Press protection under California's constitution

Overview

The U.S. Supreme Court has consistently denied the press's requests for special constitutional protection under the First Amendment. This is unlikely to change under the Roberts Court. In fact, the Court may roll back existing press protections in the coming years. Press advocates must now look to other sources of protection instead. One promising possibility is state constitutions. California's constitution, in particular, operates as a valuable yet underutilized source of protection for journalists and other newsgatherers.

Discussion

The Press Clause of the First Amendment has little independent meaning. For decades, the high court has extended protection for the press under the Speech Clause alone or under some combination of speech and press rights.[1] It has also consistently denied requests by the press for recognition of any rights that extend exclusively to the press. Instead, the Court has long held that members of the media have "no special immunity from the application of general laws."[2] The Supreme Court has rejected the press's requests for more expansive protections than those extended to the public at large in critical areas such as access to government information or protection for confidential sources.[3]

And it is possible the Court will shrink existing protections available to the press under the First Amendment in the future. The Court has adopted a neo-*Lochner* approach to freedom of speech in recent years, expanding speech protections under the First Amendment to invalidate regulatory efforts in areas like corporate campaign finance or labor law.[4] Yet federal courts overall have proved to be reluctant to offer more expansive First Amendment protections for other kinds of speakers, including the press.[5] To the contrary, the Court rarely even references

the concept of press freedom in its recent opinions.[6] And some justices have indicated a willingness to roll back longstanding press protections, such as the actual malice requirement in certain defamation contexts recognized under *New York Times v. Sullivan.*[7]

Press advocates must look to alternative sources of protection. One promising yet underutilized source of such authority is state constitutions. Many states have taken a different approach to constitutional protection for the press than the federal constitution.[8] And California offers a leading example. California's constitution offers more expansive protection for the press than the First Amendment, both in text and under current precedent, at least in certain press-related areas.[9] And textual distinctions between the First Amendment and California constitution article I, section 2 can be used by press advocates in effective ways. Press advocates in California can and should look to expansive interpretations by other state high courts for analogous speech and press provisions to push for more favorable protections under California's constitution.

California's constitution broadly protects the press

In some respects, California's constitution already offers unusually broad protections for the press. For example, it is the only state constitution in the country to elevate protections for reporters' confidential sources to the status of constitutional protection. California constitution article I, section 2 protects reporters against the compelled disclosure of both confidential and nonconfidential information.[10] The provision sweeps broadly, applying to any "person connected with . . . a . . . periodical publication."[11] And it offers protection, both for "refusing to disclose the source of any information procured while so connected or employed" by a periodical publication, and for "refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."[12]

The state constitution was amended to add article I, section 2 in 1980 by ballot initiative in direct response to the Supreme Court's failure to extend constitutional

protection for confidential sources under the First Amendment.[13] It was also introduced after state court judges demonstrated an increased willingness to hold reporters in contempt, despite the state legislative shield in effect at the time. The history of this provision demonstrates voters' concern with the democratic consequences of failing to protect newsgatherers. As the argument in favor of the ballot initiative says: "If our democratic form of government — of the people, by the people, for the people — is to survive, citizens must be informed. *A free press protects our basic liberties by serving as the watchdog of our people*."[14]

The public responded by constitutionalizing the privilege. California courts have emphasized that decision's significance, reasoning that "[t]he elevation to constitutional status must be viewed as an intention to favor the interests of the press in confidentiality over the general and fundamental interest of the state in having civil actions determined upon a full development of material facts."[15] The courts have also interpreted the scope of this constitutional protection to sweep broadly. Once it attaches, this reporter's privilege provision is absolute in civil cases.[16] And in criminal cases, it can be overcome only by a countervailing federal constitutional right.[17]

California's constitutional protections for the press sweep more broadly than the First Amendment in other respects. The Supreme Court has held that the federal constitution offers broad limitations against prior restraints on publication. But this protection is not absolute. In *Near v. Minnesota*, the Court allowed for some circumstances under which a prior restraint would be permitted, such as to prevent publication of "the location and number of troops" in wartime.[18] It later reaffirmed that prior restraints are strongly disfavored but not categorically prohibited in the *Pentagon Papers* case in 1971.[19]

In contrast, prior restraints are categorically prohibited under California's constitution. In 1896, the California Supreme Court held that the state's speech and press provision forbids all prior restraints on speech.[20] It relied on textual distinctions between the federal and California constitutions to support this

conclusion. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[21] In contrast, California's constitutional speech and press provision extends more broadly, and it articulates protection in affirmative terms, providing that "every citizen may freely speak, write, and publish his sentiments on all subjects."[22] The plain language of this provision, the California Supreme Court has reasoned, makes clear that a citizen "shall have no censor over him to whom he must apply for permission."[23] There is no exception under the state constitution; the prohibition against prior restraints is absolute.

