345, 33 C.R. 797, the state sued to condemn park property of defendant cities for freeway purposes. The trial judge restricted the experts' opinions to the market value of property used for park purposes. *Held*, this was error. There is no market value of land that can only be held as a public park and cannot be sold. The correct question is what private buyers would be willing to pay if the land were available for all uses to which it is naturally adapted. (220 C.A.2d 352.)

C.C.P. 1263.320 defines "market value" in accordance with the case law:

(a) *Where There Is a Market.* "The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available." (C.C.P. 1263.320(a).) (See *San Diego County Water Authority v. Mireiter* (1993) 18 C.A.4th

1808, 23 C.R.2d 455, *infra*, §1231; *Ventura County Flood Control Dist. v. Campbell* (1999) 71 C.A.4th 211, 221, 83 C.R.2d 725 [aggregate was integral part of land and bids for aggregate to be extracted to provide basin for flood control project established existing market for aggregate; following *People v. Andresen* (1987) 193 C.A.3d 1144, 238 C.R. 826, *infra*, §1234]; BAJI, No. 11.74 [highest and best use]; CACI, Nos. 3502 [same], 3503 [change in zoning or land use restriction].)

(b) *Where There Is No Relevant Market*. "The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable." (C.C.P. 1263.320(b).)

In *San Diego v. Rancho Vista Del Mar* (1993) 16 C.A.4th 1046, 20 C.R.2d 675, the primary issue was "whether a property owner whose land is condemned for a jail may value his property based on a highest and best use as a private detention facility." In rejecting this position, the court first observed that "there are some special purpose properties such as schools, churches, cemeteries, parks and utilities for which there is no relevant market and therefore these properties may be valued on any basis which is 'just and equitable.'" (16 C.A.4th 1060, citing the Law Rev. Com. Comment to C.C.P. 1263.320(b).) However, not only was the proposed use as a detention facility the same as the county's proposed use of the land, it was also a use that is uniquely governmental; i.e., only the government provides a market for detention facilities. "Whether a detention facility is directly constructed by the government and operated by government employees or is indirectly constructed and operated by the government through a lease payment and a contract with a private company to operate the facility, a detention facility remains a governmental function with no private sector equivalent." (16 C.A.4th 1064.)

(2) *Methods of Valuation*. Methods of proving market value are specified in the Evidence Code. (See *Ev.C. 810 et seq.*; 1 *Cal. Evidence* (4th), *Opinion Evidence*, §98 *et seq.*) "A just and equitable method of determining the value of nonprofit, special use property for which there is no relevant, comparable market" is set forth in *Ev.C. 824*, subject to the exceptions set forth in *Ev.C. 824(c)*. (C.C.P. 1263.321.)

In *Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 C.A.4th 652, 657, 7 C.R.2d 91, the court followed prior cases in holding that the "developer's approach," also known as the "economic analysis" or "residual land value" approach, is an improper method for measuring fair market value. Under the developer's approach, the value of undeveloped property is calculated by determining the value of the property if developed, then subtracting the costs of development. The court condemned the method as too speculative and conjectural. (5 C.A.4th 658.) (See *People v. Clauser/Wells Partnership* (2002) 95 C.A.4th 1066, 1073, 1077, 116 C.R.2d 240 [trial court erred in excluding inventory appraiser's opinion of fair market value of inventory of automobile salvage business that was based on value of inventory as bulk sale, with profit removed; this valuation method was not inconsistent with California law]; C.E.B., 1 *Condemnation Practice* 2d, §4.64 *et seq.*)

(3) *Commentary*. Discussion of this subject has been continuous. (See 68 A.L.R.2d 392 [condemnation of utility plant]; 92 A.L.R.2d 772 [changes in purchasing power of money as affecting compensation]; 9 A.L.R.3d 291 [zoning as factor]; 22 A.L.R.3d 961 [restrictive covenant as factor]; 40 A.L.R.3d 143 [cost of substitute facilities where land already devoted to public use]; 42 A.L.R.3d 1314 [condemnation of cemetery lands]; 51 A.L.R.3d 1050 [condemned property's location near proposed site of building complex as factor]; 35 A.L.R.4th 1263 [measure and elements of compensation for taking public transit system]; 29 A.L.R.5th 36 [measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use]; 4 *Proof of Facts*, *Eminent Domain*, *Proof* 1; 19 *Proof of Facts* 3d 613 [proof of highest and best use of property]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §275 *et seq.*; C.E.B., 1 *Condemnation Practice* 2d, Chap. 4.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Sierra View Local Health Care Dist. v. Sierra View Med. Plaza Associates, LP* (2005) 126 C.A.4th 478, 487, 490, 24 C.R.3d 210, citing the text [although value of property to condemner cannot be used to calculate value of property to owner, jury may consider condemner's historical use of building as lessee prior to condemnation]; *State*

Route 4 Bypass Authority v. Superior Court (2007) 153 C.A.4th 1546, 1550, 1567, 64 C.R.3d 286 [applying doctrine of *Porterville v. Young* (1987) 195 C.A.3d 1260, 241 C.R. 349, to dedication of strip of agricultural land for highway bypass].*Correction:* Page 907, last paragraph, should read as follows:(2) *Methods of Valuation*. Methods of proving market value are specified in the Evidence Code. (See *Ev.C. 810 et seq.*; 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §98 et seq.) "A just and equitable method of determining the value of nonprofit, special use property for which there is no relevant, comparable market" is set forth in *Ev.C. 824*, subject to the exceptions set forth in *Ev.C. 824(c)*. (*C.C.P. 1263.321.*)



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cc. Admissible Matters.

8 Witkin Sum. Cal. Law Const Law § 1231

[§ 1231] Admissible Matters.

(1) *Future Use Through Zoning Change*. "Where there is a reasonable probability that zoning restrictions will be altered in the near future, the jury should consider not only those uses currently permitted, but also other uses to which the property could be devoted in the event of such a change." (*People v. Donovan* (1962) 57 C.2d 346, 352, 19 C.R. 473, 369 P.2d 1; *Regents of Univ. of Calif. v. Morris* (1968) 266 C.A.2d 616, 626, 72 C.R. 406; see *People v. Arthofer* (1966) 245 C.A.2d 454, 466, 54 C.R. 878 [rule stated but landowner's burden to show it was not sustained]; *San Diego v. Rancho Penasquitos Partnership* (2003) 105 C.A.4th 1013, 1041, 130 C.R.2d 108 [trial court did not err in permitting expert to testify on upzonings of property, from lower to higher density, approved after defendant's property was designated as within path of highway project; it was question of fact for jury to determine whether upzonings would have occurred even without project and whether property also stood chance of being rezoned]; 9 A.L.R.3d 291 [zoning as factor in determining damages]; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §294; 40 Proof of Facts 3d 395 [proof that probable zoning change will affect market value in eminent domain proceeding].)

However, the probable conditions that will be imposed on the landowner in the rezoning plan must also be considered. In *Fresno v. Cloud* (1972) 26 C.A.3d 113, 102 C.R. 874, defendants' land was zoned for residential-agricultural use. Plaintiff city condemned portions of it for street-widening purposes. The trial judge admitted evidence of probable rezoning to a higher use, but excluded evidence of the probable requirement of dedication of streets as a condition to the rezoning. *Held*, the latter ruling was reversible error. "[I]f the landowners do not develop the remaining parcels beyond their presently permitted R-A zoning uses, the owners will have been paid exactly what the frontage strips are worth. If the remaining parcels are developed to the higher uses allowed by the contemplated zoning changes defendants will have been paid for land that they would have had to dedicate gratuitously to the city in order to gain the higher zoning advantages." (26 C.A.3d 123.)

(2) *Future Combination With Other Land*. Value may also reflect a special or higher use that could result from combining the land with other parcels, provided there is a reasonable probability of the lands being so combined in the near future. But in estimating that probability, the power of effecting the change by eminent domain must be left out. (*United States v. Powelson* (1943) 319 U.S. 266, 63 S.Ct. 1047, 1052, 87 L.Ed. 1390, 1397; *Santa Clara v. Ogata*

(1966) 240 C.A.2d 262, 268, 49 C.R. 397 [possibility of combining land with other property]; see 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §303; 8 A.L.R.4th 1202 [assemblage or plottage as factor affecting value].)

(3) *Information Discovered After Valuation Date*. In *San Diego County Water Authority v. Mireiter* (1993) 18 C.A.4th 1808, 23 C.R.2d 455, the issue was the propriety of considering "information about the condemned property discovered after the valuation date which tended to reduce the property's value." (18 C.A.4th 1811.) *Held*, this information must be considered. (18 C.A.4th 1818.)

Under C.C.P. 1263.320 (supra, §1230), "fair market value" on the date of valuation is based on "full knowledge of all the uses and purposes for which the property is reasonably adaptable and available." This language reflects "a legislative intent that all information known at the time of trial be considered to the extent relevant to establish the market value on the date of valuation. Thus, while evidence of a change in the condition of the property after the date of valuation may not be admissible ... , information about the condition of the property on the date of valuation which happens to be discovered after that date must be considered. In effect, the parties are presumed to know all relevant information available at the time of trial, even if it could not reasonably have been discovered until after the date of valuation." (18 C.A.4th 1814.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Future Use Through Zoning Change*. There is a two-step process when the trial court is presented with a proffer that there is a highest and best use that is not then permitted by current zoning: First, the trial court must determine whether sufficient evidence has been presented to permit the jury to find that there is a reasonable probability of rezoning to permit the higher use in the near future; then, the jury should "be instructed that it may consider the change in use, provided that it first finds a reasonable probability the property could be rezoned in the near future." (*Metropolitan Water Dist. of Southern Calif. v. Campus Crusade for Christ* (2007) 41 C.4th 954, 970, 62 C.R.3d 623, 161 P.3d 1175 [trial court erred in deciding, prior to trial, whether it was convinced that there was reasonable probability of rezoning].)



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dd. Inadmissible Matters.

8 Witkin Sum. Cal. Law Const Law § 1232

[§ 1232] Inadmissible Matters.

(1) *Owner's Plans for Improvement.* The property owner's personal plans for improvement are not admissible, because there can be no compensation for disappointed expectations. (*People v. La Macchia* (1953) 41 C.2d 738, 751, 264 P.2d 15; *People v. Johnson* (1962) 203 C.A.2d 712, 717, 22 C.R. 149.) However, evidence of a proposed use may be admitted, not to show the loss to the owner of a particular plan, but to show that the plan was feasible and therefore should be considered in fixing market value. (*People v. La Macchia*, *supra*; *Daly City v. Smith* (1952) 110 C.A.2d 524, 532, 243 P.2d 46; *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 C.A.2d 889, 899, 63 C.R. 640; see *People v. Tanczos* (1996) 42 C.A.4th 1215, 1218, 1220, 50 C.R.2d 70, citing the text [city-approved plans to build three rental units on condemned land was admissible, not to establish market value, but to show one of the uses to which property could be put; exclusion of evidence was prejudicial where state argued that land could accommodate only one additional rental unit]; *Stockton v. Albert Brocchini Farms* (2001) 92 C.A.4th 193, 199, 111 C.R.2d 662 [trial court properly excluded evidence of income that could have been derived from hypothetical landfill operation; storage capacity of property for landfill purposes is not akin to undeveloped natural resources such as mineral deposits]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §§298, 299.)

(2) *Use Prohibited by Zoning Law.* The attempt to establish a high market value by showing possible special uses will ordinarily fail if these uses are prohibited by an existing zoning law. But where there is a probability of a change in zoning restrictions, that fact may be considered. (See *supra*, §1231.)

In *Long Beach City High School Dist. of Los Angeles v. Stewart* (1947) 30 C.2d 763, 185 P.2d 585, the land was sought for a school in a residential zone. In the condemnation suit, defendant owner attempted to introduce evidence of its value for industrial purposes, although there had been no industrial development in the vicinity. *Held*, the evidence was properly excluded. "The general rule is that present market value must ordinarily be determined by consideration only of the uses for which the land 'is adapted and for which it is available.' The exception to this general rule is that if the land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a 'reasonable probability' of a change 'in the near future' in the zoning ordinance or other restriction, then the effect of such probability upon the minds of purchasers generally may be taken into

consideration in fixing present market value." (30 C.2d 768.) (See 9 A.L.R.3d 291 [zoning as factor].)

San Diego v. Rancho Penasquitos Partnership (2003) 105 C.A.4th 1013, 130 C.R.2d 108, upheld the trial court's exclusion of evidence of plaintiff city's zoning restriction precluding the upzoning of property to a higher density or the development of defendant's property until plaintiff's highway project was approved. "[W]here the condemning agency and zoning authority are the same, zoning restrictions on property to be condemned that are enacted to freeze or depress land values of property to be condemned should not be considered in the valuation of that property." (105 C.A.4th 1034.)

(3) *Restrictions in Conflict With Resolution of Necessity.* In *San Diego v. Bressi* (1986) 184 C.A.3d 112, 229 C.R. 44, plaintiff county condemned an aviation easement over defendant's property bordering an airport. The resolution of necessity on which the taking was based defined "aircraft" as a "contrivance now known or hereafter invented, designed, or used for navigation or flight in air or space." Plaintiff sought to introduce evidence of future airport use less extensive than the easement. *Held*, evidence of legislative and administrative restrictions that limit the scope of the taking as defined in the resolution of necessity is inadmissible. (184 C.A.3d 124.) The jury must focus on the probability of the occurrence of particular uses under the aviation easement, not on uses that contradict the easement. Thus, "the county may not offer evidence that an airport accommodating jumbo jets will not be built, but may offer evidence of the number of jumbo jets which may use the airport." (184 C.A.3d 123.)

(4) *Other Sale to Condemnor.* Evidence of the price or other terms and circumstances of an acquisition of property is inadmissible if the acquisition was for a public use for which the property could have been taken by eminent domain. (Ev.C. 822(a)(1); see 1 Cal. Evidence (4th), Opinion Evidence, Supp., §113.)

SUPPLEMENT: [This section is current through the latest supplement]



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ee. Value of Easement.

8 *Witkin Sum. Cal. Law Const Law § 1233*

[§ 1233] Value of Easement.

(1) *In General.* An easement is an interest in real property that, when taken or damaged for public use, entitles the holder to compensation. (*Pacific Gas & Elec. Co. v. Hufford* (1957) 49 C.2d 545, 552, 319 P.2d 1033; *Los Angeles v. Wright* (1951) 107 C.A.2d 235, 241, 236 P.2d 892.) (See C.E.B., 1 Condemnation Practice 2d, §4.64 et seq.)

(2) *General Rules for Valuation.* Ordinarily, the value of an easement is the diminution in market value of the dominant tenement caused by its loss. (*Hemmerling v. Tomlev* (1967) 67 C.2d 572, 575, 63 C.R. 1, 432 P.2d 697; *Redevelopment Agency of Concord v. Tobriner* (1984) 153 C.A.3d 367, 375, 200 C.R. 364; see BAJI, No. 11.78; CACI, No. 3510; 23 A.L.R.4th 631 [fear of power line, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding]; 22 Am.Jur. Trials 743; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §§342, 343.)

When a second easement is sought on land already burdened, the owner of the servient land is entitled to the difference in value of the land before and after the imposition of the second easement; and, if no substantial difference in value is shown, only nominal damages will be awarded. (*Gilroy v. Filice* (1963) 221 C.A.2d 259, 266, 34 C.R. 368.)

Redevelopment Agency of Concord v. Tobriner (1989) 215 C.A.3d 1087, 264 C.R. 481, involving condemnation of parking lot easements held by owners of property in a shopping center, held that the fact that defendant owners received no compensation did not in itself constitute a violation of either the Fifth Amendment or Cal. Const., Art. I, §19.

(a) "Where the property interest taken is an easement appurtenant to a dominant estate, the amount of reimbursement to which the condemnee is entitled is determined by the diminution, *if any*, in the value of the dominant estate to which the easement is appurtenant, caused by the loss of the easement." (215 C.A.3d 1099.)

(b) "Only the change in the value of the condemnee's property is relevant, not the effect of the condemnation on the value of the property taken. If the owner of a condemned appurtenant easement suffers no diminution in the value of his or her dominant tenement from the loss of the easement, the pecuniary damages to be awarded the condemnee must be negligible, no matter how much the removal of the easement affects the value of the servient estate over which it lies."

(215 C.A.3d 1100.)

(3) *Distinctions*. In theory, the easement is much less valuable than the fee and the compensation should be less. But in practice, a distinction is commonly drawn between two broad classes of cases: (a) Where, as in a railroad easement, it wholly excludes the use of the fee, is permanent in nature, and is unlikely to be abandoned, the effect is substantially the same as a taking of the fee; i.e., the owner's remaining interest is of negligible value. In this case, the only available measure is the value of the fee itself. (b) Where, after being burdened by the easement the fee still retains a substantial value, the measure is the decrease in market value of the land due to the imposition of the easement. This is the case, e.g., where the land contains mineral deposits that the fee-owner reserves; or where the easement is for telephone or power lines, permitting use of the land for all purposes consistent with the easement. (See *Pacific Gas & Elec. Co. v. Hufford*, *supra*, 49 C.2d 551; *People v. Southern Pac. Trans. Co.* (1978) 84 C.A.3d 315, 324, 148 C.R. 535 [railroad right of way].)

A further distinction has been noted where a city condemns an easement in railroad land for street purposes. (a) If the easement is across the tracks or right of way, only nominal compensation is given. This is because an incident of the public use to which the railroad dedicates that property is the right of the public to construct necessary street crossings, and the opening of this kind of a street ordinarily does not interfere with the use. (b) But where the easement is over a part of the right of way used, or capable of being used, for commercial purposes, the situation is different. The railway company is entitled to the usual damages based on the value of the property taken and the cost of structural changes made necessary. (*Long Beach v. Pacific Elec. Ry. Co.* (1955) 44 C.2d 599, 603, 283 P.2d 1036 [strip had been rented to lumber company, and poles, etc., had to be relocated].)

SUPPLEMENT: [This section is current through the latest supplement]



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8 Witkin Sum. Cal. Law Const Law § 1234

[§ 1234] Project Enhancement.

(1) *In General.* When a public improvement by condemnation is being planned, the value of the land within the area of probable taking may rise. There has been much debate over whether this enhancement in value due to the condemnation project itself is a proper element to be considered in valuation of the particular parcel ultimately taken. (See 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §301; C.E.B., 1 *Condemnation Practice* 2d, §4.3 et seq.; Model Eminent Domain Code, §1005, 13 (Part I) U.L.A. (Master Ed.), p. 96.)

(2) *Woolstenhulme Case.* In *Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C.3d 478, 93 C.R. 833, 483 P.2d 1, the court disapproved declarations in prior California decisions that seemingly ruled out consideration of project enhancement (4 C.3d 495), and laid down the following rules:

(a) Enhancement of value due to speculation that the property will be part of the project cannot be considered. (4 C.3d 491.)

(b) Enhancement of value due to speculation that the particular property will be taken is also excluded. "If a tribunal were required ... to consider an increase in value arising merely from the anticipation of the tribunal's final award, then logically a speculator would in effect be able to set 'just compensation' through his own purchase price." (4 C.3d 492.)

(c) On the other hand, enhancement of value of property *adjacent to or near* the proposed project, *before it becomes probable that the particular land will be condemned*, is a proper element. "Purchasers and sellers regularly, and quite reasonably, take into account the benefit that the land can be expected to reap from an imminent public project, and it would be equally unfair and incompatible with the principles underlying our constitutional just compensation provision to exclude such enhanced value. Although the district chooses to characterize compensation for this project enhanced value as a 'windfall' to the landowner, that epithet might equally be applied to the wide variety of other components of market value for which a landowner might not have directly 'paid,' factors such as zoning laws, public services and general neighborhood appearances which, as previously noted, have long been recognized to be

legitimate elements of 'just compensation.' " (4 C.3d 495.)

(d) The federal test of "probability of inclusion" is the standard to be used in determining whether a landowner's expectations were reasonable. When the condemned land was *probably* within the scope of the project from the time the condemnor was *committed* to it, the enhanced value should not be included. (4 C.3d 497, footnote 10.)

(e) The trial judge must determine the date of "probable inclusion" to rule on the admissibility of evidence of comparable sales, and to properly instruct the jury on which enhanced value is to be included or excluded. (4 C.3d 498, footnote 12.) (See *San Luis Obispo v. Bailey* (1971) 4 C.3d 518, 523, 93 C.R. 859, 483 P.2d 27 [companion case]; *People v. Reardon* (1971) 4 C.3d 507, 511, 93 C.R. 852, 483 P.2d 20 [same].)

In *People v. Andresen* (1987) 193 C.A.3d 1144, 238 C.R. 826, plaintiff Department of Water Resources maintained a reservoir and dam adjacent to defendant's grazing land, a portion of which had been used as a quarry at the time the dam was originally built. When the dam was seriously damaged in a rockslide, plaintiff condemned the land and used rock in the quarry for repairs. Defendant was awarded \$ 3.2 million based on enhancement value and use of the property as a quarry. *Held*, judgment affirmed.

(a) *Conditions for compensable enhancement.* Under *Woolstenhulme*, an owner may be compensated for enhancement value "as long as the expectation is for the property itself not to be taken." (193 C.A.3d 1154.)

(b) *Application of conditions in this case.* (1) Defendant's property was not part of the dam or reservoir. During the original construction of the dam, the quarry had been only one source of building material. (2) Defendant's reasonable expectation that the quarry would be mined to repair the dam was not equivalent to an expectation that the property would be taken in eminent domain; previous use of the quarry to construct the original dam suggests the opposite. (3) Defendant is entitled to enhancement value until the time he received notice that the property would be condemned. (193 C.A.3d 1156.)

(c) *Value of property to condemnor.* *Woolstenhulme* holds that value to the condemnor cannot be used to calculate the value to the property owner. (193 C.A.3d 1156.) But this principle does not preclude consideration of the use of the property as a quarry, because an informed buyer could evaluate the proximity of the quarry to the dam before it became apparent that the property would be condemned. The probability that the quarry would be used for future repairs existed as an enhancement figure before the rockslide. (193 C.A.3d 1157.) "The *Woolstenhulme* bar to enhancement damages for known future uses does not apply unless there is specific knowledge that the property will be, or probably will be, condemned." (193 C.A.3d 1158.)

(3) *Statutory Clarification.* The Legislature resolved the uncertainty concerning "project enhancement" by providing that fair market value "*shall not include any increase or decrease in the value of the property*" attributable to (a) the project for which the property is taken, (b) the proceeding in which the property is taken, or (c) the plaintiff's preliminary actions related to taking the property. (C.C.P. 1263.330; see BAJI, No. 11.77; CACI, No. 3504.) The statute is supplemented by an elaborate Law Revision Commission Comment, citing *Woolstenhulme* favorably and including the following points:

(a) The intention of the statute is to make the rules on appreciation and depreciation the same.

(b) An increase or decrease in the value of the property taken resulting from the use the condemnor is to make of the property is eliminated.

(c) Changes based on conjecture of a favorable or unfavorable award are not a proper element of compensation.

(d) Changes in the value of the property beyond the scope of the project are not excluded.

(e) If the condemnor's proposed use is the highest and best use, the adaptability of the property for that purpose

must be shown. (See *Los Angeles v. Decker* (1977) 18 C.3d 860, 867, 869, 135 C.R. 647, 558 P.2d 545.)

In *Emeryville Redevelopment Agency v. Harcros Pigments* (2002) 101 C.A.4th 1083, 125 C.R.2d 12, there was no dispute that the highest and best use for the property was mixed commercial, the same as the proposed project in which it would be included. Thus, the trial court erred in admitting evidence of the project. "[E]vidence of specific project plans is inadmissible in the absence of specific facts or points of contention which demonstrably enhance the probative value of the evidence to a point where it outweighs the inherent potential for prejudice. That test is not satisfied merely because the plans 'illustrate' or 'demonstrate' an undisputed potential use for the property." Otherwise, evidence of project plans could always be admissible on that rationale. (101 C.A.4th 1105.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Woolstenhulme Case*. "Although a project may not be set in stone before all regulatory requirements (including a final EIR under CEQA) have been satisfied, the owner is nevertheless entitled to be compensated for the fair market value of the property as of the time it became probable it would be acquired for the project. Under this construction, CEQA does not vitiate the *Woolstenhulme* exception." (*San Diego v. Barratt Amer.* (2005) 128 C.A.4th 917, 941, 944, 27 C.R.3d 527 [marketplace had every reason to place premium on plaintiff's property, notwithstanding uncertainty inherent in CEQA, where it was aware for nearly 30 years of Central Alignment of proposed freeway project that would take project considerably south of plaintiff's property, and city continued to support that alignment as superior to Northern Alignment ultimately chosen; thus, project enhancement should be considered until time Northern Alignment was selected].)



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8 Witkin Sum. Cal. Law Const Law § 1235

[§ 1235] Condemnation Blight.

(1) *In General.* Although announcement of a public project often enhances neighboring property values (see *supra*, §1234), the converse may also be true. "For example, publicity that a refuse dump will be located somewhere within a 10-square-mile area may tend to depress the value of all land within the area because of the adverse impact a dump might have on other property in close proximity." (*Klopping v. Whittier* (1972) 8 C.3d 39, 45, 104 C.R. 1, 500 P.2d 1345.) (See 5 A.L.R.3d 901 [depreciation due to project for which land is condemned as factor]; C.E.B., 1 Condemnation Practice 2d, §4.7.)

(2) *Klopping Case.* The traditional rule excluded this element from consideration unless the conduct of the condemnor goes so far as to constitute a de facto taking. But in *Klopping v. Whittier, supra*, the court, disapproving earlier cases (8 C.3d 49), took a different approach. Defendant city initiated condemnation proceedings for a parking district by a resolution of May 11, 1965, and an action filed November 10, 1965. But a lawsuit challenging assessments caused the city to adopt a resolution of postponement and dismissal on July 7, 1966. The dismissal was entered November 16, 1966. Because the resolution announced an intention to reinstate proceedings when the other litigation terminated favorably, plaintiffs, property owners in the proposed area, brought this action for inverse condemnation. Their theory was that the precondemnation publicity caused a decline in market value by rendering it difficult to rent their lands. *Held*, they were entitled to offer evidence of this fact on the issue of valuation.

(a) Because the city's announcements were directed at plaintiffs' properties, rather than at an undesignated area, the case did not involve typical condemnation blight. Rather, plaintiffs claimed that, because the condemnation cloud hovered over their lands, they were unable to fully use their properties and that this damage, reflected in loss of rental income, was recoverable. (8 C.3d 46.) They did not contend that there had been actual physical invasion or direct legal restraint amounting to a de facto taking; their position was that the decrease in market value caused by the condemnation announcements should be disregarded in valuing the property. (8 C.3d 48.)

(b) Total exclusion of evidence of loss in value resulting from acts of the condemning authority is not justified; but allowance of proof of all loss would be equally improper. It might deter public agencies from announcing sufficiently in

advance their intention to condemn. Hence, it may be necessary for the condemnee to bear some incidental loss; but when the condemnor acts unreasonably, by excessively delaying the eminent domain proceeding or by other oppressive conduct, the owner is entitled to compensation. (8 C.3d 49, 51, 52.)

(c) "Accordingly we hold that a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (8 C.3d 52.)

(d) This right to damages for unreasonable conduct is independent of the right to recover costs on abandonment of condemnation (see *infra*, §§1265, 1266); the remedies are distinct and no election is required. (8 C.3d 57.)

The *Klopping* rule has been extensively invoked and applied. (See *Redevelopment Agency of San Francisco v. Del-Camp Inv.* (1974) 38 C.A.3d 836, 847, 113 C.R. 762; *Walnut Creek v. Leadership Housing Systems* (1977) 73 C.A.3d 611, 621, 140 C.R. 690 [rule held inapplicable]; *Orange County Flood Control Dist. v. Sunny Crest Dairy* (1978) 77 C.A.3d 742, 755, 143 C.R. 803 [market value based on precondemnation use of property for cash and carry dairy, even though, because of precondemnation activity, use as dairy had ceased by valuation date]; *Jones v. Los Angeles* (1979) 88 C.A.3d 965, 972, 152 C.R. 256 [no recovery unless there is invasion or appropriation that directly affects landowner to his or her injury]; *People v. Peninsula Enterprises* (1979) 91 C.A.3d 332, 354, 153 C.R. 895 [rule held applicable to precondemnation damages even though there was no formal resolution to condemn]; *Los Angeles v. Monahan* (1976) 55 C.A.3d 846, 852, 127 C.R. 763 [no unwarranted delay in bringing proceeding]; *Taper v. Long Beach* (1982) 129 C.A.3d 590, 609, 181 C.R. 169 [*Klopping* damages are recoverable for loss of market value; however, precondemnation delay did not constitute *de facto taking*, because property owners failed to establish that deprivation of use and enjoyment of property was permanent]; *Fresno v. Shewmake* (1982) 129 C.A.3d 907, 911, 181 C.R. 451 [actual loss must be shown]; *Redevelopment Agency of Concord v. Contra Costa Theater* (1982) 135 C.A.3d 73, 79, 185 C.R. 159 [where property owner also seeks *Klopping* damages, question of condemnor's liability for precondemnation conduct is for court; issue of amount of damages is submitted to jury only after condemnee has made sufficient showing of liability]; *Tilem v. Los Angeles* (1983) 142 C.A.3d 694, 703, 191 C.R. 229 [rule held inapplicable]; *Cambria Spring Co. v. Pico Rivera* (1985) 171 C.A.3d 1080, 1098, 217 C.R. 772 [rule inapplicable; adoption of redevelopment plan did, and sale of bonds did not, amount to announcement of intent to condemn]; *Contra Costa Water Dist. v. Vaquero Farms* (1997) 58 C.A.4th 883, 895, 68 C.R.2d 272 [no evidence of precondemnation damage]; *Ripon v. Sweetin* (2002) 100 C.A.4th 887, 897, 122 C.R.2d 802 [determination of threshold question of city's liability for precondemnation conduct is for court, not jury; where defendants stipulated that they were not asking for *Klopping* precondemnation damages, they were not entitled to consideration, in determining market value, by court or jury, of allegedly unreasonable precondemnation conduct by city].)

(3) *Statutory Clarification.* The Legislature resolved the uncertainty concerning "condemnation blight" by providing that fair market value "*shall not include any increase or decrease in the value of the property*" attributable to (a) the project for which the property is taken, (b) the proceeding in which the property is taken, or (c) the plaintiff's preliminary actions related to taking the property. (C.C.P. 1263.330; see BAJI, No. 11.79; Model Eminent Domain Code, §1005, 13 (Part I) U.L.A. (Master Ed.), p. 96; C.E.B., 1 Condemnation Practice 2d, §§4.7, 4.8.) The statute is intended to make the rules regarding appreciation and depreciation the same by codifying the rule that valuation should not reflect a decrease in value due to general knowledge of the pendency of the project. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Klopping Case.* See *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 C.A.4th 1111, 1136, 65 C.R.3d 372 [trial court erred in awarding precondemnation damages based on redevelopment agency's issuance of cleanup notice under Polanco Act; although property owner incurred professional fees after receipt of notice, there was no evidence that notice depressed fair market value of property].



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1. Right to Compensation.

8 Witkin Sum. Cal. Law Const Law § 1236

[§ 1236] Right to Compensation.

(1) *In General.* In some cases, a parcel of land as a unit is worth more than its separate parts. If only a part is taken, payment of the market value of that part may not be adequate compensation for the loss suffered by severing it from the rest. Thus, where the property taken is part of a larger parcel, in addition to compensation for the property taken (*supra*, §1229), compensation must be awarded for an injury to the remainder. (*C.C.P. 1263.410(a)*.) The term "larger parcel" is left undefined for development by the case law. (Law Rev. Com. Comment.) (On requirement of offer to take entire parcel where remainder would be "an uneconomic remnant," see *Govt.C. 7267.7*, *supra*, §1186.)

(2) *Measure of Compensation.* The measure of compensation for injury to the remainder is the damage to the remainder (*infra*, §1237) reduced by the benefit to the remainder (*infra*, §1243). (*C.C.P. 1263.410(b)*.)

(3) *Computing Damage and Benefit.* (a) The amount of damage to the remainder and benefit to the remainder must "reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized." (b) The value of the remainder on the date of valuation, excluding prior changes in value as prescribed in *C.C.P. 1263.330*, must "serve as the base from which the amount of any damage and the amount of any benefit to the remainder shall be determined." (*C.C.P. 1263.440*; see *88 Cal. L. Rev. 565* [Assessing the Benefits of California's New Valuation Rule for Partial Condemnation].)

(4) *Compensation To Reflect Project as Proposed.* Compensation for injury to the remainder must be based on the project as proposed. Features of the project that "mitigate the damage or provide benefit to the remainder, including but not limited to easements, crossings, underpasses, access roads, fencing, drainage facilities, and cattle guards, shall be taken into account in determining the compensation for injury to the remainder." (*C.C.P. 1263.450*.)

"Physical solutions" provided by the plaintiff to minimize damages must be considered; but if the plaintiff has no specific proposal for the manner of construction and use of the project, damages will be assessed on the basis of the most injurious lawful use reasonably possible. (Law Rev. Com. Comment, citing *People v. Schultz Co. (1954) 123 C.A.2d 925, 268 P.2d 117*, *infra*, §1242.)

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aa. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1237

[§ 1237] In General.

(1) *What Constitutes Damage to Remainder.* Damage to the remainder is defined as that caused by either or both of the following: (a) Severance of the remainder from the part taken; (b) construction and use of the project for which the property is taken in the manner proposed by the plaintiff, "whether or not the damage is caused by a portion of the project located on the part taken." (C.C.P. 1263.420.) Damage to the remainder is often called "severance damages." (See *People v. Loop* (1954) 127 C.A.2d 786, 791, 799, 274 P.2d 885; *People v. Hayward Bldg. Materials Co.* (1963) 213 C.A.2d 457, 464, 28 C.R. 782; *Santa Clara v. Curtner* (1966) 245 C.A.2d 730, 736, 54 C.R. 257, citing the text; *Placer County Water Agency v. Hofman* (1985) 165 C.A.3d 890, 896, 211 C.R. 894 [under C.C.P. 1263.420, expenses to mitigate damages are limited to those related to damage caused by taking; no recovery is allowed for legal and engineering expenses incurred to prevent taking]; BAJI, No. 11.85 [severance damages where fee is taken] and BAJI, No. 11.85.3 [severance damages where easement is taken]; CACI, No. 3511 [severance damages]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §329 et seq.; C.E.B., *Condemnation Practice*, Chap. 5.)

C.C.P. 1263.420 leaves unaffected the judicially developed rules on specific elements of damages, and does not impair the ability of the court to further develop the law. (Law Rev. Com. Comment.)

(2) *Conditions of Recovery.* An award of severance damages is made on proof of three kinds of "unity," which establish the fact that the land condemned is part of a larger parcel: (a) unity of title (see *infra*, §1238), (b) in the ordinary case, contiguity (see *infra*, §1239), and (c) unity of use (see *infra*, §1240). (*Los Angeles v. Wolfe* (1971) 6 C.3d 326, 330, 99 C.R. 21, 491 P.2d 813, *infra*, §1239, citing the text; *San Diego v. Neumann* (1993) 6 C.4th 738, 745, 746, 25 C.R.2d 480, 863 P.2d 725, *infra*, §1240, citing the text.)

(3) *Abrogation of Requirement of Proximity.* In *People v. Symons* (1960) 54 C.2d 855, 9 C.R. 363, 357 P.2d 451, defendants owned a residential lot. In another action, property belonging to others immediately adjacent was condemned for a freeway, which terminated the street on which defendants' property fronted. In the present action a portion of defendants' property was taken to make that street into a cul-de-sac and provide a turn-around area. Defendants were awarded the fair market value of the part taken, and compensation for some physical damage to the

rest. At the trial, they sought additional damages for loss of privacy, view, and access. *Held*, the latter elements were noncompensable. "[W]hen a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, diminished access and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property." (54 C.2d 860.) (See *People v. Ramos* (1969) 1 C.3d 261, 264, 81 C.R. 792, 460 P.2d 992 [limiting *Symons* rule to situation where right of way is not part of property taken]; *People v. Volunteers of America* (1971) 21 C.A.3d 111, 119, 98 C.R. 423.)

The holding in *Symons* was abrogated by C.C.P. 1263.420, extending severance damages to damages caused by the project whether or not the project is located on the property taken. (See 59 A.L.R.3d 488 [compensation for diminution in value of remainder resulting from taking or use of adjoining land of others for same undertaking].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *What Constitutes Damage to Remainder.* See *Metropolitan Water Dist. of Southern Calif. v. Campus Crusade for Christ* (2007) 41 C.4th 954, 975, 62 C.R.3d 623, 161 P.3d 1175, Supp., supra, §1231 [mere fact of 7-year delay associated with construction of pipeline through plaintiff's property did not entitle plaintiff to temporary severance damages in absence of evidence of specific loss attributable to delay]; *Fremont v. Fisher* (2008) 160 C.A.4th 666, 675, 679, 73 C.R.3d 54 [following *Metropolitan Water*; trial court erred in allowing defendants' expert to testify on temporary severance damages in absence of evidence of actual injury; only evidence presented was that temporary easement substantially impaired hypothetical use of property]; 48 *Santa Clara L. Rev.* 507 [*Metropolitan Water Dist.*].



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bb. Unity of Title.

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[§ 1238] Unity of Title.

Severance damages are awarded only when the property taken and the remainder are owned by the same party. (See *People v. Los Angeles* (1963) 220 C.A.2d 345, 361, 33 C.R. 797 [license to use property condemned was insufficient]; *People v. Dickinson* (1964) 230 C.A.2d 932, 934, 41 C.R. 427 [separate ownership, although partnership existed]; *People v. Nyrin* (1967) 256 C.A.2d 288, 295, 63 C.R. 905 [leasehold interest is sufficient]; C.E.B., 1 Condemnation Practice 2d, §5.4; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §338 et seq.)

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cc. Contiguity.

8 *Witkin Sum. Cal. Law Const Law* § 1239

[§ 1239] Contiguity.

(1) *General Rule.* A landowner is not entitled to severance damages where one or more of several distinct separated parcels of his or her land is taken, even though these separate parcels are being used together in the landowner's business. In other words, the parts that make up a "parcel" must be *contiguous*, and unity of use is not a substitute for actual contiguity. (See *Oakland v. Pacific Coast Lumber & Mill Co.* (1915) 171 C. 392, 398, 153 P. 705; *People v. Bowers* (1964) 226 C.A.2d 463, 465, 38 C.R. 238, citing the text; *People v. Fair* (1964) 229 C.A.2d 801, 808, 40 C.R. 644; *People v. Dickinson* (1964) 230 C.A.2d 932, 934, 41 C.R. 427 [easement of way, of undescribed quality, connecting one tract with another, was insufficient to establish element]; C.E.B., 1 Condemnation Practice 2d, §5.5; 59 A.L.R.4th 308 [sufficient contiguity].)

In *People v. Ocean Shore R.* (1948) 32 C.2d 406, 196 P.2d 570, *supra*, §1230, the property condemned was part of a disused railroad right of way. The remaining portions of the right of way were in part contiguous and in part separated by a town. The court rejected the owners' contention that, because the whole roadbed was capable of a common use, it should be considered as a single parcel in awarding severance damages. (32 C.2d 424.)

(2) *Constructive Contiguity.* In *People v. Thompson* (1954) 43 C.2d 13, 271 P.2d 507, the requirement of physical contiguity was virtually overcome by a conclusion of legal or constructive contiguity. Defendants' 100-acre tract was already crossed by a highway, and the state sought to condemn a strip of two of the parts. *Held*, for the purpose of awarding severance damages, the already severed tract should be treated as a unit. (a) Because the highway going through defendants' tract permitted unlimited access across it, there was *no factual complete separation*. (b) By the better view, the prior deed of the highway strip gave the state only an easement; and where an owner's land is merely crossed by an easement, the separated sections are to be considered as actually contiguous and a single parcel. (43 C.2d 23.)

Los Angeles v. Wolfe (1971) 6 C.3d 326, 99 C.R. 21, 491 P.2d 813, followed *Thompson*. Defendants owned a commercial building, Parcel 3-A, and provided parking facilities to tenants as an obligation under their leases. A zoning ordinance was passed requiring that parking be provided within 750 feet of a commercial building. Defendants' building

became a nonconforming use until they bought Parcel 3, not contiguous to the building, but within the 750-foot limit and accessible over public roads. Parcel 3 thus enabled them to comply with the ordinance in furnishing parking for their tenants. Plaintiff city, unaware of the use of Parcel 3 for the benefit of the building on Parcel 3-A, condemned Parcel 3 along with adjacent property for public off-street parking. The parties agreed on the value of the land condemned--Parcel 3, but defendants claimed severance damages to Parcel 3-A. *Held*, judgment for plaintiff reversed; severance damages were proper.

"Here there was unity of ownership, reasonable physical proximity of the parcels, strong unity of use with lawful means of access, special need for private parking facilities in a congested city area, nonavailability of physically contiguous land, zoning which required that parking be provided but allowed 750 feet as being sufficiently contiguous to comply with such requirement, acquisition of noncontiguous land to provide parking and to obtain a conforming use status, and the loss of such status and loss of needed private parking by the condemnation of lot 3. An 'ordinary' situation within the rule requiring strict contiguity was not presented." (6 C.3d 338.)

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dd. Unity of Use.

8 *Witkin Sum. Cal. Law Const Law § 1240*

[§ 1240] Unity of Use.

Unity of use is a necessary element in the proof of severance damages; i.e., where the use of the part taken is distinct from that left, there is ordinarily no loss suffered by the severance. (See *Stockton v. Marengo* (1934) 137 C.A. 760, 767, 31 P.2d 467 [farmland; part taken was leased to operators of gas station]; *Menlo Park v. Artino* (1957) 151 C.A.2d 261, 270, 311 P.2d 135; *People v. International Tel. & Tel. Corp.* (1972) 22 C.A.3d 829, 834, 99 C.R. 836; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §338 et seq.; 59 A.L.R.4th 308 [sufficient unity].)

In *People v. Thompson* (1954) 43 C.2d 13, 271 P.2d 507, supra, §1239, part of the property was used for farming, a swamp was used for signboards, and beach property was not used at all. The court nevertheless held that there was no actual diversity or division of use, and therefore there was no error in treating it as one parcel. (43 C.2d 26.)

In *San Diego v. Neumann* (1993) 6 C.4th 738, 25 C.R.2d 480, 863 P.2d 725, the question was "whether, and under what circumstances, separate but contiguous legal parcels in common ownership currently devoted to diverse uses may be aggregated to form a 'larger parcel' in order to prove entitlement to severance damages." (6 C.4th 741.) Defendants owned four contiguous parcels; a trailer park was located on two parcels, and various unrelated businesses were located on the other parcels. The city condemned the latter two parcels to broaden a boulevard, and defendants sought severance damages, claiming that the four parcels together were suitable for commercial development as a shopping center, that the two condemned parcels provided a means of direct access from the boulevard to the remaining parcels, and that loss of the access lots through condemnation therefore damaged the value of the remaining parcels. The trial court refused to admit evidence to support this theory, and defendants appealed. The Court of Appeal reversed and remanded with directions to consider whether defendants' property was a single, larger parcel. *Held*, judgment of the Court of Appeal affirmed.

(a) Under C.C.P. 1263.320 (supra, §1230), the fair market value of property takes into account the highest and most profitable use to which the property might be put in the reasonably near future. (6 C.4th 744.) Defendants contend that highest and best use--including reasonably foreseeable future uses--should be considered in determining whether unity of use exists. Plaintiff argues that only present and existing uses can be considered. (6 C.4th 746.)

(b) Many cases set forth a rule purporting to require that only actual use be considered in determining unity of use. However, these cases generally were addressing issues other than unity of use or prospective use, and the concern of many was simply to avoid awards of speculative severance damages. (6 C.4th 747.)

(c) In *People v. Ocean Shore R.* (1948) 32 C.2d 406 196 P.2d 570, supra, §§1230, 1239, the court did state that prospective unity of use has no bearing on the allowance of severance damages. However, *Ocean Shore* cited no authority for that conclusion, the statement was not part of the holding of the case, and the statement has not been relied on since it was made. (6 C.4th 752, 753.)

(d) Thus, "existing California authorities do not preclude us from considering whether severance damages may be awarded based on a prospective integrated use of several parcels. The question, rather, is whether considering the prospective uses to which several parcels of contiguous property might be put furthers our obligation to ensure that a property owner receives just compensation for the government's condemnation of his property, and whether, as has concerned us in the past, such a consideration opens the door to speculative damage awards." (6 C.4th 753.)

(e) "The critical inquiry in any case in which a property owner seeks severance damages premised on a prospective unity of use will therefore be whether the development potential of the separate but contiguous parcels affected their present value. As a matter of economic reality, only those uses that are *reasonably probable and reasonably achievable* will affect present value. We therefore hold that if the landowner establishes that there is a reasonable probability his contiguous commonly owned lots are or will be available for development or use as an integrated economic unit in the reasonably foreseeable future, all of the separate lots may be considered as a larger parcel for purposes of awarding severance damages." (6 C.4th 756.)

Three justices dissented, arguing that both precedent and policy compel the conclusion that present unity of use is a prerequisite to severance damages. (6 C.4th 758 et seq.) (See 21 *Pepperdine L. Rev.* 1489.)

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8 Witkin Sum. Cal. Law Const Law § 1241

[§ 1241] In General.

Severance damages properly consist of the difference in value of the remaining part before and after the severance and construction of the improvement. (See *Pacific Gas & Elec. Co. v. Hufford* (1957) 49 C.2d 545, 555, 319 P.2d 1033 [power line easement]; *People v. Hayward Bldg. Materials Co.* (1963) 213 C.A.2d 457, 464, 28 C.R. 782; *Sacramento & San Joaquin Drainage Dist. v. Reed* (1963) 215 C.A.2d 60, 63, 29 C.R. 847; *San Diego Gas & Elec. Co. v. Daley* (1988) 205 C.A.3d 1334, 1349, 253 C.R. 144 [power line easement; court properly admitted testimony of buyer fears of health hazards from electromagnetic radiation, because these fears would diminish value of property regardless of underlying truth]; BAJI, Nos. 11.87 [loss of access as element of severance damages], 11.90 [freeway access excluded]; C.E.B., 1 Condemnation Practice 2d, §5.8 et seq.; 51 A.L.R.3d 860 [traffic noise and vibration from highway]; 25 A.L.R.4th 671 [compensation for loss of view]; 104 A.L.R.5th 503 [evidence of electromagnetic fields generated by power lines in action to value land]; 47 Proof of Facts 3d 473 [Public Fear of Electromagnetic Fields as Basis for Recovery of Damages for Property Devaluation Caused by Nearby Power Line]; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §331.)

In *Fresno v. Hedstrom* (1951) 103 C.A.2d 453, 457, 229 P.2d 809, the city condemned 10 acres of a 40-acre farm, depriving the owner of street frontage and damaging the value of the rest of the parcel for subdivision purposes, its highest and best use. *Held*, award of \$ 10,000 for taking and \$ 6,000 for severance damages affirmed. (103 C.A.2d 458.)

In *People v. Loop* (1954) 127 C.A.2d 786, 274 P.2d 885, defendant owned business property consisting of two contiguous lots fronting on a boulevard. The state condemned a triangular part of one lot for traffic to a freeway. *Held*, it was proper for defendant to appraise the part taken at a higher square foot valuation than the remainder of the property, for a part taken may be a more valuable part. Thus here, it was testified that the best use was for a big garage, and the severance, with reduction of size and a resulting five-sided irregular parcel, would impair the use of the remainder as a functioning unit. (127 C.A.2d 799.) (See *People v. Volunteers of America* (1971) 21 C.A.3d 111, 122, 128, 98 C.R. 423 [severance damages for proximity to freeway was proper even though only narrow triangular strip no wider than six feet was taken, and freeway was not actually constructed on land taken].)

In *Salinas v. Homer* (1980) 106 C.A.3d 307, 165 C.R. 65, plaintiff city took fee title to a strip of defendant's residential property for street-widening, including four feet for underground utilities and six inches for the sidewalk. Plaintiff had the right to use the four-foot strip for other purposes, but had no plans to do so. *Held*, defendant was entitled to compensation for the decrease in market value of the remainder attributable to plaintiff's fee title to the strip. The damage here was not speculative future damage as in *People v. Adamson* (1953) 118 C.A.2d 714, 722, 258 P.2d 1020, *infra*, §1242, but an immediate decrease in market value. (106 C.A.3d 312, 313.)

The cost of replacement or restoration of improvements ("cost to cure") may be relevant and admissible on the issue of loss in fair market value, but is not a separate and distinct measure of damages. (See *Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 C.A.3d 58, 65, 91 C.R. 375; C.E.B., 1 Condemnation Practice 2d, §5.11; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §337.)

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bb. Improper Elements.

8 *Witkin Sum. Cal. Law Const Law* § 1242

[§ 1242] Improper Elements.

(1) *Speculative or Contingent Damages*. There must be some physical disturbance of a property right that naturally tends to and actually does decrease the market value. Thus, the condemnor is not required to pay for injury to an expectant or possible future right. (*Los Angeles v. Geiger* (1949) 94 C.A.2d 180, 191, 210 P.2d 717 [no award for value of speculative future right of access to boulevard]; see *Arnerich v. Almaden Vineyards Corp.* (1942) 52 C.A.2d 265, 272, 126 P.2d 121; *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 C.A.3d 1113, 1147, 234 C.R. 630 [no award for speculative future use for oil and gas exploration in absence of showing that property was suited for that use]; BAJI, No. 11.86.)

In *People v. Adamson* (1953) 118 C.A.2d 714, 722, 258 P.2d 1020, property was condemned for highway purposes. Defendant argued that the discretionary right of the public authority to change the point of connection between the highway and freeway was an element to be considered because a change might result in additional damages. *Held*, this element was speculative and improper. In the event that an injurious change does occur in the future, the owner will have a new remedy in an inverse condemnation suit at that time. (118 C.A.2d 722.)

