The Age of Reform

1910–1940

CHAPTER THREE | BY LUCY E. SALYER*

Introduction

In 1911, California inaugurated its twenty-third governor, Hiram Johnson, and embarked upon a new political era, dominated by the so-called Progressive movement. Both contemporaries and later historians have been struck by 1911 as a vital watershed in California politics. Within 85 days of Johnson's election, the California legislature passed more than 800 bills and 23 constitutional amendments. "Astounding," "revolutionary," "sweeping," "novel"—these were the adjectives observers repeatedly used to convey the dramatic changes they saw engulfing the state. By 1913, California had adopted the initiative, referendum and recall; women's suffrage; a workers' compensation program; an expanded and reinvigorated public utilities regulatory scheme; an eight-hour workday and a minimum wage law for women; and a local-option law. California, concluded one commentator, was "the farthest outpost of advancing democracy."

Reform was to be a consistent theme in California in the period from 1910 to 1940, though not everyone would agree that reform was wise, necessary, or even progressive. In the early twentieth century, California grappled with the problems associated with becoming a modern, urban industrial state. Reformers sought to impose order and rationality on a diverse, unwieldy society and to temper the harsh effects of the new corporate, industrial economy. Although reformers' energies peaked during the Progressive Era, the 1920s and 1930s continued to witness significant change as the state dealt with rapid urban and economic growth, followed by the economic devastation of the Great Depression.

As the California legislature's record in 1911 demonstrates, law was both a tool and a target of progressive activists' reform agenda. In an address before the California State Bar Association in 1925, Professor Orrin K. McMurray of the University of California's then-School of Jurisprudence contrasted California jurisprudence in the last quarter of the nineteenth century, "a period of quiescence," with the early twentieth century when "the spirit of experiment in human affairs broke forth." By 1925, the legal system had been "radically changed . . . profoundly affect[ing] lawyers and courts [as well as] the activities, ideals and habits of the mass of mankind." The reform legislation and constitutional amendments embodied new legal assumptions about the relationships between employers and employees, private property and public interest, and the prerogatives of the corporation. They also embraced a new form of governance: regulation through the administrative agency. Through such agencies, McMurray concluded, "Our life at every point is affected by regulation, from the registration of our birth to our burial permit."

Such sweeping changes in law and governance did not go unchallenged, and the California Supreme Court very soon had the opportunity to rule on several key aspects of the reform legislation. The Court proved less willing than reform politicians to modify late nineteenth-century concepts of property rights and negligence and more suspicious of new administrative power. Its reluctance to embrace the legislation likely came as no surprise to legislators who tended to identify the Court as the ally of the status quo. In fact, the California courts were a prime target of Progressives' reform agenda as they sought to make judges more politically accountable and limit judicial review of new administrative bodies. Legislators' suspicions of the Court were not groundless. In its evaluation of public utility regulation, water rights, and workers compensation, the Supreme Court often narrowed the reach of the new legislative and constitutional reforms. Yet by the 1920s and 1930s, the Court showed signs of accepting broader concepts of the police power and of endorsing governmental regulatory power over an ever-widening range of activities. What had seemed novel and shocking propositions in 1911 had become mainstream notions in the face of the unique challenges brought by the Great Depression and the multitude of problems California faced as it matured into a modern industrial state.

Judicial Reform: 1925–1934

One of the first major tasks the Court attended to was internal reform. By the late twenties, the California judicial system once again had become a target for reformers. The Progressive campaign of 1911, culminating in the passage of the judicial recall and the nonpartisan election of judges, sought to divorce judges from party politics, particularly by insulating the judiciary from the influence of the Southern Pacific political

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AFTER IT WAS DISPLACED BY THE 1906 EARTHQUAKE, THE SUPREME COURT MOVED TO THE WELLS FARGO BUILDING, 85 SECOND STREET, SAN FRANCISCO, WHERE IT REMAINED FROM 1907 TO 1923.

machine. The solution of the Progressives was to make judges more democratically accountable. Reformers in the late twenties shared the concern about the relationship between politics and the judiciary but identified a strikingly different range of problems and possible solutions. Attorney Hugh Brown pointed out that, unlike the movement leading to the judicial recall in 1911, the "ferment" in 1926 was less against the judges than it was "against delay, and against the vast mass of technicalities in the law of evidence and procedure, and against the dips, spurs and angles of appellate practice . . . and the unconscionably long life of the average litigation."

