

# Short Circuit 184

**Anthony Sanders** 00:05

Hello, and welcome to Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, July 27, 2021. We have a special Short Circuit today, we have some special guests, and I'm very excited that I'll be introducing them to you in a moment. First, though, I wanted to put on listeners' radar, a conference that the Center for Judicial Engagement is sponsoring, along with our friends at the Liberty and Law Center at George Mason University. The conference is entitled, "Does the Will of the People Actually Exist? Judicial Deference to Whom?" It's all about this thing called the will of the people and what it actually is, and what that has to say for how we perceive judicial review. A philosopher might say what we're doing is trying to answer the question of, "what is the metaphysical reality of the will of the people?" We'll have more to say about it in subsequent podcasts. But for now, you can find the link to the conference webpage in the show notes. And you can sign up to attend in person if you're in the DC area or online. It will be held Friday, September 10, 2021. And there will be various top scholars from law, political science, and economics, plus a free lunch. We'd love to see you there. And if you if you do come, feel free to run up to me and tell me how much you love Short Circuit. One reason you might love Short Circuit is because we don't always talk about the Federal Courts of Appeals. Some days we venture into other areas of law, and today is one of those days. Now a few months ago, we had a special about an area of law, marriage equality spread across various state constitutions. Today, we're taking the opposite approach. And we'll be talking about a particular state and its own particular constitution, and what better state than the biggest of them all, the Golden State of California. I'm very honored to introduce to you two gentlemen whose enthusiasm for state constitutions rivals my own. We're going to talk to them about all things to do with the California Constitution, especially its history and the study of it. And we'll also talk about how we access historical records in our age of digitization and important work they've been doing to make California's past more accessible. They are Dr. David Carrillo and Steve Duvernay. David is a lecturer in residence at the University of California at Berkeley and the executive director of its California Constitution Center. The center which we'll hear a lot about today is devoted to developing scholarship concerning the California Constitution and the California Supreme Court. David, among other achievements, has published numerous articles on California constitutional law and served with a host of legal organizations. Steve is

an attorney with Benbrook Law Group in Sacramento, California, where he specializes in constitutional litigation in state and federal courts, among other areas. He is a lecturer at the University of California and a senior research fellow with the California Constitution Center. He has written extensively on constitutional law, including the Californian variety. Gentlemen, welcome to both of you.

**David Carrillo** 03:26

Thanks for having us.

**Steve Duvernay** 03:27

Thank you very much.

**Anthony Sanders** 03:28

Thanks so much to both of you. And let's start off with what you do at the California Constitution Center. And then we can move on to some background about the history of the state and its constitutions.

**David Carrillo** 03:40

So, the California Constitution Center, we've been around for almost 10 years. And we started out of a perceived void or a need for some kind of focused academic study on the California Constitution and the judicial branch, in particular, the state's highest court, the California Supreme Court. State constitutions tend to not be well studied, or at least consistently studied. There are a few huge exceptions. Professor Robert Williams, formerly of Rutgers, he recently retired. He and his colleague, Alan Tarr studied state constitutions in general, the 50 state constitutions, in a particular state constitution of New Jersey for around 30 years. So, when I say that they tend to not be well studied, I mean that mainly in comparison with the Federal Constitution, which is extensively studied, but there are a few, you know, major exceptions, like Bob Williams, in his center. So, my center is frankly modeled somewhat on his the biggest differences is one of his main focuses was on sub national constitutionalism, as he calls it a study of all 50 constitutions of the states. We do a little bit of that, but our focus is more 80 or 90% focused on California's. We do a little bit of comparative work, but we try to focus on California

**Anthony Sanders** 05:00

Right, and what and what are some of the projects that you've manifested that in? It seems like, in addition to just having a conference or writing a few things, you guys really get into the nitty gritty of some of this history?

**David Carrillo** 05:16

Yeah, we try to look at it in terms of trenches of activity, you know, hitting different audiences in different ways. So, one way to reach a particular audience is the legal community, you know, doing a bench bar conference. So, we have a few regular conferences that we've done, that tend to bring in either practitioners in general, or practitioners in a particular subject matter expertise. So, you know, municipal finance, or local government lawyers. So, we try to reach practitioners through events like that. We've done a few academic conferences, we've done some international things for, I mentioned, we do a little bit of comparative work. California, for example, is famous for its direct democracy provisions. So occasionally, we've done a little bit of work for governments of other countries that have wondered, "Huh, I wonder if we should adopt that too." And we provide them with some cautionary tales.

**Anthony Sanders** 06:12

I was going to ask, is it a recommendation or a caution?

**David Carrillo** 06:14

So far, no one has said, "yeah, we should do that." I think is telling. So, you know, so we try to reach particular audiences, practitioners to conferences, we teach courses to reach students, we write articles to theoretically reach the judiciary and hopefully, you know, influence some minds and move the needle there. We recently published the first ever case book on the California Constitution, both as a teaching tool for our classes that we teach. And then we also wrote it in kind of a Chemerinsky treatise style. So, it's actually useful to practitioners as, as a study guide, or reference work for the California Constitution.

