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175 Years of the California Supreme Court

The story of the California Supreme Court begins even before California becomes a state. Gold had just been discovered at Sutter’s Mill in late January 1848. And a mere nine days later, the Treaty of Guadalupe Hidalgo, ceding California to the United States, was signed. In the following seventeen months, there was an influx of new residents into the state, such that the population skyrocketed from a mere 10,000 in the summer of 1846 to 50,000 by August 1849.¹ Despite the significantly increased population, the only civilian government was the rudimentary *alcalde* system left over from the Mexican years. With assemblies in San Jose, San Francisco, Sacramento, Monterey, and Sonoma demanding a territorial government, the military governor, General Bennet C. Riley, called a statewide election for August 1, 1848 to select delegates to a constitutional convention.² That convention convened in Monterey on September 3, 1848, and six weeks later, a constitution that established a high court was ready for the people’s approval.³

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¹ Hunt, *The Genesis of California’s First Constitution, 1846–1849* (1895), p. 30.

² *Id.* at pp. 26–27.

³ At one point, a delegate proposed excluding “clergymen, priest[s], or teacher[s] of any religious persuasion, society or sect” from the Legislature. Future Chief Justice Hastings responded by proposing that “lawyers, physicians, or merchants” be added to the list of banned professions. *Id.* at p. 50.

Specifically, the Constitution assigned the state’s judicial power to a Supreme Court consisting of a Chief Justice and two associate justices appointed by the Legislature. Below the Supreme Court were the district courts, county courts, and justices of the peace. The Supreme Court had appellate jurisdiction in all cases where the amount in controversy exceeded \$200 (about \$8,251 today). The Court could also hear cases involving the legality of any tax, toll, impost, or fine as well as felony criminal cases.⁴ The Legislature elected Serranus C. Hastings, a former Chief Justice of the Iowa Supreme Court, as the first Chief Justice of California by a vote of 44 to 2. Henry A. Lyons and Nathaniel Bennett completed the composition of the first Court.⁵

As the Court got organized in San Francisco, its new clerk, Mr. Thorpe, faced the initial step that any organization faces: procuring office supplies. His first order consisted of “1 large Journal full bound,” “4 bottles red ink,” “1 bottle black ink,” “3 gross Gillett’s pens,” “1 parallel ruler,” “6 gold pens,” “12 sheets blotting paper,” “1 dozen pencils,” “24 sticks red tape,” “6 stamps,” “6 reams fine blue linen cap” paper, and “2 hydrostatic inkstands.”⁶

THE COURT’S EARLY YEARS

Ironically, three of the Court’s earliest cases involved the man who would ultimately become the only person in history (so far) to serve as both Chief Justice of California and as a Justice of the United States Supreme Court: Stephen J. Field. In the first matter, *People v. Field* (1850) 1 Cal. 152, the future Justice Field sought a writ of mandamus to overturn a finding of contempt against him entered by a district judge in Yuba County. The Court concluded that mandamus would be improper but directed that the trial record be sent up on a writ of certiorari, since the Court was unable to determine what Field had done.

In *Ex Parte Field* (1850) 1 Cal. 187—the second case involving Field—although the Court received a response to its writ, it was still unable to determine what had happened and accordingly reversed the contempt finding and dismissed the matter.

The third case, *People ex rel. Field v. Turner* (1850) 1 Cal. 188, was brought by Field himself, seeking a contempt finding against the judge who had entered the contempt order against him, arguing that the judge had been directed to vacate his order disbaring Field, but had failed to do so. The Court denied the motion, finding that the judge had “in substance” obeyed.

⁴ The text of the 1849 Constitution is available here: http://www.dircost.unito.it/cs/pdf/18490000_UsaCalifornia_eng.pdf

⁵ Johnson, *History of the Supreme Court Justices of California* (1963) vol. 1, pp. 20, 32.

⁶ Dear and Levin, *Historic Sites of the California Supreme Court* (1998–1999) 4 Cal. Sup. C. Hist. Soc’y Yearbook, pp. 63, 64.

In its first several years, the Court was also plagued by frequent fires—a phenomenon all too familiar to Californians today. In *Elliott v. Osborne* (1851) 1 Cal. 396, the Court commented that “The papers in this cause were destroyed by the late fire, and we must rely upon our recollection of the facts, as presented on the argument.”

In *Weber v. City of San Francisco* (1851) 1 Cal. 455, Chief Justice Hastings added the following unique note to the majority opinion: “The record having been destroyed in the late fires, I have prepared no opinion in this case and cannot now concur or dissent.”

In 1854, the state Legislature declared Sacramento to be the state capital and directed the Supreme Court to hold its sessions there.⁷ But the Supreme Court declared, by a vote of 2 to 1 on March 24, that San Jose be the state capital, and one week later, the Court moved to San Jose in a “handsome Express wagon of Messrs. Adams & Co.”⁸

Now comfortable in its newly declared capital, the Court handed down one of its more surprising early opinions, *Johnson v. Gordon* (1854) 4 Cal. 368, on October 1, 1854. *Johnson* entailed a request for the transfer of a case to the federal courts on the ground that the defendant was an alien. Today, of course, removal merely requires a single-party notice. But in an opinion by Solomon Heydenfeldt, our state high court held that the Judiciary Act of 1789, which authorized removal in such cases, was unconstitutional! And so began our state court’s independent attitude.

Meanwhile, the dispute with the Legislature over the location of the State’s capital remained. *People ex rel. Vermule v. Bigler* (1855) 5 Cal. 23 resolved the issue in 1855. Justice Alexander Wells, a San Jose resident who had been part of the 2 to 1 majority in the case the previous year, had been replaced by Justice Charles H. Bryan, and Bryan voted with Chief Justice Hugh Murray to rule that the state capital was Sacramento.

THE EARLY JUSTICES

The justices of the California Supreme Court in the 1850s were a colorful group, to put it mildly. For instance, in 1853, Hugh C. Murray, who had become Chief Justice of California at the age of twenty-six, chased future Senator John Conness around a San Francisco barroom with a bowie knife. Three years later, he assaulted a Sacramento abolitionist with a heavy bludgeon.⁹

⁷ *Id.* at p. 67, citing Stats. 1854, ch. 9, § 1, p. 21.

⁸ Dear and Levin, *supra*, at p. 68.

⁹ Grodin, *California’s Supreme Court and Constitution: The Early Years* (2003) 29 San Francisco Attorney, pp. 141, 144.

Another justice, David S. Terry, had established a reputation for violence by the time he took his seat as an associate justice in 1855. He openly admitted that it was “my custom” to carry a bowie knife in his breast pocket, and he may even have stabbed a defendant in the courtroom in a case where he represented the plaintiff.¹⁰

In 1856, a wave of violence and vigilantism swept through San Francisco, and during a street riot, Terry—who was in town to try to negotiate a resolution between the vigilantes and the city government—stabbed Sterling Hopkins of the Vigilance Committee. Terry was imprisoned for two months at Fort Gunnybags, the Vigilance Committee’s headquarters across Sacramento Street from what is now Two Embarcadero Center. He was ultimately “convicted” by the vigilantes of assault without intent to kill and released from captivity with orders to resign from the Court. Defiant, he resumed his seat, rising to the position of Chief Justice the following year upon the death of Chief Justice Murray.¹¹

Three years later, during a bitter political campaign, California Senator David Broderick read an account of a speech by Chief Justice Terry denouncing the senator in strong language. Broderick commented that Terry was “just as bad” as the other members of the Court, and Terry responded by challenging Broderick to a duel. During the duel, Terry shot Broderick in the chest, and the senator died two days later.¹² However, reflecting some sense of decorum, Terry had resigned from the Supreme Court just before the duel and was succeeded by Justice Stephen Field.

GROWING PAINS: THE EARLY COURT’S CONFOUNDING DECISION INVOLVING SLAVERY

The growing pains of the early Court arose in a case regarding the California Constitution’s prohibition against slavery at a time that the Fugitive Slave Act was federal law. In January 1858, Charles Stovall, a Mississippian who had resided in California for several months, applied to Judge Robert Robinson of the Sacramento County Superior Court for a writ of habeas corpus, arguing that a Mr. Archy Lee was a fugitive slave subject to federal rather than state jurisdiction.¹³ During the hearing on Stovall’s petition, Mr. Lee was asked whether he wanted the writ to be issued. And Mr. Lee, presumably aware that African Americans were forbidden at the time from speaking in any way against whites in court, said nothing.¹⁴ Judge Robinson transferred the matter

¹⁰ Johnson, *supra*, at p. 53.

¹¹ *Id.* at pp. 54–55; Rahm, *Justice David S. Terry and Federalism* (2020) 15 Cal. Legal Hist., pp. 9, 18, 21–27.

¹² Rahm, *supra*, at pp. 27–28; *Burlington Times*, Oct 11, 1859, p. 2.

¹³ McGinty, *Archy Lee’s Struggle for Freedom* (2020) at p. 37.

¹⁴ *Id.* at p. 39.

to George Pen Johnston, the U.S. Commissioner authorized to issue writs pursuant to the Fugitive Slave Act.¹⁵ Troubled by the case, however, Johnston adjourned to give himself time to consult with Federal District Judge Matthew Hall McAllister. After Johnston and McAllister had consulted for four days, Johnston dismissed the case on January 15, ruling that since Stovall admitted that he had peaceably brought Mr. Lee into the state in his wagon train, as opposed to Lee having “escaped” into the state, the Fugitive Slave Act did not apply, and he had no jurisdiction.

Accordingly, the case was returned to Judge Robinson, who ruled that Mr. Lee was not a fugitive, and that comity did not require enforcing Mississippi law, particularly given the California Constitution’s ban on “tolerating” slavery.¹⁶ So Stovall was told he would have to look to the state courts for a remedy.¹⁷

However, after Judge Robinson dismissed the case, a state justice of the peace authorized the arrest of Mr. Lee on the petition of Stovall’s allies, and Chief Justice Terry of the California Supreme Court authorized a writ of habeas corpus. The hearing was scheduled to begin on February 6, 1858.¹⁸ And later that day, the *Daily California Express* predicted that the “opinion will doubtless be that [Mr. Lee] is made free by his sojourn in California.”¹⁹

The California Supreme Court announced its decision five days later.²⁰ The Court began by deciding that where a citizen from another state took up residence in California for an extended period, his or her rights as a slave were lost due to California’s ban on slavery. Given that Stovall had not merely passed through California, but had resided there for months teaching school, any rights Stovall claimed to Mr. Lee had been lost. However, at the end of the decision, the Court decided that notwithstanding that holding, the Court would hand Mr. Lee over to Mr. Stovall. The majority opinion offered no rationale for this inconsistent result, aside from a vague reference to “circumstances.”

Press reaction to the Court’s decision was, for the most part, deservedly extraordinarily harsh. The *Enterprise-Record* wrote, “We denounce this decision as a disgusting display of expediency, in direct violation of law and facts.”²¹ The *Nevada Democrat* wrote, “We had always supposed it to be the duty of Judges to decide according to the law, without reference to the effect such

¹⁵ It is not entirely clear from the surviving evidence that Archy Lee was legally Stovall’s slave when he accompanied Stovall to California. *Id.* at p. 12.

¹⁶ *Id.* at pp. 43, 46.

¹⁷ *California Daily Alta*, vol. 10, n. 13, Jan. 14, 1858; *Enterprise-Record* (Chico, CA), Jan. 15, 1858, p. 2.

¹⁸ McGinty *supra*, at pp. 52, 54.

¹⁹ *Daily California Express* (Marysville, CA), Feb. 8, 1858, p. 2.

²⁰ McGinty *supra*, at p. 54.

²¹ *Enterprise-Record* (Chico, CA), Feb. 15, 1858, p. 2.

decision may have in individual cases.”²² The *San Joaquin Republican* wondered, given the Court’s decision that under California law, Mr. Lee was free, “by what authority [the Court] can remand him into a state of slavery.”²³ The *Daily Evening Express* likewise wrote that the decision was “so extraordinary as to elicit general denunciation.”²⁴ And according to the *California Daily Alta*, the decision was “generally condemned by the press as absurd and contrary to law and justice.”²⁵

In the days that followed, James Riker, a leader in the city’s African American community, enlisted the aid of two respected attorneys, Elisha O. Crosby and Walter H. Tompkins. Crosby and Tompkins prepared an affidavit that Riker signed, swearing that Mr. Lee was no one’s slave and that Stovall was attempting to spirit him out of the jurisdiction. Based upon that affidavit, San Francisco Judge Thomas Freelon issued a warrant for Stovall’s arrest on a charge of kidnapping.²⁶ As a result, considerable numbers of African American residents of San Francisco collected at the Market Street wharf, watching for any attempt to spirit Mr. Lee onto a waiting steamer. Ultimately, Stovall met the steamer in a large rowboat and tried to take Mr. Lee aboard. However, after a brief altercation, Stovall was arrested, and Mr. Lee was taken pursuant to a writ of attachment.²⁷

By the time the case came before Judge Freelon, Colonel Edward Baker, a former Congressman, had joined Mr. Lee’s defense team. After a short hearing, Judge Freelon ordered Mr. Lee’s release; however, Lee was immediately arrested on a warrant issued by U.S. Commissioner Johnston, the man who had started it all.²⁸ Before Commissioner Johnston, the case dragged on through multiple hearings and live witness testimony until on April 13, 1858, Johnston reaffirmed his previous decision that he lacked jurisdiction and ordered Lee released.²⁹

THE COURT’S EXPANSION AND THE FAIR AFFAIR

In the 1862 election, the voters approved a constitutional amendment expanding the Court to five justices and setting the justices’ terms at ten years.³⁰

²² *Nevada Democrat* (Nevada City, CA), Feb. 17, 1858, p. 2.

²³ *Sacramento Daily Union*, Feb. 16, 1858, p. 2, quoting from *San Joaquin Republican*.

²⁴ *Daily Evening Express* (Lancaster, PA), Mar. 16, 1858, p. 2.

²⁵ *California Daily Alta*, vol. 10, n. 62, Mar. 4, 1858, p. 1.

²⁶ *California Daily Alta*, vol. 10, n. 64, Mar. 6, 1858; McGinty, *supra*, at pp. 63–64.

²⁷ McGinty, *supra*, at pp. 65–67; *California Daily Alta*, vol. 10, fn. 64, Mar. 6, 1858; *Anti-Slavery Bugle*, Apr. 24, 1858, pp. 1–2.

²⁸ McGinty, *supra*, at pp. 73, 76.

²⁹ *Id.* at pp. 77–88. A detailed report of the arguments appears at *California Daily Alta*, vol. 10, n. 76, Mar. 18, 1858. See also “How a Slave Got His Freedom—A Little Bit of California History,” *San Francisco Chronicle*, Nov. 10, 1873, p. 1.

³⁰ Roth, A History of the California Supreme Court in Its First Three Decades, 1850–1879, *Calif. Legal Hist.* (2019) vol. 14, p. 305.

One possible reason for the voters' approval can be found in an observation by *Gold Hill Daily News*, which wrote: "The celebrated 'Archy decision' which made that Court the laughing stock of Christendom, would never have been rendered had there been five judges on the bench."³¹

Significantly, the Court's most heavily publicized case of the nineteenth century began shortly after that election. Alexander P. Crittenden, a well-regarded lawyer and former member of the State Legislature, began an affair in 1863 with Laura Fair, a much younger, twice-married owner of a Sacramento boarding house. For a time, Crittenden told Fair that he was a widower, but ultimately, she learned that his wife was alive and well. Crittenden repeatedly assured Fair that he was getting a divorce, but that prospect never progressed beyond the talking stage.³² In 1867, Fair abruptly married another man; however, that marriage quickly ended in divorce under circumstances apparently orchestrated by Crittenden.³³

The evidence suggested that in the first months of 1870, Fair may have had an abortion. But what is clear is that she was increasingly addicted to chloral hydrate, a sedative and hypnotic that was widely abused by nineteenth-century doctors.³⁴ In the first days of November, Fair learned that Mrs. Crittenden was returning with her children from an extended trip to the East Coast. Fair met the ferryboat *El Capitan* in its slip in Oakland, where it was about to return to San Francisco. Moments after the boat cast off, Fair stepped out of a crowd, pulled a pistol and shot Crittenden once in the chest. Crittenden died forty-eight hours later.³⁵ Coincidentally, the Governor had appointed Crittenden as the Reporter of Decisions for the Supreme Court only twenty-four hours earlier.³⁶

The drama immediately brought out the press's worst impulses. The *San Francisco Chronicle* headlined their story, "A Woman's Revenge: The Career of the Assassin—The Wicked Wiles of a Bold, Bad Woman."³⁷ The *Gold Hill Daily News* commented that "the she-devil, Mrs. Fair . . . deserved hanging long ago."³⁸ The *St. Albans Daily Messenger* was succinct: "The reporter of the California Supreme Court has been shot by a woman."³⁹

³¹ *Gold Hill Daily News* (Gold Hill, Nev.), Nov. 18, 1863, p. 2.

³² Lamott, *Who Killed Mr. Crittenden?* (1963), pp. 18–24, 27, 29, 44, 55, 59; Carole Haber, *The Trials of Laura Fair: Sex, Murder, and Insanity in the Victorian West* (2013), pp. 24, 26, 29, 109.

³³ Lamott, *supra*, pp. 70–72; Haber, *supra*, p. 38.

³⁴ Lamott, *supra*, pp. 67–68, 124–25; Haber, *supra*, pp. 87–89, 95.

³⁵ Lamott, *supra*, pp. 3, 85.

³⁶ *Id.* at p. 77.

³⁷ *San Francisco Chronicle*, Nov. 4, 1870, p. 3.

³⁸ *Gold Hill Daily News* (Gold Hill, Nev.), Nov. 4, 1870, p. 2.

³⁹ *St. Albans Daily Messenger* (St. Albans, Vt.), Nov. 7, 1870, p. 2.

Fair’s trial for capital murder began in April 1871 and was widely attended by San Francisco notables—including the founder of the California Women Suffrage Association and even the “Emperor” Norton.⁴⁰ Fair’s primary defense was temporary insanity brought on both by her medical difficulties and by Crittenden’s conduct. On April 26, after only one ballot, the jury returned a verdict of guilty.⁴¹ Following the denial of defense motions for a new trial, Fair was sentenced to become the first woman in California history to be hanged.⁴²

Fair’s appeal to the California Supreme Court turned on three issues. First, the defense presented evidence that one of the jurors seated at trial had been overheard saying beforehand that Mrs. Fair was guilty and deserved to be hanged. Second, the defense alleged that the trial court’s refusal to allow the defense the final closing statement was reversible error. Third, the defense argued that thirteen different witnesses had been allowed to testify over the defense’s objections to Mrs. Fair’s supposed reputation for unchastity.

