

Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?

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The idea that constitutional rights may be an appropriate means to regulate relations between private entities and persons is a persistent one. Thirty years ago, for example, law reviews seriously urged that corporate power should be limited by the Fourteenth Amendment.¹ This notion never caught on in federal constitutional law, but it has now begun to resurface amid the state bills of rights revival. The time is right for a serious new look at the idea of "constitutionalizing" the private sector. Governmental entities in the 1980s increasingly call for privatization, or subcontracting, of some of their traditional functions. States, counties, and school districts contract for private jails, for residential care of disabled indigents, and for special education for children unable to function in public schools. Litigators are directed to private judges or arbitrators and private schools now educate a huge proportion of the children who formerly attended public school, especially in congested urban areas. As more of government's traditional functions pass into private hands, questions about abuse of power and accountability will be raised. At the same time, the increasing wealth and power of corporations and other businesses over individuals makes those questions live ones even as applied to the established private sector.

The question whether to apply constitutional restraints on private actors is without doubt a difficult and controversial one, but adopting two assumptions makes it more manageable. First, the question can be approached, if at all, only by reference to the text, history, and purpose of individual clauses of the California Declaration of Rights. It must be

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1. Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539 (1960); Berle, *Constitutional Limits on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952). The idea has forceful contemporary proponents as well. See Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 506 (1985).

answered separately for each clause, not generally for the entire constitution. Second, the question cannot be answered by invoking current federal fourteenth amendment "state action" doctrine—a beast of a doctrine which, though it cannot be made to behave justly or even predictably, is supposed by orthodox theory to save us from even worse horrors.² The federal state action doctrine is not a good model for California law. Its staying power is attributable primarily to the text and history of the Fourteenth Amendment as well as to concerns of federalism. If California courts interpreting state law similarly believe it appropriate to limit the reach of the constitution, they should do so only for independent, state purposes consistent with California history and text.

The question narrows even more if we set aside certain instances when, most would agree, protecting constitutional-type rights in the private sector is perfectly appropriate. Constitutional rights have never been the sole domain of supreme court judges. No one finds it particularly controversial that local governments and state legislatures can act to promote constitutional values by regulating the conduct of private citizens and organizations. Existing statutory law significantly shrinks the sphere in which the constitution might be called on directly to protect minority rights. Laws against invidious discrimination in housing, employment, and credit are obvious examples, but free speech and privacy interests are also secured by state and federal statutes protecting on-the-job whistle blowers, prohibiting lie detector tests in employment, or prohibiting retaliation against labor organizers. The true debate over whether constitutional rights can be asserted against private actors concerns whether judges should take that step themselves, unaided by statute.

This debate has begun to generate published commentary,³ much of

2. The federal state action doctrine is said to be necessary to preserve for private actors an essential sphere of autonomy from federal governmental (primarily judicial) interference. Nonintervention by the government, though, preserves only the autonomy of the more powerful participant in the private transaction; it does nothing for the least powerful whose autonomy interests (e.g., free speech or equality) are diminished or destroyed. As Clyde Summers states in regard to its effect on free speech, "The judicially drawn line between state action and private action privatizes control over speech with no corresponding privatization of personal freedom." Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 690. This objection is also made in detail by Professor Chemerinsky. See Chemerinsky, *supra* note 1. The arguments of other critics are noted in Professor Sundby's Commentary, *Is Abandoning State Action Asking too Much of the Constitution?*, 17 HASTINGS CONST. L. Q. 139, 140 n.3 (1989).

3. See, e.g., Margulies, *A Terrible Beauty: Functional State Action Analysis and State Constitutions*, 9 WHITTIER L. REV. 723 (1988) (functional state analysis is both attractive and repellant in that it lends itself to judicial intervention on behalf of individual rights); Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*,

it provoked by the celebrated shopping mall access cases,⁴ but also by concerns with private employment.⁵ Some writers, and some judges, freely answer "sometimes" to the question whether to apply constitutional restraints on private actors; a few have speculated about the more difficult question of "when?"⁶ Most of those answering "no" (at times "absolutely not!") are, understandably, judges. Two articulate judges on the Washington Supreme Court have taken up this debate in law reviews,⁷ but most have expressed themselves in published opinions.⁸ On the other hand, a respectable body of case law, particularly in California,

8 U. PUGET SOUND L. REV. 221 (1985) (proposing dismantlement of Washington "state action" doctrine and recognition of justiciability of controversies involving competing private claims of state constitutional liberties).

4. See, e.g., Margulies, *supra* note 3; Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 51 (B. McGraw ed. 1985) (discussing increased reliance on state constitutional law for claims regarding access to private property by those wishing to engage in political speech); Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 WILLAMETTE L. REV. 445 (1986) (constitutional rights are guaranteed only against infringement by state or by private entities engaged in "state action"; individuals must look to legislation for protection from infringement by private entities pursuing private interests); Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157 (1985) (Washington Constitution intended to protect free speech rights against abridgement by private individuals and organizations); Note, *Free Speech, Initiative, and Property Rights in Conflict—Four Alternatives to the State Action Requirement in Washington*, 58 WASH. L. REV. 587 (1983) (direct balancing and traditional public function doctrine are the appropriate approaches for courts to take in deciding the scope of free speech rights in shopping mall cases); Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1 (1986); Hardy, *Post-Pruneyard Access to Michigan Shopping Centers: The "Malling" of Constitutional Rights*, 30 WAYNE L. REV. 93 (1983); Note, *State-Guaranteed Right to Speak in Privately Owned Shopping Centers*, 94 HARV. L. REV. 169 (1980); Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980) (free speech guarantees of state constitutions are appropriate vehicles for protection of public forum and canvassing rights).

5. See, e.g., Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42, 60-66 (1987) (state constitution can be used to "circumvent" federal state action requirement); Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522 (1982) (free speech provisions in state constitutions provide means to protect speech).

6. For example, Professor Levinson, *supra* note 4, proposes a balancing type of inquiry to draw the line between the interests of the two competing private parties. Some judges temporize, requiring *some* showing of government or government-like involvement to invoke the state constitutional right, but accepting "less" than would be required to make out a fourteenth amendment violation. See, e.g., *Jones v. Memorial Hosp. Sys.*, 746 S.W.2d 891, 896 (Tex. Ct. App. 1988) (former employee's wrongful discharge claim under Texas free speech clause; hospital would be treated as public entity for purpose of upholding state constitution, given its demonstrated involvement with various state and federal governmental agencies). This approach, though, recreates many of the difficulties of the federal state action doctrine, thus inviting much fairly pointless litigation regarding whether an entity is sufficiently "governmental," with low predictability of results.

7. See Dolliver *supra* note 4; Utter, *supra* note 4.

endorses the argument that state constitutions are *not* limited in their reach to governmental actors. Without extending their holdings much beyond each individual dispute, judges in California and elsewhere have allowed plaintiffs to assert constitutional challenges against private property owners who allegedly interfered with distribution of literature or solicitation of support for political aims,⁹ private university officials who compromised rights of privacy by disclosing sensitive information,¹⁰ doctors and others who interfered with the operation of a clinic because it performed elective abortions,¹¹ doctors who refused medical treatment to those who complained to a watchdog agency about the quality of care at a community hospital,¹² and an investor-owned utility that denied homosexuals equal job opportunity.¹³

Taking a cue from these cases, one might begin the present discussion with this hypothesis¹⁴: Unless the text or history of a particular

8. State courts in the following cases rejected claims of access to private property to conduct political activities, in the absence of a showing of "state action": *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987); *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985); *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984); *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981). *Contra infra* note 9.

In an employment related drug testing case, the Alaska court has declared that the state's 1972 privacy clause does *not* govern private action, in the absence of language in the amendment or a demonstrated intent to reach private actors. *Leudtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989). Texas courts of appeals have held that the Texas Equal Rights Amendment does not forbid purely private discrimination. *Cedillo v. Ewlin Enterprises*, 744 S.W.2d 219 (Tex. Ct. App. 1988).

