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.[1] Between 1940 and 2005, other state supreme courts followed the California Supreme Court 1,260 times,[2] which is twenty-five percent more than any other state high court.[3] 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.[4] Starting in the Traynor era, the California Supreme Court redefined its role as a legitimate and influential lawmaking institution[5] 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.[6]

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[1] *See* Jake Dear & Edward Jessen, *"Followed Rates" and Leading State Cases, 1940–2005*, 41 U.C. Davis L. Rev. 683, 694 (2007).

[2] *Id*.

[3] *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).

[4] 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.").

[5] Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 Buff. L. Rev. 1267, 1276 (2009).

[6] 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 legitimatize 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."[7] 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.[8] 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*.[9] Judicial review combined with precedent and *stare decisis* gives the judicial branch immense lawmaking powers.[10] Since *Marbury*, courts have exercised their lawmaking powers to help shape America's substantive law: constitutional and common.[11]

Simply put, "when courts decide cases, their decisions make law because they become precedent."[12] 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."[13] More recently, Justice Antonin Scalia said, "Judges in a real sense 'make' law."[14]

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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.").

7 Richard Wasserstrom, The Judicial Decision 10 (1961).

8 Adam N. Steinman, *A Constitution For Judicial Lawmaking*, 65 U. Pitt. L. Rev. 545, 548 (2004).

9 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.").

10 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).

11 Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. Rev. 1, 3 (1990).

12 *Id.*

13 S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

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

Courts make laws in three ways.[15] First, courts adjudicate cases so that the final judgment "is a legal decree" for the litigating parties.[16] Also, courts make law by "promulgating rules," such as practice and procedure instructions for the courtroom.[17] But the most influential form of judicial lawmaking is when appellate courts legislate because they create precedent for future cases."[18] As Judge Richard Posner concludes, an appellate judge's job is to "apply an old rule unmodified, modify then apply the old rule, or make and apply a new rule."[19]

Although courts still create and modify laws in the common law, legislatures displaced courts as the major lawmakers in the United States.[20] But ironically, the increased rate of new legislation also increased judicial lawmaking.[21] Legislatures cannot create codes to cover every social situation[22] because "legislatures are neither omnipresent nor omniscient."[23] "Society changes at a rapid rate, and legislatures frequently do not manufacture enough law necessary to cover new disputes created by new social relationships."[24] Thus, courts fill these ever-present gaps at an escalating rate.[25]

Finally, as Judge Posner points out, active judicial lawmaking is not based on liberal or conservative politics.[26] Both conservative and liberal courts make law regardless of their political tilt. Thus, judicial lawmaking is "independent of the policies that other governmental institutions happen to be following."[27] The "right" outcome "depends on the particular historical situation, in which the judge finds himself."[28]

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15 Steinman, *supra* note 8, at 552.

16 *Id*.

17 *Id*.

18 *Id*.

19 Posner, *supra* note 4, at 248–49.

20 John Poulos, *The Judicial Philosophy of Roger Traynor*, 46 Hastings L.J. 1643, 1701 (1995).

21 *Id*.

22 *Id*.

23 Roger J. Traynor, *Comment on Courts and Lawmaking*, Legal Institutions Today And Tomorrow 52 (Monrad G. Paulsen ed., 1959).

24 Poulos, *supra* note 20, at 1701.

25 *Id*.

26 Richard Posner, *The Meaning of Judicial Self-Restraint*, 59 Ind. L.J. 1, 12 (1983).

27 *Id*. at 14.

28 *Id*. (explaining that if Chief Justice Marshall had used judicial restraint in *Marbury,* it would have been a disaster).

II. SHOULD COURTS ACTIVELY MAKE LAW?

Critics attack judicial lawmaking from both sides.[29] Some believe courts should not tread on the legislature's territory.[30] Others fault courts for reluctance to declare new law.[31] The historical debate as to whether courts should actively engage in lawmaking will not end soon. But the tide shifted toward the approval of an active lawmaking judiciary. The acceptance of the California Supreme Court's judicial lawmaking model is hard evidence that the tides have turned. Essentially, Traynor shaped the California Supreme Court's judicial lawmaking model. Thus, Traynor was correct because he advocated for a broad construction of the judiciary's lawmaking authority.

A. JUSTICE TRAYNOR BELIEVED COURTS SHOULD ACTIVELY MAKE LAW

Justice Traynor believed courts should make law when old doctrines become unsound due to society's fluctuating expectations. Traynor's view of judicial lawmaking "emphasized the practical necessity of judicial innovation to meet constantly changing social conditions and values."[32] In Traynor's view, a court's role is to "search for solutions, hammer out new rules that respect values, which survived the tests of reason and experience, and anticipate what contemporary values will meet those tests."[33] Traynor did not believe judicial creativity was the enemy; he believed a lack of judicial creativity was.[34]

Generally, Traynor opposed formalism because formalists "either denied courts are lawmakers, or citing *stare decisis*, argued they should not be."[35] Basically, Traynor would disagree with the position taken by Chief Justice John Roberts in his confirmation hearing, in which Roberts said that courts should be simply "umpires calling balls and strikes."[36]

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29 Wachtler, *supra* note 11, at 1.

30 *Id*.

31 *Id*.

32 Ursin, *supra* note 5, at 1308.

33 *Id*. at 1309 (quoting Justice Traynor).

34 *Id*.

35 Roger J. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157, 165 (1960).

36 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55

"Traynor recognized significant differences between hard cases involving [constitutional] law and hard cases involving common law."[37] However, he was also concerned with a major likeness: a judge is faced in both realms with the same dilemma of contemplating competing policies.[38] So in either realm, judges must "arrive at a value judgment as to what the law ought to be and spell out why."[39] But, Traynor noted courts should generally defer to "legislative judgments in constitutional adjudication."[40]

1. Justice Traynor's Limits on Judicial Lawmaking

Justice Traynor believed courts are restrained when they make law. Traynor believed "the primary obligation of a judge is to keep the law's evolution on a rational course. Reason, not the rulebook, is the soul of the law."[41] Traynor also said, "Unlike the legislator, the judge takes precedent as his starting-point, so he is constrained to arrive at a decision in the context of ancestral judicial experience."[42] Essentially, a "court is not at liberty to seek hidden meanings not suggested by statutes, [precedents], or extrinsic aids."[43] Further, Traynor acknowledged a judge's explanation for evolving the law must "persuade his colleagues, make sense to the bar, pass muster with scholars, and allay suspicion of any man in the street."[44] Thus, a judge's lawmaking power is limited procedurally and substantively to reach a socially acceptable decision.

In common law, Traynor was less concerned with courts engaging in large-scale lawmaking because the "legislature can always step in to unwrite the common law that the judge [wrote]."[45] Traynor believed courts

(2005) (statement of John G. Roberts, Jr.).