In *People v. Schultz Co.* (1954) 123 C.A.2d 925, 268 P.2d 117, 96 feet of a 300-foot frontage were condemned. Defendant sought severance damages on the theory that, until a freeway was constructed, it was left with an isolated landlocked parcel with no legal right of access to the existing highway, except for the People's promise that existing access on a 20-foot strip would be preserved until the freeway was ready. *Held*, severance damages were properly denied. Although a mere promise by the condemnor cannot be a basis for reduction of damages, here the court expressly reserved the right of access in the judgment. (123 C.A.2d 931.)

(2) *Probable Future Dedication*. Severance damages based on the property's development potential are not recoverable if it is reasonably probable that development of the property would have been conditioned on dedication of the property taken. (See *Contra Costa County Flood Control & Water Conservation Dist. v. Lone Tree Inv.* (1992) 7 C.A.4th 930, 937, 9 C.R.2d 326.) However, proof that a conditional dedication is a reasonable probability requires a showing not only that the condition would probably have been imposed, but also that it would have been

constitutionally permissible. (See *Hollister v. McCullough* (1994) 26 C.A.4th 289, 297, 298, 31 C.R.2d 415 [conditional dedication requirement was invalid where it was not reasonably related to proposed use of property, but rather was aimed at promoting general municipal objectives].)

In *People v. Curtis* (1967) 255 C.A.2d 378, 63 C.R. 138, the state brought an action to condemn a 40-foot strip through defendant's eight-acre tract of vacant land, dividing it roughly in half. The strip would eventually extend a street; and, under local ordinances and established practice, the city would probably require any developer of the area, before obtaining a permit, to dedicate land needed for a full 80-foot street. Defendants argued that they could introduce this probable event into evidence as an element affecting the value of their remaining property in computing severance damages. *Held*, this evidence was properly excluded. (a) To the extent that dedication is required by the proposed development, the property will be benefited rather than damaged. (b) To the extent that it is necessary for traffic conditions, it is a risk shared by all property owners and is noncompensable. (255 C.A.2d 384.) (c) If the requirement is unreasonable and arbitrary, the city will not be able to force dedication; but the proper proceeding to test the city's power will be one brought after the condition has been imposed. (d) The owner of the remaining property may, however, elect to dedicate; hence, the present owners (defendants) should not be permitted to charge the state for the cost of dedication in the present proceeding. (255 C.A.2d 386.)

(3) *Future Assessment Liens*. In *Baldwin Park v. Stoskus* (1972) 8 C.3d 563, 105 C.R. 325, 503 P.2d 1333, defendant's property was condemned for an easement to construct a street and storm drain in a special assessment district. The fair market value of the property taken was stipulated, and there was evidence that the property remaining was enhanced in value, but defendant claimed that the amount of the assessment lien should be an element of severance damages. *Held*, this position was unsound, and the evidence was properly excluded. The assessment lien was not the direct result of the taking; it was imposed on all property in the district, whether or not any part was taken. (8 C.3d 568.) If defendant's view were followed, some owners--those whose property was condemned--would receive double recovery; i.e., the benefit of the improvement without paying for it. (8 C.3d 570.) Moreover, this rule would severely hamper the special assessment device for financing public improvements. To raise additional sums to replace those awarded as severance damages, the municipality would have to reassess and increase liens on remaining property or pay out of general funds, prejudicing remaining property owners or general taxpayers. (8 C.3d 571.) (See 59 A.L.R.3d 534 [consideration of fact that remaining land will be subject to special assessment in fixing severance damages].)

(4) *Rental Value of Remainder*. In *Orange County Flood Control Dist. v. Sunny Crest Dairy* (1978) 77 C.A.3d 742, 143 C.R. 803, a portion of plaintiff's dairy was condemned and plaintiff determined that operation of a dairy on the remainder was not economically justified. The trial court awarded plaintiff "temporary severance damages," the fair rental value of the remainder for the 2 years between the time the dairy operation ceased and the remainder was leased to a mobilehome park. *Held*, severance damages were improper. There was no temporary taking of the remainder; nothing defendant condemnor did impaired the use of the property for a profitable purpose. Essentially, plaintiff was seeking recovery for a lost business opportunity; and to award the rental value of the remainder in addition to the fair market value of the property taken would amount to double recovery. (77 C.A.3d 762, 763.)

(5) *Accelerated Urbanization*. In *Carlsbad v. Rudvalis* (2003) 109 C.A.4th 667, 135 C.R.2d 194, parts of defendant nursery owners' properties were taken for road extensions. The jury awarded defendants severance damages for diminution in value of their business assets arising from accelerated urbanization in the area that shortened the economic life of the nurseries. *Held*, reversed. Severance damages must be directly and proximately caused by the taking. (109 C.A.4th 681.) Here, the construction and use of the road extensions did not directly impact defendants' planned uses of their properties. (109 C.A.4th 683.) Further, urbanization would occur and defendants' damages would be the same whether the extensions went through defendants' or adjoining properties. (109 C.A.4th 685.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Probable Future Dedication*. See *State Route 4 Bypass Authority v. Superior Court* (2007) 153 C.A.4th 1546, 1566, 64 C.R.3d 286 [distinguishing *Hollister v. McCullough* (1994) 26 C.A.4th 289, 31 C.R.2d 415, text, p. 927, and discussing its value after *Dolan v. Tigard* (1994) 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304, text, §1157; dedication

requirement need not be specifically and uniquely attributable to development against which it is applied].



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aa. When Offset Is Proper.

8 *Witkin Sum. Cal. Law Const Law* § 1243

[§ 1243] When Offset Is Proper.

(1) *Special Benefits*. Where only a portion of a parcel is taken, the remainder will sometimes actually be benefited by the improvement. "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff." (*C.C.P.* 1263.430; see *BAJI*, No. 11.95; *CACI*, No. 3512.) In this event, the benefit to the remainder will be offset against the damage to the remainder, and may result in no award of compensation for injury to the remainder. (*C.C.P.* 1262.410(b).)

C.C.P. 1263.430 neither abrogates "court-developed rules relating to the offset of benefits" nor impairs "the ability of the courts to continue to develop the law in this area." (*Law Rev. Com. Comment.*) (See *Los Angeles County Flood Control Dist. v. McNulty* (1963) 59 *C.2d* 333, 338, 29 *C.R.* 13, 379 *P.2d* 493; *Oro Loma Sanitary Dist. v. Valley* (1948) 86 *C.A.2d* 875, 880, 195 *P.2d* 913; *People v. Al G. Smith Co.* (1948) 86 *C.A.2d* 308, 311, 194 *P.2d* 750 [same rule applies where property is damaged instead of taken]; *People v. Bond* (1964) 231 *C.A.2d* 435, 438, 41 *C.R.* 900; 88 *Cal. L. Rev.* 565 [Assessing the Benefits of California's New Valuation Rule for Partial Condemnation]; 13 *A.L.R.3d* 1149 [benefits from alterations to highway]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §371 et seq.)

In *Los Angeles County Metropolitan Trans. Authority v. Continental Dev. Corp.* (1997) 16 *C.4th* 694, 66 *C.R.2d* 630, 941 *P.2d* 809, plaintiff county transportation authority sought to offset the benefits of a light rail project, for which it was taking a strip of defendant landowner's property, against defendant's severance damages. Defendant claimed that the benefits of the project were not "special" to the land sought to be taken, and thus, could not be offset against severance damages. *Held*, the offset is authorized.

(a) *Historical derivation of rule*. Former law prohibiting the offset of severance damages was a response to the practice of railroads taking property without compensating the owners, on the mere promise that the railroad would bring future economic growth. However, current law entitles an owner to the fair market value of property taken, without setoff; thus, because "no taking per se may go uncompensated, irrespective of any benefit to the remaining property, the sharp practices of the 19th century railroad corporations have no close analogue." (16 *C.4th* 711.)

(b) *Proof limited to property taken.* Although defendant urges that special damages, like offset benefits, must be "special" to the affected property, a "landowner seeking severance damages need only prove the value of his or her property has been impaired, not that other members of the public are not similarly affected." (16 C.4th 712.) Similarly, the Eminent Domain Law "contains no requirement the landowner prove his or her severance damages are of a type not shared by neighboring landowners." (16 C.4th 713.)

(c) *Contribution of fair share.* The policy underlying just compensation is to ensure that neither the landowner nor the public contributes more than their proper share to the public undertaking. (16 C.4th 715.) To distribute the cost of the project across the community with perfect equality is impossible because the rail project will benefit other property owners whose land is not being taken. Therefore, if defendant is subjected to setoff of general benefits, it will lose an expectation of gain that other property owners are allowed to keep. On the other hand, if defendant is permitted both severance damages and the enhancement in value due to the rail project, one could say defendant thereby pays less than its proper share of the project costs. Because there is no mechanism by which to ensure an absolutely fair distribution of costs and benefits across the entire community, "[w]e must instead search for the rule of greatest relative fairness, or at least unfairness." (16 C.4th 716.)

(d) *Permitting offset is more fair.* "A rule permitting offset of all reasonably certain, immediate and nonspeculative benefits has the virtue of treating benefits and severance damages evenhandedly." (16 C.4th 717.) Defendant was entitled to, and did, present evidence that the effects of the rail operation on perceptions of view, light, and noise from its building would lower expected future rents. The increase in rental value that plaintiff sought to prove "appears to be no more speculative or uncertain, and no less immediate, than the decrease in rental value that Continental was permitted to prove." (16 C.4th 718.)

(e) *No statute prohibits offset.* Permitting the offset does not run afoul of C.C.P. 1263.420 or C.C.P. 1263.430, "neither of which, in considering damages and benefits to the remainder property, distinguishes between special and general." (16 C.4th 718.)

Two justices separately dissented to the part of the majority's opinion creating a new "setoff" rule. (16 C.4th 722, 736.)

(2) *Concentration of Traffic as Benefit.* The special benefit need not be a result of physical alteration in the character of the land. In *People v. Giumarra Farms* (1971) 22 C.A.3d 98, 99 C.R. 272, the state constructed a freeway across defendant's land. No new physical access to the remaining property was afforded, and before the improvement defendant could move freely in all directions. However, by virtue of the construction, his land was located on two quadrants of a freeway interchange; though currently restricted to agricultural uses, rezoning for a higher use could be expected; and portions of the land were suitable for service, rest, and food facilities. "In short, the property has become a magnet for traffic related commercial activity with measurable financial value and profit to defendant." (22 C.A.3d 105.) The trier of fact could therefore find that the property was enhanced in value by the unique combination of access and traffic conferred by the improvement. (22 C.A.3d 106.)

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bb. When Offset Is Improper.

8 Witkin Sum. Cal. Law Const Law § 1244

[§ 1244] When Offset Is Improper.

(1) *No Offset for Separate Parcels.* In *People v. Fair* (1964) 229 C.A.2d 801, 40 C.R. 644, defendants owned land on the west and east sides of a highway, and the state owned the highway in fee. Portions of both parcels were condemned. Severance damages were awarded for the taking on the west side, and special benefits were found accruing to the property on the east side. But the trial judge refused to offset the benefits against the severance damages, on the ground that the two pieces of land were not parts of one larger parcel. *Held*, affirmed. Unlike *People v. Thompson* (1954) 43 C.2d 13, 271 P.2d 507, *supra*, §1239, where the full fee was owned by the defendant, here the intervening fee title was in the state, and defendants had no direct access to the highway. Hence, there were two noncontiguous parcels, and the "larger parcel" condition was not met. (229 C.A.2d 808.)

(2) *No Offset Against Award for Taking.* In California, the offset for benefits is allowed only against the damage to the remainder and compensation for loss of goodwill. (On compensation for loss of goodwill, see *C.C.P.* 1263.510, *infra*, §1245.) An excess of benefit to the remainder over damage to the remainder may not be deducted from the compensation for the property taken or other compensation required by the Eminent Domain Law. (*C.C.P.* 1263.410(b).) (See *Contra Costa County Water Dist. v. Zuckerman Const. Co.* (1966) 240 C.A.2d 908, 910, 50 C.R. 224; *People v. Corporation of President of Church of Jesus Christ of Latter-Day Saints* (1970) 13 C.A.3d 371, 379, 91 C.R. 532.)

(3) *Offset of General Benefits.* Although there is conflicting authority on the point, California formerly held that only special benefits resulting from the construction of the improvement and peculiar to the land in question could be set off; general benefits, consisting of an increase in the value of the land common to the community generally, could not be. (See *Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co.* (1968) 268 C.A.2d 199, 204, 73 C.R. 733 [offset of only \$ 2,000 was proper where special benefit from drainage project for which land was taken was that defendant's property would no longer be subject to flooding, and there was evidence that it would have cost only about \$ 2,000 to build suitable levee to protect it]; *People v. Giumarra Farms* (1971) 22 C.A.3d 98, 103, 99 C.R. 272 [discussing whether existence of special benefits is question of law or fact, and observing that later decisions treat it as jury question].) However, in *Los Angeles County Metropolitan Trans. Authority v. Continental Dev. Corp.*

(1997) 16 C.4th 694, 66 C.R.2d 630, 941 P.2d 809, supra, §1243, the court permitted the setoff of general benefits of a light rail project against severance damages.

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g. Compensation for Loss of Goodwill.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1245

[§ 1245] In General.

(1) *Former Law.* Originally, speculative profits derived from a business conducted on the property taken were not considered in determining market value. (See *People v. Dunn* (1956) 46 C.2d 639, 297 P.2d 964 [stating rule, but holding that income from lease was proper element]; 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §306.) An unsuccessful attempt was made to declare a constitutional right to compensation. (See *Community Redevelopment Agency of Los Angeles v. Abrams* (1975) 15 C.3d 813, 831, 126 C.R. 473, 543 P.2d 905 [elaborate opinion examining case law and views of commentators]; 81 *A.L.R.3d* 198 [note on *Abrams*].)

(2) *Statutory Rule.* C.C.P. 1263.510 changed the rule. It provides that the "owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves" the conditions for compensation. (C.C.P. 1263.510(a); see *Redevelopment Agency of Concord v. International House of Pancakes* (1992) 9 C.A.4th 1343, 1349, 12 C.R.2d 358 [discussing statute]; BAJI, No. 11.91; CACI, No. 3513; Model Eminent Domain Code, §1016, 13 (Part I) U.L.A. (Master Ed.), p. 106.) C.C.P. 1263.510 does not affect "compensation for inverse condemnation claims for temporary interference with or interruption of business." (C.C.P. 1263.530; see *supra*, §1130.)

(3) *Conditions for Compensation.* The owner must prove all of the following:

(a) "The loss is caused by the taking of the property or the injury to the remainder." (C.C.P. 1263.510(a)(1).)

(b) "The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill." (C.C.P. 1263.510(a)(2).)

(c) "Compensation for the loss will not be included in payments" for relocation assistance under *Govt.C.* 7262 (see *infra*, §1272). (C.C.P. 1263.510(a)(3); see *Redevelopment Agency of Emeryville v. Arvey Corp.* (1992) 3 C.A.4th 1357, 5 C.R.2d 161 [C.C.P. 1263.510 excludes payment for expenses that are payable as relocation assistance under *Govt.C.* 7262, even if those expenses have not actually been recovered].)

(d) "Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner." (C.C.P. 1263.510(a)(4).) (See *Unocal Calif. Pipeline Co. v. Conway* (1994) 23 C.A.4th 331, 335, 336, 28 C.R.2d 429 [in eminent domain proceeding by pipeline corporation seeking subsurface easement, defendant ranch could recover for loss of goodwill even though it was not forced to relocate]; *People v. Leslie* (1997) 55 C.A.4th 918, 923, 64 C.R.2d 252 [combined loss of goodwill suffered by two interdependent businesses was proper measure of damages even though businesses were treated separately for tax purposes]; *San Diego Metropolitan Transit Dev. Bd. v. Handlery Hotel* (1999) 73 C.A.4th 517, 537, 538, 86 C.R.2d 473 [when golf course operator's long-term lease expired, so did its business of operating golf course, and interim lease extensions pending condemnation did not transmute its status to that of business owner for purpose of loss of goodwill].)

Emeryville Redevelopment Agency v. Harcross Pigments (2002) 101 C.A.4th 1083, 125 C.R.2d 12, held that a landowner may not present evidence of loss of goodwill to the jury until the trial court has favorably resolved disputes on the presence of the required conditions for compensation. Thus, there could be no compensation for loss of goodwill where the loss was not caused by the taking, but by the transition of the property to a higher and better use, which was being compensated, and with which the continued operation of defendant's business was incompatible. (101 C.A.4th 1119.)

(4) *What Constitutes Goodwill*. "Goodwill" is defined as "the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage." (C.C.P. 1263.510(b).)

Goodwill under C.C.P. 1263.510 is not limited to loss of patronage but extends to loss of the benefits of the location that is condemned. In *People v. Muller* (1984) 36 C.3d 263, 203 C.R. 772, 681 P.2d 1340, defendant's business property was condemned and the business was relocated nearby. Patronage of the business remained the same, but the rent for replacement facilities was substantially higher. Held, defendant was entitled to compensation for the loss of the benefit of low rent at the original location. Characterizing defendant's lost profitability as goodwill is consistent with the definition of goodwill in other contexts. (36 C.3d 271.) Further, the "excess income method" of quantifying the loss is reasonable. (36 C.3d 272.)

(5) *Costs of Mitigating Anticipated Lost Goodwill*. A plaintiff may not recover *Klopping* damages based on the purchase of relocation property in anticipation of condemnation where there has been no formal action to acquire the existing site and where the condemning authority has done nothing to interfere with the profitable operation of plaintiff's business. (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 C.A.4th 558, 572, 76 C.R.2d 575 [applying *Klopping v. Whittier* (1972) 8 C.3d 39, 104 C.R. 1, 500 P.2d 1345, *supra*, §1235, and distinguishing *People v. Muller*, *supra*].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Rule*. Entering into a leaseback agreement is not a factor in determining goodwill, and no additional goodwill accumulates during the leaseback period. (C.C.P. 1263.510(c), added in 2006; see Supp., *supra*, §1218A.)

(3) *Conditions for Compensation*. It is for the trial court to decide whether the qualifying conditions stated in C.C.P. 1263.510(a) for compensation for loss of goodwill have been met. If the court finds that the statutory conditions exist, then the issue of valuing the goodwill is for the jury. (*Santa Clarita v. NTS Technical Systems* (2006) 137 C.A.4th 264, 270, 40 C.R.3d 244.)(4) *What Constitutes Goodwill*. See *Inglewood Redevelopment Agency v. Aklilu* (2007) 153 C.A.4th 1095, 1108, 64 C.R.3d 519 [following *People v. Muller* (1984) 36 C.3d 263, 203 C.R. 772, 681 P.2d 1340, text, p. 933; "cost to create" valuation satisfied definition of goodwill where tenant had ideal location for future profitability but sustained several yearly losses in anticipation of completion of shopping center across street].



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g. Compensation for Loss of Goodwill.

2. Valuation and Proof of Loss.

8 Witkin Sum. Cal. Law Const Law § 1246

[§ 1246] Valuation and Proof of Loss.

(1) *In General*. The owner has the burden of proving the existence of conditions that entitle him or her to compensation for lost goodwill (supra, §1245), but the owner does not have the burden of proof on the amount of the loss. The general rule of *C.C.P. 1260.210* (supra, §1221) governs the burden of proof. (*Redevelopment Agency of Cathedral City v. Metropolitan Theatres Corp.* (1989) 215 C.A.3d 808, 811, 263 C.R. 637; see *People v. Salami* (1991) 2 C.A.4th 37, 45, 46, 2 C.R.2d 833 [trial court erred in instructing jury that owner had burden on proving value of loss; stipulation relieved owner of requirement that he prove foundational elements, but it did not address amount of loss].)

(2) *Method of Valuation*. There is no exclusive method for determining the value of lost goodwill. (*Community Dev. Com. of National City v. Asaro* (1989) 212 C.A.3d 1297, 1305, 261 C.R. 231 [market analysis is among acceptable methods]; *San Diego v. Sobke* (1998) 65 C.A.4th 379, 398, 76 C.R.2d 9 [although there is no set methodology for valuing goodwill, trial court properly excluded expert's evidence of loss that was based on increased expenses without establishing existence of actual pre-taking goodwill and comparing its value with post-taking goodwill].)

In *Redevelopment Agency of Pomona v. Thrifty Oil Co.* (1992) 4 C.A.4th 469, 5 C.R.2d 687, the owner's expert testified that the value of lost goodwill was \$ 125,000. Prior to trial, the city's expert had appraised lost goodwill at \$ 80,000. However, at trial the city claimed that no goodwill was shown and did not present expert evidence on the issue. The jury awarded \$ 67,500 for lost good will. *Held*, affirmed.

(a) On the issue of *entitlement* to goodwill, the landowner has the burden of proof under *C.C.P. 1263.510*. Once entitlement is shown, neither party has the burden of proof of *valuation*. (4 C.A.4th 475.)

(b) The owner argues that the jury was limited to the valuation of its expert, because that was the only valuation before it. However, a jury may evaluate the credibility of witnesses. By arguing that the owner had not met its burden of proving entitlement, the city was establishing a floor of \$ 0. When the governmental entity believes that there is no goodwill, it is not required to present expert evaluation evidence. (4 C.A.4th 476.)

(3) *Evidence To Prove Loss*. The general rules of evidence apply. (Law Rev. Com. Comment on *C.C.P. 1263.510*.)

And the inspection of the owner's tax returns is authorized. (See *C.C.P.* 1263.520.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Redevelopment Agency of San Diego v. Attisha* (2005) 128 C.A.4th 357, 372, 27 C.R.3d 126 [distinguishing *San Diego Metropolitan Transit Dev. Bd. v. Handlery Hotel* (1999) 73 C.A.4th 517, 86 C.R.2d 473, text, §1245; trial court abused its discretion in striking testimony of business lessee's witness on valuation of goodwill; lessees had property interest by operating store under valid lease with 7 years remaining on date of valuation, and there was evidence that lessees had reasonable expectation that lease would be renewed].

(2) *Method of Valuation.* See *Redevelopment Agency of San Diego v. Attisha*, *supra*, 128 C.A.4th 374 [trial court erred in excluding valuation expert's testimony on ground that he used comparable sales outside city in "cash flow multiplier" method, where there was lack of comparable sales in city and data used was reliable for goodwill comparables]; *Inglewood Redevelopment Agency v. Aklilu* (2007) 153 C.A.4th 1095, 1109, 64 C.R.3d 519 [trial court did not err in admitting appraiser's testimony valuing loss of goodwill based on "cost to create" approach; because value of goodwill was zero under excess profits test, but location was excellent for future profits, appraiser used total of yearly losses sustained while shopping center across street was being constructed as cost of goodwill]; *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 C.A.4th 1111, 1130, 65 C.R.3d 372 [trial court erred in permitting speculative testimony on value of goodwill that was based on hypothetical business that could have existed had owner better utilized premises].



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h. Personal Property of Destroyed Business.

8 *Witkin Sum. Cal. Law Const Law* § 1247

[§ 1247] Personal Property of Destroyed Business.

A number of cases hold that the value of business equipment, stock in trade, and other items of personal property not permanently affixed to the condemned property is not a proper element of damages, even if the severed personal property is rendered essentially valueless. (See *Los Angeles v. Allen's Grocery Co.* (1968) 265 C.A.2d 274, 279, 71 C.R. 88; *Community Redevelopment Agency of Los Angeles v. Abrams* (1975) 15 C.3d 813, 834, 126 C.R. 473, 543 P.2d 905.)

Abrams was distinguished and a different rule was stated in *Baldwin Park Redevelopment Agency v. Irving* (1984) 156 C.A.3d 428, 202 C.R. 792. Plaintiff redevelopment agency condemned property used for an automobile parts and wrecking yard. Because a suitable alternate location could not be found, the inventory of the business (vehicles in various stages of disrepair) was sold for scrap, at about one-sixth of the replacement value. *Held*, defendant was entitled to compensation for the loss of value in the inventory.

(a) Neither the constitutional requirement of "just compensation" nor the Eminent Domain Law distinguishes between real and personal property for purposes of compensation and, "if the state takes or damages personal property in the exercise of its power of eminent domain, it is obligated to pay just compensation to the owner." (156 C.A.3d 435.)

(b) "Where the removal or relocation of either tangible or intangible personal property, under the circumstances of the particular case, is made impossible by the condemnatory act itself, then the owner's just compensation should not be limited by an arbitrary notion that in eminent domain any particular form of recognized property right is noncompensable." (156 C.A.3d 436.) In *Abrams*, it was the personal circumstances of the condemnee (age and physical condition), not the condemnatory act itself, that brought about the devaluation. "Here, the inability to relocate was the result of the nature of the business and the lack of any appropriately zoned property within a reasonably accessible area. Hence the *act of condemnation* of the only available location *directly* caused the loss." (156 C.A.3d 437.) (See *San Diego v. Cabrillo Lanes* (1992) 10 C.A.4th 576, 584, 585, 12 C.R.2d 613; *Carlsbad v. Rudvalis* (2003) 109 C.A.4th 667, 687, 690, 135 C.R.2d 194, *supra*, §1242 [distinguishing *Baldwin Park*; jury erred in awarding damages for economic loss to defendants' movable personal property where there was no evidence that city's road project "in and of itself" destroyed value of defendants' assets].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Redevelopment Agency of San Diego v. Attisha* (2005) 128 C.A.4th 357, 381, 27 C.R.3d 126 [distinguishing *Baldwin Park Redevelopment Agency v. Irving* (1984) 156 C.A.3d 428, 202 C.R. 792, text, p. 935; inventory was not compensable element of condemnation where it was not perishable and owners failed to conduct liquidation sale or otherwise market it in reasonable manner].



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i. Mitigation Work by Condemnor.

8 Witkin Sum. Cal. Law Const Law § 1248

[§ 1248] Mitigation Work by Condemnor.

The public entity and the owner may agree to certain action by the public entity that will reduce the owner's compensation. The agreement may provide that the entity will do either of the following:

(1) Relocate a structure if the "relocation is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of such relocation." (*C.C.P. 1263.610(a).*)

(2) Carry out work for the owner on property not taken, including work on a structure, "if the performance of the work is likely to reduce the amount of compensation otherwise payable to the owner by an amount equal to or greater than the cost of the work." (*C.C.P. 1263.610(b).*)

Carrying out work for the owner is intended to have broad application. "It would include any physical or structural operation whatsoever. Thus, it would cover such things as screening off roads or canals or soundproofing buildings adjacent to highways as well as constructing rights of way, fences, driveways, sidewalks, retaining walls, and drainage or utility connections." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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j. Protective Work by Owner.

8 *Witkin Sum. Cal. Law Const Law* § 1249

[§ 1249] Protective Work by Owner.

(1) *Compensation for Expenses.* *C.C.P. 1263.620* deals with the owner who has an improvement under construction or is engaged in installing machinery or equipment at the time of service of summons. If the owner ceases the construction or installation, he or she is entitled to compensation for "expenses reasonably incurred for work necessary" either: (a) to protect against the "risk of injury to persons or other property created by the uncompleted improvement," or (b) to "protect the partially installed machinery or equipment from damage, deterioration, or vandalism." (*C.C.P. 1263.620(a).*)

(2) *Notice to Plaintiff.* The compensation is recoverable only if prior notice is given to the plaintiff, except in an emergency. (*C.C.P. 1263.620(b).*) The plaintiff may object to the necessity or reasonableness of the expenses, and this fact should be taken into consideration in determining the amount of compensation. (Law Rev. Com. Comment.)

(3) *Agreement for Work or Compensation.* The plaintiff may agree with the owner: (a) that the plaintiff will perform the necessary work, or (b) on "the amount of compensation payable under this section." (*C.C.P. 1263.620(b).*)

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8. Divided Interests.

a. Leases.

8 Witkin Sum. Cal. Law Const Law § 1250

[§ 1250] Leases.

(1) *Termination of Lease.* In the absence of a contrary provision in the lease (*C.C.P. 1265.160*), taking all the leased property terminates the lease. (*C.C.P. 1265.110*.) This rule applies where the taking is by eminent domain or its "substantial equivalent," not where the public agency is merely the purchaser of the underlying fee. (*Peter Kiewit Sons' Co. v. Richmond Redevelopment Agency* (1986) 178 C.A.3d 435, 442, 443, 223 C.R. 728; see *Kong v. Hawaiian Gardens Redevelopment Agency* (2002) 108 C.A.4th 1028, 1038, footnote 10, 134 C.R.2d 260 [*C.C.P. 1265.110* applies to inverse condemnation proceedings].)

Where only part of the property is taken, the lease is ordinarily terminated as to that part, and remains in force as to the remainder, with a pro rata abatement of rent. (*C.C.P. 1265.120*.) However, on a party's petition, the court may terminate the lease if it determines that "an essential part of the property" is taken or that the remainder "is no longer suitable for the purposes of the lease." (*C.C.P. 1265.130*.)

(2) *Time of Termination.* The termination or partial termination date is fixed at (a) the time title is taken by the condemnor, or (b) the time the condemnor is authorized to take possession, whichever is earlier. (*C.C.P. 1265.140*.)

(3) *Rights and Remedies of Parties.* The law does not affect the right of a lessee to compensation for the taking of the leasehold interest, or for the taking of other property in which the lessee has an interest. (*C.C.P. 1265.150*.) The statutory rules on termination do not apply where the lease contains contrary provisions. (*C.C.P. 1265.160*; see *C.E.B.*, 2 Condemnation Practice 2d, §10.7 et seq.)

Vista v. Fielder (1996) 13 C.4th 612, 54 C.R.2d 861, 919 P.2d 151, raised the following question: "Under the Eminent Domain Law, does a provision of a lease that declares that the lease terminates if all the property subject thereto is acquired for public use deprive the lessee of any right he may have to compensation for the taking of his leasehold or other property?" (13 C.4th 616.) The answer was "no." The Eminent Domain Law itself declares the generally applicable rules that the lease terminates if all the property subject to it is acquired for public use, and that termination does not affect any right of the lessee to compensation. These rules may be displaced by a provision of a lease to the contrary. But a provision declaring that the lease terminates if all the property is acquired for public use is *not* to the contrary of either of the two rules. It is essentially a restatement of the first. (13 C.4th 618.)

(4) *Right to Compensation*. When leased property is taken and the lessee is deprived of some valuable part of the leasehold estate, the lessee is entitled to compensation. In nearly all cases, the fee is condemned, a single amount is determined for the total value of the divided estates, and thereafter, in the same proceeding, an apportionment of the award between the lessor and lessee is made. (See *C.C.P.* 1260.220, *supra*, §1222; *New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 C.A.4th 1473, 1482, 1483, 30 C.R.2d 469 [provision waiving lessee's right to recover "bonus value" in event of condemnation constituted waiver of right to recover value of below market rental]; *South San Francisco v. Mayer* (1998) 67 C.A.4th 1350, 1356, 79 C.R.2d 704, *supra*, §1182; *San Diego Metropolitan Transit Dev. Bd. v. Handlery Hotel* (1999) 73 C.A.4th 517, 533, 86 C.R.2d 473 ["where precondemnation conduct does not interrupt or affect a commercial lessee's enjoyment of its leasehold and that interest expires naturally giving rise to no compensable real property interest, no derivative compensable personal property interest remains ... because once the leasehold is terminated, so is the business"]; *Kong v. Hawaiian Gardens*, *supra*, 108 C.A.4th 1039 [in inverse condemnation action, trial court erred in sustaining defendant's demurrer without leave to amend based on fact that plaintiff's maximum term of occupancy under original sublease had expired before defendant exercised right to possession; defendant and lessor had executed lease agreement extending lessor's right to use property until needed and plaintiff continued to occupy premises as lessor's sublessee]; 22 A.L.R.5th 327 [validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee on condemnation of leased property]; 56 Proof of Facts 3d 419 [lessee's recovery of compensation].) (On right of holder of unexpired leasehold interest to compensation when land is condemned by U.S., see *Alamo Land & Cattle Co. v. Arizona* (1976) 424 U.S. 295, 96 S.Ct. 910, 916, 47 L.Ed.2d 1, 8.)

(5) *Valuation*. The basic theory of the lessee's compensation is the same as that governing the taking of fee interests. The lessee is entitled to receive the market value of the unexpired term of the leasehold, consisting of the difference between the lease rental and the rental value, i.e., any excess that the lease might bring in on a sale. (See *Kishlar v. Southern Pac. R. Co.* (1901) 134 C. 636, 639, 66 P. 848; 58 A.L.R.3d 566 [goodwill or going concern value as element of compensation]; 17 A.L.R.4th 337 [measure and elements of lessee's compensation]; 26 Am.Jur.2d (2004 ed.), *Eminent Domain* §367 et seq.; C.E.B., 2 Condemnation Practice 2d, §10.3.) (On method of valuation, see *California v. Whitlow* (1966) 243 C.A.2d 490, 497, 52 C.R. 336; *People v. Lynbar* (1967) 253 C.A.2d 870, 879, 62 C.R. 320, *supra*, §1222; *Los Angeles v. American Savings & Loan Assn.* (1972) 26 C.A.3d 7, 12, 102 C.R. 439; on oil lessee's right to use surface for development of oil and gas resources as compensable, see *Costa Mesa Union School Dist. of Orange v. Security First Nat. Bank* (1967) 254 C.A.2d 4, 12, 62 C.R. 113.)

(6) *Trade Fixtures*. The lessee may also be entitled to compensation for the value of trade fixtures that, as between the lessor and the lessee, were removable by the lessee. For purposes of determining what land is taken, they are regarded as real property and their value is included in the award (see *supra*, §1225); but as between the lessor and lessee, the lessee is either entitled to their value as part of the award or may have their cost considered in determining the value of the leasehold. (See *Almota Farmers Elevator & Warehouse Co. v. United States* (1973) 409 U.S. 470, 93 S.Ct. 791, 794, 35 L.Ed.2d 1, 7 [lessee owning improvements with useful life beyond term of lease was entitled to what would be paid in open market by buyer with reasonable expectation that lease would be renewed, not merely salvage value of improvements]; *People v. Klopstock* (1944) 24 C.2d 897, 903, 151 P.2d 641.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Right to Compensation*. See 96 Am.Jur. Trials 211 [Condemnation of Leasehold Interests].



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b. Encumbrances.

8 Witkin Sum. Cal. Law Const Law § 1251

[§ 1251] Encumbrances.

(1) *Deduction of Amount of Indebtedness.* Where the property to be taken is encumbered by a lien (broadly defined to include a security interest, arising from contract, statute, common law, or equity; see *C.C.P. 1265.210*), the plaintiff may elect to have the lien continue and the amount not due deducted from the judgment. The plaintiff's liability for taxes, however, cannot be deducted. (*C.C.P. 1265.220.*)

(2) *Partial Taking and Allocation of Award Between Encumbrancer and Owner.* Where there is only a partial taking, the lienholder is entitled to share in the award only to the extent of impairment of the security, and the lien will continue on the part of the property not taken. (*C.C.P. 1265.225(a)*; see *15 Loyola L.A. L. Rev. 227* [Valuation of Mortgagee's Interest on Partial Condemnation]; Model Eminent Domain Code, §1014, 13 (Part I) U.L.A. (Master Ed.), p. 105; on what constitutes impairment of security, see *infra*, §1252.) This rule applies regardless of a contrary agreement at the time the indebtedness is created. However, the lienholder and owner may, after commencement of the eminent domain proceeding, agree on apportionment of the award. (*C.C.P. 1265.225(b).*)

The amount payable to the lienholder cannot include a prepayment penalty. (*C.C.P. 1265.240.*)

(3) *Partial Taking and Allocation Between Senior and Junior Encumbrancers.* *C.C.P. 1265.230* provides for the special situation arising "where there is a partial taking of property encumbered by a lien and the part taken or some portion of it is also encumbered by a junior lien that extends to only a portion of the property encumbered by the senior lien." (*C.C.P. 1265.230(a).*) The method of allocation is set forth in *C.C.P. 1265.230(c)*, (d), (e), and is summarized in the Law Revision Commission Comment as follows:

The allocation procedure of *C.C.P. 1265.230* "is designed to allow adjustment of the portion of the condemnation award available to the lienholders so that both the senior and junior lienholders will retain security interests proportionate to those existing before the taking. If the amount is not sufficient to pay both in full, it will be initially allocated to pay the full amount of the senior lien with any balance to the junior. At that time, the court will determine the adequacy of the remaining property to secure the junior lien. If it determines that the junior lienholder's security is disproportionately low, the court may make adjustments as to the initial allocation to place the junior in the same relative position as before the taking. The adjustment, made by reducing the allocation to the senior and adding to that

of the junior, is permissible only if it preserves the proportional security of the senior lienholder."

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c. Partial Taking and Impairment of Security.

8 Witkin Sum. Cal. Law Const Law § 1252

[§ 1252] Partial Taking and Impairment of Security.

In *People v. Redwood Baseline, Ltd.* (1978) 84 C.A.3d 662, 149 C.R. 11, there was a partial taking of property subject to first and second deeds of trust. The owner claimed the entire award; the trial judge found that the security of the trust deed holders had been impaired and apportioned the award. *Held*, affirmed, in an elaborate opinion discussing all the theories of impairment and apportionment.

(a) The owner urged application of the *debt equivalency rule*, that impairment is the reduction in the value of the property below the amount of the debt secured. But the significant consideration in applying the rule is whether the security transaction is to *terminate* (as by foreclosure). (84 C.A.3d 677.) In that situation, the lienholder is fully protected if the value of the property is at least equal to the amount of the debt. (84 C.A.3d 684.) But where, as here, *the transaction will continue*, application of the rule would be inequitable and inconsistent with the essential bargain and reasonable expectations of the parties. The lienholder bargains for and expects a margin of security over and above the amount of the debt, and both debtor and creditor generally expect the margin of security to increase with time, e.g., where payments of principal and interest are made periodically. (84 C.A.3d 683.)

(b) The *original ratio rule* (security to debt ratio) is more equitable, but does not truly reflect the real bargain of the parties that the lienholder will have the security of the entire property even if it has increased in value. (84 C.A.3d 685.)

(c) Under the *pre-take ratio rule*, urged by the lienholders, the security would be deemed impaired if the debt ratio is less than that existing immediately prior to the taking. This rule is favored by most of the commentators, is prescribed by C.C.P. 1265.230 for allocating the award between junior and senior encumbrancers (see *supra*, §1251), and would achieve an equitable result in many, but not all cases. (84 C.A.3d 686.)

(d) Two other rules have been suggested: (1) comparing the market value of the secured debt before and after the partial condemnation, and (2) equating impairment with the reduction in value of the property below the margin of safety (the conservative lender rule). (84 C.A.3d 687.)

(e) *Each rule may be appropriate* in a given situation, and the question should "be determined in light of the circumstances of the particular case considering all of the relevant factors." These include, among others: "whether the

debt and security transaction resulted from a sale or a loan; whether or not a deficiency judgment is legally permissible; the terms for repayment; the interest rate charged compared with the prevailing interest rate in similar transactions; the original, pretake and posttake security to debt ratios; the length of time the transaction has been in effect; the amount of the debtor's equity and the amount actually invested by the debtor in the property constituting the security; the payment record of the debtor prior to the partial condemnation; the length of time the transaction is to continue in force after the partial condemnation; whether or not the partial condemnation necessitates repair to or reconstruction of the property; the amount of the annual taxes and assessments against the property; whether the debt is currently paid or is in default; facts bearing on the likelihood of default by the debtor; the nature of the security property; whether or not the security property is likely to be readily salable; and whether or not it is likely it can be sold at a foreclosure sale for a price approximating its fair market value." (84 C.A.3d 688.)

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d. Future Interests.

8 Witkin Sum. Cal. Law Const Law § 1253

[§ 1253] Future Interests.

(1) *Use Restriction Coupled With Right to Possession on Violation.* Early cases denied compensation to the holder of a power of termination so remote as to lack substantial value. (See *Romero v. Department of Public Works* (1941) 17 C.2d 189, 194, 109 P.2d 662; *People v. Fresno* (1962) 210 C.A.2d 500, 516, 26 C.R. 853 [noting Restatement view that compensation is authorized where condition or event is probable at time of condemnation]; *Rest., Property* §53, Comment c.)

Contrary to the implication of *Romero*, compensation for contingent future interests based on violation of a use restriction is available as follows:

(a) "If violation of the use restriction was otherwise reasonably imminent, the owner of the contingent future interest is entitled to compensation for its value, if any." (C.C.P. 1265.410(a)(1).)

(b) "If violation of the use restriction was not otherwise reasonably imminent but the benefit of the use restriction was appurtenant to other property, the owner of the contingent future interest is entitled to compensation to the extent that the failure to comply with the use restriction damages the dominant premises to which the restriction was appurtenant and of which he was the owner." (C.C.P. 1265.410(a)(2).)

When the contingent future interest is not compensable under this provision, but the use restriction is that the property be devoted to a particular charitable or public use, the compensation must be devoted "to the same or similar use coupled with the same contingent future interest." (C.C.P. 1265.410(b).)

In *Palm Springs v. Living Desert Reserve* (1999) 70 C.A.4th 613, 82 C.R.2d 859, plaintiff city wanted to build a golf course on donated property it had accepted 3 years earlier on the express condition that it be used in perpetuity as a desert wildlife preserve. When it could not come to terms with defendant, the holder of the reversionary interest, plaintiff sought to take the property by eminent domain. The trial judge held that defendant's reversionary interest was not compensable. *Held*, reversed.

(a) Under C.C.P. 1265.410(a), "the owner of the contingent future interest is entitled to compensation for its value"

if "violation of the use restriction was otherwise reasonably imminent." (70 C.A.4th 624.) The *reasonable imminence* of a violation is to be determined objectively, i.e., whether reasonably prudent persons impartially looking at the circumstances would consider it to be reasonable. Thus, the fact that the city did not want to violate the restriction and lose its fee was irrelevant. (70 C.A.4th 625.)

(b) As used in the statute, "otherwise" in "otherwise reasonably imminent" "refers to the exclusion of consideration of the eminent domain proceedings." (70 C.A.4th 625.) Without this exclusion, the owner of the present interest would suffer an unfair forfeiture. However, here the condemnee and the grantee were one and the same, and condemnation of the future interest would not divest plaintiff of its present interest in the property and thus, would not prevent it from continuing to use the property in conformance with the use restriction. "That it did not plan to do so was not a decision forced upon it by the condemnation, but rather was its own voluntary choice, for which it should be held accountable." (70 C.A.4th 626, 627.)

(2) *Property Subject to Life Tenancy*. When the property is subject to a life tenancy, the life tenant or other person having an interest in the property may petition for the court to order any of the following:

(a) "[A]pportionment and distribution of the award based on the value of the interest of life tenant and remainderman." (C.C.P. 1265.420(a).)

(b) Compensation for the purchase of "comparable property to be held subject to the life tenancy." (C.C.P. 1265.420(b).)

(c) "[C]ompensation to be held in trust and invested and the income (and, to the extent the instrument that created the life tenancy permits, principal) to be distributed to the life tenant for the remainder of the tenancy." (C.C.P. 1265.420(c).)

(d) Other equitable arrangements. (C.C.P. 1265.420(d).) (See Model Eminent Domain Code, §1015, 13 (Part I) U.L.A. (Master Ed.), p. 106.)

SUPPLEMENT: [This section is current through the latest supplement]



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9. Postjudgment Procedure.

a. Payment and Final Order.

8 Witkin Sum. Cal. Law Const Law § 1254

[§ 1254] Payment and Final Order.

(1) *Payment of Judgment.* The plaintiff must pay the full amount required by the judgment within (a) 30 days after final judgment, or (b) 30 days after the conclusion of other court proceedings (including a federal court proceeding) challenging the judgment or the condemnation proceedings, whichever is later. (*C.C.P. 1268.010(a)*.) (See *C.C.P. 1235.120*, supra, §1171 [defining "final judgment"]; *Arechiga v. Housing Authority of Los Angeles* (1960) 183 C.A.2d 835, 842, 7 C.R. 338; *F & L Farm Co. v. City Council of Lindsay* (1998) 65 C.A.4th 1345, 1355, 77 C.R.2d 360 [city could not avoid paying inverse condemnation judgment by claiming that constitutional debt and tax limitations prevented its imposition of taxes and assessments to raise money to pay judgment]; C.E.B., 2 Condemnation Practice 2d, §10.25; 7 *Cal. Proc.* (4th), *Judgment*, §1.) Payment must be made either directly to the defendant (with credit for amounts previously withdrawn), or by deposit with the court under *C.C.P. 1268.110* (infra, §1255). (*C.C.P. 1268.010(b)*.)

At the request of the property owner, however, the public entity may enter into an agreement specifying the manner of payment of compensation. Payment may be made over a period of up to 10 years, with interest no greater than that authorized in connection with the issuance of bonds. (*C.C.P. 1263.015*; see *Community Redevelopment Agency of Hawthorne v. Force Electronics* (1997) 55 C.A.4th 622, 632, 64 C.R.2d 209, 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, Supp., §401 [defendant has right to be paid within 30 days of judgment or have property returned; *Govt.C. 970.6*, providing for installment payments, is available only at defendant's option]; C.E.B., 2 Condemnation Practice 2d, §10.26.)

(2) *Defendant's Remedies for Nonpayment.* If the plaintiff fails to pay the full amount within the time required, the defendant may elect either to (a) execute on the judgment, or (b) make a noticed motion for dismissal of the proceeding, without first resorting to execution. (*C.C.P. 1268.020(a)*, (b), (c).) However, the second remedy is available only after service on the plaintiff, by registered or certified mail, of a written notice of failure to pay, and plaintiff's subsequent failure to pay for 20 days after such notice. (*C.C.P. 1268.020(b)*.)

If the plaintiff is a public entity, enforcement is pursuant to *Govt.C. 810* et seq. (*C.C.P. 1268.020(a)(1)*; see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §§53, 400 et seq.)

(3) *Final Order of Condemnation*. On a party's application, the court must make a final order of condemnation if it finds that (a) the judgment is a final judgment, and (b) the full amount has been paid or satisfied. (C.C.P. 1268.030(a).) The order must describe the property taken and identify the judgment authorizing the taking. (C.C.P. 1268.030(b).) The party on whose application the order was made must serve notice of the order on all other parties affected. (C.C.P. 1268.030(c).)

An affected party may record the order in the county where the property is located, and serve notice of recordation on all other parties affected. (C.C.P. 1268.030(c).) "Title to the property vests in the plaintiff upon the date of recordation." (C.C.P. 1268.030(c).)

Vesting of title by recordation of the order ordinarily gives the condemnor the right to possession at that time. But an exception was recognized in *Redevelopment Agency of San Francisco v. Superior Court* (1970) 13 C.A.3d 561, 568, 91 C.R. 886. The taking by petitioner, a redevelopment agency, was subject to the controlling federal statute and regulation specifying that possession can be had only on giving a 90-day notice.

(4) *Effect of Sale Pending Final Order*. Compensation is awarded to the person who *owned* the property at the time it was *taken*. Thus, if property is sold prior to divestment of title by the award, and the deed is silent on the matter, the money goes to the purchaser. (*Security Co. v. Rice* (1932) 215 C. 263, 266, 9 P.2d 817; *Brick v. Cazaux* (1937) 9 C.2d 549, 554, 71 P.2d 588.)

Ordinarily, the time of taking is the time of the final decree, but an exception was formerly recognized where the condemnor exercised the right to take immediate possession (supra, §1216). It was held that the subsequent divestment of title merely confirmed the prior taking and that the time of physical possession determined the right to compensation. The result was that where the property was sold pending the action, the original owner got the money. (*People v. Joerger* (1936) 12 C.A.2d 665, 671, 55 P.2d 1269; *Long Beach v. Aistrup* (1958) 164 C.A.2d 41, 48, 330 P.2d 282 [same rule applied to a county's lien for general taxes attaching after immediate possession taken]; *United States v. Dow* (1958) 357 U.S. 17, 78 S.Ct. 1039, 1045, 2 L.Ed.2d 1109, 1115 [same rule applies to condemnation by U.S.].) However, the law now states a uniform rule whether or not possession was previously taken: title vests on recordation. (C.C.P. 1268.030(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Payment of Judgment*.

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §1. *Community Redevelopment Agency of Hawthorne case*:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §431.

(2) *Defendant's Remedies for Nonpayment*.

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §§61, 429 et seq.



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b. Deposit and Withdrawal of Award.

1. Deposit After Judgment.

8 Witkin Sum. Cal. Law Const Law § 1255

[§ 1255] Deposit After Judgment.

(1) *Right To Deposit.* The plaintiff may, at any time after entry of judgment, deposit in court for the persons entitled the full amount of the award plus interest then due, less amounts previously paid or deposited before judgment under *C.C.P. 1255.010* (supra, §1212). (*C.C.P. 1268.110(a).*) The deposit may be made notwithstanding pendency of an appeal, motion for new trial, or motion to vacate or set aside the judgment; but it cannot be made after the judgment has been reversed, vacated, or set aside. (*C.C.P. 1268.110(b).*) (On deposit in state or county treasury, and investment of money, see *C.C.P. 1268.150*, similar to *C.C.P. 1255.070*, supra, §1213.)

By making a deposit, "the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial." (*C.C.P. 1268.170.*)

(2) *Service of Notice.* Notice of the deposit, with the date and amount, must be served on the parties who have interests in the property. Service must be made in the manner required for service of an order for possession (*C.C.P. 1268.220*, infra, §1257), and service of an order for possession is a sufficient compliance. The parties are entitled to notice as follows: (a) If the deposit is made prior to apportionment of the award, all parties who have appeared in the proceeding. (b) If it is made after apportionment of the award, all parties determined by the order of apportionment to have an interest in the money deposited. (*C.C.P. 1268.120.*)

(3) *Increase or Decrease in Amount.* (a) The court, on a defendant's motion, may order the deposit of an additional amount that "the court determines to be necessary to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding." (b) Thereafter, on a party's motion, the court may order an increase or decrease in the additional amount. (c) A defendant may withdraw all or part of the amount deposited "only if it is determined that he is entitled to recover such amount in the proceeding." (*C.C.P. 1268.130.*)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Withdrawal of Deposit.

8 *Witkin Sum. Cal. Law Const Law* § 1256

[§ 1256] Withdrawal of Deposit.