9. *See, e.g., Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 445 N.E.2d 590 (1983) (state elections clause shields political activity in private shopping center); *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981) (plurality opinion) (initiative petitioners in shopping mall); *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981) (private university); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980) (leafletting at Princeton University); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 477 U.S. 74 (1980) (political petitioners in shopping mall).

10. *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (applying California privacy guarantee, CAL. CONST. art. I, § 1, to private university).

11. *Chico Feminist Women's Health Center v. Butte Glenn Medical Soc'y*, 557 F. Supp. 1190 (E.D. Cal. 1983) (applying California privacy clause).

12. *Leach v. Drummond Medical Group*, 144 Cal. App. 3d, 362, 192 Cal. Rptr. 650 (1983) (applying California petition clause, CAL. CONST., art. I, § 3, to private medical group).

13. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (applying California equal protection clause, CAL. CONST. art. I, § 7(a)); *see also Rojo v. Kliger*, 209 Cal. App. 3d 10, 257 Cal. Rptr. 158, 166-67 (1989) (noting in a wrongful discharge action that CAL. CONST. art. I, § 8 had banned sex discrimination by private employers since 1879).

14. Although Professor Sundby is skeptical about, as he puts it, "abandoning state action," he does not advocate that these existing California precedents be overruled. Sundby, *Is*

clause requires it, the California Declaration of Rights should not be interpreted to forbid only infringements of those rights by state and local governments. Any natural person who suffers an interference with one of those declared rights should be able to state a complaint against the actor responsible, even though the defendant can be characterized as merely a private person or organization.

Three main objections to this hypothesis appear in the literature and in state judges' opinions.¹⁵ The chief objection to allowing the constitution into the private sector is that it would impose undesirable, perhaps even immoral, limits on the liberty of private actors. An often used example is that without a limiting principle like state action, householders would be forced to integrate their dinner parties or open their living rooms to political protesters. Similarly, doctors would be unable to prevent anti-abortion demonstrators from occupying their clinic waiting rooms, and a woman could be sued for sex discrimination if she deliberately chose a man instead of a woman (or vice versa) as a spouse or living companion.

But these examples are absurd. To say that the Declaration of Rights may limit private conduct does not mean that standards developed for government actors can be automatically applied with full strength to private actors. The proper accommodation of the competing rights and interests of private individuals is, as in ordinary tort litigation, for state judges to decide. Private defendants in constitutional suits may assert justifications for their conduct that the government cannot assert—for example, their own privacy, property, associational, or speech rights. The court simply will be obliged to decide whether the justification is adequate. Whether the court calls its process "balancing," or something else, the question in each case will be whose autonomy—the defendant's or the plaintiff's—most merits protection. There is little doubt, for example, that in each of the above extreme hypotheticals, the rights claimants (the uninvited guest, the abortion protestor, and the disappointed lover), would lose their constitutional claim on the merits, and that the privacy, property, and association rights of the defendant householder, the doctor and patients, and the spouse-to-be would be crucial to this outcome.

abandoning State Action Asking Too Much of the Constitution?, 17 HASTINGS CONST. L.Q. 139.

15. See, e.g., Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U.L. REV. 558 (1985) (a reply to Chemerinsky, *supra* note 1); Dolliver, *supra* note 4; see cases cited *supra* note 8.

Thus, the autonomy of defendants can be preserved, when it ought to be preserved, by a decision on the merits rather than by avoiding an open accommodation through use of a state action concept.¹⁶ Eliminating this formalistic barrier to adjudication says nothing about whether any particular defendant will be liable, but only ensures that, at least in the beginning, more complaints will be heard. Simply stated, this view of the Declaration of Rights would create the foundation for a new body of state tort law, touching a new class of defendants. The increased caseload and line drawing problems this would create for state judge should not be discounted. The state courts unlikely would be flooded with novel cases. Line drawing of this type is a problem that common-law judges are well equipped to handle.

A second common objection to doing away with conventional state action analysis rests on tradition. This argument asserts that to apply constitutional guarantees in disputes between private parties wrongly defies settled expectations, for it is the essential *nature* of constitutions that they are meant to restrain only government. The appeal to tradition and settled expectations has a strong attraction, and has been accepted by state judges in New York and Wisconsin, among others.¹⁷ In other states, including California, judicial decisions are not yet as encumbered with sweeping a priori assumptions about the "nature" of constitutional rights.

A third objection is that the expansion of constitutional rights to the private sector is antidemocratic.¹⁸ Abandonment of a formalistic "state action" requirement exalts the power of unrepresentative courts at the expense of a representative legislature. The substance of this objection cannot be denied. If courts declare constitutional rights in actions against private actors, the legislature might be to that extent unable to declare a different allocation of rights. Nevertheless, the force of this objection is easily exaggerated. First, the legislature retains the power to limit and structure remedies for these rights, as Congress has done for fourteenth amendment based rights.¹⁹ Second, the electorate in Califor-

16. Some scholars have made a persuasive case for this direct approach even to disputes under the Fourteenth Amendment. See Chemerinsky, *supra* note 1, at 506. The direct approach has also been called "functional analysis" to distinguish it from the diversionary and impossible task of divining "state action" using the orthodox United States Supreme Court formula. Margulies, *supra* note 3, at 725.

17. See *supra* note 8; *infra* note 44.

18. See, e.g., Marshall, *supra* note 15, at 566-67.

19. See 42 U.S.C. §§ 1983, 1988 (1981) (providing for damages, equitable relief, and attorneys fees for loss of rights secured by the United States Constitution). As interpreted by the Supreme Court, § 1983 is subject to numerous defenses and immunities. See, e.g., *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (no respondeat superior liability for city);

nia retains significant democratic power over the content of the Declaration of Rights, and over the identity of members of the bench. Third, if, as a matter of policy, constitutional interests like speech and privacy are thought to need protection against private invasion, entrusting them to the courts and inhibiting (without preventing) democratic diminution of such rights is appropriate.

For purposes of illustration, this Article will refer mostly to California's privacy clause, to the opening section of its free speech guarantee, and to its related guarantee of the right to petition the government. Because these interests are important to almost everyone and often are unprotected by statute against private abridgement,²⁰ they are more likely than others to generate substantial civil litigation against private parties. This Article also focuses on privacy, speech, and petition because of their texts.²¹ None of them is explicitly directed solely to official conduct.²²

Harlow v. Fitzgerald, 457 U.S. 800 (1982) (qualified immunity for officers); Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (states cannot be sued under § 1983).

20. There are exceptions. *See, e.g.*, California's whistle-blowing statute, CAL. LAB. CODE § 1102.5 (West 1987) (no employer shall retaliate against an employee for disclosing to a government agency information showing possible violation of law); *see also* CAL. LAB. CODE § 1102 (no employer shall coerce employees because of employee's political activity).

21. Section 1 states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

Section 2(a) states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a)

Section 3 states: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." CAL. CONST. art. I, § 3.

22. Other sections of the Declaration easily can be read as capable of being breached by the interference of private parties. They are § 4, sentence one (free exercise of religion guaranteed); § 6 (slavery prohibited); § 8 (disqualification from a business or profession because of sex, race, creed, color, or national or ethnic origin); § 13 (unreasonable seizures and searches); § 20 (property rights of noncitizens); § 25 (right to fish).

Section 7, referring to deprivation of life, liberty, or property without due process of law and denial of equal protection of the laws implies the participation or at least encouragement of government in a private enterprise, like the monopolistic private utility in *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979). And recently the California Supreme Court seems to have taken a harder line in regard to the "state action" required to trigger the California equal protection clause. *See Schmidt v. Superior Court*, 43 Cal. 3d 1060, 742 P.2d 209, 213, 240 Cal. Rptr. 160, 164 (1987), in which Justice Mosk states: "It is incontrovertible that the mandate of the equal protection clause applies only to actions taken, directly or indirectly, by the government itself." *But see Rojo v. Kligler*, 209 Cal. App. 3d 10, 257 Cal. Rptr. 158 (1989) (suggesting that private employer could violate public policy advanced by California Constitution's nondisqualification clause, art. I, § 8, even though discharged employees did not invoke available statutory remedies for sex based job discrimination.)