The Supreme Court unanimously reversed the judgment. Although the incapacity of the juror had been waived by the defense’s failure to raise the matter before the verdict was returned, the Court agreed that both the order of the closing statements and the admission of testimony about Mrs. Fair’s reputation were reversible errors, necessitating a new trial.⁴³ Since Mrs. Fair’s original lead counsel died while the case was on appeal, she hired a new lead for her second trial. And unlike the first defense team, the new lead counsel flatly refused to put Mrs. Fair on the stand. She was acquitted.

THE LOCATIONS FOR ORAL ARGUMENT ARE RESOLVED

Meanwhile, for over a generation, a standoff regarding where the Court should be holding its sessions had been going on. In 1872, the Legislature determined that the Supreme Court would be required to sit in Sacramento.⁴⁴

Nevertheless, by early 1874, the Supreme Court was instead holding many of its sessions at 640 Clay Street in San Francisco. Later that year, the Legislature acquiesced, agreeing that the Court’s January and July terms could be in San Francisco.

However, in 1878, the Legislature expanded the Court’s schedule, and mandated argument sessions in Sacramento, San Francisco, and Los Angeles.⁴⁵

⁴⁰ [Emperor Norton - Wikipedia](#).

⁴¹ *San Francisco Chronicle*, Apr. 27, 1871, p. 3.

⁴² *San Francisco Chronicle*, Jun. 2, 1871, p. 2; Jun. 3, 1871, p. 2; Jun. 4, 1871, p. 3.

⁴³ *People v. Fair* (1872) 43 Cal. 137

⁴⁴ Dear and Levin, *supra*, pp. 71–72.

⁴⁵ *Id.* at p. 72.

PROGRESS TOWARD JUSTICE IN CRIMINAL TRIALS

During this period, the Court also instilled some fairness into the criminal justice system, albeit in a minor way. The *Yankton Press and Dakotan* reported on February 1, 1876 that an application for a new trial had been made to the California Supreme Court “on the ground that the jurors had liquor in their room during their deliberations.” The application was denied, with the Court observing that the practice had become “sanctified” by the custom of thirty years.⁴⁶

However, six years later, the Court decided *People v. Gray* (1882) 61 Cal. 164, reversing a second-degree murder conviction based on evidence that the jurors had drunk 17½ gallons of beer and two demijohns of wine during their deliberations, in addition to drinking wine and whiskey with their meals.

THE CONTINUING CHALLENGES IN ADDRESSING THE COURT’S HEAVY DOCKET AND ITS LOCATION

Despite the Court’s expansion to five justices, the perception continued to grow that the Court was unable to deal with its heavy workload. On March 30, 1878, the Legislature passed an act calling for a new constitutional convention. That convention convened in Sacramento on September 28, 1878, and adjourned *sine die* on March 3, 1879, with a new constitution ready for the voters’ approval.⁴⁷

The convention adopted multiple provisions to address the Court’s heavy docket.⁴⁸ First, the convention expanded the Court to seven justices—the Chief Justice and six associate justices. Second, most cases would be heard in one of two three-justice departments, although the Court would decide cases en banc when it desired. Third, all the state’s appellate courts were required to render their decisions “in writing, and the grounds of the decision shall be stated.”⁴⁹ However, adding to the workload, all decisions had to be handed down within ninety days of their submission.⁵⁰

Yet, when the convention turned its attention to the seat of the Supreme Court, the debate got interesting. The convention was nearly equally divided between camps favoring San Francisco, Los Angeles, or Sacramento. Charles

⁴⁶ *Yankton Press and Dakotan*, Feb. 1, 1876, p. 2.

⁴⁷ The debates of the Constitution are online at [1878–1879 Constitutional Convention Working Papers: California Secretary of State](#).

⁴⁸ The 1879 Constitution is reprinted at [Constitution of the State of California Adopted and Ratified in 1879](#).

⁴⁹ 1879 Constitution, art. VI, sec. 2. This provision was necessitated by the decision of Justice Field in *Houston v. Williams* (1859) 13 Cal. 24, 25, striking down an earlier statute requiring “reasons stated” for all the Court’s opinions. “The legislature,” wrote Field, “can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment.”

⁵⁰ 1879 Constitution, *supra*, art. VI, sec. 24.

Beerstecher, a delegate from San Francisco, spoke against Sacramento's candidacy: "For my part, sir, I hope to see the day when neither the Legislature nor the Court will sit in Sacramento, for it is the most unhealthy spot in the State of California. I think the river will drown out this city."

Henry Edgerton of Sacramento County shot back: "You have only to look at the gentleman himself to see a complete refutation of the charge he has made. He has gained fifty pounds this Winter."⁵¹ A few moments later, Edgerton took a shot at Los Angeles:

Now, I have no doubt Chief Justice Wallace, who is just as good a fellow as anybody else, felt as anybody else would have felt. He fell into the hospitable hands of my friend Ayers and his colleague, General Howard, and we all know what delicious wines they make down there, and what orange groves they have there, and it is no wonder anybody should get a little stuck after the city of angels.⁵²

But a moment later, Edgerton defended his home city of Sacramento and took another shot at Los Angeles:

As far as health is concerned, statistics show that this is the healthiest city on the globe, Los Angeles not excepted. There are sudden cases of mortality here as everywhere else. The people who die here generally come from Los Angeles. Their climate down there is very hot, and a man soon gets lazy who lives in it. And it would not be very long, if you have the Supreme Court down there, before you would see the Chief Justice, and my friend, General Howard, walking arm in arm under huge Panama hats, hunting a cool place. It will not do.⁵³

Volney Howard of Los Angeles County fired back at the Sacramento delegates:

Why, you cannot tell what day this town will be drowned out. The Judges will be seen some of these days coming out of the Court-room in a boat. Yet they should be obliged to stay here. I have had some little experience with this climate myself. It is the hottest place outside of—the one down below we read of.⁵⁴

Howard also had a theory about Los Angeles's appeal:

The Judges all prefer to go to Los Angeles. Whether it is because we

⁵¹ Willis and Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California (1881)* vol. 2, p. 952.

⁵² *Id.* at pp. 952–53.

⁵³ *Id.* at p. 953.

⁵⁴ *Id.*

have good wine there, I do not know, I leave that for the gentleman from Sacramento. Certain it is that we have good wine there. And it is about the only place in the State where you can get wine that is not adulterated.⁵⁵

Finally, San Francisco delegate Clitus Barbour took this potshot at Sacramento:

Sacramento is not well situated. The gentleman speaks of the advantages of Sacramento. Why, there is one disadvantage that is sufficient to condemn it, and that is the tendency to make men dissipated. I have heard that wine is a mocker and strong drink raging, but men will put it in their mouths, and I would like to know what sort of Supreme Court can exist and do business upon the water we find in Sacramento? It is enough to drive men to intoxication. And they don't even get good whisky . . . they have the most villainous whisky of any city I have ever had occasion to be in.⁵⁶

In the end, an evenly divided convention punted, opting for the status quo: sessions in San Francisco, Los Angeles, and Sacramento—an option that delegate Abraham Freeman of Sacramento County derided as “a Supreme Court on wheels.”⁵⁷

Ironically, many years later, Chief Justice Donald R. Wright commented that the convention had stumbled into the right answer by having the Court spend much of its time outside the state capital: “I think it is a great advantage,” observed Chief Justice Wright, explaining that he had become acquainted with Supreme Court justices from around the country, and “almost without exception they regretted the fact that they were located in the capital city of the state wherein the executive branch and the legislative branch of the government were located.”⁵⁸

The newly expanded California Supreme Court organized itself in San Francisco on January 5, 1880.⁵⁹ At the Court's first session a week later, Chief Justice Robert F. Morrison announced that Justices Elisha McKinstry, Samuel McKee, and Erskine M. Ross had been assigned to Department 1, and Justices James D. Thornton, Milton H. Myrick, and John R. Sharpstein would be in Department 2. Justices McKinstry and Thornton were then elected Presiding Justices of their respective departments. The Court boasted: “There will practically be two Supreme Courts for the transaction of business,

⁵⁵ *Id.*

⁵⁶ *Id.* at p. 955.

⁵⁷ *Id.*

⁵⁸ *Oral History Donald R. Wright: Chief Justice of California (1970–1977)* (2014) 9 Cal. Legal Hist., p. 61.

⁵⁹ *Napa Valley Register*, Jan. 6, 1880, p. 1; *Sacramento Union*, Jan. 6, 1880, p. 2; *Arizona Daily Star*, Jan. 8, 1880, p. 1.

as the Departments can hold Court in [San Francisco], Sacramento or Los Angeles, or in any two of those places at once.”⁶⁰ And dividing the caseload was easy: Chief Justice Robert F. Morrison announced that all even-numbered cases would be assigned to Department 1, while odd-numbered cases would be assigned to Department 2.⁶¹

The next day, the new Court handed down its first decision, *Ex Parte Hung Sin alias Ah Fong Chi* (1880) 54 Cal. 102, unanimously holding in a three-paragraph opinion that a prisoner charged with grand larceny could only be granted bail by the magistrate who issued the arrest warrant.⁶² And the Court began making quick headway against its backlog, deciding 170 cases in its January term, 125 in its April term, and 104 in its July 1880 term.⁶³

Unfortunately, this progress was short-lived. A mere two years later, the *Pacific Coast Law Journal* insisted that the time for fundamental reform had come again, characterizing “the practical working of the Court at present” as “a positive denial of justice.” When a case “must remain upon the calendar nearly two years before it is reached for argument and decision,” the *Journal* wrote, “it is a lamentable commentary upon a system said to be one of quick but sure justice.”⁶⁴ At the opening of the Court’s January 1882 term, “the Chief Justice remarked to the Bar that they must rely mainly upon their briefs, as the Court had not time to listen to oral arguments.” Still, the Court did not abolish oral arguments entirely, however; it limited arguments to thirty minutes (as the Court does today).⁶⁵

Nonetheless, by 1885 the *San Francisco Chronicle* reported that there were 9,000 appeals pending before the Supreme Court and that its backlog was growing.⁶⁶ How could this be? Many observers concluded that the effect of the department structure was being virtually wiped out because so many cases were being reheard en banc.⁶⁷

Accordingly, in the hopes of reducing the Court’s workload, the Legislature authorized the Court to appoint three Commissioners: “Cases will be sent to the Commissioners by the Court, and after the necessary investigation, will be reported upon, with a written opinion recommending their affirmance or

⁶⁰ *Sacramento Union*, Jan. 13, 1880, p. 2, quoting *San Francisco Bulletin*, Jan. 10, 1880.

⁶¹ *San Francisco Chronicle*, Jan. 13, 1880, p. 1.

⁶² *Sacramento Bee*, Jan. 13, 1880, p. 3.

⁶³ Bakken, *The Court and the New Constitution in an Era of Rising Industrialism, 1880–1910*, in *Constitutional Governance and Judicial Power: The History of the California Supreme Court* (Scheiber, ed., 2017) pp. 76, 80.

⁶⁴ Baggett, *Pacific Law Journal* (1882), vol. 5, p. 722.

⁶⁵ *Id.*

⁶⁶ *San Francisco Chronicle*, May 14, 1885, p. 3.

⁶⁷ *California Courts in Historical Perspective* (1970), 22 Hastings L.J. 170.

reversal, and the Court will then pass upon the opinion and affirm or reverse in accordance with its conclusions.”⁶⁸ In 1889, the Legislature authorized the Court to appoint two additional Commissioners.⁶⁹

THE NINETEENTH-CENTURY COURT ADDRESSES DISCRIMINATION

Naturally enough, as times changed, so did the nature of the Court’s cases. By the mid-1880s, California had been plagued for a generation by increasingly virulent attacks on Chinese residents and immigration. As far back as 1861, the Court had addressed the constitutionality of “An Act to protect free white labor against competition with Chinese coolie labor and discourage the immigration of the Chinese into the State of California,” holding in *Lin Sing v. Washburn* (1861) 20 Cal. 534, that the Act was invalid pursuant to the federal government’s exclusive power to regulate immigration. Nonetheless, in the late 1870s the Workingmen’s Party demanded the abolition of Chinese labor and the expulsion of the Chinese from the state.⁷⁰ Debates in the 1878–1879 Constitutional Convention were marred by ugly racist attacks on Chinese immigration.⁷¹

Unfortunately, the San Francisco City Council enacted multiple discriminatory ordinances during this period. The council enacted both an ordinance prohibiting gambling within Chinatown and a second ordinance against the smoking of opium. In 1880, the council enacted an ordinance banning laundries from operating in wooden buildings without a permit from the council. In 1884, Lee Yick was granted a permit, but when he applied for renewal in 1885, he was denied, despite his having certificates from the Board of Fire Wardens and the Board of Health.⁷² When he refused to shut down his business, he was convicted of violating the ordinance. After he was imprisoned, he petitioned the California Supreme Court for a writ of habeas corpus. The Supreme Court denied the petition in an opinion by Commissioner Niles Searls, and the justices endorsed the Commissioners’ opinion without comment.⁷³

But the United States Supreme Court unanimously reversed the California Supreme Court’s decision. The Court pointed out that of 320 laundries in San Francisco located in wooden buildings, over 200 were owned by Chinese. Of

⁶⁸ *Id.*

⁶⁹ Cal. Stat. ch. 16, § 1, p. 13.

⁷⁰ Bakken, *The Court and the New Constitution*, *supra*, p. 66.

⁷¹ *Id.* at p. 67.

⁷² *San Francisco Examiner*, Dec. 29, 1885, p. 3.

⁷³ *In re Yick Wo* (1885) 68 Cal. 294.

those applicants, only one was granted renewal, while all but one of the non-Chinese applicants were granted renewal. The Court held that the combination of discriminatory enforcement and the City Council’s intent to shut down Chinese-owned laundries rendered the ordinance a violation of the Fourteenth Amendment’s Equal Protection Clause.⁷⁴ The *Solano-Napa News Chronicle* aptly observed that given the clear evidence of discriminatory enforcement, “it was hardly possible for the opinions of the justices to be otherwise than they were.”⁷⁵ And happily, the city of San Francisco has honored Yick with the christening of the Yick Wo Alternative Elementary School, a highly rated neighborhood school in the Chinatown District.

CALIFORNIA’S GROWTH YIELDS NEW LEGAL DEVELOPMENTS IN WATER RIGHTS, TRANSPORTATION, AND ULTRAHAZARDOUS ACTIVITY

During this period, California’s population grew exponentially, increasing 38 percent from 1880 to 1890 and doubling again between 1890 and 1910. At the same time, the population center shifted from the San Francisco area to southern California.⁷⁶ The principal drivers of this growth were three: (1) the liberalization of water rights, (2) the expansion of the railroads, and (3) the opening of East Coast markets to California’s fruit crop and lumber supplies.

An important early step in the law of water rights was *California v. Gold Run Ditch and Mining Company* (1884) 66 Cal. 138. This case involved hydraulic mining—the practice of directing water at high pressure at hillsides, resulting in the exposure of some gold (along with prodigious amounts of dirt, sand, and grass). However, the runoff raised the beds of both the American and the Sacramento rivers by between six and twelve feet, causing flooding and impairing navigation.⁷⁷ As a result, the Supreme Court took its first steps toward developing the state’s water law, declaring the rivers to be “public highways.” As such, the people had “paramount and controlling rights” to use the water for “transportation and commercial intercourse.”⁷⁸ The Court declared the “unauthorized invasion of the rights of the public” to be an enjoined public nuisance.

Two years later, the Court took another important step in the development of water law in the case of *Lux v. Haggin* (1886) 69 Cal. 255. *Lux* was the product of the inevitable collision of two different theories of water use that

⁷⁴ *Yick Wo v. Hopkins* (1886) 118 U.S. 356.

⁷⁵ *Solano-Napa News Chronicle*, May 13, 1886, p. 2.

⁷⁶ Bakken, *The Court and the New Constitution*, *supra*, p. 81.

⁷⁷ *Id.* at p. 88.

⁷⁸ *California v. Gold Run Ditch and Mining Company*, *supra*, 66 Cal. at p. 146.

had existed simultaneously in California for thirty years: riparian rights, which held that any property owner has the right to use water running through or adjacent to his or her property so long as the riparian's use did not impair the rights of downstream riparians; and the prior appropriation theory, which held that rights in water were acquired by the first to take them, whether one had nearby property or not. In this case, Charles Lux and his partner Henry Miller had bought up 40,000 acres along the Buena Vista Slough during the 1860s to provide pastureland for their cattle. Years later, in 1877, the defendants built a diversion dam and the Calloway Canal north of Miller and Lux's properties to irrigate desert lands, with the result that the downstream flow to the lands of Lux and Miller was significantly impaired.

The Court held that the riparian rights of downstream property owners like Miller and Lux could not be impaired by upstream prior appropriators without just compensation being paid. The Court declared that irrigation of farmland or pastureland was a public use, and that the holders of riparian rights could reasonably use water for purposes of irrigation.⁷⁹

As California agriculture evolved and grew, the railroad industry invested heavily in the newly productive areas of the state. By 1886, the advent of the refrigerator car enabled the shipment of an entire trainload of oranges to the East Coast. Twenty years later, the industry was shipping 82,000 carloads of fruits and nuts to eastern markets.⁸⁰ By 1910, the state had four direct transcontinental railway links.⁸¹

In 1886, the Court decided *Colton v. Onderdonk* (1886) 69 Cal. 155, an early landmark in national tort law. Andrew Onderdonk was a San Francisco contractor. He chose to blast rocks, using gunpowder, on a lot adjoining the house that was owned by Mrs. Colton. As a result, the house was damaged, both by rocks thrown against the house by the force of the blasting and by the resulting concussion of air.⁸² Supreme Court Commissioner Foote rejected Onderdonk's invocation of the negligence standard, appending a lengthy string cite of cases across the country and from England, including the landmark case of *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330.⁸³ Blasting rocks in the middle of a large city with a residence next door, the Commissioners found, was an "unreasonable, unusual, and unnatural use" of the property, and "no care or skill" could excuse the defendant from being responsible in

⁷⁹ *Lux v. Haggin*, 69 Cal. at p. 264–65.

⁸⁰ Bakken, *The Court and the New Constitution*, *supra*, p. 90.

⁸¹ *Id.* at p. 81.

⁸² *Lux v. Haggin*, *supra*, 69 Cal. at 159.