37 Ursin, *supra* note 5, at 1310.

38 *Id*.

39 Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 234 (1962).

40 Ursin, *supra* note 5, at 1270.

41 Roger J. Traynor, *Limits on Judicial Creativity*, 63 Iowa L. Rev. 1, 7 (1977).

42 Roger J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 Sask. L. Rev. 201, 203 (1967).

43 Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 618 (1961).

44 *Id*. at 621.

45 Ursin, *supra* note 5, at 1355.

should "play an active role in bringing the common law into conformity with [contemporary] social realities and values."[46]

However, in constitutional law, Traynor used a combination of creativity and caution. In the constitutional realm, courts can limit the legislature's power.[47] In other words, the court tells the legislature it cannot do something, and except by constitutional amendment, only the court can change its constitutional rulings. So, Traynor advised courts to defer to the legislature, but they should not let tradition thwart constitutional scrutiny.[48]

Traynor used a pragmatic analysis to determine if courts should avoid deference to the legislature. Traynor's analysis included four factors; (1) the issue's urgency, (2) competing interests (*i.e.* costs and benefits to society), (3) if the legislature will cure the problem, and (4) if the Court can issue justice within the time prescribed.[49] On balance, if these factors weigh against deference, then the court should act.

When this slim exception applies, Traynor believed courts have a responsibility to safeguard "civil liberties, which are the sum and substance of citizenship."[50] Traynor grounded his position on limited constitutional lawmaking by demonstrating "social changes [consistently] bring about the rise, fall, and modification of constitutional doctrines."[51] In essence, Traynor believed courts should defer to the legislature, unless modern public policy directly conflicts with constitutional doctrines.

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46 *Id*. at 1295.

47 *Id*. at 1292.

48 *Id*. at 1314.

49 Traynor, *supra* note 41, at 13 ("If on rare occasion [a judge] contemplates a decision of constitutional tenor, intended to prompt legislators to take action, he must first analyze exhaustively the claimed urgency of such action, particularly in the context of possibly equally strong competing claims, no one of which might be fulfilled without cost to the others. If this hurdle is cleared, he must still analyze whether legislators would otherwise remain delinquent toward the federal or a state constitution, despite the pleas of their constituents. The second hurdle cleared, he must finally analyze whether his own decision is one that the legislature can implement with justice to all and within the time prescribed.").

50 Ursin, *supra* note 5, at 1313.

51 Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. Ill. L.F. 230, 237 (1956).

B. JUSTICE TRAYNOR BELIEVED COURTS SHOULD REFLECT MODERN PUBLIC POLICY TRENDS WHEN THEY MAKE LAW

Under the "consent of the governed" theory of government, laws' premises come from the ground up, not from the top down.[52] In other words, laws are created by interpreting the will of the people and exist to serve the people.[53] Holmes articulated and Traynor followed the premise that law embodies the preference of the "people in a given time and place."[54]

Traynor believed courts should factor modern public policy trends into the court's decision-making process. He explained that judges always choose "one policy over another"[55] when making a decision. Essentially, Traynor believed a judge's job is to displace old polices with new ones.[56]

Traynor noted, "Courts have a creative job to do when they find that a rule has lost its touch with reality. The rule should be abandoned or reformulated to meet new conditions and moral values."[57] "The task [of interpreting public policy trends] is not easy," but judges should do their best.[58] This public policy concept guided the Traynor-era California Supreme Court and its descendants to modernize innumerable laws to reflect Californians' perception of sound policy.

III. THE CALIFORNIA SUPREME COURT EMBRACES JUDICIAL LAWMAKING

The California Supreme Court embraces its lawmaking function to supplement the Legislature and facilitate the law's evolution. "During Justice

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[52] Alexander Tsesis, *Self-Government and The Declaration of Independence*, 97 Cornell L. Rev. 693, 696 (2012).

[53] John Locke, Two Treatises on Government 104 (Peter Laslett ed., Cambridge Univ. Press 1988) ("Reason being plain on our side, that men are naturally free, and the examples of history shewing, that the governments of the world, that were begun in peace, had their beginning laid on that foundation, and were made by the consent of the people; there can be little room for doubt, either where the right is, or what has been the opinion, or practice of mankind, about the first erecting of governments.").

[54] Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897).

[55] Traynor, *supra* note 42, at 213.

[56] Ursin, *supra* note 5, at 1276.

[57] Traynor, *supra* note 51, at 232.

[58] *Id*.

Traynor's tenure, California witnessed a transformation of the judicial role."[59] California's liberal social policies coupled with political and economic development forced the California Supreme Court to expand its role to supplement the Legislature.[60]

This renaissance came about because Traynor and the California Supreme Court embraced judicial lawmaking and rejected formalism.[61] Since 1940, numerous California Supreme Court decisions exemplify the Court's willingness to supplement the Legislature. But, please note this paper does not discuss a vast number of very influential cases.[62] All of the Court's

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[59] Craig Green, *An Intellectual History of Judicial Lawmaking*, 58 Emory L.J. 1196, 1247 (2009).

[60] *Id*.

[61] Ursin, *supra* note 5, at 1276–77.

[62] Here are some examples of California Supreme Court decisions which span generations and are widely influential: *Summers v. Tice*, 33 Cal.2d 80 (1948) (shifting the burden to the defense to disprove causation when it was clear one of two defendants must have caused the plaintiff's injury, but it was unclear which one); *Lucas v. Hamm,* 56 Cal.2d 583 (1961) (allowing beneficiaries of wills to pursue a professional negligence action despite a lack of privity); *Seely v. White Motor Co.,* 63 Cal.2d 9 (1965) (holding strict liability does not extend to recovery for purely economic loss); *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263 (1966) (requiring the insurer to defend an action in which the interests of insurer and insured are so opposed as to nullify the insurer's fulfillment of its duty of defense and of the protection of its own interests); *Dillion v. Legg*, 68 Cal.2d 728 (1968) (expanding the tort of negligent infliction of emotional distress (NIED) beyond its traditional form, which was limited to plaintiffs standing in the same "zone of danger" as a relative who was killed); *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566 (1973) (recognizing the tort of insurance bad faith); *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425 (1976) (holding that mental health professionals have a duty to protect individuals who are being threatened with bodily harm by a patient); *Ray v. Alad Corp.,* 19 Cal.3d 22 (1977) (creating an additional exception to the traditional successor liability framework (product-line exception), which imposes liability on an asset purchaser for the seller's defective products if the purchaser continues to manufacture the seller's product line following the transaction); *Barker v. Lull Engineering Co.*, 20 Cal.3d 413 (1978) (describing two ways in which a product can be defective); *People v. Wheeler*, 22 Cal.3d 258 (1978) (prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race); *Sindell v. Abbott Laboratories*, 26 Cal.3d 588 (1980) (creating the doctrine of market share liability); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988) (holding that the covenant of good faith and fair dealing applies to employment contracts and that breach of the covenant may give rise to contract, but not tort, damages); *Thing v. La Chusa*, 48 Cal.3d 644 (1989) (withdrawing from the expansive form of NIED set forth in *Dillon* and imposing a rigid bright-line test for recovery in bystander NIED cases); *In re Alvarez*, 2 Cal.4th 924 (1992) (explaining the

decisions include a similar factor that transcends decades and justices: lawmaking, which reflects contemporary public policy trends.[63]