In contrast, some of the rights preserved in the California Declaration of Rights are concededly limitations only on government. Clauses governing bail,²³ punishment,²⁴ and trial by jury²⁵ are obvious examples, as well as prohibitions on certain kinds of "laws": ex post facto laws and bills of attainder,²⁶ laws respecting an establishment of religion,²⁷ or laws restraining the freedom of the press.²⁸ This Article addresses those guarantees that do not, by text or context, clearly limit their operation to government.

I. The California Point of View—Speech and Privacy

A. Origins of the Texts

The text of California's speech and privacy guarantees are not worded so as to govern only public bodies. This aspect of the text stands in contrast to most of the 1791 Federal Bill of Rights, the Federal Fourteenth Amendment, and some of our sister states' bills of rights. California's article I, section 1, for example, opens the bill of rights by declaring, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." The free speech or "liberty of speech" clause also declares the existence of a broad affirmative right to speak, followed by a separate sentence restraining government: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."²⁹ Third is the right to petition for redress of grievances: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."³⁰

The language of all three clauses, with only one important exception,³¹ dates from California's earliest constitution. The delegates to the

23. CAL. CONST. art. I, § 12.

24. CAL. CONST. art. I, § 17.

25. CAL. CONST. art. I, § 16.

26. CAL. CONST. art. I, § 9.

27. CAL. CONST. art. I, § 4.

28. CAL. CONST. art. I, § 2(a) (second sentence).

29. CAL. CONST. art. I, § 2(a).

30. CAL. CONST. art. I, § 3.

31. In 1972, § 1 was amended by initiative to add "privacy" to the end of the list of inalienable rights and to declare that "all people" possessed these rights, a change from "all men." *White v. Davis*, 13 Cal. 3d 757, 773, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975). The liberty of speech clause adopted in 1849 declared it to be the right of "every citizen."

1849 Constitutional Convention,³² who unanimously approved all three, did not choose to word them as limits on government. The choice instead to *declare* the existence of broad and affirmative rights creates at least an inference that private as well as official interference with these rights was meant to be barred.

The inference is supported by the convention records. When the Declaration of Rights was moved and adopted, over several days, inalienable rights, liberty of speech, and petition rights provoked little debate or dissent.³³ The debates, which on other provisions are quite detailed, contain no record of any "original intent" of these delegates in regard to the private/public distinction.

1. *The Liberty of Speech and Right to Petition Clauses*

The text of the liberty of speech clause was borrowed virtually unchanged from the New York Constitution.³⁴ The choice of affirmative rather than restrictive language might have been fortuitous,³⁵ but the distinction between the two structures may have been known and appreciated. The fourteen attorneys in the delegation would have known that

Subsequent amendments expanded this class to "every person" desiring to express "his or her" sentiments. CAL. CONST. art. I, § 2.

32. California's 48 delegates to Monterey originally hailed from 15 states in addition to California. Among the delegation were fourteen attorneys, as well as merchants, farmers, army officers, a banker, a physician, a printer, a surveyor, a "labrador" (laborer), and the mysterious Mr. B. F. Moore, lately of Texas, who listed his profession as "elegant leisure." J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 478-79 (1850). Many delegates were recent immigrants to California; over half had resided in California three years or less, a quarter for a year or less. Only six lifelong Californians served as constitutional delegates, all of them Spanish surnamed men who had been born in California. *Id.*

33. *Id.* at 34 (inalienable rights section approved as § 1); *id.* at 41 (free speech clause adopted as section 8 without debate); *id.* at 42 (right to assemble and petition approved, in form borrowed from the Iowa Constitution).

In fact, Mr. Botts, an attorney and delegate from Monterey, objected to inclusion of § 1 only on the grounds that it was superfluous: "It merely secures to the citizens of the State certain privileges, of which this Convention has no power to deprive them. It is only by their own act that they can be legally dispossessed of those privileges." *Id.* at 34. Mr. Semple, a printer and representative from Sonoma, responded that this article was "an essential principle to be incorporated in a bill of rights. It takes precedence of all others, and places those that follow it in a higher point of view. He trusted it would be retained." It was. The question was taken and the section adopted without further debate. *Id.*

34. *Id.* at 31. The general format was commonplace, however. In fact, about 43 state constitutions still contain a similar affirmatively phrased right to speak freely. See Halbert, *The First Amendment in the Workplace*, 17 SETON HALL L. REV. 42, 61 n.138 (1987); Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522 (1982).

35. Ten delegates were from New York. The prestige of New York law owing to the prominence of Mr. David Dudley Field and the recent Field Code may have led to the choice of New York law. J. BROWNE, *supra* note 32, at 478-79.

the Federal First Amendment furnished a competing model, one that restrained only government. Second, minutes of the debates reveal one instance in which the delegation was presented with a clear choice between a restrictive and affirmative form of guarantee and chose the affirmative wording.³⁶ This choice concerned the right of petition and assembly clause that came up for debate immediately after the adoption of New York's free speech clause.

The petition clause as originally proposed stated, "No law shall be passed abridging the right of the people peaceably to assemble and to petition the government." Mr. Botts, a Virginia attorney, objected to the humiliating notion that a sovereign people must "petition" for their just demands. Three other attorneys—Mr. Ord, Mr. Shannon, and Mr. Jones—joined the debate. Shortly thereafter the assembly adopted a different version, attributed to the Iowa Constitution. It read, "The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances."³⁷ The minutes do not reveal why the delegates chose to declare an open-ended right rather than simply to prohibit oppressive "laws," as the original proposal had done. Perhaps the delegates preferred it for its grander and more sweeping style; or perhaps that style was more attractive precisely because it secured a precious liberty against the entire world.

Roughly contemporaneous evidence from our sister states on the West Coast also lends modest support for the conclusion that California delegates understood the difference between a clause that, on its face, binds "all the world" and one that binds only government. Oregon citizens, who drafted their first constitution in 1857, eight years after Monterey, rejected the open format of the California and New York free speech clauses, and chose instead to borrow from Indiana, where an 1851 amendment had recast that state's speech guarantee from a broad declarative form to a form that was strictly a limit on government.³⁸ If the broader New York form, by far the overwhelming favorite in the states that had entered the union by 1857, had been commonly thought by

36. *Id.* at 42.

37. *Id.*

38. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 201 (1926). Oregon's version, adopted in 1857, still reads, "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." OR. CONST. art. I, § 8.

Indiana's original free speech clause was, in 1816, worded much like the open declaration favored by New York and most other states. But, intriguingly, Indiana amended it in 1851 to provide, "No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print freely on any subject whatever, but for the abuse

West Coast lawyers and politicians to be directed only to government, there is no easy explanation, except perhaps an excess of caution, for Oregon's choice to make that limit explicit. Nor did Oregon prove to be a trend setter in free speech clauses. When the delegates to the Washington constitutional convention took up the same debate in 1889, they chose the California and New York models, deliberately rejecting an early draft drawn from the Oregon version.³⁹

Still, these arguments drawn from the text are not conclusive. The text plausibly can be read as directed only to government interference. First, as noted above, California's speech clause does, after declaring the existence of the right, go on to prohibit any "law" that restrains or abridges liberty of speech. Adding this prohibition on oppressive laws might mean that, although the delegates wished to declare generally the sanctity of free expression, they feared only government intrusions. In this respect, the structure of the clause bears a strong resemblance to the Federal Fourth Amendment.⁴⁰ In both clauses, the declared right may be read as secured only against the specified invasion (for instance, legal restraints on speech, or unsupported warrants), or as secured only against the specified invader (for instance, governments, which pass laws and issue warrants). Of course, the Fourth Amendment is consistently read in this latter way, to bind only the official arms of government. But the California speech clause, at least, has not been interpreted so

of that right every person shall be responsible." IND. CONST. art. I, § 9; see 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 364-65, 378-79 (W. Swindler ed. 1974).