⁸³ *Id.*

damages for the natural and proximate results of his blasting.⁸⁴ The justices endorsed the unanimous opinion of the Commissioners without dissent. In doing so, the Court helped lay the foundation of what today is called the law of ultrahazardous activity.

THE DECLINE AND FALL OF FORMER CHIEF JUSTICE TERRY

In January of 1888, a different, long-running melodrama arrived on the Court's doorstep. William Sharon had served one term in the U.S. Senate, representing Nevada from 1875 to 1881. However, Sharon lived full-time in San Francisco for virtually the entirety of his term; indeed, he was present for only five sessions and was recorded as voting in less than one percent of all roll calls.⁸⁵ Near the end of his term, in 1880 Sharon met Sarah Althea Hill, and the two began a year-long relationship. When Sharon tried to end the relationship, Hill sued, charging that they had been secretly married.⁸⁶ Senator Sharon countersued in federal court—again relying on his fictional Nevada residence—alleging that the purported marriage contract that Hill had produced was fraudulent. But Hill prevailed at trial in the California state court, due in part to her new lead counsel, former Chief Justice David S. Terry, and his five-day closing statement!⁸⁷ Not long after the trial court's judgment, Senator Sharon died. In January 1886, the federal circuit declared the marriage contract produced by Hill to be a forgery. But by that time, Hill had married Justice Terry.⁸⁸

Meanwhile, the state court judgment in favor of Hill was initially affirmed three years after Senator Sharon's sudden death.⁸⁹ However, the following summer, a second appeal—this one from denial of the motion for a new trial by Sharon's estate—arrived at a much different Supreme Court with several new justices. A majority, mostly consisting of the dissenters from the previous year, reversed, holding that the evidence “shows conclusively that these parties did not live and cohabit together ‘in the way usual with married people.’ They did not *live* or *cohabit* together at all.”⁹⁰ Accordingly, the Court concluded that “[t]heir acts and conduct were almost entirely consistent with the meretricious relation of man and mistress, and almost entirely inconsistent with the relation of husband and wife.”⁹¹

⁸⁴ *Id.* at pp. 158–159.

⁸⁵ Keraghosian, “How Notorious Tycoon William Sharon Left SF’s Children a Still-Popular Landmark.”

⁸⁶ Keraghosian, *supra*.

⁸⁷ Rahm, *Justice David S. Terry and Federalism*, *supra*, p. 35.

⁸⁸ *Id.*; Keraghosian, *supra*.

⁸⁹ *Sharon v. Sharon* (1888) 75 Cal. 1.

⁹⁰ *Sharon v. Sharon* (1889) 79 Cal. 633.

⁹¹ 79 Cal.3d at 663.

When the Terrys returned to federal court in 1888, they found themselves before none other than Terry’s successor on the Supreme Court—Stephen Field, now a justice of the United States Supreme Court. Field held that the handwritten will that Hill had produced was a forgery. And Hill and Terry were both arrested following a violent confrontation in the courtroom. Justice Field sentenced both to jail for contempt of court.⁹² While serving their sentences, both Hill and Terry threatened to kill Justice Field. Only a couple of weeks after the California Supreme Court’s (second) decision, Justice Field returned to California to hear court on circuit. The U.S. Attorney General directed David Neagle of the United States Marshals to protect Justice Field.⁹³

After their jail terms expired, Terry and Hill returned to Fresno. In August 1889, they happened to board a train that Justice Field and Neagle were on. Former Justice Terry saw Justice Field and struck him. Marshal Neagle rose and warned Terry, but when Terry drew back a fist, poised to strike again, Neagle shot him. Terry died in a few moments.⁹⁴

THE BEATTY COURT’S TUMBLES AND SUCCESSES

After a succession of chief justices, Warren Beatty became Chief Justice of the California Supreme Court in January 1889 and served until the beginning of World War I.⁹⁵ A contentious probate matter wound up bringing tensions within the Court into public view. Gershom P. Jessup was a wealthy San Francisco bachelor. In 1865, he had met a young African American woman. A child, christened Richard Jessup, was the result. Jessup supported the boy throughout his mother’s life, visiting frequently, and according to friends and associates, referring to Richard as “my boy.” But when the mother died, support payments ceased. Moreover, when Gershom Jessup died, notwithstanding his earlier promise to provide for the boy in his will, his brothers and sisters claimed the entire estate. Richard Jessup filed suit, claiming the surviving child’s share of the estate. On July 1, 1889, in an opinion by Justice Works, the California Supreme Court affirmed the lower court’s judgment upholding Richard’s claims.⁹⁶

But only three weeks after that decision, Justice Charles Fox was appointed to the Court following the resignation of Justice Jackson Temple. Shortly thereafter, an order was entered by the clerk granting rehearing, but no signed

⁹² Rahm, *Justice David S. Terry and Federalism*, *supra*, at p. 41; Makley, *The Infamous King of the Comstock: William Sharon and the Gilded Age in the West* (2006) pp. 202–203.

⁹³ Makley, *supra*, p. 205.

⁹⁴ Keraghosian, “How Notorious Tycoon William Sharon,” *supra*; Rahm, *Justice David S. Terry and Federalism*, *supra*, p. 44; Makley, *supra*, p. 206.

⁹⁵ Bakken, *supra*, pp. 96–97.

⁹⁶ *In re Jessup* (1889) 81 Cal. 406, 436.

order was filed as required by section 45 of the Code of Civil Procedure.

On November 30, 1889, the Court issued a second opinion reversing the lower court judgment in an opinion by Justice Fox.⁹⁷ The new majority insisted on strict construction of the Probate Code, whereas the original majority opinion had endorsed a liberal construction. The majority also endorsed an explicitly racist rationale to suggest there was no presumptive adoption of Richard, writing, “Instead of providing for him among people of his own race, he reared him and had him brought up in a colored family, respectable, it is true, but still a family of another race, commonly considered inferior, and to be brought up among whom is regarded by most [whites] . . . as degrading.”⁹⁸

Richard’s attorneys moved for issuance of the remittitur based upon the original decision, arguing that because the order granting a rehearing had not complied with Code of Civil Procedure section 45, no rehearing was permissible. In a brief opinion by Chief Justice William Beatty, the majority denied the motion and struck down section 45.⁹⁹ Justice Works filed a twenty-page dissent from the Chief Justice’s opinion, arguing that section 45 was constitutional because the Constitution said nothing about rehearing of cases heard *en banc*.¹⁰⁰

“The liberality of the court in granting rehearings needs some check,” said Justice Works. “The fact that a court of last resort must hear and decide a case twice in order to decide it correctly is not calculated to inspire confidence in either its wisdom or its integrity.”¹⁰¹ Justice Works publicly objected to Justice Fox having voted on the rehearing petition.¹⁰²

Three years after *Jessup*, the Court set another enduring precedent in *Ball v. Rawles* (1892) 93 Cal. 222. There, the plaintiff was accused by the defendant of having maintained an illegal game in Boonville, Mendocino County. The plaintiff was arrested, but the jury hung, at which point the plaintiff sued for malicious prosecution. The plaintiff lost at the trial court, but the California Supreme Court reversed for error in the instructions. In an opinion by Justice Ralph Harrison, the Court held that while “[m]alice is always a question of fact for the jury,” the presence (or absence) of probable cause “is always to

⁹⁷ *Id.*, 81 Cal. 406.

⁹⁸ *Id.* at pp. 432–433.

⁹⁹ *Id.* at pp. 459–474.

¹⁰⁰ *Id.* at p. 476.

¹⁰¹ *San Francisco Chronicle*, Dec. 21, 1889, p. 8.

¹⁰² *Id.* Neither Justice Works’s comment regarding the power of the Court to rehear cases initially heard *en banc* nor his comments about Justice Fox appear in his dissent. The inference, therefore, is that Justice Works took the extraordinary step of airing his issues with the Court directly in the *Chronicle*.

be determined by the court from the facts in each particular case.”¹⁰³ The decision in *Ball* has continued to be cited in the California courts as recently as 1986.¹⁰⁴

In November 1904, the electorate made another attempt to alleviate the Court’s crushing workload. New article VI, section 4 of the state Constitution created three district Courts of Appeal—the First in San Francisco, the Second in Los Angeles, and the Third in Sacramento.¹⁰⁵ To fill those new courts, all five commissioners were appointed justices of the new Courts of Appeal.¹⁰⁶

Meanwhile, the Court was thrust once again into the public spotlight: “The period from 1902 to 1906 was the most scandalous in San Francisco’s history.”¹⁰⁷ Political boss, Abraham Ruef, had engineered the election of his friend, Eugene Schmitz, as mayor. For four years, they ran protection rackets for a variety of unlawful businesses and sold government favors. In November 1906, a grand jury began investigating. Soon, Ruef confessed. The matter reached the Supreme Court in September 1907, when one of the alleged bribers sought a writ of prohibition, arguing that the grand jury was not validly constituted. Once the writ was denied, the *San Francisco Call* was ecstatic: “The last drowning clutch of San Francisco’s wealthy grafters at the phantom wisp which they hoped against hope might save them from meeting retribution for their crimes has failed.”¹⁰⁸

But the story was far from over. In early January 1908, the Court of Appeal threw out Schmitz’s bribery conviction on the ground that the Penal Code required that the defendant’s threat be to do something illegal. In this case, as mayor, Schmitz had the right to withhold a liquor license from a house of prostitution.¹⁰⁹

On March 9, 1908, the case came before the Supreme Court on the petition of the prosecution. In a *per curiam* opinion, the Court summarily affirmed the Court of Appeal, both on the grounds cited by the Court of Appeal and on a second basis—the indictment had failed to allege that Schmitz was Mayor of San Francisco and Ruef was a powerful political boss and therefore that the two were in a position to make good on their threats.¹¹⁰

¹⁰³ *Ball*, 93 Cal. at 227, 233; *San Francisco Chronicle*, Feb. 5, 1892, p. 10.

¹⁰⁴ Bakken, *The Court and the New Constitution*, *supra*, p. 112, citing *Williams v. Coombs* (1986) 179 Cal.App.3d 636.

¹⁰⁵ [Courts of Appeal | Judicial Branch of California](#).

¹⁰⁶ Dear, *California’s First Judicial Staff Attorneys*, Calif. Legal Hist. (2020) vol. 15, p. 126.

¹⁰⁷ Johnson, *History of the Supreme Court Justices of California* (1966) vol. 2, p. 76.

¹⁰⁸ *San Francisco Call*, Sept. 24, 1907, p. 1.

¹⁰⁹ *People v. Schmitz* (1908) 7 Cal. App. 330, 342–69.

¹¹⁰ *Id.* at 373.

The Court’s decision prompted a firestorm of criticism—so much so that Chief Justice William Beatty took the extraordinary step of sending a letter to the editor of the *Sacramento Bee* defending the ruling.¹¹¹ The *San Francisco Call* was not impressed: “To say that the court cannot take cognizance of a fact of official record, such as the incumbency of a mayor, is to make the law a foolish and impotent thing.”¹¹² Later that year, the *Call* called the Chief Justice’s defense of the *Schmitz* decision “singularly weak.” The newspaper wrote that the decision “pounces on an immaterial mistake of a conjunction” and that Beatty “has an eye for the infinitely little.” The *Call* accused the Chief Justice of “building up trifling and immaterial technicalities to the height of mountainous obstacles on the path of justice.”¹¹³

But two years later, the Ruef fiasco had a sequel that would again trigger public criticism, together with calls for judicial reform. In that case, Abraham Ruef was accused of offering a bribe to Supervisor John Furey in hopes of influencing him to vote for granting a franchise to operate streetcars by an overhead trolley electric system, rather than the underground cable the franchisee was using.¹¹⁴ Ruef was convicted, and in November 1910, the First District Court of Appeal in San Francisco unanimously affirmed the judgment.¹¹⁵

On the last day of 1910, the defendant filed a “petition for the transfer of the . . . case from the district court of appeal to the Supreme Court for hearing.” On January 23, 1911, an order signed by four justices granting the petition was filed in the clerk’s office.¹¹⁶

But when the lawyers examined the Court’s order, things got interesting: Justice Frederick Henshaw’s signature on the order was dated January 10, 2011. This raised the initial question of why Henshaw had not recused himself, given his close ties with the Ruef machine.¹¹⁷

And when the lawyers consulted the docket, a more serious question arose: The state’s brief in opposition to Ruef’s petition had been filed on January 12, 2011—two days *after* Justice Henshaw had signed the order granting review.¹¹⁸ When this was revealed, William Denman, a prominent San Francisco attorney,

¹¹¹ *San Francisco Call and Post*, May 3, 1908, p. 48, quoting *Sacramento Bee*.

¹¹² *Id.* at p. 20.

¹¹³ *San Francisco Call and Post*, Nov. 2, 1908, p. 6.

¹¹⁴ *People v. Ruef* (1910) 14 Cal.App. 576, 583.

¹¹⁵ *Id.* at 620.

¹¹⁶ *Id.* at 621.

¹¹⁷ *San Francisco Call*, May 14, 1908, p. 1.

¹¹⁸ *Id.*

appeared before the Legislature's Judiciary Committee to demand Henshaw's impeachment.¹¹⁹ A still bigger problem was that Justice Henshaw had left the state immediately after signing the order, meaning that he was not in California when the fourth justice signed, making the order ineffective.¹²⁰

When the state filed a motion to vacate the order granting review on the grounds that it was a nullity, this led to two extraordinary events. At the outset of the argument on the motion, the Court issued a statement, rendered by Chief Justice Beatty and signed by all seven justices (including Justice Henshaw), explaining the Court's procedures for arriving at decisions on the merits and decisions on petitions for hearing.¹²¹ On February 28, 1911, the Court issued an opinion, holding that Justice Henshaw was unable to exercise any judicial functions during his absence from the State of California, and therefore the order granting review had not had the concurrence of four justices and must be vacated. Once again, the opinion was signed individually by all seven justices, including Justice Henshaw.¹²²

Notwithstanding the controversial conclusion to the last thirty years, the years 1880 to 1910 were nonetheless foundational to the Court's stature. The Court and the Legislature had attempted to address the crushing workload of the Court, first by creating the Court commissioners, and later by creating the first three District Courts of Appeal. The Court had also filed landmark opinions in water law, which contributed significantly to California's explosive growth. And the Court had made lasting law on inherently dangerous instrumentalities, malicious prosecution, as well as other areas. By 1918, Senator Roscoe Conkling commented that there was no court in the United States of higher standing than the California Supreme Court.¹²³

THE PROGRESSIVE REFORM ERA

Hiram Johnson was only an assistant district attorney during the Rueff-Schmitz prosecutions.¹²⁴ But in 1911, he rode the popularity of that endeavor to election as governor.

Within eighty-five days of Johnson's election, the California Legislature passed more than eight hundred bills and twenty-three constitutional

¹¹⁹ *Id.*

¹²⁰ *People v. Rueff*, 14 Cal.App. at 625.

¹²¹ *Id.* at 621–623.

¹²² *Id.* at 626; Older, *My Own Story* (1926), pp. 146–48. Older credits Charles S. Wheeler with spotting the fatal flaw in the Court's order on rehearing.

¹²³ Johnson, *supra*, vol. 1, p. 100.

¹²⁴ Johnson, *supra*, vol. 2, p. 131.

amendments.¹²⁵ The Legislature’s progressive revolution included: (1) the adoption of the right to voter initiatives and referenda (Proposition 7); (2) recall (Proposition 8), and the direct primary, all intended to break the Southern Pacific Railroad’s hold on politics;¹²⁶ (3) nonpartisan elections and the authority to impeach judges (Proposition 21);¹²⁷ (4) a vast expansion in the authority of the Railroad Commission; (5) a declaration that all pipelines, gas and electric plants, water systems, and warehouses were businesses affected with the public interest and therefore public utilities (Propositions 12 & 14);¹²⁸ and (6) a comprehensive workers’ compensation system (Proposition 10).¹²⁹ Finally, the Legislature enacted a constitutional amendment extending the vote to California’s women (Proposition 4).¹³⁰

Support for progressive reform was not universal, of course. In an article entitled “The Legislature of a Thousand Freaks,” the *San Francisco Call* reported on one of the more unusual proposals:

Among the curiosities in the line of freak legislation, of which the sitting legislature is making a collection that might grace a museum, if it served no other purpose, perhaps the most extraordinary is that offered by Senator [Lester] Burnett, who proposes for submission a constitutional amendment declaring all bills enacted at this session to be a part of the state constitution. This amendment might justly be described as a plan to drive the constitution down a steep place into the sea.¹³¹

In 1903, Lucien Shaw, a renowned expert on water law,¹³² had been elected to the Supreme Court and assigned to Department One, which was considered the liberal wing of the two-department Court.¹³³ In the years before the 1911 legislative session, Shaw had written two important water law decisions for the Court, which helped set the stage for the Legislature’s changes. *Katz v. Walkinshaw* (1903) 141 Cal. 116, addressed the rules applicable to percolating water—underground bodies of water, not flowing in any defined stream, which reached the surface by percolating up through saturated soil. Such supplies were important, particularly in southern California and the enormous citrus

¹²⁵ Mowry, *The California Progressives* (1951), pp. 147–148.

¹²⁶ *The Times-Herald*, Oct. 11, 1911, p. 1.

¹²⁷ *Id.*; Documents on the State-Wide Initiative, Referendum and Recall (1912), pp. 265–270.

¹²⁸ Hallett, *The Public Utilities Act of California* (1912), [1912publicutilitiesactofcaliforniatemp.pdf](#)

¹²⁹ Glenn M. Shor, *The Evolution of Workers’ Compensation Policy in California* (2021), vol. 16, pp. 52–58.

¹³⁰ Spencer C. Olin, *California’s Prodigal Sons: Hiram Johnson and the Progressives, 1911–1917* (1968), p. 55.

¹³¹ *San Francisco Call and Post*, Mar. 20, 1911, p. 4.

¹³² Shaw, *The Development of the Law of Waters in the West* (1922).

¹³³ Salyer, *The California Supreme Court in an Age of Reform, 1910–1940*, in *Constitutional Governance and Judicial Power: The History of the California Supreme Court* (Scheiber, edit., 2017), p. 147.

fields planted there. The Court held that the doctrine of riparian rights did not apply to these water supplies. Instead, if the percolating supply was on land owned by the claimant, the claimant was entitled to whatever supply he or she was putting to beneficial use, and no more. Accordingly, landowners using percolating water for irrigators were entitled to an injunction that barred the diversion of such supplies by third parties for sale on distant lands.