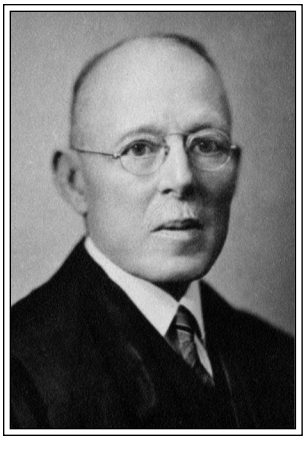
The high turnover of judicial personnel, congestion, and delay plagued courts throughout the state. The dockets of the appellate courts were in serious arrears. "California Supreme Court is 20 Months Behind in Work" announced one *San Francisco Chronicle* headline in 1918. And this was an improvement, according to Chief Justice Angellotti, who reported that the Court had recently been as much as five years behind in its work. But "extensive litigation," especially in Los Angeles, "made it difficult to keep pace with the docket." Congestion had become so "critical" by 1926, according to Brown, that "it is tantamount to a breakdown in the appellate system of the state." Some blamed the backlog on the "inefficiency and indolence" of attorneys who took frivolous appeals and did not prepare adequately. Others complained of "incompetent and lazy" judges. But Brown found the fault to lie in an outdated legal system. "In a skyscraper age the Court business still lumbers up and down stairs," he argued. The solution was "to release the court from its old traditions, its old straightjacketed methods, and to speed its operations."

The judiciary and the bar associations took the lead in attacking the problem of congestion and the staffing of the courts; in doing so, they carved out a larger, more independent legal arena in which they would wield greater authority. Most legal reformers in the twenties shared Brown's broad perspective that the judicial system needed to be revamped to meet the modern age. They further believed that lawyers and judges, as the legal experts, were situated ideally to bring about this transformation. Drawing upon analogies to the business world, the reformers argued that congestion and delay could "be overcome only by coherent effective business administration, with a head vested with adequate powers." If the best legal talent could be drawn to the bench and, once there, if judges had sufficient discretion to exercise their expertise, they soon would put the "judicial plant" in order. Between 1925 and 1934, legal reformers succeeded in instituting several changes, including, in order of their adoption: higher salaries for judges, the creation of a judicial council, the wearing of judicial robes, and the approval of the unopposed judicial retention election.

The push for higher salaries came as respected justices began to leave the Supreme Court for financial reasons. Modern justice, reformers argued, required judges of "greater mentality" to handle the complex, often technical issues of the day; yet such judges could not be attracted and kept on the bench at the salaries then current. In 1906, new provisions in the state constitution removed the power to set judicial salaries from the legislature and, instead, prescribed the pay of the justices at $8,000 a year. Furthermore, the justices' salaries could be delayed if the Court did not dispose of cases submitted for decision within 90 days. The resignations of Angellotti, Sloss, and Shaw for financial reasons provoked a move to change the "clearly inadequate" salary levels, to at least "relieve the judge and his family from

financial worry for the present and for the future." Once again, the bar took the lead to improve judicial salaries. Initially distrusting the legislature with the power to adjust salaries, the California Bar Association first sponsored an initiative constitutional amendment in 1920 to increase the justices' salaries to $10,000, a measure that was "overwhelmingly defeated" by the voters. The bar then proposed to give the legislature the power to establish judicial salaries. Voters ratified that amendment in 1924 and a year later, the justices received a long-overdue raise.

Higher judicial salaries would help to keep the best jurists on the bench. But even the "best men" could not make a significant difference if they remained restrained, in Brown's words, in "old straight-jacketed methods." Reformers proposed a judicial council to help modernize the court system. Headed by "experts"—the chief justice of the Supreme Court and representatives from all of the state courts—the council's mission was to study the administration of justice and suggest changes to expedite judicial business. California voters approved a constitutional amendment creating a judicial council in 1926, allowing for the assignment of judges to aid other courts in the hope that greater coordination of the state's courts would allow "justice to speed up."