(1) *Application for Withdrawal and Effect.* On a court order, a defendant with an interest may be paid from the deposit. The defendant applies for the order, filing either a satisfaction of the judgment or a receipt for the money, which constitutes "a waiver by operation of law of all claims and defenses except a claim for greater compensation." (C.C.P. 1268.140(a).) (See *People v. Gutierrez* (1962) 207 C.A.2d 759, 24 C.R. 781 [owner retained right to move for new trial on amount of damages after withdrawal of full amount of judgment]; *San Francisco Bay Area Rapid Transit Dist. v. Fremont Meadows* (1971) 20 C.A.3d 797, 805, 97 C.R. 898 [owner was entitled to appeal, notwithstanding withdrawal of amount of judgment]; *Regents of Univ. of Calif. v. Morris* (1968) 266 C.A.2d 616, 634, 72 C.R. 406 [receipt constituted waiver of questions regarding right of condemnation, including constitutionality]; *San Diego Gas & Elec. Co. v. Moreland Inv. Co.* (1986) 186 C.A.3d 1151, 1156, 231 C.R. 274 [stipulated order for withdrawal of deposit treated as receipt under C.C.P. 1268.140(a)(2); right to appeal was preserved].)

In *People v. Neider* (1961) 55 C.2d 832, 13 C.R. 196, 361 P.2d 916, plaintiff paid the money into court. Defendant drew it out, and then took an appeal from that part of the judgment fixing the award. Plaintiff contended that, because it made no attempt to invoke the predecessor statute by express notice of the deposit, the statutory protection of defendant's right to appeal was inapplicable, and the general rule of waiver by acceptance of benefits applied (see 9 *Cal. Proc.* (4th), *Appeal*, §212). *Held*, the appeal was good; his right could not be frustrated by the condemnor's failure to expressly invoke the statute in depositing the sum awarded. (55 C.2d 837.)

(2) *Conditions.* The following procedure is provided:

(a) If the award has not been apportioned, the applicant must give notice to all other defendants who have appeared and who have an interest; if it has been apportioned, the applicant must give "notice to the other defendants as the court may require." (C.C.P. 1268.140(b).)

(b) On objection to the withdrawal by a party to the proceeding, the court has discretion to require the filing of an undertaking on the conditions prescribed in C.C.P. 1255.240 for withdrawal prior to judgment (see *supra*, §1215). (C.C.P. 1268.140(c).)

(c) If the judgment has been reversed, vacated, or set aside, withdrawal may be made only pursuant to *C.C.P.* 1255.210 et seq. (supra, §1215). (*C.C.P.* 1268.110(c), 1268.140(d).)

(3) *Repayment of Excess Withdrawal.* (a) An excess amount withdrawn must be paid to the parties entitled to it, and the court must enter judgment accordingly. (b) The judgment includes interest only where the amount withdrawn by one defendant is to be paid to another defendant. (c) If the judgment is not paid within 30 days after entry, the court may, on motion, enter judgment against the sureties, if any. (d) The court may, in its discretion and with security that it deems appropriate, grant a party obligated to pay the plaintiff a stay of execution, which must not exceed 1 year following entry of the judgment under this section. (*C.C.P.* 1268.160; see *Downey v. Johnson* (1978) 79 C.A.3d 970, 973, 145 C.R. 298.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Application for Withdrawal and Effect.*

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §67.



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c. Possession After Judgment.

8 Witkin Sum. Cal. Law Const Law § 1257

[§ 1257] Possession After Judgment.

(1) *Power of Court.* "The court in which a proceeding in eminent domain is brought has the power to: (a) Determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with this title. (b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order for possession as a matter of right." (*C.C.P. 1230.050.*) The "appropriate process" includes writs of possession (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §317 et seq.) and orders for possession under 1268.210 et seq. (Law Rev. Com. Comment.) (On order for possession before judgment, see supra, §1216.)

(2) *Application.* If the plaintiff is not in possession, he or she may, at any time after entry of judgment, apply ex parte for an order for possession, which must be granted on a showing that the judgment determines that the plaintiff is entitled to take and has made the deposit required by *C.C.P. 1255.010* (supra, §1212) or *C.C.P. 1268.110* (supra, §1255). (*C.C.P. 1268.210(a).*) (See *People v. Loop* (1958) 161 *C.A.2d* 466, 473, 326 *P.2d* 902; *Pacific Gas & Elec. Co. v. Superior Court* (1973) 33 *C.A.3d* 321, 325, 109 *C.R. 10* [on proper showing, order is mandatory].) If the judgment is reversed, vacated, or set aside, the plaintiff may obtain possession only pursuant to *C.C.P. 1255.410* (supra, §1216). (*C.C.P. 1267.210(c).*)

(3) *Order.* The order must state the date of authorization to take possession, and if a deposit is made, the fact, date, and amount of the deposit. (*C.C.P. 1268.210(b).*)

(4) *Service of Order.* The plaintiff must serve a copy of the order on each defendant and his or her attorney either personally or by mail; but a single service or mailing to one of several persons with a common business or residence address is sufficient. (*C.C.P. 1268.220(a), (b).*) The time of service is specified: (a) If the property is "lawfully occupied by a person dwelling thereon or by a farm or business operation," at least 30 days prior to the date possession is to be taken. (b) In other cases, at least 10 days prior to that date. (*C.C.P. 1268.220(a).*)

The plaintiff, by taking possession, does not waive the right to appeal from the judgment, to move to abandon, or to request a new trial. (*C.C.P. 1268.230*, similar to *C.C.P. 1255.470*, supra, §1216.) Nothing in the article limits the exercise of police power in emergency situations. (*C.C.P. 1268.240*, similar to *C.C.P. 1255.480*, supra, §1216.) (See 40 *A.L.R.3d* 203 [payment of award in court as affecting condemnor's right to appeal].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Power of Court.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §325.



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d. Interest.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1258

[§ 1258] In General.

(1) *Right to Interest.* Interest, including interest accrued due to prejudgment possession by the plaintiff, and any offset against interest, must be assessed by the court. (*C.C.P.* 1268.340; see *Bellflower City School Dist. v. Skaggs* (1959) 52 *C.2d* 278, 281, 339 *P.2d* 848; *Redevelopment Agency of San Francisco v. Goodman* (1975) 53 *C.A.3d* 424, 430, 125 *C.R.* 818; 36 *A.L.R.2d* 337 [interest on damages for period before judgment for injuring or detaining property]; 7 *Cal. Proc.* (4th), *Judgment*, §272 et seq. [interest on judgment].)

A property owner is not entitled to interest on a condemnation award where, after judgment, the proceeding is abandoned, the action is dismissed, and the award is not paid. (*Santa Clarita Water Co. v. Lyons* (1984) 161 *C.A.3d* 450, 460, 207 *C.R.* 698; *People v. Union Pac. Land Resources Corp.* (1986) 179 *C.A.3d* 307, 315, 316, 224 *C.R.* 487 [following *Lyons*; there is no right to interest where proceeding is abandoned in absence of taking possession]; see 92 *A.L.R.2d* 355 [liability on abandonment for interest on award or judgment].)

(2) *Time When Interest Begins To Run.* Interest commences to accrue from the earliest of three dates: (a) the date of entry of the judgment; (b) the date the plaintiff takes possession; or (c) the date after which the plaintiff is authorized to take possession, as stated in the order of possession. (*C.C.P.* 1268.310; see *Metropolitan Water Dist. of Southern Calif. v. Adams* (1940) 16 *C.2d* 676, 680, 107 *P.2d* 618 [time of taking possession]; *People v. Southern Calif. Edison Co.* (2000) 22 *C.4th* 791, 798, 803, 94 *C.R.2d* 609, 996 *P.2d* 711 [declining to apply *C.C.P.* 1268.310 where, under unique facts of case, application would defeat purpose behind statute and go far beyond legislative intent; instead, interest would run from date condemnee asked state to begin condemnation proceedings and asserted its statutory right to compensation]; *Riverside County Flood Control & Water Conservation Dist. v. Halman* (1968) 262 *C.A.2d* 510, 517, 69 *C.R.* 1 [date of entry of judgment]; *People v. Williams* (1973) 30 *C.A.3d* 980, 982, 106 *C.R.* 795 [date of possession specified in entry agreement].)

If property is taken or damaged prior to judgment, the constitutional requirement of "just compensation" requires an award of interest for the delayed payment. To meet this constitutional command, the language "takes possession of the property" in *C.C.P.* 1268.310(b) must be construed to include a constructive taking and to allow interest based on an inverse condemnation claim. (*People v. Gardella Square* (1988) 200 *C.A.3d* 559, 571, 574, 246 *C.R.* 139, citing

Redevelopment Agency of Burbank v. Gilmore (1985) 38 C.3d 790, 214 C.R. 904, 700 P.2d 794.)

(3) *Time When Interest Ceases To Run.* Interest ceases to accrue on the earliest of three dates: (a) regarding amounts deposited before judgment, the date of withdrawal; (b) regarding amounts deposited after judgment, the date of deposit; (c) regarding amounts paid to a person entitled to payment, the date of payment. (C.C.P. 1268.320.)

(4) *Offsets Against Interest.* (a) If the defendant continues in actual possession after the date interest begins to accrue, the value of that possession is offset against the interest. The value is presumed to be the rate of interest calculated under C.C.P. 1268.350 (infra, §1259) on the compensation awarded. (C.C.P. 1268.330(a).) (See *Placer County Water Agency v. Hofman* (1985) 165 C.A.3d 890, 903, 211 C.R. 894 [there is no offset where easement is taken; owner cannot remain in actual possession of easement once it is taken].) (b) If the defendant receives income from the property after the date interest begins to accrue, the net income is offset against the interest. (C.C.P. 1268.330(b).) (See *People v. Giumarra Vineyards Corp.* (1966) 245 C.A.2d 309, 321, 53 C.R. 902; *Stockton v. Albert Brocchini Farms* (2001) 92 C.A.4th 193, 203, 111 C.R.2d 662 [trial court erred in limiting plaintiff's offset rights to defendant's actual return on land (here, less than zero); limiting offset would allow defendant beneficial use of asset while tying plaintiff's right to offset to defendant's ability to make profit from it].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Right to Interest.*

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §326 et seq.(4) *Offsets Against Interest.* See *Inglewood Redevelopment Agency v. Aklilu* (2007) 153 C.A.4th 1095, 1121, 64 C.R.3d 519 [trial court did not err in failing to hold hearing on offset of rent against interest because offset was mandatory, trial court had already received evidence related to fair market rent of property, and there was no factual dispute].



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d. Interest.

2. Market Rate of Interest.

8 *Witkin Sum. Cal. Law Const Law* § 1259

[§ 1259] Market Rate of Interest.

(1) *In General.* As originally enacted, *C.C.P. 1268.310* provided for "legal interest" on the amount of compensation. The statutory maximum was held unconstitutional in *Redevelopment Agency of Burbank v. Gilmore* (1985) 38 C.3d 790, 214 C.R. 904, 700 P.2d 794. Plaintiff redevelopment agency condemned defendants' property and took prejudgment possession under *C.C.P. 1255.410* et seq. (supra, §1216), after depositing the probable amount of compensation under *C.C.P. 1255.010* et seq. (supra, §1212). Defendants withdrew the deposited amount. The value of the property determined at trial substantially exceeded the amount deposited, and the judgment awarded defendants the difference between the final assessed value and the deposit, together with interest at the *legal rate* (then 7%). *Held*, the constitutional requirement of "just compensation" required computation of interest at the *prevailing market rate*.

(a) *Statutory interest ceiling is constitutionally inadequate.* Where private property is taken for public use, the constitutional requirement of just compensation means that the owner must be put in the same financial position he or she would be in if the property had not been taken. If the property is taken and used before payment, the owner is entitled to the full equivalent of the value of the use "at the time of the taking paid contemporaneously with the taking." Interest at "a proper rate" is fair reimbursement for the deferred payment. (38 C.3d 797, quoting *Seaboard Air Line Ry. Co. v. United States* (1923) 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664, and *Phelps v. United States* (1927) 274 U.S. 341, 47 S.Ct. 611, 71 L.Ed. 1083.) A statutory interest ceiling cannot prevail "where it falls short of constitutional 'just compensation' under the standard of *Seaboard* and *Phelps*." (38 C.3d 797.) Under the Eminent Domain Law, a property owner is permanently deprived of all property rights when a condemnor deposits probable compensation and obtains possession. A constitutional taking occurs at that time, and "just compensation" is the monetary equivalent of the value of the property paid at that time. (38 C.3d 801.)

(b) *Computation of market rate of interest.* Constitutionally acceptable interest on a delayed payment "should bear the same relationship to rates the condemnee could have achieved by investing the funds if they had been paid at the time of the taking." Interest is frequently calculated at the rate that would be earned by a "reasonably prudent person" investing to produce "a reasonable return while maintaining safety of principal." (38 C.3d 803.) "Absent specific statutory guidance, ... the 'prudent investor' principle is a sound basis for calculation of interest as just compensation. This doctrine seems best suited to give the condemnee the 'full and perfect' monetary equivalent of a timely cash

payment for his property." (38 C.3d 804.) Determining the proper rate of interest is primarily a task for trial courts on a case-by-case basis, examining "the rates prevailing during the period a condemnation payment was delayed for all forms of money-market obligations, governmental and private, which prudent depositors and investors normally purchase for income purposes, and whose terms or maturities fall within the period of delay." (38 C.3d 806.) (See *Redevelopment Agency of Fresno v. Erganian* (1989) 211 C.A.3d 166, 170, 173, 259 C.R. 213 [distinguishing *Redevelopment Agency of Burbank*; property owner who has right to withdraw deposit under C.C.P. 1255.075 (supra, §1213), but chooses not to do so, is entitled to legal rate rather than market rate of interest].)

(2) *Statutory Provisions*. Interest is computed as prescribed by C.C.P. 1268.350 (C.C.P. 1268.310), which provides that (a) interest is calculated semiannually for the first 6 months and the last 6 months of the calendar year; and (b) the rate is the "apportionment rate" calculated by the Controller as the rate of earnings on the Surplus Money Investment Fund for the preceding 6-month period. (C.C.P. 1268.350.) Interest payable for one 6-month period is compounded, drawing interest in each succeeding period. (C.C.P. 1268.360.) (See *Smith v. Los Angeles* (1989) 214 C.A.3d 266, 294, 262 C.R. 754 [fact that C.C.P. 1268.350 was not applicable to period in question (prior to January 1, 1987) did not preclude trial judge from relying on statutory standard as reliable measure of rate of return]; *Glendale Redevelopment Agency v. Parks* (1993) 18 C.A.4th 1409, 1418, 1420, 23 C.R.2d 14 [C.C.P. 1268.350 is constitutional].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Provisions*. C.C.P. 1268.350 and 1268.360, as amended in 2006, provide for the quarterly calculation of interest.



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e. Ad Valorem Property Taxes.

1. Liability, Proration, and Payment.

8 Witkin Sum. Cal. Law Const Law § 1260

[§ 1260] Liability, Proration, and Payment.

(1) *Liability.* As between the plaintiff and the defendant, the plaintiff is liable for ad valorem taxes, penalties, and costs prorated from and including the date of apportionment as determined by Rev.C. 5082. (*C.C.P. 1268.410.*) If the defendant pays an amount for which the plaintiff is liable, that amount must be repaid to the defendant. (*C.C.P. 1268.430.*) (On taxing authority as party, see *C.C.P. 1250.250*, supra, §1205; on liability of owner for taxes accruing prior to final order of condemnation, see *Ontario v. Kelber (1973) 35 C.A.3d 751, 755, 111 C.R. 222.*)

(2) *Order To Certify Information.* The court by order gives the tax collector or auditor, where both are elected officials, the legal description of the property, and directs the tax collector or auditor to certify to the court specified information. (*C.C.P. 1260.250(a).*) The order must be made on or before the earliest of the following dates: (a) date of order for possession; (b) date set for trial; (c) date of entry of judgment. (*C.C.P. 1260.250(b).*)

(3) *Information To Be Certified.* The court order directs the tax collector or auditor to promptly certify the following information:

(a) "The current assessed value of the property together with its assessed identification number." (*C.C.P. 1260.250(c)(1).*)

(b) All unpaid taxes on the property, and penalties and costs that have accrued on it "while on the secured roll, levied for prior tax years that constitute a lien on the property." (*C.C.P. 1260.250(c)(2).*)

(c) All unpaid taxes on the property, and penalties and costs that have accrued on it "while on the secured roll, levied for the current tax year that constitute a lien on the property prorated to, but not including, the date of apportionment determined" pursuant to Rev.C. 5082 "or the date of trial, whichever is earlier. If the amount of the current taxes is not ascertainable at the time of proration, the amount shall be estimated and computed based on the assessed value for the current assessment year and the tax rate levied on the property for the immediately prior tax year." (*C.C.P. 1260.250(c)(3).*)

(d) "The actual or estimated amount of taxes on the property that are or will become a lien on the property in the next succeeding tax year prorated to, but not including, the date of apportionment determined" pursuant to Rev.C. 5082 "or the date of trial, whichever is earlier. Any estimated amount of taxes shall be computed based on the assessed value of the property for the current assessment year and the tax rate levied on the property for the current tax year." (*C.C.P. 1260.250(c)(4).*)

(e) "The amount of the taxes, penalties, and costs allocable to one day of the current tax year, and where applicable, the amount allocable to one day of the next succeeding tax year," which is referred to as the "daily prorate." (*C.C.P. 1260.250(c)(5).*)

(f) The total of *C.C.P. 1260.250(c)(2)*, *1260.250(c)(3)*, and *1260.250(c)(4)*. (*C.C.P. 1260.250(c)(6).*)

If the property does not have a separate valuation on the assessment roll, the information required is for the larger parcel of which the property is a part. (*C.C.P. 1260.250(d).*)

(4) *Order for Payment.* (a) The judgment must separately state the amount certified and order that it be paid to the tax collector from the award. (b) If the amount is prorated to the date of trial the order must state an additional amount for the period between the commencement of trial and the date of apportionment. (*C.C.P. 1260.250(e).*) The date of apportionment is the date (1) of conveyance to the public entity, or of recording the final order of condemnation, (2) of actual possession, or (3) after which the entity may take possession, whichever is earliest. (Rev.C. 5082.)

(5) *When Payment Is Not Ordered.* The board of supervisors may transfer unpaid taxes, penalties, and costs to the unsecured roll (Rev.C. 5087), and in that event the court makes no award of taxes in the judgment. (*C.C.P. 1260.250(f).*)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Exempt Property.

8 Witkin Sum. Cal. Law Const Law § 1261

[§ 1261] Exempt Property.

(1) *Moratorium on Collection of Taxes.* When the property to be acquired by the United States, the state, or a county, city, school district, or other public entity will become exempt under federal or state law, taxes are not collectible. (*C.C.P. 1268.420(a)*; see *Rev.C. 5081*.) However, if the action is later dismissed, in whole or in part, the amount of unpaid taxes, penalties, and costs for which the plaintiff would have been liable under *C.C.P. 1268.410* (see *supra*, §1260), is awarded to the defendant, and paid to the tax collector from the award. (*C.C.P. 1268.420(b)*.)

(2) *Refund of Taxes.* If taxes have been collected on exempt property, the amount that would have been subject to cancellation under *Rev.C. 5081 et seq.* (see *infra*, §1262) is refunded. (*C.C.P. 1268.440(a)*.) The public entity is deemed to be the person who paid the taxes if it reimbursed the defendant under *C.C.P. 1268.430* (*supra*, §1260). (*C.C.P. 1268.440(b)*.) These provisions apply to taxes paid on either the secured or unsecured roll. (*C.C.P. 1268.440(c)*.)

(3) *Separate Valuation.* When the property acquired does not have a separate valuation on the roll (see *supra*, §1260), a party may, after taxes are subject to cancellation, apply for a separate valuation. (*C.C.P. 1268.450*.)

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3. Cancellation of Taxes.

8 Witkin Sum. Cal. Law Const Law § 1262

[§ 1262] Cancellation of Taxes.

(1) *Existing Liens on Property That Becomes Exempt.* When exempt property (see Rev.C. 5081) is acquired by negotiated purchase or eminent domain, a lien for prior taxes is extinguished on acquisition and the lien "immediately transfers to the proceeds constituting the purchase price." (Rev.C. 5083.)

(2) *Delinquent Taxes.* Delinquent taxes, penalties, and costs for prior tax years are not cancelled when the property becomes exempt. They are paid through escrow or from the award; or, if unpaid for any reason, they are transferred to the unsecured roll and are collectible from the former owner or the public entity that acquired the property. (Rev.C. 5084.)

(3) *Property Acquired Prior to Fiscal Year.* If exempt property is acquired by negotiated purchase, gift, devise, or eminent domain between the lien date and the commencement of the fiscal year for which taxes are a lien on the property, the taxes for that fiscal year are cancelled and are not collectible from either the former owner or the acquiring public entity. (Rev.C. 5085.)

(4) *Property Acquired After Commencement of Fiscal Year.* If exempt property is acquired after the commencement of the fiscal year by negotiated purchase, gift, devise, or eminent domain, the portion of current taxes, penalties, and costs allocable to the part of the fiscal year that ends on the day before the date of apportionment (see Rev.C. 5082, *supra*, §1260) is collected in the same manner as delinquent taxes, and the balance is cancelled. (Rev.C. 5086.) A county may also provide for transfer of the allocable portion of unpaid current taxes to the unsecured roll, to be collected from the former owner. (Rev.C. 5087; see Rev.C. 5090 [transfer and collection].)

(5) *Nominal Amounts.* If the amount of taxes to be transferred to the unsecured roll is less than \$ 20, the county may prescribe that the tax must be cancelled. (Rev.C. 5089.)

(6) *Notice of Proposed Acquisition.* When a public entity proposes to acquire property that will be exempt, it must notify the appropriate taxing authorities, within a reasonable time after the initial budgeting of funds for the proposed acquisition, of the approximate extent of the project and the estimated time of completion of all necessary acquisitions.

(Rev.C. 5091; see Rev.C. 5082.1 [duties of public entities on acquisition].)

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f. Special Assessment Liens.

8 *Witkin Sum. Cal. Law Const Law* § 1263

[§ 1263] Special Assessment Liens.

(1) *Joinder of Lienholder as Defendant.* The holder of a lien securing a special assessment, or a bond representing the special assessment, must be named as a defendant, regardless of the nature of the special assessment and the manner of its collection. (*C.C.P. 1250.250(b).*)

(2) *Certification of Information Instead of Answer.* The holder of the lien may, instead of an answer, certify to the court, within 30 days after service of summons and complaint on the holder, all of the following information:

- (a) "A complete description of the lien." (*C.C.P. 1250.250(b)(1).*)
- (b) "A description of the property encumbered by the lien." (*C.C.P. 1250.250(b)(2).*)
- (c) "The amount remaining due on the lien as of the date of the certificate." (*C.C.P. 1250.250(b)(3).*)
- (d) The date on which each installment payable is due and its amount. (*C.C.P. 1250.250(b)(4).*)

A copy of the certification must be sent by first-class mail to all parties at the time it is provided to the court. Filing the certificate or answer is a *general appearance*. (*C.C.P. 1250.250(c).*)

(3) *Payment Where Fixed Lien Special Assessment.* A "fixed lien special assessment" is a nonrecurring assessment levied by a public entity in a fixed amount "for the capital expenditure for a specific improvement, whether collectible in a lump sum or in installments." (*C.C.P. 1265.250(a)(1).*) The amount must be paid to the lienholder from the award, or withheld from the award for payment pursuant to *C.C.P. 1265.220* (see *supra*, §1251). (*C.C.P. 1265.250(b)(1).*) If there is a *partial taking*, the amount must be paid from the award; or at the option of the lienholder, the applicable statutory procedure, if any, for segregation and apportionment may be invoked. (*C.C.P. 1265.250(b)(2).*)

(4) *Payment Where Special Annual Assessment.* A "special annual assessment" is a recurring assessment levied "annually in an indeterminate amount by a local public entity, whether for the capital expenditure for a specific improvement or for other purposes." (*C.C.P. 1265.250(a)(2).*) The amount prorated to, but not including, the date of apportionment (see *Rev.C. 5082*), must be paid to the lienholder from the award. As between the plaintiff and the

defendant, the plaintiff is liable for the amount prorated from and including the date of apportionment. (*C.C.P. 1265.250(c)(1)*.) If there is a partial taking, the amount of the lien, reduced by the amount for which the plaintiff is liable, must be paid to the lienholder from the award. As between the plaintiff and the defendant, the plaintiff is liable for the amount "allocable to the part taken for the current assessment year, determined to the extent practicable in the same manner and by the same method as the amount of the assessment on the property for the current assessment year was determined, prorated from and including the date of apportionment" determined pursuant to Rev.C. 5082. (*C.C.P. 1265.250(c)(2)*.)

The Government Code deals with special assessment liens where the property is acquired by *negotiated purchase and sale, gift, or devise*, as follows:

(a) If property is so acquired, except to the extent that the lien is paid out of escrow or is otherwise apportioned under applicable statutory procedure, the lien continues to encumber the property acquired and is enforceable against the public entity. It is payable in the manner and to the extent provided in *C.C.P. 1265.250*. (*Govt.C. 53938.5*.)

(b) If the property is part of a larger parcel, and there is no applicable statutory procedure for segregation and apportionment, a party to the transaction may, within 1 year after its completion, apply to the superior court of the county where all or part of the property is located, "and the court may segregate and apportion the lien among the parties." (*Govt.C. 53939*.)

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g. Abandonment and Dismissal.

8 *Witkin Sum. Cal. Law Const Law* § 1264

[§ 1264] Abandonment and Dismissal.

(1) *In General.* After filing the complaint, but before the expiration of 30 days after final judgment, the plaintiff may abandon, in whole or in part, by serving on the defendant and filing a written notice of abandonment. (*C.C.P. 1268.510(a)*.) Unless a motion to set the abandonment aside is granted (see *infra*, this section), the court, on a party's motion, must enter judgment "wholly or partially dismissing the proceeding." (*C.C.P. 1268.510(c)*.) (See *Community Dev. Com. v. Shuffler* (1988) 198 C.A.3d 450, 458, 243 C.R. 719; *Lincoln v. Barringer* (2002) 102 C.A.4th 1211, 1229, 126 C.R.2d 178 [city did not abandon initial resolution of necessity for partial taking by later pursuing second resolution of necessity for remainder of property; second resolution had failed because remainder did not constitute uneconomical remnant under *C.C.P. 1240.410*, as asserted by city]; 5 A.L.R.2d 724 [condemnor's waiver, surrender, or limitation of rights after award]; 27 *Am.Jur.2d* (1996 ed.), *Eminent Domain* §567 et seq.; for form of request for dismissal, see Judicial Council Form No. 982(a)(5); on predecessor statute, see *Torrance Unified School Dist. of Los Angeles v. Alway* (1956) 145 C.A.2d 596, 600, 302 P.2d 881; *Southern Public Util. Dist. v. Silva* (1956) 47 C.2d 163, 165, 301 P.2d 841 [extension of time to pay award after final judgment does not extend time to abandon]; on award of costs and attorneys' fees to defendant, see *infra*, §1265; on denial of interest on unpaid award following abandonment, see *supra*, §1258.)

(2) *Estoppel.* Estoppel to abandon where the landowner materially changed his or her position was judicially recognized in *Times-Mirror Co. v. Superior Court* (1935) 3 C.2d 309, 44 P.2d 547, and is the basis for the statutory remedy. Under the Eminent Domain Law, the court may, on motion made within 30 days after filing of the notice, set the abandonment aside if it determines (a) that the position of the moving party has been substantially changed to his or her detriment in justifiable reliance on the proceeding, and (b) that the party cannot be restored to substantially the same position he or she was in before commencement of the proceeding. (*C.C.P. 1268.510(b)*.) (See *Torrance v. Superior Court* (1976) 16 C.3d 195, 206, 127 C.R. 609, 545 P.2d 1313 [predecessor statute was designed to be applied in broad range of circumstances not limited to those involving immediate possession by condemnor; moving party met statutory test]; *Redevelopment Agency of Pomona v. Heller* (1988) 200 C.A.3d 517, 519, 522, 246 C.R. 160 [where defendant did not move to set abandonment aside within 30 days provided by *C.C.P. 1268.510(b)*, damages for precondemnation delay under *Klopping v. Whittier* (1972) 8 C.3d 39, 104 C.R. 1, 500 P.2d 1345, *supra*, §1235, could be pursued only in separate action for inverse condemnation]; *Los Angeles Unified School Dist. v. Trump Wilshire Associates* (1996) 42 C.A.4th 1682, 1688, 50 C.R.2d 229 [claim of justifiable reliance was rejected, where property owner simply put its

plans for long-term development on hold pending condemnation litigation]; *Los Angeles Unified School Dist. v. Wilshire Center Marketplace* (2001) 89 C.A.4th 1413, 1420, 108 C.R.2d 691 [defendant's pending inverse condemnation action did not estop plaintiff school district from enforcing judgment it had obtained after abandoning eminent domain action, which ordered return of amount plaintiff had deposited as probable compensation].)

SUPPLEMENT: [This section is current through the latest supplement]



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h. Expenses and Damages on Dismissal or Defeat of Right To Condemn.

1. Litigation Expenses.

8 Witkin Sum. Cal. Law Const Law § 1265

[§ 1265] Litigation Expenses.

(1) *In General.* The defendant may recover litigation expenses when (a) the proceeding is wholly or partially dismissed for any reason, or (b) there is a final judgment that the plaintiff does not have the right to take the property. (*C.C.P. 1268.610(a)*); for definition of "litigation expenses," see *C.C.P. 1235.140*, supra, §1171.) They are claimed by a cost bill as in a civil action (see 7 *Cal. Proc. (4th), Judgment*, §135 et seq.); and if the proceeding is dismissed on motion of the plaintiff, the cost bill must be filed within 30 days after notice of entry of judgment. (*C.C.P. 1268.610(d)*.) (See 92 *A.L.R.2d* 355 [liability on abandonment for interest on award or judgment]; 68 *A.L.R.3d* 610 [what constitutes abandonment for purposes of liability for defendant's expenses]; Model Eminent Domain Code, §1303, 13 (Part I) U.L.A. (Master Ed.), p. 136.)

Where there is (a) a partial dismissal, or (b) a judgment that the plaintiff cannot acquire a portion of the property, or (c) a dismissal of one or more plaintiffs under *C.C.P. 1260.020* (supra, §1219), the award is limited to "only those litigation expenses, or portion thereof, that would not have been incurred had the property sought to be acquired following the dismissal or judgment been the property originally sought to be acquired." (*C.C.P. 1268.610(b)*.) And where (a) the plaintiff files a notice of abandonment or request for dismissal of a particular defendant, and (b) the court determines that the defendant did not have an interest in the property sought to be acquired, the court must award only those litigation expenses that defendant incurred up to that time. (*C.C.P. 1268.610(c)*.)

In *California v. Meyer* (1985) 174 *C.A.3d* 1061, 220 *C.R. 884*, defendant property owner sought damages for unreasonable condemnation delay for the first time in a memorandum of costs for litigation expenses following abandonment. *Held*, delay damages were properly disallowed. Recovery of damages for unreasonable condemnation activities is authorized by *Klopping v. Whittier* (1972) 8 *C.3d* 39, 104 *C.R. 1*, 500 *P.2d* 1345, supra, §1235, either by answer in an eminent domain proceeding or by a separate action for inverse condemnation. (174 *C.A.3d* 1071.) "Nevertheless, it does not follow that the statutory procedure for obtaining litigation expenses was designed to be the vehicle for a full-blown lawsuit with a threshold determination of liability for unreasonable precondemnation conduct to be determined by the court and a right to jury trial on the amount of damages." (174 *C.A.3d* 1072.)

(2) *Right to Attorneys' Fees.* "Litigation expenses" include reasonable attorneys' fees incurred to protect the

defendant's interest whether before or after the complaint is filed. (*C.C.P. 1235.140(b)*; see *supra*, §1171.)

(3) *Amount of Award.* The amount of the award is discretionary with the trial court. (See *California v. Westover Co.* (1956) 140 C.A.2d 447, 449, 295 P.2d 96 [\$ 150,000 fee affirmed]; *Port San Luis Harbor Dist. v. Port San Luis Trans. Co.* (1963) 213 C.A.2d 689, 694, 29 C.R. 136 [\$ 125,000 fee affirmed]; *Excelsior Union High School Dist. of Los Angeles v. Lautrup* (1969) 269 C.A.2d 434, 442, 74 C.R. 835 [\$ 77,265 fee affirmed]; *California v. Meyer*, *supra*, 174 C.A.3d 1073 [court is not required to use "lodestar multiplier" in determining fees]; *People v. Yuki* (1995) 31 C.A.4th 1754, 1767, 1771, 1775, 37 C.R.2d 616 [in determining reasonable attorneys' fees, court may consider contingent fee agreement but may not determine award solely by reference to that agreement; fee award was excessive where it was based on contingent fee agreement that included surcharge resulting in fee equal to 72% of net recovery]; on determination of reasonable fees generally, see 1 *Cal. Proc.* (4th), *Attorneys*, §225 et seq.)

In *Oakland v. Oakland Raiders* (1988) 203 C.A.3d 78, 249 C.R. 606, defendant sought attorneys' fees after successfully defending plaintiff city's condemnation action. (See *Oakland v. Oakland Raiders* (1982) 32 C.3d 60, 183 C.R. 673, 646 P.2d 835, *supra*, §1176; *Oakland v. Oakland Raiders* (1985) 174 C.A.3d 414, 220 C.R. 153, *infra*, §1303.) The trial court determined a fee of approximately \$ 850,000 based on hourly rates, then raised the fee to \$ 2 million to account for the extraordinary novelty and complexity of the issues, the need for defendant's counsel to act quickly throughout the litigation, the deferral of his fees, and the critical importance to the Raiders of the litigation and its result. *Held*, affirmed.

(a) While hourly rates and hours devoted to the case are the starting point of a fee award, "numerous other factors must also be considered, including the novelty and difficulty of the issues presented, the quality of counsel's services, the time limitations imposed by the litigation, the amount at stake, and the result obtained by counsel." (203 C.A.3d 83.)

(b) Plaintiff's argument that the court improperly used a multiplier is flawed for two reasons. First, the increase was not based on a multiplier, but rather was tied to specific factors. Second, *California v. Meyer* did not prohibit the use of multipliers; it simply refused to hold that they *must* be used. (203 C.A.3d 84.)

(c) The amount of the award is left to the trial judge's discretion, and the increase here was not clearly wrong. (203 C.A.3d 85.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Temple City Redevelopment Agency v. Bayside Drive Ltd. Partnership* (2007) 146 C.A.4th 1555, 1560, 53 C.R.3d 728 [*C.C.P. 1268.610*, permitting recovery of defendant's litigation expenses when condemnation action is dismissed "for any reason," applied where action was dismissed when defendant sold property while condemnation action was pending].

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §139 et seq.(3) *Amount of Award.*

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §199 et seq.



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2. Damages Caused by Dispossession.

8 Witkin Sum. Cal. Law Const Law § 1266

[§ 1266] Damages Caused by Dispossession.

Recovery of damages and possession is allowed if, "after the defendant moves from property in compliance with an order or agreement for possession or in reasonable contemplation of its taking by the plaintiff, the proceeding is dismissed with regard to that property for any reason or there is a final judgment that the plaintiff cannot acquire that property." On this showing, the court must (a) order "the plaintiff to deliver possession of the property to the persons entitled to it," and (b) make just provision "for the payment of all damages proximately caused by the proceeding and its abandonment as to that property." (*C.C.P. 1268.620*; see *Los Angeles Unified School Dist. v. Trump Wilshire Associates* (1996) 42 *C.A.4th* 1682, 1692, 50 *C.R.2d* 229 [*C.C.P. 1268.620* requires that property owner be physically dispossessed; mere fact that development plans were disrupted during pendency of action is insufficient].)

The Law Revision Commission Comment points out that recovery could be had for damages for temporary interference with the operation of a business, even though they might not have been compensable if the proceeding had not been abandoned.

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9. Postjudgment Procedure.

i. Costs.

8 *Witkin Sum. Cal. Law Const Law* § 1267

[§ 1267] Costs.

(1) *Trial Court Costs*. The defendant is allowed costs, including the cost of determining the apportionment of an award under *C.C.P. 1260.220(b)* (divided interests in the property; see *supra*, §1222). However, the cost of determining an issue of title between two or more defendants is borne by the defendants in the proportion the court directs. (*C.C.P. 1268.710*.) (On inclusion of litigation expenses where defendant's pretrial demand was reasonable and plaintiff's offer was not, see *C.C.P. 1250.410(b)*, *supra*, §1209.)

(2) *Costs on Appeal*. Unless the court orders otherwise, the defendant is allowed costs on appeal, whether or not the defendant is the prevailing party. (*C.C.P. 1268.720*; see *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 C.A.3d 1113, 1147, 234 C.R. 630 [defendant is entitled to costs on appeal even though plaintiff is prevailing party]; *Poway Unified School Dist. v. Chow* (1995) 39 C.A.4th 1478, 1485, 46 C.R.2d 651 [defendant is entitled to litigation expenses incurred on appeal]; 50 A.L.R.2d 1386 [liability for costs on appeal]; 9 *Cal. Proc.* (4th), *Appeal*, §805.) However, *C.C.P. 1268.720* does not apply to an appeal involving issues between defendants. (*C.C.P. 1268.720*.)

(3) *Items Recoverable*. Because the statute does not specify the items of recoverable costs, they are basically the same as those in ordinary civil actions, i.e., they are governed by *C.C.P. 1033.5* (see 7 *Cal. Proc.* (4th), *Judgment*, §114 et seq.). (*People v. Bowman* (1959) 173 C.A.2d 416, 418, 343 P.2d 267 [decided under predecessor statutes].)

Expert witness fees are specifically recoverable as "litigation expenses" on dismissal of the proceeding or a judgment denying acquisition. (See *C.C.P. 1268.610(a)*, *supra*, §1265; *C.C.P. 1235.140* [defining "litigation expenses"], *supra*, §1171.) However, except for expert witnesses ordered by the court (see *C.C.P. 1033.5(a)*), expert witness fees are not recoverable after a judgment awarding a sum for the taking. (*Los Angeles v. Ortiz* (1971) 6 C.3d 141, 144, 98 C.R. 454, 490 P.2d 1142 [decided under predecessor statutes; noting that *C.C.P. 998*, allowing award of expert's fees if settlement offer is rejected, expressly excludes condemnation]; see 7 *Cal. Proc.* (4th), *Judgment*, §121.)

In *Downey v. Gonzales* (1968) 262 C.A.2d 563, 69 C.R. 34, defendants, multiple condemnees, devised an ingenious method of getting a more substantial award of costs. The city brought this proceeding to condemn land against 28 owners of 15 parcels; analyzed, the actions amounted to 13 condemnation cases joined for convenience, with the joinder not objected to by defendants. The trial judge allowed as costs one witness fee for each day the witness testified.

Defendants asked for the fees for *each defendant* who used the witness. *Held*, they were entitled to separate fees for *each separate litigated cause*, because the defendant could not call the witness as his without obligating himself to pay the statutory fee. This gave them a recovery of 13 times the actual fee paid the witness. (262 C.A.2d 568.)

The dissenting justice argued that fees are allowed for *attending court*, not for testifying. Hence, whether the witness came in one or 13 capacities he was there only once and entitled to only one fee; no authority supports the majority's statement that each defendant who subpoenaed him would be obligated to pay a fee; and clearly, multiple allowance for mileage is unjustified--"At the very least he should be forced to form a car pool with himself." (262 C.A.2d 573.) He concluded that if the "harsh and possibly unconstitutional rule" denying recovery of an expert's fees is to be reexamined, it should be done openly.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Costs on Appeal*.

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §956.

(3) *Items Recoverable*.

C.C.P. 1033.5:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §117 et seq.

Expert witness fees:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §124.



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E. Statutory Eminent Domain Law.

10. Arbitration.

a. In General.

8 Witkin Sum. Cal. Law Const Law § 1268

[§ 1268] In General.

(1) *Purpose of Enactment.* The expenses of condemnation proceedings, and the burden on the courts of jury trials in these cases, have led to various proposals for arbitration as an alternative. In 1970, pursuant to a recommendation of the California Law Revision Commission, statutory authority was provided. (See Law Rev. Com. 1969 Report, p. 127 et seq.; 2 *Pacific L. J.* 252.) Those provisions were restated without substantive change in the Eminent Domain Law as *C.C.P. 1273.010* et seq. (See Model Eminent Domain Code, §1501 et seq., 13 (Part I) U.L.A. (Master Ed.), p. 147 et seq.; on nonbinding arbitration of dispute in eminent domain proceeding, see *supra*, §1210.)

(2) *The Arbitration Agreement.* "Any person authorized to acquire property for public use may enter into an agreement to arbitrate a controversy as to the *compensation* to be made in connection with the acquisition of the property." (*C.C.P. 1273.010(a)*.) Where property to be taken is already appropriated to a public use, the public entity that owns or controls the property may agree to arbitrate the compensation to be paid. (*C.C.P. 1273.010(b)*.)

The agreement, or a memorandum of it, may be acknowledged and recorded in the manner of a conveyance of real property; it then gives constructive notice to subsequent purchasers and encumbrancers for 2 years after recording or rerecording. (*C.C.P. 1273.050*.) This provision is calculated to make filing an eminent domain proceeding, solely to obtain the effect of a *lis pendens*, unnecessary. (Law Rev. Com. Comment.)

(3) *Scope of Arbitration.* The "controversy," as defined in the general arbitration law (*C.C.P. 1280(c)*), covers questions of law and fact. (Law Rev. Com. Comment on *C.C.P. 1273.030*.) And the term "compensation" covers "any amounts that may be assessed or awarded in a condemnation proceeding," including compensation for injury to the remainder and compensation for loss of goodwill. (Law Rev. Com. Comment to *C.C.P. 1273.010*.)

(4) *Parties.* The statute contains nothing comparable to the requirement in condemnation actions of naming all persons having an interest in the property as defendants. "The chapter assumes that prudence on the part of the acquiring agency will assure that it agrees to arbitrate with the person who owns the interest it seeks to acquire. Also, the interests of persons other than parties to the arbitration would be unaffected by the arbitration agreement or the carrying out of that agreement. In short, unlike the *in rem* character of an eminent domain proceeding, an arbitration operates only as a contract and conveyance between the parties to the particular agreement." (Law Rev. Com. Comment to *C.C.P.*

1273.010.)

(5) *Acquirer's Lack of Power Is Immaterial.* The agreement may be enforced notwithstanding the fact that "the party acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings." (C.C.P. 1273.030(d).)

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b. Effect and Enforcement of Agreement.

8 Witkin Sum. Cal. Law Const Law § 1269

[§ 1269] Effect and Enforcement of Agreement.

(1) *Effect on Eminent Domain Proceeding.* The agreement to arbitrate does not preclude an eminent domain proceeding, and may be made even if an eminent domain proceeding has already been commenced. (*C.C.P. 1273.030(b).*) The effect of the agreement where a proceeding has been commenced is as follows:

(a) A petition or response relating to the arbitration must be filed and determined in the eminent domain proceeding. (*C.C.P. 1273.030(b).*)

(b) On motion of a party to the eminent domain proceeding, the court must stay the determination of compensation until the petition for an order to arbitrate is determined, and if arbitration is ordered, until arbitration is had. (*C.C.P. 1273.030(c).*)

(2) *Procedure.* The procedural provisions of the general arbitration law (*C.C.P. 1280 et seq.*) govern except for minor specific provisions in the eminent domain chapter. (*C.C.P. 1273.030(a).*) The important differences are:

(a) The *venue* provisions of the general arbitration law do not apply; the petition must be filed, as in condemnation actions, in the superior court of the county where the property is located. (*C.C.P. 1273.030(e).*)

(b) If the arbitration is conducted during pendency of an eminent domain proceeding, the condemnor's power to take possession prior to judgment is not impaired. (*C.C.P. 1273.030(c).*)

(3) *Expenses and Fees.* (a) The party acquiring the property must pay the ordinary expenses and the fees of the arbitrator, just as that party would pay costs of the condemnee in a condemnation action. (b) The party acquiring is not, however, liable for attorneys' fees or expert witness fees or other expenses incurred by other parties for their own benefit, unless the agreement so provides. (*C.C.P. 1273.020.*)

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c. Abandonment of Acquisition.

8 Witkin Sum. Cal. Law Const Law § 1270

[§ 1270] Abandonment of Acquisition.

(1) *Right To Abandon.* (a) Unless the agreement prohibits abandonment, the party acquiring the property may abandon the acquisition, the arbitration proceeding, or an eminent domain proceeding. This may be done at any time, but not later than the time for filing and serving a petition or response to vacate an arbitration award (100 days after service of the award or 10 days after service of a petition to confirm it). (*C.C.P. 1273.040(a)*.) (b) The agreement may, however, "specify the terms and conditions" of the abandonment, except for expenses and fees. (*C.C.P. 1273.040(a)* and Law Rev. Com. Comment.)

(2) *Expenses and Fees.* On abandonment, the property owner may recover the following items:

(a) All expenses reasonably and necessarily incurred: (1) in preparing for the arbitration proceeding and for judicial proceedings in connection with the acquisition, (2) during the arbitration proceeding and during judicial proceedings in connection with the acquisition, and (3) in subsequent judicial proceedings in connection with the acquisition. (*C.C.P. 1273.040(b)*.)

(b) Reasonable attorneys' and appraisal fees, and fees for the services of other experts where the fees were reasonably and necessarily incurred to protect the owner's interests in connection with the acquisition. (*C.C.P. 1273.040(b)*.)

The right of the property owner to recover fees and expenses cannot be modified in the arbitration agreement (Law Rev. Com. Comment to *C.C.P. 1273.040(b)*); but unless the agreement provides otherwise, the *amount* is determined by arbitration in accordance with the agreement. (*C.C.P. 1273.040(b)*.)

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F. Removal and Relocation Costs.
1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1271

[§ 1271] In General.

(1) *No Constitutional Right.* The traditional rule has been that compensation is given "for the property, and not to the owner"; i.e., the owner is entitled only to the market value of the property, and cannot obtain additional compensation for the expense of moving personal property from the condemned premises or relocating the business or home elsewhere. (See *Los Gatos v. Sund* (1965) 234 C.A.2d 24, 27, 44 C.R. 181; *United States v. Petty Motor Co.* (1946) 327 U.S. 372, 66 S.Ct. 596, 600, 90 L.Ed. 729, 735 [condemnation of entire leasehold; lessee's costs of removal or relocation were "personal to the lessee"]; *United States v. Westinghouse Elec. & Mfg. Co.* (1950) 339 U.S. 261, 70 S.Ct. 644, 646, 94 L.Ed. 816, 820 [same].)

A distinction was made in *United States v. General Motors Corp.* (1945) 323 U.S. 373, 65 S.Ct. 357, 360, 89 L.Ed. 311, 319, where only a part of the leasehold was taken (condemnation by federal government of 1 year of 20-year lease of warehouse stocked with auto parts). The remainder of the lease might have been of little value if the lessee had to bear the multiple costs of moving out and back at the time of condemnation and also at the time of expiration of the term. Hence, in determining the market value of this peculiar kind of temporary taking, the cost of removal and storage of the auto parts, and the destruction or depreciation of fixtures and permanent equipment, were included in the award.

(2) *Statutory Development.* The rule denying compensation for removal and relocation costs was frequently criticized as harsh and unfair, and a number of statutes were adopted in California to give relief to the owner in particular kinds of condemnation. (See 3 *Pacific L. J.* 116.) In 1971, Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C., §4601 et seq.). This statute applies to all federal projects and all state projects that are federally assisted. (42 U.S.C., §§4630, 4655.) The 1971 California Legislature then repealed its special statutes and adopted a general act patterned after the federal law. (*Govt.C.* 7260 et seq.; see *Mountain View v. Superior Court* (1975) 54 C.A.3d 72, 77, 126 C.R. 358, *infra*, §1276; C.E.B., 1 Condemnation Practice 2d, §7.17 et seq.)

(3) *Enlarged Scope of Act.* The California Act goes beyond relocation assistance by borrowing additional federal statutes dealing with a number of related subjects:

(a) Encouraging property acquisition by negotiation and agreement, to avoid litigation. (*Govt.C.* 7267 et seq.; see *supra*, §1186.)

(b) Requiring 90 days' written notice before requiring a person to move from a dwelling, business, or farm operation. (*Govt.C. 7267.3*; see *Los Angeles v. Decker* (1976) 61 C.A.3d 444, 446, 132 C.R. 188, *infra*, §1275.)

(c) Limiting rental where the owner or tenant is permitted to occupy the property for a short period to a maximum of "the fair rental value of the property to a short-term occupier." (*Govt.C. 7267.4*.)

(d) Prohibiting coercive action by public entity to compel agreement on price. (*Govt.C. 7267.5*; see *supra*, §1186.)

(e) Requiring institution of condemnation proceeding to avoid necessity of owner bringing inverse condemnation suit. (*Govt.C. 7267.6*.)

(4) *Application to Quasi-Public Entities*. If a resolution has been adopted consenting to the acquisition of property by a quasi-public entity (see *supra*, §1203), and property has been acquired by purchase, eminent domain, or otherwise, the quasi-public entity must also provide relocation assistance and payments. (*Govt.C. 7276*.)

(5) *Application to Acquisition Other Than by Condemnation*. A condemnation action is not essential to the recovery of relocation benefits; the statute applies to acquisitions of property by any means. (*Superior Strut & Hanger Co. v. Port of Oakland* (1977) 72 C.A.3d 987, 994, 140 C.R. 515 [displacement of tenant by notice terminating tenancy].)

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F. Removal and Relocation Costs.

2. Authorized Payments and Assistance.

8 Witkin Sum. Cal. Law Const Law § 1272

[§ 1272] Authorized Payments and Assistance.

(1) *Relocation Advisory Assistance.* A public entity must provide relocation advisory assistance to a person, business, or farm operation displaced by the taking of property. (Govt.C. 7261(a).)

(2) *Relocation Payments.* The public entity must compensate a displaced person for the following:

(a) The expense of *moving* himself or herself, and his or her family, business, or farm operation, including moving personal property. (Govt.C. 7262(a)(1).)

