

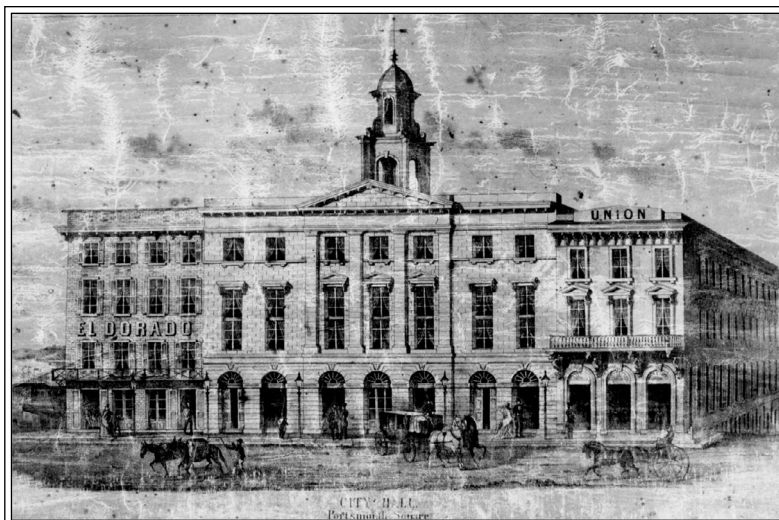
Creating a Court System

1880–1910

CHAPTER TWO | BY GORDON MORRIS BAKKEN*

THE 1879 CONSTITUTION

CALIFORNIA'S 1878–79 CONSTITUTIONAL CONVENTION created a court system with the traditional American pattern of trial and appellate courts, and a revised fundamental law. The delegates focused more on the business of courts than their structure. In fact, the delegates spent far more time discussing constitutional law, criminal justice administration, and the costs of litigation than the structure of courts. In the process of debating the nature of California's court system and the function of judges, the delegates said much about our state and our nation's legal system.



THE CALIFORNIA SUPREME COURT HEARD ORAL ARGUMENTS IN SAN FRANCISCO'S CITY HALL (CENTER) UNTIL MARCH 1854, WHEN THE COURT MOVED TO SAN JOSE FOR NINE MONTHS, AND THEN TO SACRAMENTO FOR THE NEXT TWO DECADES.

CONSTITUTIONAL LAW AND THE STRUCTURE OF THE JUDICIARY

The debates regarding the judiciary in 1878–1879 were qualitatively more sophisticated than in 1849, in that constitutional issues evoked pointed debate of a legally informed nature. The delegates discussed many landmark United States Supreme Court decisions including *Munn v. Illinois*, *Dartmouth College v. Woodward*, *The Passenger Cases*, *The Slaughterhouse Cases*, *State Tax on Foreign-Held Bonds*, *Baron v. Baltimore*, and *Calder v. Bull*. In addition, they offered opinions on jurisprudence; *stare decisis*; state constitutional change; state case law from Wisconsin, Illinois, New York, and California; the national treaty power; eminent domain; state police power; federalism; the law of the land; the extent of the power of Congress; due process; and the uniform law movement. Many of these issues flowed from the duty to write a constitution, but the extent of debate and the level of argument on point were significantly higher than in 1849.

* The late Gordon Morris Bakken (1943–2014) was Professor Emeritus of History at California State University, Fullerton. [Editor's Note: This article is excerpted, without endnotes, from the Society's forthcoming history of the California Supreme Court.]

For many of the delegates, the 1877 decision in *Munn v. Illinois* was of central importance. The United States Supreme Court had held that state legislatures had the authority to regulate businesses affected with a public interest. This put on the legislative agenda a vast array of opportunities to use legislation to regulate rates charged to consumers. The regulatory agenda confronted the vested rights of private property so dear to conservative Americans, making *Munn* even more of a prime focus for debate for delegates and the nation. What were the implications of allowing states to regulate business?