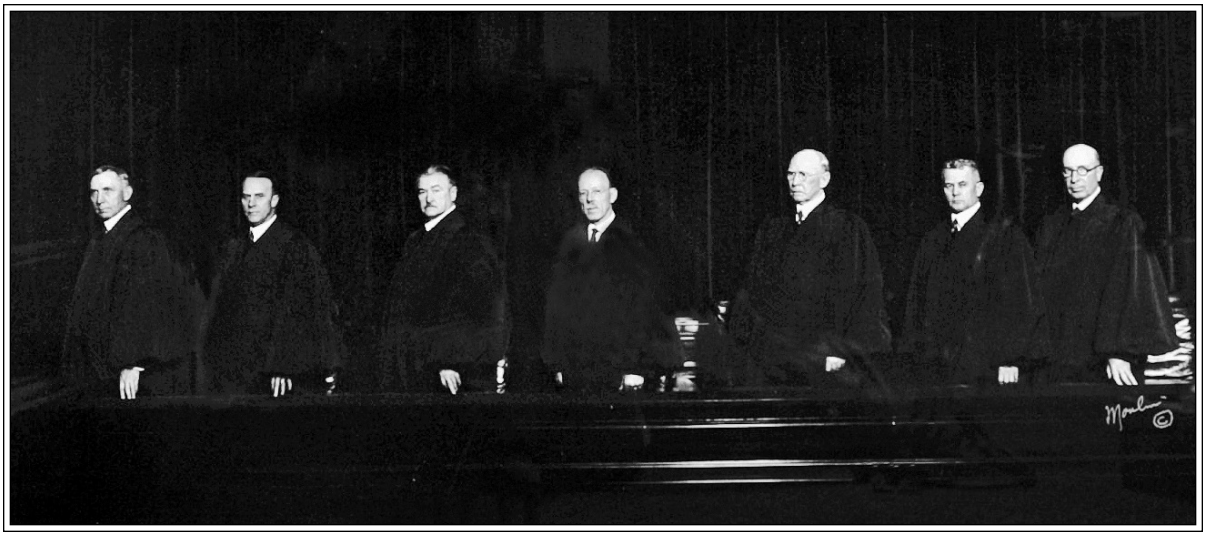
CHIEF JUSTICE
WILLIAM H. WASTE

One of its main proponents, Chief Justice Waste, trumpeted the "bold advance in the administration of judicial business" in California, but cautioned those who expected immediate results—and perhaps reassured those who worried about dramatic change—that his council was judicial in its method and orientation. Although council members were to be efficient administrators, they would conduct themselves in a judicial manner, meaning "after due consideration of every matter presented, and in the exercise of sound judgment."

As if to emphasize that judges would continue to be "judicial" even as they were being recast in progressive reform as efficient administrators, Waste instituted a third reform in 1928: the wearing of judicial robes. Although Governor Johnson had advised that the lawyers of the future would do better to pack away their wigs and legal traditions, Waste established the tradition of wearing robes to give the modern judge a patina of greater respectability. For the major chronicler of the Supreme Court, the donning of judicial robes symbolized the end of the Court's "pioneer age" and indicated that the state "had clearly come of age judicially." The *San Francisco Chronicle* treated the topic humorously but readily acknowledged the symbolic effect of the robes: they served as "a reminder of the dignity of the law" and "will tend to make the court impressive to those who appear before it." Perhaps wrapped in such robes, the Court would become clothed, literally, with greater authority and would be able to distance itself from recent political turmoil and from the tarnished reputations of certain justices.

The attempt to disassociate the judiciary from the political arena was more explicit in reform efforts concerning the selection of judges. In explaining the rapid turnover of Supreme Court justices, commentators blamed not only low salaries but the distasteful and costly nature of political campaigning. Supreme Court judges in California had been selected by popular election since 1849. The push for a different method of choosing judges gathered steam in the 1920s, as a response to the difficulty in getting qualified jurists to sit and remain on the bench. Though justices had always had to stand for election, the process had become worse since 1911, in the eyes of several critics. In 1911, the direct primary had been established, doing away with the political parties' control over nominations. Lawyer Joe Sweet complained that while the direct primary had some laudable aims, it made the judicial candidate's campaign more difficult; rather than relying upon the party organization to secure his election, the candidate had to "trumpet his own virtues, . . . solicit votes and . . . solicit funds" to pay for his campaign. These efforts not only took time away from judicial duties, but also attracted the "wrong sort" to the bench. The president of the California Bar Association agreed, arguing that the best jurists found campaigning "disagreeable" and "abhorrent" and antithetical to the judicial role, leaving the "incompetent and unfit to seek election."