And in *Duckworth v. Watsonville Water Company* (1907) 150 Cal. 520, Justice Shaw further developed the rights of riparian water rights owners. In that case, plaintiffs owned 320 acres on Pinto Lake in Santa Cruz County. One plaintiff claimed riparian rights over the lake and the other also claimed appropriator's rights. But the defendant water company owned the lakebed and claimed riparian rights over the entire water supply of the lake. The Court held that riparian rights are limited to the use of water as it passes the owner's property, plus the right to enjoin diminution or pollution above the owner's property to the extent they interfere with the owner's use. Accordingly, the Court held that the water company had riparian rights to the entire lake, subject only to what the landowners were using. But that wasn't the end of the story. In that case, the water company was using none of the water on the adjoining property. Instead, it was shipping it to distant landowners for sale. As a result, the water company's rights were limited to the water it was accessing; its riparian rights did not extend to the remaining supply.

In 1911, as the Progressive era was launched, the Legislature began the process of sorting out the conflicts between riparian and appropriators' rights in water via the concept of beneficial use. The Legislature provided that all water within the state was the property in common of the people of the state. Two years later, the Legislature established time limits in which both appropriators and riparian owners would be required to put their claims to beneficial use.¹³⁴ This was a direct response to the Supreme Court's decision in *Miller & Lux v. Madera Canal and Irrigation Co.* (1909) 155 Cal. 59, in which the Supreme Court had declined to subject the riparian owners Miller & Lux to a "reasonable use" limitation on their rights.

Five years later, in *California Pastoral & Agricultural Co. v. The Madera Canal and Irrigation Co.* (1914) 167 Cal. 78, the Supreme Court limited appropriators' rights in a way it had earlier declined to limit riparian rights owners. There, the defendant had appropriated waters from the Fresno River before Miller & Lux had acquired their riparian rights. An appropriator, the Court held, acquired rights to whatever quantity of water was reasonably necessary for the

¹³⁴ Salyer, *supra*, p. 179.

purpose that the appropriator was putting it to, no more.

One year earlier, the Supreme Court had addressed the new powers conferred by the Legislature on the Railroad Commission. According to article XII of the state Constitution, the Legislature had “plenary” power to confer new powers on the Commission, and such power was “unlimited by any provision of this constitution.”¹³⁵ Nonetheless, the Supreme Court overturned the Commission’s order in *Pacific Telephone and Telegraph Company v. Eshleman* (1913) 166 Cal. 640. Notwithstanding the clear language of the Constitution regarding the Commission’s powers, the Court held that a private corporation must actively and intentionally dedicate its property to public use in order for the state to acquire rights under the police power to regulate it.¹³⁶

The Court also pumped the brakes on the Legislature’s progressive revolution in another area in *Associated Pipe Line Company v. Railroad Commission* (1917) 176 Cal. 518. By way of background, in 1913 the Legislature had enacted legislation deeming every oil pipeline company to be a public utility and common carrier. In its argument before the Supreme Court, the Railroad Commission relied on the proposition that any business affected with the “public interest” is per se a public utility and subject to regulation. But the Supreme Court unanimously disagreed, pointing out that the charter of the pipeline company had expressly stated that it was *not* a common carrier and that the company had only carried the oil of two companies in its pipeline. Accordingly, the Court held that any attempt to extend the Commission’s regulatory power over the pipeline violated the Fourteenth Amendment. Thus, the Court struck down the portion of the 1913 Act that declared all oil pipelines to be public utilities.

The state’s new workers’ compensation system also came before the Court during these years. In 1911, the Roseberry Act had created workers’ compensation in California. Two years later, the Boynton Act made the system compulsory.

The system survived its first constitutional challenge in *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686. There, a foreman had fired a worker and a fight ensued. In the violent altercation, the foreman suffered injuries to his face, hands, and arms.¹³⁷ A majority of the Court upheld the Commission’s award, holding that the “conditions of modern industry” justified evolution away from the traditional common law view that an employer’s liability should be

¹³⁵ *Id.* at p. 151.

¹³⁶ *Id.* at pp. 153–154.

¹³⁷ *Western Indemnity*, 170 Cal. at 703–704.

limited to fault.¹³⁸ As for whether the injury arose in the course of the worker’s employment, the majority cited the statute making the Commission’s factual findings conclusive so long as supported by substantial evidence.¹³⁹ Justice Henshaw filed a vigorous dissent, complaining that the workers’ compensation system was little more than a “general reapportionment of wealth” and placed California on the path to “socialistic paternalism.”¹⁴⁰

Not long after, the Court affirmed an award of death benefits by the Workers’ Compensation Commission by a narrow 4-3 margin in *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407. Despite the common law rule that the right of action in tort dies with the injured person, the majority held that “too strict and literal” an interpretation should not be given to the constitutional amendment establishing the workers’ compensation system. Justice Henshaw once again dissented, writing, “I deny the power of the state constitution to take the property of one man under such circumstances and bestow it on another.”¹⁴¹

Tragically, neither the state nor the Legislature had yet outgrown vicious racist attacks on the foreign-born, especially Japanese residents. In 1913, the Alien Land Law was enacted. The statute prohibited the sale of land to persons ineligible for citizenship—which at the time, Japanese residents were¹⁴²—and limited leases of agricultural land to Japanese residents to three years.¹⁴³ However, the proponents quickly discovered that the law was ineffective. Between 1910 and 1920, the Japanese population of California increased by 50 percent, and Japanese land ownership more than doubled.¹⁴⁴ Moreover, it became routine to evade the 1913 Land Law by simply holding land in the name of resident immigrants’ native-born children.

Although the racist campaigns were largely quiet during World War I, they resumed after the war was over. In 1920, the electorate approved a new Alien Land Law by a wide margin. The new law barred the transfer or lease of land to Japanese nationals, barred the acquisition of land by any corporation in which a Japanese national held a majority of the stock, and forbade Japanese

¹³⁸ *Id.* at 693.

¹³⁹ *Id.* at 705.

¹⁴⁰ *Id.* at 724.

¹⁴¹ *Western Supply*, 172 Cal. at 428.

¹⁴² The original naturalization statute had limited naturalization to “free white persons,” and had been broadened to include African Americans after the Civil War. However, courts had ruled that Chinese and “other Orientals” were ineligible for citizenship until Congress legislated to the contrary. Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California, and the Struggle for Japanese Exclusion* (1966), pp. 50–51.

¹⁴³ *Id.* at p. 62.

¹⁴⁴ *Id.* at p. 82.

nationals from serving as guardians of their native-born children.¹⁴⁵ A separate initiative, which also passed, imposed a poll tax on alien nationals.¹⁴⁶

The Supreme Court struck down the alien poll tax in *In re Kotta* (1921) 187 Cal. 27, on equal protection grounds. The following year, in *In re Estate of Yano*,¹⁴⁷ the Court struck down the ban on Japanese residents serving as the guardians of their native-born children, again on equal protection grounds.

About the same time, a scandal involving Justice Frederick Henshaw broke into print, bringing the controversial justice's career on the Court to an end. The story began with the death of James G. Fair, who had made many millions in the 1860s and 1870s through his interest in a silver mine in Virginia City, Nevada. Believing that his children would dissipate his fortune, Fair's will placed his money in a trust, assigning his children only the interest. Following Fair's death, the children challenged the trust, but the trust was upheld in the lower court, and by a vote of 4 to 3 (with Justice Henshaw in the majority), the Supreme Court affirmed.¹⁴⁸ The children sought a rehearing, and it was granted, with Justice Henshaw mysteriously changing sides and voting with the children. On rehearing, the Court held that the trust was invalid.¹⁴⁹ Justice Henshaw voted with the majority and added a concurrence to explain his abrupt change of heart.¹⁵⁰

This was also a time of social unrest. On July 22, 1916, a large crowd gathered in downtown San Francisco to watch the Preparedness Day parade, staged to promote readiness for a likely war. Suddenly a bomb exploded at the corner of Steuart and Market streets. When the smoke cleared, ten were dead; forty were wounded.¹⁵¹ Thomas Mooney, a labor organizer and avowed socialist, and an associate were convicted of murder—notwithstanding a photograph of Mooney and his wife taken standing on the roof of a building more than a mile away from the blast site only minutes before the bomb went off.¹⁵² Mooney was sentenced to death.

Within two months of Mooney's conviction, significant new evidence came to light suggesting that testimony against him had been perjured. Nevertheless, the Supreme Court repeatedly refused to disturb Mooney's conviction, even

¹⁴⁵ *Id.* at pp. 88, 90.

¹⁴⁶ *Id.* at pp. 82, 90.

¹⁴⁷ *In re Estate of Yano* (1922) 188 Cal. 645.

¹⁴⁸ *In re Estate of Fair* (1901) 132 Cal. 523, 563.

¹⁴⁹ *In re Estate of Fair*, *supra*, p. 523 for the majority opinion on rehearing.

¹⁵⁰ *Id.* at 550; Older, *My Own Story*, *supra*, pp. 197–198.

¹⁵¹ Older, *My Own Story*, *supra*, pp. 333–334; Salyer, *The California Supreme Court in an Age of Reform*, *supra*, p. 172.

¹⁵² Salyer, *supra*, p. 174.

though at the behest of the trial judge, the attorney general had confessed error and sought a new trial.¹⁵³ An article by a Modesto attorney in *The American Law Review* harshly criticized the Court's inaction:

[I]f by means of fraud and perjury, a concededly innocent person is convicted of a crime and is condemned to death, the courts of this State, under the conditions stated, are so manacled and fettered by their own arbitrary rules and precedents as to be without power to undo the wrong . . . This is murder—judicial murder—and nothing less.¹⁵⁴

Supporters of Mooney from all over the world charged that his conviction had more to do with his union activities and political beliefs than the facts. Felix Frankfurter urged President Wilson to pressure California authorities to intervene.¹⁵⁵ Crusading journalist Fremont Older, who had earlier been a major figure in the prosecution of Abraham Ruef and Mayor Eugene Schmitz, wrote in a banner headline in the *San Francisco Bulletin*, “[District Attorney] Fickert framed the Mooney Case.”¹⁵⁶

For months, Fremont Older kept the Mooney story alive. He knew that Fickert and Justice Frederick Henshaw were old friends and political allies, and he suspected that Justice Henshaw had been involved in the Mooney prosecution in some way. In late 1917, Older received a copy of a handwritten confession by William Dingee, who testified that he had funneled a bribe to Justice Henshaw in connection with the petition for rehearing in *In re Estate of Fair*. According to Dingee, Henshaw was paid \$10,000 for switching his vote and supporting a rehearing, and \$400,000 when the final decision was filed, narrowly reversing in favor of the Fair children and breaking the trust.¹⁵⁷

Not long thereafter, former Mayor Schmitz visited Older's office and told him that Justice Henshaw wanted to meet with him.¹⁵⁸ After Older declined to come to Henshaw's chambers, the two met in the lobby of the Fairmont Hotel that evening. Justice Henshaw initially denied the story, but Older told him that Dingee's ledger supported the bribe allegation.¹⁵⁹ When Henshaw's wife interrupted the conversation, they agreed to meet again the next day. During that conversation, Henshaw allegedly confirmed the story and agreed to resign

¹⁵³ *People v. Mooney* (1917) 175 Cal. 666; *People v. Mooney* (1917) 176 Cal. 105; *People v. Mooney* (1918) 177 Cal. 642; *People v. Mooney* (1918) 178 Cal. 525; Hindman, *The Mooney Case*, *American Law Review* LII (1918) 743.

¹⁵⁴ Hindman, *The Mooney Case*, *supra*, p. 745.

¹⁵⁵ Salyer, *supra*, pp. 172–73.

¹⁵⁶ Older, *My Own Story*, *supra*, p. 336.

¹⁵⁷ Older, *supra*, pp. 197–198.

¹⁵⁸ Older, *My Own Story*, *supra*, p. 199.

¹⁵⁹ *Id.* at p. 200.

from the Supreme Court, sever his ties with District Attorney Fickert, and urge the Governor to get Mooney a new trial.¹⁶⁰ Henshaw resigned from the Court effective January 1, 1918, citing a desire to participate in war work—just as he told Older he would.¹⁶¹

About a year later, Older left the *Bulletin* to become editor of the *San Francisco Call*.¹⁶² He was given a copy of a draft report to Labor Secretary William Wilson from John Densmore, Director General of the United States Employment Bureau, who had been directed by Wilson to secretly place a dictaphone in District Attorney Fickert’s office in hopes of unraveling the Mooney prosecution. The report contained recent conversations between Fickert and Henshaw directly related to the Mooney case.¹⁶³ Concluding that Henshaw had broken their agreement, Older published the draft report a few days later in the *Call*, including the story of the bribe to Henshaw.¹⁶⁴ But Henshaw denied the charges.¹⁶⁵

THE 1926-1927 LEGAL SYSTEM REFORM: BLACK ROBES AND THE ESTABLISHMENT OF A STATE BAR

In 1918, the question of docket congestion yet again took center stage. On January 24, 1918, the banner headline in the *San Francisco Chronicle* announced “California Supreme Court is 20 Months Behind in Work.”¹⁶⁶ The *Chronicle* reported that “Ordinary Appeals Filed Now Will Not Be Reached Until September 1919.”¹⁶⁷ Still, this was an improvement: Not long before, Chief Justice Angellotti had reported that the Court had been five years behind on its docket.¹⁶⁸ In 1926, the voters approved a constitutional amendment establishing a judicial council and permitting the assignment of judges from one court to another to help alleviate docket congestion.¹⁶⁹

Another important step in reform was taken in 1927 when the unified California State Bar was formed. The State Bar, a public corporation within the judicial branch, was created by the State Bar Act to assist the Supreme Court in regulating the legal profession and improving the administration of

¹⁶⁰ *Id.* at pp. 200–201.

¹⁶¹ *Id.* at p. 200.

¹⁶² *San Francisco Examiner*, Aug. 16, 1918, p. 8.

¹⁶³ Older, *supra*, p. 203.

¹⁶⁴ *San Francisco Examiner*, Nov. 24, 1918, p. 8; see *San Francisco Examiner*, Nov. 23, 1918, p. 6 for a summary of the audio tapes.

¹⁶⁵ *San Francisco Examiner*, Nov. 23, 1918, p. 7.

¹⁶⁶ *San Francisco Chronicle*, Jan. 24, 1918, p. 9.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

justice. Chief Justice William Waste was the first name enrolled in the newly created statewide registry of attorneys.¹⁷⁰

The following year, for the first time, the Supreme Court began wearing black robes when Court was in session. In a short piece entitled “And Anyone Who Giggles Will Do It In a Dungeon,” the *San Francisco Chronicle* commented on the Chief Justice’s innovation.¹⁷¹

Some years ago a witness charged with perjury before a legislative investigating committee solemnly assured the judge before whom he was arraigned that had the members of the committee worn black silk robes like the judge’s he certainly would have told the truth. He did not think it was really perjury to lie to a lot of men in business suits.

There is something in this viewpoint. When seen in the setting of court the white wigs and gowns of English barristers are not so comical as they appear to the stranger as the wearers skip across the street from chambers to court. And there is little talking back to the judge, terrible in his uniform of justice as he sits upon the woosack.

The black silk of the United States supreme court justices is a reminder of the dignity of the law that has been adopted with advantage by the judges of some other courts. The custom of wearing black robes started by the state supreme court justices at the University of California charter day exercises, and which it is said will be followed hereafter when that court sits en banc will tend to make the court impressive to those who appear before it.

THE WASTE COURT

William Waste assumed the position of Chief Justice in January 1926 and held that position until June 1940, as the Nazis invaded France.

In 1926, the Court handed down another water law case that would become the last stand of classical water law theory. In *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81, the plaintiffs owned 18,000 acres near the Fresno River. The plaintiff had used the river water for many years for irrigation, including to flood pasturelands.¹⁷² The Court held that the rule that a riparian owner of water rights is entitled only to access water for reasonable uses applied only to cases involving other riparian owners. As part of their riparian rights, the plaintiffs were entitled to not only the ordinary course of

¹⁷⁰ State Bar of California, *Celebrating 75 Years*, pp. 3, 12.

¹⁷¹ *Fresno Morning Republican*, Mar. 31, 1928, p. 4, quoting from *San Francisco Chronicle*, Mar. 30, 1928.

¹⁷² *Herminghaus v. Southern California Edison Co.* (1926), 200 Cal. 81, 86.

the river, but to all routine yearly accretions arising from melting snow.¹⁷³ The defendants, who owned riparian property above the plaintiffs' property in the course of the river, proposed to divert nearly all of the river water by a system of dams and reservoirs to generate power, a diversion which would virtually destroy the plaintiffs' rights.¹⁷⁴ The Court struck down sections 11 and 42 of the Water Act, which had limited *all* water rights—both riparian owners and appropriators—to reasonable uses.¹⁷⁵

The electorate responded in 1928, approving a new section 3 of article XIV of the state Constitution. Section 3 declared that “because of the conditions prevailing in this state, the general welfare requires” that *all* water rights—both riparian and appropriators—be limited to such amounts as the claimant could reasonably and beneficially use.

Accordingly, in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, the Court held that in the wake of section 3, *Miller & Lux* and *Herminghaus* were no longer good law,¹⁷⁶ reversing the trial court's determination that the riparian owners were entitled to all of the ordinary and natural flow of the creek. The Court found that so long as no damage to the plaintiffs' use of water for irrigation was shown, section 3 mandated that the defendants were entitled to the excess.¹⁷⁷

The Court completed the retreat from classical water law theory in *Meridian v. City and County of San Francisco* (1939) 13 Cal.2d 424. There, the defendant had appropriated water from the Tuolumne and San Joaquin Rivers by virtue of the construction of the Hetch Hetchy dam. The Court cleared the way for the dam project, holding that since the downstream riparian plaintiff still had ample water for all beneficial uses, even as an appropriator, the City was entitled to proceed.¹⁷⁸

The Waste Court also engaged in other reforms around this time. Court historians often note that one of the most critical moments in the history of the jurisprudence of the United States Supreme Court was the decision in *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937). The apocryphal story has long been that Justice Owen Roberts switched sides from the wing of the Court that had repeatedly struck down New Deal innovations to the liberal wing of the Court in order to discourage the need for Franklin Roosevelt's Court-packing plan.

Something like that happened in California around the same time. As

¹⁷³ *Id.* at 91.

¹⁷⁴ *Id.* at 105–107, 109–112.

¹⁷⁵ *Id.* at 115–117.

¹⁷⁶ *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 364–366.

¹⁷⁷ *Id.* at 368–369.