Constitutional argument of high order was offset by overtly racist attacks upon the Chinese. On a plane higher than racism, some delegates felt that the federal government did not have an effective immigration policy, and as a result, they contended, California was being swamped with cheap immigrant labor to the detriment of working men. In the end, delegates would petition Congress for federal legislation that would exclude the Chinese.

THE SUPREME COURT AND ITS JUSTICES

The report of the Committee on the Judiciary generated a discussion of whether the Supreme Court should hold sessions in places other than Sacramento, the election of judges, the term of office, and the costs

of justice. Regarding the length of terms for Supreme Court justices, Samuel M. Wilson of San Francisco, the law partner of Joseph P. Hoge, the president of the convention and founder, with Hoge, of the San Francisco Bar Association, wanted long terms for judges. A long term was necessary to attract the best legal talent, he argued, and “the continual changing of Judges is certainly one of the worst things in our system.” Horace C. Rolfe, representing San Bernardino and San Diego counties, warned the convention of judicial elections and politics. “This idea of a Justice of a Supreme Court being re-elected in consequence of having been a good and efficient Judge, is all a delusion,” he asserted. George V. Smith agreed, cautioning that politics could “make the office of Supreme Judge merely a political office.” Others saw the judiciary article as a means of keeping the courts out of politics. Thomas B. McFarland of Sacramento thought that “the judiciary [was] by far the most important department to the people.” A Supreme Court justice’s salary must therefore be sufficient and the term long enough “that he may expect [to be judge] . . . the balance of his life.” Another delegate saw long terms as a barrier to political caprice. “The excellence of the judicial system . . . is predicated not on change, but on certainty, on permanence and precedent,” he offered. Further, judges were special breeds having “quite a different order of talent . . . to hand down the laws unimpaired, to adhere to precedent, and to refine without over refinement.” Long terms put some distance between judges and the political environment of frequent elections.

THE ELECTION OF A SUPREME COURT

In 1879 voters elected the California Supreme Court that sat in 1880. The Court was now seven in number, increased from five; the Workingmen’s Party of Denis Kearney nominated six of the seven. This first court under the new constitution was not unlike the Supreme Courts that would follow in the next 30 years. It was composed largely of attorneys schooled in the nineteenth-century manner of reading law. Twenty-six justices would serve in the period; yet only one, Charles Henry Garoutte, was a native son of California.

The 1879 election brought 23 candidates out for the seven seats on the California

Supreme Court. The top seven candidates would serve and they in turn would draw for terms. Robert Francis Morrison won election for chief justice on the Democratic and Workingmen’s Party tickets. Morrison brought three decades of practice and judicial experience to the position. Elisha Williams McKinstry, also a Democratic and Workingmen’s Party candidate, won the most votes at the election and was the only member of the old five-man court to win election. Admitted to practice in New York in 1847, McKinstry also brought three decades of practice, legislative, and judicial experience to the Court. Erskine Mayo Ross, a Democratic, Workingmen’s, and Prohibition Party candidate, was the only southern Californian elected to the Court. Ross was 35, a graduate of the Virginia Military Institute, a Confederate veteran of the Civil War, and a Los Angeles attorney with a decade of experience at the bar. Ross also raised oranges, lemons, and olives in Glendale. John Randolph Sharpstein, another Workingmen’s Party candidate, was admitted to practice in Michigan in 1846, entered practice in Wisconsin the next year, held legislative office in the Badger state, was U.S. Attorney in Wisconsin, and escaped Wisconsin winters in 1864 to settle in San Francisco. He too brought three decades of practice and public service experience to the Court. Samuel Bell McKee was born in Ireland, studied law in Alabama, practiced law in Oakland, and won election to the first of many judicial positions in 1856. He had decades of legal and



THE COURT’S HOME FROM 1890 TO 1896 WAS AT 305 LARKIN STREET IN SAN FRANCISCO.

judicial experience when he took his seat in 1880. The Democratic, Workingmen's, and Prohibition Parties all nominated James Dabney Thornton. He was admitted to the Alabama bar in 1849, arrived in San Francisco in 1854, and maintained his Democratic Party affiliation throughout the Civil War years. Thornton refused for two years to take the "ironclad oath" after the war, and he was appointed to the third judicial district bench in San Francisco in 1878. Milton Hills Myrick was the only Republican elected to the Court. Myrick was the son of a New York preacher and member of the New York Anti-Slavery Society. He was admitted to the Michigan bar in 1850, arriving in California in 1854. Myrick spent his early years in the West practicing the printers' trade before practicing law in Red Bluff. He presided over the San Francisco probate court from 1872 to 1880 and became widely known for his expertise in the law.