(b) The *loss of tangible personal property* as a result of moving or discontinuing a business or farm operation, not to exceed the cost that would have been required to relocate that property. (Govt.C. 7262(a)(2).)

(c) Actual and reasonable expenses in searching for a replacement business or farm, not to exceed \$ 1,000. (Govt.C. 7262(a)(3).)

(d) Actual and reasonable expenses, not to exceed \$ 10,000, to reestablish a displaced farm, nonprofit organization, or small business at a new site. (Govt.C. 7262(a)(4).) (See Govt.C. 7262.5 [tenants in multifamily rental projects who are displaced for 1 year or less are not eligible for permanent housing assistance benefits if specified criteria are satisfied].)

A number of decisions discuss relocation payments. (See *Parking Authority v. Nicovich* (1973) 32 C.A.3d 420, 425, 108 C.R. 137; *Cavanaugh v. California* (1978) 85 C.A.3d 354, 358, 149 C.R. 453 [postacquisition tenants as displaced persons]; *Mitakis v. Department of General Services* (1983) 149 C.A.3d 684, 688, 197 C.R. 142 [displaced property owner is entitled to in-lieu moving expenses under Govt.C. 7262(c) for cost of relocating residential rental business, even though replacement property was purchased before business was discontinued and title passed to state]; *Peter Kiewit Sons' Co. v. Richmond Redevelopment Agency* (1986) 178 C.A.3d 435, 445, 223 C.R. 728 [tenant who remained in possession of property purchased by public entity beyond termination of lease was tenant at sufferance and was not entitled to relocation assistance]; *Redevelopment Agency of Emeryville v. Arvey Corp.* (1992) 3 C.A.4th 1357, 1362, 1364, 5 C.R.2d 161 [expenses that are payable as relocation assistance under Govt.C. 7262 may not be included in award for goodwill, even if those expenses have not actually been recovered]; *Kong v. Hawaiian Gardens*

Redevelopment Agency (2002) 101 C.A.4th 1317, 1329, 125 C.R.2d 1 [distinguishing *Peter Kiewit Sons' Co.*; sublessee was entitled to relocation benefits where property was acquired under threat of condemnation, which resulted in termination of original master lease and sublease, even though sublessee was able to stay on premises for another 6 years under new sublease until property was ready for development].)

Relocation payments are not considered income or resources for purposes of income tax or public assistance. (*Govt.C. 7269.*) They are also given a limited exemption from execution. (*C.C.P. 704.720(b)*; see 8 *Cal. Proc. (4th), Enforcement of Judgment*, §209.)

Govt.C. 7262, specifies a number of minimum and maximum amounts, and is supplemented by *Govt.C. 7263* (payment to dwelling owner to purchase another dwelling); *Govt.C. 7264* (payment to cover additional rent or downpayment on purchase of another dwelling); *Govt.C. 7264.5* (use of project funds to provide replacement housing); *Govt.C. 7265* (payment to owner of property contiguous to land taken for airport purposes); *Govt.C. 7265.3* (payment to person paying increased rent or moving or discontinuing business because of rehabilitation or demolition program or enforcement of building, housing, or health codes); *Govt.C. 7265.4* (reimbursement for expenses such as recording fees and transfer taxes incidental to conveying condemned property to public entity).

The Legislature intended to establish *minimum requirements*, and *Govt.C. 7260 et seq.* is not to be construed to limit other authority a public entity may have to make other payments, or to provide for payments exceeding the maximum amounts specified. (*Govt.C. 7272.3.*) (See *United Auto. Workers v. Department of Trans. (1993) 20 C.A.4th 1462, 1471, 1473, 25 C.R.2d 290* [Caltrans regulation not allowing payment of costs for renovation of replacement premises was invalid; although project at issue was federally funded and federal law does not provide for these payments, federally allowed payments are simply minimum state must provide].)

(3) *Rules and Regulations.* Public entities must adopt rules and regulations to implement payments and administer relocation assistance, in conformity with rules and regulations of the Department of Housing and Community Development and applicable federal law. (*Govt.C. 7267.8.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Relocation Payments.Exemption from execution:*

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment*, §218.



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3. Displaced Person.

8 Witkin Sum. Cal. Law Const Law § 1273

[§ 1273] Displaced Person.

A "displaced person" is a person who moves from real property as the result of (a) written notice of the intent to acquire, (b) the acquisition of the property by a public entity (or one acting on behalf of a public entity) for public use, or (c) as a direct result of rehabilitation, demolition, or other displacing activity of real property where the person is a residential tenant or conducts a business or farm operation, if the displacement is permanent. (*Govt.C. 7260(c)*.) For purposes of *Govt.C. 7261, 7262* (*supra*, §1272), the term also includes a person who moves as a result of acquisition, rehabilitation, etc., of *other* real property on which the person conducts a business or farm operation. (*Govt.C. 7260(c)(1)*.) This definition is to be construed so that persons displaced as a result of public action receive benefits in cases where they are displaced by an owner participation agreement or the acquisition is carried out by a private person for a public use, where the public entity is otherwise empowered to acquire the property to carry out that use. (*Govt.C. 7260(c)(2)*.)

Except for certain occupants of low-income public housing projects, "displaced person" does not include (a) one who was not a lawful tenant or occupant, (b) one whose right of possession arose after the public entity acquired the property, (c) one who occupied the property for the purpose of obtaining relocation assistance, and (d) where the property is acquired for a public program or project, one who occupies the property for a period subject to termination when the property is needed for the program or project. (*Govt.C. 7260(c)(2)*.)

The concept was given an elaborate examination in *McKeon v. Hastings College* (1986) 185 C.A.3d 877, 230 C.R. 176. Defendant, a public entity, acquired residential hotels and apartments adjacent to its campus in anticipation of expansion, and began efforts to resettle displaced tenants, including (1) renovation of two residential hotels in which displaced tenants were offered substitute subsidized housing, (2) appointment of a community housing committee, and (3) employment of a relocation counselor. Plaintiffs, former tenants and an unincorporated community association, sought declaratory and injunctive relief, alleging that defendant's relocation plan did not provide the full measure of benefits required by the Relocation Assistance Act. *Held*, both the individual plaintiffs and the association have standing.

(a) The individual plaintiffs were residents who moved because of defendant's expansion plan. Thus, they were "displaced persons" within the meaning of *Govt.C. 7260(c)*, and were presumptively eligible for benefits. Because each alleged a specific loss of benefits by reason of past or prospective actions by defendant, thereby asserting a cognizable

and remediable claim for redress, they have standing. Defendant's argument that individual plaintiffs were not entitled to replacement housing because they had secured new habitation incorrectly conditions benefits on remaining homeless, in conflict with the legislative intent of the Act. (185 C.A.3d 891.)

(b) Plaintiff association represents low-income persons with housing problems and includes some members who had been tenants in the buildings acquired by defendant. Participation by this kind of association has become common in public interest litigation such as this. (185 C.A.3d 892.) Plaintiff association is pursuing more than privately held rights; it is acting in the public interest, and therefore has standing. (185 C.A.3d 893.)

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4. Comparable Replacement Housing.

8 *Witkin Sum. Cal. Law Const Law* § 1274

[§ 1274] Comparable Replacement Housing.

"Comparable replacement housing" means a sufficient number of "decent, safe and sanitary dwellings" in "areas not generally less desirable" with regard to public utilities and public and commercial facilities, at rents or prices within the financial means of displaced families and individuals, and reasonably accessible to their places of employment. (*Govt.C. 7261(c)(3)*.) A person may not be required to move from his or her *dwelling* because of acquisition by a public entity unless comparable replacement housing is available. (*Govt.C. 7264.5(b)*.) If comparable replacement housing is not available and cannot otherwise be made available, the public entity must use funds authorized for the project for which the property is acquired to provide that housing. (*Govt.C. 7264.5(a)*.) (See *Garcia v. Anthony* (1989) 211 C.A.3d 467, 474, 259 C.R. 393 [90-day residency requirement for relocation payments under *Govt.C. 7264* (see *supra*, §1272) does not apply to use of project funds to provide housing under *Govt.C. 7264.5*].)

In *McKeon v. Hastings College* (1986) 185 C.A.3d 877, 230 C.R. 176, *supra*, §1273, the trial judge granted an injunction requiring defendant, which had acquired residential hotels as part of a campus expansion, to provide 375 units of comparable replacement housing. *Held*, reversed. Plaintiffs, displaced tenants, failed to prove entitlement to comparable replacement housing.

(a) Relocation benefits, including replacement housing, do not accrue to the general public, but to identifiable displaced persons. Here, no individual plaintiff has shown that he required alternative housing or that he would move to alternative housing provided by defendant. (185 C.A.3d 896.) The overwhelming majority of the displaced tenants were transient occupants, generally staying in one location for a short period and frequently becoming tenants on multiple occasions, "probably uninterested in establishing a more stable domicile." (185 C.A.3d 898.) Benefit to the public at large is not a valid basis for the judgment and is inconsistent with the Act, which requires a causal connection between the acquisition of the property and the displacement. (185 C.A.3d 899.)

(b) The burden of proving what caused displaced tenants to move did not shift to defendant, as it did in *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 91 C.R. 745, 478 P.2d 465, 6 *Summary* (10th), *Torts*, §1195, because there is no claim that defendant committed a tort. (185 C.A.3d 901.) Although defendant was at fault in improperly conducting a survey of tenants, its conduct was "far less egregious than that of the defendants in *Haft*." The absence of evidence of causation (1) was attributable in approximately equal parts to plaintiffs and defendant, (2) was not a direct and foreseeable result of defendant's failure to survey, and (3) was not linked to a substantial probability that defendant's omission contributed

to the harm allegedly suffered. (*185 C.A.3d 902.*)

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5. Review.

8 *Witkin Sum. Cal. Law Const Law* § 1275

[§ 1275] Review.

(1) *Administrative Remedy*. A "person aggrieved" by a determination concerning eligibility for or the amount of relocation assistance is entitled to review by the public entity or by a relocation appeals board, if one has been established and authorized to hear the appeals. (*Govt.C.* 7266.) (See *Superior Strut & Hanger Co. v. Port of Oakland* (1977) 72 *C.A.3d* 987, 1000, 140 *C.R.* 515.)

In *Los Angeles v. Decker* (1976) 61 *C.A.3d* 444, 132 *C.R.* 188, plaintiff city gave the 90-day notice to vacate under *Govt.C.* 7267.3, but defendant failed to vacate the property. Plaintiff brought unlawful detainer, obtained a default judgment, and had execution issued. Defendant's motion to recall and quash the writ was denied, and she appealed. *Held*, affirmed; as a "displaced person" she was required to pursue the administrative remedies provided by the statute and city regulations. She was entitled to make a claim for benefits, to have the agents of the city determine the type and amount of benefits for which she qualified, and to have the determination reviewed by the Relocation Assistance Program Director, and thereafter to have a hearing before the *Board of Public Works*. (61 *C.A.3d* 452.) Having failed to take the appropriate action, she was not entitled to belatedly interpose her claims in opposition to execution. (61 *C.A.3d* 449.) (See *Baiza v. Southgate Recreation & Park Dist.* (1976) 59 *C.A.3d* 669, 673, 130 *C.R.* 836 [failure to file claim].)

(2) *Judicial Remedy*. The judicial remedy of a party denied relocation benefits, who has exhausted his or her administrative remedies, is by administrative mandamus under *C.C.P.* 1094.5 (see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §262 et seq.). (*Mountain View v. Superior Court* (1975) 54 *C.A.3d* 72, 81, 126 *C.R.* 358, *infra*, §1276.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Judicial Remedy*.

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §263 et seq.



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6. Cross-Complaint in Condemnation Action.

8 Witkin Sum. Cal. Law Const Law § 1276

[§ 1276] Cross-Complaint in Condemnation Action.

The distinct nature of the condemnee's claims for compensation and relocation benefits, and the interrelation between the Eminent Domain Law and the Relocation Assistance Law, were explored in *Mountain View v. Superior Court* (1975) 54 C.A.3d 72, 126 C.R. 358. Plaintiff city brought an action to condemn business property leased by B. B filed an answer alleging that the value of his leasehold interest was \$ 15,000, the value of his fixtures was \$ 35,000, and that his in-lieu moving expenses under *Govt.C. 7262(c)* were \$ 10,000. The city's demurrer was overruled and it sought mandamus. *Held*, writ granted, with directions.

(a) The Legislature did not integrate the Relocation Assistance Law and the Eminent Domain Law; it followed the recommendation of the Law Revision Commission that they should not be combined, and the only mention in the Eminent Domain Law is designed to prevent double recovery (*C.C.P. 1263.010(b)*, *supra*, §1223). (54 C.A.3d 78.)

(b) The just compensation to which a condemnee is entitled (54 C.A.3d 79, citing the text) does not include moving expenses (54 C.A.3d 79; see *supra*, §1271). These are recoverable only under the *Relocation Assistance Law*. (54 C.A.3d 80.)

(c) The Relocation Assistance Law does not expressly provide a judicial remedy for a person denied benefits; but it does provide a fact-finding process to determine the claimant's eligibility and to fix the amounts. (54 C.A.3d 80.) B's pleading alleges that the benefits claimed were denied him after a hearing before the city's governing body; hence, his judicial remedy is administrative mandamus under *C.C.P. 1094.5* (see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §262 et seq.). (54 C.A.3d 81.)

(d) The procedures to claim compensation and relocation benefits are distinct: (1) The defendant condemnee is entitled to compensation consisting of money damages assessed by a jury. (2) The petitioner in an administrative mandamus proceeding is not entitled to a jury. (54 C.A.3d 81.)

(e) It therefore follows that: (1) The condemnee cannot allege the amount of relocation benefits in his answer in the condemnation action, and cannot prove them in the trial of that action. (2) He can, however, assert his claim for these benefits by a cross-complaint. Although ordinarily a cross-complaint may not be filed in a condemnation action (*C.C.P. 428.10(a)*), it may be filed if the cause of action arises out of the same transaction (*C.C.P. 428.10(b)*). (54 C.A.3d 83.)

Here, the cause of action seeking relief in administrative mandamus clearly arises out of the transaction of condemnation of the property, and B should be granted leave to file the cross-complaint, following which the administrative mandamus hearing must be severed from the trial of the condemnation action. (54 C.A.3d 84.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §263 et seq.



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XIII. EMINENT DOMAIN
F. Removal and Relocation Costs.
7. Inverse Condemnation Action.

8 *Witkin Sum. Cal. Law Const Law* § 1277

[§ 1277] Inverse Condemnation Action.

In *Beaty v. Imperial Irr. Dist.* (1986) 186 C.A.3d 897, 231 C.R. 128, plaintiff brought an inverse condemnation action alleging that defendant district caused flooding that amounted to a taking of plaintiff's land. While the action was pending, plaintiff vacated the property and sought relocation assistance. *Held*, the statutes were applicable.

(a) *Inverse condemnees may be "displaced persons."* Under Govt.C. 7260(c), defining "displaced person" (see *supra*, §1273), relocation assistance benefits are triggered when a person is "displaced" due to "acquisition" of private property for public use. The definition is broad enough to include inverse condemnees who are forced to move from their property because a public entity has taken possession for a public use without first providing just compensation. The statutes are neither expressly nor by implication limited to planned, intentional takings such as negotiated purchases and direct condemnation. (186 C.A.3d 905, 906.) The intent not to exclude inverse condemnees is shown by California's rejection of the "narrow federal language limiting relocation assistance to persons displaced as a result of planned government programs and projects" in favor of broad language that "could include inverse condemnees." (186 C.A.3d 911, 914.)

(b) *Displacement of condemnee and acquisition of property interest is required.* There are two kinds of inverse condemnation actions: (1) those that are a substitute for a direct condemnation action (the government has intentionally taken or damaged a property interest without prior payment), and (2) those that are essentially a special kind of tort liability applicable only to the government (the damage is neither intentional nor immediate). (186 C.A.3d 904.) Because only some inverse condemnees are displaced and only some inverse condemnation actions result in the acquisition of property by a public entity, the relocation statutes are applicable only to those that are a substitute for direct condemnation. (186 C.A.3d 905.)

(c) *Final judgment in inverse condemnation is required.* "Once there has been a final judgment in an inverse condemnation action establishing just compensation and a permanent acquisition by the public entity, no practical distinction remains between the two actions; whether by judgment in inverse condemnation or by an eminent domain proceeding, the result is the same: an acquisition by the public entity for public use and the displacement of persons. Given the policy underlying the relocation assistance provisions--equitable treatment of persons displaced by public acquisition for public use so they do not bear a disproportionate burden on behalf of the public as a whole--we see no rational basis for denying relocation assistance to persons forced to bring an inverse action because the public entity

failed or refused to proceed by way of negotiated purchase or eminent domain. Therefore, in order to avoid an unconstitutional denial of equal protection, we conclude those inverse condemnees who are similarly situated to direct condemnees (i.e., those whose action is a substitute for a direct condemnation action) are entitled to relocation assistance benefits." (186 C.A.3d 920.)

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XIV. OBLIGATION OF CONTRACTS
A. Nature of Protection.
1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1278

[§ 1278] In General.

U.S. Const., Art. I, §10, provides that *no state* shall pass a "law impairing the obligation of contracts." The California Constitution has a similar provision. (Cal. Const., Art. I, §9.) These laws come within the classification of invalid retrospective legislation (*supra*, §623). (See *United States Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 97 S.Ct. 1505, 1514, 52 L.Ed.2d 92, 105; *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 98 S.Ct. 2716, 2730, 57 L.Ed.2d 727, 734; *Davis v. Industrial Acc. Com.* (1926) 198 C. 631, 637, 246 P. 1046; *Union Oil Co. v. Moesch* (1979) 88 C.A.3d 72, 77, 151 C.R. 517, citing the text; *Walsh v. Board of Administration* (1992) 4 C.A.4th 682, 696, 6 C.R.2d 118; *California Assn. for Safety Education v. Brown* (1994) 30 C.A.4th 1264, 1284, 36 C.R.2d 404 [because statute providing for appropriation of money from special fund to reimburse schools for drivers training was subject to another statute limiting money to amount appropriated in state budget, it did not constitute contractual obligation subject to impairment prohibition]; *White v. Davis* (2003) 30 C.4th 528, 564, 574, 133 C.R.2d 684, 68 P.3d 74 [although public employee has right under state law to compensation for work performed during budget impasse, employee has no right to receive compensation until there is available appropriation; however, California is required to comply with federal Fair Labor Standards Act, which requires *timely* payment of minimum and overtime wages covered by Act]; 97 *Harv. L. Rev.* 1414; 81 *Cal. L. Rev.* 433 [contracts in modern Supreme Court]; 60 *So. Cal. L. Rev.* 1; 44 *Stanf. L. Rev.* 1373 [nature of doctrine and current application]; 2 Rotunda, §15.8; 2 Tribe, §9-8 et seq.; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §708 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 2 Rotunda 4th, §15.8.



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Witkin Summary of California Law XIV. OBLIGATION OF CONTRACTS A. Nature of Protection. 2. Distinctions.

8 Witkin Sum. Cal. Law Const Law § 1279

[§ 1279] Distinctions.

(1) *No Limitation on Federal Court.* The restriction is on the states; the federal Government is not so limited. Federal legislation cannot therefore be attacked on this ground, although a similar challenge may be made for violation of due process or failure to compensate for property taken for public use. (*Louisville Joint Stock Land Bank v. Radford* (1935) 295 U.S. 555, 55 S.Ct. 854, 863, 79 L.Ed. 1593, 1604; *Kuehner v. Irving Trust Co.* (1937) 299 U.S. 445, 57 S.Ct. 298, 301, 81 L.Ed. 340, 346; see *supra*, §§623 et seq., 1112.)

(2) *No Limitation on Courts.* The Legislature alone is restricted. Court decisions that, under the doctrine of stare decisis, may affect the obligations of contracts of nonparties, do not violate the Constitution. (See *Rooker v. Fidelity Trust Co.* (1923) 261 U.S. 114, 43 S.Ct. 288, 67 L.Ed. 556; *Tidal Oil Co. v. Flanagan* (1924) 263 U.S. 444, 44 S.Ct. 197, 199, 68 L.Ed. 382, 385; 9 *Cal. Proc.* (4th), *Appeal*, §978; 44 *Stanf. L. Rev.* 1373 [discussing "nearly forgotten issue" of judicial impairments].)

(3) *No Claim by Municipal Corporation.* A municipal corporation cannot attack a state law on the ground that the law impairs the obligation of its contracts. (*Trenton v. New Jersey* (1923) 262 U.S. 182, 43 S.Ct. 534, 537, 67 L.Ed. 937, 941; *California v. Marin Mun. Water Dist.* (1941) 17 C.2d 699, 705, 111 P.2d 651; *Mallon v. Long Beach* (1955) 44 C.2d 199, 209, 282 P.2d 481.)

(4) *Intent To Incorporate Changes in Law.* Where the language of a contract clearly indicates that it was the intention of the parties to incorporate subsequent changes in the law, these changes are not an unconstitutional impairment of the obligation of the contract. (*Torrance v. Work. Comp. App. Bd.* (1982) 32 C.3d 371, 378, 379, 185 C.R. 645, 650 P.2d 1162; *Hermosa Beach Stop Oil Coalition v. Hermosa Beach* (2001) 86 C.A.4th 534, 556, 564, 103 C.R.2d 447 [initiative banning oil exploration did not substantially impair contract between city and oil company permitting oil drilling on city property; initiative was valid exercise of city's police power and contract required oil company to comply with applicable laws].)

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(2) *No Limitation on Courts.* *Colony Hill v. Ghamaty* (2006) 143 C.A.4th 1156, 1170, 50 C.R.3d 247, held that an injunction preventing plaintiff from renting out rooms in his home in violation of the homeowner association's covenants, conditions, and restrictions did not violate Cal. Const., Art. I, §9, prohibiting laws that impair the obligation

of contracts. However, although the court found no substantial impairment of plaintiff's contractual rights here, it cited *Bradley v. Superior Court (1957)* 48 C.2d 509, 519, 310 P.2d 634, which stated, under former Cal. Const., Art. I, §§1, 16, that neither the Legislature nor the courts may impair the obligation of a valid contract.

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §542.



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8 Witkin Sum. Cal. Law Const Law § 1280

[§ 1280] In General.

The protection extends not only to ordinary private contracts (see *infra*, §1288), but to unusual types like corporate charters (*infra*, §1281), and to public contracts of various types (*infra*, §1282 et seq.). (See *40 Stanf. L. Rev.* 203 [government settlement by agreement or consent decree]; *16B Am.Jur.2d* (1998 ed.), *Constitutional Law* §712 et seq.)

The following, however, are considered noncontractual and not within the protection of the constitutional provision:

(1) *Marriage*. Marriage is a status, not a contract. (*Maynard v. Hill* (1888) 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654; *In re Marriage of Walton* (1972) 28 C.A.3d 108, 112, 104 C.R. 472, citing the text.)

(2) *Public Office*. A public office involving performance of governmental functions, as distinguished from a public employment, is not a contract. (*Higginbotham v. Baton Rouge* (1939) 306 U.S. 535, 59 S.Ct. 705, 83 L.Ed. 968.)

(3) *Municipal Charter*. A municipal charter is merely a delegation of power by the state and may be modified without violating the Constitution. (*Tulare v. Dinuba* (1922) 188 C. 664, 669, 206 P. 983.)

(4) *Taxpayer Status*. The statutory relationship between a taxpayer and the state is not a contract; hence, changes in procedure for collection of unpaid taxes do not violate the contract clause. (*Mercury Herald Co. v. Moore* (1943) 22 C.2d 269, 272, 138 P.2d 673.) The same is true of the relationship between an assessment district and taxpayers. (See *Consolidated Fire Protection Dist. of Los Angeles v. Howard Jarvis Taxpayers' Assn.* (1998) 63 C.A.4th 211, 224, 73 C.R.2d 586 [fire district assessment did not create contract between district and taxpayer, but was just ordinance, which is presumed not to create private contractual or vested rights, and which may be repealed through initiative process].)

(5) *Teachers*. An annuity to teachers is not a contract; hence, amendments may be made reducing the amounts. (*Dodge v. Board of Education of Chicago* (1937) 302 U.S. 74, 58 S.Ct. 98, 100, 82 L.Ed. 57, 62.) In *Phelps v. Board of Education of West New York* (1937) 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674, the same conclusion was reached regarding the power to reduce salaries of teachers under the tenure law. (See *Taylor v. Board of Education of San Diego* (1939) 31 C.A.2d 734, 744, 89 P.2d 148.) But in *Indiana v. Brand* (1938) 303 U.S. 95, 58 S.Ct. 443, 448, 82 L.Ed. 685, 693, the Teacher's Tenure Law of Indiana was construed to create a contract, and a statutory change to permit

termination of a tenured teacher's employment impaired its obligation.

(6) *Taxi Permit*. A permit or license to operate a taxicab, issued by a city pursuant to its police power, is not a contract. (*O'Connor v. Superior Court* (1979) 90 C.A.3d 107, 113, 153 C.R. 306.)

(7) *Judgment or Decree Regarding Benefits*. A consent decree or stipulated judgment regarding welfare benefits is not a contract. (See *Mendly v. Los Angeles* (1994) 23 C.A.4th 1193, 1206, 28 C.R.2d 822, *infra*, §1292; *Welfare Rights v. Frank* (1994) 25 C.A.4th 415, 423, 30 C.R.2d 716 [consent decree mandating future compliance with statutory obligation does not invest parties to decree with contractual right to demand continued performance in event underlying statutory obligation is changed].)

The United States Supreme Court will determine for itself the question of the existence of a contract, its effect and meaning, and whether its obligation has been impaired. (*Coombes v. Getz* (1932) 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866.) But it will lean toward agreement with the state court. In *Hale v. Iowa State Bd. of Assessment & Review* (1937) 302 U.S. 95, 58 S.Ct. 102, 82 L.Ed. 72, bonds of the state and subdivisions provided that they were "exempt" from taxation. Later, a state income tax law was passed, and the income from these bonds was taxed. *Held*, the tax was valid. The Iowa court could reasonably construe this particular exemption provision of the contract as limited to a *property tax* on the bond in proportion to its value, and as not applicable to an excise or income tax on the net yield from all sources.

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B. What Constitutes Contract.
2. Corporate Charter.

8 Witkin Sum. Cal. Law Const Law § 1281

[§ 1281] Corporate Charter.

(1) *Nature of Doctrine.* A corporate charter was held to be a contract and therefore within the protection of the Contract Clause in the celebrated case of *Trustees of Dartmouth College v. Woodward* (1819) 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629, 656. In 1769, the English crown granted a charter to the corporation. In 1816, the New Hampshire Legislature passed several acts amending the charter. Acting under these statutes, Woodward obtained possession of the records, seal, and other corporate property, and the trustees brought an action to recover them. *Held*, the statutes were unconstitutional; the charter was a contract to which the donors, the trustees, and the crown were the original parties.

(2) *Reserved Power.* Following the decision in *Trustees of Dartmouth College*, the states generally made provision for a reserved power to amend or repeal corporate charters. (See *Phillips Petroleum Co. v. Jenkins* (1936) 297 U.S. 629, 56 S.Ct. 611, 613, 80 L.Ed. 943, 947; Cal. Const., Art. XX, §5; 9 *Summary* (10th), *Corporations*, §2.) Thus, a shareholder contracts with the knowledge that the Legislature may authorize changes in the stock structure, such as increase or decrease of common or preferred shares, even though this denies or modifies voting privileges and changes the potential control of the corporation. (*Heller Inv. Co. v. Southern Title & Trust Co.* (1936) 17 C.A.2d 202, 211, 61 P.2d 807; see *In re Mayellen Apartments* (1955) 134 C.A.2d 298, 304, 285 P.2d 943 [statutes on judicial supervision of voluntary dissolution are part of contract and subject to reserved power].)

(3) *Due Process as Limitation on Reserved Power.* Although, under the reserved power, the Legislature avoids the inhibitions of the Contract Clause in making changes in the interrelations of the state, corporations, and shareholders, it must still act within the limits of the Due Process Clause, and therefore cannot impair vested rights of third persons. (See *Chicago, Milwaukee & St. Paul R. Co. v. Wisconsin* (1914) 238 U.S. 491, 35 S.Ct. 869, 59 L.Ed. 1423.)

In *Coombes v. Franklin* (1931) 213 C. 164, 1 P.2d 992, 4 P.2d 157, a creditor of a corporation sued one of the directors, to recover, under the former California constitutional provision, money misappropriated by officers of the corporation during the director's term of office. Pending appeal, the provision was repealed. The California court dismissed the appeal under the rule that a right dependent solely on a statute abates on the repeal of the statute in the absence of a saving clause, reasoning that the liability, though contractual, was contingent, being entered into in contemplation of the possibility of alteration or repeal under the reserved power. (213 C. 166.) But the United States Supreme Court reversed the decision, holding that the cause of action was a property right that vested prior to the repeal, and that to abate the action would violate both the Contract and the Due Process Clauses. (*Coombes v. Getz*

(1932) 285 U.S. 434, 52 S.Ct. 435, 436, 76 L.Ed. 866, 871.)

In *Schroeter v. Bartlett Syndicate Bldg. Corp.* (1936) 8 C.2d 12, 63 P.2d 824, a statute taking away the power of assessment from existing corporations unless their articles originally or by amendment conferred the power, was upheld. The legislative change here concerned only interrelations of the corporation and stockholders, and made no attempt (as in *Coombes v. Getz*) to destroy the right of a third party creditor that had vested prior to the statutory repeal. (8 C.2d 16.)

In *Rainey v. Michel* (1936) 6 C.2d 259, 57 P.2d 932, stock in a banking corporation was acquired by defendant, and later, in 1931, a statute was amended to impose a special stockholders' liability. *Held*: (a) The statute could validly impose the liability, because defendant's contract with the corporation was subject to the reserved power. (b) But, prior to the time the stock was acquired, the creditors had no rights against defendant; and to impose on the defendant a liability not existing when the debt was incurred would be a *denial of due process* as to him. The proper interpretation of the statute, to avoid unconstitutionality, was that it did not purport to impose that liability. (6 C.2d 279.) (See *Stockholders of Peoples Banking Co. of Smithsburg, Maryland v. Sterling* (1937) 300 U.S. 175, 57 S.Ct. 386, 390, 81 L.Ed. 586, 591.)

West's Key Number Digest, Constitutional Law k.125 et seq.

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B. What Constitutes Contract.
3. Public Franchise or Grant.

8 Witkin Sum. Cal. Law Const Law § 1282

[§ 1282] Public Franchise or Grant.

An accepted franchise or other grant is a contract within the meaning of the Contract Clause. (See *Russell v. Sebastian* (1914) 233 U.S. 195, 34 S.Ct. 517, 519, 58 L.Ed. 912, 921; *Fletcher v. Peck* (1810) 10 U.S. 87, 3 L.Ed. 162; *Wood v. Lovett* (1941) 313 U.S. 362, 61 S.Ct. 983, 986, 85 L.Ed. 1404, 1407 [deed by state to purchaser of land at sale for delinquent taxes is contract, and existing statute giving rights or immunities to purchaser is part of obligation]; 60 So. Cal. L. Rev. 29.) And a *continuing offer*, by statute, to telephone and telegraph companies, of a franchise to use streets and highways, may become a binding contract when lines are constructed and maintained. (See *Los Angeles v. Southern Calif. Tel. Co.* (1948) 32 C.2d 378, 384, 196 P.2d 773; *Petaluma v. Pacific Tel. & Tel. Co.* (1955) 44 C.2d 284, 288, 282 P.2d 43.)

However, a grant by a state will be strictly construed in favor of the public and against the grantee. (See *The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge* (1837) 36 U.S. 420, 9 L.Ed. 773, 823; *Southern Calif. Gas Co. v. Los Angeles* (1958) 50 C.2d 713, 719, 329 P.2d 289; *Orange v. Santa Margarita Water Dist.* (1996) 44 C.A.4th 189, 191, 193, 52 C.R.2d 8 [rule applies only to agreements between privately owned public utilities and public agencies, not to agreements between two public agencies; in disputes between public agencies, facilities "prior in time" are "prior in right"]; 60 So. Cal. L. Rev. 35.) And the grant to a public utility of a franchise in a public street is subject to an implied obligation to relocate its facilities at its own expense when necessary for a proper governmental use of the street. (*Southern Calif. Gas Co. v. Los Angeles*, *supra*, 50 C.2d 716 [construction of sewer]; *Los Angeles County Flood Control Dist. v. Southern Calif. Edison Co.* (1958) 51 C.2d 331, 334, 333 P.2d 1 [construction of storm drains]; *Livermore v. Pacific Gas & Elec. Co.* (1997) 51 C.A.4th 1410, 1412, 1417, 59 C.R.2d 852 [utility must pay cost of relocating utility poles to accommodate municipal street-widening project partly financed by assessment district funds and partly by fee imposed on development throughout city; fact that private development aggravated need for expansion was not dispositive].)

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See *Anderson v. Time Warner Telecom of Calif.* (2005) 129 C.A.4th 411, 415, 28 C.R.3d 289 [under *Pub.Util.C.* 7901, telephone corporation has right to use county road easements for installation of fiber optic network]; *Pasadena Metro Blue Line Const. Authority v. Pacific Bell Tel. Co.* (2006) 140 C.A.4th 658, 665, 44 C.R.3d 556 [construction authority that stepped in to complete light rail project involving relocation of utility lines, like its predecessor, was obligated by

Pub.Util.C. 30631 to pay relocation costs].



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B. What Constitutes Contract.
4. Bond of Public District.

8 *Witkin Sum. Cal. Law Const Law* § 1283

[§ 1283] Bond of Public District.

Where a street improvement or similar district is formed to construct a public improvement, with funds derived from the issuance and sale of bonds secured by special assessments on the lands in the district, two contractual relationships arise: (a) between the state or its agency (the district) and the bondholders; and (b) between the bondholders and the property owners whose lands are subject to the assessments. Hence, subsequent legislation that materially changes either the rights of the existing bondholders or those of the landowners is unconstitutional. (See *Los Angeles v. Rockhold* (1935) 3 C.2d 192, 210, 44 P.2d 340; *Sutter Basin Corp. v. Brown* (1953) 40 C.2d 235, 241, 253 P.2d 649; *Schuhart v. Pinguelo* (1991) 230 C.A.3d 1599, 1604, 282 C.R. 144; *infra*, §1082; on citizen's right to sue school or community college district for misuse of bond funds under *Educ.C. 15264 et seq.*, see *Educ.C. 15284*; on local tax and bond accountability generally, see *Govt.C. 50075.1 et seq.* and *53410 et seq.*)

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B. What Constitutes Contract.

5. Public Pension System.

a. Contractual Theory.

8 *Witkin Sum. Cal. Law Const Law* § 1284

[§ 1284] Contractual Theory.

The early rule treated a public pension as a gratuity. The prospective pensioner (employee) had no vested right, and the pension could be substantially modified or wholly abolished by statutory change. Under the modern view, a pension is a part of the compensation for services rendered. Hence, on acceptance of employment, a "vested contractual right" arises, and the governing body cannot abrogate or substantially impair it. (See *Wallace v. Fresno* (1954) 42 C.2d 180, 183, 265 P.2d 884; *Miller v. California* (1977) 18 C.3d 808, 816, 135 C.R. 386, 557 P.2d 970; *Frank v. Board of Administration of Public Employees' Retirement System* (1976) 56 C.A.3d 236, 242, 128 C.R. 378; *Bonelli v. California* (1977) 71 C.A.3d 459, 466, 139 C.R. 486; *Valdes v. Cory* (1983) 139 C.A.3d 773, 783, 784, 189 C.R. 212; *Association of Blue Collar Workers v. Wills* (1986) 187 C.A.3d 780, 786, 791, 232 C.R. 174; 78 A.L.R.2d 1197 [retroactive change in rate of employee's contribution to public pension fund].) However, because an early retirement incentive program is not a vested pension right, a less favorable program could be substituted at the time of a second offer to designated employees. (*Creighton v. Regents of Univ. of Calif.* (1997) 58 C.A.4th 237, 243, 68 C.R.2d 125.)

In *Kern v. Long Beach* (1947) 29 C.2d 848, 179 P.2d 799, the charter of defendant city had established a pension plan under which certain employees might retire after 20 years of service. When plaintiff lacked 32 days of the 20-year period, the provision was repealed. On completion of the period, plaintiff sought mandamus to compel payment of the pension. *Held*, the repeal was ineffective as to him. (29 C.2d 855.)

The contract need not be *express*. In *California Teachers Assn. v. Cory* (1984) 155 C.A.3d 494, 506, 202 C.R. 611, a statute required the transfer of money owed as state contributions to the Teachers' Retirement Fund. *Held*, the statute implied a legislative intent to grant private rights of contract.

(a) "[T]hree quarters of a century of cases ... have *implied* contractual obligations from the particular texts and contexts of the statutes at issue. Once an implied contract of the state is demonstrated it is of equal dignity with an express contract for purposes of the prohibitions against impairment." (155 C.A.3d 504.)

(b) "In California law, a legislative intent to grant contractual rights can be implied from a statute if it contains an unambiguous element of exchange of consideration by a private party for consideration offered by the state." (155 C.A.3d 505.) And "a statute offering pension rights in return for employee services expresses an element of exchange

and thereby implies these rights will be private rights in the nature of the contract." (155 C.A.3d 506.)

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B. What Constitutes Contract.

5. Public Pension System.

b. Valid Modifications.

8 *Witkin Sum. Cal. Law Const Law* § 1285

[§ 1285] Valid Modifications.

The pension systems of governmental agencies must be flexible and capable of change to meet new conditions, and it would be disastrous if the right, both as to the amount and conditions, became irrevocably fixed for an employee on entering employment. (See *Maffei v. Sacramento County Employees' Retirement System* (2002) 103 C.A.4th 993, 997, 127 C.R.2d 279 [plaintiff, who opted for deferred retirement as member of county retirement system when she resigned employment with county, and who took job as teacher in public school where she became member of State Teachers' Retirement System, would be entitled to benefit of reciprocity legislation (*Govt.C. 31840.8*) enacted after she left county job and while she was employed as teacher]; *Medina v. Board of Retirement Los Angeles Employees Retirement Assn.* (2003) 112 C.A.4th 864, 871, 5 C.R.3d 634 [vested rights doctrine did not apply to give plaintiffs, who were former public safety officers, pension benefits of safety members when their classification as safety members was mistakenly continued after they became assistant district attorneys; contract clause does not apply in case of invalid or unenforceable contracts]; *Sappington v. Orange Unified School Dist.* (2004) 119 C.A.4th 949, 953, 14 C.R.3d 764 [school district retirees had no vested right to receive free PPO health coverage forever].)

Accordingly, the courts have held that the vested right is to a *substantial and reasonable pension*, which the governing body may not repeal, but may modify regarding the amount, terms, and conditions. This loose but practical doctrine is stated in *Kern v. Long Beach* (1947) 29 C.2d 848, 855, 179 P.2d 799, *supra*, §1284, as follows: "[A]n employee may acquire a vested contractual right to a pension but ... this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. ... There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered." (29 C.2d 855.) (See *Wallace v. Fresno* (1954) 42 C.2d 180, 183, 265 P.2d 884, *infra*, §1286; 7 A.L.R.2d 692 [reduction of benefits of public officer or employee because of independent income]; for illustrations of valid modifications, see *Allen v. Board of Administration* (1983) 34 C.3d 114, 119, 192 C.R. 762, 665 P.2d. 534; *International Assn. of Firefighters v. San Diego* (1983) 34 C.3d 292, 300, 193 C.R. 871, 667 P.2d 675; *Lyon v. Flournoy* (1969) 271 C.A.2d 774, 787, 76 C.R. 869; *Ruster v. Ruster* (1974) 40 C.A.3d 379, 382, 114 C.R. 812; *Claypool v. Wilson* (1992) 4 C.A.4th 646, 661, 665, 666, 6 C.R.2d 77.)

Modification of employees' rights may consist of the total destruction of the interests of *dependents*. In *Packer v. Board of Retirement of Los Angeles Peace Officers' Retirement System* (1950) 35 C.2d 212, 214, 218, 217 P.2d 660, the

modification eliminated the widow's pension under certain circumstances. *Held*, this was valid. Although the pension right is community property (see 11 *Summary* (10th), *Community Property*, §58 et seq.), the widow's interest is not a separate right in her but merely part of her husband's benefits. Hence, it may be cut off if the total change in the husband's pension rights does not exceed the permissible bounds of modification. The court expressly rejected the theory that the widow had a vested right similar to that of a beneficiary of a life insurance policy with no reservation of power to effect a change. (35 C.2d 215.)

SUPPLEMENT: [This section is current through the latest supplement]

See *California Assn. of Professional Scientists v. Schwarzenegger* (2006) 137 C.A.4th 371, 383, 40 C.R.3d 354

[alternative retirement program for new hires].



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5. Public Pension System.

c. Invalid Modifications.

8 *Witkin Sum. Cal. Law Const Law* § 1286

[§ 1286] Invalid Modifications.

In *Wallace v. Fresno* (1954) 42 C.2d 180, 265 P.2d 884, petitioner, a police officer, acquired a vested pension right. But subsequently, before he was eligible to retire, the pension ordinance was amended to provide for termination of a pension on conviction of a felony. After retirement and receipt of the pension for some time, petitioner was convicted of preparing a fraudulent income tax return, and termination was ordered. *Held*, the ordinance could not be thus retroactively applied.

The court seemingly laid down a test of valid modifications. They may be made "for the purpose of keeping the pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy." (42 C.2d 184.) The amendment here did not meet the test. It did not appear to have a "material relation to the theory of the pension system or to its successful operation. Rather, the change was designed to benefit the city and ... to meet the objections of taxpayers. ... A city has no more right to adopt an amendment which does not come within the purposes of the rule permitting modifications than a private insurance carrier would have to change an annuity policy by making a unilateral amendment under which the insured's interest might be terminated upon his conviction of a felony." (42 C.2d 185.) (For cases holding amendments invalid, see *Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 C.3d 859, 866, 148 C.R. 158, 582 P.2d 614; *Frank v. Board of Administration of Public Employees' Retirement System* (1976) 56 C.A.3d 236, 245, 128 C.R. 378; *Valdes v. Cory* (1983) 139 C.A.3d 773, 791, 189 C.R. 212 [state failed to meet burden of demonstrating that impairment was warranted by emergency serving to protect basic interest of society]; *Pasadena Police Officers Assn. v. Pasadena* (1983) 147 C.A.3d 695, 701, 703, 704, 195 C.R. 339 [changes in pension plan that result in disadvantage to employees should be accompanied by comparable new advantages]; *United Firefighters of Los Angeles v. Los Angeles* (1989) 210 C.A.3d 1095, 1102, 259 C.R. 65 [following *Pasadena Police Officers Assn.*; amendment placing cap on cost-of-living adjustments]; *Board of Administration of the Public Employees' Retirement System v. Wilson* (1997) 52 C.A.4th 1109, 1135, 1153, 61 C.R.2d 207 ["in arrears" pension financing unconstitutionally impaired contractual right to actuarially sound retirement system and failed to provide comparable new advantages for its adverse effect].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Teachers' Retirement Bd. v. Genest* (2007) 154 C.A.4th 1012, 1031, 1033, 65 C.R.3d 326 [state's reduction of

funding for Teachers' Retirement Fund violated Contract Clauses of state and federal Constitutions; state was contractually obligated to make specific annual contribution into supplemental benefit account regardless of actuarial soundness].



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1. Valid Changes in Remedy or Procedure.

8 *Witkin Sum. Cal. Law Const Law* § 1287

[§ 1287] Valid Changes in Remedy or Procedure.

Parties to a contract have no vested right in the particular remedies or methods of procedure existing at the time of their agreement. The Legislature can neither take away all remedies, nor so substantially restrict the remedies as practically to destroy the right; but an ordinary change in procedure that alters the remedy for breach of a contract is valid, though retroactively applied to existing contracts. (See *Oshkosh Waterworks Co. v. Oshkosh* (1903) 187 U.S. 437, 23 S.Ct. 234, 47 L.Ed. 249; *National Collection Agency v. Fabila* (1979) 93 C.A.3d Supp. 1, 5, 155 C.R. 356; *Danekas v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (2001) 95 C.A.4th 638, 651, 115 C.R.2d 694 [rent control provision governing tenant's right to sublet when one of multiple tenants departs promotes legitimate and significant public purpose, and is moderate and restrained]; *Severns v. Union Pac. R. Co.* (2002) 101 C.A.4th 1209, 1222, 125 C.R.2d 100, quoting the text [requirement of Marketable Record Title Act that plaintiff record intent to preserve future interest within 5 years of its effective date was reasonable procedural addition addressed to legitimate state interest of relieving title and marketability problems created by powers of termination]; 16B *Am.Jur.2d* (1998 ed.), *Constitutional Law* §726 et seq.; on legislation shortening period of statute of limitations, see 3 *Cal. Proc.* (4th), *Actions*, §432.)

In *Simons Brick Co. v. Eagle Indem. Co.* (1930) 110 C.A. 676, 294 P. 1075, the obligation of a bond to pay materialmen who had contracted with a school district was made expressly conditional on filing a verified claim with the district, as provided by statute. Thereafter, the statute was amended to permit suit without the filing. *Held*, the amendment was applicable. The obligation of defendant surety remained the same, and elimination of the preliminary notice to the obligor was a mere change in remedy. (110 C.A. 684.)

In *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Trust Co.* (1937) 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, state law provided two remedies for creditors under trust deeds: (a) foreclosure in equity, subject to the court's power to set aside an unfair sale, or (b) a trustee's sale by authorization in the contract. After execution of a trust deed, a statute was enacted to provide that, in the event of a trustee's sale and purchase thereunder, the debtor could defeat a deficiency judgment in whole or in part by showing that the price paid was less than the true value of the property. *Held*, this law could be retroactively applied to the prior deed of trust. The traditional remedy of foreclosure, with its equitable restrictions, was adequate; hence, the Legislature might wholly abolish the remedy of trustee's sale, or subject it to the same equitable restrictions, without impairing the obligation of the contract. (See *Gelfert v. National City Bank of New York* (1941) 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299, *infra*, §1290.)

In *Security-First Nat. Bank of Los Angeles v. Sartori* (1939) 34 C.A.2d 408, 93 P.2d 863, former C.C. 2957, requiring rerecording of a chattel mortgage after 4 years, was held applicable to a preexisting mortgage on the ground that the statute merely required the mortgagee to give notice of the continued existence of the mortgage and imposed no unreasonable burden. (34 C.A.2d 413.)

In *Coast Bank v. Holmes* (1971) 19 C.A.3d 581, 97 C.R. 30, C.C. 1717, allowing an award of attorneys' fees to the prevailing party in an action on a contract whenever the contract provides for fees for either party, was held applicable to an action on a previously executed note. Litigation expenses are special damages, and there is no vested right to a particular measure of damages. (19 C.A.3d 596.)

In *San Diego White Truck Co. v. Swift* (1979) 96 C.A.3d 88, 157 C.R. 745, the question was whether the statutory dwelling house exemption from execution applied to an obligation incurred prior to its effective date. The statute did not create a new exemption but rather a new and essentially automatic method of obtaining an exemption without the formalities associated with filing homesteads. (96 C.A.3d 91.) "The retroactive application of the dwelling house exemption has a minimal effect, for the rights of creditors in California have always been subject to the homestead. Any reliance by a creditor on the debtor's failure to seek the benefits of that statute is questionable. Commerce is not disrupted when the only change in the law is the Legislature's reasonable action in removing gamesmanship from an exemption statute to assure its proper application." (96 C.A.3d 94.)

Changes that *increase the remedy* of the creditor are valid, if they do not enlarge the obligation of the debtor. (See *Bernheimer v. Converse* (1907) 206 U.S. 516, 27 S.Ct. 755, 760, 51 L.Ed. 1163, 1174; *Funkhouser v. J.B. Preston Co.* (1933) 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243; *Stockholders of Peoples Banking Co. of Smithsburg, Maryland v. Sterling* (1937) 300 U.S. 175, 57 S.Ct. 386, 390, 81 L.Ed. 586, 591 [stockholders' liability, remedy given to receiver]; *Faitoute Iron & Steel Co. v. Asbury Park* (1942) 316 U.S. 502, 62 S.Ct. 1129, 1135, 86 L.Ed. 1629, 1637.) Hence, the 1933 amendment to C.C.P. 725a, giving the creditor under a deed of trust the remedy of foreclosure for breach in addition to his or her existing right of sale, was validly applied to existing deeds of trust. (*Lincoln v. Superior Court* (1934) 2 C.2d 127, 129, 39 P.2d 405.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 Cal. Proc. (5th), Actions, §459.



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2. Invalid Changes in Obligation.

8 Witkin Sum. Cal. Law Const Law § 1288

[§ 1288] Invalid Changes in Obligation.

The following are examples of changes that violate the Contract Clause:

(1) *Statutes changing nature of creditor's security.* In *Los Angeles v. Rockhold* (1935) 3 C.2d 192, 44 P.2d 340, street assessment bonds had been issued that were payable by an ad valorem tax levied against all property owners in the district. Subsequently, a refunding statute was passed that attempted to cancel the old bonds and substitute others, each of which was to be secured by a specific lien on a particular parcel of land. *Held*, this was a material change in the obligation, both as to bondholders and landowners, and was invalid. (3 C.2d 204.) (See *W.B. Worthen Co. v. Kavanaugh* (1935) 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298; *Islais Co. v. Matheson* (1935) 3 C.2d 657, 663, 45 P.2d 326; *Shouse v. Quinley* (1935) 3 C.2d 357, 360, 45 P.2d 701; *Sutter Basin Corp. v. Brown* (1953) 40 C.2d 235, 242, 253 P.2d 649.)

(2) *Statutes cutting down creditor's rights by granting exemptions to debtor.* In *Worthen Co. v. Thomas* (1934) 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344, a statute exempting insurance money from liability to creditors was held unconstitutional regarding a creditor's lien on those funds that attached prior to the statute.