In addition to Oregon and Indiana, four more states presently phrase their free speech guarantees exclusively as a limitation on government. They are Hawaii, HAW. CONST. art. I, § 4; South Carolina, S.C. CONST. art. I, § 2; Utah, UTAH CONST. art. I, § 15; and West Virginia, W. VA. CONST. art. III, § 7. All four use a model similar to the Federal First Amendment, i.e., that "no law" shall abridge freedom of speech.

39. Utter, *supra* note 4, at 172-77.

40. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

California's counterpart is virtually identical:

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

CAL. CONST. art. I, § 13. With unimportant exceptions, this text has remained unchanged since its adoption in the 1849 Convention. Its immediate source was probably the Fourth Amendment. J. BROWNE, *supra* note 32, at 48.

narrowly.⁴¹

Section 2(a)'s interesting limiting phrase, "being responsible for the abuse of the right," might also shed some light on the private/public issue. Responsibility for abuse of the right to speak was almost certainly meant to preserve common-law defamation actions, which might otherwise be eradicated by the broad protective language of the guarantee.⁴² If this is so, then the corollary would be that if speech is not abusive, it should not be suppressed by a private suit for injunctive or damage relief. This, then, is evidence of awareness that the constitution could not only shield conduct (nondefamatory speech) from civil liability, but also limit other private conduct (damage suits for nondefamatory speech). True, the United States Supreme Court has conceded that judicial enforcement of common law defamation actions satisfies "state action."⁴³ But the "responsibility for abuse" phrase was adopted in California nearly 100 years earlier. At the very least, its inclusion in 1849 supports the argument that the document's drafters, or borrowers, did not have a fixed notion that only the conduct of public actors could be affected by constitutional guarantees.

2. *Inalienable Rights and Privacy*

The historical record, then, does not clearly support a narrow reading of section 2(a), the free speech clause. A narrow reading is even less appropriate for section 1, the inalienable rights section.

41. For example, owners of some kinds of commercial private property, in addition to shopping mall owners, must respect the rights of individuals to distribute literature on their premises, at least so long as the ordinary conduct of business is not disrupted. *See, e.g.,* *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 477 U.S. 74 (1980) (free speech and petition provisions of California Constitution protect speech and petitioning, reasonably exercised, even when shopping center is privately owned); *Laguna Publishing Co. v. Golden Rain Found.*, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982) (owner of common areas in a private residential community unconstitutionally deprived plaintiff's free speech and free press rights by denying plaintiff access afforded to rival publisher).

On the other hand, New York, whose bill of rights furnished the original text of California's speech clause in 1849, has since interpreted the same language to require proof of conventional state action. *See* *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985) (political demonstrators could be banned from distributing leaflets in privately owned shopping mall, absent allegation that state action was involved).

42. *See, e.g.,* *Marlin Fire Arms Co. v. Shields*, 171 N.Y. 384, 391, 64 N.E. 163, 165 (1902) (interpreting similar language; slander and libel are abuses of the state constitutional right of free speech and speaker may be sued civilly, but is not subject to prior restraint); *Wheeler v. Green*, 286 Or. 99, 118, 593 P.2d 777, 788 (1979) ("Defamatory statements, of course, have throughout the history of this state been recognized as an abuse of the right of free expression for which a person is to be held responsible under the provisions of Article I, § 8 [of the Oregon Constitution].").

43. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Because the concept of inalienable rights itself transports us to the realm of political philosophy, it creates a sensible context in which to address the traditional objection mentioned above—that constitutional rights were never meant to protect against merely private conduct. This argument holds that California's convention delegates could not have intended private actors to be bound because regulation of rights between private parties was not conceived, in the nineteenth century, to be a valid constitutional purpose. Private relations were left to the common law of contracts, or torts, or property, or to the developing codes. Constitutions were meant to constrain newly created state governments, so that the bill of rights in the state charter served the same function, and *solely* the same function, as the 1791 Federal Bill of Rights, to preserve civil liberties from a potentially tyrannical government.⁴⁴ In order for this argument to succeed, its proponents would have to convince state courts that, at least on this fundamental character of the Bill of Rights, "framers' intent" must be respected. A limiting principle must be implied where not explicit in the text.

Without entering the fray over the proper weight to be assigned to even discoverable framers' intent, the opening section of California's earliest constitution may be evidence of a different historical intent than the one advanced by this traditional argument. Whatever the subsequent direction taken by constitutional theory, section 1 is evidence that California's pioneer legal architects believed that people possessed natural rights.⁴⁵ Section 1 is a conventional natural law formula, a philosophy that, in the United States, achieved the peak of its popularity in the eighteenth and nineteenth centuries. When the delegates began with a declaration that "all men are by nature" possessed of "inalienable rights" with respect to life, liberty, and property, they dipped into a tradition of political philosophy that earlier gave shape to the Declaration of Independence.⁴⁶ For our purposes the questions raised by section 1 are first,

44. For example, the New York Court of Appeals has stated, "[T]his fundamental concept [of state action] concerning the reach of constitutionally guaranteed individual rights is not only deeply rooted in constitutional tradition, it is at the foundation of the very nature of a constitutional democracy." *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 503, 488 N.E.2d 1211, 1215, 498 N.Y.S.2d 99, 103 (1985); *accord* Dolliver, *supra* note 4.

45. Again, the only debate that Mr. Browne recorded in connection with section 1 is instructive. Mr. Botts, an attorney delegate, argued that section 1 was unnecessary: "It merely secures to the citizens of the State certain privileges, of which this Convention has no power to deprive them. It is only by their own act that they can be legally dispossessed of those privileges." J. BROWNE, *supra* note 32, at 34.

46. The Declaration of Independence para. 2 (U.S. 1776):

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are

whether such language was meant to be enforceable by means of a lawsuit and second, whether calling the rights of people inalienable and natural adds anything to the debate about whether its sponsors meant only government was bound to respect them.

Modern theorists could question whether this section was, even in 1849, meant to embody concrete rights enforceable by courts against anyone in particular, as opposed to declaring a philosophy of government for the legislature and the people.⁴⁷ In light of the European and early American tradition of declaring the existence of inalienable rights in documents unsuited or unintended to serve as premises for judicial enforcement, the inclusion of natural rights in the body of the state constitution creates an enigma. For, by 1849, judicial review of American constitutional rights was accepted and expected, and the specific rights in the sections following section 1 were clearly meant to be enforceable in court.

Compounding this convergence of natural law and positivism is the 1972 addition of "privacy" to section 1. While it might once have been plausible to treat section 1 as merely precatory language declaring a general philosophy and not as a guarantee of substantive rights, that position is undermined by the 1972 initiative amendment declaring "privacy" as one of the enumerated inalienable rights. There is no question that privacy was meant to be enforced, indeed enforced even against private actors, and California courts are unanimous in treating it so.⁴⁸

Even disregarding the modern addition of privacy, however, section 1 may be viewed more modestly as only an aid to interpreting the scope

instituted among men, deriving their just powers from the consent of the governed

.....

47. Continental European nations commonly included similar declarations of rights in their basic charters. However, these constitutions often did not provide for judicial review even of governmental acts that transgressed these declared rights. In this type of legal culture, such declarations are obviously not meant to serve as a basis for a lawsuit. *See generally* M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

48. *White v. Davis*, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975) (enjoining police surveillance of university classes; constitutional provision guaranteeing privacy is self-executing and confers a judicial right of action on all Californians); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976) (permitting damage suit against private school for disclosure of student records; privacy is protected not merely against state action, but is an inalienable right that may not be violated by anyone).