¹⁷⁸ *Meridian v. City and County of San Francisco* (1939) 13 Cal.2d 424, 446–447.

discussed, the California Supreme Court had repeatedly limited or outright rejected major innovations of the progressive era. But in the late 1930s, with two new justices on the Court, votes changed and reform gained several consecutive crucial victories.

First, in *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, the Court upheld the Fair Trade Act. There, the plaintiff's exclusive sales agent had a system of contracts with all buyers of a product by which the resale price was fixed. But the defendant refused to sign the contract and instead accessed the product through the black market, selling it at cut-rate prices. Relying heavily on *Nebbia v. New York*,¹⁷⁹ in which the United States Supreme Court had approved an emergency measure passed in the early days of the Depression to prevent "cut-throat" price competition, the majority held that the police power had expanded in scope under current conditions to extend "to measures designed to promote the public convenience and the general prosperity."¹⁸⁰

Reform scored yet another important win one day later in *Agricultural Prorate Commission v. Superior Court* (1936) 5 Cal.2d 550. Of note, *Agricultural Prorate* marks the second appearance of Matthew Tobriner¹⁸¹ at that point in the Court's history. Although merely co-counsel for a petitioner's amicus in that case, he was set to play an important role for the Court decades later. As explained in that case, the Agricultural Prorate Act of 1933 set production ceilings for individual lemon producers in the hope of mitigating a market failure resulting from too much production chasing too little demand.¹⁸² Although 99 percent of California's production was consumed in other states, the Court nevertheless rejected a preemption argument, holding that until the shipments actually crossed state lines, they were not in interstate commerce.¹⁸³ The respondent argued that the Commission was an unconstitutional delegation of legislative authority, but the Court pointed out that since the statute provided seven conditions that had to be met before production ceilings could be imposed, the Commission's power was sufficiently limited.¹⁸⁴

During this period, the Court continued to be bedeviled by the same problem that had troubled it throughout its history—docket congestion. Justice Douglas Edmunds joined the Court in late 1936. At that time, the backlog at the Court was estimated to be three years. He undertook a study

¹⁷⁹ 291 U.S. 502 (1934).

¹⁸⁰ *Max Factor*, 5 Cal.2d at 461.

¹⁸¹ See *Agricultural Prorate Commission*, counsel list, 5 Cal.2d at 552.

¹⁸² *Agricultural Prorate Commission*, 5 Cal.2d at 553.

¹⁸³ *Id.* at p. 559–563.

¹⁸⁴ *Id.* at p. 569.

attempting to determine the size of the docket arrearages and the reasons for it. He found 523 uncalendared cases languishing on the Court’s docket. But it was his findings on counsel’s briefs that may shock modern attorneys. Justice Edmunds determined that as of June 1939, briefs in a little more than half of the pending cases were 200 pages or less. But “[a] large number” ran between 200 and 500 pages. And some were between 500 and 1,000 pages, and four briefs were over 1,200 pages!¹⁸⁵ Justice Edmunds’s reform to address this situation had four parts: “extended oral argument”; shorter briefs—presumably, *much* shorter; more sessions; and a shift by the Court toward doing more of its work in conference.¹⁸⁶

A BRUSH UP WITH THE PRESS

Only one month into the new decade, the California Supreme Court found itself in hot water. *Times-Mirror Co v. Superior Court* (1940) 15 Cal.2d 99, involved three editorials published by the *Los Angeles Times* in May and June 1938. The *Times* editorials were about union strikers, a political boss, and union members convicted of violence against nonmembers.¹⁸⁷ In each case, a verdict had been rendered, but the sentencing decisions were still pending. The newspaper and its managing editor were found guilty of constructive contempt.¹⁸⁸

The Supreme Court affirmed the judgments of contempt on the grounds that the editorials had a “reasonable tendency to interfere with the orderly administration of justice.”¹⁸⁹ Dissenting from the decision, Justice Phil Gibson wrote that the contempt charges were “a regrettable mistake” and commented, “I think that by our decision in this and the Bridges case¹⁹⁰ we have sacrificed a substantial part of our cherished freedom of speech and press in order to stamp out an evil that does not exist.”¹⁹¹

Not surprisingly, the decision was criticized extensively in newspapers throughout the country. The *Edmonton Journal* quoted extensively from Justice Gibson’s dissent.¹⁹² The *Sacramento Union* quoted Justice Gibson’s comment that “[w]e should not ignore the growing suspicions that courts are prone to place

¹⁸⁵ This was several years before the advent of the California Rules of Appellate Procedure. Perhaps even more shocking than these page numbers, at this time the appellate courts “allow[ed] attorneys to file as many briefs as they choose.” *Napa Journal*, Apr. 5, 1940, p. 12.

¹⁸⁶ Johnson, *supra*, vol. 2, p. 76.

¹⁸⁷ *Times-Mirror*, 15 Cal.2d at pp. 109–110, 112.

¹⁸⁸ *Id.* at p. 102.

¹⁸⁹ *Id.* at pp. 102–103.

¹⁹⁰ Justice Gibson was referring to *Bridges v. Superior Court* (1939) 14 Cal.2d 464, in which the Court affirmed a contempt conviction against union organizer Harry Bridges, who had written a telegram to Secretary of Labor Frances Perkins condemning a court decision which the press published.

¹⁹¹ *Times-Mirror*, 15 Cal.2d at p. 129 (Gibson, J., dissenting).

¹⁹² *Edmonton Journal*, Feb. 1, 1940, p. 15.

their own security above all other considerations.” According to the *Union*, the *Times* contended that “any interpretation of the constitution under which such convictions are sustained is an erroneous one and fraught with grave danger to constitutional liberties.”¹⁹³ The *Van Nuys News and Valley Green Sheet* quoted extensively from Justice Gibson’s dissent, almost entirely ignoring the majority opinion.¹⁹⁴ In an editorial entitled “Not Above Criticism,” the *Turlock Journal* also quoted extensively from Justice Gibson’s dissent, concluding, “What it all boils down to, of course, is that no governmental institution of a democracy has the right to put itself forth as immune to the criticism of the people who created it. The people have the last word; and in a democracy, their chief medium for this expression is a free press.”¹⁹⁵ The following year, both the Court’s *Times-Mirror* and *Bridges* decisions were reversed by the United States Supreme Court in *Bridges v. California* (1941) 314 U.S. 252.

THE GIBSON COURT BEGINS

In late May 1940, Chief Justice William Waste was stricken by the recurrence of an old heart ailment. He ultimately lapsed into a coma and passed away on June 6, 1940. The Supreme Court immediately adjourned, putting over its calendar until its next session in Los Angeles.¹⁹⁶ The following day, Governor Culbert Olson nominated Associate Justice Phil Gibson, whom he had elevated to the Court less than a year earlier, to be the new Chief Justice.¹⁹⁷ On June 18, Justice Gibson was approved by the Judicial Qualifications Commission and sworn in as Chief Justice of California.¹⁹⁸

The press immediately settled on Professor Max Radin of the University of California Law School as the Governor’s likely nominee to assume Justice Gibson’s seat as an Associate Justice.¹⁹⁹ Radin had been a law professor at the University of California School of Law in Berkeley since 1919.

But opposition to Radin coalesced rapidly. Earlier in 1940, Radin had become involved in the prosecution of several young employees from the State Relief Administration (“SRA”). The SRA employees had been called to testify before Sam Yorty’s Assembly Relief Investigating Committee on Subversive Activities, had declined to testify about Communist affiliations or beliefs, and had then been prosecuted for contempt of the Committee. Professor Radin

¹⁹³ *The Sacramento Union*, Feb. 8, 1940, p. 4.

¹⁹⁴ *Van Nuys News and Valley Green Sheet*, Feb. 15, 1940, p. 13.

¹⁹⁵ *Turlock Journal*, Feb. 16, 1940, p. 4.

¹⁹⁶ *Redlands Daily Facts*, Jun. 7, 1940, p. 8.

¹⁹⁷ *The Los Angeles Times*, Jun. 8, 1940, p. 1; *Turlock Journal*, Jun. 8, 1940, p. 1.

¹⁹⁸ *Oakland Tribune*, Jun. 18, 1940, p. 2.

¹⁹⁹ *The Los Angeles Times*, Jun. 8, 1940, p. 1.

wrote letters and lobbied Stockton attorneys, advocating for leniency toward the young SRA employees. As a result, the San Joaquin County Bar Association adopted a resolution opposing his nomination on June 13 and declared that Professor Radin’s support for the SRA employees “demonstrated his lack of ethical precepts and his unfitness to properly sit in judgment upon cases which should be determined solely upon the merits and rights legally presented.”²⁰⁰ The Stockton Chamber of Commerce followed suit the following morning, calling Professor Radin an “extreme leftist.”

Nevertheless, Governor Olson formally nominated Professor Radin for the Supreme Court on June 26, 1940.²⁰¹ Assemblyman Yorty denounced Radin, accusing him of “sympathy for Communists” because of his action in the SRA case.²⁰²

On July 22, 1940, following a two-hour meeting, the Judicial Qualifications Commission rejected Professor Radin’s nomination.²⁰³ Reporting on the meeting, the Ontario *Daily Report* described Professor Radin as a “distinguished legal scholar and teacher.” And Governor Olson said he was “greatly surprised” by the action.²⁰⁴ But ironically, the rejection led to the appointment of one of the California Supreme Court’s greatest jurists.

On July 31, 1940, Governor Olson named his new nominee—Professor Roger Traynor, also of the University of California Law School in Berkeley. Although only 40 years old, Traynor was an established expert of national stature in both tax and constitutional law.²⁰⁵ Yet, even as he announced his new nomination, the Governor released copies of a letter to the Judicial Qualifications Commission protesting its treatment of Professor Radin. Professor Traynor’s nomination was unanimously approved in a twenty-minute session of the Judicial Qualifications Commission on August 12, 1940.²⁰⁶

For the next thirty years, the California Supreme Court produced one opinion after another destined to wind up in law school casebooks around the country—many of them with Justice Traynor playing a leading role.

²⁰⁰ *Stockton Evening and Sunday Record*, Jun. 14, 1940, pp. 1–2.

²⁰¹ *Hanford Sentinel*, Jun. 27, 1940, p. 1.

²⁰² *Vallejo Evening News*, Jun. 28, 1940, p. 1.

²⁰³ The *New Republic* was scathing: “As for [Attorney General Earl] Warren’s liberalism, neither as District Attorney nor as Attorney General did he show any. He used his position to block the appointment of Max Radin, one of California’s most brilliant jurists, to the Supreme Court, and gave no reason for so doing. It was well-known, however, that Radin’s outspoken advocacy of the New Deal was anathema to Joe Knowland and the Republican hierarchy, who were already engaged in a red-baiting campaign, and Mr. Warren undoubtedly obliged.” *The New Republic*, Jun. 23, 1952, p. 11.

²⁰⁴ *Daily Report*, Jul. 23, 1940, p. 3.

²⁰⁵ *Id.*

²⁰⁶ *Oakland Tribune*, Aug. 13, 1940, p. 2; *Modesto Bee*, Aug. 13, 1940, p. 1.

Escola v. Coca-Cola Bottling Co. (1944) 24 Cal.2d 453—one of the Gibson Court’s famous decisions—began when a bottle of Coca-Cola exploded in the hand of a restaurant waitress. At trial, the plaintiff relied on the doctrine of *res ipsa loquitur*—the notion that an accident like the one involved in the case does not happen absent negligence. The majority said there was no evidence that anything had happened at the restaurant, which instead led to the inference that something went wrong at the factory. The majority concluded that the jury was therefore entitled to infer that either the glass in the damaged bottle was defective or the factory added an excessive charge of pressure.

Justice Traynor concurred. He argued, however, that *res ipsa loquitur* should not govern. Citing the classic case of *McPherson v. Buick* (1916) 111 N.E. 1050, he argued that “it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.”²⁰⁷ Justice Traynor saw clearly which way the balancing of the harms inclined: “The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”²⁰⁸

The following month, the Court decided *Fairchild v. Raines* (1944) 24 Cal.2d 818. In a majority opinion by Justice Rey Schauer, the Court held that a racially restrictive covenant was unenforceable because the racial composition of the surrounding neighborhood had changed, and that enforcement of the covenant would accordingly impose greater hardship on the defendants (a black couple) than a benefit to the plaintiffs. Concurring in the opinion, Justice Traynor took a broader view. He argued that the court should “consider whether enforcement would be contrary to the public interest in the use of land in urban communities where people are concentrated in limited areas.”²⁰⁹ Justice Traynor explained that racially restrictive covenants were contrary to the public interest in rapidly growing urban areas: “Race restriction agreements, undertaking to do what the state cannot, must yield to the public interest in the sound development of the whole community.”²¹⁰

²⁰⁷ *Escola, supra*, 24 Cal.2d at pp. 461–462.

²⁰⁸ *Id.* at p. 462. Five months after *Escola*, the Court decided *Ybarra v. Spangard* (1944) 25 Cal.2d 486. There, the plaintiff had awakened with severe pain in his shoulder following surgery. In an opinion by Chief Justice Gibson, the Court held that since the plaintiff’s body was in the exclusive control of the defendants when the injury happened, each defendant had the burden of refuting an inference of negligence if they could.

²⁰⁹ *Fairchild, supra*, 24 Cal.2d at p. 831.

²¹⁰ *Id.* at p. 834.

Four months after *Fairchild*, the Court struck another blow for racial equity and inclusion in *James v. Marinship Corp.* (1944) 25 Cal.2d 721. There, the defendant operated shipyards in Sausalito.²¹¹ The yards were closed shops. Indeed, the union had closed shop agreements with virtually every shipyard on the West Coast.²¹² But the union did not admit African American members.²¹³ Instead, the union consigned African American craftsmen to the “Negro Auxiliary.” The Negro Auxiliary had no vote in the union itself and no grievance committee, and was subject to dissolution by the union at any time.²¹⁴ The defendants argued that the plaintiffs’ racial discrimination claim was subject to the exclusive jurisdiction of the National Labor Relations Board, but Chief Justice Gibson’s unanimous majority opinion held that states were free to enjoin unlawful conduct that was not authorized by the National Labor Relations Act.²¹⁵ The Court also rejected the plaintiff’s claim that racial discrimination could only be barred by an affirmative law, as opposed to the common law of the nation and the state.²¹⁶ Instead, the Court held that once a union achieved a closed shop agreement, it became affected with a public interest.²¹⁷ Although the Court did not compel the union to admit African American members, it did hold that “the union may not maintain both a closed shop and an arbitrarily closed or partially closed union.”²¹⁸

In *Danskin v. San Diego Unified School District* (1946) 28 Cal.2d 536, members and officers of the San Diego Civil Liberties Committee, affiliated with the American Civil Liberties Union, filed an application to use a junior high school auditorium for a series of meetings on the general theme of the “Bill of Rights in Post-War America.”²¹⁹ But the school board conditioned the grant of the permit upon the applicants’ execution of what amounted to a loyalty oath. The petitioners refused to comply, and the board denied the application for a permit.²²⁰ However, the Civic Center Act²²¹ required that a permit be granted to any group that wished to discuss the “educational, economic, artistic, and moral interests of the citizens of the communities in which they reside.”²²²

²¹¹ *James, supra*, 25 Cal.2d at p. 725.

²¹² *Id.* at p. 727.

²¹³ *Id.* at p. 725.

²¹⁴ *Id.* at pp. 737, 739.

²¹⁵ *Id.* at pp. 735, 743.

²¹⁶ *Id.* at pp. 739–740.

²¹⁷ *Id.* at p. 740.

²¹⁸ *Id.* at p. 745.

²¹⁹ *Danskin, supra*, 28 Cal.2d at p. 538.

²²⁰ *Id.* at p. 539.

²²¹ Cal. Education Code § 19431 et seq.

²²² *Danskin, supra*, 28 Cal.2d at 540.

On the other hand, section 19432 of the Education Code required the loyalty oath.²²³ Granting the writ of mandate sought by the petitioners, the Court, in an opinion by Justice Traynor, commented, “Is it reasonable to suppose that meetings that would be harmless elsewhere would take on a sinister quality in a school building?”²²⁴

In a 1948 opinion by Justice Traynor, the Supreme Court decided a case that once again anticipated federal legal developments that took place decades later in *Perez v. Sharp* (1948) 32 Cal.2d 711. Since 1872, section 69 of the Civil Code had barred the issuance of licenses for a marriage between a white person and a “Negro, mulatto, Mongolian or other member of the Malay race.”²²⁵ The facts of the case were as follows: During the war years, Lockheed had an enormous plant on land that today encompasses the Burbank airport. Andrea Perez and Sylvester Davis were employees at the plant.²²⁶ When they were denied a marriage license, they filed a petition for writ of mandamus directly with the Supreme Court.²²⁷ At the time, federal law was governed by *Pace v. Alabama* (1883) 106 U.S. 583, which held that bans on interracial relations were not unconstitutional.²²⁸ Largely because of *Pace*, Daniel G. Marshall, the couple’s counsel, chose to ground their argument on freedom of religion. Both Perez and Davis were devout Catholics. Accordingly, they argued that since the Catholic Church did not ban interracial marriage, the state ban prevented them from practicing their religion.²²⁹ The couple’s supplemental brief, however, largely abandoned their freedom of religion argument, founding their claim squarely on the Equal Protection Clause.²³⁰

The California Supreme Court struck down the statute.²³¹ The Court held that the Equal Protection Clause applies to the rights of *individuals*, not entire *groups*.²³² Because of the fundamental nature of the right to marry, prohibiting the marriage of two persons must be based on observations about those persons, not generalizations about an entire race.²³³ Writing that racial restrictions must be viewed with great suspicion, the Court rejected the notion that there

²²³ *Id.*

²²⁴ *Id.* at p. 545.

²²⁵ *Perez, supra*, 32 Cal.2d at p. 712.

²²⁶ Caragozian, *Perez v. Sharp: A California Landmark Case that Overturned a Century-Old Ban on Interracial Marriage*, *Calif. Legal Hist.* (2022) vol. 17, pp. 242, 251–252.

²²⁷ *Id.* at p. 252.

²²⁸ *Id.* at p. 253.

²²⁹ *Id.* at p. 254.

²³⁰ *Id.* at p. 258.

²³¹ *Id.* at p. 250.

²³² *Perez*, 32 Cal.2d at pp. 716–717.