A statute creating a new exemption from execution (motor vehicle of a certain value) was inapplicable to a creditor's claim based on a pre-existing contract, even though the creditor had acquired no specific lien at that time. (*Medical Finance Assn. v. Wood* (1936) 20 C.A.2d Supp. 749, 751, 63 P.2d 1219; *Smith v. Hume* (1937) 29 C.A.2d Supp. 747, 749, 74 P.2d 566.)

In re Rauer's Collection Co. (1948) 87 C.A.2d 248, 196 P.2d 803, approved these cases and reached the same conclusion on somewhat similar facts. In 1939, a debtor incurred a contractual obligation and declared a homestead on his property; the statutory exemption at that time was \$ 5,000. In 1946, when a judgment was obtained against him on the obligation, the exemption had increased to \$ 6,000. *Held*, the exemption statute at the time the *obligation was incurred* was controlling; to hold the increased exemption retroactive would impair the obligation of the contract. (87 C.A.2d 253.)

(3) *Statutes depriving creditor of part of claim.* Retroactive statutes prohibiting or unreasonably restricting deficiency judgments have been held invalid. (*Brown v. Fardon* (1936) 5 C.2d 226, 231, 54 P.2d 712; *Hales v. Snowden* (1937) 19 C.A.2d 366, 370, 65 P.2d 847 [C.C.P. 580b]; see 4 Summary (10th), *Security Transactions in Real Property*,

§207.)

(4) *Statute depriving purchaser under tax sale of statutory protections existing at time of deed.* In *Wood v. Lovett* (1941) 313 U.S. 362, 61 S.Ct. 983, 85 L.Ed. 1404, a state law in the nature of a curative act provided that tax sales should not be set aside by courts for certain irregularities. *Held*, this was part of the contract with the purchaser at the sale who received a tax deed from the state (the deed was the contract), and the attempted repeal of the statute to remove the protection impaired the obligation of that contract (the tax deed from the state and the existing law governing the sale and its effect). (61 S.Ct. 986, 85 L.Ed. 1407.)

(5) *Statute retroactively altering pension agreement between private employer and employees, enlarging obligation of employer.* (See *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 98 S.Ct. 2716, 2723, 2725, 57 L.Ed.2d 727, 738, 740; 92 Harv. L. Rev. 86.)

(6) *Statute nullifying wage agreement of public agency and employees.* *Sonoma County Organization of Public Employees v. Sonoma* (1979) 23 C.3d 296, 152 C.R. 903, 591 P.2d 1, deals with the legislative attempt to mitigate the effects of the limitations in taxing power imposed by Proposition 13 (see 9 *Summary* (10th), *Taxation*, §125 et seq.). Govt.C. 16280, enacted in 1978, prohibited distribution of state surplus or loan funds to local public agencies granting a cost-of-living wage or salary increase that exceeded the cost-of-living increase provided for state employees, and declared null and void agreements by local agencies to pay the prohibited increase. A number of local public agencies that had made these agreements refused to authorize the additional wages, and petitioner, a labor organization representing the employees, sought mandamus to compel payment. *Held*, writ granted.

(a) The statute by its express terms impaired the obligation of the agreements, and the issue was whether this impairment was a valid exercise of the police power under the tests laid down by *Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 54 S.Ct. 231, 240, 78 L.Ed. 413, 429, and subsequent cases (see *infra*, §1289 et seq.). (23 C.3d 305.)

(b) Applying the tests: (1) The statute did not merely postpone contractual benefits or alter enforcement remedies; the right to a wage increase for the fiscal year was taken away, and this was a severe, permanent, and immediate impairment of contractual rights. (23 C.3d 309.) (2) The statutory declaration of a fiscal emergency was not binding on the court. And the governmental agencies had not met the burden of establishing that the emergency existed, because five-sevenths of their lost revenues were replaced by state funds, and the net loss was only 6%. (23 C.3d 310, 311.) (See 68 Cal. L. Rev. 829.)

(7) *Statute impairing spouse's contractual rights under settlement agreement on dissolution of marriage.* (See *In re Marriage of Guthrie* (1987) 191 C.A.3d 654, 661, 662, 236 C.R. 583 [former statute authorizing modification of family home award was invalid if retroactively applied to award previously made on stipulation of parties; impairment of contract and violation of due process].)

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a. Emergency Legislation.

8 *Witkin Sum. Cal. Law Const Law* § 1289

[§ 1289] Emergency Legislation.

During the economic depression following 1929, police power legislation was enacted in many states for the relief of debtors, and particularly mortgage debtors. The statutes usually provided for (1) a moratorium on foreclosures and sales, for a limited period, to prevent sacrifice of property at prices far below actual value, and to give the debtor an opportunity to pay; (2) extension of the period of redemption giving the mortgagor more time to redeem; (3) a fair sale price, prohibiting sales below fair value; or (4) a limitation on deficiency judgments. (See 47 *Harv. L. Rev.* 660; 21 *Cal. L. Rev.* 471; 22 *Cal. L. Rev.* 170.)

Federal and state decisions on similar legislation enacted during previous financial depressions were almost unanimous in condemning such legislation as violative of the Contract Clause. (See *Barnitz v. Beverly* (1896) 163 *U.S.* 118, 16 *S.Ct.* 1042, 41 *L.Ed.* 93; *Bronson v. Kinzie* (1843) 42 *U.S.* 311, 11 *L.Ed.* 143.) But in *Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 *U.S.* 398, 54 *S.Ct.* 231, 78 *L.Ed.* 413, the Court considered the provision of the Minnesota Mortgage Moratorium Law, which authorized the lower court to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable." The statute was enacted as an emergency measure, to remain in effect only during the emergency, and in no event beyond May 1, 1935. *Held*, the provision was valid. (a) The Contract Clause is not an absolute prohibition; contracts are made subject to the state's police power; and, in an emergency, this reserved power may be exercised directly to prevent the strict enforcement of the contract to safeguard the public interest. (b) The exercise of the power must be of a character appropriate to the emergency and reasonable in its conditions; and the Minnesota law, being reasonable, temporary, and limited to the emergency, did not violate either the *Contract or the Due Process Clause*. (54 *S.Ct.* 240, 78 *L.Ed.* 429.) (See *State Bonded Audit Bureau v. Pomona Mut. Bldg. & Loan Assn.* (1940) 37 *C.A.2d Supp.* 765, 769, 98 *P.2d* 829; *Board of Administration of the Public Employees' Retirement System v. Wilson* (1997) 52 *C.A.4th* 1109, 1161, 61 *C.R.2d* 207 [necessity defense in action challenging constitutionality of "in arrears" financing of public pension system failed where state cited no evidence of actuarial input, effort to deal narrowly with exigencies of fiscal emergency, or consideration of other less drastic alternatives].)

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b. Non-Emergency Legislation.

8 Witkin Sum. Cal. Law Const Law § 1290

[§ 1290] Non-Emergency Legislation.

In cases subsequent to *Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, supra, §1289, the Supreme Court gave effect to the limitations expressed in the opinion by holding invalid legislation that was not restricted to the emergency or was unreasonable in its conditions. (See *Worthen Co. v. Thomas* (1934) 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344; *W.B. Worthen Co. v. Kavanaugh* (1935) 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298.) California followed this same view, holding unconstitutional the retroactive application of the former statute restricting deficiency judgments after sale under a deed of trust. (*Brown v. Ferdon* (1936) 5 C.2d 226, 235, 54 P.2d 712.) (See *Shouse v. Quinley* (1935) 3 C.2d 357, 362, 45 P.2d 701; *Treigle v. Acme Homestead Assn.* (1936) 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575 [statute modifying withdrawal rights of stockholders of building and loan associations was not limited to emergency; invalid].)

But in *Gelfert v. National City Bank of New York* (1941) 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299, a statute prohibited deficiency judgments on mortgage foreclosures unless the fair value of the property, determined by the court, was deducted from the debt; and the statute was unrestricted in operation and not based on or confined to an emergency. *Held*, it was valid (though the decision was limited to the situation where the mortgagee buys). The mortgagee's contractual right is only to receive payment in full; there is no constitutional claim to the benefits of a forced judicial sale at a price below the fair value of the property. The Legislature is merely acting uniformly in the field in which equity courts have long acted. (61 S.Ct. 903, 85 L.Ed. 1305.) (See *Castleman v. Scudder* (1947) 81 C.A.2d 737, 740, 185 P.2d 35, supra, §629 ["into all contracts is superimposed the higher authority of the state which must be presumed to be known by all, and every contract is made in subordination of that authority and must yield to that control"].)

In *El Paso v. Simmons* (1965) 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446, Texas school lands were sold in 1910 on long-term contracts providing for forfeiture on default in interest, with an indefinite right to reinstatement by the purchaser on paying back interest. In 1941, the statute was amended to limit the right of reinstatement to a period of 5 years from the date of forfeiture. *Held*, the amendment was validly applied to lands sold under the original statute. This history of the school land situation revealed the need for reform, to eliminate litigation and clouds on title. "The measure taken to induce defaulting purchasers to comply with their contracts, requiring payment of interest in arrears within five years, was a mild one indeed, hardly burdensome to the purchaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest." (85 S.Ct. 588, 13 L.Ed.2d 459.)

The factors to be considered in determining the issue of unconstitutional impairment of contract are "the nature, importance and urgency of the interest to be served by the challenged legislation; and whether the legislation was appropriately tailored and limited to the situation necessitating its enactment." (*Donlan v. Weaver* (1981) 118 C.A.3d 675, 682, 173 C.R. 566 [impairment was small; interest of state was substantial and significant].) (See *Energy Reserves Group v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 103 S.Ct. 697, 704, 74 L.Ed.2d 569, 581; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 107 S.Ct. 1232, 1251, 1252, 94 L.Ed.2d 472, 499, 500; *Interstate Marina Dev. Co. v. Los Angeles* (1984) 155 C.A.3d 435, 446, 202 C.R. 377; *In re Marriage of Potter* (1986) 179 C.A.3d 73, 82, 83, 224 C.R. 312; *United States v. State Water Resources Control Bd.* (1986) 182 C.A.3d 82, 147, 227 C.R. 161.)

Retrospective application of amendments to the Fair Employment and Housing Act that declare unlawful preexisting restrictive covenants that discriminate against the disabled do not result in an unconstitutional impairment of contract. (*Hall v. Butte Home Health* (1997) 60 C.A.4th 308, 317, 70 C.R.2d 246.)

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c. Insurance Contracts.

8 Witkin Sum. Cal. Law Const Law § 1291

[§ 1291] Insurance Contracts.

Proposition 103, an initiative measure enacted in 1988 to regulate insurers (see *supra*, §1083), contained the following provision: "Notwithstanding any other provision of law, a notice of cancellation or non-renewal of a policy for automobile insurance shall be effective only if it is based on one or more of the following reasons: (1) nonpayment of premiums, (2) fraud or material misrepresentation affecting the policy or insured; (3) a substantial increase in the hazard insured against." (See *Ins.C. 1861.03(c)*.)

In *Calfarm Ins. Co. v. Deukmejian* (1989) 48 C.3d 805, 258, C.R. 161, 771 P.2d 1247, *supra*, §1083, the court construed this provision as applicable to existing as well as future policies, and rejected the contention that this application would violate the Contract Clause.

(a) Decisions of the United States Supreme Court and the courts of a number of states make it clear that the police power may justify some impairment of existing contracts. (48 C.3d 828, 829.) The impairment in the present case is relatively moderate and restrained. The insurer may still refuse to renew policies for nonpayment of premium, fraud, misrepresentation, or substantial increase in the hazard insured against; and when it renews pursuant to Proposition 103, it is guaranteed fair and reasonable rates. (48 C.3d 830.) Moreover, insurance is a highly regulated industry affected with a public interest, and insurers were well aware of the possibility that initiatives or ordinary legislation might be enacted that would affect existing policies. (48 C.3d 830, 831.) Proposition 103 does not prevent an insurer from discontinuing its California business. (48 C.3d 831.)

(b) The public interest justifies the impairment. "[T]he drafters and the voters were evidently concerned that the enactment of Proposition 103 might cause some insurers not to renew some or all of their existing policies, an action which would undermine Proposition 103's goal of making insurance 'available' for all Californians. Indeed if many insurers refused to renew the state could face a crisis in which many of its residents would be unable to obtain insurance and thus could not legally drive, and others would be forced to accept inadequate protection. We conclude that the public interest in averting this danger, when measured against the relatively low degree of impairment of contract rights involved, is sufficient to justify Proposition 103's nonrenewal provision, and accordingly that this provision can be applied to existing policies without violating the state or federal Constitutions." (48 C.3d 831.)

In *Travelers Indem. Co. v. Gillespie* (1990) 50 C.3d 82, 266 C.R. 117, 785 P.2d 500, the issue was whether notices of nonrenewal of policies, not based on the grounds listed in *Ins.C. 1861.03*, were rendered ineffective by that section when the notices were sent by insurers who were withdrawing from the California market. *Held*, the mandatory renewal provision did not apply.

"Because insurers have the right to discontinue their business activities in this state, and because nonrenewal of existing automobile policies is a logical and integral part of the orderly winding up of a withdrawing insurer's affairs, we have determined that Proposition 103's mandatory renewal provision does not apply to an insurer who has commenced the process of withdrawing as an insurer in this state by complying with statutory application requirements, including surrender of its certificate of authority for cancellation." (50 C.3d 103.) (See *Dairyland Ins. Co. v. Gillespie* (1990) 223 C.A.3d 1229, 1232, 1235, 273 C.R. 80 [*Travelers* exemption from mandatory renewal provision applies only after insurer has begun statutory withdrawal procedure; exemption does not apply to nonrenewal notices mailed in anticipation of withdrawal]; *AIU Ins. Co. v. Gillespie* (1990) 222 C.A.3d 1155, 1163, 272 C.R. 334 [restrictions on nonrenewal applied where insurer mailed notices of nonrenewal before election in which Proposition 103 was adopted, but policies did not expire until after election]; *20th Century Ins. Co. v. Superior Court* (2001) 90 C.A.4th 1247, 1269, 109 C.R.2d 611, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §49 [C.C.P. 340.9, reviving for 1 year certain barred claims for damage attributable to 1994 Northridge earthquake, did not impair defendant insurer's contract rights; insurance industry is regulated and statute was adopted to alleviate significant problems caused by insurers' conduct]; *Hellinger v. Farmers Group* (2001) 91 C.A.4th 1049, 1061, 111 C.R.2d 268 [same; relying on *Calfarm Ins. Co.*]; 18 *Pepperdine L. Rev.* 796 [*Travelers*].)

SUPPLEMENT: [This section is current through the latest supplement]
20th Century Ins. Co. case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §52.



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XIV. OBLIGATION OF CONTRACTS
C. What Constitutes Impairment.
3. Valid Impairment Under Police Power.
d. Stipulated Judgment for Welfare Benefits.

8 *Witkin Sum. Cal. Law Const Law* § 1292

[§ 1292] Stipulated Judgment for Welfare Benefits.

In *Mendly v. Los Angeles* (1994) 23 C.A.4th 1193, 28 C.R.2d 822, general assistance recipients brought an action on behalf of themselves and others similarly situated in which they challenged the amount of the county's general relief grant. Plaintiffs and the county entered into a stipulated judgment under which the grant amount was set at a higher level for 5 years and plaintiffs waived their rights to receive retroactive general relief benefits. One paragraph of the judgment provided that, if the Legislature abolished all obligations under Welf.C. 17000, or took control of or otherwise assumed the county's obligations under that statute, the terms of the judgment would automatically expire. The Legislature subsequently enacted Welf.C. 17000.5, setting forth a formula for determining a sufficient standard of aid, and Assembly Bill No. 2883, declaring that it was the Legislature's intent to abrogate court-ordered stipulated judgments providing for grant levels higher than the statutory amount. Plaintiffs then filed a motion to enforce the judgment and for a permanent injunction. The trial judge denied the motion. *Held*, affirmed.

(a) For purposes of the state and federal Contract Clauses, the stipulated judgment entered into by plaintiffs was not a contract. Plaintiffs assert that their claim for retroactive benefits was part of the consideration for the agreement, and that to abrogate the judgment robs them of their valuable claim as if it never existed. But the judgment clearly provides that the claim for retroactive benefits is waived, and nothing in the judgment indicates that some portion of the future grant level includes a portion reflecting retroactive benefits. (23 C.A.4th 1205.)

(b) The setting of general relief grant levels involves an exercise of the state's police power. Thus, the stipulated judgment must be interpreted as being based on and authorized by the statutory underpinnings for benefits as those laws existed at the time. Plaintiffs cannot reasonably be said to have a protectible interest in the laws regarding grant levels remaining unchanged, and the judgment itself acknowledges as much. (23 C.A.4th 1209.)

(c) Even assuming that the judgment does create a contract, however, there has been no unconstitutional impairment. This is so because the judgment provides for its automatic expiration in the event the Legislature takes control of or otherwise assumes the county's general assistance obligations. The enactment of Welf.C. 17000.5 and Assembly Bill No. 2883 were events in which the Legislature took control of the county's general relief obligations. (23 C.A.4th 1209.)

(d) A substantial legislative impairment of contract is constitutional only if it is reasonable and necessary to serve a legitimate public purpose. But even assuming that an impairment occurred, plaintiffs have failed to address the issues of reasonableness and necessity. Thus, "they have not established the impairment was unconstitutional under the contract clause." (23 *C.A.4th* 1211.)

SUPPLEMENT: [This section is current through the latest supplement]



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XV. FEDERAL POWERS
A. Nature of Federal Powers.

8 *Witkin Sum. Cal. Law Const Law* § 1293

[§ 1293] Nature of Federal Powers.

Although the federal government is one of *granted* powers, and in a sense is limited to the exercise of express powers, the Constitution also provides that Congress has the power to "make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." (U.S. Const., Art. I, §8.)

The Necessary and Proper Clause was given a liberal interpretation in *McCulloch v. Maryland* (1819) 17 U.S. 316, 4 L.Ed. 579, where it was held that Congress had the power to establish a national bank. The court declared that the term "necessary" was not restrictive, and that any convenient and appropriate means to carry out the powers of Congress would be constitutional. Subsequent cases expressed the same view. (See *Legal Tender Cases* (1870) 12 Wall. 457, 20 L.Ed. 287; *James Everard's Breweries v. Day* (1924) 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174; *United States v. Classic* (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *United States v. Oregon* (1961) 366 U.S. 643, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575, 579, *supra*, §2; 36 U.C. Davis L. Rev 407 [*McCulloch* and Fourteenth Amendment]; 44 U.C.L.A. L. Rev. 745 [Necessary and Proper Clause]; 1 Rotunda, §3.1 et seq.; 16A Am.Jur.2d (1998 ed.), *Constitutional Law* §235.)

The Constitution also grants Congress broad general powers to legislate with respect to Indian tribes. (*United States v. Lara* (2004) 541 U.S. 193, 124 S.Ct. 1628, 1633, 158 L.Ed.2d 420, 428 [Congress had power to lift restrictions on Indian tribes' criminal jurisdiction over nonmember Indians].)

All of the great substantive powers of Congress are paramount and superior to both state legislation and private contracts. (*Norman v. Baltimore & Ohio R. Co.* (1935) 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885.) But they are nevertheless subject to the Due Process Clause of the Fifth Amendment and other provisions of the Bill of Rights. (See *Louisville Joint Stock Land Bank v. Radford* (1935) 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593; cf. *Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112, *infra*, §1318 [upholding Railway Labor Act against attacks based on First and Fifth Amendments].)

The federal *taxing power* is considered in another chapter (9 *Summary* (10th), *Taxation*, §105 et seq.). The other major powers are covered here (*infra*, §1294 et seq.).

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, §3.1 et seq.; 93 *Cal. L. Rev.* 847 [tribal criminal jurisdiction after *United States v. Lara*].



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XV. FEDERAL POWERS

B. The Commerce Power.

1. What Constitutes Interstate and Foreign Commerce.

a. In General.

8 Witkin Sum. Cal. Law Const Law § 1294

[§ 1294] In General.

The federal Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (U.S. Const., Art. I, §8.) This is known as the Commerce Clause.

In *Gibbons v. Ogden* (1824) 22 U.S. 1, 6 L.Ed. 23, commerce was broadly defined as commercial intercourse in all its branches, including navigation, but not restricted to buying and selling. Subsequent cases have enlarged on this definition, so that today a greatly expanded scope of the federal commerce power is recognized. For example, in *United States v. South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, the Court said: "Not only, then, may transactions be commerce though noncommercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." (See *Heart of Atlanta Motel v. United States* (1964) 379 U.S. 241, 85 S.Ct. 348, 356, 13 L.Ed.2d 258, 266, supra, §850; *Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 109 S.Ct. 1698, 1715, 1716, 104 L.Ed.2d 209, 236, 237 [distinction between Interstate Commerce and Indian Commerce Clauses]; 31 *San Diego L. Rev.* 555 [economics of federalism and proper scope of federal commerce power]; 37 *U.C. Davis L. Rev.* 605 [Ninth Circuit's dangerous expansion of Commerce Clause]; 1 Rotunda, Chap. 4; 2 Rotunda, Chap. 11; 2 Tribe, Chap. 6; 15A *Am.Jur.2d* (2000 ed.), *Commerce* §§1 et seq., 39 et seq.) (On regulation of foreign commerce, see 1 Rotunda, §4.2; 2 Tribe, §6-21; 15A *Am.Jur.2d* (2000 ed.), *Commerce* §5.)

However, exercise of the commerce power is not unlimited. In *United States v. Lopez* (1995) 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626, involving a federal statute prohibiting the possession of firearms near schools, the Court identified three categories of activities that Congress can regulate under the Commerce Clause: "First, Congress may regulate the use of the channels of interstate commerce. ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. ... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." (115 S.Ct. 1629, 131 L.Ed.2d 637.) (See 88 *Cal. L. Rev.* 1575 [federal prosecution of state-legalized medical marijuana use after *Lopez*]; 24 *Hastings Const. L. Q.* 785 [*Lopez*]; 23 *Lincoln L. Rev.* 27 [same]; 23 *Pepperdine L. Rev.* 1363 [same]; 28 *Pepperdine L. Rev.* 547 [same]; 48 *Stanf. L. Rev.* 1431 [same].)

Lopez has been applied or distinguished in other cases. (See *United States v. Morrison* (2000) 529 U.S. 598, 120 S.Ct. 1740, 1749, 146 L.Ed.2d 658, 671 [applying *Lopez*; Congress acted beyond scope of its powers in enacting civil remedy provision of Violence Against Women Act; prohibited acts do not substantially affect interstate commerce]; *Kilroy v. Superior Court* (1997) 54 C.A.4th 793, 808, 63 C.R.2d 390 [distinguishing *Lopez*; Full Faith and Credit for Child Support Orders Act, which vests continuing exclusive jurisdiction over child support in issuing court, is valid regulation of interstate commerce; support payments between parents in different states substantially affect interstate commerce]; *Harding v. Harding* (2002) 99 C.A.4th 626, 633, 121 C.R.2d 450 [same]; 90 Cal. L. Rev. 1675 [*Lopez* and *Morrison*]; 91 Cal. L. Rev. 1331 [same]; 43 Santa Clara L. Rev. 1399 [*Morrison*]; 32 Southwestern U. L. Rev. 549 [discussing federal case challenging prosecution under Child Support Recovery Act as exceeding Congress' authority under Commerce Clause]; 55 Stanf. L. Rev. 571 [*Lopez* and *Morrison*]; 31 U.C. Davis L. Rev. 625 [Violence Against Women Act after *Lopez*; reconsidering congressional power under Fourteenth Amendment].)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, Chap. 4; 2 Rotunda 4th, Chap. 11; 1 Rotunda 4th, §4.2 [foreign commerce]; 54 U.C.L.A. L. Rev. 1847 [Commerce Clause and myth of dual federalism].



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B. The Commerce Power.

1. What Constitutes Interstate and Foreign Commerce.

b. Transportation.

8 *Witkin Sum. Cal. Law Const Law* § 1295

[§ 1295] Transportation.

(1) *Commercial Transportation*. The transportation of goods or passengers, by railroad, ship, or other means, is a traditional example of interstate commerce. (See *Kirmeyer v. Kansas* (1915) 236 U.S. 568, 35 S.Ct. 419, 59 L.Ed. 721 [peddler carrying goods in his wagon between states]; on interstate character of transportation between two points within state which enters another state en route, see *Central Greyhound Lines of New York v. Mealey* (1948) 334 U.S. 653, 68 S.Ct. 1260, 1262, 92 L.Ed. 1633, 1637.) The flow of oil or gas into and through a state by pipelines is another established form. (See *Pennsylvania Gas Co. v. Public Service Com., Second Dist., of New York* (1920) 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434; *Interstate Natural Gas Co. v. Federal Power Com.* (1947) 331 U.S. 682, 67 S.Ct. 1482, 1486, 91 L.Ed. 1742, 1746; *Federal Power Com. v. East Ohio Gas Co.* (1950) 338 U.S. 464, 70 S.Ct. 266, 268, 94 L.Ed. 268, 275; 15A *Am.Jur.2d* (2000 ed.), *Commerce* §68 et seq.)

(2) *Noncommercial Transportation*. The transportation need not be for commercial purposes; any carrying across the state line is enough. (*Covington & Cincinnati Bridge Co. v. Kentucky* (1894) 154 U.S. 204, 14 S.Ct. 1087, 38 L.Ed. 962; *Edwards v. California* (1941) 314 U.S. 160, 62 S.Ct. 164, 167, 86 L.Ed. 119, 125 [bringing nonresident person into state]; *Cleveland v. United States* (1946) 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12 [transportation by Mormon of plural wives in violation of Mann Act]; see 15A *Am.Jur.2d* (2000 ed.), *Commerce* §68 et seq.)

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1. What Constitutes Interstate and Foreign Commerce.

c. Interstate Activity Without Transportation.

8 *Witkin Sum. Cal. Law Const Law* § 1296

[§ 1296] Interstate Activity Without Transportation.

(1) *Communications and Electricity*. Transportation, i.e., physical movement of persons or goods, is not essential; telegraph and telephone communication across state lines comes within the modern definition of interstate commerce. (See *Western Union Tel. Co. v. Speight* (1920) 254 U.S. 17, 41 S.Ct. 11, 65 L.Ed. 104.) The same is true of the transmission of electric power. (See *American Power & Light Co. v. Securities & Exchange Com.* (1946) 329 U.S. 90, 67 S.Ct. 133, 138, 91 L.Ed. 103, 111; 26 *Ecology L. Q.* 243 [Dormant Commerce Clause threat to market-based environmental regulation: electricity deregulation].)

(2) *Public Utility Holding Companies*. Certain public utility holding companies have been held to be engaged in interstate commerce on two grounds: (a) Their control over a multi-state network of operating subsidiary corporations necessitates continuous and substantial use of the mails and instrumentalities of interstate commerce for business communications; and (b) their operating subsidiaries transmit electric energy across state lines. (*American Power & Light Co. v. Securities & Exchange Com.*, *supra*; *North Amer. Co. v. Securities & Exchange Com.* (1946) 327 U.S. 686, 66 S.Ct. 785, 791, 90 L.Ed. 945, 953 ["In view of North American's very substantial stock interest and its domination as to the affairs of its subsidiaries, as well as its latent power to exercise even more affirmative influence, it cannot hide behind the facade of a mere investor. Their acts are its acts in the sense that what is interstate as to them is interstate as to North American"].)

(3) *Correspondence Schools*. A correspondence school, with headquarters in one state and students in other states, is engaged in interstate commerce. (*International Textbook Co. v. Pigg* (1910) 217 U.S. 91, 30 S.Ct. 481, 484, 54 L.Ed. 678, 685; *National Schools v. Los Angeles* (1955) 135 C.A.2d 311, 317, 287 P.2d 151; see 92 A.L.R.2d 522 [regulation of correspondence schools].)

(4) *Newspapers and Advertising*. "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. ... The same is true of national advertising originating throughout the nation and offering products for sale on a national scale." (*Lorain Journal Co. v. United States* (1951) 342 U.S. 143, 72 S.Ct. 181, 185, 96 L.Ed. 162, 170; see *Associated Press v. United States* (1945) 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013; 15A *Am.Jur.2d* (2000 ed.), *Commerce* §81.)

(5) *Insurance*. In *United States v. South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, 64 S.Ct. 1162, 1170, 88 L.Ed. 1440, 1454, the Court, overruling prior cases, held that the business of selling insurance, involving negotiation and movement of persons, paper, and money across state lines, was interstate commerce, and therefore that the Sherman Antitrust Act applied to these activities. Traffic in intangibles is commerce; under a practical test, though the insurance contract itself is not, the entire transaction of its negotiation and issuance is commerce; and "a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature." (64 S.Ct. 1170, 88 L.Ed. 1454.) (See *Federal Trade Com. v. Travelers Health Assn.* (1960) 362 U.S. 293, 80 S.Ct. 717, 4 L.Ed.2d 724, *infra*, §1310; on legislative change that gave states regulatory power, see *infra*, §1309.)

(6) *Athletic and Theatrical Exhibitions*. The interstate character of organized sports, including football and boxing, and of nationwide theatrical enterprises, has been clearly established by cases dealing with Sherman Act regulation. (See *United States v. International Boxing Club* (1955) 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290; *United States v. Shubert* (1955) 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279; 1 *Summary* (10th), *Contracts*, §556.)

(7) *Broadcasting*. Radio and television broadcasting across state lines is interstate commerce. (See *Fisher's Blend Station v. Tax Com.* (1936) 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956 [radio]; *United States v. Midwest Video Corp.* (1972) 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 [television]; *People v. Eller Telecasting Co.* (1970) 13 C.A.3d 296, 300, 91 C.R. 468 [injunction by Imperial County district attorney against advertising illegal only in California was unconstitutional burden on commerce].)

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B. The Commerce Power.

1. What Constitutes Interstate and Foreign Commerce.

d. Local Activity as Part of Interstate Movement.

8 *Witkin Sum. Cal. Law Const Law* § 1297

[§ 1297] Local Activity as Part of Interstate Movement.

(1) *In General.* *Coe v. Errol* (1886) 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, pointed out that goods in a "flow" of interstate commerce do not lose their character by temporary stoppage within a state, where they are later to continue their interstate journey and there is practical continuity of movement.

This principle was applied in a number of later decisions. Thus, where goods were shipped to consignees in Los Angeles from outside the state, and were unloaded at the docks, a motor carrier engaged in picking up the goods and delivering them to the consignees within the city was held to be operating in interstate commerce. (*Meyers v. Railroad Com. of Calif.* (1933) 218 C. 316, 318, 23 P.2d 26; 22 Cal. L. Rev. 547.) (See *Puget Sound Stevedoring Co. v. Tax Com. of Washington* (1937) 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 [stevedoring business, i.e., loading and discharging cargoes of vessels engaged in interstate and foreign commerce, is part of this commerce]; *Joseph v. Carter & Weekes Stevedoring Co.* (1947) 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993 [following *Puget Sound*]; *Lorain Journal Co. v. United States* (1951) 342 U.S. 143, 72 S.Ct. 181, 185, 96 L.Ed. 162, 170 [local distribution of news and advertisements transmitted in interstate commerce].)

(2) *Natural Gas Transactions.* Cases decided subsequent to the federal Natural Gas Act (see *infra*, §1309) have clarified the rules relating to transportation of natural gas:

(a) *Interstate Sale for Local Resale.* The transportation of gas into a state pursuant to a sale to a local *distributor or wholesaler*, for resale to consumers, has always been considered an interstate transaction, free from state regulation; and it is now regulated by the Federal Power Commission under the Natural Gas Act. (See *infra*, §1309.)

(b) *Interstate Sale for Local Use.* It was formerly thought that where gas was transported into a state pursuant to a sale to a local *consumer*, there was a local activity subject to taxation and regulation. The theory was that the decrease in pressure, when the gas leaves the main transmission line to enter a branch line running to the local user, is like the breaking of a load of commodities in bulk, and that the interstate movement comes to an end. This theory is now repudiated. "Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales. ... Variations in main pressure are not the criterion." Accordingly, sales for local use, *whether domestic or industrial*, are

in interstate commerce, but are subject to state regulation by congressional permission under the Natural Gas Act. (*Panhandle Eastern Pipe Line Co. v. Public Service Com. of Indiana* (1948) 332 U.S. 507, 68 S.Ct. 190, 193, 92 L.Ed. 128, 135, *infra*, §1309.)

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B. The Commerce Power.

2. State Power and Interstate Commerce.

a. Prohibitory Legislation.

1. General Principle.

8 Witkin Sum. Cal. Law Const Law § 1298

[§ 1298] General Principle.

Except under the Twenty-First Amendment (*infra*, §1311), a state has no power to erect barriers against interstate commerce. Thus, it cannot prohibit the sale or shipment of products to or from other states. (*West v. Kansas Natural Gas Co. (1911)* 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716; *Foster-Fountain Packing Co. v. Haydel (1928)* 278 U.S. 1, 49 S.Ct. 1, 3, 73 L.Ed. 147, 153.) Nor can it make criminal the act of bringing an indigent nonresident into the state. (*Edwards v. California (1941)* 314 U.S. 160, 62 S.Ct. 164, 166, 86 L.Ed. 119, 125.)

In *Philadelphia v. New Jersey (1978)* 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475, the Court invalidated a New Jersey law prohibiting the importation of most "solid or liquid waste" collected outside its territorial limits. The purpose--to conserve the state's landfill space--was improper; "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." (98 S.Ct. 2535, 57 L.Ed.2d 481.) In "previous cases the scarce natural resource was itself the article of commerce, whereas here the scarce resource and the article of commerce are distinct. But the difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons." (98 S.Ct. 2538, 57 L.Ed.2d 484.) (See *Wyoming v. Oklahoma (1992)* 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1, *infra*, §1301 [discussing *Philadelphia*]; *People v. Prevost (1998)* 60 C.A.4th 1382, 1397, 71 C.R.2d 487 [1984 Cable Act does not conflict with state law prohibiting unauthorized reception of cable signals, which includes manufacture or distribution of equipment to be used for unauthorized reception]; 92 Harv. L. Rev. 57 [*Philadelphia*]; 74 Cal. L. Rev. 1203 [same]; 8 Ecology L. Q. 371 [same]; 39 Santa Clara L. Rev. 373 [constitutionality of selective purchasing laws]; 15A Am.Jur.2d (2000 ed.), *Commerce* §25 et seq.; for restrictions on waste disposal, see *infra*, §1302.)

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2. State Power and Interstate Commerce.

a. Prohibitory Legislation.

2. Export of Natural Resources.

8 *Witkin Sum. Cal. Law Const Law* § 1299

[§ 1299] Export of Natural Resources.

(1) *Former Rule.* It was originally held that a state may validly conserve its common property in fish and game for the benefit of its own citizens. (See *Geer v. Connecticut* (1896) 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793; *In re Florence* (1930) 107 C.A. 607, 613, 290 P. 652.)

However, the *Geer* rule was strictly limited in purpose and scope. In *Foster-Fountain Packing Co. v. Haydel* (1928) 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147, a Louisiana statute prohibited the exporting of raw shrimp, but permitted the taking and canning of shrimp within the state and shipment of the canned product anywhere. *Held*, this was invalid. The real object was not to conserve the shrimp, but to secure the profitable canning business for the state. By permitting export of the canned product, the state released its hold and could no longer prevent free shipment of any shrimp.

Foster-Fountain was followed in *Toomer v. Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 1166, 92 L.Ed. 1460, 1474. A South Carolina statute required all fishermen who caught shrimp in the marginal waters (3-mile belt) of the state to dock at a port within the state, and unload and pack their catch before shipping it to another state. *Held*, "assuming" that South Carolina had the power to confine the consumption of free-swimming fish to its own boundaries, it could not permit their shipment to other states and at the same time impose conditions burdening interstate commerce. (See *H.P. Hood & Sons v. Du Mond* (1949) 336 U.S. 525, 69 S.Ct. 657, 667, 93 L.Ed. 865, 876, *infra*, §1315; *People v. Marine Products Co.* (1947) 77 C.A.2d Supp. 929, 931, 177 P.2d 67 [statute making it unlawful to possess or sell spiny lobsters cooked outside the state was unconstitutional discrimination against legitimate object of interstate commerce].)

(2) *Repudiation of Geer Rule.* In *Hughes v. Oklahoma* (1979) 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250, an Oklahoma statute, assertedly directed at conserving the minnow resources of the state, allowed free and unrestricted sale of the fish to residents or nonresidents, thereby permitting exportation by nonresident purchasers; but it prohibited transportation from the state for sale outside the state. The Oklahoma court, relying on *Geer*, sustained the statute. *Held*, reversed; the *Geer* holding is no longer acceptable.

(a) *Erosion of Geer by subsequent cases.* *West v. Kansas Natural Gas Co.* (1911) 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716, *Foster-Fountain*, *Toomer*, and other cases departed from *Geer*'s formalistic ownership analysis, and the

present case, essentially on all fours with *Geer*, calls for a different approach. "We now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore expressly overrule *Geer*. We thus bring our analytical framework into conformity with practical realities. Overruling *Geer* also eliminates the anomaly, created by the decisions distinguishing *Geer*, that statutes imposing the most extreme burdens on interstate commerce (essentially total embargoes) were the most immune from challenge. At the same time, the general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." (99 S.Ct. 1736, 60 L.Ed.2d 261.)

(b) *Discrimination against interstate commerce.* Applying the general rules articulated in cases governing other types of commerce, the statute is clearly discriminatory. And the state's assertion of an interest in maintaining the ecological balance in state waters is not a justification. "The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory conservation measures are available." (99 S.Ct. 1737, 60 L.Ed.2d 263.) Oklahoma places no limit on the number of minnows that can be taken by licensed dealers, nor does it limit the manner in which they may be disposed of within the state. Thus, it has chosen the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the legitimate local purpose more effectively. (99 S.Ct. 1737, 60 L.Ed.2d 263.)

Two justices dissented, observing that many other cases have upheld regulations designed to conserve natural resources of a state. (99 S.Ct. 1738, 60 L.Ed.2d 264.)

In *Sporhase v. Nebraska* (1982) 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254, the Court held unconstitutional a Nebraska statutory restriction on the withdrawal of ground water from Nebraska wells for use in an adjoining state. Ground water, like other natural resources, is an article of commerce. (102 S.Ct. 3462, 73 L.Ed.2d 1264.) "Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." (102 S.Ct. 3466, 73 L.Ed.2d 1268.) (See 87 Cal. L. Rev. 1545 [interstate marketing of Indian water rights: impact of Commerce Clause]; 11 *Hastings Const. L. Q.* 283 [*Sporhase*].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. The Commerce Power.

2. State Power and Interstate Commerce.

b. Unreasonable Burdens.

1. In General; Dormant Commerce Clause.

8 Witkin Sum. Cal. Law Const Law § 1300

[§ 1300] In General; Dormant Commerce Clause.

For the same reason that a state cannot prohibit interstate commerce (*supra*, §1298), a state cannot impose an unreasonable burden on it. (See *South-Cen. Timber Dev. Co. v. Wunnicke* (1984) 467 U.S. 82, 104 S.Ct. 2237, 2240, 81 L.Ed.2d 71, 76, *infra*, §1313 [Commerce Clause has long been recognized as self-executing limitation on power of states to enact laws imposing substantial burdens on interstate commerce]; *New Energy Co. of Indiana v. Limbach* (1988) 486 U.S. 269, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302, 308.) This implicit or "dormant" limitation on the authority of the states to enact legislation affecting interstate commerce is sometimes referred to as the Dormant Commerce Clause. It precludes state regulation in certain areas "even absent congressional action." (*Ferguson v. Friendfinders* (2002) 94 C.A.4th 1255, 1261, 115 C.R.2d 258; see *Miller v. Arkansas* (1956) 352 U.S. 187, 77 S.Ct. 257, 1 L.Ed.2d 231 [state cannot require state license for federal contractor bidding on work for United States]; *Healy v. The Ben Institute* (1989) 491 U.S. 324, 326, footnote 1, 109 S.Ct. 2491, 2494, 105 L.Ed.2d 275, 281; *People v. Hsu* (2000) 82 C.A.4th 976, 983, 99 C.R.2d 184; 110 Harv. L. Rev. 1537 [Functional Analysis, Subsidies, and the Dormant Commerce Clause]; 26 *Ecology L. Q.* 243 [Dormant Commerce Clause threat to market-based environmental regulation: electricity deregulation]; 34 *San Diego L. Rev.* 571 [Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause]; 73 *So. Cal. L. Rev.* 1423 [Who Controls the Internet? States' Rights and the Dormant Commerce Clause]; 2 *Tribe*, Chap. 6; 2 *Rotunda*, Chap. 11.)

Thus, a state cannot fix rates or otherwise regulate interstate carriers that cross state borders, or even those carriers operating entirely within the borders of the state, where they carry goods in the flow of interstate commerce and hence, constitute local links in the chain of commerce. (*Buck v. Kuykendall* (1925) 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623; *Meyers v. Railroad Com. of Calif.* (1933) 218 C. 316, 318, 23 P.2d 26; see *Morgan v. Virginia* (1946) 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 [required segregation in carrier]; *Southern Pac. Co. v. Arizona* (1945) 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915, *infra*, §1312; *Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 [Illinois statute requiring special mudguards for trucks]; *Raymond Motor Trans. v. Rice* (1978) 434 U.S. 429, 98 S.Ct. 787, 795, 54 L.Ed.2d 664, 675 [Wisconsin statute prohibiting large trucks on highways]; *Kassel v. Consolidated Freightways Corp.* (1981) 450 U.S. 662, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580, 589 [similar Iowa statute]; *Dennis v. Higgins* (1991) 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969, *supra*, §820 [retaliatory taxes and fees]; *People v. Fink*

(1985) 168 C.A.3d Supp. 15, 21, 215 C.R. 236 [statute prohibiting tinting of window of vehicle was unconstitutional]; 95 Harv. L. Rev. 93 [Kassel]; 21 Loyola L.A. L. Rev. 581 [federal district court case holding that Commerce Clause did not restrict city's oil pipeline franchise fee].)

In *Bendix Autolite Corp. v. Midwesco Enterprises* (1988) 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896, a state statute denying a statute of limitations defense to a foreign corporation not "present" in the state was held unconstitutional.

(a) Ohio's unique statute placed a 4-year limitation period on actions for breach of contract or fraud, but tolled the statute for the period when a foreign corporation defendant had not appointed an agent for service of process. "The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity. Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden." (108 S.Ct. 2221, 100 L.Ed.2d 903.)

(b) Under *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628, supra, §632, the statute of limitations defense is not a fundamental right. However, it is an integral part of the legal system, and "[t]he state may not withdraw such defenses on conditions repugnant to the Commerce Clause." (108 S.Ct. 2221, 100 L.Ed.2d 903.) The Ohio statute is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts, thus imposing a greater burden on out-of-state companies than it does on Ohio companies. (108 S.Ct. 2222, 100 L.Ed.2d 904.) (See *Filet Menu v. Cheng* (1999) 71 C.A.4th 1276, 1283, 84 C.R.2d 384, 3 Cal. Proc. (4th), Actions, Supp., §650A [following *Bendix Autolite*; C.C.P. 351, providing for tolling of statute of limitations while party is out of California, "impermissibly burdens interstate commerce with respect to residents who travel in the course of interstate commerce"].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Bronco Wine Co. v. Jolly* (2005) 129 C.A.4th 988, 1015, 29 C.R.3d 462 [Pub.Util.C. 25241, prohibiting use of brand name on wine bottle with "Napa" on label unless at least 75% of grapes used came from Napa County, does not violate Dormant Commerce Clause; statute regulates intrastate activities, and indirect and incidental effect on interstate commerce is outweighed by state's interest in protecting both California wine consumers from misleading labels and integrity, reputation, and value of premier wine industry in Napa County]; *Excelsior College v. Board of Registered Nursing* (2006) 136 C.A.4th 1218, 1235, 39 C.R.3d 618 [requiring nursing program of plaintiff out-of-state college to comply with California's minimum standards did not violate Dormant Commerce Clause; although plaintiff's program would not be as attractive as in-state schools for students seeking licensure in California, California has right to regulate nursing within state for protection of citizens regardless of incidental impact on interstate commerce, and plaintiff could have structured its program to satisfy California's requirements]; *People v. PuriTec* (2007) 153 C.A.4th 1524, 1534, 1536, 64 C.R.3d 270 [statutes prohibiting sellers of water treatment devices from making health benefit claims about devices when they have not been certified by state did not violate dormant Commerce Clause; seller was not forced to exclude California consumers from website, but could provide warning that devices have not been certified in compliance with California law; statutes did not have practical effect of directly controlling commerce wholly outside California, and burden imposed on interstate commerce was not clearly excessive in relation to putative local benefits]; 2 Rotunda 4th, Chap. 11; 38 U.C. Davis L. Rev. 1505 [Eminent Domain, Municipalization, and the Dormant Commerce Clause]; 53 U.C.L.A. L. Rev. 153 [Why Congress May Not "Overrule" the Dormant Commerce Clause]; 42 U.S.F. L. Rev. 185 [can California curb greenhouse gas emissions from out-of-state, coal-fired power plants without violating Dormant Commerce Clause?]. *Filet Menu case*:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §712. *Correction:* Page 1001, line 13, "*Healy v. The Ben Institute*" should read "*Healy v. The Beer Institute*".



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2. Legislation Protecting Local Industry.

8 Witkin Sum. Cal. Law Const Law § 1301

[§ 1301] Legislation Protecting Local Industry.

A state cannot impose protectionist price restrictions or other economic standards on those engaged in interstate trade. In *Baldwin v. G.A.F. Seelig* (1935) 294 U.S. 511, 55 S.Ct. 497, 501, 79 L.Ed. 1032, 1039, a New York statute sought to prevent the sale by dealers of milk imported from another state, if the price paid to producers in the other state was below the minimum established for producers in New York. This was unconstitutional. In *Polar Ice Cream & Creamery Co. v. Andrews* (1964) 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389, a Florida statute compelled a distributor having sources in a number of states to take milk from Pensacola producers at a fixed minimum price. *Held*, it was unconstitutional. "The principles of *Baldwin* are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market." (84 S.Ct. 386, 11 L.Ed.2d 398.) (See 74 Cal. L. Rev. 1203 [State Discriminations Against Interstate Commerce]; 15A Am.Jur.2d (2000 ed.), *Commerce* §31 et seq.)

In *Wyoming v. Oklahoma* (1992) 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1, plaintiff State of Wyoming imposed a severance tax on the privilege of severing or extracting coal from land within its boundaries. The Oklahoma Legislature required coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture containing at least 10% of Oklahoma-mined coal. As a result, Wyoming lost severance taxes in substantial sums. Wyoming then obtained leave to file a complaint in the Supreme Court under its original jurisdiction (U.S. Const., Art. III, §2; see 2 Cal. Proc. (4th), *Jurisdiction*, §60), seeking a declaration that the Oklahoma Act violated the Commerce Clause. *Held*, the Act was invalid.

(a) The Commerce Clause limits the power of states to discriminate against interstate commerce. This "negative aspect" of the Clause prohibits economic protectionism, i.e., regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. "When a state statute clearly discriminates against interstate commerce, it will be struck down, ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. ... Indeed, when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied." (112 S.Ct. 800, 117 L.Ed.2d 22.)

(b) The Oklahoma Act, on its face and in practical effect, discriminates against interstate commerce. It purports to

exclude coal mined in other states based solely on its origin. (112 S.Ct. 800, 117 L.Ed.2d 23.) Oklahoma argues that the Act sets aside only a "small portion" of the coal market, and thus does not place an overall burden on out-of-state coal producers. However, the "volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." (112 S.Ct. 801, 117 L.Ed.2d 23.) The burden was therefore on Oklahoma to justify the discrimination both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests. Oklahoma has not met that burden. (112 S.Ct. 801, 117 L.Ed.2d 24.)

Two dissenting opinions of three justices were filed. The first points out that the coal companies with sales allegedly affected by the law chose not to litigate, and that this is the first time that the Court recognized a state's standing to bring a negative Commerce Clause action on the basis of its consequential loss of tax revenue. "That is a major step, and I think it is wrong." (112 S.Ct. 804, 117 L.Ed.2d 27.) (See *Pacific Merchant Shipping Assn. v. Voss* (1995) 12 C.4th 503, 514, 48 C.R.2d 582, 907 P.2d 430 [state scheme imposing inspection fee on foreign commerce, while paying inspection fee for interstate commerce out of general fund, discriminated against foreign commerce in violation of "negative Commerce Clause"]; *Children's Hosp. & Med. Center v. Bonta'* (2002) 97 C.A.4th 740, 762, 768, 118 C.R.2d 629 [state scheme that reimbursed Medi-Cal costs of out-of-state hospitals at lower rate than in-state hospitals and that deprived out-of-state hospitals of procedural rights available to in-state hospitals to challenge adequacy of compensation obviously discriminated against out-of-state hospitals and came within "negative sweep" of Commerce Clause]; 24 *Pepperdine L. Rev.* 732 [*Pacific Merchant*]; on state taxes unduly burdening commerce, see 9 *Summary* (10th), *Taxation*, §66 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §59.



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3. Restrictions on Waste Disposal.

8 Witkin Sum. Cal. Law Const Law § 1302

[§ 1302] Restrictions on Waste Disposal.

In *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources* (1992) 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139, a Michigan law prohibited private landfill operators from accepting solid waste that originated outside the county in which their facilities were located. *Held*, following *Philadelphia v. New Jersey* (1978) 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475, *supra*, §1298, the Michigan law was unconstitutional. (112 S.Ct. 2023, 119 L.Ed.2d 146.) "[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." (112 S.Ct. 2024, 119 L.Ed.2d 148.) Two justices dissented. (112 S.Ct. 2028, 119 L.Ed.2d 152.)

In *Chemical Waste Management v. Hunt* (1992) 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121, petitioner maintained a large hazardous waste disposal facility in Alabama. Much of the tonnage was shipped in from other states. An Alabama statute imposed a "base fee" of \$ 25.60 per ton on all waste disposed of at commercial facilities, and an "additional fee" of \$ 72.00 per ton for waste generated outside of Alabama. *Held*, the additional fee was unconstitutional.