The Court implemented the procedure that "cases must be decided in the long run" so that they are harmonious with the "moral sense of the community."[64] Regardless of whether the injustice is in the constitutional or common law realm, the Court is willing to make law when it no longer aligns with modern public policy trends. As the Court saw it, "judicial doctrines are on trial as well as the litigants, and only doctrines that meet the test of experience survive."[65]

A. THE CALIFORNIA SUPREME COURT AND THE CALIFORNIA STATE LEGISLATURE CO-EXIST AS LAWMAKING INSTITUTIONS

Justice Traynor viewed the California Supreme Court and California State Legislature as "co-workers," not competitors.[66] Sometimes the Court is forced to engage in judicial lawmaking because of legislative inaction.[67]

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appropriate remedy for ineffective counsel that resulted in a defendant's decision to reject an offered plea bargain); *People v. Leahy*, 8 Cal.4th 587 (1994) (imposing limitations on the use of a certain type of field sobriety test); *Waller v. Truck Insurance Exchange,* 11 Cal.4th 1 (1995) (finding no duty to defend allegations of incidental emotional distress damages caused by the insured's non-covered economic or business torts); *Temple Community Hospital v. Superior Court*, Cal.4th 464 (1999) (declining to recognize a new proposed common law tort of intentional third-party spoliation of evidence).

63 Dear, *supra* note 1, at 702–03.

64 Roscoe Pound, *Spurious Interpretation*, 7 Colum. L. Rev. 379, 381 (1907) (explaining that statutory interpretation is purely judicial in character and that the interpretation should reflect the community standards).

65 Walter Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 Cal. L. Rev. 11, 18 (1965).

66 Traynor, *supra* note 43, at 616 ("The judiciary must continue as a co-worker with the legislature in the development of the law.").

67 The California State Legislature cannot act to align the law with modern public policy trends when it is stalemated by party polarization. Recently, the United States has experienced significant party polarization, which is not present in the general population. Pietro Nivola & David Brady, Red and Blue Nation?: Characteristics and Causes of America's Polarized Politics 1 (Brookings Institution Press, vol. 2, 2006). Although the Democrats have a supermajority in the California State Legislature, the Legislature still becomes stalemated by party polarization. *See* John Diaz, *How California tamed its once-dysfunctional Legislature,* SFGate (Feb. 21, 2014), http://www.sfgate.com/default/article/How-California-tamed-its-once-dysfunctional-5256895.php

The Court supplements the Legislature when there is "legislative indifference, legislative sensitivity to political issues, or legislative adherence to singular agendas."[68]

The justiciability doctrine combined with checks and balances allows the California Supreme Court and the California State Legislature to coexist as lawmaking institutions.[69] As Edward White explains, the justiciability doctrine is "the primary force harmonizing judicial lawmaking with the doctrine of separation of powers. Properly understood and applied, justiciability principles serve as the foundation for legitimate judicial lawmaking."[70]

Further, the checks and balance system restricts the Court from usurping too much lawmaking power. Essentially, the Court and the Legislature have a symbiotic relationship, each drawing on the actions of the other. The Legislature passed statutes "whose applicability to specific situations was uncertain, the Court undertook the applications, and the Legislature revised that decision if they found a specific application offensive."[71]

IV. THE CALIFORNIA SUPREME COURT REFLECTS THE PUBLIC'S PERCEPTION OF SOUND POLICY WHEN IT MAKES LAW

The use of public policy in judicial decision-making[72] ignited the flame which made the California Supreme Court the most influential state court. Early in the Traynor era, many frowned upon using public policy in judicial decision-making[73] because most judges embraced formalism. But, "during the 1960s and 1970s, the California Supreme Court was a frequent legislator, comfortable with basing its lawmaking on policies, which was abhorrent to

(explaining that recent terms of the California State Legislature have seen party polarization, which caused dysfunction).

68 Traynor, *supra* note 43, at 618.

69 *Id*.

70 Edward White, The American Judicial Tradition: Profiles of Leading American Judges 255 (1976).

71 *Id*.

72 Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. Pa. J. Const. L. 455, 456 (2010).

73 Ursin, *supra* note 5, at 1273.

formalists."[74] Subsequent generations of the California Supreme Court followed Traynor's lawmaking model.[75] Therefore, the Court's model persists because it passed the tests of experience, but the Court's model didn't just survive, it flourished.

The Court uses public policy in its analysis "not because it is particularly desirable, but because there is often no feasible alternative."[76] "Modern times demand judicial creativity, and advances in the social sciences assist the judge in this task."[77]

Additionally, the Court considers competing political interests when determining modern public policy trends because the justices are subject to retention elections. Former California Supreme Court Justice Otto Kaus stated, "There is no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he has to make them near election time. That would be like ignoring a crocodile in your bathtub."[78]

However, the "mass public is generally uninterested in politics, especially supreme court decision making. Consequently, there are a limited number of high-salience issues in which the justices have strong incentive to take into account voter backlash."[79] But California Supreme Court justices understand their role within government, so they will not issue a decision that significantly diverges from contemporary public policy.[80] The

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[74] *Id*. at 1338.

[75] *See* Knight v. Jewett, 3 Cal.4th 296 (1992) (using policy to limit liability for participants in sporting events); Dear, *supra* note 1, at 703 (explaining that the data suggests the current generation of the California Supreme Court will continue to influence other courts because they follow the Traynor-era judicial lawmaking model).

[76] Henry Friendly, *The Courts and Social Policy: Substance and Procedure,* 33 U. Miami L. Rev. 21, 22 (1978).

[77] Richard Posner, *The Rise and Fall of Judicial Self-Restraint,* 100 Cal. L. Rev. 519, 540 (2012) (quoting Ben Field who spoke about Traynor's writings and decisions).

[78] Otto Kaus often stated that ignoring the political consequences of visible decisions is like ignoring a crocodile in your bathtub. Paul Reidinger, *The Politics of Judging,* 73 A.B.A.J. 52, 58 (1997).

[79] Devins, *supra* note 72, at 473.