**Anthony Sanders** 06:54

And, Steve, I understand you litigate at times under the California Constitution. Do you want to share any security insights from your work there?

**Steve Duvernay** 07:03

Sure. We do a variety of work in state constitutional law, which can range from advising, say, political candidates on free speech and constitutional election issues when we talk about the recall, for example, or the initiative power, which frequently comes up in election related litigation. In addition, we do a fair amount of practice on state privacy rights and state taxation law, as I'm sure we'll discuss, in detail when talking about the comparative structure of the federal and state constitutions. The California

Constitution, for example, gets into pretty significant detail on how taxes can be assessed against people how they're approved, and the processes that must be followed. So, there's a fair amount of litigation in that area of law in particular, that we get involved in some regularity.

**David Carrillo** 08:01

In the work that Steve does is, it exemplifies one of the mantras that we have at the center, which is that we want our work to be of practical value. We, you know, so even if we're doing something that's sort of typical, typically academic, like writing a law review article, we always try to bring it back to reality and think about how will this move the needle or influence hearts and minds or potentially change outcomes in the real world like in the litigation that Steve does?

**Anthony Sanders** 08:29

Right. And I understand one part of that is your work on the California Supreme Court specifically. Is that right?

**David Carrillo** 08:36

Right, right. Right. So, you know, so I mentioned tranches of activities, and one of the things we do is what I would broadly call mass media or public facing writing. And that that largely takes a couple of different forms. One is we do short form things with the recorder, or the National Law Journal. In California, the legal newspaper is called, "The Daily Journal." It's published out of San Francisco and Los Angeles. We've read for a couple of other, what you would think of as sort of like the legal newspapers, you know, sort of the, I don't know what the San Francisco Chronicle or the New York Times but specifically of the legal world. So, 1000, word op-ed, think pieces that are specifically aimed at reaching, you know, sort of a broader public legal audience. And then the other part of that that we do is, and again, I try to, I try to steal from the best. So, I modeled the blog that we produce at the Senate on SCOTUS blog, we call it SCOCA blog, because we focus on the California Supreme Court not Supreme Court of the United States. And SCOCA blog, it's sort of the opposite end of the spectrum from the more public legal media things, you know, so the recorder has a subscribership that's in the 10's of 1000's. You know, it's a nationwide publication, The Daily Journal in California, you know, the subscriber list I'm sure is in the 1000's. SCOCA blog, our actual subscribers, it's very small, but we tend to be okay with that, because we like to think of it as it's small, but it's the eyeballs that matter. We don't necessarily need everybody to be reading it as long as the right people read it. And it's a way for us to hopefully reach what we think of as our target audience, which is people who can litigate the cases and make the decisions that that actually change the law on the California Constitution.

**Anthony Sanders** 10:32

So, on the California Constitution, I think most people have this general sense that at one time, California was a pretty sleepy place. Gold was discovered. A lot of people went there, they kind of came up with their own state and laws. And you know, it's been moving in bigger and bigger directions ever since. So, fill in some of the details. For those of us who don't know, much beyond that. I understand, you know, California, like a lot of states, hasn't just had one constitution, it's actually had two, it's met twice to try to write and cut those constitutions. And of course, it's amended it in in famously, as you alluded to earlier, many times since then. So, if you could take it back to the beginning and, and tell us where this California is constitutionalism came from?

**David Carrillo** 11:28

I really liked your 25 words or less summary of California history that was very accurate. It's everything you need to know about California. So yeah, California was kind of a nothing, not important place until gold was discovered. And then everything changed. And nothing's been the same sense. So the thing that I would want to get across about the constitutional evolution of California is that it's highly context dependent. As I mentioned, California, like most other states has had more than one constitutional convention. So, what one of the comparative points that we tried to repeat frequently in our work is that most of the things that people know about the U.S. Constitution, either aren't true, or the opposite of them is true for state constitutions, you know, so the U.S. Constitution tends to be very static state constitutions tend to be very dynamic. There's only been one U.S. Constitution. Let's leave aside the Articles of Confederation for the moment. You know, there's only been one convention, there's only been one constitution, states have had literally hundreds of constitutions and conventions. So constitutional dynamism, is sort of the rule within the state's constitutional stasis, except for judicial interpretation tends to be the rule in the United States. I mean, when's the last time we amended the U.S. Constitution? Not within my lifetime?

**Anthony Sanders** 12:58

Well, the 27th amendment, but we'll leave that out of it.

**David Carrillo** 13:03

That was the one thing, the guy with the college paper, right.

**Anthony Sanders** 13:06

That's right. And so, it kept. It was originally part of the Bill of Rights. Yeah, capped the salaries in the current Congress.