(a) The additional fee facially and in practical effect discriminates, and the burden is on the State to show that it serves legitimate local purposes. (112 S.Ct. 2014, 119 L.Ed.2d 132.) "But only rhetoric, and not explanation, emerges as to why Alabama targets *only* interstate waste to meet these goals. ... [T]here is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama." (112 S.Ct. 2014, 119 L.Ed.2d 133.)

(b) Ultimately, the State's concern focuses on the volume of waste entering the facility. However, less discriminatory alternatives are available to alleviate this concern; e.g., a generally applicable per-ton additional fee on all hazardous waste disposed of within *Alabama*. (112 S.Ct. 2015, 119 L.Ed.2d 134.) The additional fee is "an obvious effort to saddle those outside the State with most of the burden of slowing the flow of waste" into the facility. (112 S.Ct. 2016, 119 L.Ed.2d 135.) This effort is impermissible. (112 S.Ct. 2016, 119 L.Ed.2d 135.)

One justice dissented, for the reasons set forth in his dissent in *Fort Gratiot Sanitary Landfill*. (112 S.Ct. 2017, 119

L.Ed.2d 136.) (See *Oregon Waste Systems v. Department of Environmental Quality of Oregon* (1994) 511 U.S. 93, 114 S.Ct. 1345, 1355, 128 L.Ed.2d 13, 27 [surcharge on disposal of solid waste discriminated against interstate commerce, where waste generated in other states was subject to fee almost three times greater than fee for waste generated within state]; *C & A Carbone v. Clarkstown, New York* (1994) 511 U.S. 383, 114 S.Ct. 1677, 1681, 128 L.Ed.2d 399, 407 [ordinance requiring all solid waste to be processed at local facility violated Commerce Clause]; *Waste Management of Alameda County v. Biagini Waste Reduction Systems* (1998) 63 C.A.4th 1488, 1499, 74 C.R.2d 676 [distinguishing *Clarkstown*; ordinance granting exclusive franchise for collection and disposal of solid waste within city did not directly regulate interstate commerce and did not violate Commerce Clause; it imposed same restrictions on local and out-of-state concerns]; 108 *Harv. L. Rev.* 149 [*Clarkstown*]; 20 *Ecology L. Q.* 817 [hazardous waste in interstate commerce; critical analysis of *Fort Gratiot* and *Chemical Waste Management*]; 70 *So. Cal. L. Rev.* 1239 [interstate garbage wars].)

SUPPLEMENT: [This section is current through the latest supplement]

See *United Haulers Assn. v. Oneida-Herkimer Solid Waste Management Authority* (2007) 550 U.S. 330, 127 S.Ct. 1786, 1795, 1796, 167 L.Ed.2d 655, 667, 668 [distinguishing *C & A Carbone v. Clarkstown, New York* (1994) 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399; trash disposal is typically local government function; hence, local flow control ordinances that required private trash haulers to have trash processed at public facilities and that treated all private companies equally did not discriminate against interstate commerce for purposes of dormant Commerce Clause].



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4. Condemnation of Sports Franchise.

8 Witkin Sum. Cal. Law Const Law § 1303

[§ 1303] Condemnation of Sports Franchise.

In *Oakland v. Oakland Raiders* (1985) 174 C.A.3d 414, 220 C.R. 153, defendant, owner of a professional football team as a franchise member of the National Football League, decided to move its team from Oakland to Los Angeles. In an effort to keep the team in Oakland, plaintiff city brought a condemnation action to acquire defendant's property rights. The trial judge granted summary judgment for defendant, but the Supreme Court reversed, holding that the power of eminent domain could be exercised to acquire a sports franchise, and that the issue of public use should be tried on the merits. (*Oakland v. Oakland Raiders* (1982) 32 C.3d 60, 183 C.R. 673, 646 P.2d 835, supra, §1176.) On retrial, the judge ruled in favor of the defendant on three grounds: no public use, violation of federal antitrust law, and violation of the Commerce Clause. The appellate court affirmed on the Commerce Clause ground, and did not reach the issues of public use and antitrust.

(a) Plaintiff pointed out that the exercise of eminent domain power has never been held to constitute an interference with interstate commerce. However, this lack of case law "serves merely to point out that eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations which deal primarily with products in the flow of interstate commerce. Whether the commerce clause precludes taking by eminent domain of intangible property, however, is a novel question posed, it seems, for the first time in this case." (174 C.A.3d 419.)

(b) In *Partee v. San Diego Chargers Football Co.* (1983) 34 C.3d 378, 194 C.R. 367, 668 P.2d 674, the court held that application of our state antitrust act (Cartwright Act) to an NFL league franchise would be an unreasonable burden on interstate commerce. The same would be true of condemnation of this kind of franchise. "An involuntarily acquired franchise could, at local government's pleasure, be permanently indentured to the local entity. The League's interests would be subordinated to, or at least compromised by, the new owner's allegiance to the local public interest in matters such as lease agreements, ticket prices, concessions, stadium amenities, scheduling conflicts, etc. As the trial court found, it must also be anticipated that a single precedent of eminent domain acquisition would pervade the entire League, and even the threat of its exercise elsewhere would seriously disrupt the balance of economic bargaining on stadium leases throughout the nation." (174 C.A.3d 420.)

(c) In *Partee*, the court held that the state's legitimate interest in enforcing its antitrust laws was outweighed by the

burden on interstate commerce. In the present case, plaintiff does not seek to further public health or safety, or even, as in *Partee*, to promote fair economic competition. It seeks to promote public recreation and social welfare, and to secure economic benefits, including utilization of the stadium in which the Raiders played. As in *Partee*, the burden that would be imposed on interstate commerce outweighs the local interest. (174 C.A.3d 421, 422.)

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c. State Regulatory Powers Generally.

1. Local Phases of Commerce.

8 Witkin Sum. Cal. Law Const Law § 1304

[§ 1304] Local Phases of Commerce.

The early case of *Cooley v. Board of Wardens of Port of Philadelphia* (1851) 53 U.S. 299, 13 L.Ed. 996, made a distinction between *national phases* of commerce such as actual interstate transportation, which call for *uniformity* of regulation throughout the nation, and *local phases*, which do not. As developed and applied in subsequent cases, the rules are as follows: (a) If the state law is in *direct conflict* with federal law it is void, for Congress has occupied the field. (b) If the subject is one of national scope, the state law is void even though there is no conflicting federal statute, because "the Constitution itself occupies the field," the federal power is exclusive, and the absence of congressional action indicates an intention that this activity must be free from regulation. (c) But as to local phases, the state may act during the *silence or inactivity* of Congress, i.e., *in the absence* of federal regulation; and even where there is a federal statute, state regulation outside its scope and not in direct conflict with it may be valid, for Congress need not occupy the whole field. (See *Kelly v. Washington* (1937) 302 U.S. 1, 58 S.Ct. 87, 92, 82 L.Ed. 3, 10; *Cloverleaf Butter Co. v. Patterson* (1942) 315 U.S. 148, 62 S.Ct. 491, 495, 86 L.Ed. 754, 762; *Southern Pac. Co. v. Arizona* (1945) 325 U.S. 761, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915, 1923.)

The *Cooley* doctrine was reaffirmed and restated as a broad rule of congressional policy and intent, rather than a mechanical rule of thumb, in *California v. Zook* (1949) 336 U.S. 725, 69 S.Ct. 841, 93 L.Ed. 1005, *infra*, §1308: "Whether as inference from congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce. ... Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, State action is struck down. If the activity is one of predominantly local interest, State action is sustained. More accurately, the question is whether the State interest is outweighed by a national interest in the unhampered operation of interstate commerce." (69 S.Ct. 842, 93 L.Ed. 1008.) (See *Bob-Lo Excursion Co. v. Michigan* (1948) 333 U.S. 28, 68 S.Ct. 358, 363, 92 L.Ed. 455, 463, *infra*, §1306; *Jones v. Union Pac. R. Co.* (2000) 79 C.A.4th 1053, 1066, 94 C.R.2d 661 [harassment of property owners by railroad's employees in needlessly blowing horns and whistles, idling train engines in front of plaintiffs' home for hours on end, at all hours of day and night, is not protected by Commerce Clause, and railroad's liability for consequential harm does not unduly burden interstate commerce]; *Ferguson v. Friendfinders* (2002) 94 C.A.4th 1255,

1262, 115 C.R.2d 258 [statute regulating unsolicited e-mail advertisements sent to California residents by service providers who do business in California via equipment located in California does not violate Dormant Commerce Clause; statute does not discriminate against or regulate interstate commerce, and burdens imposed on interstate commerce do not outweigh benefits to state residents]; *15A Am.Jur.2d (2000 ed.), Commerce §29 et seq.*)

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c. State Regulatory Powers Generally.

2. Local Activities of Interstate Salespersons.

8 Witkin Sum. Cal. Law Const Law § 1305

[§ 1305] Local Activities of Interstate Salespersons.

In *Eli Lilly & Co. v. Sav-On-Drugs* (1961) 366 U.S. 276, 81 S.Ct. 1316, 6 L.Ed.2d 288, plaintiff, an Indiana corporation, brought an action in New Jersey for violation of the Fair Trade Act. Defendant moved to dismiss on the ground that plaintiff was a foreign corporation transacting business in New Jersey without complying with the filing requirements. Plaintiff, relying on the "drummer" cases (see 9 *Summary* (10th), *Taxation*, §88), contended that it was engaged solely in interstate business, because its salespersons were merely promoting interstate sales. *Held*, dismissal affirmed. Plaintiff's 18 "detailmen," working in a New Jersey office with a district manager, traveling throughout the state promoting sales not only with interstate customers but with local retail buyers, constituted an interstate activity. "The fact that the business of 'inducing' interstate sales, as engaged in by Lilly, is primarily a promotional and service business which does not include a systematic solicitation of orders goes only to the nature of the intrastate business Lilly is carrying on, not to the question of whether it is carrying on an intrastate business." (81 S.Ct. 1320, 6 L.Ed.2d 293.)

Four justices dissented, stating that the activity was sufficient for an apportioned *tax* (see 9 *Summary* (10th), *Taxation*, §96 et seq.), or for plaintiff to have been subjected to the jurisdiction of the state courts (see 2 *Cal. Proc.* (4th), *Jurisdiction*, §159), but that different tests determine whether an interstate business can be subjected to a state licensing system. "Here the *dominant* activity is nothing more than advertising and public relations. These are the minimum activities in which every 'drummer' for an out-of-state concern engages." (81 S.Ct. 1325, 6 L.Ed.2d 299.) (See *People v. Mobin* (1965) 237 C.A.2d 115, 118, 46 C.R. 605 [ordinance regulating door-to-door solicitation by salespersons selling product sent by mail from out-of-state; upholding small license fee that was reasonably related to expense of investigation].)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §167.



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8 Witkin Sum. Cal. Law Const Law § 1306

[§ 1306] Localized Foreign Commerce.

The theory that the state may legislate concerning interstate or foreign commerce of a peculiarly local nature was given an unusual application in *Bob-Lo Excursion Co. v. Michigan* (1948) 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455. Appellant owned an island in the Detroit River across the Canadian border, which it maintained as a recreation center for patrons transported by boat to and from Detroit. It refused to carry a black passenger, and was convicted under the Michigan Civil Rights Act, forbidding racial discrimination in public conveyances. *Held*, the application of the statute to appellant was valid. (a) The transportation was clearly in foreign commerce. (b) However, it was highly localized; there was no ordinary means of access from Canada; all persons transported came from Detroit; and the situation fell within the doctrine of *Cooley v. Board of Wardens of Port of Philadelphia* (1851) 53 U.S. 299, 13 L.Ed. 996, *supra*, §1304. "It is difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce, affecting relations with foreign nations, or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so." (68 S.Ct. 364, 92 L.Ed. 464.) (See *Colorado Anti-Discrimination Com. v. Continental Air Lines* (1963) 372 U.S. 714, 83 S.Ct. 1022, 1025, 1026, 10 L.Ed.2d 84, 89, 90 [upholding state employment discrimination statute; hiring employee is localized matter]; *People v. Buck* (1950) 101 C.A.2d Supp. 912, 917, 226 P.2d 87 [upholding San Diego County's licensing of taxi drivers operating across Mexican border]; *Buck v. California* (1952) 343 U.S. 99, 72 S.Ct. 502, 504, 96 L.Ed. 775, 780 [affirming *People v. Buck*].)

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3a. (New) Interstate Reach of California Law.

8 Witkin Sum. Cal. Law Const Law § 1306A

[§ 1306A] (New) Interstate Reach of California Law.

In *RLH Industries v. SBC Communications* (2005) 133 C.A.4th 1277, 35 C.R.3d 469, plaintiff raised an issue of first impression by alleging that defendant's Midwest subsidiary violated California antitrust law by requiring its local telephone customers to lease their high-voltage protection (HVP) services from defendant rather than buying their own. Plaintiff is a California company that makes HVP devices. The trial court granted summary judgment to defendant. *Held*, reversed.

(a) Defendant relied on *Healy v. The Beer Institute* (1989) 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275, text, §1311, regarding the "extraterritorial effects of state economic regulation." (133 C.A.4th 1288.) However, *Healy* was concerned with state laws controlling retail prices in other states. It was not concerned with the extraterritorial application of state antitrust laws. (133 C.A.4th 1289.) Thus, *Healy* does not necessarily bar "state antitrust and unfair competition laws from reaching anticompetitive conduct occurring in other states, regardless of its effects on local residents." (133 C.A.4th 1290.)

(b) The primary concern of the Commerce Clause "is not geographic, but practical. It focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct." (133 C.A.4th 1290.) Here, defendant did not attempt to balance "the benefits of applying California law to their alleged out-of-state tying arrangements against the burden that condemning the tying arrangements under California law--which appears to be consistent with federal law ...--would impose on interstate commerce." Thus, the Commerce Clause "does not necessarily prohibit state antitrust and unfair competition law from reaching out-of-state anticompetitive practices injuring state residents." (133 C.A.4th 1291.)

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aa. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1307

[§ 1307] In General.

Under the rules stated above (*supra*, §1304 et seq.), where Congress has not acted, the state may regulate the local phases of commerce, such as harbor improvement and regulation, and bridges over navigable rivers. (*Bowman v. Chicago & Northwestern Ry. Co.* (1888) 125 U.S. 465, 8 S.Ct. 689, 31 L.Ed. 700; *Wilmington Trans. Co. v. Railroad Com. of Calif.* (1915) 236 U.S. 151, 35 S.Ct. 276, 59 L.Ed. 508 [California Railroad Commission is allowed to fix rates of carriers plying on high seas between San Pedro and Catalina]; *Townsend v. Yeomans* (1937) 301 U.S. 441, 57 S.Ct. 842, 847, 81 L.Ed. 1210, 1219 [regulation of rates of tobacco warehouse where tobacco was destined for interstate shipment]; *California v. Thompson* (1941) 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219; 15A *Am.Jur.2d* (2000 ed.), *Commerce* §25 et seq.)

Even where federal laws do exist, if they do not fully occupy the field, the state may act on the unregulated phases. (*Kelly v. Washington* (1937) 302 U.S. 1, 58 S.Ct. 87, 91, 82 L.Ed. 3, 9; *South Carolina State Highway Dept. v. Barnwell Bros.* (1938) 303 U.S. 177, 58 S.Ct. 510, 516, 82 L.Ed.2d 734, 741 [upholding state weight limitation on trucks where Federal Motor Carrier Act did not deal with subject]; *H.P. Welch Co. v. New Hampshire* (1939) 306 U.S. 79, 59 S.Ct. 438, 440, 83 L.Ed. 500, 504 [state regulation was valid after passage of federal Act before its effective date]; *Maurer v. Hamilton* (1940) 309 U.S. 598, 60 S.Ct. 726, 734, 84 L.Ed. 969, 980; *Parker v. Brown* (1943) 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315.)

But in *Cloverleaf Butter Co. v. Patterson* (1942) 315 U.S. 148, 62 S.Ct. 491, 497, 86 L.Ed. 754, 764, a federal statute regulated interstate commerce in reprocessed butter. A state statute dealing with the same subject, and authorizing seizure of defective material intended for use in the product and interstate shipment, was held void. The intent of the federal statute was to exclude any state regulation of the subject. (See *Hill v. Florida* (1945) 325 U.S. 538, 65 S.Ct. 1373, 1374, 89 L.Ed. 1782, 1784 [state statute regulating business agents of labor unions was in conflict with basic policy of Wagner Act]; *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 [federal law preempted different state weight-labeling requirements].)

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4. Congressional Silence.

bb. Coincidence of Federal and State Statutes.

8 Witkin Sum. Cal. Law Const Law § 1308

[§ 1308] Coincidence of Federal and State Statutes.

Where an activity involving interstate commerce is regulated by a state statute, and a federal statute thereafter imposes the same type of regulation on the same activity, does this "coincidence" of state and federal statutes mean that Congress has "occupied the field" and that the state law is nullified? The two chief arguments for this result are that (a) the coincidence of the statutory regulations necessarily discloses a congressional intent to cover the field and provide a uniform rule instead of divergent state laws; and (b) the simultaneous operation of both state and federal regulations in the criminal field would permit double punishment for the same act.

Nevertheless, the view that coincidence has the same effect as direct conflict was expressly rejected in *California v. Zook* (1949) 336 U.S. 725, 69 S.Ct. 841, 93 L.Ed. 1005. Defendants operated a travel bureau arranging "share-expense" transportation in private automobiles for a commission. California and federal law prohibited the sale of this kind of transportation in interstate commerce except in carriers having permits from the Interstate Commerce Commission. Defendants were convicted in the Los Angeles municipal court for violation of the California statute; the Appellate Department reversed the conviction on the ground that the federal legislation has superseded the California law as to interstate commerce; the U.S. Supreme Court held, however, that the California statute was valid.

(a) There is no mechanical rule that coincidence or identity has the same effect as actual conflict of state and federal laws; coincidence, with its possibility of double punishment, is an important factor indicating a congressional intent to exclude the state law, but is not conclusive. Otherwise many state statutes, e.g., those dealing with acts of extortion or robbery in interstate commerce, would be set aside "to satisfy a congressional purpose which could be only the product of this Court's imagination." (69 S.Ct. 845, 93 L.Ed. 1011.)

(b) Where Congress does not expressly declare an intention to displace local laws, and there is no direct conflict in the two statutes, the purpose to supersede must clearly appear. Looking at the whole case, "the factors indicating exclusion of state laws are of no consequence in the light of the small number of local regulations and the state's normal power to enforce safety and good-faith requirements for the use of its own highways. ... So far as casual, occasional, or reciprocal transportation of passengers for hire is concerned, the State may punish as it has in the present case for the

safety and welfare of its inhabitants; the nation may punish for the safety and welfare of interstate commerce. There is no conflict." (69 S.Ct. 848, 93 L.Ed. 1014.) (See *De Veau v. Braisted* (1960) 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109, supra, §66 [no incompatibility found].)

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aa. Rule and Illustrations.

8 *Witkin Sum. Cal. Law Const Law* § 1309

[§ 1309] Rule and Illustrations.

(1) *General Principles.* Although in theory the Constitution gives Congress the sole power over interstate commerce, it is now established that Congress may limit its own power by express permission to a state to make regulations in the field of interstate commerce. The subject was fully expounded in *Prudential Ins. Co. v. Benjamin* (1946) 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342. As a result of the decision in *United States v. South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, 64 S.Ct. 1162, 1170, 88 L.Ed. 1440, 1454, *supra*, §1296, holding that the business of selling insurance is interstate commerce, it was widely asserted that numerous state *regulations* and state *taxes* were invalid as unreasonable burdens on interstate commerce. To meet this situation, Congress enacted the McCarran Act (15 U.S.C., §1011 et seq.) which provided that the business of insurance should be subject to state regulation and taxation. Nevertheless, *Prudential*, a foreign insurance corporation doing insurance business in South Carolina, objected that a state tax assessed on foreign insurance corporations and not on domestic insurers was an unconstitutional burden on interstate commerce. *Held*, the tax was valid.

(a) The Commerce Clause is an express affirmative grant of power to Congress and also an implied limitation on state power; but the trend of decision has been both to broaden the affirmative power of Congress and to sustain state regulatory and taxing measures formerly regarded as in conflict with the implied limitation. The contention that the Commerce Clause of its own force forbids discriminatory state action, and that Congress cannot impose these regulations either by affirmative action or by action with the state, is unsound, because the Commerce Clause is a grant of power, and in no sense a limitation on the power. (66 S.Ct. 1158, 90 L.Ed. 1363.)

(b) Here, both Congress and the state have acted in complete coordination, and the tax is an "exercise of all the power of government residing in our scheme." (66 S.Ct. 1158, 90 L.Ed. 1363.) Although federal and state powers were separated for great reasons of policy and history, Congress and the states "were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion." (66 S.Ct. 1160, 90 L.Ed. 1365.)

(2) *Illustrations.* In *State Bd. of Ins. v. Todd Shipyards Corp.* (1962) 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620,

defendant did business in Texas and insured its Texas property. But the insurance company was a New York corporation and the policies were issued, premiums paid, and losses adjusted outside the state. *Held*, a Texas tax on the premiums was invalid. The purpose of the McCarran Act was to give the states the power they formerly had before *Southeastern Underwriters*, and Congress assumed that the limitations of prior decisions would remain. Hence, as in other cases in which the court refrained from disturbing a status quo, these cases were followed and the tax was held invalid for lack of sufficient contacts with Texas to satisfy due process.

In *Panhandle Eastern Pipe Line Co. v. Public Service Com. of Indiana* (1948) 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128, plaintiff transported natural gas from Texas and Kansas fields into Indiana pursuant to direct sales to large industrial consumers. After first declaring that the sales were interstate commerce (see *supra*, §1297), the Court held that they were nevertheless subject to regulation of rates and service by the Indiana Public Service Commission.

(a) Under the provisions of the federal Natural Gas Act, Congress regulates transportation in interstate commerce, sales in interstate commerce for *resale*, and companies engaged in transportation or sale. The Act deliberately omits reference to *direct sales for consumptive use, whether by domestic or industrial users*, and this omission unmistakably discloses an intent to allow the continuance of that regulation by the states. (68 S.Ct. 196, 92 L.Ed. 135.)

(b) Even if Congress had remained silent, the vital interests of the states would have justified the regulation. The action of Congress recognizes these interests by providing a comprehensive and complementary scheme of federal and state regulation. (68 S.Ct. 199, 92 L.Ed. 141.) (See *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Com.* (1951) 341 U.S. 329, 71 S.Ct. 777, 780, 95 L.Ed. 993, 999 [same holding]; *Robertson v. California* (1946) 328 U.S. 440, 66 S.Ct. 1160, 1165, 90 L.Ed. 1366, 1374 [interest of California in protecting public from evils of uncontrolled insurance solicitation justified licensing of interstate insurance business even before enactment of McCarran Act]; *Wilburn Boat Co. v. Fireman's Fund Ins. Co.* (1955) 348 U.S. 310, 75 S.Ct. 368, 374, 99 L.Ed. 337, 346 [in absence of federal legislation, states may regulate marine insurance].)

In *Speegle v. Board of Fire Underwriters of the Pac.* (1946) 29 C.2d 34, 49, 172 P.2d 867, 1 Summary (10th), *Contracts*, §596, the court, following *Prudential*, held that, by virtue of the McCarran Act, the California antitrust law (Cartwright Act) could be invoked against an association of insurance companies engaged in interstate commerce. (See *Northwest Cen. Pipeline Corp. v. State Corp. Com. of Kansas* (1989) 489 U.S. 493, 109 S.Ct. 1262, 1281, 1282, 103 L.Ed.2d 509, 537, 538 [Natural Gas Act reserves to states power to regulate production, and Congress must have contemplated some effect on interstate commerce; hence, evenhanded regulation of production is valid where effect on interstate commerce is incidental]; *People v. Wilmschurst* (1999) 68 C.A.4th 1332, 1345, 81 C.R.2d 221 [exemption provision of Clean Air Act demonstrates express congressional intent "to allow California to forge emissions standards at variance with the rest of the United States"].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations.* See *County Sanitation Dist. No. 2 of Los Angeles v. Kern* (2005) 127 C.A.4th 1544, 1609, 27 C.R.3d 28 [as long as federal regulatory standards are met, Clean Water Act authorizes some local control over use and disposal of sewage sludge, and ordinance requiring heightened treatment standards for sewage sludge used on county land reflects local determination of manner of use or disposal and does not discriminate against sewage sludge originating outside county or state].



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bb. Distinctions.

8 *Witkin Sum. Cal. Law Const Law* § 1310

[§ 1310] Distinctions.

(1) *Due Process*. The McCarran Act removed the barrier of the Commerce Clause from state regulation, but statutes still remain subject to challenge under the Due Process Clause. Hence, decisions prior to the McCarran Act must still be considered in determining whether the state has the requisite authority over the activities. (See *People v. United Nat. Life Ins. Co.* (1967) 66 C.2d 577, 589, 58 C.R. 599, 427 P.2d 199.)

In *United Nat. Life*, the Insurance Commissioner sued three out-of-state life insurance companies to enjoin them from carrying on business without a certificate of authority under *Ins. C* 700. The companies were soliciting and negotiating policies and collecting premiums from California residents entirely by mail, without offices, agents, or other representatives in the state. *Held*, *Ins.C. 700* is constitutional and applicable.

(a) Earlier cases were concerned with the place of making the insurance contracts. Today the emphasis is on contacts with the regulating state and the interest of the state in the transactions. (66 C.2d 592.)

(b) The presence of agents in the regulating state is not essential; other contacts are sufficient. Here, the insureds were residents; solicitation actually took place in California where advertising material and forms were received; California residents completed applications here; premiums were paid from California funds or bank accounts; claims would be investigated here and litigation commenced here; and if defendants should fail to perform, California might be called on to provide assistance for the beneficiaries. (66 C.2d 593.)

(c) The long continued administrative construction of *Ins.C. 700* as inapplicable to mail business was based on a misapprehension of constitutional authority and is not persuasive. (66 C.2d 597.)

(d) Doing business illegally without a certificate would not affect the validity of policies issued by the insurers. (66 C.2d 600.)

(2) *Federal Power*. The McCarran Act did not entirely displace federal authority. In *Federal Trade Com. v.*

Travelers Health Assn. (1960) 362 U.S. 293, 80 S.Ct. 717, 4 L.Ed.2d 724, Travelers, licensed only in Nebraska and Virginia, did a mail order business in every state, operating from Nebraska. The Nebraska statute generally prohibited unfair practices by a person domiciled in the state, in the conduct of the business of insurance "in any other state, territory, possession, province, country, or district." *Held*, nevertheless, the Federal Trade Commission had jurisdiction to issue a cease-and-desist order to prohibit false representations in Travelers' circular letters. The intention of the McCarran Act was to displace federal law only where there was state regulation "by the state in which the deception is practiced and has its impact." (80 S.Ct. 721, 4 L.Ed.2d 728.)

(3) *No Clear Congressional Consent*. In *South-Cen. Timber Dev. Co. v. Wunnicke (1984) 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71*, *infra*, §1313, an Alaska statute required that timber taken from state lands be processed within the state prior to export. The state contended that the requirement had been authorized by Congress because Congress had endorsed this policy with respect to federal lands. *Held*, this fact did not justify the inference that Congress intended to authorize a similar policy with respect to state lands. (104 S.Ct. 2243, 81 L.Ed.2d 77.)

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6. Direct Burdens Under Twenty-First Amendment.

8 Witkin Sum. Cal. Law Const Law § 1311

[§ 1311] Direct Burdens Under Twenty-First Amendment.

(1) *In General.* Section 2 of the Twenty-First Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Under this provision, a state may impose a *direct burden* on interstate commerce in liquor. (*State Bd. of Equalization of Calif. v. Young's Market Co.* (1936) 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 [state may impose license fee on importation of liquor]; *Ziffirin v. Reeves* (1939) 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128; *California v. LaRue* (1972) 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, *supra*, §453.)

In *Carter v. Virginia* (1944) 321 U.S. 131, 64 S.Ct. 464, 468, 88 L.Ed. 605, 611, a statute provided that, where liquor was transported *through* Virginia to another state, the carrier had to post bond and conform to certain regulations designed to assure delivery only to a consignee legally entitled to receive it. Though the law obviously burdened interstate commerce, it was upheld as a reasonable police measure to protect the state of transit (Virginia) from illegal diversion and sale of the liquor there. As indicated in concurring opinions, it is doubtful whether such a substantial interference could be justified in the transportation of ordinary commodities. (Cf. *Von Hamm-Young Co. v. San Francisco* (1947) 29 C.2d 798, 808, 178 P.2d 745 [although Amendment may permit regulation of interstate commerce to prevent evasion of local laws, it does not permit *taxation* of property *in transit*].)

The Twenty-First Amendment did not "repeal" the Commerce Clause in connection with regulating liquor so as to leave Congress with no power over interstate or foreign commerce in it; "each must be considered in the light of the other." (*Hostetter v. Idlewild Bon Voyage Liquor Corp.* (1964) 377 U.S. 324, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350, 356.) In *Hostetter*, Idlewild Corp. sold tax-free liquor at Kennedy Airport in New York, solely to international travelers for delivery at their foreign destinations. New York sought to prohibit the business as unlicensable under its law. *Held*, the Amendment merely gave unlimited power to prevent importation for use within the state, and did not authorize prohibition of export. (See *Rice v. Alcoholic Bev. Control App. Bd.* (1978) 21 C.3d 431, 448, 146 C.R. 585, 579 P.2d 476 [liquor price maintenance law is unconstitutional]; *Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263, 104 S.Ct. 3049, 3058, 82 L.Ed.2d 200, 209 [discriminatory tax is violative of Commerce Clause]; 324 *Liquor Corp. v. Duffy* (1987) 479 U.S. 335, 107 S.Ct. 720, 729, 93 L.Ed.2d 667, 677 [New York statute requiring liquor retailers to charge at least 112% of wholesaler's posted bottle price violates Sherman Act]; 79 *Cal. L. Rev.* 161 [The Twenty-First

Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest]; 13 *Hastings Const. L. Q.* 361 [*Bacchus*]; 20 *A.L.R.4th* 600 [validity, construction, and effect of laws prohibiting or regulating advertising of intoxicating liquors]; 116 *A.L.R.5th* 149 [interplay between Twenty-First Amendment and Commerce Clause concerning state regulation of liquors].)

(2) *Affirmation Statutes*. In *Joseph E. Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336, 342, the Court upheld a New York statute requiring liquor brand owners, their agents, or "related persons" to affirm that their filed prices for sales to wholesalers and retailers in New York were no higher than the lowest price charged anywhere else in the U.S. during the preceding month.

Seagram was distinguished in *Brown-Forman Distillers Corp. v. New York State Liquor Authority* (1986) 476 U.S. 573, 106 S.Ct. 2080, 2085, 90 L.Ed.2d 552, 561. The Court held that the extraterritorial effect of a New York "affirmation law" constituted an unconstitutional burden on interstate commerce (106 S.Ct. 2086, 90 L.Ed.2d 562), and was not justified by the Twenty-First Amendment. The Amendment gives New York only the authority to control sales of liquor in New York; the statute had the effect of regulating sales of liquor to be consumed in other states. (106 S.Ct. 2088, 90 L.Ed.2d 563.) It might also interfere with the ability of other states to exercise their own authority under the Amendment. "Once a distiller has posted prices in New York, it is not free to lower them in another State, even in response to a regulatory directive by that State, without risking forfeiture of its license in New York. New York law, therefore may force other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in New York." (106 S.Ct. 2088, 90 L.Ed.2d 564.)

In *Healy v. Beer Institute* (1989) 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275, the Court struck down a Connecticut beer-price affirmation statute. "In the interest of removing any lingering uncertainty about the constitutional validity of affirmation statutes and of avoiding further litigation on the subject of liquor-price affirmation, we recognize today what was all but determined in *Brown-Forman*: to the extent that *Seagram* held that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law. Retrospective affirmation statutes, like other affirmation statutes, have the inherent practical extraterritorial effect of regulating liquor prices in other States. By tying maximum future prices in one State to the lowest prices in other States as determined at a specified time in the past, retrospective affirmation laws control pricing decisions in nonaffirmation States by requiring that those decisions reflect not only local market conditions, but also market conditions in the affirmation States--market conditions that would be irrelevant absent the binding force of the affirmation statutes. Every pricing decision made in a nonaffirmation State will reflect the certain knowledge that the price chosen will become in the future the maximum permissible price in the State requiring affirmation. For the reasons noted today in *Brown-Forman*, this extraterritorial effect violates the Commerce Clause." (109 S.Ct. 2502, 105 L.Ed.2d 292.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. *State Bd. of Equalization of Calif. v. Young's Market Co.* (1936) 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38, text, p. 1015, was distinguished in *Granholm v. Heald* (2005) 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796, which invalidated direct-shipment laws in Michigan and New York. Both states regulate the sale and distribution of alcoholic beverages, including wine, through a three-tier system requiring producers to sell to wholesalers, who sell to retailers, who sell to the public. Michigan allows in-state wineries with a state license to sell directly to consumers, but bans all direct sales by out-of-state wineries. New York does not ban direct shipments altogether, but requires out-of-state wineries to establish a distribution operation in New York before being allowed to make direct shipments.

(a) Under the Twenty-First Amendment, a state has nearly complete control over the sales and distribution of alcoholic beverages. Hence, a state may ban the sale and consumption of alcoholic beverages altogether, or it may assume direct control of liquor distribution through state-run outlets or channel sales through a three-tier system. (125 S.Ct. 1905, 161 L.Ed.2d 819.) But it cannot enact a law that favors in-state producers. This kind of law violates the Commerce Clause and is not saved by the *Twenty-First Amendment*. (125 S.Ct. 1905, 161 L.Ed.2d 820.)

(b) The state regimes here did not advance legitimate local purposes "that cannot be adequately served by

reasonable nondiscrimination alternatives." There is little evidence that the direct shipment of wine will increase alcohol consumption by minors, and even if there were substantial evidence, "this would not justify regulations limiting only out-of-state direct shipments." (125 S.Ct. 1905, 161 L.Ed.2d 820.) Banning direct shipments of wine by out-of-state producers also does not facilitate the states' tax collection efforts. Michigan already collects taxes directly from out-of-state wineries on imports shipped to in-state wholesalers. And New York could require out-of-state wineries to procure a permit, as it does for in-state wineries, to protect itself against lost revenue. Further, the states have not shown that tax evasion by out-of-state wineries poses a unique threat that justifies their discriminatory regimes. (125 S.Ct. 1906, 161 L.Ed.2d 821.)

Four justices dissented in two opinions. (125 S.Ct. 1907, 1909, 161 L.Ed.2d 822, 825.) Both opinions would uphold the *Young's Market* view that the Twenty-First Amendment must be interpreted broadly to allow comprehensive state regulation of alcoholic beverages, even if that regulation places a direct burden on interstate commerce. (125 S.Ct. 1908, 1920, 161 L.Ed.2d 823, 836.) (See 119 Harv. L. Rev. 307 [Granholm]; 52 U.C.L.A. L. Rev. 899 [new approach to wine wars]; 32 Western State L. Rev. 63 [direct shipping of wine to customers].) Correction: Page 1017, line 4, "*Healy v. Beer Institute*" should read "*Healy v. The Beer Institute*".



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d. Police Power Regulations.

1. Health and Safety Measures.

8 Witkin Sum. Cal. Law Const Law § 1312

[§ 1312] *Health and Safety Measures.*

The states may enact regulatory laws dealing with local aspects of interstate commerce, if they do not unreasonably burden the commerce. (See 98 A.L.R.5th 167 [validity of state statutes and administrative regulations regulating Internet communications under Commerce Clause]; 15A Am.Jur.2d (2000 ed.), *Commerce* §96.) Illustrations are numerous in the field of health and similar protective measures:

New York, New Haven & Hartford R. Co. v. New York (1897) 165 U.S. 628, 17 S.Ct. 418, 41 L.Ed. 853 [sustaining state legislation requiring heating equipment for passenger cars].

Plumley v. Massachusetts (1894) 155 U.S. 461, 15 S.Ct. 154, 39 L.Ed. 223 [labeling of oleomargarine colored to look like butter].

In re Bear (1932) 216 C. 536, 540, 15 P.2d 489 [labeling of imported egg products].

Bourjois v. Chapman (1937) 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027 [statute requiring registration of cosmetics sold within state, and payment of inspection fees].

California v. Thompson (1941) 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219 [California statute regulating, by license and bond, *transportation agents* who sell or negotiate for interstate transportation].

Robertson v. California (1946) 328 U.S. 440, 66 S.Ct. 1160, 1165, 90 L.Ed. 1366, 1374 [following *Thompson*].

People v. Buck (1950) 101 C.A.2d Supp. 912, 914, 226 P.2d 87 [San Diego ordinance denying taxi driver's license to person of bad moral character was upheld as to defendant operating cabs from Mexico through San Diego].

Buck v. California (1952) 343 U.S. 99, 72 S.Ct. 502, 504, 96 L.Ed. 775, 780 [same; affirming *People v. Buck*].

Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R. Co. (1968) 393 U.S. 129, 89 S.Ct. 323, 327, 21 L.Ed.2d 289, 295 [upholding Arkansas "full-crew" law, specifying minimum number of employees in

train crew].

CTS Corp. v. Dynamics Corp. of America (1987) 481 U.S. 69, 107 S.Ct. 1637, 1648, 95 L.Ed.2d 67, 82 [upholding state statute regulating acquisition of control shares in corporation by imposing condition of approval by majority of preexisting disinterested shareholders].

Hatch v. Superior Court (2000) 80 C.A.4th 170, 194, 197, 94 C.R.2d 453 [P.C. 288.2, prohibiting sending defined material over Internet to minors for purpose of seducing them and requiring at least an attempt in California, does not unduly burden interstate commerce; statute does not criminalize "access" or require differing versions of communications in different jurisdictions].

People v. Hsu (2000) 82 C.A.4th. 976, 985, 99 C.R.2d 184 [same].

In *Huron Portland Cement Co. v. Detroit* (1960) 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852, appellant, a Michigan corporation, operated vessels on the Great Lakes in interstate commerce between states. Its ships had boilers that conformed in all respects to federal specifications and were inspected and licensed by federal authorities, under congressional regulations. But for lack of conformity to the requirements of Detroit's smoke-abatement ordinance, appellant was criminally prosecuted and convicted. *Held*, the ordinance was valid. The federal boiler inspection is designed solely to insure the seagoing safety of a vessel from the perils of maritime navigation. The purpose of Detroit's law--elimination of air pollution to protect health and enhance cleanliness of the local community--was different. Thus, there was no overlap of federal and local law, and no federal preemption. (80 S.Ct. 815, 4 L.Ed.2d 855; see dissent, criticizing criminal conviction for using very equipment that federal government authorizes.)

Florida Lime & Avocado Growers v. Paul (1963) 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248, involved a California statute prohibiting the sale of avocados containing less than 8% oil. The theory of the law was that the oil content is a test of maturity, and that the regulation was necessary to prevent deception of consumers. Florida avocados, certified under a marketing order of the Secretary of Agriculture acting under federal statutory authority, were excluded from the California market if they did not reach that oil content. An action was brought by Florida growers to enjoin enforcement of the California statute, and judgment went against plaintiffs. *Held*, reversed for determination of the facts relating to the commerce issue.

(a) Federal preemption was not shown. Although the federal and California standards are different, the test is whether they can both be enforced without impairing federal superintendence, and compliance with both is possible here. Nor does the subject matter call for exclusive federal supervision. Foodstuffs for the market have always been deemed a matter of peculiarly local concern. While, under *Cloverleaf Butter Co. v. Patterson* (1942) 315 U.S. 148, 62 S.Ct. 491, 497, 86 L.Ed. 754, 764, *supra*, §1307, Florida might not be entitled to prevent *exportation* of federally certified fruit by imposing a higher standard, nothing in that case forbids California regulation of *marketing*: "Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." (83 S.Ct. 1219, 10 L.Ed.2d 258.) (See dissent of 4 justices, arguing that the federal law was irreconcilable.)

(b) On the issue of burden or discrimination, the record was insufficient and a retrial was necessary. (83 S.Ct. 1222, 10 L.Ed.2d 262.)

The limits on this type of state power were discussed in *Southern Pac. Co. v. Arizona* (1945) 325 U.S. 761, 65 S.Ct. 1515, 1521, 89 L.Ed. 1915, 1925, holding invalid the Arizona Train Limit Law, prohibiting trains of more than 14 passenger cars or 70 freight cars. The possible safety advantages were outweighed by the interference with efficiency and economy of interstate transportation, because the law required breaking up and reorganizing trains at the state border. The confusion that could result from numerous conflicting state laws necessarily made this a subject for national regulation alone.

Even where the ostensible object is health, an arbitrary restriction on *importation* will be nullified. (*Dean Milk Co. v. Madison* (1951) 340 U.S. 349, 71 S.Ct. 295, 297, 95 L.Ed. 329, 333.) (See *Hunt v. Washington State Apple*

Advertising Com. (1977) 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 [statute requiring containers of apples sold in state to exhibit federal grading categories or no grading categories, and prohibiting sister-state grading categories, was unconstitutional burden].)

SUPPLEMENT: [This section is current through the latest supplement]

See *People v. PuriTec* (2007) 153 C.A.4th 1524, 1534, 1536, 64 C.R.3d 270 [prohibiting sellers of water treatment devices from making health benefit claims about devices when they have not been certified by state Department of Public Health].



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2. State as Market Participant.

8 Witkin Sum. Cal. Law Const Law § 1313

[§ 1313] State as Market Participant.

A statute providing a subsidy for local businesses was sustained in *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220. The Maryland Legislature, after a study of the aesthetic problem of abandoned automobiles, adopted the following plan to speed up the "scrap cycle": (1) A "stick," consisting of a requirement that Maryland wreckers must obtain a license and pay a recurring fine for old vehicles retained for over 1 year. (2) A "carrot," consisting of a bounty paid by the state for destroying vehicles formerly titled in Maryland; a licensed wrecker shares the bounty with the processor. (3) Documentation requirements, to give clear title to the wreckers, were eliminated where the vehicle was a "hulk"--over 8 years old and inoperable. However, under a 1974 amendment, a scrap processor with a plant outside of Maryland had to produce full documentation to receive the bounty on a hulk, while Maryland processors were required only to submit a simple indemnity agreement. The amendment was challenged by a processor located outside of Maryland whose business in bounty-eligible hulks had greatly declined. *Held*, the statute as amended was valid.

(a) The common thread in prior cases holding statutes invalid is that "the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." But Maryland has not done either; it has itself entered into the market to bid up the price; and the impact on the interstate flow of hulks is due to the fact that it has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland rather than take them outside the state. (96 S.Ct. 2496, 49 L.Ed.2d 229.)

(b) This presents a new issue. "[U]ntil today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State." (96 S.Ct. 2497, 49 L.Ed.2d 231.)

(c) The Maryland statute does not violate the Commerce Clause. It does not impose a forbidden trade barrier; the hulks remain in the state "in response to market forces, including that exerted by money from the State." The Commerce Clause does not forbid a state, in the absence of congressional action, "from participating in the market and exercising the right to favor its own citizens over others." (96 S.Ct. 2497, 49 L.Ed.2d 231.)

Three justices dissented, contending that the opinion repudiates established principles and ignores the reasoning of many cases. (96 S.Ct. 2501 et seq., 49 L.Ed.2d 236 et seq.) (See *Reeves v. Stake* (1980) 447 U.S. 429, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244, 251 [in time of shortage, state may confine sale of cement it produces solely to its residents; "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law"]; *White v. Massachusetts Council of Const. Employers* (1983) 460 U.S. 204, 103 S.Ct. 1042, 1044, 75 L.Ed.2d 1, 6 [following *Alexandria Scrap* and *Reeves*]; 97 Harv. L. Rev. 70 [White case]; 21 *Loyola L.A. L. Rev.* 59 [reviewing cases].)

These cases were distinguished in *South-Cen. Timber Dev. Co. v. Wunnicke* (1984) 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71. An Alaska statute imposed a "primary manufacture" requirement for timber taken from state lands. The timber had to be processed within the state prior to export. *Held*, the state could not use the market-participant doctrine to justify regulation of the timber-processing market in which it was not a participant.

(a) "The limit of the market-participation doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." (104 S.Ct. 2245, 81 L.Ed.2d 83.)

(b) "There are sound reasons for distinguishing between a State's preferring its own residents in the initial disposition of goods when it is a market participant and a State's attachment of restrictions on dispositions subsequent to the goods coming to rest in private hands. ... We reject the contention that a State's action as a market regulator may be upheld against Commerce Clause challenge on the ground that the State could achieve the same end as a market participant. We therefore find it unimportant for present purposes that the State could support its processing industry by selling only to Alaska processors, by vertical integration, or by direct subsidy." (104 S.Ct. 2246, 81 L.Ed.2d 83.)

(c) "Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. In contrast to the situation in *White*, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract." (104 S.Ct. 2246, 81 L.Ed.2d 84.) (See 21 *Loyola L.A. L. Rev.* 595 [South-Cen. Timber]; 15A *Am.Jur.2d* (2000 ed.), *Commerce* §§37, 46.)

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3. Economic Restrictions on Imports.

8 Witkin Sum. Cal. Law Const Law § 1314

[§ 1314] Economic Restrictions on Imports.

(1) *Restrictions Invalid*. While impure or unsanitary commodities such as milk may be excluded, a statute that conditions the importation of milk on the maintenance of price standards or other economic factors in another state is an unreasonable burden on commerce and is invalid. (*Baldwin v. G.A.F. Seelig* (1935) 294 U.S. 511, 55 S.Ct. 497, 501, 79 L.Ed. 1032, 1039; see *Dean Milk Co. v. Madison* (1951) 340 U.S. 349, 71 S.Ct. 295, 297, 95 L.Ed. 329, 333 [requirement of local processing of milk was invalid where applied to out-of-state producers]; *Exxon Corp. v. Governor of Maryland* (1978) 437 U.S. 117, 98 S.Ct. 2207, 2214, 57 L.Ed.2d 91, 102; *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 101 S.Ct. 715, 728, 66 L.Ed.2d 659, 675; *West Lynn Creamery v. Healy* (1994) 512 U.S. 186, 114 S.Ct. 2205, 2211, 129 L.Ed.2d 157, 166 [Massachusetts assessment imposed on milk sold by dealers to in-state retailers was invalid, where two-thirds of dealers were from out of state and entire assessment was distributed to Massachusetts dairy farmers]; *Chrysler Corp. v. New Motor Vehicle Bd.* (1979) 89 C.A.3d 1034, 1042, 153 C.R. 135; 10 Ecology L. Rev. 113 [*Minnesota v. Clover Leaf Creamery*].)

In *Great Atlantic & Pac. Tea Co. v. Cottrell* (1976) 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55, Mississippi's statute regulating milk production and sale provided that milk from another state could be sold in Mississippi only if that state accepted Grade A milk produced in Mississippi on a reciprocal basis. Plaintiff processed milk in Louisiana for its Mississippi retail outlets, but was denied a permit to distribute the milk to the outlets because Louisiana had not made a reciprocal agreement. *Held*, the statute was an unconstitutional burden on commerce. Under the tests laid down in *Dean Milk Co. v. Madison*, *supra*, Mississippi failed to show a local interest of substantial importance justifying the regulation that in practical effect excluded wholesome milk produced outside the state. (96 S.Ct. 930, 47 L.Ed.2d 63.) The Court rejected a two-pronged argument that the reciprocity requirement was in effect a free trade provision, advancing the identical national interest served by the Commerce Clause.

(a) While mutually beneficial objectives may be promoted by voluntary reciprocity agreements, "Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement." (96 S.Ct. 931, 47 L.Ed.2d 65.)

(b) Even if Louisiana has refused reciprocity in bad faith, i.e., has erected unconstitutional economic barriers under

the guise of health and inspection regulations, Mississippi has a remedy by suit to challenge Louisiana's actions. And if Louisiana is legitimately exercising its local powers in the interests of health, i.e., is refusing reciprocity and consequently the admission of milk deemed of insufficient quality, Mississippi cannot force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk. (96 S.Ct. 932, 47 L.Ed.2d 65.)

(2) *Restrictions Valid.* A statute regulating milk prices was validly applied to an interstate shipment where otherwise uniform and effective operation of the statute would have been impossible. (*Milk Control Bd. of Pennsylvania v. Eisenberg Farm Products* (1939) 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752.)

In *Maine v. Taylor* (1986) 477 U.S. 131, 106 S.Ct. 2240, 91 L.Ed.2d 110, a Maine statute prohibited the importation of live baitfish, on evidence that Maine's population of wild fish would be placed at risk by parasites prevalent in out-of-state baitfish, and that nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology. "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' ... it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives." (106 S.Ct. 2455, 91 L.Ed.2d 129.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 1022, last full line of first paragraph, 10 Ecology L. Rev. 113 should be 10 Ecology L. Q. 113.



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8 Witkin Sum. Cal. Law Const Law § 1315

[§ 1315] Economic Restrictions on Exports.

The doctrine of *Baldwin v. G.A.F. Seelig* (1935) 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, supra, §1314, was followed in a different factual pattern in *H.P. Hood & Sons v. Du Mond* (1949) 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865. New York's statutes provided for licensing of dealers purchasing milk for resale, and regulated prices to be paid to producers. Issuance of a license was conditioned on a showing that it "will not tend to a destructive competition in a market already adequately served." Petitioner, operating as a licensed dealer in full compliance with price and other regulations, was denied a license to acquire additional purchasing facilities, despite the fact that all of its purchases were made for interstate shipment to Massachusetts consumers. *Held*, denial of the additional license was an invalid restriction on interstate commerce.

(a) In *Milk Control Bd. of Pennsylvania v. Eisenberg Farm Products* (1939) 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752, supra, §1314, regulation of prices to be paid to milk producers was upheld under "the power of the State to shelter its people from menaces to their health or safety and from fraud, even when these dangers emanate from interstate commerce." (69 S.Ct. 662, 93 L.Ed. 870.)