[80] Lee Epstein & Jack Knight, The Choices Justices Make 157–59 (1998) (explaining that justices "operate within the greater social and political context of the society as a whole, so the justices must attend to those informal rules that reflect dominant societal beliefs about the rule of law in general, and the role of the Supreme Court in particular — the norms of legitimacy"); Barry Friedman, *Mediated Popular*

justices know the electorate[81] and the Legislature[82] can and will override a decision if it steps outside Californians' public policy limits.

A. CALIFORNIANS' LIBERAL AND PROGRESSIVE PUBLIC POLICY TENDENCIES

Justice Holmes articulated the maxim that laws are best created by reflecting the public's perception of sound policy. In industrial accident cases, Holmes recognized that juries often found for injured plaintiffs, despite the judges' instructions which dramatically favored industrial defendants.[83] Holmes foresaw a shift in tort law because he understood "the life of the law has not been logic: it has been experience."[84] Essentially, Holmes believed that public policy dictates what the law should be. Thus, a governing institution that reflects contemporary public policy trends will create laws the people want.

California is a populous state with dynamic and diverse social, cultural, and economic conditions. The diverse nature of California produces "a wealth of litigation capable of yielding leading decisions."[85] Thus, the California Supreme Court "addresses difficult cases of broad application," and it faces novel cases that arise from new social conditions.[86] Therefore, when the Court addresses these questions, it must look at a variety of competing policy issues.

Constitutionalism, 101 MICH. L. REV. 2596, 2606–07 (2003) (asserting that judicial decision making is often consistent with popular opinion).

81 The electorate will retaliate against a California Supreme Court decision in two ways. First, the electorate can remove a justice through the retention election. Second, the electorate can amend California's Constitution through a referendum to alter the Court's decisions.

82 Because the Democrats hold a supermajority, the California State Legislature can quickly overturn a peculiar California Supreme Court decision that does not align with Californians' expectations.

83 Holmes, *supra* note 54, at 463.

84 OLIVER WENDELL HOLMES, THE COMMON LAW 4 (1881) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

85 Dear, *supra* note 1, at 703.

86 Dear, *supra* note 1, at 707.

Inevitably, the Court reflects Californians' political orientation. The majority of Californians are liberals and progressives, which is illustrated by Californians' recent voting trends. California's 113th congressional delegation is regarded as one of the most liberal. "Six of the House's fifteen most liberal members, based on their voting records, come from California. Conversely, none of the fifteen most conservative members of Congress come from California."[87] Further, Californians' liberal propensity can be seen in the California State Legislature, where at present the Democrats hold a supermajority.[88] Indeed many exceptions apply to Californians' liberal propensity, but as a general notion, most Californians are liberals and progressives. So, the Court is generally bonded to a liberal or progressive public policy position on high-salience issues.

However, this liberal and progressive propensity also helped the California Supreme Court become the most influential. Gregory Caldeira explained that the most prestigious and influential high courts throughout history are characterized as "politically liberal."[89]

B. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TRENDS TO UPDATE THE COMMON LAW

The California Supreme Court foreshadowed large doctrinal shifts for the nation in the common law. The Court's opinions demonstrate that it modernized the law to align with emerging trends in public policy. Specifically, the California Supreme Court identified and updated outdated policies in products liability, landowner duties, and negligence law. These cases "dispel the myth" that the Court could not make "fundamental changes to tort law."[90]

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87 Dan Walters, *Californians Dominate "Most Liberal" Rankings in Congress*, The Sacramento Bee (Feb. 6, 2014), http://blogs.sacbee.com/capitolalertlatest/2014/02/californians-dominate-most-liberal-rankings-in-congress.html.

88 Diaz, *supra* note 67.

89 Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 Pol. Behav. 83, 101 (1983) (asserting that the most "innovative and prestigious state supreme courts" are those that have "handed down numerous progressive decisions" characterized by "political liberalism" and "judicial activism").

90 Edmund Ursin & Virginia Nolan, Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century 175 (1995).

1. Products Liability

Traynor built the foundation for California's eventual shift to strict products liability with his 1944 concurring opinion in *Escola v. Coca-Cola Bottling Co.* In *Escola*, the Court held the defendant was liable for an exploding soda bottle which injured a waitress.[91] In the concurring opinion, Traynor reasonably deduced the forward-looking position that manufacturers should be strictly liable for defective products.[92] Strict liability should be adopted because plaintiffs are not in a position to refute the defense of due-care.[93] Thus, the risk of loss should be distributed as a cost of doing business.[94]

Traynor supported the proposed change in the law by citing public policy,[95] and he overtly argued that the law should reflect public policy.[96] He said, "If public policy demands a manufacturer be responsible, then there is no reason not to fix responsibility openly."[97] Traynor's concurrence rippled through the legal system because it argued that laws should reflect contemporary public policy trends.[98]

Eighteen years after *Escola*, the California Supreme Court officially aligned the law with public policy in *Greenman v. Yuba Power Products, Inc.*[99] The opportunity for the Court to act came from a case where a defective power tool seriously injured the plaintiff. *Greenman* was the "first unequivocal court decision adopting both the rule and the theory of strict liability for products."[100] Traynor unceremoniously cited his concurrence in *Escola* to support the holding in *Greenman* because the shift in public policy was now very clear.[101]

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91 Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461 (1944).

92 *Id*. at 462.

93 *Id*. at 463.

94 *Id*. at 462.

95 *Id*. ("Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.").

96 *Id*. at 463.

97 *Id*.

98 John Wade, *Chief Justice Traynor and Strict Tort Liability for Products*, 2 Hofstra L. Rev. 455, 456 (1974).

99 *See* Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57 (1963).

100 Wade, *supra* note 98, at 459.

101 *Greenman*, 59 Cal.2d at 63.

Traynor's *Escola* concurrence and *Greenman* logically extended strict liability from food cases to all products.[102] At the time, William Prosser believed the California Supreme Court's position on strict products liability was too radical and disruptive.[103] But Prosser was incorrect because *Greenman* "produced a rapid revolution" of products liability reform.[104] Now, *Greenman* is the cornerstone of American law for defective products.[105] As Judge Henry Friendly noted, the California Supreme Court influenced the nation's products liability laws because it made laws which reflected modern public policy trends.[106]

2. Landowners' Duty of Due Care

In its 1968 opinion *Rowland v. Christian*, the California Supreme Court eliminated the archaic landowner rules in favor of a general duty of due care for all visitors to land.[107] The Court discarded the categories of trespasser, licensee, and invitee, which determined the level of due care owed by a landowner.