The California Supreme Court has relied heavily on statements in the official voters' pamphlet promoting passage of the privacy amendment as evidence of the intent behind the amendment. These statements identified the chief mischiefs at which the amendment was directed as the collecting and use, by both government and business, of personal information. *White*, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106. No such detailed evidence of intent is available for the earliest version of § 1.

of concrete, particular rights that follow.⁴⁹ Were they to apply to private conduct? Natural law adherents believed that rights were inherent; to say that they were "inalienable" as well means that they were thought "beyond the scope of governmental power to control or the free human being to surrender."⁵⁰ If early Californians treated rights as natural and inalienable, there is no reason to believe that private interference with them was viewed as any more acceptable than official interference.⁵¹

3. *Modern Translations: Twentieth Century Pioneering in California Constitutional Law*

In the end, though, perhaps the most we can say about the text and history of the Declaration is that by adopting open, affirmative statements of rights, the drafters simply left open the question of who must respect those rights. The text does not compel a finding that private parties are bound; it only creates an opportunity to do so.⁵² When the language is unclear, modern judges are required to make a choice that remains true to the aspirations actually expressed in the text, while also bringing ancient language to bear on unforeseen modern analogues to the original evil that prompted it.⁵³ To make this choice, a natural question

49. When this article was proposed, Mr. Semple, a printer and representative from Sonoma, California, argued that it was "an essential principle to be incorporated in a bill of rights. It takes precedence of all others, and places those that follow it in a higher point of view." J. BROWNE, *supra* note 32, at 34.

50. L. TRIBE, *supra* note 18, at 1309-10.

51. This argument did not help the rights claimant in a recent Wisconsin shopping mall access case. Justice Steinmetz disposed of an inherent rights/natural law argument by saying:

The defendants argue there are inherent rights coming from God or nature which existed, therefore, prior to the very idea of a Wisconsin Declaration of Rights Defendants then come to the conclusion that if such rights have any meaning, they must apply as against one's fellow human beings. This they say is true since a right which, because it is inherent, exists prior to the institution of any government, cannot shrink or disappear when a government is established, but retains its full moral vigor and validity in nongovernmental as well as governmental contexts. . . . Carrying this to its logical conclusion produces the absurd result that the right can be exercised on any property including private property.

Jacobs v. Major, 139 Wis. 2d 492, 526-27, 407 N.W.2d 832, 846 (1987).

52. See Margulies, *supra* note 3, at 729 (footnotes and citations omitted):

Some courts eschew the thicket of functional analysis altogether. Instead, they sustain the constitutional challenge by relying upon the absence of state action language in the constitutional text [citing *Pruneyard*]. Textual analysis of this kind may be the path of least resistance for judges unwilling to grapple with the complexities of functionalism, but in the final analysis it is not always convincing, for there may be other reasons why no state action language appears. The omission, in other words, does not necessarily evince an intent to apply constitutional guarantees to private parties. It merely supplies an opportunity.

53. Justice Shirley Abrahamson used this principle to argue, unsuccessfully, that a shopping mall in Wisconsin should have to permit a political dance:

Protection of speech against nongovernmental interference is consistent with the intentions of the framers and electors adopting [the Wisconsin free speech clause].

is whether concentrated private power threatens the values protected by declared rights in a way fairly analogous to the threat posed by unlimited government power.⁵⁴

Judges deciding privacy cases in California do not need to struggle with this question of evolutionary interpretation because the voters undisputedly intended to apply that portion of the constitution in the private sector.⁵⁵ On the different question of access to public forums, the shopping mall speech cases clearly have taken an evolutionary tack by recognizing that the replacement of public streets and sidewalks with enclosed malls has the potential of abridging the right to speak freely. It would be equally true to the text and spirit of the 1849 constitution to

Judge Robert H. Bork, a distinguished proponent of the jurisprudence of original intent, has explained that, in order to be true to the original intent of the framers, the modern judge must apply the general principle on which the framers agreed to circumstances which the framers could not have dreamed of. "A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty." Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 827 (1986).

Jacobs, 139 Wis. 2d at 535-36, 407 N.W.2d at 850 (Abrahamson, J., concurring in part and dissenting in part).

54. Thus, in the same shopping mall case, Justice Abrahamson would have concluded that, by "restraining political speech . . . and asserting a right to control and orchestrate speech in these new centers of community life these nongovernmental entities present a threat analogous to the specific threat identified by the framers of the Wisconsin Constitution" in the second half of the clause, which explicitly forbids laws that interfere with speech. 139 Wis. 2d at 537, 407 N.W.2d at 851. Justice Steinmetz, writing for the majority, was not swayed:

This court has the power, perhaps the duty, to make sure that the protections of our state constitution remain relevant in light of changing conditions, emerging needs, and acceptable changes in social values, but such action must be consistent with the clear meaning of the constitution. However, this cannot be "made an excuse for imposing the individual beliefs and philosophies of the judges upon other branches of government. . . ."

Jacobs, 139 Wis. 2d at 520, 407 N.W.2d at 843-44. On his side of the original intent war, Justice Steinmetz cited Raoul Berger, George Deukmejian, and Professor Thayer. *Id.* (quoting B. CARDOZO, *NATURE OF THE JUDICIAL PROCESS*, 91 (1921)). Justice Abrahamson's rejoinder: "The personal preference of the judge should no more be used to read rights out of the constitution than it should be used to read rights into the constitution." *Id.* at 541, 407 N.W.2d at 853. As for any question raised by the text itself, Justice Steinmetz thought that Wisconsin's article I, § 3 (which is almost identical to California's free speech clause) had such a "plain meaning" that applying it to private conduct was not only wrong, but, in all seriousness, unthinkable:

We need go no further than holding that Art. I, sec. 3 has plain, unambiguous meaning that free speech is protected constitutionally [exclusively] against state interference. There cannot be a different understanding of Art. I, sec. 3 by reasonable persons and therefore there is no ambiguity. Whether language of a statute or constitutional provision is clear or ambiguous depends on the mind-set of the reader. Thus, two persons or groups can each have a different concept of the same words both reasonable but only one correct.

Id. at 504, 407 N.W.2d at 837.

55. See *supra* note 48.

recognize that, in the late twentieth century, threats to the complete enjoyment of freedom of speech and to privacy from other private entities are as serious as threats from elected and appointed officials. The ranchers, farmers, and miners of 1849 did not yet live in a world where the overwhelming majority of Californians are dependent on wages for their living and live in rented housing, often in areas where decent housing and employment are in short supply. Indeed, we spend most of our lives at school, or at jobs, or in our apartments. Employers and landlords, among others,⁵⁶ possess, and some will inevitably use, their significant economic power to prevent unwanted speech or to invade privacy, or to deny equality of opportunity. Both courts and scholars have commented on this everyday reality.⁵⁷

At the same time, it would do violence to the text and history of the Declaration to ignore property rights, also enshrined in section 1. A place at least as high as liberty in the hierarchy of inalienable rights is given to "acquiring, possessing, and protecting property."

"All people" who enjoy such rights does not clearly embrace corporations. And if it does, it can only be assumed that some accommodation of property with liberty was intended. It may be that, if asked, the peo-

56. Under some circumstances, a private medical group can be sued for damages under California's "right to petition" clause, without the need to show "state action." *Leach v. Drummond Medical Group*, 144 Cal. App. 3d 362, 192 Cal. Rptr. 650 (1983). The defendants in that case were providers of medical services who refused to continue to treat the plaintiffs, in retaliation for the plaintiffs' complaint to a government investigating committee about the health care provided at a community hospital.

57. "The right of free expression is as important to many people in their personal and institutional relationships as it is in the narrower 'civil liberties' related to politics, and nothing in [Oregon's free expression guarantee] suggests that it is limited to the latter." *State v. Robertson*, 293 Or. 402, 435, 649 P.2d 569, 589 (1981). "Unions and corporations have an importance in our lives which the founding fathers would have thought possible only of government itself." Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345, 348 (1961). "[T]he state has itself immunized [the private utility] from many of the checks of free market competition and has placed the utility in a position from which it can yield enormous power over an individual's employment opportunities." *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 472, 156 Cal. Rptr. 14, 22, 595 P.2d 592, 600 (1979); see also *White v. Davis*, 13 Cal. 3d 757, 774, 120 Cal. Rptr. 94, 106, 533 P.2d 222, 234 (1975) (proponents of successful privacy amendment argued in election brochure that "[t]he proliferation of government and business records over which we have no control limits our ability to control our personal lives").