²³³ *Id.* at pp. 722–723.

is any racial correlation to intelligence.²³⁴ The Court similarly rejected the notion that social stigmas against the progeny of such a marriage justifies the ban, holding that such biases are society's problem, and in any event, such a rationale could just as easily justify a ban on mixed religious marriages.²³⁵ Justice Jesse Carter wrote a concurrence, charging that the statute at issue was the product of "ignorance, prejudice and intolerance."²³⁶ Justice Carter also observed that judicial error had prevented the reconstruction amendments to the federal Constitution from accomplishing their intended purpose.²³⁷ He ended his concurrence with a quotation about "race-crossing" from Hitler's *Mein Kampf*.²³⁸ Naturally enough, the decision was the subject of considerable comment in the press, both in California²³⁹ and elsewhere.²⁴⁰

One month after *Perez*, the Supreme Court handed down another landmark decision, this time from the pen of Justice Jesse Carter: *Summers v. Tice* (1948) 33 Cal.2d 80. In *Summers*, the plaintiff was struck by birdshot from a shotgun but was unable to identify which defendant fired it.²⁴¹ Analogizing the case to *Ybarra v. Spangard*,²⁴² Justice Carter wrote that both defendants were wrongdoers with respect to the plaintiff, so the burden of proof shifted to them to exonerate themselves if they could.²⁴³

In 1952, in *State Rubbish Collectors Association v. Siliznoff* (1952) 38 Cal.2d 330, the Court staked out another innovation in tort law governing the tort of intentional infliction of emotional distress. There, an association's rules provided that one member should not take a rubbish collecting contract from another member without paying for it.²⁴⁴ In this case, although a member had signed the contract, everyone understood that the work would be done by the member's son-in-law, whom he was trying to establish in the business.²⁴⁵ Although the plaintiff son-in-law ultimately agreed to pay for the contract pursuant to the Association's rules, the Association allegedly threatened him

²³⁴ *Id.* at pp. 719, 724.

²³⁵ *Id.* at p. 724.

²³⁶ *Id.* at p. 735 (Carter, J., concurring).

²³⁷ *Id.*

²³⁸ *Id.* at p. 739.

²³⁹ *Sacramento Bee*, Oct. 1, 1948, p. 1; *Peninsula Times-Tribune*, Oct. 1, 1948, p. 1.

²⁴⁰ *Courier-Journal*, Oct. 2, 1948, p. 10; *Chicago Tribune*, Oct. 2, 1948, p. 8. The *News Tribune* of Tacoma Washington followed their report on *Perez* by reporting that Washington state law did not forbid interracial marriages but noted that the state statute did permit county clerks to deny licenses where they doubted the sanity of the applicants, an "excuse [which] has been used in recent years by the Spokane county auditor." *New Tribune*, Oct. 2, 1948, p. 1.

²⁴¹ *Summers*, 33 Cal.2d at 82–83.

²⁴² *Ybarra v. Spangard* (1944) 25 Cal.2d 486.

²⁴³ *Summers*, at pp. 86–87.

²⁴⁴ *State Rubbish Collectors*, 38 Cal.2d at 334.

²⁴⁵ *Id.* at pp. 333–334.

with violence. The plaintiff alleged that he had suffered extreme fright from the defendants' threats, which the defendants did not deny making.²⁴⁶ In an opinion by Justice Traynor, the Court unanimously affirmed judgment for the plaintiff, recognizing the tort of intentional infliction of emotional distress without a showing of physical injury.

In 1955, the Court established another landmark, this time in criminal law, with Justice Traynor's opinion in *People v. Cahan* (1955) 44 Cal.2d 434. There, the defendants were convicted of conspiring to engage in horse-race bookmaking. Police officers admitted at trial to warrantless searches of the defendants' house, including numerous forcible entries and the installation of listening devices in multiple locations, all without a warrant. The Court noted scornfully:

Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the city employs and pays them.²⁴⁷

As a result and despite the fact that the United States Supreme Court had not yet applied the exclusionary rule to the states, the California Supreme Court held that the exclusionary rule applied in California.²⁴⁸

Six years later, Justice Traynor wrote *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211. There, a patient fell and further injured a hip that was being treated.²⁴⁹ The patient sued the hospital, which defended the suit on the grounds that it was a state agency and thus immune from tort liability.²⁵⁰ The Court abolished the rule of governmental tort immunity, calling it an anachronism without a rational basis, which had existed only through the force of inertia.²⁵¹

In 1962, two new justices began their terms on the Gibson Court. The first was Mathew Tobriner, a San Francisco labor law attorney, who was nominated to replace Maurice Dooling Jr. Tobriner had been appearing in the

²⁴⁶ *Id.* at pp. 335–336.

²⁴⁷ *Cahan*, 44 Cal.2d at pp. 437–438.

²⁴⁸ *Id.* at pp. 442–443. The United States Supreme Court held that the exclusionary rule applied across the country in *Mapp v. Ohio* (1961) 367 U.S. 643.

²⁴⁹ *Muskopf*, 55 Cal.2d at p. 213.

²⁵⁰ *Id.*

²⁵¹ *Id.* at p. 216.

newspapers for many years. In 1914, an article in the *Oakland Tribune* reported that “Mathew Tobriner, 9-year-old son of Dr. and Mrs. Oscar Tobriner of San Francisco, is one of the youngest German students in California. He speaks and reads the German language and he enjoys the old German stories.” The article featured a photo of the young Tobriner.²⁵² Seven years later, the *Examiner* reported that Tobriner had assembled a book based on his impressions of the Great Exhibit of Nations.²⁵³ In 1922, Tobriner joined a team from Stanford to debate a team from the University of Southern California on a proposed water and power amendment.²⁵⁴ Seven years later, Tobriner was elected to the first board of directors of the Young Lawyers group of the Bar Association of San Francisco.²⁵⁵ In 1930, Tobriner published an article called “Equal Protection of the Law” in *The New Republic*.²⁵⁶

The other new justice was Paul Peek, who was appointed to the Court five months after Tobriner, succeeding Thomas P. White. Peek was a unique candidate for the bench, having served in the legislative branch as Speaker of the Assembly and in the executive branch as Secretary of State before joining the judiciary.²⁵⁷

In 1963, Justice Traynor finally achieved the goal that he set nineteen years before in *Escola. Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, involved a wood lathe. An accident occurred when a piece flew out of the machine and struck the user in the head, fracturing his skull. The plaintiff sued for breach of warranty and negligence, but the unanimous court held that it was not necessary to establish a cause of action for breach of express warranty: “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”²⁵⁸

Reflecting Justice Traynor’s influence, only one year later, relying upon *Greenman* and *Hemmingsen v. Bloomfield Motors* (N.J. 1960) 161 A.2d 69, the American Law Institute modified its Restatement of Torts to adopt strict liability in tort.²⁵⁹

²⁵² *Oakland Tribune*, Oct. 22, 1914, p. 10.

²⁵³ *San Francisco Examiner*, Nov. 27, 1915, p. 3.

²⁵⁴ *Fresno Morning Republican*, Nov. 5, 1922, p. 35.

²⁵⁵ *The Recorder*, May 16, 1929, p. 1.

²⁵⁶ *The New Republic*, Oct. 15, 1930, p. 12.

²⁵⁷ California Reports 3d, vol. 43, pp. 1421–1422.

²⁵⁸ *Greenman*, 59 Cal.2d at 62.

²⁵⁹ McClain, *The Gibson Era, 1940–1964*, in *Constitutional Governance and Judicial Power: The History of the California Supreme Court* (Scheiber, edit., 2017) p. 301.

Six months after *Greenman*, the Court handed down yet another landmark opinion in *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876. There, the complaint alleged that the defendant school board had deliberately gerrymandered a school district so that students from a particular elementary school would be assigned to a majority white school rather than a majority black one.²⁶⁰ In a majority opinion by Chief Justice Gibson, the Court held: “This was done for the purpose of instituting, maintaining and intensifying racial segregation . . . permitting most white pupils to avoid attendance at schools where substantial numbers of Negroes are enrolled.”²⁶¹ Reversing the judgment sustaining a demurrer, the Chief Justice stated: “The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.”²⁶²

CHIEF JUSTICE GIBSON’S ADMINISTRATIVE REFORMS

In short order after taking the center seat as California’s twenty-second Chief Justice, Phil Gibson also proved himself to be a superb administrator.

In 1934, Congress had given the power to make appellate rules to the United States Supreme Court. In the years that followed, several state legislatures gave similar authority to their state supreme courts. Accordingly, not long after taking office, Chief Justice Gibson urged the State Legislature to give the Judicial Council the authority to create rules of appellate procedure. In 1941, the Legislature complied, making an appropriation of funds necessary to hire experts and support staff to work with the judges of the Judicial Council in accomplishing this task. Bernard Witkin, then a member of the Supreme Court staff, was put in charge of the project. The new rules were approved by the Legislature and went into effect on July 1, 1943.²⁶³

Late in the 1940s, Chief Justice Gibson then turned his attention to the immense task of reforming the byzantine California court system. The California court system today is straightforward: the Supreme Court, the Court of Appeal, and the Superior Courts covering each county. But at this point in state history, it was a different world. Charles McClain sets the scene:

There were at the time 768 inferior courts scattered over the state, falling into seven different categories. There were two different types of municipal court, one constitutionally based, the other not; township justices’ courts,

²⁶⁰ *Jackson*, 59 Cal.2d at pp. 878–879.

²⁶¹ *Id.* at p. 879.

²⁶² *Id.* at p. 881.

²⁶³ McClain, *The Gibson Era, 1940–1964*, *supra*, at p. 250.

again of two types; two different kinds of city courts; and finally tribunals known as police courts . . . It was, as Gibson put it bluntly in 1949, “a damn stupid arrangement.”²⁶⁴

Several different entities, including the State Bar, had offered reform proposals in the late 1940s, but finally, the Legislature asked the Judicial Council to take on the job. The Council studied the problem in detail and began immediately to build political support for a solution. The resulting plan provided for only two types of inferior courts: municipal courts, serving districts with populations above 40,000, and justice courts, serving smaller districts. The plan was approved by the Legislature, the necessary constitutional amendment was endorsed by the voters, and the new plan went into effect in 1952.²⁶⁵

Gibson also instituted a pre-oral argument conference system at the Court, having previously commented in an oral history interview that a shocking number of justices went into oral argument with no idea what was in the briefs.²⁶⁶ Once the new system was in place, the Chief believed that the old-fashioned vision of an oral argument turning a case around was quickly becoming a rarity: “Sometimes the oral arguments would have changed our views, some of us, at least. I don’t think it did that very often.”²⁶⁷ Like many appellate judges to this day, Chief Justice Gibson was a proponent of appellate specialists in the bar: “It takes real talent and effort to do a good job of handling an appeal.”²⁶⁸

THE GIBSON COURT’S GREAT DISSENTER

Justice Jesse W. Carter was one of the memorable personalities who sat on the Supreme Court during this era. During his private law practice, Carter had won approximately thirty personal injury cases against the Southern Pacific Railroad Company.²⁶⁹ Just a few years before he was nominated to the Court, the railroad company settled all its pending cases involving Carter and hired him as its lawyer.²⁷⁰

If one counts dissents from the denials of rehearing, Justice Carter filed 510 dissents during his twenty-year tenure on the California Supreme Court.²⁷¹ Although Justice Carter was criticized at times for the acerbic tone of many of

²⁶⁴ *Id.* at p. 284.

²⁶⁵ *Id.* at pp. 284–285.

²⁶⁶ Gibson, *Conversation with Edward L. Lascher*, Cal. Legal Hist. (2010) vol. 5, p. 44.

²⁶⁷ *Id.* at p. 45.

²⁶⁸ *Id.* at p. 43.

²⁶⁹ Johnson, *supra*, vol. 2, p. 161.

²⁷⁰ *Id.*

²⁷¹ *Oral History, Justice Jesse W. Carter*, Cal. Legal Hist. (2009) vol. 4, p. 181.

his dissents, like many “Great Dissenters” throughout American legal history, Justice Carter lived to see many of his dissents become black-letter law. Two years before his death, Justice Carter personally compiled a list of cases in which the United States Supreme Court had agreed with his dissent and reversed the California Supreme Court:²⁷²

1. *Gospel Army v. City of Los Angeles* (1947) 331 U.S. 543, reversing *Gospel Army v. City of Los Angeles* (1945) 27 Cal.2d 232;
2. *Takahashi v. Fish and Game Commission* (1948) 334 U.S. 410, reversing *Takahashi v. Fish and Game Commission* (1947) 30 Cal.2d 719;
3. *Rochin v. California* (1952) 342 U.S. 165, reversing *People v. Rochin* (1950) 101 Cal.App.2d 140;
4. *Anderson v. Atchison, Topeka & S.F. Ry. Co.* (1948) 333 U.S. 821, reversing *Anderson v. Atchison, Topeka & S.F. Ry. Co.* (1947) 31 Cal.2d 117;
5. *Garmon v. Building Trades Council of San Diego* (1957) 353 U.S. 26, reversing *Garmon v. San Diego Building Trades Council* (1955) 45 Cal.2d 657;
6. *California v. Taylor* (1957) 353 U.S. 553, reversing *State of California v. Brotherhood of Railroad Trainmen* (1951) 37 Cal.2d 412;
7. *Konigsberg v. State Bar of California* (1957) 353 U.S. 252, reversing the unreported order of the California Supreme Court;
8. *Chessman v. Teets* (1957) 354 U.S. 156, reversing *People v. Chessman* (1950) 35 Cal.2d 455; *People v. Chessman* (1951) 38 Cal.2d 166; *In re Chessman* (1954) 43 Cal.2d 391; and *In re Chessman* (1954) 43 Cal.2d 408.

Justice Jesse Carter continued to serve on the Supreme Court until his death on March 15, 1959.

THE TRAYNOR COURT BEGINS

The late summer of 1964 saw the retirement of one major figure in the Court’s history and the elevation of two others.

On August 10, 1964, Chief Justice Phil Gibson announced his retirement after twenty-five years’ service as an associate justice and Chief Justice. Governor Edmund G. “Pat” Brown said in a statement: “With Chief Justice Gibson’s retirement, American law loses one of its giants. His wisdom and learning in the law are matched by his compassion for human beings and his fierce dedication to justice . . . his efforts in behalf of better administration of justice through procedural reforms have been unmatched anywhere in the United States.”²⁷³

²⁷² *Id.* at pp. 332–333.

²⁷³ *Sacramento Union*, Aug. 11, 1964, p. 3.

A few days later, Governor Brown announced the elevation of Associate Justice Roger Traynor to Chief Justice. The *Sacramento Legal Press* was enthusiastic:²⁷⁴

Traynor's court opinions have been printed in law textbooks which are used in many law schools of the country. Articles by Traynor on federal and state tax law and analyses of taxation problems have appeared in many professional tax and accounting magazines and in many university law reviews.

Former Chief Justice Walter V. Schaefer of the Supreme Court of Illinois said Traynor "has been for many years the nation's number one state court judge." A professor of law at Duke University once said that Traynor "carries on the great American judicial tradition of sensitivity, humaneness and reason."

The same day, Governor Brown announced the nomination of Attorney General Stanley Mosk to take Traynor's seat as Associate Justice. Mosk was first elected to the Los Angeles Superior Court in 1942, remaining there for sixteen years. In 1947, he made national news when he invalidated a racially restrictive covenant on constitutional grounds in *Wright v. Drye* one year before the United States Supreme Court followed suit in *Shelley v. Kraemer*.²⁷⁵ In 1958, Mosk left the court to run for state Attorney General.

Meanwhile, the new Rumford Act, which banned racial discrimination in the renting of apartment buildings of five units or more and private dwellings financed with loans funded or insured by the government, had generated a firestorm of criticism from right-wing elements around the state. Proponents quickly gathered sufficient signatures to place Proposition 14 on the ballot as a constitutional amendment. It provided:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

The ballot pamphlet argument in favor of the proposal said:²⁷⁶

Your "Yes" vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their

²⁷⁴ *Sacramento Legal Press*, Aug. 18, 1964, p. 6.

²⁷⁵ *Congressional Record* (2001) vol. 147, pp. 13025-13026.

²⁷⁶ Voter Information Guide for 1964, General Election (1964). https://repository.uclawsf.edu/ca_ballot_props/676

property as they wish, without interference by State or local government . . . The Rumford Act establishes a new principle in our law—that State appointed bureaucrats may force you, over your objections, to deal concerning your property with the person they choose. This amounts to seizure of private property.

The argument against the proposal—which was cosigned by Attorney General Stanley Mosk—said:²⁷⁷

Proposition 14 would write hate and bigotry into the Constitution . . . Proposition 14 is a deception . . . Proposition 14 says one thing but means another . . . Proposition 14 is not legally sound . . . Proposition 14 is misleading . . . Proposition 14 is a threat . . . Proposition 14 is immoral. It would legalize and incite bigotry. At a time when our nation is moving ahead on civil rights, it proposes to turn California into another Mississippi or Alabama and to create an atmosphere for violence and hate.

Proposition 14 passed with 65.39 percent of the vote.²⁷⁸ It failed in only one of California’s fifty-eight counties.

By a 5-2 vote, in *Mulkey v. Reitman* (1966) 64 Cal.2d 529, the California Supreme Court held that Proposition 14 violated the Equal Protection Clause:²⁷⁹

We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of discrimination itself.

The United States Supreme Court affirmed the Supreme Court in *Mulkey v. Reitman* (1967) 387 U.S. 369. Justice Paul Peek, the author of *Mulkey*, resigned seven months after the decision was filed on health grounds.²⁸⁰

Justice Peek was succeeded by Justice Raymond L. Sullivan, the Presiding

²⁷⁷ *Id.*

²⁷⁸ https://repository.uclawsf.edu/ca_ballot_props/672/

²⁷⁹ *Mulkey, supra*, 64 Cal.2d at 542; *Santa Cruz Sentinel*, May 10, 1966, p. 1.

²⁸⁰ *Ukiah Daily Journal*, Dec. 8, 1966, p. 8.