**David Carrillo** 13:14

Yeah. So anyway, so California had two constitutional conventions, two constitutions. The first convention was in 1849. The second convention started in 1878 and continued into the next year. So, our first constitution was adopted in 1849. Our second constitution was adopted in 1879. And then, and then there's a later evolution that I'm sure we'll come back and talk about later. But in all three of those contexts, the later evolution and the two, constitution conventions, they're all sort of the product of their environment. Context is key for understanding them. So, you mentioned the gold rush. And that obviously, was the context for the 1849 constitution. And it sort of, everything around or everything that was important to the delegates to that convention, arose in that context. It was a very new, dynamic culture or society that was evolving very quickly. There kind of were no rules, the miners made up things as they went. And some of the rules that they made up; they still exist in in water law today in California. So, everything was very contextual, loose, it was fast. The convention only lasted six weeks. It wasn't particularly original. They borrowed a lot from other constitutions, Iowa and New York in particular.

**Anthony Sanders** 14:40

Do you know why those in particular by the way, did they just happen to have a copy of each?

**David Carrillo** 14:44

You know, it's sort of funny, one of the delegates to the convention showed up with a stack of the Iowa constitution and just handed it out. And, and when somebody said, "why are you giving these out?" He says, well, it's one of the latest in the shortest, the most recent and the shortest. So, let's use this and the other delegates were like, "Alright, that's that sounds good." A lot of them are for the East Coast. So, they were very familiar with, for example, the New York constitution. So, you know, so there was very little writing on a blank slate whenever they were sitting around talking about "Okay, so we need to have a provision on freedom of speech. Who wants to write that? Well, I'm from New York, and we had a pretty good one, why don't we start with that? Okay, that sounds great. Let's do that." You know, there was a lot of plagiarism or cribbing, or copying or whatever, however you want to put it. That's probably why it only took them six weeks. And then after that, of course, the Constitution is ratified.

**Anthony Sanders** 15:36

So, after the state enters the union, what kinds of records do we have of that process? Today?

**David Carrillo** 15:47

The good news is the delegates were pretty organized. They one of the first things they did was they delegated somebody to be their scribe, and they authorize the payment of I think it was like a couple \$100 in gold dust to somebody to print up the debates that were hand handwritten. The original 1849 California Constitution is written in longhand, probably on a sheepskin or a parchment or something like that. It's amazing, like somebody sat there and had to, you know, write with, I don't know what they used back then quill pens or whatever. It's kind of amazing. So yeah, so we have we have the complete record of the complete debates, or at least everything that was that the scribe wrote down. I'm sure there was lots of, I don't know, side chatter that didn't get recorded. Yeah. But did they have?

**Anthony Sanders** 16:38

But did they have like committee reports or discussions back then?

**David Carrillo** 16:42

They did use committees, but I don't think that they were reported, at least I've never seen or heard of records of all we have is the Committee of the Whole and reports from the subcommittees to the Committee of the Whole.

**Anthony Sanders** 16:54

Okay. And then we move along a few years, and like many states, often do they have this this in a denied dynamic process. They have another constitution, what why did they feel they had to write it again,

**David Carrillo** 17:10

The 1849 constitution was not well regarded. And I don't mean to disparage the guys who wrote it, but it didn't turn out super well. And, and a lot of that was due to the evolution of events that that were sort of out of their control. And they couldn't necessarily foresee. So, you have, you have a state that undergoes explosive growth in in every way population. Economically, major industries start forming the railroads in particular, exploded into the dominant industry in the country, not just in California at the time. So, in what is that 50. So in about 30 years, for over the course of 30 years from the 1849

constitution, as you get into the 1870s. A number of things are going on, what one is it the railroads have come to dominate not just the economy of politics in California, it's fairly well known that starting from, you know, around the 1860s/1870s, and going up until the Progressive Era, in the early 1900s, the railroads basically ran California, to the point of having the legislature in their pockets. So, so that was happening. The state exploded in population and the economy exploded, there was a massive wave of immigration, a lot of it driven by the railroads, which were very labor hungry, you know, like building railroads very labor intensive, like literally labor-intensive operation. So, you had huge numbers of immigrants, both from the United States and outside the United States, from Asia and China in particular. And the third big thing that happened, that was the impetus for the 1878 convention was that the economy crashed. So if you say to what American, you know, the depression, they'll probably think of the 1930s. But you know, any economist will tell you that there been a number of crashes. And if you talk to somebody that you ran into on the street in, you know, the late 1800s, and you asked about the depression, they'll talk about the 1870s, which at the time was the long depression. So great depression, Great Recession, long depression.

