

# JUDICIAL LAWMAKING, PUBLIC POLICY, AND THE CALIFORNIA SUPREME COURT

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## I. INTRODUCTION

A recent study showed the California Supreme Court is the most followed state court in the nation.<sup>1</sup> Between 1940 and 2005, other state supreme courts followed the California Supreme Court 1,260 times,<sup>2</sup> which is twenty-five percent more than any other state high court.<sup>3</sup> Therefore, the California Supreme Court is a unique provider of persuasive authority to the rest of the country. But, why is the California Supreme Court so influential?

The California Supreme Court is the most influential state court for two connected reasons. First, the Court embraces judicial lawmaking and rejects formalism. Formalists contend courts should not make law, use policy, exercise discretion, or explore extrinsic sources when deciding cases.<sup>4</sup> Starting in the Traynor era, the California Supreme Court redefined its role as a legitimate and influential lawmaking institution<sup>5</sup> that actively makes law, uses policy, exercises discretion, and explores extrinsic sources.

Second, the Court modernizes California's law to reflect the public's perception of sound policy. When the California Supreme Court faces a hard case, the Court identifies trends in public policy, and then uses its lawmaking power to align the law with that policy. In other words, the Court follows William Hurst's model of judicial lawmaking because the Court expresses the times and foretells the generation to come.<sup>6</sup>

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<sup>1</sup> See Jake Dear & Edward Jessen, "Followed Rates" and Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683, 694 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (explaining that the Washington Supreme Court was the second most followed state supreme court with 942; thus, the California Supreme Court is followed twenty-five percent more than any other state supreme court).

<sup>4</sup> RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 7–8 (1999) (explaining the formalist view that courts "do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts — mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) — for guidance in deciding new cases.").

<sup>5</sup> Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1276 (2009).

<sup>6</sup> LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 157 (1957) (explaining that "great jurists like Shaw, who vitalize and revitalize the law so that it may fulfill its function, can channel and legitimize social change in as

As Richard Wasserstrom emphasizes, “a desirable legal system is one that succeeds in giving maximum effect to the needs, desires, interests, and aspirations of the members of society.”<sup>7</sup> Thus, a democratic lawmaking institution, which reflects contemporary public policy trends, will be the most endearing and influential. This paper argues the California Supreme Court’s interpretation of its role within government, as a lawmaking institution that reflects contemporary public policy, makes it the most influential state court. Therefore, other courts should consider adopting a similar model to facilitate the evolution of the law to reflect public policy trends.

#### A. FOUNDATION: COURTS MAKE LAW

Although judicial lawmaking is not expressly set forth in the Constitution, courts inherently make law.<sup>8</sup> In the United States, Chief Justice John Marshall fortified the judicial branch as a lawmaking institution when he established judicial review in *Marbury v. Madison*.<sup>9</sup> Judicial review combined with precedent and *stare decisis* gives the judicial branch immense lawmaking powers.<sup>10</sup> Since *Marbury*, courts have exercised their lawmaking powers to help shape America’s substantive law: constitutional and common.<sup>11</sup>

Simply put, “when courts decide cases, their decisions make law because they become precedent.”<sup>12</sup> Many famous judges expressly recognized the judiciary’s lawmaking power. For example, Justice Oliver Wendell Holmes stated, “I recognize without hesitation that judges do and must legislate.”<sup>13</sup> More recently, Justice Antonin Scalia said, “Judges in a real sense ‘make’ law.”<sup>14</sup>

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reasoned a way possible. William Hurst remarked that great judges have the ability to express the times or foretell the generation to come.”).

<sup>7</sup> RICHARD WASSERSTROM, *THE JUDICIAL DECISION* 10 (1961).

<sup>8</sup> Adam N. Steinman, *A Constitution For Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 548 (2004).

<sup>9</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (concluding that “it is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>10</sup> H.L.A. HART, *THE CONCEPT OF LAW* 121–35 (1961) (explaining that in a *stare decisis* system, courts perform a rule-producing function, in which public policy may be taken into account).

<sup>11</sup> Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 3 (1990).

<sup>12</sup> *Id.*

<sup>13</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

<sup>14</sup> *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).