The Court could have justly resolved *Rowland* without making new law, but the Court used the opportunity to "discard inflexible and confusing rules" that no longer reflected modern public policy.[108] The Court explained that modern public policy considerations dictated that the rule should change. "Public policy changed from concern for the rights of the individual landowner to a greater concern for public safety."[109]

Rowland rippled through the American legal system because "innumerable judicial descendants adopted *Rowland*."[110] *Rowland*'s impact is

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102 This is a prime example of Traynor's "creative judicial elaboration." *See* Traynor, *supra* note 23 at 52.

103 Ursin, *supra* note 5, at 1304.

104 Wade, *supra* note 98, at 459.

105 Wade, *supra* note 98, at 459.

106 Friendly, *supra* note 76, at 27 n.26 (noting the California Supreme Court, *i.e.* Justice Traynor, "sounded the bell" for products liability reform by using public policy).

107 Rowland v. Christian, 69 Cal. 2d 108, 120 (1968) (creating a unitary standard for landowners' duty of due care).

108 Gary T. Shara, Comment, *California Applies Negligence Principles in Determining Liability of a Land Occupier*, 9 Santa Clara Lawyer 179, 188 (1969).

109 Douglas Bergere, *Negligence — Duty of Due Care-Invitee/Licensee/Trespasser Distinction Abolished — Rowland v. Christian*, 10 Wm. & Mary L. Rev. 495, 497 (1968).

110 Juarez v. Boy Scouts of America, Inc., 81 Cal. App. 4th 377, 401 (2000) ("Since its publication in 1968, the seminal case of *Rowland v. Christian*, has stood as the gold

evident because it started a national trend towards the adoption of a unitary standard.[111] Also, modern California courts treat *Rowland* as the "gold standard" for determining the existence of a legal duty of care.[112]

Moreover, the Restatement (Third) of Torts adopted the *Rowland* standard.[113] The Restatement's adoption of *Rowland* is significant because the purpose of the Restatement is to inform judges and lawyers about general principles of the common law. The Restatement implicitly proposes that courts should adopt *Rowland*'s substantive holding: landowners owe a general duty of due care for all visitors to land.[114] But more controversially, by adopting *Rowland*, the Restatement implicitly approves of active judicial lawmaking. This implicit approval by the American Law Institute further demonstrates that the California Supreme Court's judicial lawmaking model is influential, reasonable, and widely accepted.

3. Comparative Negligence

In *Li v. Yellow Cab*, the California Supreme Court adopted comparative negligence and rejected contributory negligence.[115] Again in 1975, the Court used its lawmaking power to promote modern public policy. The

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standard against which the imposition of common law tort liability in California is weighed by the courts in this state. Since *Rowland* was decided, its innumerable judicial descendants have adopted the *Rowland* court's multi-factor duty assessment in determining whether a particular defendant owed a tort duty to a given plaintiff. These factors include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability.").

111 Michael D. Green, *Introduction: The Third Restatement of Torts in a Crystal Ball*, 37 Wm. Mitchell L. Rev. 993, 1002 n.30 (2011); *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 51 cmt. reporters' note (stating that, of forty-eight states that can be classified, twenty-four had adopted a unitary duty for invitees and licensees).

112 *Juarez*, 81 Cal. App. 4th at 401.

113 Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 51 (2012).

114 *Id*.

115 *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 805 (1975).

Court concluded "logic, practical experience, and fundamental justice" justified a doctrinal shift.[116]

The Court specifically noted that juries often did not follow the contributory negligence doctrine. "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and the compromise in the jury room results in some diminution of damages because of the plaintiff's fault."[117] Therefore, the doctrinal shift to comparative negligence aligned the law with what the people practiced and wanted, *i.e.* public policy.

However, many debated this doctrinal shift. The most compelling argument against judicial adoption of comparative negligence is that the change should be left to the Legislature.[118] Before *Li*, the California Civil Code contained a statute that arguably codified the contributory negligence defense.[119] Some argued that the code restricted the Court from eliminating contributory negligence.[120]

However, the Court dispensed with the myth that they could not adopt comparative negligence. The Court explained that the judiciary created the contributory negligence defense, so courts have the power to change it.[121] The Court also determined that the Legislature did not intend to preclude judicial action to remove contributory negligence.[122] The Court relied on outside studies[123] and the code itself[124] to justify its action. Further, the

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116 *Id.*

117 *Id.* at 811.

118 Victor E Schwartz, *Judicial Adoption of Comparative Negligence — The Supreme Court of California Takes A Historic Stand,* 51 IND. L.J. 281 (1976); *Li*, 13 Cal.3d at 813.

119 *Li*, 13 Cal.3d at 816 (explaining that Section 1714 of the Civil Code does not preclude the Court from removing contributory negligence because the Legislature did not intend to exclude judicial action).

120 Izhak Englard, *Li v. Yellow Cab. Co. — A Belated and Inglorious Centennial of the California Civil Code,* 65 CAL. L. REV. 4, 7 (1977) ("Two conflicting interpretations of the pertinent language of section 1714 were advanced. The first argued that section 1714 had codified the doctrine of contributory negligence, thus rendering the 'all-or-nothing' rule invulnerable to attack in the courts except on constitutional grounds.").

121 *Li*, 13 Cal.3d at 813.

122 *Id.* at 816.

123 *Id.* at 814–15.

124 England, *supra* note 120, at 7 ("[The Court] interpreted the language of section 1714 as establishing in specific terms a rule of comparative negligence. The use of the compound conjunction 'except so far as' indicated a legislative intent to adopt a system

California Supreme Court demonstrated to other state courts that they could also judicially adopt comparative negligence.

Li is significant because it gave other courts persuasive precedent to change the law. The Illinois Supreme Court demonstrated a comedic reversal when they struggled with the adoption of comparative negligence. In 1968 the Illinois Supreme Court refused to adopt comparative negligence in *Maki v. Frelk* because "such a far-reaching change should be made by the legislature rather than by the court."[125] Thirteen years later, in *Alvis v. Ribar,* the Illinois Supreme Court reversed its position and adopted comparative negligence.[126] The *Alvis* Court cited *Li* along with several other cases to justify that judicial action is appropriate because the courts created the contributory negligence doctrine,[127] and the legislature did not act.[128]

C. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TO UPDATE CONSTITUTIONAL DOCTRINES

In constitutional law, the California Supreme Court fortified equality as a fundamental right for Californians, influenced the United States Supreme Court, and laid the foundation for protecting gay marriage. Although the Court generally defers to the Legislature on constitutional issues,[129] the Court uses its lawmaking power to modernize constitutional doctrines when they directly conflict with contemporary public policies.

In 1948, Traynor authored the *Perez v. Sharp* opinion, which struck down a ban on interracial marriage.[130] *Perez* was significant because it was the first case of the twentieth century to invalidate an anti-miscegenation law.[131] The Court anticipated the imminent civil rights movement when it emphasized that a civilization based on equality is repulsed by

other than one where contributory fault on the part of the plaintiff would operate to bar recovery.").