**Anthony Sanders** 19:26

I once heard someone's grandmother, who, well, maybe it was someone who was now a grandmother whose grandmother said she would refer to it as the real great depression, sometime after the you know, the great depression that we understand,

**David Carrillo** 19:41

Right? Yeah. So, there was a massive market crash in the early 1870s. And, and so there was this period of great economic upheaval. So, a lot of the context of the 1878 convention in California was economic. It was driven by the dominance of the by the railroads of the main industry in California, it was driven by labor conflicts between, you know, sort of preexisting or indigenous Californians and immigrants, both from other parts of United States and then also outside the United States. And then overhanging all of that was this massive economic crisis, the biggest one that anybody, you know, had seen in their lifetime at the time. Little did they know it was going to get worse. So that's how to do it.

**Anthony Sanders** 20:30

And then how did that all come together with what they came up with?

**David Carrillo** 20:36



So, it's interesting comparing the two conventions, because I think the context sort of explains why they look so different. You know, California was trying to get admitted as a state in 1849. You know, things seemed simpler back then. They probably were simpler back then, you know, so when you read the debates in 1849, there's this very, you can almost sort of see a fellow with, you know, twirling his waxed mustaches, saying, "Well, I concur with the comments, or my colleague, the gentleman from South Carolina," you know, it's, it has that very, you know, sort of old timey flavor to it. The 1878 convention is completely different. The 1849 convention took six weeks, the 1878 convention took five months. The 1849 convention debates are about 500 pages long, the 1878 debates are 1500 pages long. Wow. So, they're, they're very different. The character of the debates is also very different. So, whereas, you know, at 49, it was very hail fellow well met, and there was a lot of back slapping, and, you know, it almost seemed like, you know, very jocular, just a bunch of fellas hanging out writing constitution, no big deal. 1878 convention, lots of strife, lots of fighting, not very collegial. They fought constantly. So, they're, you know, things are more complicated. The context hadn't had a lot more strife in it. The delegates to the convention, there were more of them, they were not as collegial. So, you know, so there are a lot of factors that contribute to the convention taking much longer being much more fraught, in the debates being much longer.

**Anthony Sanders 22:20**

And where there were there, you know, divisions within the delegates say there were some that were on the side of the railroads, and some that weren't, or some that especially were maybe anti-Chinese immigration, and some that, that were on the other side was, were there those factions? And how did those factions play out?

**David Carrillo 22:41**

Yeah, one of the one of the other ways of looking at comparing and contrasting the two sets of debates is that, you know, again, in 1849, they dealt with things at a much more macro level, and they did it in a more collegial way. You know, somebody would say, so, what about slavery? Are we going to get admitted as a slave state or a free state? And everybody would sort of say, "Well, you know, I think slavery is really bad. Let's, let's, you know, let's move for admission as a free state. All right, that sounds really good. Moving on." It took like five minutes. "What about community property? Women should be entitled to have their property, yeah, that sounds good. Let's do that. Okay, moving on." In 1878, you know, as you mentioned, that it was much more factional, you know, so you did have people

that were sort of the representatives of the interests of the of the big industries, like, like the railroads, primarily. The one group that the 1878 debates are perhaps best known for are the working men. So, one of the flashpoints for the labor strife in California, at the time was San Francisco, which had, at times, pitched battles in the streets between members of what was called the working men's Party, which was formed by a guy named Denis Kearney, between them and an immigrant laborer, again, primarily Asian, and among them primarily Chinese. So, the Working Men's Party were preexisting Californians, I don't want to call them native California, but they had been there already. And they it was straight protectionism, they were opposed to immigration, they were opposed to what they perceived as immigrants taking their jobs. And so that that was that was the motivation of the Working Men's Party in San Francisco. And then members of the Working Men's Party went to the convention, specifically on the platform of excluding foreign labor, particularly agents, particularly Chinese.

**Anthony Sanders** 24:42

Now what one thing that some listeners and fans of IJ might be wondering and listening to this is I know there were, there was some litigation at the time, around this period, both before and after this convention, about protecting the rights of the Chinese laborers in, in California under at least the United States Constitution, I don't know about the former California Constitution. And of course, famously, after the convention, there's the case of Yick Wo v. Hopkins, which protected at least as the ruling was protected the rights of the of the Chinese. Was the convention in some ways trying ruling against what the courts had been doing, or was where the courts in a sense at that time in kind of in lockstep with this anti-immigrant feeling?

**David Carrillo** 25:34

The way I remember those cases going is, you're right, but you have you have the timing backwards.

**Anthony Sanders** 25:40

I see.

**David Carrillo** 24:41

So, the Working Men were successful in the 1878 constitution in getting what at the time was article 19. I think it was titled like, the Chinese something, I actually can't come up with the title. It's specifically referred to Chinese. So, article 19, had very broad provisions that expressly applied to Chinese laborers, and quote, Mongolians are mongoloids. I forget which way they put. But it was also much broader. It was specifically targeted, but broad enough to cover basically anybody that that anybody

that would compete with them for work. So that made it into the California Constitution of 1879. That then led to the litigation that you're thinking of.

**Anthony Sanders** 26:32

I see.