California's constitution also contains broader and more explicit rights of information access than those contained in the federal constitution. The Supreme Court has recognized an implicit constitutional right of access to criminal trials, one that derives from the First Amendment.[24] Federal courts have extended this right to other judicial contexts, including civil trials and other pre- and post-trial proceedings, as well as to certain judicial records.[25] But they have largely declined to extend a constitutional right of access beyond the judicial branch.[26]

In contrast, California's constitution provides an express constitutional right of access. Article I, section 3 provides: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[27] The California constitution further provides that this state constitutional right of access "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."[28]

California courts have pointed to this language to emphasize the breadth and strength of the right of access to state and local government information, holding that constitutionalizing the right of access shows voters' intent to expand upon the existing statutory rights in place at the time.[29] "Given . . . the constitutional mandate to construe statutes limiting the right of access narrowly," the California Supreme Court has explained, "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary."[30]

California's constitution can further protect the press

California's constitutional text can support even broader protections for the press going forward. The state constitution already extends more expansive protections for the press than those contained in the federal constitution in some areas. But more could be done. Press advocates in California could push the courts to interpret these state constitutional provisions in ways that extend such protection further.

One approach is to look to judicial interpretations of analogous constitutional provisions in other states. Many state constitutions contain identical or near-identical language regarding protections for speech and the press.[31] This is also true for California's constitution. And such textual similarities often derive from a deliberate choice by state constitutional drafters to model their constitution on an existing one. For example, when California constitutional delegates gathered in Monterey in 1849 to draft a state bill of rights, in drafting the press and speech provisions the delegates selected New York's Constitution to serve as their model.[32] New York's Constitution at the time provided: "Every citizen may freely speak, write and publish his or her sentiments on all subjects . . ."[33] The new California constitution adopted nearly the identical language.

Since then, New York's state high court has placed great interpretive weight on the affirmative nature of this language, as well as on the breadth of its promise to protect speaking, writing, and publishing activities. For instance, in 1990 the Supreme Court narrowed federal constitutional protection for statements of opinion. Previously, most federal circuits had adopted a rule defining opinion statements — which received protection from defamation liability — broadly. Yet in *Milkovich v. Lorraine Journal*, the Supreme Court narrowed this definition, extending protection only to statements that were not "provable as false" or "cannot reasonably [be] interpreted as stating actual facts."[34]

A number of state high courts declined to follow suit, including New York.[35] New York's highest court pointed to textual distinctions between federal and state constitutional speech protections to support this rejecting federal interpretive precedent. It reasoned that the state constitution articulates speech and press

protection in "strong affirmative terms," in contrast with the First Amendment's negative phrasing of protection against government interference.[36]

Press advocates could draw upon this precedent, pointing to both the textual similarities in the New York and California constitutional free expression provisions and the historical lineage of California's constitutional language as a reason to follow New York's lead. The California Supreme Court could rely on this state constitutional language to offer more expansive protection against defamation liability under the state constitution than currently exists under the First Amendment.

Conversely, California's constitution can and should serve as a model for other states to follow as well. Voters in California have twice elevated statutory protections that implicate the press to constitutional status — first in the form of the reporter's privilege, and second in the form of information access rights.[37] State constitutional amendment is an underutilized tool when it comes to press protections, and press advocates should follow California's lead in other states.

Conclusion

The press faces an onslaught of threats today. The longstanding financial model for news media has collapsed and public faith in the institutional media has plummeted. The new Trump administration has already renewed its attacks on the press that were a characteristic feature of the first Trump administration. New sources of protection are needed. State constitutions offer a promising avenue for press advocates to rely upon in the years to come. California's constitution is one place to start.