Recent contested judicial elections revealed the drain they took on the judges as well as their potentially damaging effect on the Court as a whole. Thomas Joseph Lennon, for example, campaigned vigorously against William H. Waste for the position of chief justice in 1926. Like Lennon, Waste had established a long judicial career before he came to the Supreme Court, but he had been appointed rather than elected to most of his judicial posts. When Angellotti resigned in 1923, Governor Stephens appointed Waste to the Supreme Court and, three years later, Governor Richardson, a friend as well as political colleague, elevated him to chief justice. A fervent proponent of the election of judges, Lennon cast both Waste and his judicial colleagues in an unfavorable political light. Lennon charged that the rapid turnover of justices after 1918 had allowed the governor



THE WASTE COURT

CHIEF JUSTICE WILLIAM H. WASTE (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES JOHN W. PRESTON, JOHN W. SHENK, EMMET SEAWELL, JOHN E. RICHARDS, JESSE W. CURTIS, AND WILLIAM H. LANGDON

PHOTO: MOULIN STUDIOS

unprecedented opportunity to appoint justices to the bench, resulting in a judiciary chosen by "a coterie of high-powered corporation lawyers and ex- and incumbent judges." "If I am elected at the hands of the people I will not be 'The Governor's Chief Justice,' " Lennon promised. "I shall be the people's Chief Justice . . . and I can assure you that there will be no beaten path from my office to the private office of the Chief Executive of the State!" But fate denied Lennon his chance to become the people's chief justice; before the election came to a close, he reportedly "died of exhaustion." Now unopposed, Waste became chief justice and, partly in response to the contentious election battle with Lennon, became an advocate of an alternative to judicial elections. The elections clearly overtaxed the judges' strength. They also turned judges into political candidates, tainting the image of a dignified, neutral judiciary and encouraging candidates to politicize the bench in unseemly ways.

Many in the bar agreed with California Bar Association President, Thomas Ridgeway, that "it would seem that some method ought to be devised that would remove our judiciary from politics and place it upon a higher plane where fitness and merit count." From the late twenties into the early thirties, the bar sharply debated how judges should be selected. A move to appoint, rather than elect, state judges began as early as 1914 when the Commonwealth Club argued that the "average intelligent citizen" did not have the capacity to evaluate the qualifications of modern judges who needed to be of "greater mentality" as the growing "complexities of our life call for high technical ability in settling disputes." Who did have the expertise to assess the qualifications of potential Supreme Court justices? Not surprisingly, the bar answered "the bar." As legal "experts," lawyers sought to take the lead in judicial reform and secure a more professional judiciary, taking part in the national campaign of the American Bar Association to assert greater control over judicial selection and the legal profession as a whole. But proposals to appoint judges met persistent resistance from those such as attorney Saul Klein who believed "we . . . should maintain our democratic method of selection at all hazards." He feared that appointment would return the state to the domination of the elite and concluded that "our task is to restore the judiciary to the people and not to make it easier to control them."

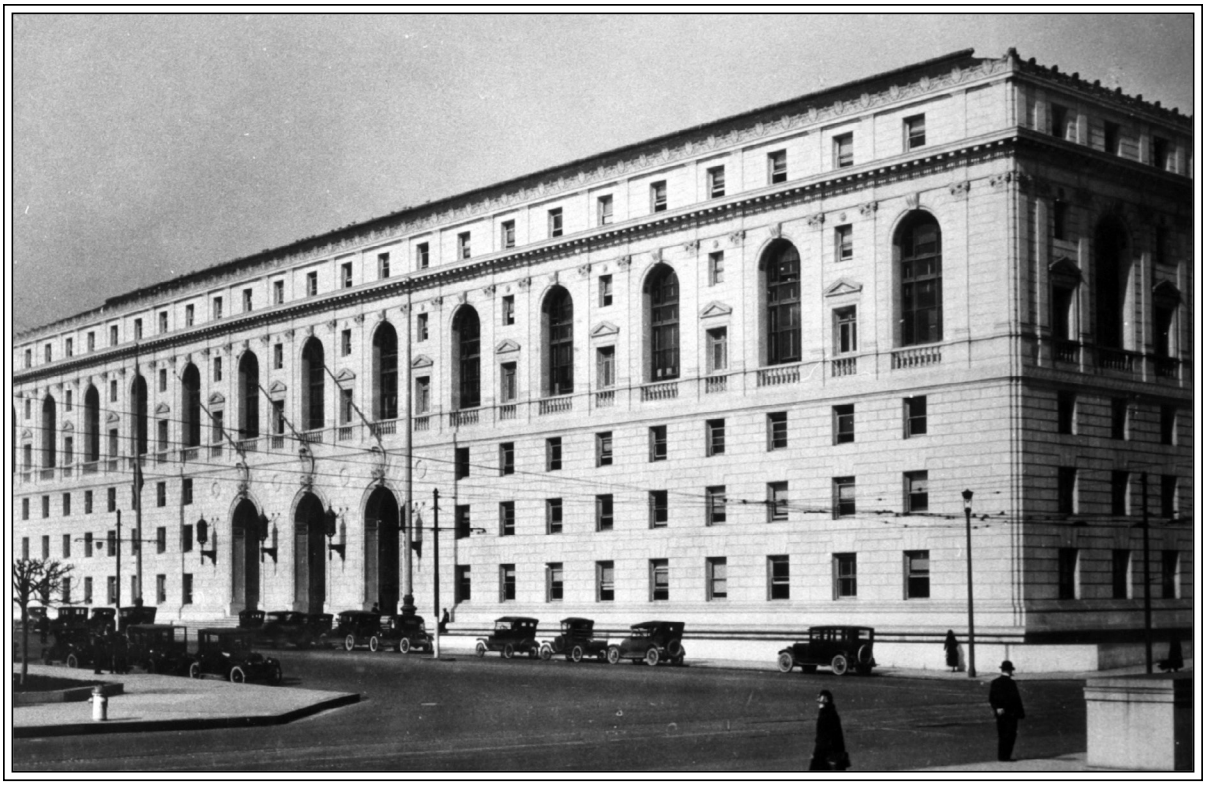
The debate over judicial selection ended with a compromise: the constitutional amendment that was finally adopted in 1934 provided that candidates for the Supreme Court would run unopposed. Either the incumbent could declare his or her intention to stand for election, or, if the incumbent declined to declare such candidacy, the governor could nominate a candidate. The governor's nomination first had to be approved by a "Commission on Judicial Appointments," composed of the chief justice of the Supreme Court, a presiding judge of the district court of appeals, and the state attorney general. The electorate would then either vote "yes" or "no" on the single candidate.