**David Carrillo** 26:33

It also, on kind of a parallel track, it led to the Chinese Exclusion Act, which Congress passed, which then caused some litigation and later got overturned. But yeah, but there was an extensive series of judicial decisions, both then and they still they sort of still sort of trickle in occasionally. California Supreme Court not that long ago, reversed an earlier case, from around this time that it denied a Chinese man, I think, admission to the bar as a lawyer, specifically because of these, you know, racially discriminatory laws. And, you know, somebody pointed that out, and the California Supreme Court unanimously overturned the precedent.

**Anthony Sanders** 27:11

Wow it can take a long time to fix a mistake when it comes to the courts. So that this second convention, if someone is going to study what happened there, what kinds of records have survived from that period?

**David Carrillo** 27:26

Well, that's the bad news.

**Anthony Sanders** 27:27

Let's turn to that.

**David Carrillo** 27:32

So, Steve, I know you've looked at both the 1849 debates and 1878 debates, what would you say is the top-level difference between the two of them?

**Steve Duvernay** 27:40

Well, the 1879 debates are quite long, quite difficult to read. They are publicly available, but it's very, very small print. And as a practitioner, it really limits their utility. If you can't search through them, if you can't quickly find things, it's difficult to decipher exactly what's going on. It's hard to develop a record if

you're trying to advance or study a particular interpretation of the constitutional provision. So that's really the big picture difference. The 1849 convention records are shorter, they're actually easier to read. But they're sort of somewhat lesser utility, depending on which provision you're trying to study.

**David Carrillo** 28:31

So yeah, there's a huge practical difference between the two of them, because unfortunately, the 1879 constitution being the currently operative one, that's the one that you're more likely to have to look at, in terms of reading its debates,

**Anthony Sanders** 27:48

Right.

**David Carrillo** 28:49

You know, there are reasons and times when you have to go back to 1849. But most of the time, you're going to be looking at the 1879 Constitution, which means that you have to look at the 1500 pages of debates. And as Steve said, so when they originally got printed in it, you know, physical book, I imagine it being like kind of a Shakespearean folio size, like it's not, you know, it's not an, you know, an airport paperback book that fits in your hand like they were really big format. So, when they got scanned by Google Books, they, you know, they had to condense it down to a standard PDF, size, eight and a half by 11. So, it makes the print incredibly small.

**Anthony Sanders** 29:24

Yeah, it's really hard to use. And it's just not the way Google did it. It's just not searchable. You said are not very well?

**David Carrillo** 29:31

Well, it's, I don't know, see, like tell me how much success you've had, like I have, I have a very hard time doing it. And I get very unreliable results because the print quality wasn't particularly good. The scan quality wasn't particularly good. And because the print size is so small, it winds up making it very difficult for the OCR software to actually you know, tell one word for another so I have no confidence in the word search results that I get from using the PDFs of the 1870 debates, what's it like for you Steve?

**Steve Duvernay** 30:04

I've had a very similar experience, you know, in your sort of left to a scattershot effort to search through and sort out what's, what's in the documents. They're not sort of organized in a way that a modern, you know, textbook or modern resource would be. So, you've basically got to do word searches through a massive PDF and hope that the scan is accurate enough, or that you've got an accurate cross reference from an existing document. I mean, if, for example,

**Anthony Sanders** 30:36

Did they make an index at the time? Or did they just put it out there?

**David Carrillo** 30:40

No, it's indexed. But it's terrible. And also, you know, and this is my 21st century bias, it's not hyperlinked, so it's, yes, it there's index, but it's a very limited utility.

**Anthony Sanders** 30:54

Right. So, so someone, you know, has a case at the California Supreme Court, or California Superior Court, and they're making a constitutional argument. The text has been there since 1879. And they dig into this, this resource to try to persuade the Justices of their interpretation. What else is there out there that help them other than, you know, having to flip through this this behemoth that you're talking about?

**David Carrillo** 31:24

I think the short answer is nothing. Steve, unless you can think of something, Steve. Like in terms of secondary finding aids, I can't think of anything, occasionally you'll get lucky. And a provision has been litigated before, you know, so there might be a case on it floating around or an academic has written an article about it. But that's not super likely. Because if it's already been litigated, then why are you litigating? Right? If it's a settled question, then why are we even here? So, I mean, the bad news is that there really isn't much else if you have to go back to the original text. That's really the only thing there is. And it's very difficult to work with. The flipside of that, though, I mean, it's kind of a good news, bad news thing is that when they're when there is debate, evidence, and Steve in a second, I'll ask you about how you employ it. So, when we're getting ready for this podcast, we did some quick research on how frequently and how the California Supreme Court uses evidence from the debates. And when we looked at it, I guess this is, you know, good news for practitioners. If you can find something in the debates that supports your argument, it's going to be very compelling. The California Supreme Court only rarely rejects, or discounts evidence from the debates. So, if you find it, or if it exists, and you can

find it, and it's and it's on point, and helps you, it can probably be very helpful. So, Steve, what's been your experience actually trying to deploy that evidence in real life litigation?