Justice of the First District Court of Appeal.²⁸¹ From Justice Sullivan we learn that the Court’s attitude toward *amicus curiae* briefs was much the same fifty years ago as it is today: “The chief justice would usually ask the associate justice . . . as to whether he wanted an *amicus* brief. The principle, I think, that all the members of the court operated on was: the more help, the better. And so invariably we authorized the filing of an *amicus* brief.”²⁸²

The California Supreme Court continued to hand down important decisions even as the Traynor era drew toward its close. *Dillon v. Legg* (1968) 68 Cal.2d 728 was a claim for emotional distress by a mother who witnessed injury to her child. The prevailing rule at the time was that a plaintiff was barred from recovery unless she or he was in the “zone of danger” and feared for his or her own safety.²⁸³ Justice Tobriner rejected the “zone of danger” constraint and allowed recovery as long as the plaintiff was near the scene of the accident, observed the accident, and had a close relationship with the victim. Chief Justice Traynor dissented.²⁸⁴

Rowland v. Christian (1968) 69 Cal.2d 108 was another landmark case in tort law. The defendant’s landlord entered the apartment to fix the faucets and was injured due to the negligence of the resident.²⁸⁵ The Court abolished the traditional common law distinctions in the scope of duty to a visitor to the property, holding that the ordinary rules of negligence applied.²⁸⁶

In the first weeks of 1970, the Court lost another giant of California law when Chief Justice Roger Traynor announced his retirement. Tributes poured in from all quarters. Upon his retirement, the *Independent Press-Telegram* wrote: “Roger Traynor, without question the most respected state judge in this nation, leaves behind him a body of work so sweeping and so grand and so solid of stature that it will command attention for generations.”²⁸⁷ Associate Justice Mathew Tobriner wrote a tribute to the retiring Chief Justice in a special issue of the *Harvard Law Review* dedicated to Traynor. In that article, Justice Tobriner included a list of “Some of the Chief’s outstanding opinions.” Omitting only the opinions that are discussed elsewhere in this history, Justice Tobriner’s list

²⁸¹ *Oakland Tribune*, Dec. 8, 1966, p. 1.

²⁸² Bakken, *Interview of Justice Raymond L. Sullivan* (1995) 2 Cal. Sup. C. Hist. Soc’y Yearbook, pp. 161, 182.

²⁸³ *Dillon*, 68 Cal.2d at p. 734.

²⁸⁴ *Id.* at p. 748.

²⁸⁵ *Rowland*, 69 Cal.2d at p. 110.

²⁸⁶ *Id.* at pp. 116–117.

²⁸⁷ *Independent Press Telegram*, Feb. 1, 1970, p. 16.

is set forth in the margin.²⁸⁸

In a special issue of the *California Law Review* dedicated to Chief Justice Traynor upon his passing thirteen years later, Judge Henry Friendly stated: “For the thirty years of his service on the Supreme Court of California, from 1940 to 1970, Roger Traynor was the ablest judge of his generation in the United States.”²⁸⁹ Former Governor Pat Brown likewise observed: “The Supreme Court of the State of California has always been a great court, but I do believe the court under the leadership of Roger Traynor was the best judicial body in the United States. This was not only my view, but the view of most legal scholars in our country.”²⁹⁰ According to Warren Burger, then-Chief Justice of the United States, “In all of his roles as a judge, scholar and administrator Roger Traynor will be remembered as one of the great contemporary figures of the law.”²⁹¹ Professor Adrian Kragen wrote that Traynor “was a giant in the law and was recognized as such not only throughout the United States legal community but all over the western legal world.”²⁹²

THE WRIGHT COURT

In April 1970, Governor Ronald Reagan announced his nominee as Traynor’s successor: Justice Donald R. Wright of the Second District Court of Appeal.²⁹³ As Chief Justice, Donald Wright placed tremendous emphasis on unanimity in the Court’s decisions. Admirably, Chief Justice Wright spent considerable time trying to mediate differences among the justices, hoping to “manufacture” 6-1 or 7-0 decisions. “It takes someone willing to be an errand boy on occasion,” he lamented, referring to his frequent trips from one Justice’s chambers to another, discussing differences among the associate justices.²⁹⁴

In 1970, the California Legislature passed a new section 1009.5 to the Education Code, barring school districts from requiring busing of school children for any purpose “without the written permission of the parent or

²⁸⁸ Associate Justice Mathew O. Tobriner, *Chief Justice Roger Traynor* (Jun. 1970) 83 Harv. L.R., no. 8, 1769. Justice Tobriner’s string cite appears at page 1770: *Malloy v. Fong* (1951) 37 Cal.2d 356 [abolition of charitable tort immunity]; *McCarroll v. Los Angeles County Dist. Council of Carpenters* (1957) 49 Cal.2d 45 [definition of jurisdiction of state and federal courts under National Labor Management Relations Act]; *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536 [major clarification of California law of libel]; *Reich v. Purcell* (1967) 67 Cal.2d 551 [adoption of governmental interest approach in determining applicable law in tort conflicts of law case]; *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93 [enforcement of fiduciary duty of majority shareholders to minority shareholders].

²⁸⁹ Friendly, *Ablest Judge of His Generation* (July 1983), 71 Calif. L.R., no. 4, 1039. Judge Friendly notes in a footnote to his tribute that he inserted the words “of his generation” only to avoid comparisons to Judge Learned Hand, who served until 1961.

²⁹⁰ Brown, *A Judicial Giant*, (July 1983), 71 Calif. L.Rev., no. 4, 1054.

²⁹¹ Burger, *A Tribute*, (July 1983), 71 Calif. L.Rev., no. 4, 1038.

²⁹² Kragen, *A Legacy of Accomplishment* (July 1983), 71 Calif. L.R., no. 4, 1055.

²⁹³ *Press Democrat*, Apr. 6, 1970, p. 1.

²⁹⁴ *Oral History of Chief Justice Donald R. Wright*, Cal. Legal Hist. (2014) vol. 9, p. 48.

guardian.” The Court adjudicated a constitutional challenge to that statute in *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, in an opinion by Justice Tobriner. The Court explained that the statute was capable of two interpretations: first, that school districts were merely barred from requiring students to use buses provided by the district to travel to a school beyond walking distance; or second, that school districts were barred from assigning students to a school beyond walking distance at all.²⁹⁵ If the second alternative was the correct construction, the Court held that the statute was unconstitutional on its face because it imported a private parental decision into the educational system, transforming it into state action and violating the Fourteenth Amendment in a way analogous to Proposition 14 in *Mulkey v. Reitman*.²⁹⁶ The Court endorsed the view that “[t]he Constitution is both color blind and color conscious.” The Constitution must be color blind when a classification denies a benefit, causes harm, or imposes a burden. “But the Constitution is color conscious to prevent discrimination being perpetrated and to undo the effects of past discrimination.”²⁹⁷ It would be “ironic indeed,” Justice Tobriner wrote, “if the Fourteenth Amendment, adopted to secure equality of citizenship for the Negro, prevented school boards from providing equality of education for the Negro.”²⁹⁸

The Wright Court handed down another monumental decision on equality of educational opportunity later that year in *Serrano v. Priest* (1971) 5 Cal.3d 584. At the time, California public schools were financed for the most part through property taxes collected within the particular school district’s boundaries. But of course, the value of the property located within a particular district varied widely. For that reason, the Court wrote, the assessed valuation per unit of average daily attendance of elementary school children across the state varied from a low of \$103 to a high of \$952,156.²⁹⁹ The Court held that the financing system invidiously discriminated because—unless a poorer district was willing to tax itself at a far higher rate than a richer one—the quality of a child’s education (a fundamental interest) would depend on the wealth of his or her parents and neighbors.³⁰⁰

The Court’s decision set off an even bigger firestorm of public criticism one year later when it decided *People v. Anderson* (1972) 6 Cal.3d 628. There, in an opinion by Chief Justice Wright, the Court held that the California death penalty statute violated the California Constitution. The Court began by

²⁹⁵ *San Francisco Unified School Dist.*, 3 Cal.3d at 945–946.

²⁹⁶ *Id.* at pp. 948, 953.

²⁹⁷ *Id.* at p. 951.

²⁹⁸ *Id.* at p. 950.

²⁹⁹ *Serrano*, at p. 592.

³⁰⁰ *Id.* at pp. 614–615.

emphasizing a key distinction between the federal Constitution, which bars “cruel *and* unusual” punishments and the California Constitution, which bars punishments that are “cruel *or* unusual.” Reviewing the debates from both of California’s constitutional conventions, the Court concluded that the use of the disjunctive “or” was deliberate. The Court also noted that the majority of the state constitutions to which the delegates had access barred “cruel or unusual” punishments.³⁰¹ The Court endorsed the proposition that determining when a punishment was “cruel” depended on “evolving standards of decency that mark the progress of a maturing society.”³⁰² The Court concluded that both the punishment of death itself and the lengthy imprisonment inevitably imposed prior to its imposition are cruel: “The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment.”³⁰³ The state attempted to defend the death penalty on grounds of achieving retribution and deterrence, but the Court disagreed: “[I]t is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance.”³⁰⁴ Governor Reagan professed himself “deeply disappointed” at the decision, claiming that the Court had “put itself above the people—above the legislature.”³⁰⁵ *Anderson* was overturned one year later when the voters adopted a constitutional amendment declaring the death penalty permissible.³⁰⁶

By 1975, Governor Reagan had chipped away at the composition of the Traynor court, nominating Justices Frank Richardson³⁰⁷ and William Clark in the hopes of moving the Court toward a more conservative direction. Nevertheless, the Court handed down yet another landmark decision in *Li v. Yellow Cab Company* (1975) 13 Cal.3d 804. There, the Court abolished the traditional common law rule that when a plaintiff was at fault to any degree in an accident, all recovery from the defendant was barred. Calling its ruling preferable in “logic, practical experience, and fundamental justice,” the Court adopted a system of “pure” comparative negligence, pursuant to which liability would be determined by the percentage of fault assigned to each party by the jury.³⁰⁸

³⁰¹ *Anderson*, 6 Cal.3d at pp. 634–636.

³⁰² *Id.* at p. 648.

³⁰³ *Id.* at p. 650.

³⁰⁴ *Id.* at p. 651.

³⁰⁵ *Sacramento Bee*, Feb. 18, 1972, p. 1.

³⁰⁶ Scheiber, *The Liberal Court: Ascendancy and Crisis*, in *Constitutional Governance and Judicial Power: The History of the California Supreme Court* (Scheiber, edit., 2017) p. 401.

³⁰⁷ Justice Richardson’s nomination garnered unusual press attention a few months after he took his seat, when United Press International reported that Chief Justice Wright had broken his promise to Governor Reagan to retire in 1974 so that Richardson could be appointed Chief Justice. Chief Justice Wright denied that any such promise had been made. *San Francisco Examiner*, Feb. 28, 1975, p. 8.

³⁰⁸ *Li, supra*, 13 Cal.3d at 808.

The Court turned to criminal law in *Disbrow v. Superior Court* (1976) 16 Cal.3d 101. There, the police had obtained a confession from the defendant by falsely telling him that it could not be used against him. At the time, federal law held that statements obtained in violation of *Miranda* could be introduced at trial for purposes of casting doubt on his veracity if the defendant testified. Nonetheless, in an opinion by Justice Mosk founded upon the state Constitution, the Court held that the opposite rule would apply in California:³⁰⁹

To instruct a jury that they are not to consider expressions of complicity in the charged crime as evidence that the speaker in fact committed the charged crime, but only for the purpose of demonstrating that he was probably lying when he denied committing the charged crime, would be to require, in the words of Learned Hand, “a mental gymnastic which is beyond, not only [the jury’s] power, but anybody else’s.”

The long-running debate over school desegregation—particularly in the giant Los Angeles School District—returned to the Court in *Crawford v. Los Angeles Unified School District* (1976) 17 Cal.3d 280. There, the trial court had found that the Los Angeles schools were becoming increasingly segregated, and that the school board had taken affirmative steps that tended to perpetuate that segregation. The school board argued that the segregation in Los Angeles was “de facto” rather than “de jure,” and that the board had no responsibility to alleviate “de facto” segregation. In a unanimous opinion by Justice Tobriner, the Court held that the Board had a responsibility to act regardless of the cause of segregation.³¹⁰

That same year, the Court decided another important case in *Tarasoff v. Regents of University* (1976) 17 Cal.3d 425. There, a man told his psychiatrist of his intention to kill the plaintiffs’ daughter, which he subsequently did.³¹¹ The Court concluded that although most people did not owe a duty to warn anyone of potential harm from a third person, the common law had carved out an exception to that rule when the defendant and either the victim or the perpetrator were in a “special relationship.” The Court held that psychiatrist–patient satisfied that “special relationship” requirement, and therefore the plaintiffs had stated a cause of action against the defendant therapists.³¹²

The Court reviewed another important case regarding racial diversity in 1976, deciding *Bakke v. Regents of the University of California* (1976) 18 Cal.3d 34. There, the U.C. Davis Medical School had set up a special admissions

³⁰⁹ *Disbrow*, 16 Cal.3d at 112.

³¹⁰ *Crawford*, 17 Cal.3d at 285.

³¹¹ *Tarasoff*, 17 Cal.3d at 430.

³¹² *Id.* at p. 435.

committee charged with filling 16 of 100 places in incoming classes with minority candidates. The plaintiff, a white applicant who was twice denied admission, alleged an equal protection violation. In an opinion by Justice Mosk, the Court wrote that a racial quota “becomes no less offensive when it serves to exclude a racial majority.”³¹³ Justice Tobriner filed a solo dissent, arguing that “our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term.”³¹⁴

Later that year, the *Serrano* case returned to the Court. *Serrano* was back partially because a United States Supreme Court decision after *Serrano I*—*San Antonio School Dist. v. Rodriguez* (1973) 411 U.S. 1—had apparently knocked much of the doctrinal support from under *Serrano I*, holding that the wealth of school districts was not a suspect classification, and that access to education was not a fundamental interest.

Serrano v. Priest (1976) 18 Cal.3d 728 arose from a sixty-day trial following the Court’s initial reversal five years earlier. The trial court had concluded that the amendments to the Education Code made by the Legislature after *Serrano I* had not remedied the unconstitutionality of the system, at least under the state Constitution, and the Court agreed. Noting the U.S. Supreme Court’s invocation of “local control” in *San Antonio*,³¹⁵ the California Supreme Court found that local control was a “cruel illusion” as long as the tax base of different districts varied so widely. “The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.”³¹⁶

As the Wright Court era came to a close, Chief Justice Wright wrote one of his final majority opinions in *Ray v. Alad Corporation* (1977) 19 Cal.3d 22. There, the plaintiff had been injured by a defective ladder. The plaintiff’s problem, however, was that the ladder was not manufactured by the defendant. Instead, the manufacturer had sold its plant, equipment, inventory, trade name, and good will to the defendant after the ladder was bought, and the manufacturer had ceased to exist.³¹⁷ However, after the deal, the “new” company (Alad) continued to manufacture the same ladders, using the same equipment, designs, and personnel.³¹⁸ Under the circumstances, the Court unanimously

³¹³ *Bakke*, at p. 62.

³¹⁴ *Id.* at p. 73 (Tobriner, J., dissenting).

³¹⁵ *San Antonio School Dist.*, *supra*, 411 U.S. 1.

³¹⁶ *Serrano*, at p. 761.

³¹⁷ *Ray*, at p. 24–25.

³¹⁸ *Id.* at p. 25.

concluded that public policy did not allow the defendant to avoid liability by the shuffling of ownership.³¹⁹

In terms of the Court's management of its workload, by the mid-1970s, the Wright Court's methods of handling its workload resembled, at least in general terms, the Court's procedures today. According to a law review article by two externs at the Court, once the justices agreed in conference as to which cases would be granted review, the Chief Justice assigned responsibility for preparing a "calendar memorandum" to one of the justices who had voted to grant review. That calendar memorandum "briefs the court on the facts and issues involved and sets forth tentative conclusions on the disposition of the case"³²⁰—which in general terms is the Court's procedures today.

THE BIRD COURT TAKES CENTER STAGE

On February 12, 1977, Governor Jerry Brown announced his nomination to succeed Chief Justice Wright—the Secretary of the Agriculture and Services Agency, Rose E. Bird.³²¹ The nomination was almost immediately met with shock. In an editorial, the *Peninsula Times Tribune* called the Bird choice "a daring move."³²² Secretary Bird was only the second woman nominated for a state Chief Justice position.³²³ Moreover, it was widely reported in the weeks following the Bird nomination that retiring Chief Justice Wright and Justice Tobriner had expected Justice Mosk to be the nominee, and that Mosk himself had wanted the nomination.³²⁴ Justice Tobriner purportedly told an author that Justice Mosk complained "bitterly" to him about his having voted to approve the nomination on the Commission on Judicial Qualifications. "[H]e told me that I should have voted against her, that I should have known that she was not suited for this position."³²⁵

The new Bird Court made its first contribution to tort law in *Barker v. Lull Engineering* (1978) 20 Cal.3d 413. *Barker* involved a plaintiff who was injured at a construction site while operating a high-lift loader. In previous cases, tort law

³¹⁹ *Id.* at p. 34.

³²⁰ Scheiber, *The Liberal Court*, *supra* at p. 352; William Goodman and Thom Seaton, *Ripe for Decision: Internal Workings and Current Concerns of the California Supreme Court* (1974) 62 Calif. L.Rev. 309, 315. In the Oral History of his tenure, Chief Justice Wright commented that cases were not typically scheduled for oral argument "until you've written the opinion almost in its final form." *Oral History of Donald R. Wright*, *supra*, at p. 84. We will address later in this history a few recent justices' views as to how often the disposition of a case changes from the calendar memorandum following oral argument.

³²¹ *The Times-Herald*, Feb. 13, 1977, p. 1.

³²² *Peninsula Times Tribune*, Feb. 15, 1977, p. 12.

³²³ *Albuquerque Journal*, Feb. 13, 1977, p. 56.

³²⁴ Braйтман and Uelman, Justice Stanley Mosk: A Life at the Center of California Politics and Justice (2012) pp. 184–186; Medsger, Framed: The New Right Attack on Chief Justice Rose Bird and the Courts (1983) at 160–161.

³²⁵ Medsger, Framed, at p. 161.

had been based on a showing that a product was “defective.” In a unanimous opinion by Justice Tobriner, the court reversed the judgment based on a jury verdict for defendants, holding that a products liability claim could be based *either* on a showing of defective manufacture *or* on a showing of “defective design.”³²⁶ However, the Court acknowledged that arriving at a satisfactory definition of design defect “has proven a formidable task,”³²⁷ and indeed, many further cases on that issue were yet to come.

In 1978, the Court handed down an important decision for racial equity in jury selection. Both defendants in *People v. Wheeler* (1978) 22 Cal.3d 258 were African American. The victim was white. After the prosecutor struck several African Americans from the prospective jury, the defense attorney began requiring each prospective juror to state his or her race on the record. The defense ultimately moved for a mistrial on the ground that the prosecutor was deliberately excluding all African American prospective jurors. The prosecutor refused to explain his conduct, and the motion was denied. After the prosecutor struck several more African Americans, the defense moved again for a mistrial. Once again, the prosecutor refused to explain, and once again, the motion was denied. The Supreme Court ruled that although a defendant must establish a “strong likelihood” that the strikes were made because of race, the trial court had committed reversible error by failing to require the prosecutor to explain.