Professor Sundby does not deny the enormous economic power of the private establishment, see Sundby, *supra* note 2, at 142-43 nn.7 & 8, but argues that the government possesses even more power to affect citizens' lives and that state action is therefore "not an irrational line," *id.*, at 143. Even if he is correct about the greater degree of power possessed by "government," the argument should also consider the checks against abuse of that power. Potential government abuse is arguably less likely because it is restrained by the need to be politically accountable to the press, the voters, and appointing authorities. Private power, privately exercised, is removed from all direct political restraints, short of corrective legislation.

ple of California would decide that a corporation should be free to discharge its employees for exercise of what we call "free speech," even in cases in which the employee was competently performing his or her job. Empirical evidence suggests otherwise. No controlled studies indicate whether the public is aware that the Federal Bill of Rights does not protect them against their private employers; however, years of teaching constitutional rights to law students have convinced this author⁵⁸ that a significant percentage of even this relatively sophisticated population is surprised by this legal truism. Specifically in regard to employment, one study conducted in Nebraska showed that only a small fraction (ranging, according to age group, from eight to twenty-two percent) of people knew that employers generally have the right to fire an employee without cause connected to the employee's performance.⁵⁹ By a large majority, the respondents in this study believed that such terminations were unethical and believed that laws should be passed to prohibit them. Of course, that is hardly evidence that the people would want such rules to be constitutionalized. But where such laws are not passed, private employees and tenants, among others, will predictably seek to invoke the fair procedures and freedom of expression apparently promised in the constitution.

B. Constitutional Torts

This important objection remains: What precedent or justification exists for casting such rights against private entities in a constitutional form rather than legislative or nonconstitutional common-law processes, where adjustment of private party relations ordinarily takes place?

If relief against private conduct is available under the Declaration of Rights, plaintiffs alleging infringement of speech and privacy will seek damages based on a tort theory. These suits would present a classic case for tort liability. The duty element of the tort is supplied by the constitution; state judges would decide whether that duty had been breached, what defenses or immunities were available, and whether damages or attorney fees for prevailing parties were available. A major consequence of permitting such claims would be to make of the state Declaration of Rights a new "font of tort law."⁶⁰ These new torts would not displace existing common-law torts like wrongful discharge and invasion of privacy, but would often overlap with them.

58. *Accord* Chemerinsky, *supra* note 1.

59. Forbes & Jones, *A Comparative, Attitudinal, and Analytical Study of Dismissal of At-Will Employees Without Cause*, 37 *LAB. L.J.* 157, 165 (1986).

60. The phrase is from Justice Rehnquist's opinion in *Paul v. Davis*, 424 U.S. 693 (1976) (disclaiming that role for federal constitutional law).

Constitutional torts already are well established in this state and others. A number of state courts have been asked to allow a cause of action in tort for violation of state constitutional rights. Most states that have addressed the question do not seem to find it controversial; about twelve have allowed suits for damages, characterized either as an "implied" cause of action, citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁶¹ or simply as a matter of common law.⁶² Most of these cases have been filed against public agencies. California, however, has permitted constitutional damage claims against private entities as well as public ones.⁶³

In addition to direct damage claims, constitutional policies are enforced against private actors, without the need to discuss "state action," when those policies are absorbed into existing common-law causes of action. For example, California courts have a ten year tradition, recently reaffirmed, of honoring constitutional rights in tort actions for wrongful discharge in violation of public policy. As the Supreme Court iterated last year in *Foley v. Interactive Data Corp.*, a private employer may be sued in tort when an employee's dismissal breaches a public policy "derived from a statute or constitutional provision."⁶⁴ Applying this familiar principle, the court of appeal has noted that California's constitutional prohibition on sex discrimination supported a female worker's suit against her private employer for discrimination.⁶⁵ Similarly, reasoning under the right to petition the government, some California cases have suggested that private employees may enjoy, by means of a

61. 403 U.S. 388 (1971) (violation of fourth amendment by federal agent gave rise to action for damages directly under the Constitution).

62. For a survey of state decisions on this topic, see Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985). Since 1985, a Texas court of appeals also has joined the fold in a fairly typical case, a suit brought by an intensive care nurse whose article on the "right to die" provoked her dismissal by a hospital. After noting the broad, affirmative nature of most state free speech clauses, the court stated: "We accordingly hold that article 1, section 8 of the Texas Constitution constitutes an independent legal basis for a cause of action claiming an infringement of the right of free speech guaranteed by that section of the state constitution." *Jones v. Memorial Hosp. Sys.*, 746 S.W.2d 891, 893-94 (Tex. Ct. App. 1988).

63. See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (allowing claim for damages against public utility for discrimination against homosexuals); *Rojo v. Kliger*, 209 Cal. App. 3d 10, 257 Cal. Rptr. 158 (1989) (allowing claim for damages against private employer for sexual harassment); *Fenton v. Groveland Community Serv. Dist.*, 135 Cal. App. 3d 797, 185 Cal. Rptr. 758 (1982) (allowing action against private individuals as well as government for denial of right to vote); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (allowing claim for damages against private university for invading student's privacy).

64. 47 Cal. 3d 654, 669, 765 P.2d 373, 379, 254 Cal. Rptr. 211, 217 (1988).

65. *Rojo v. Kliger*, 209 Cal. App. 3d 10, 24, 257 Cal. Rptr. 158, 166 (1989).

common-law absorption of constitutional policy, an immunity from discharge or discipline for work-related protests.⁶⁶

Granting that the state courts have the power to recognize a cause of action for constitutional deprivations, the question becomes whether exercise of this power is unwise or improper when the defendant is a private actor. Of course, the immediate objection is that, unlike ordinary common-law torts, this theory would create a sort of "super tort," beyond the power of the legislature to modify or abolish. At the same time, it would amplify the power of judges in relation to the legislature. Thus, it would be antidemocratic; courts should be hesitant to bypass the legislature when the question is "merely" one of regulating relations between private parties.

This objection is sound, but can be easily overstated. First, to the extent that we believe the Declaration of Rights promotes interests, like privacy and freedom of speech that should not be at the mercy of the democratic give and take of representative politics, or the law of contracts, assignment of their enforcement to the judiciary is appropriate. Second, the antimajoritarian feature is greatly softened by another constitutional right in California: constitutional amendment by initiative and referendum. For better or worse, no constitutional right in California is beyond the reach of the electorate if that right proves to be politically intolerable.

The California Legislature also has the power to shape appropriate remedies for the violation of constitutional rights. The legislature may, if it desires, pass statutes regulating the filing of claims, defenses and immunities, amount of damages recoverable, and attorney fees. State tort claims acts commonly regulate these aspects of tort litigation against public bodies and officials. Private tort litigation would be equally regulable. The California Legislature has modified common-law remedies and

66. See, e.g., *Greene v. Hawaiian Dredging Co.*, 26 Cal. 2d 245, 157 P.2d 367 (1945), in which the court held that an employee's protest of working conditions was not "cause" for termination of his employment contract. The court stated:

The wisdom and importance of the right to petition is not new. The right of the governed to petition those exercising the powers of government is secured by the Constitution of the United States and this state. (U.S. CONST. amend. I; CAL. CONST. art. I, § 10.) The obligations of the employee in the instant case are those implied in law because considered wise policy. That policy must be applied in the light of the policy insuring the right to petition.