**Steve Duvernay** 32:54

I think it can be incredibly powerful because courts, in particularly, state courts, under the canons of construction are going to look at the sort of original public meaning or the intent of the drafters. And the best way to get there is with the original source material. And for some provisions, you know, we've got a pretty good record of the take free speech, for example, obviously, there's First Amendment of the US Constitution, and then on the state constitutional side. In 1849, the California Constitution drew the free speech provision from 1846, New York constitution was then incorporated into 1879. And then we have a very clear record of, of sort of what that means. Now, if you're litigating the right to fish or water rights, you know, you may have a more difficult time piecing together precisely what the different constitutional directives and in the intent was at the time and meshing that with, with modern life in in California,

**David Carrillo** 33:56

I guess we should, we should qualify what we both just said, with the point that you wanted to make Steve about the fact that in California, you're not just limited to the 1849 and the 1878 debates, there's a whole other category of information that's potentially relevant.

**Steve Duvernay** 34:12

Sure, I think Professor Carrillo highlighted the dynamism of the state constitution. on the federal side, we sort of have a constitution, twice born of revolution, where you have these two significant inflection points in sort of 18 sorry, 1787 convention and the 1789 constitution, and then what the reconstruction amendments where you're looking at these periods of time, either in 1789, or the late 1860s. To really drill into what intent is, and those are the big sort of pieces on the federal side, on the California side, in addition to 1849 and 1879. The progressive amendments in the 19 teens mark, sort of a change in California's relationship with their constitution, particularly with the introduction of the initiative process. And over the last, you know, 100 plus years, we have the serial amendment of the constitution through either direct initiatives or legislatively referred constitutional amendments. So just as one counterpoint to the long lineage of California's free speech provision, for example, we're now doing some research into California's constitutional right to privacy, which was adopted by a legislative constitution amendment, an initiative in the early 1970s. So then, we're sort of going back into time to 1972 to the late 1960s, in which you look at there are the ballot arguments in sort of the context in which the right to

privacy becomes enshrined in the state constitution. So, in that respect, you're always sort of looking at a snapshot in time to determine the intent of the voters and the intent of the California people.

**Anthony Sanders** 36:09

Fascinating. So, in if someone is, is litigating, you know, that provision or provision from a different period of time? What are what are going to be what it seem the courts look to when we're talking about a constitutional amendment? Because of course, you have the plain text of the amendment, you have what the voter maybe had read on the ballots, which I know is often litigated to death is what actually is, is the, you know, the introduction on the ballot where the voter is reading it, and then has the text that they're actually going to be voting on. And then of course, there's what was said at the time in the media in the campaign for the amendment with the signature process of getting it on, on the ballot. And what I find fascinating about this is because, you know, we talk about constitutional conventions and how constitutions are ratified and how legislation is ratified, that here, the people directly are speaking on the ballot, whether they're engaged or not as a different question, but getting at what they were thinking is going to be a big question there. So, what generally have the courts look to when they're trying to divine the intent of the voters and when the constitutional amendment?

**David Carrillo** 37:29

Steve, my impression is that, particularly for more recent things, the ballot arguments are 95% of what will matter. Like as you go back in time, contemporary news accounts, you know, editorials, things like that can be, I've seen courts considered those as secondary evidence of intent. But that tends to be older cases, for more modern issues. Tell me what you think, but my experiences it really is limited to the ballot arguments.

**Steve Duvernay** 38:03

The California Supreme Court has been consistent in focusing on the ballot arguments, I mean, the language of the provision itself, and the ballot arguments and sort of the surrounding constitutional provisions when trying to derive intent and sort of depending on the nature of the constitutional change, the extent to which the court relies on the actual ballot arguments, ebbs, and flows. Again, to go back to the example of privacy. That's an initiative that literally added two words to the California Constitution, there was the word privacy. So, to determine what having, you know, the inalienable right to privacy means you've got to turn to the ballot arguments and get a feel for what was in front of the voters and, and try to get into the mind of, of California in 1972.

**Anthony Sanders 39:03**

What do you think are they the most maybe underutilized sources? If someone's going to study or litigate about the California Constitution, that they that they might not realize, I think most people when they know a bit about state constitutions, know that there, there may have been a transcript of what was said at the convention, certainly something better in for many states than what James Madison took in 1787, the notes he took at the convention, but what else is out there that people might not know about?