125 Maki v. Frelk, 40 Ill.2d 193, 196 (1968).

126 Alvis v. Ribar, 85 Ill.2d 1, 28 (1981).

127 *Alvis*, 85 Ill. 2d at 21.

128 *Id*. at 22; *Maki*, 40, Ill.2d at 203.

129 Ursin, *supra* note 5, at 1314.

130 Perez v. Sharp, 32 Cal.2d 711 (1948).

131 Randall Kennedy, Interracial Intimacies 259–66 (2003).

racism.[132] To justify the holding, the Court cited several social science studies[133] and policy reasons,[134] which emphasized the illogical foundation of racism.[135] Specifically, during oral argument, Traynor directly attacked the 'white superiority doctrine' when he said, "Anthropologists say there is no such thing as race."[136]

Nineteen years after *Perez*, the United States Supreme Court followed the California Supreme Court's lead and banned anti-miscegenation laws for the nation in *Loving v. Virginia*.[137] However, Chief Justice Warren's approach was very different than Traynor's.[138] Warren "devoted very little attention to social scientific evidence; instead he focused on normative matters of racial equality and personal choice."[139] However, "the similarities in the way Warren and Traynor discuss race and marriage are especially noteworthy and should not be overlooked."[140] Both decisions reveal "a commitment to racial equality and a commitment to marital autonomy."[141] Also, Traynor[142] and Warren both relied on the Due Process Clause and Equal Protection Clause to invalidate the ban on interracial marriages.[143] Thus, the opinions differ on the surface, but both are based on the same public policy of social equality.

"*Perez* highlights the Court's early efforts to grapple with notions of colorblindness, which are now enshrined in equal protection law."[144] Although many Californians did not approve of interracial marriage

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132 *Perez*, 32 Cal.2d at 715 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

133 *Id*. at 756–60.

134 *Id*. at 737–38.

135 R.A. Lenhardt, The Story of *Perez v. Sharp*: Forgotten Lessons on Race, Law, and Marriage 366 (2011).

136 Transcript of Oral Argument at 3–4, *Perez,* 198 P.2d 17 (No. L.A. 20305).

137 Lenhardt, *supra* note 135, at 365–366. *See also* Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967).

138 Lenhardt, *supra* note 135, at 366.

139 *Id*.

140 *Id*.

141 *Id*.

142 *Perez*, 32 Cal.2d. at 714.

143 *Loving*, 388 U.S. at 2.

144 Lenhardt, *supra* note 140, at 345.

in 1948,[145] the Court correctly identified the emerging social equality trend in public policy[146] because "today, *Perez* is recognized as clearly correct."[147]

Further, *Perez* created the foundation that allowed the Court to protect gay rights six decades later. In *Perez*, Traynor expressed that the right to choose one's partner is fundamental and vital to the Constitution. In 2008, the Court used Traynor's words to constitutionally protect gay rights in *In Re Marriage*.[148]

The *In Re Marriage* cases demonstrated a more recent example of the Court aligning the law with emerging public policy trends in constitutional law. Historically, Americans ostracized the gay culture. However, by the early 1990s Americans started to shift their attitudes.[149] By 2006, fifty-five percent of Americans accepted gay culture,[150] and by 2008, a majority of Californians accepted gay marriage.[151] Once the "acceptance" was apparent, the California Supreme Court aligned the law with this emerging public policy trend. In 2008, the Court held that forming a family relationship is a fundamental constitutional right for *all* Californians.[152]

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145 R. A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Anti-miscegenation Law, and the Fight for Same-Sex Marriage*, 96 Cal. L. Rev. 839, 848 (2008).

146 After *Perez*, Traynor noted, "It is now widely, if not universally, accepted that there is no rational basis in any law for race discrimination." Traynor, *supra* note 51, at 237.

147 Plaintiff-Appellants' Brief at 48, Hernandez v. Robles, No. 103434/04, 7 N.Y. 3d 338 (N.Y. 2006).

148 *In re* Marriage Cases, 43 Cal.4th 757, 781 (2008).

149 Marilyn Elias, *Gay teens coming out earlier to peers and family*, USA Today (Feb. 2, 2007), http://usatoday30.usatoday.com/news/nation/2007-02-07-gay-teens-cover_x.htm (explaining graphically by region that Americans' perception of gay culture shifted and that now a majority of Americans support gay culture).

150 *Id*.

151 John Wildermuth, *The California Majority Supports Gay Marriage*, SFGate (May 28, 2008), http://www.sfgate.com/news/article/CALIFORNIA-MAJORITY-BACKS-GAY-MARRIAGE-3211777.php (explaining Californians' public opinion of gay marriage shifted in a dramatic fashion, and now a majority of Californians openly support gay marriage, according to a Field Poll).

152 *In re* Marriage Cases, 43 Cal.4th at 782 (2008) ("The substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.").

Proposition 8 was the conservative reaction to the shift in public policy toward acceptance of gay marriage.[153] In a highly contested election, California voters narrowly passed Proposition 8, a constitutional amendment aimed at stopping gay marriage.[154] In its 2009 opinion *Strauss v. Horton*, the Court deferred to the electorate and upheld Proposition 8.[155] However, the Court narrowly construed the amendment to a hollow definition of the term "marriage," and the Court upheld the basic civil right to form a family relationship.[156]

In *Strauss v. Horton,* the Court continued its tradition of upholding voter-approved constitutional amendments. But the Court did not give conservatives the ultimate victory when it upheld Proposition 8 because the Court narrowly construed the definition of "marriage." Essentially, the Court only facially changed the law because it upheld substantive gay rights, so the Court gave the ultimate victory to Proposition 8 opponents. Thus, the Court followed its precedent and the policy of social equality when it upheld Proposition 8. The Court used a flurry of litigation around gay marriage to align the law with the policy of social equality.

Although California was not the first state to legalize gay marriage, the Court leveraged California's influence to further gay rights. Now, the dominos are falling.[157] Traditionally conservative courts in Iowa and Utah now expressly recognize gay rights. In *Kitchen v. Herbert*, the federal district court in Utah recounted the history of same-sex marriage by citing California's same-sex marriage litigation history.[158] This in-depth reference

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153 *See* Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1064 (2009).

154 Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1, 18–20 (1978) ("Supporters of minority rights must be concerned with the initiative process because that process often serves those opposed to reform. Tumultuous media campaigns are not conducive to careful thinking and voting.").

155 *See* Strauss v. Horton, 46 Cal.4th 364 (2009).

156 *Id*. at 388 (emphasizing "only among the various constitutional protections recognized in the *Marriage Cases* as available to same-sex couples, it is only the designation of marriage that has been removed by this initiative measure").