By 1934, the legal reformers had achieved a significant degree of success in altering the image and operation of the California judiciary. The reforms adopted between 1925 and 1934 were an outgrowth of the earlier reforms of 1911. The Progressives' critique of the judiciary in 1911 had raised questions about its relationship to politics and resolved the perceived conflict in favor

of greater democratic controls over the judiciary. By the 1920s, however, reformers from within the legal system addressed the same question by attempting to reconstitute the judiciary as a professional, neutral body of experts engaged in the administration of justice, rather than in substantive policymaking. Attorney Hugh Brown saw the difference in the 1911 recall and the later reform efforts when he argued that the first reflected dissatisfaction with judges and their decisions while the latter revealed an impatience with delay and technicalities. What he did not appreciate, perhaps, is how he and other legal reformers had helped to refocus the reform debate away from judges and their decisions in their framing of the problems and the solutions they advocated.

Conclusion

By 1940, California law and legal institutions had changed significantly from when the Progressives first embarked upon their "search for order." The reformers left their mark: the efforts to rationalize the economy had resulted in more active public management of natural resources and public utilities, the regulation of commercial markets, and the endorsement of organized labor under the "countervailing powers" theory. The boundaries of urban and rural communities were policed by novel zoning ordinances and discriminatory legislation such as the Alien Land Laws. The criminal justice system had more tools at its disposal—probation, indeterminate sentencing, the juvenile court—and the discretion to use them in its effort to cope with modern crime. The California Supreme Court initially had resisted several of the changes such reforms brought, proving hesitant to sanction the substantial expansion of public power over private property that lay at the heart of much of the reform agenda. The Court eventually acquiesced to the new public order, sometimes enthusiastically, as in the Court's path-breaking embrace of zoning, and at other times, such as in the conflict over riparian rights, reluctantly and only after the state passed constitutional amendments to overcome jurisprudential hurdles. The Court not only ended up endorsing much of the reform agenda, but also adopted some of the reformers' rhetoric and techniques in putting its own house in order. With the creation of the Judicial Council and changes in judicial selection, the Waste Court appealed to the need for a more efficient, professional, and depoliticized judiciary and provided the foundation for ongoing Court reform. If the Court accepted the rise of the administrative state, with the concomitant need to redraw the boundaries of private rights, it had yet to consider in depth the consequences of expanded public power for civil liberties and civil rights. Before 1940, the Court proved hesitant to expand the protections of free speech and association or the rights of criminal defendants. Those issues would await the attention of the Gibson Court. ★



THE COURT MOVED TO ITS PRESENT LOCATION AT 350 McALLISTER STREET IN 1923.