**David Carrillo 39:36**

Um, I don't think there really are equivalence to like the best example of what you're talking about on the federal side is the Federalist Papers. Right? It's, you know, a set of basically like, pamphlets or news, op ed pieces that, you know, a few guys wrote and publicized and because of who those people were and the role they played in actually drafting the constitution that, you know, it's it, it's valuable evidence of what they were thinking. As far as I know, I don't think there's anything like that for either of the California constitutional conventions, and they're sort of, I can't think of anything that would be an equivalent for any of the any of the big ballot propositions that we've looked at. And on the flip side of that, you know, as we were just discussing, like, particularly as you move forward in time, courts are less likely or less willing to look at anything other than the ballot arguments. And the reason they're more likely to do it as you go back in time, is because the ballot arguments were non standardized, you know, California has, has this very particular way of doing them, and they've done it very consistently for the last 30,40, 50 years, you know, but if you go back to an initiative that was on the ballot in 1920, just finding the ballot arguments is difficult. Back then, you know, there were only a few newspapers. And, you know, elections were conducted by proclamation with the Secretary of State would go out and basically nail a piece of paper to the nearest tree and send it out to the big newspapers. And the newspapers would run a special edition or put it on the front page. And so, the whole front page of the San Francisco Call, which was a big paper at the time, would be proclamation, there's going to be election next Tuesday, we're voting on amending the constitution, to institute a right to fish or whatever it was. So first of all, you have to go back, and you have to track down the October 27, 1920 edition of the San Francisco Call in a newspaper archive. And then you have to see if there's anything else. So, you know, that kind of thing. It exists. And I've seen courts use it. I've used it in my scholarship, but only for older things. When you get to more modern things like, Steve, have you for anything after 1950. Have you seen a court reference? Anything outside the ballot arguments for an initiative amendment?

**Steve Duvernay 42:00**



You know, not off the top of my head.

**David Carrillo** 42:02

I can't think of one either. And there's obvious reasons for that, you know, the court I don't want to get into, you know an originalism debate, but Steve talked a minute ago about how California Courts in general, their interpretive methodology is to start with the text, see if they can figure out what that means. And only if they can't figure out what that means. Did they go to secondary indicia of intent? And the gold standard for that, particularly for modern initiative amendments is the ballot arguments. And I can't think of an instance where I've ever seen a court go outside the ballot arguments.

**Anthony Sanders** 42:34

And you mentioned originalism, I think it's interesting, this isn't 100% true, but that in state constitutions, it seems like it's a lot less controversial. When they're trying to figure out like what the original meaning what the original intent of the various provisions, it, maybe that's just because it's usually not as much of a hot button, contentious issue at the state level. Maybe it's because they're, they're not as old. So that's the original meaning right of 1787 is going to be more shifted the 1920 from the present time, but it seems like there is a broad consensus in different states, amongst its Supreme Courts that it is very useful to look at convention materials. And you know, there isn't that much argument about it, although you always have the same different group agreements you have on constitutional interpretation.

**David Carrillo** 43:26

Yeah, yeah. Everybody agrees that the debates are relevant. But you know, people might disagree reasonably about what they mean, exactly. You're certainly right about that for California. When we were getting ready for this, we quickly looked for instances that we could find at the California Supreme Court looking at either 1849 or 1878 debates. And we found a lot of them. What we thought was interesting was that there were only rare instances where the court disagreed about what they meant, we found just a few instances where the majority would go one way and then the dissent would have an extra, you know, 20 pages worth of quotations and analysis from evidence from the debates to argue why the majority opinion was wrong. It was very rare. And so that was really interesting. I think for two reasons. One is that you know, as you said, it has long been the accepted interpretation methodology on the California Court that we looked at text first and only if that's unclear, then we look at secondary indicia. And, and the things that are permissible as secondary indicia. It's a fairly limited set, like the debates like about arguments. So you have this very well accepted non-controversial interpretation methodology. And then the practical effect that you see is that tends to encourage consensus. We only

found rare instances where the court disagreed over what that evidence meant. Now there are some, you know, when they disagreed, it tends to be fairly dramatic, like the Steve mentioned, we're working on privacy. And our position that we're going to take in this article that we're that we're submitting for publication in a week or so, is that the court initially got it right when it interpreted the ballot arguments for privacy, and then changed its mind about what it meant and got it wrong. And it's been wrong ever since. So, you know, so that next gets to your point that, you know, like two reasonable people could look at the same piece of debate, text and get completely different meanings out of it.

**Anthony Sanders** 45:35

Absolutely.

**David Carrillo** 45:36

Which then makes you wonder how much value originalism has and you start chasing your tail.

**Anthony Sanders** 45:41

Well, we'll leave that debate for another day.

**David Carrillo** 45:43

Yes, please.

**Anthony Sanders** 45:44

But what I'd like to close by, we've talked about California, we've also talked about most of what you guys do is centered on California, but sometimes you go a bit beyond that. Is from your experience of studying the California Constitution for the other 49 states, whose you know, constitutions and records and histories, of course, are all over the place. There are states that had a constitution many years ago, didn't really have a transcript of the convention. They just put it out there. And that's it. There are states such as Georgia that has had like 10, constitutions

**David Carrillo** 46:26

12.

**Anthony Sanders** 46:26

12. Is your account. Yeah, I know, I know, accounts differ. But they have, you know, all kinds of, of documents you could look at for how that that constitution came together many times, what lessons

could people in other states take for, you know, how best to first access the records that may or may not be online for how to interpret their constitution, and then how to piece that together when they're either they're making an argument or they're just doing scholarship.