157 Richard Wolf, *Same-Sex Marriage On Winning Streak Toward High Court*, USA Today, (Feb. 15, 2014), http://www.usatoday.com/story/news/nation/2014/02/14/supreme-court-gay-lesbian-marriage-virginia/5485119/.

158 *See* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1198 (D. Utah 2013).

demonstrated that the California Supreme Court influenced the decision to strike down a ban on same-sex marriage. In *Varnum v. Brien,* the Iowa Supreme Court cited *In Re Marriage* multiple times to demonstrate that other courts legalized gay marriage because public policy has shifted.[159]

V. COUNTERS TO CRITICS OF THE CALIFORNIA SUPREME COURT'S JUDICIAL LAWMAKING MODEL

Historically, critics of judicial lawmaking cite accountability, reliability, and competence as the main reasons courts should not tread on the legislature's territory.[160] However, these arguments hold less weight with the California Supreme Court. The accountability factor weighs less because California's justices are held accountable through the appointment process and retention elections. The reliance critique weighs less because the Court creatively includes the "reliability" factor into its opinions' application. The competence factor weighs less because the justices study independently, consider *amici* and Brandeis briefs, and use extrinsic sources supplied by vigorous advocates.

A. CALIFORNIA SUPREME COURT JUSTICES ARE ACCOUNTABLE TO THE PEOPLE, SO THE COURT CAN LEGISLATE WITHOUT VIOLATING DEMOCRATIC PRINCIPLES

The premise behind democracy is that public decisions should reflect the will of the people.[161] Therefore, government officials making decisions need to be accountable to the people. California uses a merit-based appointment process and retention election system to ensure that the justices are held accountable because they make laws that impact Californians' everyday lives.

In California, Supreme Court justices must be an attorney or judge for ten years prior to their appointment.[162] First, the governor nominates the

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159 *See* Varnum v. Brien, 763 N.W.2d 862, 882–94 (Iowa 2009).

160 Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

161 Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, AM. ECON. REV., Sep. 2004, at 1.

162 Cal. Const. art. VI, § 8.

justices, and then they must be confirmed by the Commission on Judicial Appointments, which consists of the chief justice, the attorney general, and a presiding justice of the courts of appeal.[163] After appointment, the justice is subjected to a retention vote in the first general election and every twelve years thereafter.[164] The California judicial selection and retention election system is known as the "California Plan."[165]

The California Plan is a merit-based judicial selection and retention system.[166] Generally, merit plans reduce political influence, thus resulting in better justices.[167] Undoubtedly, political pressures affect the judicial selection process in some way because of recent political polarization.[168] However, a justice must impress the governor and the selection committee to reach the bench, so a justice is unlikely to embody a polarized viewpoint. Further, the people hold a revolving veto power over a sitting justice, so the justice is unlikely to develop a polarized viewpoint. Additionally, the retention rate for California justices is very high,[169] so justices are unlikely to be swept away by polarized political waves in the electorate.

A counter to judicial accountability (*i.e.* judicial retention elections) is that it strips judges of some of their independence. However, Supreme

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163 *Id.*

164 Cal. Const. art. VI, § 16.

165 Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 Fla. St. U. L. Rev. 1, 30 (1995).

166 *Id.* at 31.

167 *Id.*

168 Polarized political parties no longer represent the moderate American electorate. Wealth disparity, immigration, and other forces in modern American politics cause extreme party polarization:

> In the choreography of American politics inequality feeds directly into political polarization, and polarization in turn creates policies that increase inequality. Some direct causes of polarization can be ruled out rather quickly. The consequences of "one person, one vote" decisions and redistricting can be ruled out because the Senate and the House are polarized. The shift to a Republican South can be ruled out because the North is also polarized. Primary elections can be ruled out because polarization actually decreased after primaries became widespread.
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> Nolan McCarty et al., Polarized America 1 (2d ed. 2006).

169 Gerald Uelman, *California Judicial Retention Elections*, 28 Santa Clara L. Rev. 333, 335 (1988) (explaining that only fourteen California Supreme Court justices have been removed from office since 1855).

Court Justice Sandra Day O'Connor, a vocal critic of judicial elections,[170] concedes that judicial accountability advances the rule of law and furthers judicial integrity.[171]

Times have changed since Hamilton penned *Federalist Paper No. 78*, when the judiciary was the weakest branch of government.[172] Indeed, the Founding Fathers implemented judicial independence in the federal model to insulate the judiciary, but the people want judicial accountability because courts do make law, not just "call balls and strikes." This is evident because a supermajority of states implemented judicial elections. Currently, thirty-eight states have some type of judicial election for the state's high court.[173]

Another counter to judicial accountability is that it invites politics into judicial decision-making. Justice O'Connor said, "Judicial elections powered by money and special interests create the impression, rightly or wrongly, that judges are accountable to money and special interests, not the law."[174] However, money that supports political agendas is constitutionally protected,[175] so these influences are inevitable. But Californians hold a veto over Supreme Court justices, like they do with legislators, so people can remove a justice.

Additionally, California Supreme Court justices do not need to constantly campaign because they have twelve-year terms. Essentially, the justices do not need to start campaigning on their first day in office, like

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170 Annemarie Mannion, *Retired Justice Warns Against Politicians In Robes,* Chicago Tribune, (May 30, 2013), http://articles.chicagotribune.com/2013-05-30/news/chi-retired-justice-warns-against-politicians-in-robes-20130530_1_o-connor-bias-judges (explaining that Justice Sandra Day O'Connor has been a vocal critic of judicial elections).

171 Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 Denv. U. L. Rev. 1, 4 (2008).

172 Alexander Hamilton, *The Federalist No. 78*, (Clinton Rossiter ed., 1961) (examining the role of the judiciary as a limited functioning branch of government).

173 American Bar Association, Fact Sheet On Judicial Selection Methods In States, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited May 16, 2014).

174 Bill Rankin, *Ex-justice Says Contested Elections Threaten Fair Judiciary*, The Atlanta Journal–Constitution, (Aug. 12, 2013), http://www.ajc.com/news/news/local/ex-justice-says-contested-elections-threaten-fair-/nZMSC/.

175 *See* Citizens United v. FEC, 558 U.S. 310, 339 (2010) (announcing that financial speech deserves the highest constitutional protections).

most legislators do.[176] The long terms allow the justices to be independent because they can exercise wide discretion during their decade-long tenure. Therefore, time, instead of campaign commercials, vindicates or condemns the justices' policies and judgments.