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1. *Associated Press v. NLRB* (1937) 301 U.S. 103, 132–33. ↑

2. See, e.g., *Branzburg v. Hayes* (1972) 408 U.S. 665, 682 (denying First

Amendment protection for confidential sources in response to criminal grand jury subpoenas); *Houchins v. KQED, Inc.* (1978) 438 U.S. 1, 15 (denying the press a First Amendment right to access prison facilities). ↑

3. See, e.g., *Sorrell v. IMS Health Inc.* (2011) 563 U.S. 552; *Citizens United v. Fed. Elec. Com.* (2010) 558 U.S. 310; *Janus v. Am. Federation of State, County, and Mun. Employees, Council 31* (2018) 585 U.S. 878. See also Shanor, *The New Lochner* (2016) 2016 Wis. L.Rev. 133, 136 (arguing that "where earlier constitutional deregulation rested on the apparent naturalness of common law baselines, First Amendment deregulation — what I term the new Lochner—largely rests on the apparent obviousness of what constitutes speech"). ↑

4. See, e.g., *United States v. Sterling* (2013) 724 F.3d 482 (denying a constitutional shield for reporter's sources in federal criminal trials); *McKevitt v. Pallasch* (2003) 339 F.3d 530. ↑

5. Jones & West, *The Disappearing Freedom of the Press* (2022) 79 Wash. & Lee L.Rev. 1377, 1380. ↑

6. *Berisha v. Lawson* (2021) 141 S. Ct. 2424 (Thomas, J., dissenting from denial of cert.); *id.* at 2425 (Gorsuch, J., dissenting from denial of cert.). ↑

7. See Koningisor, *The Other Press Clauses* in The Future of Press Freedom (Jones & West eds., 2025) (forthcoming, Cambridge University Press). ↑

8. See, e.g., Cal. Const. art. I, section 2 (constitutionalizing the reporter's privilege); *Playboy Enterprises, Inc. v. Superior Ct.* (1984) 154 Cal.App.3d 14, 27–28 ("The elevation to constitutional status must be viewed as an intention to favor the interests of the press in confidentiality over the general and fundamental interest of the state in having civil actions determined upon a full development of material facts."). ↑

9. Cal. Const. art. I, section 2. ↑

10. *Id*. ↑

11. *Id.* ↑

12. Voter Information Guide, Primary Election (1980) at 18–21. ↑

13. *Id.* at 19 (emphasis original). ↑

14. *Playboy Enterprises*, 154 Cal.App.3d at 27–28. ↑

15. *Miller v. Superior Court* (1999) 21 Cal.4th 883, 891. ↑

16. *Id.* at 897. ↑

17. *Near v. State of Minnesota ex rel. Olson* (1931) 283 U.S. 697, 716. ↑

18. *N.Y. Times Co. v. United States* (1971) 403 U.S. 713, 714. ↑

19. *Dailey v. Superior Court of San Francisco* (1896) 112 Cal. 94, 97. ↑

20. U.S. Const., 1st Amend. ↑

21. Cal. Const. art. I, section 2. ↑

22. *Dailey*, 112 Cal. at 97. ↑

23. *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 580 ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.") (internal citations and quotations omitted). ↑

24. See "The Roots of Access Rights," Rptrs. Com. for Freedom of the Press (describing the evolution of constitutional right of access law in the various circuits). ↑

25. A handful of courts have extended the right of access to quasi-judicial proceedings held by administrative agencies, but this exception is limited. See Dunn, "Rediscovering the First Amendment Right of Access" (2011) N.Y.L.J. ↑

26. Cal. Const. art. I, section 3. ↑

27. *Id.* ↑

28. See, e.g., *Von Herrmann v. Superior Court* (2022) 75 Cal.App.5th 535, 543. ↑

29. *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166 (internal citations and quotations omitted). ↑

30. See Koningisor, *The Other Press Clauses* in The Future of Press Freedom at appx. A. ↑

31. Grodin, *Freedom of Expression Under the California Constitution* (2011) 6 Cal. L. History 187–88. ↑

32. N.Y. Const. art. I, section 8. See Hist. Society of the N.Y. Courts, *The 1846 New York Constitution: An Annotated Text* (2018). ↑

33. *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19–20. ↑

34. See, e.g., *Immuno AG. v. Moor-Jankowski* (1991) 77 N.Y.2d 235, 261; *West v. Thomson Newspapers* (1994) 872 P.2d 999, 1014; *Dow v. New Haven Independent, Inc.* (1987) 41 Conn.Supp. 31, 44. ↑

35. *Immuno AG.*, 77 N.Y.2d at 249. ↑

36. *Playboy Enterprises*, 154 Cal.App.3d at 27–28; *Sierra Club*, 57 Cal.4th at 166 (internal citations and quotations omitted). ↑