

THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY YEARBOOK



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Almost one hundred and fifty years ago, one Mr. Botts, a delegate to California's first constitutional convention in 1849, observed: "Your Legislature and your Executive departments might be faulty in design, the principles of liberty might be discarded and denied by the despot on the throne, and the evils would be less felt than those under a bad judiciary system from the despot of the law. . . ."1 Some might consider this an overstatement, but it highlights the fact that the early crafters of California's Constitution considered the creation of a strong, stable judicial system key to the success of their work. A review of the record of both the 1849 and 1879 constitutional conventions reveals that the judicial article was the subject of heated debate on issues ranging from the structure of the courts to the scope of appellate review to the location of arguments before the Supreme Court.

Why should the history of those who served on the courts and the times in which they served be of interest to more than a few history buffs? After all, casebooks offer an easily accessible source of how the law has been interpreted and applied; they provide the precedent on which lawyers and judges rely. The answer lies in the fact that "the law" is more than words penned on a page—or called up on a computer screen. As we grapple today with the scope of the rule of law and the role of our justice system, our knowledge about the individuals who crafted the opinions that helped shape our world, the society in which they lived, and the forces that touched them as they reached their decisions provides context and perspective and a broader understanding of the administration of justice that will help us face the challenges of the future.

The men and women bring to it their own personal history and views. Judges interpret the written law presented in constitutions and statutes and strive to apply that law to the facts presented in a fair, objective manner. But it is obvious that the practice of law and the rendering of decisions is not an exact science. If it were, briefs might actually live up to their name, and dissents would become obsolete. Nor is the significance of our system of law confined to information contained in official case

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reports. As an equal branch of government, the judicial system plays a societal role beyond the adjudication of specific cases and issues. As one third of our tripartite system, the court system is one of the stabilizing pedestals on which our government rests. Courts function within the broader framework of government. An understanding of their relations with the other branches of government, with the citizens they serve, and with popular perceptions about the justice system is essential to evaluating whether our courts are serving their fundamental constitutional functions and whether they remain truly independent.

We often take the stability and continuity of our system of justice for granted. It is clear, however, that its independence and strength must be carefully guarded. The list of stresses confronting courts is lengthy. Budgetary constraints, increasing caseloads, societal trends that affect the nature and number of issues brought to the courts, public expectations, insufficient general knowledge about the administration of justice, and partisan political pressures are only some of the factors that affect court functioning. Three years ago, as chair of the Judicial Council, I appointed a Commission on the Future of the Courts. Its report, issued earlier this year, looks ahead to the year 2020 and outlines a "preferred future" for the justice system. The report touches on a multitude of changes and trends that are expected to affect the courts. It makes it abundantly clear that administering justice does not and cannot take place in an ivory tower isolated from the rest of society and its problems.²

As we look ahead, we can learn from the past. The individual twist on a problem may be different, but reading the debates at the constitutional conventions of 1849 and 1879 reveals that many questions that occupied the drafters remain open today. Common themes pervade our judicial system's history— independence of the judiciary, assuring access to the courts—and extend to our expectations for the future.

The Supreme Court Historical Society offers an avenue to obtain information and insights that will aid us as we move into the next century. I am pleased that this first yearbook starts us on what I hope will be a continuing journey of education and enlightenment.

June 1994

¹Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution (1850) at p. 218; see also Vols. 1-3, Willis & Stockton, Debates and Proceedings of the Constitutional Convention of the State of California (1880).

²Scholarly papers written for the Commission on the Future of the Courts are published in a symposium in the *Southern California Law Review*, 66 (1993).

Editor's Preface to the Inaugural Issue

Since the earliest days of the California Supreme Court Historical Society's founding phase, its directors have pursued a plan to establish a journal of legal history that would present for its members and for a wider public scholarly work on the California Supreme Court's history—and, more generally, on the history of California's legal and judicial system. The present volume brings to fruition that plan.

The history of California law has not languished, by any means, for it has been pursued by scholars in the state's universities and law schools; has been advanced by publications of the California Historical Society, the Historical Society of the U.S. District Court for Northern California, and the Ninth Judicial Circuit Historical Society. Although the emphasis is upon federal law, there has been much of interest to students of California legal history in the last-mentioned organization's fine journal, *Western Legal History*.

Still, despite the efforts of many individuals and organizations over the years, there are many very serious gaps in the history of California law. We lack judicial biographies of even some of the most important figures in the history of the state's courts, including its Supreme Court; and we also have serious need for topical studies that will reveal the full richness of the courts' historic contributions to legal change and law's relationships with social, economic, political, and cultural change in California history. More particularly, there is a need for monographic studies that can become the building blocks for the broad synthesis of California legal development that might one day, one hopes, be advanced by a full-scale history of the California Supreme Court—a highly interesting project that is on our Society's future agenda.

Hence it is with a sense of commitment as well as pride that the Society presents this first issue of its *Yearbook*. This volume contains, first of all, a set of original articles by established scholars, including several authors who are among the leading contributors in recent years to research on California legal history. In addition, this volume includes some materials that originally appeared in the first three issues of the Society's *Newsletter*; they are reprinted here in order to give them a more

permanent format that is also convenient to our readers, many of whom have not had access to the newsletters.

The Society has been most fortunate in the opportunity to join with the Institute for Governmental Studies (IGS) Press of the University of California, Berkeley, in this venture. The press, which will serve as publisher of the *Yearbook*, is well known to students of California government, history, and politics for the many monographs, conference volumes, bibliographical materials, and anthologies that it has published. Headed by a distinguished former journalist with long experience in publishing, Gerald Lubenow, the press has a veteran editorial production staff expert in scholarly publications.

The principal work of substantive editing for this inaugural issue has been done in the Center for the Study of Law and Society, at the Boalt Hall School of Law, UC Berkeley. I wish to thank Dean Herma Hill Kay of Boalt Hall and Professor Robert Kagan, director of the Center, for their continuing support of this project. Kiara Jordan of the Center staff has provided expert editorial coordination and substantive assistance. One of the authors represented here, Amy Toro, has also played an invaluable role as an editorial and research assistant. Several academic colleagues have also served as referees of papers, and their services are very much appreciated. Lynn Holton of the Judicial Council and the staff of the Bancroft Library, UC Berkeley, have extended invaluable assistance on research and editorial matters.

It is a pleasure to acknowledge the contributions of Maria Wolf, editor, and Pat Ramirez, publications coordinator, both of the IGS staff.

A special note of thanks is owed to Robert Warren, Esq., of Los Angeles, president of the Society, to Chief Justice Malcolm Lucas, and to Bernard Witkin, Esq., and other members of the Society's board of directors, for their encouragement of the scholarly work that the Society seeks to promote. Lee W. Cake, Esq., the Society's executive director and now editor of its newsletter, has been of great help also to the editorial effort.

All of us involved in this project are confident that the *Yearbook* will develop into a significant forum for writings on California legal history that will be of enduring interest and importance to the Society's members and to the scholarly community, as well as to members of the California bench and bar and to the public more generally.

Harry N. Scheiber