(b) On the other hand, in *Baldwin v. G.A.F. Seelig*, supra, restrictions designed for the economic advantage of the state were an unreasonable burden on commerce. *Baldwin* dealt with restrictions on *importation and sale* of milk, designated to exclude foreign milk from the New York market; the instant case deals with restrictions on *purchase and exportation* of local milk to out-of-state consumers; but both cases are controlled by the same principle, because the object of each regulation was the protection of local economic interests. (69 S.Ct. 663, 93 L.Ed. 871.)

(c) The doctrine that the states are not separable economic units, and that one state cannot set up embargoes or economic barriers against competition of another state, is usually invoked in cases where the discrimination is against importation of commodities into the state. That it applies equally to restrictions on exports is established by *West v. Kansas Natural Gas Co.* (1911) 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716, supra, §1298, *Foster-Fountain Packing Co. v. Haydel* (1928) 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147, supra, §1299, and *Toomer v. Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 1166, 92 L.Ed. 1460, 1474, supra, §1299. "We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that

state shall have priority. ... Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? ... Could Ohio then pounce upon the rubber-tire industry, on which she has substantial grip, to retaliate for Michigan's auto monopoly?" (69 S.Ct. 665, 93 L.Ed. 874.)

Du Mond was distinguished in *Cities Service Gas Co. v. Peerless Oil & Gas Co.* (1950) 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190, holding that the interest of Oklahoma in preventing waste of natural gas outweighed the national interest so as to authorize state fixing of minimum prices for gas produced. Unlike the regulation in *Du Mond*, there was no embargo and no discrimination against interstate commerce, because the regulation applied to all gas taken from the field whether for interstate or intrastate sale. (71 S.Ct. 220, 95 L.Ed. 203.)

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5. Use of Highways.

8 *Witkin Sum. Cal. Law Const Law* § 1316

[§ 1316] Use of Highways.

It has been held that a state may regulate the use of its highways, and may impose a reasonable fee as a condition of granting a license or permit to use them, provided that the amount of the fee is necessary to reimburse the state for local facilities furnished or to cover the expense of enforcing the regulations. (*Ingels v. Morf* (1937) 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 [fees under California Caravan Act of 1935 were excessive]; *South Carolina State Highway Dept. v. Barnwell Bros.* (1938) 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 [upholding prohibition of motor trucks of excessive width and weight loads]; *Clark v. Paul Gray* (1939) 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 [upholding California Caravan Act of 1937, where there was no showing that fees were excessive]; *Lord v. Henderson* (1951) 105 C.A.2d 426, 432, 234 P.2d 197 [same]; *Motor Trading Co. v. Ingels* (1941) 43 C.A.2d 20, 25, 110 P.2d 132 [statute requiring license, bond, etc., from those bringing in secondhand cars for resale was invalid].)

As the Court observed in *Railway Express Agency v. New York* (1949) 336 U.S. 106, 69 S.Ct. 463, 466, 93 L.Ed. 533, 539: "Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce."

Prior to the enactment of the federal Motor Carrier Act subjecting those carriers to regulation, it was indicated that a state, to conserve its highways and prevent traffic congestion, might require an interstate motor carrier to obtain a certificate of public convenience and necessity before being allowed to operate. (*Bradley v. Public Util. Com.* (1933) 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053.) Since the federal Act took effect, the states lack power to deny permission to operate, and cannot indirectly exercise this power by suspending a license as punishment for violation of valid state regulations such as weight load limits. (*Castle v. Hayes Freight Lines* (1954) 348 U.S. 61, 75 S.Ct. 191, 193, 99 L.Ed. 68, 73; see *supra*, §1092.)

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3. Federal Power Over Commerce.

a. Regulation of Interstate Commerce.

1. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1317

[§ 1317] In General.

The federal power over interstate commerce has the same content and scope as the state police power over intrastate commerce. It authorizes appropriate legislation to protect or advance interstate commerce, and embraces a wide range of regulations. (See *Kentucky Whip & Collar Co. v. Illinois Cen. R. Co.* (1937) 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, *infra*, §1320; *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234; *United States v. Darby* (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, *infra*, §1321; *Federal Power Com. v. Natural Gas Pipeline Co. of America* (1942) 315 U.S. 575, 62 S.Ct 736, 741, 86 L.Ed. 1037, 1047 ["authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the states under the Fourteenth to regulate the prices of commodities in intrastate commerce"]; *Railway Employes' Dept. v. Hanson* (1956) 351 U.S. 225, 76 S.Ct. 714, 719, 100 L.Ed. 1112, 1131, *infra*, §1318; 41 *San Diego L. Rev.* 405 [cabining the Commerce Clause]; 1 Rotunda, Chap. 4; 15A *Am.Jur.2d* (2000 ed.), *Commerce* §§18 et seq., 93.)

Thus, Congress has validly prohibited the interstate transportation of lottery tickets, impure food and drugs, obscene literature, and women for prostitution or other immoral purposes. (*Hipolite Egg Co. v. United States* (1911) 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364; *Hoke v. United States* (1913) 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523.) (See 13 *Southwestern U. L. Rev.* 531 [A Constitutional Analysis of Federal Drug Marketing Regulations and Food and Drug Administration Implementation].)

The regulation of *interstate carriers* is another important illustration of the power. (See *Dayton-Goose Creek Ry. Co. v. United States* (1924) 263 U.S. 456, 44 S.Ct. 169, 68 L.Ed. 388.) In *Railroad Retirement Bd. v. Alton R. Co.* (1935) 295 U.S. 330, 55 S.Ct. 758, 768, 79 L.Ed. 1468, 1483, a federal statute applying to interstate carriers provided for a fund to be maintained by contributions of employers and employees, and compulsory retirement of employees on pensions at certain ages. It was held invalid, partly on the ground that the promotion of social security of employees is not a regulation of commerce and, hence, is not justified under the commerce power. This reasoning would seem to be no longer effective in light of cases upholding more drastic regulation of the employment relationship even in the field of intrastate activity. (See *infra*, §§1318, 1321.)

The broad scope of the power is emphasized in cases dealing with the Public Utility Holding Company Act of

1935. The legislation was directed at the pyramided structure, involving interposed subholding companies between the holding company and the operating companies, with different classes of stock having unequal voting rights, resulting in domination of the whole system by a small group of holders of common stock at the top of the pyramid. To attack this evil of irresponsible management and unsound capital structure, with its injurious effects on the ordinary investor and the operating utility customer, Congress provided that the Securities and Exchange Commission should take necessary steps against the improper stock structures. In *American Power & Light Co. v. Securities & Exchange Com.* (1946) 329 U.S. 90, 67 S.Ct. 133, 139, 91 L.Ed. 103, 112, the Court reviewed the types of regulations of corporate organization and management upheld as within the federal commerce power, and concluded: "[W]e affirm once more the constitutional authority ... to undertake to solve national problems directly and realistically, giving due recognition to the scope of state power. That follows from the fact that the federal commerce power is as broad as the economic needs of the nation." (67 S.Ct. 141, 91 L.Ed. 115.) (See *North Amer. Co. v. Securities & Exchange Com.* (1946) 327 U.S. 686, 66 S.Ct. 785, 796, 90 L.Ed. 945, 959.)

SUPPLEMENT: [This section is current through the latest supplement]
See 1 Rotunda 4th, Chap. 4.



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3. Federal Power Over Commerce.

a. Regulation of Interstate Commerce.

2. Labor Relations.

8 *Witkin Sum. Cal. Law Const Law* § 1318

[§ 1318] Labor Relations.

Originally, the U.S. Supreme Court denied the federal power to promote labor peace in interstate commerce by protecting union organization and membership. (See *Adair v. United States* (1908) 208 U.S. 161, 28 S.Ct. 277, 282, 52 L.Ed. 436, 445 [statute outlawing yellow-dog contract by making it criminal to refuse employment in interstate railroad because of union membership was invalid].) Subsequent decisions departed from this position and sustained various types of statutes regulating employer and employee relationships and union activities. (See *Santa Cruz Fruit Packing Co. v. N.L.R.B.* (1938) 303 U.S. 453, 58 S.Ct. 656, 659, 82 L.Ed. 954, 959 [federal power can extend to regulating labor relations to prevent strikes]; for particular statutes and their interpretation and application, see 3 *Summary* (10th), *Agency and Employment*, §531 et seq.)

A definitive decision to this effect was made in *Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112. The federal Railway Labor Act, as amended in 1951, authorized carriers and labor unions, notwithstanding state laws, to enter into agreements requiring union membership of all employees, provided that membership was not denied or terminated for improper reasons. This kind of agreement was made with Union Pacific R. R. Co., and was challenged by Nebraska employees as a violation of the "right to work" guarantee of the Nebraska Constitution, stating that no person shall be denied employment because of membership or nonmembership in a labor organization. *Held*, the power of Congress over interstate commerce is like the police power of the state in its scope and latitude in choosing methods of carrying out its objectives; industrial peace in interstate commerce is a legitimate objective, and the policy choice of the union shop as a stabilizing force is an allowable one. Though the right to work may be included within the due process guarantee, union organizations may enhance and strengthen that right. "To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce." (76 S.Ct. 720, 100 L.Ed. 1132.)

The court did not overlook the contention that the statute forced employees into ideological and political associations in violation of the First Amendment freedoms. But Congress has explicitly precluded the imposition of conditions on union membership other than dues, etc. "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of

the First Amendment, this judgment will not prejudice the decision in that case." (76 S.Ct. 721, 100 L.Ed. 1134.)

Hanson was followed in *California v. Taylor* (1957) 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034, holding that our State Belt Line Railroad, although publicly owned and operated, was subject to the Railway Labor Act provisions on collective bargaining, and that these supersede conflicting state civil service laws. (77 S.Ct. 1044, 1 L.Ed.2d 1042.)

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b. Regulation of Intrastate Activity.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1319

[§ 1319] In General.

Congress may regulate intrastate commerce or other local activities that interfere with interstate commerce, when necessary to make effective the regulation of interstate commerce. "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." (*Heart of Atlanta Motel v. United States* (1964) 379 U.S. 241, 85 S.Ct. 348, 358, 13 L.Ed.2d 258, 269 [upholding provision of federal Civil Rights Act on public accommodations].) A number of decisions are illustrative:

Southern R. Co. v. United States (1911) 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 [federal safety regulation may be made applicable to cars used in intrastate commerce by interstate railroad].

Houston, East & West Texas Ry. v. United States (1914) 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 [Interstate Commerce Commission could prohibit local rates for intrastate carriers that were much lower than interstate rates].

Stafford v. Wallace (1922) 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735 [goods in flow of interstate commerce; shipment of livestock to meat packing plants, with the meat to be subsequently shipped out; regulation of stockyards is valid].

Brooks v. United States (1925) 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699 [upholding National Motor Vehicle Theft Act provision punishing local act of knowingly receiving or concealing stolen motor vehicle that has been moving in interstate commerce as necessary to prevent interstate transportation of stolen vehicles].

United States v. Wrightwood Dairy Co. (1942) 315 U.S. 110, 62 S.Ct. 523, 527, 86 L.Ed. 726, 733 [Secretary of Agriculture, under federal statute, could regulate prices of milk marketed wholly in intrastate commerce, but competing with price-regulated milk shipped interstate].

Perez v. United States (1971) 402 U.S. 146, 91 S.Ct. 1357, 1361, 28 L.Ed.2d 686, 692 [upholding Title II of Consumer Credit Protection Act, as applied to loan sharks: "Extortionate credit transactions, though purely intrastate,

may in the judgment of Congress affect interstate commerce"].

Hodel v. Virginia Surface Mining & Reclamation Assn. (1981) 452 U.S. 264, 101 S.Ct. 2352, 2360, 2362, 69 L.Ed.2d 1, 16, 20 [upholding Surface Mining Control and Reclamation Act of 1977, designed to protect environment from adverse effects of surface coal mining operations]; 10 *Ecology L. Q.* 69 [*Hodel*].

However, in *United States v. Lopez* (1995) 514 U.S. 549, 115 S.Ct. 1624, 1630, 131 L.Ed.2d 626, 638, *supra*, §1294, the Court invalidated the Gun-Free School Zones Act of 1990 (18 U.S.C., §922(q)(1)(A)), which prohibits knowing possession of a firearm at a place known to be a school zone. The statute is beyond Congress's power to enact. It is a criminal law that, at best, tenuously, and not substantially, affects interstate commerce. (See 88 *Cal. L. Rev.* 1575 [federal prosecution of state-legalized medical marijuana use after *Lopez*]; 36 *Santa Clara L. Rev.* 151 [validity under Commerce Clause of Brady Handgun Violence Prevention Act]; 31 *U.C. Davis L. Rev.* 625 [Violence Against Women Act after *Lopez*; reconsidering congressional power under Fourteenth Amendment].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Gonzales v. Raich* (2005) 545 U.S. 1, 125 S.Ct. 2195, 2201, 2211, 162 L.Ed.2d 1, 14, 26, 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare, Supp.*, §70 [Congress' power to regulate controlled substances encompasses markets where drugs are produced and consumed; thus, Congress may prohibit local cultivation and use of marijuana for medicinal purposes in California even though that cultivation and use complies with California law]; *Gonzales v. Oregon* (2006) 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748, 1 *Cal. Crim. Law* (3d), *Crimes Against the Person, Supp.*, §101 [federal Controlled Substances Act does not authorize U.S. Attorney General to prohibit states from allowing doctors to prescribe regulated drugs for physician-assisted suicide]; 31 *Ecology L. Q.* 459 [Commerce Clause challenges to Endangered Species Act]; 119 *Harv. L. Rev.* 169 [*Gonzales v. Raich*]; 41 *San Diego L. Rev.* 1873 [medical marijuana and revival of federalism].



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aa. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1320

[§ 1320] In General.

(1) *Early Cases Limiting Federal Power.* The authority of Congress to regulate local production was formerly denied in the celebrated decision of *Hammer v. Dagenhart* (1918) 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101. Here, the attempt by Congress to prohibit interstate shipment of goods manufactured by child labor was held void, on the theory that Congress could not prohibit commerce where the *goods* themselves were not harmful, and that the real object of the statute was to control local production.

In *A.L.A. Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837, 850, 79 L.Ed. 1570, 1588, petitioners, whose business was carried on wholly within the State of New York, were convicted of violating the Live Poultry Code, adopted under the National Industrial Recovery Act of 1933. The statute provided for the regulation of industry under codes of fair competition approved by and subject to modification by the President, during the period of an emergency. Violation of a code provision in transactions "in or affecting interstate or foreign commerce" was made criminal. Codes were adopted extensively regulating production, prices, hours of labor, wages, and trade practices. *Held*, the Act was unconstitutional; it went beyond the commerce power in its regulation of local activities. The Court declared that the *indirect effect* of depressed production on interstate commerce does not give Congress the power to regulate production. (See *Carter v. Carter Coal Co.* (1936) 298 U.S. 238, 56 S.Ct. 855, 869, 80 L.Ed. 1160, 1185 [holding Bituminous Coal Conservation Act invalid]; on abandonment of *Schechter*, see *infra*, §1322.)

(2) *Enforcement of Local State Policy.* In *Kentucky Whip & Collar Co. v. Illinois Cen. R. Co.* (1937) 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270, a federal statute made it unlawful knowingly to transport, in interstate or foreign commerce, goods made by convicted labor, where the destination was a state that prohibits or restricts their sale or possession. Plain labeling of the goods was also required. *Held*, the act was valid.

(a) Congress may exercise its regulatory power within the field of interstate commerce to forbid or punish the use of interstate commerce as an agency to promote immorality, dishonesty, or the spread of evil or harm from one state to another. The evil may be something inherent in the subject, e.g., diseased or noxious articles; or in the purpose, e.g., lottery tickets. The prohibition may be designed to give effect to national policy, e.g., prohibiting interstate carriers from

transporting commodities owned by them; or to prevent frustration of valid state laws protecting person and property, e.g., motor vehicle thefts, kidnapping. (57 S.Ct. 280, 81 L.Ed. 273.)

(b) Though the product itself is harmless, the state may lawfully prohibit intrastate commerce in convict-made goods to protect its free labor from this competition; and, as in the case of intoxicating liquors, Congress may properly act to prevent interstate commerce from being used to impede carrying out the state policy. (57 S.Ct. 281, 81 L.Ed. 275.)

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bb. Labor Regulations.

8 Witkin Sum. Cal. Law Const Law § 1321

[§ 1321] Labor Regulations.

(1) *National Labor Relations Act*. The rule of *A.L.A. Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, supra, §1320, was substantially modified in *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893. The National Labor Relations Act of 1935 declares that commerce has been injured by denial of the right of employees to organize and bargain collectively, and establishes the right, prohibits unfair labor practices, makes rules as to representation of employees for purposes of collective bargaining, and creates the National Labor Relations Board, giving it the power to investigate and prevent unfair practices, making its findings of fact conclusive where supported by evidence, and providing for review in the courts. Defendant Pennsylvania corporation and its subsidiaries owned and operated mines, railroads, steamships, warehouses, and fabricating shops in many states, and drew raw materials from these various sources into Pennsylvania plants for manufacture and subsequent distribution throughout the country. *Held*, the statute was constitutional, and validly applied to defendant.

Defendant relied chiefly on the holdings of *Schechter* and *Carter v. Carter Coal Co.* (1936) 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160, that manufacturing is not commerce. The board relied largely on the "flow of commerce" theory (supra, §1297), arguing that the raw materials moved to the steel mills, and through them as steel products, in a continuous "stream," the plant being a focal point. But the court left this aspect of the question undetermined, and rested its decision on the *federal power to control local activities for protection of interstate commerce*. Though activities may be intrastate when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress can control them. Where industries are, like defendant's, organized on a national scale, making their relation to interstate commerce the dominant factor in their activities, stoppage of manufacturing operations would have a serious and direct effect on commerce; and Congress may regulate their labor relations to protect interstate commerce from the paralyzing consequences of industrial war. "[O]f what avail is it to protect the *facility* of transportation, if interstate commerce is throttled with respect to the *commodities to be transported!*" (57 S.Ct. 627, 81 L.Ed. 915.)

(2) *Fair Labor Standards Act*. *United States v. Darby* (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, upheld the Fair Labor Standards Act of 1938. The Act prohibits shipment in interstate commerce of goods produced by employees

working in violation of its wage and hour regulations, and prohibits employment of workers in the production of goods "for interstate commerce" in violation of these provisions. The object was to exclude from interstate commerce goods produced under improper labor conditions, and to prevent the use of commerce to perpetuate substandard labor conditions by means of competition. *Held*: (a) The federal power over commerce is *plenary and complete*, equal to that of the state over intrastate commerce, and Congress, following its own conception of public policy, may exclude anything from commerce where its use might be conceived to be injurious. (b) Congress may regulate *intrastate* commerce when it so affects interstate commerce that it makes the regulation an appropriate means to a legitimate end. (c) *Hammer v. Dagenhart* (1918) 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, *supra*, §1320, was overruled, and *Carter v. Carter Coal Co.* was declared to have been limited by *Jones & Laughlin Steel Corp.* (See *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 [federal minimum wage and overtime provisions were applicable to employees of local transit system].)

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cc. Farming.

8 *Witkin Sum. Cal. Law Const Law* § 1322

[§ 1322] Farming.

The already weakened theory of *A.L.A. Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, supra, §1320, was finally abandoned in *Wickard v. Filburn* (1942) 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122. The Court there upheld the Agricultural Adjustment Act of 1938, fixing marketing quotas for wheat, as applied to an individual farmer who grew wheat purely for local consumption, but whose excessive production was considered a danger to the scheme of regulation. Recognizing that this was the first case to uphold federal regulation of strictly "local" activities, the Court repudiated the distinction between "direct" and "indirect" effects of intrastate activity, declaring that "no form of state activity can constitutionally thwart the regulatory power." Hence, it was immaterial that the activity was *local* and *not commerce*; whatever its nature, it can be reached by Congress "if it exerts a substantial economic effect on interstate commerce." (63 S.Ct. 89, 87 L.Ed. 135.)

This principle was reaffirmed in *Mandeville Island Farms v. American Crystal Sugar Co.* (1948) 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328. Defendant sugar refiners, controlling the supply of sugar beet seed, were able to compel sugar beet farmers to enter into uniform contracts to grow and sell the beets at fixed prices. In this action by California farmers for treble damages under the Sherman Act, defendant refiners argued that, although the manufacturer and sale of the sugar involved interstate commerce, the severable and distinct growing and sale of the beets took place entirely within California, and was therefore not subject to federal control. *Held*, the statute was validly applied. The modern approach draws no sharp line where interstate commerce ends and intrastate commerce begins. The location of the line makes no difference if the forbidden effects flow across it to injure interstate commerce or defeat congressional policy regarding it. "The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce,' without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority." (68 S.Ct. 1002, 92 L.Ed. 1336.)

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8 *Witkin Sum. Cal. Law Const Law* § 1323

[§ 1323] In General.

(1) *Constitutional Provision.* Congress has the power to (a) "provide for the common Defense," (b) "declare War," (c) "raise and support Armies," (d) "provide and maintain a Navy," (e) "make Rules for the Government and Regulation of the land and naval forces," and (f) call for the Militia to "suppress insurrections and repel invasions." (U.S. Const., Art. I, §8; see *Ex parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 1, 10, 87 L.Ed. 3, 11; *Perpich v. Department of Defense* (1990) 496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312 [under "Militia Clause" of U.S. Const., Art. I, §8, Congress can authorize members of National Guard to be ordered to active duty for purpose of training outside U.S.]; 26 *Loyola L.A. L. Rev.* 1291 [growing use of American military in civilian law enforcement operations]; 1 Rotunda, §§6.9, 6.10; 78 *Am.Jur.2d* (2002 ed.), War §12 et seq.)

(2) *Authority of President and Congress.* The President is "Commander in Chief of the Army and Navy" and has the authority to make treaties and appoint ambassadors. (U.S. Const., Art. II, §2; see 1 Tribe, §4-7; on treaties, see *infra*, §1338 et seq.; on power in foreign affairs, see *infra*, §1337.)

(3) *War Powers Resolution.* The War Powers Resolution (50 U.S.C., §1541 et seq.) requires the President to consult with Congress before committing troops to hostile situations abroad and requires that troops be withdrawn within 60 days unless Congress authorizes longer involvement. (See 102 *Harv. L. Rev.* 637; 34 *Loyola L.A. L. Rev.* 1 [War Powers Resolution and Kosovo]; 37 *U.C. Davis L. Rev.* 321 [Presidential Declarations of War]; 1 Rotunda, §6.12.)

In *Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578, the Court held that the United States has the authority, under the congressional resolution authorizing the use of force after September 11, 2001, to detain citizens who qualify as "enemy combatants." However, these citizens must be given a meaningful opportunity to contest the factual basis for detention before a neutral decisionmaker. (124 S.Ct. 2639, 2648, 159 L. Ed.2d 591, 601.)

(4) *Commentary.* The responsibilities of the President and Congress relating to war powers have been the subject of extensive commentary. (See 81 *Harv. L. Rev.* 1771 [allocation of power, between President and Congress, to control use of combat forces in foreign affairs]; 84 *Cal. L. Rev.* 167 [The Continuation of Politics by Other Means: The Original Understanding of War Powers]; 13 *Hastings Const. L. Q.* 233 [congressional authority to regulate use of nuclear weapons]; 14 *Hastings Const. L. Q.* 683 [covert war and presidential power]; 27 *Southwestern U. L. Rev.* 185 [The War Power and a Career-Minded Congress: Making the Case for Legislative Reform, Congressional Term Limits, and

Renewed Respect for the Intent of the Framers]; 56 *Stanf. L. Rev.* 605 [Accommodating Emergencies]; 56 *Stanf. L. Rev.* 755 [liability rules and mass detentions]; 51 *U.C.L.A. L. Rev.* 1619 [Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement]; *Am.Jur.2d*, *New Topic Service, Terrorism* §1 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Constitutional Provision*. See 1 Rotunda 4th, §§6.9, 6.10.(3) *War Powers Resolution*. See 16 *A.L.R. Fed* 2d 333 [construction and application of resolution].

(4) *Commentary*. See 118 *Harv. L. Rev.* 406 [*Hamdi v. Rumsfeld*]; 118 *Harv. L. Rev.* 2047 [Congressional Authorization and the War on Terrorism]; 119 *Harv. L. Rev.* 1815 [Recapturing the War Power]; 56 *Hastings L. J.* 441 [*Hamdi v. Rumsfeld*]; 45 *Santa Clara L. Rev.* 99 [rethinking War Powers Resolution]; 81 *So. Cal. L. Rev.* 477 [commander in chief power]; 38 *U.C. Davis L. Rev.* 79 [*Hamdi v. Rumsfeld*]; 53 *U.C.L.A. L. Rev.* 29 [The Security Constitution]; 54 *U.C.L.A. L. Rev.* 1559 [internal legal constraints on executive power]; 54 *U.C.L.A. L. Rev.* 1815 [challenges to civilian control of military]; 22 *A.L.R. Fed* 2d 1 [jurisdiction of federal court to grant writ of habeas corpus in proceeding concerning U.S. citizen detained by U.S. military].



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C. War Power.

2. Economic Regulations.

8 *Witkin Sum. Cal. Law Const Law* § 1324

[§ 1324] Economic Regulations.

In *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 56 S.Ct. 466, 473, 80 L.Ed. 688, 700, the Court upheld the right, under the National Defense Act of 1916, of the Tennessee Valley Authority, a federal agency, to construct a dam across a navigable stream to generate power, to produce nitrates and other products for munitions of war, and to sell surplus power generated there in peacetime. Price and rent controls during World War II were sustained under the Emergency Price Control Act. (See *Yakus v. United States* (1944) 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; *Bowles v. Willingham* (1944) 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892; 1 Rotunda, §6.11.)

The federal wartime Renegotiation Act, authorizing the recovery by the Government of excessive profits made under war contracts, was upheld in *Lichter v. United States* (1948) 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694. The Court declared that the "mobilization of property" was as essential as the mobilization of manpower under the Selective Service Act, and that both were grounded on the constitutional authority of Congress to raise and support armies and the Necessary and Proper Clause. (On continuance of war power after cessation of actual hostilities, see *Ludecke v. Watkins* (1948) 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881, *infra*, §1326.)

SUPPLEMENT: [This section is current through the latest supplement]

See 1 Rotunda 4th, §6.11.



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C. War Power.

3. Restrictions on Speech and Press.

8 Witkin Sum. Cal. Law Const Law § 1325

[§ 1325] Restrictions on Speech and Press.

In *Greer v. Spock* (1976) 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505, the Commanding Officer of Fort Dix Military Reservation, a basic combat training area in New Jersey, issued regulations prohibiting speeches or demonstrations of a partisan political nature, and requiring advance approval of distribution or posting of newspapers, magazines, circulars, or other publications. Respondents, candidates for federal office, challenged the regulation on the theory that, because members of the public were freely permitted to visit the Reservation, it became a "public forum" for purposes of the First Amendment. *Held*, this theory was historically and constitutionally false, and the regulations were valid.

(a) The military has a special constitutional function, and "it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum." The respondents therefore had no generalized constitutional right to make political speeches or distribute leaflets at *Fort Dix*. (96 S.Ct. 1217, 47 L.Ed.2d 514.)

(b) The regulation prohibiting speeches was not unconstitutionally applied here. Members of the Armed Forces stationed at the Reservation were wholly free as individuals to attend political rallies, out of uniform and off base. The policy of keeping official military activities free of entanglement with partisan politics was objectively and even-handedly applied. This "policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control." (96 S.Ct. 1218, 47 L.Ed.2d 515.)

(c) The regulation restricting distribution of publications was likewise not unconstitutionally applied. The commander, under official guidelines, can only disapprove those that he finds constitute a clear danger to military loyalty, discipline, or morale; and the Constitution does not disable a military commander from acting to avert the danger. Because respondents did not submit any material for review, no issue of unconstitutional application arose. (96 S.Ct. 1218, 47 L.Ed.2d 515.) (See *Brown v. Glines* (1980) 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 [regulation requiring Air Force members to obtain approval from base commander before distributing petitions within military base was upheld, on authority of *Greer*]; *United States v. Albertini* (1985) 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 [upholding federal statute barring civilian from reentering military base after being barred by commanding officer].)

Commentary on media restrictions during wartime is extensive. (See 19 *Hastings Const. L. Q.* 1037 [constitutionality of Desert Storm media restrictions]; 25 *Loyola L.A. L. Rev.* 1073 [press censorship and access restrictions during Persian Gulf War]; 23 *Pacific L. J.* 315 [constitutional analysis of press access to military operations

in Grenada, Panama, and Persian Gulf]; *44 Stanf. L. Rev.* 675 [constitutionality of press restrictions in Persian Gulf War]; *28 U.S.F. L. Rev.* 919 [analysis of Supreme Court cases and proposal for reform of military regulations governing media coverage of combat operations].)

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C. War Power.
4. Enemy Aliens.

8 Witkin Sum. Cal. Law Const Law § 1326

[§ 1326] Enemy Aliens.

(1) *Seizure of Property*. The power to seize property of enemy aliens during wartime has long been established. (See *United States v. Chemical Foundation* (1926) 272 U.S. 1, 47 S.Ct. 1, 5, 71 L.Ed. 131, 141 [no constitutional prohibition against confiscation of enemy properties]; *Cummings v. Deutsche Bank und Discontogesellschaft* (1937) 300 U.S. 115, 57 S.Ct. 359, 81 L.Ed. 545; *Schilling v. Rogers* (1960) 363 U.S. 666, 80 S.Ct. 1288, 4 L.Ed.2d 1478 [denying judicial review of determination of Director of Alien Property that petitioner was ineligible for return of property]; *Estate of Hogemann* (1965) 63 C.2d 131, 136, 45 C.R. 149, 403 P.2d 405 [seizure of California estate by U.S. Attorney General pursuant to Trading With the Enemy Act and executive orders vesting interests of German legatees]; 78 Am.Jur.2d (2002 ed.), War §36 et seq.)

(2) *Removal or Restraint of Persons*. The relatively unlimited scope of the war power in this field over persons is made clear in *Ludecke v. Watkins* (1948) 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881. The Alien Enemy Act of 1798 (50 U.S.C., §21) gives the President, during wartime, the authority to restrain or remove natives of a hostile government. In 1945, the President ordered the removal of alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety," and, pursuant to this order, petitioner was ordered deported. In upholding the denial of habeas corpus by the district court, the majority (5-4) laid down the following propositions: (a) The statute gave unrestricted power to the President, not subject to judicial review, regardless of the fact that he exercised the power through the Attorney General. (b) The power of the President under the statute did not terminate with the cessation of actual hostilities, because no treaty, legislation, or presidential proclamation had officially declared the end of the war. Whether the war had ended was a political question, and whether alien enemies were still dangerous involved political judgment "for which judges have neither technical competence nor official responsibility." (68 S.Ct. 1434, 92 L.Ed. 1889.) (c) The same considerations supporting this interpretation of the statute establish its validity under the war power. "The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights. ... The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts." (68 S.Ct. 1434, 92 L.Ed. 1889.)

The chief significance of *Ludecke* is its apparent holding that the Fourteenth Amendment, though applicable generally to "persons," may not be invoked by an enemy alien to secure procedural due process where the proceeding against him or her is within the constitutional and statutory war power of the President. (See 54 Stanf. L. Rev. 953

[Enemy Aliens]; 55 *Stanf. L. Rev.* 1419 [mandatory detention under Patriot Act].)

In *Rasul v. Bush* (2004) 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548, the Court held that the habeas corpus statute confers jurisdiction on the district court to review the legality of Executive detention of aliens at *Guantanamo Bay Naval Base*. (124 S.Ct. 2696, 159 L.Ed.2d 560.) (See 192 A.L.R. Fed 595 [Jurisdiction of Federal Court To Grant Writ of Habeas Corpus in Proceeding Concerning Alien Detainees Held Outside the United States].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Removal or Restraint of Persons*. See 118 *Harv. L. Rev.* 396 [*Rasul v. Bush*]; 6 A.L.R. Fed 2d 185 [Rights of Alien Detainees Held Outside the United States as to Their Treatment and Conditions of Detainment].

On authorization to hold citizen combatants, see *Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578, text, §1323; on trial of enemy alien by military commission, see *Hamdan v. Rumsfeld* (2006) 548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723, Supp., infra, §1328.

In *Boumediene v. Bush* (2008) 553 U.S. ___, 128 S.Ct. 2229, 171 L.Ed.2d 41, 94, the Court held that certain procedures for review of the status of Guantanamo detainees set forth in the Detainee Treatment Act of 2005 were not an adequate and effective substitute for habeas corpus. Hence, §7 of the Military Commissions Act of 2006, 28 U.S.C., §2241(e), which strips jurisdiction from federal courts to hear applications for habeas corpus from detainees, is unconstitutional. The detainees have the constitutional privilege of habeas corpus, which may not be withdrawn except in conformity with the Suspension Clause, U.S. Const., Art. I, §9, cl. 2. (128 S.Ct. 2274, 2277, 171 L.Ed.2d 94, 97.)

Three justices concurred (128 S.Ct. 2277, 171 L.Ed.2d 97), and four justices joined in two dissenting opinions (128 S.Ct. 2279, 2293, 171 L.Ed.2d 99, 115).



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5. American Citizens of Japanese Descent.

8 *Witkin Sum. Cal. Law Const Law* § 1327

[§ 1327] American Citizens of Japanese Descent.

During the war with Japan, certain military orders were issued not only against aliens but also affecting American citizens of Japanese descent. In *Hirabayashi v. United States* (1943) 320 U.S. 81, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774, 1782, a curfew order affecting Japanese persons, and designed to prevent espionage and sabotage, was held a valid war measure, because this racial group might reasonably be deemed to include sympathizers with the enemy cause and could therefore constitute a menace to public safety. In *Korematsu v. United States* (1944) 323 U.S. 214, 65 S.Ct. 193, 194, 89 L.Ed. 194, 199, an order excluding these persons from certain military zones on the Pacific Coast was upheld on the same grounds. (Cf. *Ex parte Mitsuye Endo* (1944) 323 U.S. 283, 65 S.Ct. 208, 218, 89 L.Ed. 243, 255 [holding that exclusion order and statutes could not be interpreted to authorize detention in relocation center of citizen of Japanese ancestry whose loyalty was conceded]; 116 *Harv. L. Rev.* 1933 [*Endo*].) (See 3 Rotunda, §18.8; 51 *U.C.L.A. L. Rev.* 933 [review of cases and lessons of history]; 78 *Am.Jur.2d* (2002 ed.), *War* §§32, 33.)

These decisions have been criticized, and a federal district court vacated the conviction in *Korematsu*, concluding that the decision had been based on suppression of evidence and mistaken assumptions. (See 1 *Cal. Western L. Rev.* 1, 8; 26 *Santa Clara L. Rev.* 1; 21 *Loyola L.A. L. Rev.* 979.)

The Civil Liberties Act of 1988 (a) acknowledges and apologizes for "the fundamental injustice" of wartime evacuation, relocation, and internment of citizens and permanent resident aliens, (b) establishes a public education fund, and (c) authorizes restitution of \$ 20,000 to each living individual of Japanese ancestry deprived of liberty or property as a result of evacuation, relocation, or internment. (See 21 *Loyola L.A. L. Rev.* 979, 1029.)

Section 2 of the Act states: "Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons, and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation."

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Rotunda 4th, §18.8; 27 Thomas Jefferson L. Rev. 255 [*Korematsu*].



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6. Martial Rule and Military Commissions.

8 *Witkin Sum. Cal. Law Const Law* § 1328

[§ 1328] Martial Rule and Military Commissions.

The law of martial rule, and the jurisdiction of military commissions, have been the subject of considerable discussion since World War II. (See 48 *Cal. L. Rev.* 1 [Peacetime Martial Law in Guam]; 33 *Golden Gate L. Rev.* 207 [unequal treatment of U.S. citizens after September 11, 2001]; 42 *So. Cal. L. Rev.* 546 [Martial Law]; 76 *So. Cal. L. Rev.* 1371 [Detentions, Military Commissions, Terrorism, and Domestic Case Precedent]; 185 *A.L.R. Fed* 475 [Designation as Unlawful or Enemy Combatant].)

Jurisdiction of military commissions over enemy belligerents is clear. (See *Ex parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 [German citizens charged with spying and violation of laws of war]; *In re Yamashita* (1946) 327 U.S. 1, 66 S.Ct. 340, 344, 90 L.Ed. 499, 505 [captured Japanese generals charged with violation of laws of war]; *Hirota v. MacArthur* (1948) 338 U.S. 197, 69 S.Ct. 197, 93 L.Ed. 1902 [International Military Tribunal for Far East; decisions not subject to review by U.S. Supreme Court]; *Johnson v. Eisentrager* (1950) 339 U.S. 763, 70 S.Ct. 936, 945, 94 L.Ed. 1255, 1267 [German nationals charged with military activity against U.S. in China after German surrender; no right to habeas corpus]; cf. *Rasul v. Bush* (2004) 542 U.S. 466, 124 S.Ct. 2686, 2693, 159 L.Ed.2d 548, 557 [distinguishing *Eisentrager*; district court had jurisdiction to hear alien detainees' habeas corpus challenges to detention at Guantanamo Bay Naval Base].)

On the other hand, it was early declared that a military commission has no jurisdiction over resident civilian citizens in areas in which the courts are functioning. In *Ex parte Milligan* (1866) 71 U.S. 2, 18 L.Ed. 281, 296, petitioner, who had never been in the military service of the United States, was arrested, charged with conspiracy against the Government, tried before a military commission, and sentenced to hang. During the period of his detention, the federal grand jury in that territory met and adjourned without indicting him. *Held*, the commission had no jurisdiction to try him. Martial law may properly be applied on the scene of active military operations in cases of actual foreign invasion or civil war when the courts are closed, but can never exist where the courts are open and in the unobstructed exercise of their jurisdiction. (See *Duncan v. Kahanamoku* (1946) 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 [Hawaiian Organic Act did not authorize military courts under declaration of martial law to take over trial of all offenses by civilians in Hawaii].)

SUPPLEMENT: [This section is current through the latest supplement]
See 118 *Harv. L. Rev.* 1962 [Secret Evidence in the War on Terror].

In a remarkably fractured decision, five justices in *Hamdan v. Rumsfeld* (2006) 548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723, agreed that the military commission convened to try plaintiff, a Yemeni national being held as an enemy combatant at Guantanamo Bay, Cuba, lacked the power to proceed because its structure and procedures violated both the Uniform Code of Military Justice (UCMJ) (text, §1330) and the Geneva Conventions. The Commission Order governing the procedures applicable in plaintiff's trial provided that he could be excluded from "closed" parts of the proceedings and could be convicted based on evidence that he had never seen or heard. Further, evidence could be admitted against him that did not comply with admissibility and relevancy rules normally applicable in criminal trials or court-martial proceedings.

(a) The President determined that the dangers to the United States from international terrorism makes it impracticable to apply in military commissions the normal rules of law and evidence applicable in criminal cases in district courts. However, this determination "is insufficient to justify variances from the procedures governing courts-martial ... and requires a different showing of impracticability." The UCMJ demands that the rules applied in courts-martial also "apply to military commissions unless impracticable." The President has not "made a similar official determination that it is impracticable to apply the rules for courts-martial." (126 S.Ct. 2791, 165 L.Ed.2d 772.) Even if the President made this determination, nothing in the record here "demonstrates that it would be impracticable to apply court-martial rules in this case." (126 S.Ct. 2791, 2792, 165 L.Ed.2d 773.)

(b) The Geneva Conventions are "part of the law of war ... [a]nd compliance with the law of war is the condition upon which the authority" for military commissions set forth in Article 21 of the UCMJ is granted. (126 S.Ct. 2794, 165 L.Ed.2d 775.) The Government asserts that the Geneva Conventions do not apply because plaintiff was captured as an al Qaeda operative and the Conventions only apply when war has been declared or there is an armed conflict between signatory nations. However, Article 3 of the Conventions is applicable to plaintiff. It applies to conflicts "not of an international character occurring in the territory" of one of the signatory parties, and requires sentencing "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." As used in this article, the phrase "not of an international character" means that the conflict is not between nations. (126 S.Ct. 2795, 165 L.Ed.2d 776, 777.)



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7. Courts-Martial and Uniform Code.

a. American Military Court System.

8 *Witkin Sum. Cal. Law Const Law* § 1329

[§ 1329] American Military Court System.

Like state law, military law is a jurisprudence that exists separate and apart from the law that governs in the federal judicial establishment. (*Burns v. Wilson* (1953) 346 U.S. 137, 73 S.Ct. 1045, 1047, 97 L.Ed. 1508, 1513; see 103 *Harv. L. Rev.* 1909 [Military Justice and Article III]; 28 *Southwestern U. L. Rev.* 481 [Courts-Martial: Time To Play Taps?]; 53A *Am.Jur.2d* (1996 ed.), *Military and Civil Defense* §250 et seq.)

In *Parker v. Levy* (1974) 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439, an army captain was convicted in a court-martial of violating several articles of the Uniform Code of Military Justice, including Art. 133, conduct unbecoming an officer and gentleman, and Art. 134, disorders and neglects to the prejudice of good order and discipline. The evidence showed that on a number of occasions he criticized the Vietnam War, characterized Special Forces personnel as "liars and thieves and killers of peasants," and urged black people to refuse to fight. On habeas corpus in the federal district court, he challenged the constitutionality of the articles for uncertainty and overbreadth. *Held*, the articles were valid and the conviction was proper.

(a) The military is "a specialized society separate from civilian society" and military law is a separate jurisprudence. (94 S.Ct. 2555, 2556, 41 L.Ed.2d 450, 451.)

(b) The differences between the two systems continue under the Uniform Code. "While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community." (94 S.Ct. 2558, 41 L.Ed.2d 454.)

(c) The challenged articles have been construed by military authorities and the Court of Military Appeals (now the Court of Appeals for the Armed Forces; see *infra*, §1330) to partially narrow their broad scope, and there is a substantial range of conduct to which both articles apply without vagueness or imprecision. (94 S.Ct. 2560, 2561, 41 L.Ed.2d 456, 457.) Hence, "[w]hile there may lurk at the fringes of the Articles, even in the light of their narrowing construction by the United States Court of Military Appeals, some possibility that conduct which would be ultimately held to be protected by the First Amendment could be included within their prohibition, we deem this insufficient to invalidate either of them at the behest of appellee." (94 S.Ct. 2564, 41 L.Ed.2d 460.) (See *Secretary of Navy v. Avrech* (1974) 418

U.S. 676, 94 S.Ct. 3039, 41 L.Ed.2d 1033; 58 So. Cal. L. Rev. 871 [Military Dissent].)

In *Weiss v. United States* (1994) 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1, the court rejected a challenge to the method of appointing military judges. Under the Uniform Code of Military Justice (UCMJ), infra, §1330, military judges must be commissioned officers and members of a federal or state bar. They are selected by the Judge Advocate General of their branch of the armed forces and perform judicial duties only when so assigned; they do not serve for fixed terms. Weiss and Hernandez, Marines convicted of offenses under the UCMJ, argued that the method of appointment violates the Appointments Clause (see supra, §172) and that the lack of a fixed term violates the Due Process Clause. *Held*, neither provision is violated.

(a) All the military judges involved were already commissioned military officers when they were assigned to serve as judges. Thus, they had already been appointed under the *Appointments Clause*. (114 S.Ct. 757, 127 L.Ed.2d 11.) Congress has not required a separate appointment as judge, and the Appointments Clause itself does not require a second appointment before a military officer may serve as a judge. (114 S.Ct. 760, 127 L.Ed.2d 14.)

(b) *Middendorf v. Henry* (1976) 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556, infra, §1334, provides the appropriate standard for evaluating a due process claim in the military context. Hence, the question is whether the factors favoring a fixed term of office are so extraordinarily weighty that they overcome the balance struck by Congress. (114 S.Ct. 761, 127 L.Ed.2d 15.)

(c) An impartial judge is a necessary component of a fair trial. However, there is no claim that the judges here were biased. A fixed term of office has never been a part of the military justice system, and the UCMJ and corresponding regulations provide safeguards that insulate military judges from the effects of command influence and ensure impartiality. (114 S.Ct. 761, 762, 127 L.Ed.2d 16, 17.) Hence, petitioners have failed to demonstrate that the factors favoring a fixed term of office are so extraordinarily weighty that they overcome the balance achieved by Congress. (114 S.Ct. 763, 127 L.Ed.2d 18.) (See *Ryder v. United States* (1995) 515 U.S. 177, 115 S.Ct. 2031, 2034, 2036, 132 L.Ed.2d 136, 141, 144 [after Court of Military Appeals agreed with defendant that civilian judges on Coast Guard Court of Military Review had been appointed in violation of Appointments Clause, actions of those judges could not be upheld under de facto officer doctrine].)

SUPPLEMENT: [This section is current through the latest supplement]
See 53 *Am.Jur.2d* (2006 ed.), *Military and Civil Defense* §212 et seq.



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7. Courts-Martial and Uniform Code.

b. Uniform Code of Military Justice.

8 Witkin Sum. Cal. Law Const Law § 1330

[§ 1330] Uniform Code of Military Justice.

The Uniform Code of Military Justice (UCMJ) (*10 U.S.C., §801 et seq.*), effective in 1951, modernized the military justice procedure and created a high reviewing tribunal, now called the Court of Appeals for the Armed Forces in 1994. (See *10 U.S.C., §867.*) Rigorous provisions in the Code "guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense." It establishes "a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services. And finally Congress has provided a special post-conviction remedy within the military establishment, apart from ordinary appellate review, whereby one convicted by a court-martial, can attack collaterally the judgment under which he stands convicted." (*Burns v. Wilson (1953) 346 U.S. 137, 73 S.Ct. 1045, 1048, 97 L.Ed. 1508, 1514*; on three tiers of military courts under UCMJ, see *Ryder v. United States (1995) 515 U.S. 177, 115 S.Ct. 2031, 2037, 132 L.Ed.2d 136, 146.*) (See *81 Harv. L. Rev. 1697* [contemptuous words against President or other civilian authority]; *82 Harv. L. Rev. 483* [suspension of statute of limitations for absence without leave in time of war]; *22 Hastings L. J. 201* [Courts-Martial Practice: A View From the Top]; *22 Hastings L. J. 213* [Judicialization of Military Courts]; *22 Hastings L. J. 259* [Prejudicial and Discreditable Military Conduct]; *22 Hastings L. J. 291* [Disciplinary Discharges--Restricting the Commander's Discretion]; *33 U.C.L.A. L. Rev. 1189* [Military Free Speech]; *53A Am.Jur.2d (1996 ed.), Military and Civil Defense §252.*)

SUPPLEMENT: [This section is current through the latest supplement]
See *53 Am.Jur.2d (2006 ed.), Military and Civil Defense §214.*



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7. Courts-Martial and Uniform Code.

c. Status of Forces Agreements.

8 *Witkin Sum. Cal. Law Const Law* § 1331

[§ 1331] Status of Forces Agreements.

The Status of Forces Agreements with some foreign nations (NATO countries and Japan) recognize the primary jurisdiction of their courts over offenses committed by members of the American armed forces, other than offenses against the United States or its personnel, or arising out of an act or omission in the performance of official duty. The agreements also provide that either nation may, in cases where it is deemed important, request a waiver of the other's primary jurisdiction.

The validity of the agreements was upheld in *Wilson v. Girard* (1957) 354 U.S. 524, 77 S.Ct. 1409, 1 L.Ed.2d 1544. Girard, an American soldier, fired an empty cartridge case from a grenade launcher in the direction of trespassing Japanese civilians, killing a woman. He was indicted by the Japanese authorities, and the United States waived whatever jurisdiction it may have. *Held*, there was no constitutional objection to this procedure.

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d. No Jurisdiction Over Civilians.

8 *Witkin Sum. Cal. Law Const Law* § 1332

[§ 1332] No Jurisdiction Over Civilians.

Earlier cases (see *supra*, §1328) "recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed." (*Reid v. Covert* (1957) 354 U.S. 1, 77 S.Ct. 1222, 1239, 1 L.Ed.2d 1148, 1172.) (See 55 *Stanf. L. Rev.* 1999 [Treaties, International Law, and Constitutional Rights].)

(1) *Discharged Service Members*. The Uniform Code of Military Justice (*supra*, §1330) provided that a person under military jurisdiction who committed a serious offense (punishable by 5 years' imprisonment) remained subject to that jurisdiction despite termination of his or her military status if the person could not be tried in an American civilian court. This provision was held unconstitutional in *United States v. Quarles* (1955) 350 United States 11, 76 S.Ct. 1, 100 L.Ed. 8. Toth was honorably discharged from the Air Force in Korea, and returned to the United States. Five months later he was arrested by military authorities, charged with murder allegedly committed in Korea, and taken to Korea to stand trial before a court-martial. *Held*, the military court had no jurisdiction. The Court envisaged serious dangers (over 3,000,000 veterans who might be thus brought under military jurisdiction), and a simple solution to the problem (confer this jurisdiction on the federal district court). No constitutional power was found to justify this attempt to discard the Article III type of federal court in favor of the military tribunal. "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.' We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution." (76 S.Ct. 8, 100 L.Ed. 17.)

(2) *Persons Accompanying Armed Forces in Foreign Country*. The Code (see 10 U.S.C., §802(a)(11)) was made applicable to offenses committed by persons accompanying the armed services abroad if that jurisdiction is authorized by agreement with the foreign nation. In cases arising in Japan and Great Britain, both involving murders of American servicemen by their wives, the defendants were tried by court-martial and convicted. The United States Supreme Court first upheld the constitutionality of the Code provision and affirmed the convictions. (*Kinsella v. Krueger* (1956) 351 U.S. 470, 76 S.Ct. 886, 100 L.Ed. 1342; *Reid v. Covert* (1956) 351 U.S. 487, 76 S.Ct. 880, 100 L.Ed. 1352.) But on rehearing of the two consolidated cases, the Court rendered a new opinion in *Reid v. Covert* (1957) 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1157, in which it took a contrary position. The Court held that the Bill of Rights is fully applicable to

American citizens while outside the continental limits of the *United States* (77 S.Ct. 1226, 1 L.Ed.2d 1158); that no treaty with a foreign nation can authorize action contrary to the *Constitution* (77 S.Ct. 1230, 1 L.Ed.2d 1163); that the military power under U.S. Const., Art. I, §8, cl. 14, does not extend to persons who are not *members* of the "land and naval forces" (77 S.Ct. 1233, 1 L.Ed.2d 1165); and that *Quarles* was controlling (77 S.Ct. 1238, 1 L.Ed.2d 1171).