1. Californians Hold the California Supreme Court Justices Accountable When a Justice's Policies Directly Conflict with Californians' Public Policy

In the 1986 general election, Californians sent a message to the justices that the Court must reflect public policy. Californians looked at the justices' "subjective value judgments"[177] (*i.e.* policies), when they decided to oust Chief Justice Bird and others because they were "soft on crime."[178] Californians rejected Bird mainly because she reversed every one of the death penalty cases that came across her desk.[179] Californians handily removed Bird with a 66 percent "no" vote.[180] Thus, the justices understand their decisions need to be socially acceptable to Californians; otherwise they may be removed from office.

B. THE CALIFORNIA SUPREME COURT FACTORS RELIANCE INTO ITS OPINIONS

A major critique of active judicial lawmaking is a lack of stability in the law, *i.e.* reliance. The critics argue that people cannot rely on precedent because the Court may change the law at any moment. To reduce reliance issues, the California Supreme Court factors reliance into its opinions and creatively chooses the fairest course for the parties and society.

Essentially, reliance is a double-edged sword. Traynor noted that a dilemma arises when people substantially relied on precedent the Court now finds

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176 Legislators are constantly campaigning, instead of focusing on legislative matters because they must start campaigning on their first day in office so they can be re-elected. *See* Ryan Grim, *Call Time For Congress Shows How Fundraising Dominates Bleak Work Life*, Huffington Post, (Jan. 8, 2013), http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html.

177 Michael Dann & Randall Hansen, *Judicial Retention Elections*, 34 Loy. L.A. L. Rev. 1429, 1433 (2001).

178 *Id*. at 1432.

179 *Id*.

180 *Id*.

unsound.[181] The Court may retroactively apply the new law.[182] This causes hardship on the party who relied, but a substantial benefit to the other who benefits from the new law.[183] Or, the Court may apply the old law, and prospectively apply the new law.[184] This protects the party who relied, but hurts the other because he is subjected to an unsound law.[185] Traynor said the Court should balance "whether or not the hardship of defeating reliance of one party will outweigh the hardship of subjecting the other to a precedent unfit to survive."[186] "Barring exceptional situations, where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, a court should be free to overrule such a precedent."[187]

To dull the double-edged sword of reliance, Traynor advocated that the Court should "retreat or advance the law with minimum shock to its evolutionary course and with a minimum shock to those who relied upon judicial decisions."[188] In other words, the Court should "interweave the new with the old to make a seamless whole."[189]

To confront large doctrinal shifts (*i.e.* when reliance is a major issue), the California Supreme Court weighs competing reliance interests and creatively chooses the fairest course for society and the litigants. In *Li*, for example, the California Supreme Court held that the doctrinal shift to comparative negligence is "given a limited retrospective application."[190] The Court applied comparative negligence to all future cases and retrials, but the Court did not apply comparative negligence to cases already in trial.[191] After balancing the litigants' reliance interests, the Court concluded, "This is a case where the litigant before the court should be given the benefit of the new rule."[192]

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181 Traynor, *supra* note 35, at 167.

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.* at 168.

187 Traynor, *supra* note 23, at 66.

188 Poulos, *supra* note 20, at 1705.

189 *Id.*

190 *Li*, 13 Cal.3d at 808.

191 *Id.* at 829 (explaining the retroactive and prospective application of the new contributory negligence doctrine).

192 *Id.*

C. THE CALIFORNIA SUPREME COURT IS A COMPETENT LAWMAKING INSTITUTION

Unlike the legislature, "justices may not commission scientific studies, convene groups of experts, or issue notice-and-comment procedures."[193] However, this "legislative subpoena power" is unnecessary for the California Supreme Court to obtain adequate information to correctly adjudicate cases before it. Traynor noted, "Only a small fraction of cases are of a complexity that calls for inquiry beyond the facts and available precedents."[194] However, when justices need more information, they study independently, solicit Brandeis and *amicus* briefs, and use information supplied by the vigorous advocates. Thus, like the Legislature, the Court is competent when it makes new laws.

When justices need more information, they study outside materials to supplement their decision.[195] Today, the Internet gives justices infinite information at their fingertips. If the justices need "legislative facts," then the justices can quickly research existing studies, assess competing interests, and examine legislative records: all with a click of the mouse. Or even easier, the justices can order their clerks to comb the Internet for the required information.

Also, interested parties can file Brandeis and *amicus* briefs with the Court to support their positions. Thus, the Court is aware of scientific and outside perspectives on the issues. Brandeis briefs bring to the Court a compilation of scientific information and social science. *Amicus* briefs allow interested parties to make their position known. Also, the *amicus* brief acts as a notice-and-comment procedure because interested parties are put on notice when the case is on appeal, and then the interested parties can comment on the case through the *amicus* brief. Traynor argued that Brandeis and *amicus* briefs should be used more often.[196] Since his time, the use of these briefs skyrocketed in the California Supreme Court and others.[197]

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193 Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2540 (2010).

194 Traynor, *supra* note 43, at 627.

195 Dear, *supra* note 1, at 705 (explaining that the California Supreme Court's culture from the 1940s until today supports independent study, which is apparent in the opinions).

196 Traynor, *supra* note 43, at 627.

197 *The Rise of Amicus Briefs*, Appellate Practice Committee Newsletter (International Association of Defense Counsel) March 2010.

Further, vigorous advocates bring case-specific experts, studies, and knowledge to the Court. Essentially, these advocates come to trial prepared to educate the Court on the issues at hand. Recently, advocates use experts and studies more often in litigation,[198] so the Court is supplied with ample information from the parties. The Court can consider the experts' opinions and contrast them with independent research.

The argument against courts' using every available resource is that judges will be overwhelmed with conflicting information to consider. However, Traynor articulated the counter to this. He explained that judges can "detect latent quackery in science or medicine, edit the swarm spore of the social scientists, and add grains of salt to the fortune-telling statistics of the economists."[199]

VI. CONCLUSION

The California Supreme Court is the most followed state court because it embraces its lawmaking powers and uses public policy in its decision-making process. Great courts, like great judges, are known for their active role in lawmaking, not for idle adherence to precedent.[200] The California Supreme Court is a "great court" because its significant influence proves its lawmaking model is successful. The data indicates the California Supreme Court will continue to influence other courts for the foreseeable future,[201] so the Court's lawmaking model will continue to gain traction. Therefore, other courts should consider embracing a similar model to facilitate the evolution of the law to continually align with public policy.

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198 Faust F. Rossi, *Modern Evidence and the Expert Witness*, 12 Litig. 18 (1985) (asserting that inflation in the use of experts is the result of (1) the growth of complex litigation, (2) the explosion of technology and science, (3) the increasing creativity of advocates, and (4) liberality of the rules of evidence).

199 Traynor, *supra* note 43, at 627.

200 *See generally* Ursin, *supra* note 5.

201 Dear, *supra* note 1, at 702–03.