**David Carrillo** 46:55

I see those as two different things on the litigation side. If I were in Steve's shoes, I might approach it from sort of from their perspective we did in the research that I just mentioned, where we looked at what the courts actually look at that, I guess you could think, well, if there's this other nugget of evidence out there, and the courts haven't been looking at it, maybe that's how I win my case. You know, I'm the first one who brings this new undiscovered arc of truth. And it's going to blow people's minds. That maybe, or it could be that's just not in the category of things that courts are going to look at. So you'll get the question. Okay, well, that's interesting, but we don't care about that. So I would look at it from, you know, the reverse end of the telescope, what is a court going to think is important. From a practical side, if I'm a litigator as an academic, I would look at it through, you know, the short end of the telescope and say, okay, what's the available universe of information out there? And, and then the secondary question is, what's the utility of it? You know, so if I find one isolated letter to the editor, in, you know, a newspaper in San Diego, published once, in 1850, that's not going to be very persuasive to anybody. And it might be academically interesting, but, you know, that that's a very limited utility to make an argument for how we should interpret the California Constitution of 1849. Because of this one guy, one time in San Diego wasn't even at the convention.

**Anthony Sanders** 48:30

Steve, any thoughts as a litigator?

**Steve Duvernay** 48:31

Yeah, as a as a litigator? I think in any of these instances, you need to develop the constitutional pedigree of whatever provision you're looking at, to be able to, to inform the court and illuminate for the court precisely what it means. Again, to turn back to the free speech provision, you know, you can trace California's free speech provision, you know, back to the New York constitution of 1846, through our constitutions of 1849 to 1879. And then through the modern development of free speech doctrine. And while, California's constitution is, as the Supreme Court will say, a document of independent force, in effect that has protections that extend a broader and or more protective of certain individual rights, for example, the Federal First Amendment, you've got an entire universe of material out there to sort of say, all right, this is what the provision protects. This is what it doesn't protect. This is how people

throughout time have understood the scope and reach of a particular constitutional provision. So, you know, if you're in Louisiana or Georgia and they've had 12 conventions, then you can trace your particular issue back in time, you know, through each state's admission to the union and get a feel for exactly what that's a constitutional provision means. And on that point, I think that's what's great about this project that we've got going on with the California Constitution debates, to get them scanned and more accessible and more usable for practitioners. So, they can go through and develop precisely this pedigree that can be quite powerful and useful in litigation and in scholarship.

**Anthony Sanders** 50:36

Yeah, it sounds like you're going to solve the OCR problem for us. It.

**David Carrillo** 50:37

I hope.

**Anthony Sanders** 50:38

during your current work

**David Carrillo** 50:40

I hope

**Anthony Sanders** 50:42

That would be great. Well, anything you guys would like to add about all things California and constitution for our listeners?

**David Carrillo** 50:46

Steve, you want to you want to go first and make a meta point?

**Steve Duvernay** 50:50

I think the meta point for me as a litigator, again, is to go back develop constitutional pedigree and get to the original public meaning of each provision.

**Anthony Sanders** 51:00

Well put.

**David Carrillo** 51:02

I think the message that I'd want to get out there is that state constitutions have, you know, they've, they've always been there, they've been there since the founding, you know, we had we had 13 states before we had a United States. But unfortunately, interest in or deployment of state constitution says is waxed and waned over time. You know, the Civil War is maybe the best example of, of a time when state constitutions were very important. You know, and that's, that's been true, or not true to greater or lesser degrees, you know, throughout the nation's history. And even though I think that's sad, it's it still makes me happy that there are times when people remember that they have state constitutions and reach for them in time of need. And, and they will always be there for you. The whole point of having state constitutions and a federal constitution is, is dual sovereignty is the better protector of liberty. So, when you're oppressed by one sovereign, you can turn to the other and that perhaps explains why state constitutions wax and wane. Sometimes you need them to protect you against the federal government. And sometimes you don't. Sometimes it's the other way around, you might need the federal government to protect to protect you against your state. That's happened too. I would just say, you know, remember that you do have a state constitution. And if it has a provision that tracks or is a corollary or analog to something in the Federal Constitution, you may not want to make the Federal Constitutional argument first. There may be good reasons to make the state constitutional argument first, that may actually be better for you. And it may be better for state constitutionalism in general. So, remember that you have a state constitution.

**Anthony Sanders** 52:41

Well, David, I think that is beautifully put, as we like to say at IJ you have two ways to win,

**David Carrillo** 52:47

Right

**Anthony Sanders** 52:47

When your state or local government is oppressing you. And it's important that we all remember that. Well, thank you both for coming on Short Circuit. It's been a wonderful conversation about California and state constitutions. And I hope that in the future, we will have more episodes on engaging with state constitutions, but for now, I would ask that all of you get engaged.