26 Cal. 2d at 251, 157 P.2d at 370.

Greene was quoted by then Presiding Judge Grodin to support his conclusion that an employee dismissed for protesting unhealthful work conditions could sue his employer in tort. *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 297, 188 Cal. Rptr. 159, 163 (1982). The opinion also invoked a general public policy of encouraging employee comment on possible violations of state statutes requiring healthful work places. *Id.* at 296, 188 Cal. Rptr. at 162-63.

contingency fee arrangements, for example, with respect to medical malpractice claims.⁶⁷

II. Line Drawing

California has pioneered the terrain of constitutional rights litigation over private conduct. Largely unexplored, however, is the standard by which courts should decide when the interests of a private defendant will prevail, even over assertions of constitutional rights. The difficulty of this enterprise may be the most powerful objection to commencing it.

Almost everyone who speaks of this accommodation assumes that it calls for something called balancing. For example, Professor Levinson writes, in regard to the shopping mall line of cases:

There is no alternative to such balancing once a court decides to recognize any rights of access to private property. Otherwise, individuals seeking to speak indeed would have a right to climb over backyard fences and distribute their literature at family picnics, and no one seriously argues in behalf of such a right.⁶⁸

Most state courts also seem to assume that balancing is the method of choice, although they disagree about the factors and weights in the balance. To see how lower courts are coping with line drawing under such open-ended standards, compare three recent "second wave" lower court opinions, each from a state whose supreme court generally has proclaimed some sort of free speech access rights to private property.

The first is the Washington Court of Appeals opinion in *City of Sunnyside v. Lopez*,⁶⁹ a case particularly well suited to testing the mettle of civil libertarians since it concerns free speech rights invoked by an anti-abortion demonstrator. Ms. Mary Lopez, the demonstrator, tried to speak to patients and pass out anti-abortion literature on the covered outdoor "breezeway" immediately surrounding a doctor's offices. The

67. The California Legislature enacted the Medical Injury Compensation Reform Act of 1975 (MICRA), 1975 Cal. Stat. 3949, which made significant changes in medical malpractice litigation. MICRA requires notice of intent to file suit, modifies statutes of limitations, places ceilings on recoveries for noneconomic losses, and limits the amount of contingency fees for which the plaintiff's attorney may contract. MICRA has been sustained by the California Supreme Court against various state and federal constitutional attacks. *See generally* Note, *Medical Malpractice and Contingency Fee Controls: Is the Prescription Curing the Crisis or Killing the Patient?*, 19 LOY. L.A.L. REV. 623 (1985) (discussing the application of statutory fee limits in light of first amendment protections afforded attorneys' fees).

68. Levinson, *supra* note 4, at 54 (footnotes and citations omitted). Professor Margulies also calls for eliminating the formal search for state action and balancing openly the interests of speaker and property owner. Margulies, *supra* note 3, at 730, 736. Professor Sundby likewise accepts "balancing" as a description of what judges do in deciding constitutional rights. *See* Sundby, *supra* note 2, at 148 n.24.

69. 50 Wash. App. 786, 751 P.2d 313 (1988).

breezeway was adjacent to the parking lot, but was posted against trespassing. She was arrested for trespass when she refused to confine her activities to the public sidewalk. She claimed a right under the Washington free speech clause (which is like California's) to free access, at least to the outdoor portions of the Sunnyside Professional Center. No evidence indicated that Ms. Lopez's activities interfered in any way with the ordinary use of the breezeways. As Judge Thompson pointed out in his dissent, "She was not impeding access to the center's tenants, nor was she harassing or verbally abusing potential patients. Her activities were not found to have financial impact on the center."⁷⁰

Despite the lack of any real harm from the speech, the appeals court affirmed her conviction for trespass.⁷¹ The court purported to apply a balancing test taken from Washington's leading shopping mall case, *Alderwood Associates v. Washington Environmental Council*.⁷² An asserted constitutional right of access depended upon three factors:

"The first is the use and nature of the private property. As property becomes the functional equivalent of a downtown area or other public forum, reasonable speech activities become less of an intrusion on the owner's autonomy interests. When property is held open to the public, the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value." The second factor for the court to consider is the nature of the speech activity. The third factor is whether the potential exists for reasonable regulation of the speech. Some speech activity may be so unreasonable that it violates the property owner's First Amendment right not to participate in the dissemination of an ideological message or it may amount to an uncompensated taking of private property.⁷³

70. *Id.* at 800, 751 P.2d at 321.

71. *Id.* at 787, 751 P.2d at 314.

72. 96 Wash. 2d 230, 244, 635 P.2d 108, 116 (1981) (plurality stated that article 1, § 5 of the Washington Constitution does not require state action).

73. *Lopez*, 50 Wash. App. at 791-92, 751 P.2d at 317 (quoting *Alderwood*, 96 Wash. 2d at 244-45, 635 P.2d at 116). The explanation of the first factor may not be entirely logical. *Alderwood* states that when property is held open to the public, "any speech activity is less threatening to the property's value." *Lopez*, 50 Wash. App. at 791, 751 P.2d at 317 (quoting *Alderwood*, 96 Wash. 2d at 244, 635 P.2d at 116). In most cases the exact opposite is true. When private property is held open to the public, it is invariably with the expectation that the owner will profit by selling something to the public. Since obnoxious speech probably induces some shoppers to avoid commercial premises, or to patronize a competitor, this type of property could be the *most* vulnerable to loss from *unregulated* speech activity, not the least. Other property not used for retail purposes, like an office building, cannot be so easily avoided by those with business inside, and therefore the purposes of the property might be unimpaired by expression in and around it.

As to factor number three, the owner might, of course, also have a state-based, "article I, § 5" right not to participate in the dissemination of an ideological message; the use of "First Amendment" to describe all speech type rights generically probably is reflexive.

But of these three, the first “factor” alone—use and nature of the property—was adequate to overcome any constitutional right of access to the medical center. The center was, the court said, unlike a shopping mall in that it was not a successor to a traditional public forum; it was not open generally to the public, but only to patients, and prohibition of access would not curtail the realistic opportunity of citizens to exercise their right of free speech elsewhere.⁷⁴ To the extent that the public *was* invited to enter, the court likened the premises to the “modest retail establishment” that California’s *Robins v. Pruneyard Shopping Center*⁷⁵ decision suggested would *not* require access.⁷⁶ The court concluded that it did not have to reach the last two of the three factors, but could affirm the conviction based only on the first factor, nature and use of the property as “private.”⁷⁷

In a New Jersey trial court case, *Bellemead Development Corp. v. Schneider*,⁷⁸ the rights claimant was a union organizer who wished to distribute organizing literature on private sidewalks in front of office buildings to the office workers employed there. New Jersey’s test for such cases comes from the celebrated Princeton University case—*State v. Schmid*.⁷⁹ The *Schneider* court characterized *Schmid* as a “sliding scale” standard⁸⁰ composed of three slightly different factors: “(1) the nature, purposes, and primary use of such private property, generally, its ‘normal’ use, (2) the extent and nature of the public’s invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.”⁸¹ After addressing all three factors, the *Schneider* court ruled that organizers could be barred from entering the grounds of the office complex.⁸² It reasoned that factor number two—here, there was no invitation to the public to enter—was more important than any other.

The opinion is full of interesting tensions. The court conceded that, concerning factor number three, there was a near perfect relation between the use of the property and the purpose of the expression.⁸³ The purpose was to reach workers and the use of the property included the employment of workers. Plainly, the protestations of the building

74. *Lopez*, 50 Wash. App. at 794, 751 P.2d at 318.

75. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff’d*, 477 U.S. 74 (1980).

76. 50 Wash. App. at 794, 751 P.2d at 318.

77. *Id.*

78. 193 N.J. Super. 85, 472 A.2d 170 (1983).

79. 84 N.J. 535, 423 A.2d 615 (1980).

80. 193 N.J. Super. at 92, 472 A.2d at 174.

81. 84 N.J. at 563, 423 A.2d at 630.

82. 193 N.J. Super. at 100, 472 A.2d at 178.