In *Kinsella v. United States* (1960) 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268, the *Reid* doctrine was applied to the conviction of a soldier's wife in Germany for involuntary manslaughter. The Court declared that military jurisdiction depends on the status of the accused rather than the nature of the offense, and concluded that there was no practical necessity or constitutional justification for expanding the military power to permit prosecution of civilians for any offenses, capital or noncapital. (80 S.Ct. 304, 4 L.Ed.2d 277.)

(3) *Distinction: Reservists.* Reservists who voluntarily accept written orders for inactive training duty are subject to military jurisdiction. (See 10 U.S.C., §802(a)(3); 7 Cal. Western L. Rev. 238; 7 U.S.F. L. Rev. 57; 73 Harv. L. Rev. 1626 [reservist subject to military jurisdiction for offense committed while on active duty].)

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e. Jurisdiction Over Non-Service-Connected Crimes.

8 *Witkin Sum. Cal. Law Const Law* § 1333

[§ 1333] Jurisdiction Over Non-Service-Connected Crimes.

(1) *Former Law.* In *O'Callahan v. Parker* (1969) 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291, petitioner was an army sergeant stationed in Hawaii. While on leave, in civilian clothes, he assaulted and attempted to rape a girl. The police delivered him to the military, and he was tried by court-martial. His sentence was 10 years' imprisonment, forfeiture of pay and allowances, and dishonorable discharge. The Court of Military Appeals (now the Court of Appeals for the Armed Forces; see *supra*, §1330) affirmed. On habeas corpus, *held*, the trial was invalid. The prior holdings that courts-martial have no jurisdiction over nonsoldiers (*supra*, §1332) do not imply that they have unlimited jurisdiction over soldiers. (89 S.Ct. 1688 et seq., 23 L.Ed.2d 299 et seq.) To be under military jurisdiction, the crime must be service-connected. (89 S.Ct. 1690, 23 L.Ed.2d 301.) Here, it was not. Petitioner was on leave, not on a military post or enclave, not in performance of military duties; and the victim was not performing these duties. It was peacetime; the situs was not under military control; the civil courts were open. There was no flouting of military authority, security of a military post, or integrity of military property. (89 S.Ct. 1691, 23 L.Ed.2d. 302.)

Three justices dissented. (89 S.Ct. 1692, 23 L.Ed.2d 303.) (See *Relford v. Commandant, United States Disciplinary Barracks* (1971) 401 U.S. 355, 91 S.Ct. 649, 651, 28 L.Ed.2d 102, 104, footnote 1 [citing numerous comments on *O'Callahan*, and leaving open issue of its retroactivity]; *Gosa v. Mayden* (1973) 413 U.S. 665, 93 S.Ct. 2926, 2939, 37 L.Ed.2d 873, 892 [*O'Callahan* decision is prospective only].)

(2) *O'Callahan Overruled.* In *Solorio v. United States* (1987) 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364, petitioner, on active duty in the Coast Guard, sexually abused daughters of fellow Coast Guardsmen. He was tried by court-martial, and the Court of Military Appeals upheld jurisdiction on the ground that the offenses were service-connected. The Supreme Court affirmed the decision, but also abandoned the service-connection test, and overruled *O'Callahan*.

(a) "In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused. ... This view was premised on what the Court described as 'the natural meaning' of Art. I, §8, cl. 14, as well as the Fifth Amendment's exception for 'cases arising in the land or naval forces.' " (107 S.Ct. 2926, 97 L.Ed.2d 370.) "Implicit in the military status test" was the principle that the scope of court-martial jurisdiction over offenses committed by

servicemen was a matter reserved for *Congress*. (107 S.Ct. 2927, 97 L.Ed.2d 371.)

(b) The constitutional grant of power to Congress to regulate the armed forces appears in the same section as do the provisions granting Congress authority to regulate commerce, to coin money, and to declare war. "On its face there is no indication that the grant of power in clause 14 was any less plenary than the grants of other authority to Congress in the same section." (107 S.Ct. 2928, 97 L.Ed.2d 372.) The historical foundation for the *O'Callahan* Court's holding is insufficient. "[T]here is overwhelming force to Justice Harlan's reasoning that the plain language of the Constitution, as interpreted by numerous decisions of this Court preceding *O'Callahan*, should be controlling on the subject of court-martial jurisdiction." (107 S.Ct. 2931, 97 L.Ed.2d 376.) "We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged." (107 S.Ct. 2933, 97 L.Ed.2d 378.)

One justice, concurring in the judgment, saw no reason to reexamine the *O'Callahan* holding. Three other justices, dissenting, asserted that *O'Callahan* was correct and workable, and that the majority "disregards constitutional language and principles of *stare decisis* in its singleminded determination to subject members of our armed forces to the unrestrained control of the military in the area of criminal justice." (107 S.Ct. 2934, 97 L.Ed.2d 379.)

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f. Procedure in Courts-Martial.

8 Witkin Sum. Cal. Law Const Law § 1334

[§ 1334] Procedure in Courts-Martial.

(1) *In General.* There has been a great deal of court-martial litigation since the adoption of the Uniform Code of Military Justice (UCMJ), *supra*, §1330, and a considerable volume of judicial precedent has accumulated in opinions of the Court of Military Appeals, now called the Court of Appeals for the Armed Forces (see *10 U.S.C.*, §867). (See *20 Cal. Western L. Rev.* 9 [Two-Thirds Verdict]; *33 Hastings L. J.* 727 [Military Triers of Fact: A Needless Deprivation of Constitutional Protections?]; *8 Hastings Const. L. Q.* 617 [military justice system and right to trial by jury]; *19 San Diego L. Rev.* 839 [Nonjudicial Punishment Under Article 15 of the Uniform Code]; *30 U.C.L.A. L. Rev.* 366 [Death Penalty in Military Courts: Constitutionally Imposed?].) The following may be consulted on significant procedural problems:

- (a) Insanity and the *McNaghten* test. (See *Whelchel v. McDonald* (1950) 340 U.S. 122, 71 S.Ct. 146, 95 L.Ed. 141.)
- (b) Law officer member. (See *Hiatt v. Brown* (1950) 339 U.S. 103, 70 S.Ct. 495, 94 L.Ed. 691.)
- (c) Right to move for new trial. (See *Gusik v. Schilder* (1950) 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146.)
- (d) Review of sentence by board of review. (See *Jackson v. Taylor* (1957) 353 U.S. 569, 77 S.Ct. 1027, 1 L.Ed.2d 1045.)
- (e) Right to counsel. (See *In re Palacio* (1965) 238 C.A.2d 545, 548, 48 C.R. 50 [under Uniform Code and Cal. Mil. & Vet.C.].)
- (f) Review by Court of Appeals for the Armed Forces. (See *United States v. Augenblick* (1969) 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 [availability of this review precluded collateral attack by action to recover back pay in court of claims, where challenge was not on constitutional questions but only as to asserted violation of rules of evidence]; *Noyd v. Bond* (1969) 395 U.S. 683, 89 S.Ct. 1876, 23 L.Ed.2d 631 [exhaustion of military remedy before seeking relief in civil court]; *Ryder v. United States* (1995) 515 U.S. 177, 115 S.Ct. 2031, 2038, 132 L.Ed.2d 136, 146 [difference between Court of Military Appeals and intermediate courts of military review].)

(2) *Summary Court-Martial.* The UCMJ provides four methods of handling offenses: general, special, and

summary courts-martial, and disciplinary punishment administered by the commanding officer. General and special courts-martial are like judicial proceedings, with the right to counsel guaranteed. Disciplinary punishment is administrative in nature, with no counsel provided. Summary court-martial is an informal proceeding conducted by a single commissioned officer, acting as judge, factfinder, prosecutor, and defense counsel, to exercise justice promptly for relatively minor offenses. Jurisdiction is confined to noncommissioned officers and enlisted personnel, and the accused must consent to the trial or the case will be dismissed or referred to a special or general court-martial. (See *Middendorf v. Henry* (1976) 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556.)

In *Middendorf*, the Court held that there was no right to counsel in these proceedings: (a) In view of the maximum punishment--30 days' confinement at hard labor--and the procedural differences between the nonadversary summary court-martial and a criminal trial, the summary court-martial was not a "criminal prosecution" within the meaning of the *Sixth Amendment*. (96 S.Ct. 1287, 47 L.Ed.2d 566.) (b) Contrary to the holding of a divided Court of *Military Appeals* (96 S.Ct. 1291, 47 L.Ed.2d 569), due process did not require counsel in this proceeding where Congress did not provide for it. Introduction of counsel would turn a brief, informal hearing into an attenuated proceeding, which would be a burden on the armed forces. Where the accused feels that he or she needs a formal, counseled proceeding, the accused may simply refuse consent; and the fact that by exercising this option the accused subjects himself or herself to greater possible penalties is not constitutionally decisive; these choices are a necessary part of the criminal justice system. (96 S.Ct. 1294, 47 L.Ed.2d 571.)

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g. Judicial Review.

8 *Witkin Sum. Cal. Law Const Law* § 1335

[§ 1335] Judicial Review.

(1) *Collateral Attack by Habeas Corpus.* The federal courts have only limited appellate jurisdiction over courts-martial; the final *appeal* is to the Court of Appeals for the Armed Forces. If, however, the military proceedings are challenged on "jurisdictional" grounds, e.g., denial of due process or other infringement of a constitutional right, a collateral attack on the decision by writ of habeas corpus is proper, and is recognized by the Uniform Code of Military Justice. (See *Hiatt v. Brown* (1950) 339 U.S. 103, 70 S.Ct. 495, 94 L.Ed. 691; *Gusik v. Schilder* (1950) 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 [necessity of exhausting remedy of motion for new trial]; *Burns v. Wilson* (1953) 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508; *Parisi v. Davidson* (1972) 405 U.S. 34, 92 S.Ct. 815, 821, 31 L.Ed.2d 17, 26 [district court may entertain attack based on conscientious objector status despite pending court-martial]; 95 A.L.R. Fed 472 [modern cases on review of court-martial convictions].)

A petition to enjoin court-martial proceedings has also been recognized. (See *Schlesinger v. Councilman* (1975) 420 U.S. 738, 95 S.Ct. 1300, 1308, 43 L.Ed.2d 591, 601, 602.)

The tendency has been to restrict review to cases involving serious challenges of denial of fundamental rights, and not to reexamine the evidence unless the military courts have failed to consider the issues. The military courts have the same responsibility as federal courts to protect constitutional rights, and Congress has made their decisions final. Moreover, "the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. ... Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law." (*Burns v. Wilson*, *supra*, 73 S.Ct. 1047, 97 L.Ed. 1513.) (See *Whelchel v. McDonald* (1950) 340 U.S. 122, 71 S.Ct. 146, 95 L.Ed. 141.)

(2) *Certiorari.* The Uniform Code of Military Justice creates a category of cases directly reviewable by the Supreme Court on certiorari. (See 28 U.S.C., §1259.) As outlined in 10 U.S.C., §867(a), the following cases are reviewed by the Court of Appeals for the Armed Forces: (a) cases in which the sentence extends to death, (b) cases that the Judge Advocate General orders sent to the court for review, and (c) cases in which the court grants review on petition of the accused and a showing of good cause. In addition, cases in which the Court of Appeals for Military Justice granted relief may be reviewed by the Supreme Court by writ of certiorari. (28 U.S.C., §1259.) (See 1 Rotunda,

§6.13.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Certiorari*. See 1 Rotunda 4th, §6.13.



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8 Witkin Sum. Cal. Law Const Law § 1336

[§ 1336] Selective Service.

Congress has implied power to provide for compulsory military service in time of war. (*Arver v. United States* (1918) 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349; see 53 Am.Jur.2d (1996 ed.), *Military and Civil Defense* §73 et seq.) Occasional broad challenges to the constitutionality of the draft have been made, but most of the cases have dealt with narrower constitutional issues and statutory interpretation. The following have been the principal problem areas:

(1) *Conscientious Objectors*. (See *United States v. Seeger* (1965) 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 [interpreting statutory requirement of objection based on "religious training and belief," and holding that each of three parties, though deviating from normal religious beliefs, met criterion]; *Welsh v. United States* (1970) 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 [defendant was entitled to status even if beliefs were not based on religious training]; on selective conscientious objection, see *Sicurella v. United States* (1955) 348 U.S. 385, 75 S.Ct. 403, 99 L.Ed. 436 [beliefs of Jehovah's Witnesses are not selective in fact]; *Gillette v. United States* (1971) 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 [status sought on basis of opposition to particular war was properly denied]; on right to ministerial deferment, see *Dickinson v. United States* (1953) 346 U.S. 389, 74 S.Ct. 152, 98 L.Ed. 132 [Jehovah's Witnesses]; on refusal to admit conscientious objector to bar, see *In re Summers* (1945) 325 U.S. 561, 65 S.Ct. 1307, 1312, 89 L.Ed. 1795, 1801; on denial of veterans' educational benefits to conscientious objector who performed required alternative civilian service, see *Johnson v. Robison* (1974) 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389.)

(2) *Failure To Register*. (See *Toussie v. United States* (1970) 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 [failure to register is not continuing act for purposes of statute of limitations].)

(3) *Preinduction Review*. (See *Breen v. Selective Service Local Bd. No. 16, Bridgeport, Connecticut* (1970) 396 U.S. 460, 90 S.Ct. 661, 24 L.Ed.2d 653 [bona fide student deferment, delinquency reclassification; preinduction review was proper]; *Fein v. Selective Service System Local Bd. No. 7, Yonkers, New York* (1972) 405 U.S. 365, 92 S.Ct. 1062, 31 L.Ed.2d 298 [denial of claim of conscientious objection was not subject to preinduction review].)

(4) *Regulations Against War Protestors*. (See *Oestereich v. Selective Service System Local Bd. No. 11, Cheyenne, Wyoming* (1968) 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 [theological student cannot be deprived of status because he returned draft card to express dissent from Vietnam war]; *Gutknecht v. United States* (1970) 396 U.S. 295, 90 S.Ct. 506, 24 L.Ed.2d 532 [accelerated induction of one seeking conscientious objector status as "delinquent" for war protest

was improper]; on burning draft cards, see *supra*, §473.)

(5) *Administrative Procedure*. (See *McKart v. United States* (1969) 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 [claim of deferment as sole surviving son may be asserted as defense in criminal action despite failure to exhaust administrative remedies; status is available even after death of parents]; *Mulloy v. United States* (1970) 398 U.S. 410, 90 S.Ct. 1766, 26 L.Ed.2d 362 [refusal to reopen classification to consider conscientious objector exemption claim was improper denial of administrative appeal]; *Ehlert v. United States* (1971) 402 U.S. 99, 91 S.Ct. 1319, 28 L.Ed.2d 625 [refusal to reopen to consider conscientious objector claim after induction notice was proper]; *Clay v. United States* (1971) 403 U.S. 698, 91 S.Ct. 2068, 29 L.Ed.2d 810 [conviction would be reversed where record was not clear that claim of conscientious objection was denied on valid basis]; *Musser v. United States* (1973) 414 U.S. 31, 94 S.Ct. 196, 38 L.Ed.2d 190 [following *Ehlert*]; 33 *Hastings L. J.* 871 [judicial review of draft classification].)

(6) *Required Registration of Males and Not Females*. The gender-based distinction is based on military judgment accepted by Congress in light of the fact that women, by statute, are not eligible for combat duty; hence, it is not a denial of equal protection to men. (*Rostker v. Goldberg* (1981) 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478.) (See 95 *Harv. L. Rev.* 161.)

SUPPLEMENT: [This section is current through the latest supplement]
See 53 *Am.Jur.2d* (2006 ed.), *Military and Civil Defense* §64 et seq.



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D. Power in Foreign Affairs.

1. In General.

8 Witkin Sum. Cal. Law Const Law § 1337

[§ 1337] In General.

The scope of federal power is much greater in the foreign area than in the domestic area, and the doctrine that only granted powers exist does not apply in this field. In *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255, a statute gave the President the power to prohibit or restrict the sale of munitions to certain countries at war. *Held*, assuming that this delegation was too broad to be sustained if applied to *internal affairs*, it was nevertheless valid.

(a) The powers of external sovereignty, including making of war, peace, treaties, and maintaining diplomatic relations with other nations, would have vested in the U.S. as necessary *concomitants of nationality* even if never mentioned in the Constitution; and other powers not mentioned there, such as the power to acquire territory by discovery, to expel undesirable aliens, and to make international agreements other than treaties, also exist. (57 S.Ct. 220, 81 L.Ed. 261.)

(b) The practical exercise of the power over external affairs requires a degree of discretion and freedom in the President much greater than that in domestic affairs, and a long current of legislative practice confirms the validity of the delegation here. (57 S.Ct. 221, 81 L.Ed. 262.) (On power to impose conditions on retention of citizenship acquired by birth abroad, see *Rogers v. Bellei* (1971) 401 U.S. 815, 91 S.Ct. 1060, 28 L.Ed.2d 499, *supra*, §196; on President's power to restrict travel to Cuba, see *Regan v. Wald* (1984) 468 U.S. 222, 104 S.Ct. 3026, 82 L.Ed.2d 171 [following *Zemel v. Rusk* (1965) 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179, *supra*, §404].)

In *Bethlehem Steel Corp. v. Board of Commrs. of Dept. of Water & Power of Los Angeles* (1969) 276 C.A.2d 221, 90 C.R. 800, the California Buy American Act (requiring contracts for public works construction, or purchase of materials for public use, to be awarded only to persons who agree to use or supply materials produced in the U.S.) was held unconstitutional. The statute, placing an embargo on foreign products, usurped the federal power to control foreign trade. (276 C.A.2d 225.) The federal Act is distinguishable. It serves as an equalizer in considering foreign bids, not as a complete embargo. (276 C.A.2d 227, footnote 8.) (See *Zschernig v. Miller* (1968) 389 U.S. 429, 88 S.Ct. 664, 670, 19 L.Ed.2d 683, 692, *infra*, §1340; *American Ins. Assn. v. Garamendi* (2003) 539 U.S. 396, 123 S.Ct. 2374, 2390, 156 L.Ed.2d 376, 399 [state statute seeking to resolve Holocaust-era insurance claims by U.S. residents by requiring domestic insurers doing business in California to disclose information about policies it, or any company related to it, sold in Europe between 1920 and 1945, interferes with federal executive's conduct of foreign relations, and is

preempted]; 117 *Harv. L. Rev.* 226 [*Garamendi*]; 107 *A.L.R.5th* 673 [state "buy American" acts].)

Commentary on the foreign affairs power is extensive. (See Rest.3d, Foreign Relations Law of the United States [covering jurisdiction, recognition, international agreements, and responsibility of states for injuries to aliens]; 75 *Cal. L. Rev.* 405 [powers of President and Congress]; 64 *So. Cal. L. Rev.* 1549 [Understanding Dynamic Obligations: Arms Control Agreements]; 17 *Southwestern U. L. Rev.* 659 [Challenging "Covert" Paramilitary Operations in Nicaragua Under the Neutrality Act]; 24 *U.C. Davis L. Rev.* 841 [Cutting the President Off From Tin Cup Diplomacy]; 38 *U.C.L.A. L. Rev.* 1533 [arms control agreements as congressional-executive agreements]; 1 *Rotunda*, §6.1 et seq.; 1 *Tribe*, §4-4 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Steinberg v. International Com. on Holocaust Era Ins. Claims* (2005) 133 *C.A.4th* 689, 699, 34 *C.R.3d* 944 [following *American Ins. Assn. v. Garamendi* (2003) 539 *U.S.* 396, 123 *S.Ct.* 2374, 156 *L.Ed.2d* 376; state statute providing that California residents may bring actions in California courts on Holocaust era insurance policies is preempted by foreign policy concerns; to have preemptive effect, specific interest need not be expressly set forth in official agreement, as long as that interest is reflected in official agreements and statements by officials of executive branch]; 1 *Rotunda* 4th, §6.1 et seq.; 94 *Cal. L. Rev.* 175 [inflation of executive's foreign affairs powers, 1951-1954]; 119 *Harv. L. Rev.* 1877 [Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions].



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2. Treaties.

a. In General.

8 *Witkin Sum. Cal. Law Const Law* § 1338

[§ 1338] In General.

(1) *In General.* The President has the power, "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." (U.S. Const., Art. II, §2.) (On extradition treaties, see *Valentine v. United States* (1936) 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5; on jurisdiction of Mexican Claims Commission, created by treaty between United States and Mexico, see *Luckhardt v. Mooradian* (1949) 92 C.A.2d 501, 509, 207 P.2d 579; for commentary on treaties generally, see *infra*, §1342.)

(2) *United Nations Charter and Conventions.* One of the contentions made against the former California Alien Land Act (invalidated on other grounds, *supra*, §722) was that its provisions were in conflict with the United Nations Charter statements of fundamental freedoms without distinction as to race. But in *Sei Fujii v. California* (1952) 38 C.2d 718, 242 P.2d 617, the court held that the Charter declarations were not self-executing provisions imposing legal obligations on member nations or creating rights in private persons. "The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the Alien Land Law." (38 C.2d 724.) (See *Sale v. Haitian Centers Council* (1993) 509 U.S. 155, 113 S.Ct. 2549, 125 L.Ed.2d 128 [neither Immigration and Nationality Act nor United Nations Convention Relating to the Status of Refugees limits President's power to order repatriation of undocumented aliens intercepted on high seas; Convention was not intended to have extraterritorial effect]; 108 Harv. L. Rev. 513 [waiver under Foreign Sovereign Immunities Act]; 61 Cal. L. Rev. 110 [domestic status of human rights clauses of U.N. Charter]; 19 Santa Clara L. Rev. 195 [individual enforcement of obligations arising under U.N. Charter]; *Rest.3d, Foreign Relations of the United States* §202.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* On applicability of Geneva Conventions to trial of enemy alien, see *Hamdan v. Rumsfeld* (2006) 548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723, Supp., *supra*, §1328.



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D. Power in Foreign Affairs.

2. Treaties.

b. Warsaw Convention.

8 *Witkin Sum. Cal. Law Const Law* § 1339

[§ 1339] Warsaw Convention.

The Convention for Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention) was adopted by the United States in 1934. (See 49 Stats. 3000 et seq.) It provides uniform rules for international air travel and limits potential liability for international air carriers.

Article 28(1) of the Convention states:

"An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principle place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination."

In *P.T. Airfast Services, Indonesia v. Superior Court* (1983) 139 C.A.3d 162, 188 C.R. 628, a wrongful death action arising from an airplane crash in Southeast Asia, defendant carrier sought to quash service of summons. Plaintiff, conceding the absence of minimum contacts between defendant and California, asserted jurisdiction under Article 28(1) of the Convention, contending that California was decedent's final destination. In finding no basis for jurisdiction under the Convention, the court discussed two conflicting interpretations of Article 28: (a) The view that, by engaging in international flights, a carrier consents to *personal jurisdiction* in one of the forums set forth in Article 28(1). (b) The view that the Convention provides only *treaty jurisdiction*. Even though a country may be a proper country in which to bring an action under Article 28, "questions of subject matter jurisdiction and personal jurisdiction over the defendant still must be resolved by reference to the domestic laws of the jurisdiction of the particular court" in which the action is brought. (139 C.A.3d 167.) (See *Eastern Airlines v. Floyd* (1991) 499 U.S. 530, 111 S.Ct. 1489, 113 L.Ed.2d 569 [Article 17, setting forth conditions under which international air carrier can be held liable for injuries to passengers, does not allow recovery for infliction of emotional distress unaccompanied by physical injury]; *Aquino v. Asiana Airlines* (2003) 105 C.A.4th 1272, 1280, 130 C.R.2d 223 [Warsaw Convention did not preempt claims relating to airline's refusal to let elderly plaintiffs board ticketed flight; plaintiffs merely tried to check in and never began operations of embarking]; 6 A.L.R.3d 1272 [construction and validity of Article 28(1)]; 8 *Am.Jur.2d* (1997 ed.), *Aviation* §§190, 191.)

In *Miceli v. MGM Grand Air* (1996) 51 C.A.4th 702, 59 C.R.2d 311, a case of first impression, plaintiff was injured

on an international charter flight arranged through his employer, when the plane hit turbulent weather. Defendant air carrier filed a motion for summary adjudication based on its defense that plaintiff's damages were limited to \$ 75,000 by the Warsaw Convention. The trial court granted the motion and entered judgment for that amount. *Held*, reversed and remanded.

(a) The Warsaw Convention applies to all international flights, including charter flights. However, Article 3 of the Convention requires a carrier to deliver a "passenger ticket" containing a statement that transportation is subject to the liability limitations established by the *Convention*. (51 C.A.4th 706.) Article 3(2) of the Convention provides that a carrier that accepts a passenger without a ticket having been delivered is not entitled to avail itself of the limited liability provisions of the *Convention*. (51 C.A.4th 707.)

(b) Here, plaintiff was never issued a ticket, and therefore had no notice of the liability limitations. (51 C.A.4th 707.) The charter contract between the air carrier and the charterer was not a "passenger ticket" for all who boarded the aircraft. (51 C.A.4th 709.)

In *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* (1999) 525 U.S. 155, 119 S.Ct. 662, 670, 142 L.Ed.2d 576, 588, another case of first impression, plaintiff claimed damages for emotional trauma from being subjected to a personal search by airline security before boarding her flight. The trial judge dismissed the claim, concluding that it was governed by the Warsaw Convention and was not compensable because plaintiff sustained no bodily injury. The Court of Appeals reversed, holding that "national law was intended to provide the passenger's remedy where the Convention did not expressly apply." *Held*, reversed.

(a) Under Article 24 of the Convention, cases covered by Article 17 may only be brought subject to the conditions and limitations set out in the *Convention*. (119 S.Ct. 671, 142 L.Ed.2d 589.) Article 17 provides for airline liability for a passenger's injury or death if the accident that caused the damage took place on board the aircraft or in the course of the operations of embarking or disembarking. (119 S.Ct. 668, 142 L.Ed.2d 586.) Under United States government and defendant airline interpretation, Article 24 precludes "a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy Article 17's liability conditions, notably, because the injury did not result from an 'accident' ... , or because the 'accident' did not result in physical injury or physical manifestation of injury." (119 S.Ct. 671, 142 L.Ed.2d 590.) A reasonable interpretation of an international treaty by the Executive Branch is ordinarily entitled to respect. "We conclude that the Government's construction of Article 24 is most faithful to the Convention's text, purpose, and overall structure." (119 S.Ct. 671, 142 L.Ed.2d 590.)

(b) The purpose of the Warsaw Convention is to provide uniformity in the rules governing the liability of international air carriers. "Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations." (119 S.Ct. 672, 142 L.Ed.2d 590.)

(c) An amended version of Article 24, effective March 4, 1999, clarifies the Convention's rule of exclusivity: " 'In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limitations set out in this Convention.' " (119 S.Ct. 674, 142 L.Ed.2d 593.)

One justice dissented, stating that "a treaty, like an Act of Congress, should not be construed to preempt state law unless its intent to do so is clear." (119 S.Ct. 677, 142 L.Ed.2d 598.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Doe v. United Air Lines* (2008) 160 C.A.4th 1500, 1512, 1514, 73 C.R.3d 541 [Warsaw Convention did not cover sexual assault on plane in absence of evidence of physical injury; injuries relating to mental distress do not constitute "bodily injury" under Convention]; 8A Am.Jur.2d (1997 ed.), Aviation, §§190, 191.



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2. Treaties.

c. Supremacy Over State Law.

8 Witkin Sum. Cal. Law Const Law § 1340

[§ 1340] Supremacy Over State Law.

Treaties are the "supreme law of the land." (U.S. Const., Art. VI.) But, unless self-executing, new treaty provisions do not supersede existing local law. (*Sei Fujii v. California* (1952) 38 C.2d 718, 721, 242 P.2d 617; for illustrations of state statutes upheld against contention that they invaded treaty-making power, see *Clark v. Allen* (1947) 331 U.S. 503, 67 S.Ct. 1431, 1438, 91 L.Ed 1633, 1645 [former statute making right of nonresident alien to inherit in California dependent on reciprocal inheritance rights being given U.S. citizens]; *Estate of Knutzen* (1948) 31 C.2d 573, 577, 191 P.2d 747 [same]; *Palermo v. Stockton Theatres* (1948) 32 C.2d 53, 64, 195 P.2d 1; 116 Harv. L. Rev. 2654 [discussing whether U.S. states are beyond reach of law of nations]; 1 Rotunda, §§6.5, 6.6; 1 Tribe, §4-6; *Rest.3d, Foreign Relations Law of the United States* §111; on state taxation of Indians and Indian tribes, see 9 *Summary* (10th), *Taxation*, §2.)

Zschernig v. Miller (1968) 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683, involved an Oregon reciprocal inheritance statute. An alien heir could inherit only by proof that he or she would receive the benefits of the property without confiscation by his or her country's government. Pursuant to this statute, Oregon held that the alien claimant, a resident of East Germany, could not take personal property. *Held*, reversed. The statute affected international relations, and impaired the effective exercise of the nation's foreign policy by the federal *Government*. (88 S.Ct. 670, 19 L.Ed.2d 692.) (See 82 Harv. L. Rev. 238 [commenting on unclear theory of *Zschernig*, and suggesting that it casts doubt on validity of all reciprocity statutes].)

Mitsubishi Materials Corp. v. Superior Court (2003) 113 C.A.4th 55, 6 C.R.3d 159, held that the 1951 peace treaty between the United States and Japan that formally ended World War II expressly preempted C.C.P. 354.6, which would otherwise allow surviving American prisoners of war to sue Japanese companies for whom they were forced to perform slave labor during the war. "[O]nly the federal government has the power to make war and peace with foreign nations, and that power specifically includes the authority to make peace treaties" that govern the rights of American nationals to sue foreign nationals in a state court. (113 C.A.4th 76, 77.) (See *Taiheiyo Cement Corp. v. Superior Court* (2004) 117 C.A.4th 380, 390, 12 C.R.3d 32 [following *Mitsubishi Materials Corp.* and *American Ins. Assn. v. Garamendi* (2003) 539 U.S. 396, 123 S.Ct. 2374, 2390, 156 L.Ed.2d 376, 399].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Medellin v. Texas* (2008) 554 U.S. ___, 128 S.Ct. 1346, 1358, 1367, 170 L.Ed.2d 190, 212, 221 [judgment of International Court of Justice based on violations of Vienna Convention was not directly enforceable as domestic law in state court; Protocol on which judgment was based was bare grant of jurisdiction, was not self-executing, and did not provide enforcement mechanism; hence, judgment did not constitute binding federal law that preempted state restrictions on filing successive habeas petitions]; 1 Rotunda 4th, §§6.5, 6.6.



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2. Treaties.

d. Limitations on Power.

8 Witkin Sum. Cal. Law Const Law § 1341

[§ 1341] Limitations on Power.

The Constitution places no express restrictions on the treaty power, and it seems not to be limited either by the scope of the power of Congress to legislate or by rights of the states. (*De Geofroy v. Riggs* (1890) 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642; *In re Terui* (1921) 187 C. 20, 24, 200 P. 954.) For example, the federal Government in 1913 passed legislation regulating the killing of migratory birds flying between the United States and Canada, which was held unconstitutional. Then a treaty was entered into with Great Britain, by the terms of which each nation agreed to enact these laws, and the subsequent legislation by Congress was upheld against a challenge based on the Tenth Amendment (reserved power of states). (*Missouri v. Holland* (1920) 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641.)

But in *De Geofroy*, the Court suggested that a treaty can neither authorize what the Constitution forbids, nor change the character of the national or state government, nor cede a portion of the territory of a state without its consent. And in *Reid v. Covert* (1957) 354 U.S. 1, 77 S.Ct. 1222, 1230, 1 L.Ed.2d 1148, 1163, the *De Geofroy* dictum was reaffirmed in the most positive terms. The Uniform Code of Military Justice attempted to give court-martial jurisdiction over civilians (supra, §1332) pursuant to executive agreements with Great Britain and Japan. The Government sought to sustain the Code provision against the contention that it denied the constitutional right to a jury trial, on the ground that it was legislation necessary and proper to carry out obligations of the United States under these international agreements. The court, referring to the "supreme law of the land" clause, said:

"There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. ... It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights--let alone alien to our entire constitutional history and tradition--to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." (See *Rest.3d, Foreign Relations Law of the United States* §115.)

It is also settled that a federal statute is equal in dignity to a treaty, and that a subsequent statute may nullify a treaty to the extent of a conflict. (*Whitney v. Robertson* (1888) 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386; see *Reid*, supra, 77

S.Ct. 1231, 1 L.Ed.2d 1164; South Dakota v. Bourland (1993) 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 [Congress had power to abrogate Cheyenne River Sioux Tribe's power to regulate hunting and fishing by non-Indians]; *Kirmse v. Hotel Nikko of San Francisco (1996) 51 C.A.4th 311, 59 C.A.2d 96* [Japanese Friendship, Commerce, and Navigation Treaty does not apply to domestic subsidiary of Japanese corporation]; *100 Harv. L. Rev. 853; 101 Harv. L. Rev. 511, 524; 28 Loyola L.A. L. Rev. 675 [Bourland]; 31 Stanf. L. Rev. 947* [application of civil rights to foreign employers operating under commercial treaties]; *Rest.3d, Foreign Relations Law of the United States §115.*)

SUPPLEMENT: [This section is current through the latest supplement]

See *Haluck v. Ricoh Electronics (2007) 151 C.A.4th 994, 1009, 60 C.R.3d 542* [following *Kirmse v. Hotel Nikko of San Francisco (1996) 51 C.A.4th 311, 59 C.R.2d 96*, text, p. 1057; treaty with Japan governing right of Japanese and American companies to hire specified employees of choice while operating in other's country did not bar employment discrimination action against U.S. company, which was wholly owned subsidiary of New Jersey corporation, which was wholly owned subsidiary of Japanese corporation].



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D. Power in Foreign Affairs.

2. Treaties.

e. Texts and Law Reviews.

8 Witkin Sum. Cal. Law Const Law § 1342

[§ 1342] Texts and Law Reviews.

(1) *In General.* Commentary on treaties and the treaty power is extensive. (See *104 Harv. L. Rev.* 1269 [Judicial Enforcement of International Law Against the Federal and State Governments]; *106 Harv. L. Rev.* 1792 [European nationalism and modernist renewal of international law]; *107 Harv. L. Rev.* 1099 [maintaining accountability in international regulation]; *108 Harv. L. Rev.* 1715 [developing countries and multilateral trade agreements; law and promise of development]; *114 Harv. L. Rev.* 2478 [Restructuring the Modern Treaty Power]; *78 Cal. L. Rev.* 449 [human rights violations in international law]; *92 Cal. L. Rev.* 1729 [ensuring U.S. compliance with Vienna Convention on Consular Relations]; *46 Hastings L. J.* 909 [procedure for international tribunal in former Yugoslavia]; *22 Hastings Const. L. Q.* 607 [exposure of human rights abuses as help or hindrance to reconciliation]; *23 Hastings Const. L. Q.* 727 [discussing proposed U.S. reservations to Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and their effect on human rights]; *22 Pepperdine L. Rev.* 1089 [safeguarding sustainable development through application of environmental impact statement requirements to international trade agreements]; *55 Stanf. L. Rev.* 1557 [delegations of authority to international institutions]; *55 Stanf. L. Rev.* 1697 [delegations of legislative, executive, and judicial authority]; *55 Stanf. L. Rev.* 1999 [Treaties, International Law, and Constitutional Rights]; *55 Stanf. L. Rev.* 2061 ["unsigning" treaties]; *20 U.C. Davis L. Rev.* 913 [interpretation of treaties]; *35 Stanf. L. Rev.* 259 ["Yellow Rain" and the Treaties Regulating Chemical and Biological Warfare]; *41 U.C.L.A. L. Rev.* 953 [Revivalist Canons and Treaty Interpretation]; *42 U.C.L.A. L. Rev.* 575 [discussing lunar mining under moon treaty]; *13 U.S.F. L. Rev.* 1 [impact of Income Tax Treaty between U.S. and United Kingdom]; *17 U.S.F. L. Rev.* 1 [Conference on International Human Rights Law in State and Federal Courts]; *17 U.S.F. L. Rev.* 71 [The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist]; *Rest.3d, Foreign Relations of the United States §301 et seq.*; *1 Rotunda, §6.4 et seq.*; *1 Tribe, §§4.5, 4.6*; *74 Am.Jur.2d (2001 ed.), Treaties §1 et seq.*)

(2) *North American Free Trade Agreement (NAFTA).* Many commentators have written on NAFTA. (See *108 Harv. L. Rev.* 804 [discussing constitutionality of NAFTA]; *21 Pepperdine L. Rev.* 1313 [resolution of private commercial disputes under NAFTA]; *31 San Diego L. Rev.* 1025 [NAFTA and the Environmental Side Agreement: Fusing Economic Development and Ecological Responsibility]; *27 U.C. Davis L. Rev.* 791 [symposium on NAFTA and its effect on human rights].)

(3) *Indian Rights.* Commentary on Indian law and treaties also has been extensive. (See *107 Harv. L. Rev.* 381

[Marshalling Past and Present Colonialism, Constitutionalism, and Interpretation in Federal Indian Law]; 63 *Cal. L. Rev.* 601 [judicial review of Indian Treaty abrogation]; 78 *Cal. L. Rev.* 1137 [federal Indian law]; 84 *Cal. L. Rev.* 1573 [new subjectivism of Supreme Court in Indian law]; 68 *So. Cal. L. Rev.* 1075 [state minimum environmental standards on Native American reservation]; 23 *Southwestern U. L. Rev.* 331 [arguing that effective legal redress for Native American land claims requires reinstatement of treaty status and recognition of Indian tribes as independent nations]; 25 *U.C. Davis L. Rev.* 85 [federal laws and Indian tribes]; 43 *U.C.L.A. L. Rev.* 547 [Native American treaty rights to scarce natural resources]; 41 *Am.Jur.2d* (1995 ed.), *Indians* §55 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 1 *Rotunda 4th*, §6.4 et seq.; 94 *Cal. L. Rev.* 531 [United States Supreme Court inaction or activism by International Court of Justice in international law]; 95 *Cal. L. Rev.* 75 [Disability Human Rights]; 118 *Harv. L. Rev.* 1868 [Executing the Treaty Power]; 45 *Santa Clara L. Rev.* 937 [Vienna Convention on consular relations].



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D. Power in Foreign Affairs.

3. International Compacts.

8 Witkin Sum. Cal. Law Const Law § 1343

[§ 1343] International Compacts.

Treaties require the consent of the Senate. But international compacts, such as protocols, postal conventions, and commercial agreements under the Tariff Act, are negotiated by the Executive without senatorial consent. A compact is an exercise of federal power over external affairs and has the same supremacy as a treaty over state laws and policy. (*United States v. Belmont* (1937) 301 U.S. 324, 57 S.Ct. 758, 760, 81 L.Ed. 1134, 1139 [agreement settling claims between U.S. and Soviet Union]; see *Rest.3d, Foreign Relations Law of the United States* §§111, 303.)

In *United States v. Pink* (1942) 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796, the Russian Soviet Government nationalized certain property, and by agreement between its foreign Commissar and the President of the United States (without formal treaty or Senate action), the United States undertook to collect Russian Government claims to property in America, including the New York assets of a Russian insurance company. The New York court decided that under its law and policy, local creditors were entitled to payment. *Held*, the compact prevailed over the state policy. "Power over external affairs is ... vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." (62 S.Ct. 567, 86 L.Ed. 819.)

SUPPLEMENT: [This section is current through the latest supplement]



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8 *Witkin Sum. Cal. Law Const Law* § 1344

[§ 1344] Fiscal Power.

(1) *In General.* Congress has a variety of fiscal powers, including the power to (a) coin money and regulate its value, and regulate the value of foreign coin, (b) borrow on the credit of the United States, (c) impose and collect taxes, duties, imposts, and excises, and (d) provide for the general welfare. (U.S. Const., Art. I, §8.) (See 1 Rotunda, Chap. 5; 107 *Harv. L. Rev.* 1419 [arguing that Spending Clause should be reevaluated in interests of federalism and to insure political accountability]; 53A *Am.Jur.2d* (1996 ed.), *Money* §26; 63C *Am.Jur.2d* (1997 ed.), *Public Funds* §58 et seq.; 77 *Am.Jur.2d* (1997 ed.), *United States* §12; on conditional federal spending, see *South Dakota v. Dole* (1987) 483 U.S. 203, 107 S.Ct. 2793, 2796, 2797, 97 L.Ed.2d 171, 178, 179 [federal statute reducing highway funds to states with drinking age under 21 was valid exercise of Congressional spending power]; 15 *Hastings Const. L. Q.* 649 [*Dole*]; 39 *Stanf. L. Rev.* 1103; on federal taxing power, see 9 *Summary* (10th), *Taxation*, §105 et seq.; 33-34B *Am.Jur.2d*, *Federal Taxation*.)

(2) *Appropriations Clause.* "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." (U.S. Const., Art. I, §9; see 19 *Hastings Const. L. Q.* 457 [Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes]; 63C *Am.Jur.2d* (1997 ed.), *Public Funds* §48 et seq.)

(3) *Gold Standard.* In 1933 and 1934, Congress enacted legislation (a) prohibiting gold hoarding, and requiring delivery of gold to the Treasury and payment for it in currency; (b) prohibiting removal of gold from the United States except as permitted by the Treasury; (c) prohibiting gold clauses in contracts, and making obligations, including those existing, payable in legal tender; and (d) devaluing the dollar. In *Norman v. Baltimore & Ohio R. Co.* (1935) 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, plaintiff, holder of a bond issued in 1930 and payable in "gold coin ... of the present standard" sued on a \$ 22.50 coupon, claiming \$ 38.10 in the devalued currency, and attacking the validity of the legislation nullifying the gold clauses. *Held*, the legislation was valid. (a) Congress has express constitutional power to coin and regulate the value of money (U.S. Const., Art. I, §8), and has broad authority over finance, derived from the aggregate of other powers including taxing, borrowing, commerce, etc. (b) Private contracts are made subject to the paramount federal powers, and, where they interfere with those powers, Congress may declare them void. (c) Congress having determined that the stability of our currency was threatened by weakening of the gold reserves, these contracts clearly interfered with the federal monetary power.

But in *Perry v. United States* (1934) 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, plaintiff sued on a United States

bond with a gold clause, contending that to give him the face value in devalued currency instead of the equivalent of the gold coin was to take his property without due process. The court denied recovery on the ground of failure to establish actual damage; but held (a) that although Congress had the power to nullify private contracts, it could not repudiate its own promises; and (b) that although the United States cannot be sued without its consent, this infirmity of procedure does not affect the binding character of the obligation. (See *Guaranty Trust Co. v. Henwood* (1939) 307 U.S. 247, 59 S.Ct. 847, 853, 83 L.Ed. 1266, 1276; *Henderson v. Mann Theatres Corp.* (1976) 65 C.A.3d 397, 406, 135 C.R. 266 [gold clause in contract must be construed as contract for payment of money].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 1 Rotunda 4th, Chap. 5; 53A *Am.Jur.2d* (2006 ed.), *Money* §24; 77 *Am.Jur.2d* (2006 ed.), *United States* §10.



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E. Other Federal Powers.
2. Bankruptcy Power.

8 *Witkin Sum. Cal. Law Const Law* § 1345

[§ 1345] Bankruptcy Power.

Congress has the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." (U.S. Const., Art. I, §8.) The Contract Clause is not a limitation on the bankruptcy power, but the Due Process Clause does apply. (*Kuehner v. Irving Trust Co. (1937)* 299 U.S. 445, 57 S.Ct. 298, 301, 81 L.Ed. 340, 346.) (See 96 *Harv. L. Rev.* 973 [impairment of secured creditors' rights in reorganization: study of relationship between Fifth Amendment and Bankruptcy Clause]; on uniformity requirement, see *Railway Labor Executives Assn. v. Gibbons (1982)* 455 U.S. 457, 102 S.Ct. 1169, 1176, 71 L.Ed.2d 335, 346; 96 *Harv. L. Rev.* 71.)

In *Louisville Joint Stock Land Bank v. Radford (1935)* 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593, the court considered the Frazier-Lemke Act of 1934, which amended the Bankruptcy Act to permit farmers whose mortgages were in default to become bankrupt and thereafter, without assent of the mortgagee, retain possession of the property at a reasonable rental, and purchase it in 5 years at an appraised value that might be less than the amount of the loan. The Act applied solely to existing mortgages, not to future ones. *Held*, it was unconstitutional. (a) Valid legislation for relief of mortgage debtors has been concerned with remedies, e.g., moratory and stay laws; abridgment of the substantive right to full payment of the debt is a taking without due process. (b) The federal bankruptcy power, given by the Constitution, authorizes the discharge of *personal obligations* of the debtor, but not the destruction of the *property interest* of the mortgagee. (55 S.Ct. 863, 79 L.Ed. 1604.) (Cf. *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Virginia (1937)* 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 [upholding revised statute].)

A 1934 amendment to the Bankruptcy Act provided for relief of debtors that were political subdivisions of a state. The plan involved a scaling down of the indebtedness where approved by the court and two-thirds of the creditors. In *Ashton v. Cameron County Water Imp. Dist. (1936)* 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309, the Act was held void on the theory that the same rule that prevents federal taxation of state governmental agencies prohibits the application of the bankruptcy power to them. But in *United States v. Bekins (1938)* 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137, a revised statute providing for composition of indebtedness was upheld where its operation was dependent on the state's consent. "[I]t is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power." (58 S.Ct. 815, 82 L.Ed. 1144.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Property Power.

8 Witkin Sum. Cal. Law Const Law § 1346

[§ 1346] Property Power.

The Property Clause of the Constitution provides that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." (U.S. Const., Art. IV, §3; on federal rights in tidelands, see 12 *Summary* (10th), *Real Property*, §209; on federal water rights, see 12 *Summary* (10th), *Real Property*, §922 et seq.) Under this unlimited grant, "Congress exercises the powers both of a proprietor and of a legislature over the public domain." (*Kleppe v. New Mexico* (1976) 426 U.S. 529, 96 S.Ct. 2285, 2292, 49 L.Ed.2d 34, 44.) (See 15 *Ecology L. Q.* 375, 439 [Public Lands Federalism: Judicial Theory and Administrative Reality]; 28 *Hastings Const. L. Q.* 167 [Congress' Property Clause Power To Prohibit Taking Endangered Species]; 30 *Loyola L.A. L. Rev.* 275 [Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy]; 63C *Am.Jur.2d* (1997 ed.), *Public Lands* §7 et seq.; 77 *Am.Jur.2d* (1997 ed.), *United States* §32 et seq.)

In *Kleppe*, the Court upheld the validity of the Wild Free-Roaming Horses and Burros Act of 1971, protecting unbranded and unclaimed horses and burros on United States public lands against a state's claim of rights under its estray law. The state contended that federal power was limited to regulation and disposition of the *lands*, and did not extend to wildlife on the lands, and that the states traditionally have trustee powers over wild animals (see *supra*, §612). The Court held, however, that these state powers were subject to the paramount power of the federal Government, and that the Property Clause, broadly construed, gives Congress the power to protect wildlife notwithstanding the state law. (96 S.Ct. 2295, 49 L.Ed.2d 45.)

SUPPLEMENT: [This section is current through the latest supplement]
See 77 *Am.Jur.2d* (2006 ed.), *United States* §30 et seq.



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E. Other Federal Powers.
4. Postal Power.

8 *Witkin Sum. Cal. Law Const Law* § 1347

[§ 1347] Postal Power.

Congress has the power to establish "Post Offices and post Roads." (U.S. Const., Art. I, §8.) To assure prompt, reliable, and efficient services to postal patrons in all areas, Congress enacted the Private Express Statutes, establishing the United States Postal Service as a monopoly (39 U.S.C., §403) and prohibiting others from carrying letters over postal routes (18 U.S.C., §1694). (See *Regents of Univ. of Calif. v. Public Employees Relations Bd.* (1988) 485 U.S. 589, 108 S.Ct. 1404, 1408, 99 L.Ed.2d 664, 669; 41 U.C.L.A. L. Rev. 1035 [discussing dispute between United States Postal Service and Postal Rate Commission].)

The constitutional power was held to support a postal service regulation prohibiting the deposit of unstamped "mailable matter" in a letter box approved by the service. The regulation was designed to prevent the practice of private concerns delivering circulars or statements through private messengers, causing loss of postal revenue and practical difficulties in delivery of mail; and there was no violation of the First Amendment, because the regulation was not directed at the content of the message, and a letter box is not analogous to a street or park. (*United States Postal Service v. Council of Greenburgh Civic Assn.* (1981) 453 U.S. 114, 101 S.Ct. 2676, 2687, 69 L.Ed.2d 517, 532.)

The "letters-of-the-carrier" exception (18 U.S.C., §1694) was construed in *Regents of Univ. of Calif., supra*. A public employees' union sought to distribute organizational literature to the university's custodial employees through the university's internal mail system. The union relied on the provision excepting from its prohibition letters that relate "to the current business of the carrier." The California Court of Appeal held that the communications from the union related to the current business of the University and therefore came within the exception. (182 C.A.3d 78, 80.) The United States Supreme Court reversed.

(a) "The alleged 'business' in this case is not close enough to appellant's affairs to be the natural subject of letters concerning appellant's 'current business.' " (108 S.Ct. 1410, 99 L.Ed.2d 672.)

(b) There is also no basis for applying the "private-hands exception" of 18 U.S.C., §1696(c) (exempting "conveyance or transmission of letters or packets by private hands without compensation"). "By delivering the Union's letters, appellant would perform a service for its employees that they would otherwise pay for themselves, through their union dues. This service would become part of the package of monetary and nonmonetary benefits that appellant provides its employees in exchange for their services. ... [C]arriage of the Union's letters pursuant to such an exchange

of benefits necessarily means that the carriage is not 'without compensation.' " (108 S.Ct. 1412, 99 L.Ed.2d 676.)

SUPPLEMENT: [This section is current through the latest supplement]