In sum, the justices of the Court were clearly experienced in the law, and they also were cognizant of the political issues of the day.

CALIFORNIA'S CHANGED ECONOMY

The first 30 years of the state's development under the new constitution was a time of dramatic social, economic and demographic change, as the economy grew explosively, due in considerable measure to transportation expansion. In the late 1870s the Southern Pacific Railroad extended its line into the agriculturally rich San Joaquin Valley and continued construction to New Orleans, finishing that branch in 1883. The Atchison, Topeka, and Santa Fe arrived in Los Angeles in the 1880s and by 1898 had extended its lines into the San Joaquin Valley. The Southern Pacific continued its northern expansion in the 1880s and 1890s into the Sacramento Valley. By 1910, California had four direct transcontinental railway links and a web of feeder lines into every corner of the state except the northwest. The expansion of the railway net opened new markets and with the advent of irrigation revolutionized California agriculture.

Irrigation started the shift from wheat culture to fruits, vegetables, and nuts on California's farms. Paul W. Rhode has termed this shift "one of the most rapid and complete transformations ever witnessed in American agricultural history." The refrigerator car enabled the shipment of an entire train carload of oranges to the east in 1886. In 1906 growers sent eastward nearly 82,000 carloads of fruits and nuts. A county named Orange won legal status in 1889.

Railroads also enabled the expansion of the lumber industry. Redwood became a familiar product in the East, and between 1899 and 1904 many eastern lumbermen moved their operations to the redwood forests and the pine forests of the Sierra. The port of San

Francisco shipped to the world, and railcars carried California lumber to the robust markets in the Midwest and the East. Meanwhile, San Francisco grew as a financial center for the West—but also thus became more susceptible to nationwide economic panic and depression, particularly in 1893 and 1907. Money at interests would push parties into court as well as into insolvency in times of economic distress.

California's population grew dramatically in this period and shifted away from San Francisco. In 1880, the state's population stood at 864,694. One decade later, the number had swelled to 1.2 million and by 1910 close to 2.4 million. The population increase after the turn of the century was not distributed evenly. Most of the new settlers came to Southern California or the Central Valley; and Los Angeles grew 212 percent to nearly 320,000 in 1910, while new settlements boomed in the hydraulic empire that had grown up in the San Fernando Valley. Newcomers to Sacramento and the San Joaquin Valley saw potential in the booming fruit and nut industries. With the surge of population, California revisited the problem of the homeless, the tramps, and the floating army of dispossessed workers. For the California Supreme Court, the expanding population and economy would bring a vast variety of important new questions to the appellate bench.

CONCLUSION

Despite the strident language of its critics, by 1910 the California Supreme Court had moved from the formalistic jurisprudence characteristic of its early years to a form of activism that would come to characterize the twentieth-century Court. The Court had affirmed a woman's right to access to employment, become more sensitive to the constitutional rights of minorities, and fearlessly interpreted law regardless of firestorms of public outrage. The Court was now a public institution at the center of efforts to reform government, regulate corporations, and preserve the rule of law. Moreover, the Court had created lasting precedent in numerous areas of law, resolved the most inflammatory water and land-use rights disputes of the day, and established new standards for inherently dangerous instrumentalities that would substantially influence tort law in the twentieth century. In so doing, the Court laid the foundations for California's transformation from frontier state to diverse and prosperous center of population and industry. Finally, the Court largely achieved the balance sought under the 1879 constitution, avoiding judicial despotism and adjudging disputes with fairness and integrity, and guiding with a modest hand California's development through the tempestuous politics of the late nineteenth century. ★