83. *Id.* at 98, 472 A.2d at 177.

owner—that it was not in his tenants’ interests to have unionized employees—were not supposed to be conclusive. The owner’s desires could not be the measure of the free speech right, for “*Schmid* directs this court to look to whether the expressional activities are *discordant* with the use of the property and not whether they are discordant with the owner’s desires or interests.”⁸⁴ Nevertheless, the owner ultimately won because “the normal use of the property is private and . . . there is no invitation by plaintiffs *to the public* to enter upon and use the property”⁸⁵

Characterizing the reasoning as balancing is difficult because one consideration, the “invitation” factor, was conclusive. The court even came close to openly rejecting balancing altogether. The court stated:

The *Schmid* court did not advise as to the weight to be given each of the three factors. The court will issue an injunction, not because more factors weigh in favor of plaintiffs, but because the court finds that factor number two is the most important as expressing the constitutional policy . . . and because, overall, the properties are found to be private in nature.⁸⁶

The Washington and New Jersey opinions probably are wrong,⁸⁷ but they are at least fairly clear. The third opinion, from the California court of appeal, might be correct in barring certain kinds of free speech activity in a shopping center, but it cites so many reasons that its reasoning is difficult to ascertain. In *Horton Plaza Associates v. Playing For Real Theatre*,⁸⁸ the California Fourth District Court of Appeal ruled against a group of political demonstrators whose protest against United States policies in Central America took the form of skits. The group was allowed to distribute literature within a shopping center in San Diego, but enjoined from any other expressive activity because (1) distributing literature was an alternative means of presenting their views, (2) the protesters had not proved that the premises were large enough to accommodate both plays and shoppers, (3) the protesters had alternative forums in a nearby park, and (4) the plaza was downtown instead of in the suburbs.⁸⁹

If these three opinions are typical of future progeny of the shopping mall precedents, few commercial property owners, let alone residential ones, have anything to fear from state constitutions. Certainly this is true if they do not issue general invitations to the public to enter their

84. *Id.* 472 A.2d at 177 (emphasis added).

85. *Id.* 472 A.2d at 177 (emphasis added).

86. *Id.* at 98-99, 472 A.2d at 177.

87. *See supra* notes 65-79 and accompanying text.

88. 184 Cal. App. 3d 10, 228 Cal. Rptr. 817 (1986).

89. *Id.* at 827.

premises. Results aside, these opinions show little evidence of balancing. The Washington anti-abortion case and the New Jersey labor organizing case seem to rest on little more than the rationale that because the owners did not invite the public to enter, the public could not enter for speech purposes.⁹⁰ While the lack of an invitation to the public surely is relevant when the entire public seeks to enter, that observation hardly should dispose of the rights of particular members of the public whose purposes for entering are both nondisruptive and highly related to the use of the property. The rationales of *Lopez* and *Schneider* effectively negate the state constitutional right whenever the use of the property does not happen to require a large number of customers. This might mean that the right is enforceable only against huge retail shopping centers, and even then not against all of them.

Both opinions contain the seeds of what could be a different way to evaluate whether the proposed speech activity is in fact *incompatible* with the use of the property, including the owner's legitimate expectation of profit and other satisfactions from ownership, such as service to patients. At a minimum, the speaker's constitutional interest could be accommodated when the financial cost to the defendant is low, and the defendant has no competing constitutional interest of her own. In the Washington case, for example, the record did not contain any evidence tending to show that Ms. Lopez's actions had induced patients to avoid this doctor in favor of another, or to forego medical consultation, or that patients' physical or mental well-being were at all affected. The dissenting judge found the absence of financial impact on the medical center significant.⁹¹ That sort of evidence would have been highly persuasive if the test were the compatibility of her entry with the owner's and users' legitimate expectations. But the majority did not find such evidence interesting. It allowed the case to turn solely on a fact within the owner's exclusive control: the degree to which he had invited the public to enter the premises. In the New Jersey case, on the other hand, compatibility of uses is declared to be part of the test used, and the court makes an explicit finding that the proposed expressive activity was compatible with the use of the property; but that fact availed the organizers and employees not at all, since they had not been invited for this purpose.⁹²

90. *E.g.*, *Bellemead Dev. Corp. v. Schneider*, 193 N.J. Super 85, 99, 472 A.2d 170, 177 (1983) ("Plaintiffs have not opened their premises for public use . . . ; therefore, defendants herein have no right to enter the subject property to distribute leaflets.").

91. *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 800, 751 P.2d 313, 321 (1988).

92. *Schneider*, 193 N.J. Super. at 100, 472 A.2d at 178.

A standard that starts with the incompatibility of speech with competing interests also makes sense in employment disputes. In a wrongful discharge case brought under the Texas free speech clause, an intensive care nurse filed suit when she was fired after she published an article about tensions between the duty of health workers to preserve life and a patient's "right to die" with dignity.⁹³ The nurse's case might have been decided by asking what job functions and professional standards the nurse had reasonably undertaken to perform and whether publishing an article on this subject was incompatible with carrying out those functions.⁹⁴ Asserting that her job description included a duty of silence, conformity, or loyalty was not sufficient. Hospital counsel should have investigated whether publication of the article harmed the emotional or physical well-being of anyone to whom the nurse owed a responsibility. At a minimum, the court should have required evidence about who was disturbed by reading the article (patients or their families, or only doctors or hospital administrators?) and whether her views ever affected her actual willingness to carry out orders. In speech cases the determination of incompatibility can be difficult. In others it can be fairly simple. No legitimate property interest of an employer normally is advanced when the employer hires or fires because of the employee's gender or race, for example. Such action would exemplify the use of power for its own sake, a use incompatible with the simultaneous advancement of the sister value of liberty.

Conclusion

The choice to apply constitutional rights to private conduct finds support in text and precedent and is a task less daunting than it may

93. *Jones v. Memorial Hosp. Sys.*, 746 S.W.2d 891, 893-94 (Tex. Ct. App. 1988). This recent opinion affirmed that article 1, § 8 of the Texas Constitution supplied an independent legal basis for a cause of action, but did not address the merits.

94. One state free speech case making "incompatibility" the focus in an employment related dispute is the Oregon Supreme Court opinion in a bar disciplinary case, *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983). A disciplinary rule, aimed at promoting fair criminal trials, forbade prosecutors from making public statements regarding the arrest or prosecution of suspects. A prosecuting attorney was accused of violating the rule by issuing certain statements to the press. The court described the standard as follows:

[T]he rule addresses the incompatibility between a prosecutor's official function, including his responsibility to preserve the conditions for a fair trial, and speech that, though privileged against other than professional sanctions, vitiates the proper performance of that function under the circumstances of the specific case. In short, a lawyer is not denied the freedom to speak, write, or publish; but when one exercises official responsibility for conducting a prosecution according to constitutional standards, one also undertakes the professional responsibility to protect those standards in what he or she says or writes.

Id. at 125, 673 P.2d at 857.

appear. California's case law in this area has been innovative, but hardly radical. Privacy clearly is established as a constitutional right, regardless of the status or identity of the privacy invader. Employment decisions by some private employers must comport with equal protection, and use of the right to petition the government cannot be made the occasion for some types of private coercion. Access to private property for political activity under article 1, section 2 is well established as a general rule, but has not really expanded in ten years, and is subject to uncertain exceptions and distinctions. If the judiciary were so inclined, this line of cases easily could be confined to large retail establishments. That would be an unfortunate closing of a window in constitutional doctrine that California opened with such flair ten years ago.

On the other hand, constitutional actions against private actors could continue to provide an avenue for decision of grievances now going completely unredressed. For common sensical and economic reasons, a large fraction of privacy, equality, and speech claims likely would involve defendants such as employers, landlords, labor unions, private schools, and government contractors that are in a position to inflict significant losses on employees, tenants, or students. The net result could be an increase in the power of the individual in situations in which, because of disparities in economic power, negotiation for such rights is unlikely. Whether that would represent a net gain for California society is a topic California courts increasingly will be invited to discuss.