Chief Justice Bird faced her first retention election in November 1978. On election day, the *Los Angeles Times* ran a story claiming that the Court had decided to invalidate a 1975 law that required a prison term for those who used a gun during a violent crime, but that release of the decision was being delayed until after the election in order to aid the Chief Justice’s chances in retaining her position.³²⁸ The *Times* cited “well-placed court sources,” and—after Justice Tobriner flatly refused to offer any comment at all—“two other Justices” as the sources for its story.³²⁹

Subsequent investigations have cast considerable doubt over whether the *Times* had anything at all that could fairly be called a “source” for the story, and certainly, brief telephone calls to any appellate specialists familiar with the

³²⁶ *Barker*, at p. 417–418.

³²⁷ *Id.* at p. 418.

³²⁸ The case the *Times* was referring to is *People v. Tanner* (1979) 24 Cal.3d 514. The irony of this story, for which Justice Clark was supposedly one of the two sources, is that at least one book on the Bird controversy says that Justice Clark had “some” opinions in his chambers for more than a year, and “a few” for more than two years. (Medsger, *Framed*, *supra*, at p. 49), but that possibility did not address the timing of the delay in issuing this particular opinion.

³²⁹ *Los Angeles Times*, Nov. 7, 1978, p. 8.

Court's procedures would have made that abundantly clear.³³⁰ Nevertheless, on November 24, 1978, Chief Justice Bird wrote a letter to Judge Bertram Janes, the Chair of the Commission on Judicial Performance, noting the controversy over the handling of the case and requesting an investigation.³³¹ Justice Frank Newman reported that Chief Justice Bird had sent the letter without asking any of the other justices for their opinions.³³² In any event, Chief Justice Bird was confirmed by a vote of 52 percent to 48 percent.

The Commission's hearings over the Chief Justice's handling of the case began on June 11, 1979. Ultimately, the Commission established very little, notwithstanding the public testimony of several justices, owing to Justice Mosk's successful lawsuit arguing that public hearings were unlawful. Nevertheless, the justices' public testimony revealed enough political motivations and petty backbiting that Professor P. J. Riga argued that:

Some of the Justices of the State Supreme Court seem to have played politics with the juridical office. From here on in, it will be difficult (if not impossible) for people to have any deep trust or confidence in this court and when this happens—no matter what the individual responsibility of the Justices—the effectiveness of the court is at an end. What is called for is as drastic as the disease of moral suspicion from which the court suffers: resignation en masse of all seven Justices with the re-appointment of others to take their place.³³³

Ultimately, the Supreme Court overturned the mandatory prison-term statute three days before Christmas 1978. However, the Supreme Court granted rehearing and—with Justice Mosk switching sides without explanation—reversed its original decision in June 1979.³³⁴

Amid this public relations fiasco, the Supreme Court decided *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, expanding speech rights under the California Constitution. There, a group of high school students had set up a table at a privately owned shopping center to solicit signatures for a petition opposing a United Nations resolution on Zionism.³³⁵ The Court held that the

³³⁰ Preble Stolz, *Judging Judges: The Investigation of Rose Bird and the California Supreme Court* (Free Press, 1981), pp. 7–8, 131.

³³¹ *Los Angeles Times*, Nov. 25, 1978, p. 24.

³³² *Justice Frank C. Newman Oral History Interview* (2006) 1 Cal. Legal Hist., pp. 87, 121; Justice Malcolm Lucas found it “just incredible” that Chief Justice Bird had sent the letter without giving the associate justices a chance to vote on it. *Chief Justice Malcolm Lucas: How “Collegiality” and a “Steady Hand” Reset a Court in Crisis* (2024) 19 Cal. Legal Hist., p. 306.

³³³ *San Francisco Examiner*, Aug. 5, 1979, p. 27.

³³⁴ *People v. Tanner* (1979) 24 Cal.3d 514.

³³⁵ *Robins*, 23 Cal.3d at pp. 902–903.

California Constitution protected a broader spectrum of speech rights than the federal Constitution did.³³⁶

Another case of import during the Bird Court is *Gay Law Students Association v. Pacific Telephone & Telegraph Association* (1979) 24 Cal.3d 458, which was a class action alleging discrimination against LGBT employees based upon their sexual preference. The Court acknowledged that sexual preference was not one of the classifications listed in article I, section 7 of the state Constitution as protected classes. But the Court concluded that the list in section 7 was merely illustrative, not exhaustive, and in any event, this particular defendant was a state-protected monopoly, and thus, state action was established.³³⁷

Another significant case from the Bird Court was *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588. There, a number of manufacturers were making the same product from the same formula.³³⁸ The plaintiff was injured when her mother used the drug but was unable to identify the manufacturer. The plaintiff invoked *Summers v. Tice*, but the problem with reliance on *Summers* is that it included all possible tortfeasors.³³⁹ In *Sindell*, the plaintiffs argued that if there was cooperation among the defendants and proof that the injury-causing substance was made by one of them, the plaintiff could shift the burden and require the defendants to exonerate themselves. The court held that each defendant could be held to a percentage of fault equal to their market share unless it proved that it could not have made the product that caused the plaintiff's injury.³⁴⁰

Three months after *Sindell*, the Court turned its attention to employment law in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. In *Tameny*, the plaintiff alleged that he had been fired for refusing to take illegal actions, but the termination arose in the context of classic “at-will” employment, where the employer could fire an employee for any reason at all.³⁴¹ The Court ruled that the classic theory of at-will employment had been substantially limited by legislation and allowed the action for wrongful termination.³⁴²

In *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, a plurality of the Court, led by Justice Tobriner, struck down a budget act limiting Medi-Cal funding for abortions. Analogizing the case to *Danskin v. San Diego*

³³⁶ *Id.* at pp. 908–909.

³³⁷ *Gay Law Students*, 24 Cal.3d at pp. 469, 490, 492.

³³⁸ *Sindell*, 26 Cal.3d at 605.

³³⁹ *Id.* at pp. 598–599.

³⁴⁰ *Id.* at pp. 615–616.

³⁴¹ *Tameny*, 27 Cal.3d at p. 172.

³⁴² *Id.* at p. 178.

Unified Sch. Dist. (1946) 28 Cal.2d 536,³⁴³ the Court explained that California courts had repeatedly rejected the notion that simply because the state was not obligated to provide a benefit, it could provide it on a discriminatory basis.³⁴⁴ Chief Justice Bird concurred, arguing that strict scrutiny should apply to the statute.³⁴⁵

In 1983, the Supreme Court addressed the issue of felony-murder in criminal cases. The issue in *Carlos v. Superior Court* (1983) 35 Cal.3d 131 was whether a defendant could be charged or convicted of murder with the special circumstance of felony-murder if he did not intend to kill or to aid in the commission of a killing. The Supreme Court held that intent to kill or intent to aid in killing was a necessary element of felony-murder special circumstances.³⁴⁶

However, following these decisions, but largely because the Bird Court had affirmed only five of the sixty-nine death penalty sentences it had considered,³⁴⁷ the voters delivered an unprecedented rebuke to the Court in November 1986: Three Justices of the Court lost their bids for retention for another twelve-year term.³⁴⁸ Justice Joseph Grodin carried 43.4 percent of the vote; Justice Cruz Reynoso carried 39.8 percent; Chief Justice Rose Bird carried only 33 percent of the vote.

THE LUCAS COURT

On November 26, 1986, Republican Governor George Deukmejian announced his nomination to succeed Rose Bird as Chief Justice—his friend and former law partner, Associate Justice Malcolm Lucas.³⁴⁹ By elevating Lucas, Governor Deukmejian opened up a third vacancy among the associate justices. On February 18, 1987, he filled those three seats, nominating John A. Arguelles, David N. Eagleson, and Marcus Kaufman, all three Court of Appeal justices, to the Court.³⁵⁰

The impact of the Deukmejian majority began to be felt almost immediately across a broad spectrum of California law. In *People v. Anderson*

³⁴³ *Committee to Defend Reproductive Rights*, at p. 263.

³⁴⁴ *Id.* at p. 257–258.

³⁴⁵ *Id.* at p. 286 (Bird, C.J., concurring).

³⁴⁶ *Carlos*, at p. 141.

³⁴⁷ Egelko, *The Lucas Years, 1987–1996*, in *Constitutional Governance and Judicial Power: The History of the California Supreme Court* (Scheiber, edit., 2017), p. 520.

³⁴⁸ The usual explanation for this result is that the three Justices voted to reverse a large number of death penalty cases. In fact, thirty-nine of the sixty-two death penalty decisions which Chief Justice Bird voted to reverse were reversed due to an instructional error arising out of the standard set by the Court in *People v. Carlos*. Chief Justice Malcolm Lucas: *How “Collegiality” and a “Steady Hand” Reset a Court in Crisis* (2024) 19 Cal. Legal Hist. at p. 310.

³⁴⁹ *Oakland Tribune*, Nov. 27, 1986, p. 1.

³⁵⁰ *San Francisco Examiner*, Feb. 18, 1987, p. 1.

(1987) 43 Cal.3d 1104, the Court overruled the decision in *People v. Carlos* that had led to the reversal of so many death penalties during the Bird era.³⁵¹ In *Elden v. Sheldon* (1988) 46 Cal.3d 267, in a majority opinion surprisingly written by Justice Mosk, the Court held that negligent infliction of emotional distress and loss of consortium claims were unavailable in tort unless the plaintiff and victim were actually married.³⁵²

The Court took a further step toward retrenching California tort law in *Moradi-Shalal v. Fireman's Fund Insurance* (1988) 46 Cal.3d 287. In an opinion by Chief Justice Lucas, the Court overruled its earlier decision in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, and instead held that third parties had no cause of action for an insurer's bad faith failure to settle.³⁵³ Justice Mosk, the author of *Royal Globe*, filed a vigorous dissent, joined by Justice Broussard.³⁵⁴

In the early fall of 1988, the Court resolved an unusual lawsuit asking that the Court be required to strictly comply with the clause of the state Constitution that required decisions to be filed within 90 days of their submission. For more than thirty years, the Court had “avoided” the provision by not filing an order deeming a case submitted until the opinions were ready for filing. The Court's new rule, enforcing the 90-day rule, drew mixed reactions.³⁵⁵ A Berkeley law professor worried that the tight deadline would mean that the justices “will have closed their minds before [oral] argument.” Other attorneys expressed concern that the change would adversely affect the quality of the Court's opinions.³⁵⁶ In the wake of the new rule, the Court further formalized the “front-loading” procedure by which the assigned justice would prepare a calendar memo for the Court and the memo would be circulated for written preliminary responses and dissenting or concurring calendar memos.³⁵⁷ Peter Belton, a staff attorney at the Court for forty years, talked about oral argument during his oral history interview:

Oral argument has never been as important to the court as it has been to counsel. Never. Even in the old days . . . a lot of the work that we do is very intellectual work. It requires an analysis of facts, of cases, of statutes; and oratory doesn't help . . . The main purpose it serves is to clarify—to give the lawyers the opportunity to clarify their position on the legal questions

³⁵¹ *Anderson*, 43 Cal.3d at p. 1147.

³⁵² *Elden*, 46 Cal.3d at p. 277.

³⁵³ *Moradi-Shalal*, 46 Cal.3d at p. 304.

³⁵⁴ *Id.* at pp. 313–331.

³⁵⁵ *Internal Operating Practices and Procedures of the California Supreme Court*, Sec. VID.

³⁵⁶ *Los Angeles Times*, Sep. 21, 1988, *id.*

³⁵⁷ LaBerge, *Peter Belton Oral History* (2007) 2 Cal. Legal Hist. 1, 23–29.

and to give the judges the opportunity to ask questions . . . It's not often that it will change the outcome of the case, but people might sometimes concede a point in oral argument. That's happened.³⁵⁸

Preble Stolz, the author of one of the book-length studies of the Bird court, agreed:

The court's internal process invites this kind of disassociation of judicial opinions from counsel's arguments because the justices for the most part work from the opinion of the Court of Appeal and staff generated documents—the conference and calendar memorandums—rather than from the parties' briefs . . . The message that counsel's argument is irrelevant also emerges from the court's willingness to decide cases on issues not argued.³⁵⁹

Later in 1988, following the resolution of the lawsuit concerning the 90-day rule, a case came before the Court regarding the intersection between tort law and the Constitution's right to religious freedom. *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, involved a young man's suicide. His parents sued the church and four clergy, alleging claims for clergy malpractice in addition to more traditional claims for negligence.³⁶⁰ A major barrier to such a claim at the time was *United States v. Ballard* (1944) 322 U.S. 78, holding that a civil court could not adjudge the truth or falsity of a sincerely held religious belief. The majority in *Nally* held that despite the evidence suggesting that the church's counsellors held themselves out as competent to treat depression and schizophrenia, it would be impractical and "quite possibly unconstitutional" to impose a duty of care on pastoral counselors.³⁶¹ In the majority's view, there was no "special relationship" between the counselors and the young man sufficient to support such a duty.³⁶²

Although each of these decisions may fairly be characterized as conservative, the Court's decision in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, was more of a mixed result. There, the plaintiff alleged that he had discovered that his new supervisor was under an F.B.I. investigation for embezzlement from a former employer and had passed that information to his former supervisor. After his termination, he sued.³⁶³ The Court held that plaintiff had sufficiently

³⁵⁸ *Id.* at p. 30.

³⁵⁹ Stolz, *Judging Judges*, *supra*, at pp. 403–404.

³⁶⁰ *Nally*, 47 Cal.3d at p. 283.

³⁶¹ *Id.* at pp. 299, 306.

³⁶² *Id.* at pp. 293–294. Whether *Nally* might have a different result today following the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) is an interesting question beyond our scope here.

³⁶³ *Foley*, 47 Cal.3d at p. 662.

alleged a breach of an implied promise not to discharge. The Court also extended the implied covenant of good faith and fair dealing to employment situations; however, that also had the effect of limiting his claim to contract damages, not tort damages.³⁶⁴

In his oral history, Justice Edward Panelli, who concurred in the opinion in *Foley*, had interesting comments regarding oral argument. Ever since academics first applied analytics techniques to appellate oral arguments, the notion that such an analysis enables one to predict the winner and the author of the majority and any dissents has been controversial, both among judges and some lawyers. But according to Justice Panelli: “It wouldn’t take a rocket scientist sometimes to know who had the majority and who had the minority, just by virtue of who was asking the questions.” On the value of appellate argument, Justice Panelli observed: “[A]s far as really persuading you otherwise, after you’ve spent all that time reading and you have a half-hour to make your point, it doesn’t—I never found it was all that helpful. You got to test your views, but as far as getting new information, rarely did you get much.”³⁶⁵

In *Thing v. La Chusa* (1989) 48 Cal.3d 644, the Court pared back another Bird-era opinion, *Dillon v. Legg*. In *Thing*, the plaintiff did not directly witness the accident involving her child, but she nevertheless sought damages for emotional distress arising from her experience *after* arriving at the scene. The majority held that the cause of action for negligent infliction of emotional distress had to be limited to persons who were directly present and aware that the accident was causing injury to a close relative.³⁶⁶

On March 1, 1989, Justice John Arguelles announced his resignation from the Court, citing “a great deal of separation from [his] family” as the reason, given his weekly commutes from southern California to the Court.³⁶⁷ Less than two weeks later, Governor Deukmejian announced Court of Appeal Justice Joyce Kennard as his nominee for the open seat on the Court. “Justice Kennard is superbly qualified and she has had a remarkable life of achievement and triumph over adversity,” said the Governor. “[She] has proved that hard work, skill and intelligence, combined with the promise of the American dream, can lead one to great achievements.”³⁶⁸

³⁶⁴ *Id.* at p. 663.

³⁶⁵ *Oral History of Edward A. Panelli, Associate Justice, California Supreme Court, 1985–1994* (2022) 17 Calif. Legal Hist. p. 568.

³⁶⁶ *Thing*, 48 Cal.3d at p. 647.

³⁶⁷ *Sacramento Bee*, Mar. 2, 1989, p. 7.

³⁶⁸ *Los Angeles Times*, Mar. 12, 1989, p. 1.

Justice Marcus Kaufman retired soon thereafter on March 31, 1989, and a few days later, Governor Deukmejian announced his nomination of Court of Appeal Justice Armand Arabian to succeed him. Deukmejian said Justice Arabian had “earned a reputation for well-reasoned legal opinions, intellectual honesty, open-mindedness and a great ability to analyze tough legal problems.”³⁶⁹ A former Los Angeles District Attorney predicted that “we can look forward to literally decades of service” from Arabian.³⁷⁰

In late 1988, California voters faced multiple competing initiatives billed as regulating the insurance industry. The only initiative eventually approved—after a campaign estimated to have cost \$85 million—was Proposition 103, the Insurance Rate Reduction and Reform Act.³⁷¹ The Court heard multiple challenges to that measure in *Calfarm Ins. v. Deukmejian* (1989) 48 Cal.3d 805. In that case, the Court held that a provision of the Act barring rate increases, except where an insurer is threatened with insolvency, was unconstitutional on its face.³⁷² However, the Court upheld a provision regulating the insurer’s ability to decline to renew policies, while noting that insurers retained the option of withdrawing from the California market.³⁷³ Earlier this year, Reuters claimed that because of rate regulation put in place by Proposition 13, insurance costs were cheaper measured against home values in California’s Pacific Palisades than in 97 percent of all United States postal codes.³⁷⁴ (On the other hand, insurers have recently withdrawn from segments of the California insurance market because of the constraints on premiums.)

Separately, the Lucas Court illustrated how far it would go to uphold death penalty verdicts in *People v. Allison* (1989) 48 Cal.3d 879. Denying the motion for modification of the verdict, the trial judge had commented that “in view of the criminal record of the defendant . . . there would be no basis to modify.” The trial judge also commented that the defendant had “earned the verdict the jury has given him” in view of “the long and distinguished record of the defendant in the criminal annals of the county.”³⁷⁵ Although the Court’s majority conceded that in fact, the defendant had no record of prior violent

³⁶⁹ *Turlock Journal*, Feb. 5, 1990, p. 2.

³⁷⁰ *Los Angeles Times*, Feb. 3, 1990, p. 26. In his Oral History interview, Justice Arabian had a very different view of oral argument before the Court than some others: “Believe me, you can turn parts of that so-called draft opinion around, in some cases you can change the whole outcome if it’s done correctly.” *Oral History Justice Armand Arabian* (2020) 15 Calif. Legal Hist., p. 630.

³⁷¹ *Los Angeles Times*, Mar. 31, 1989, pp. 3, 23.

³⁷² *Calfarm Ins.*, 48 Cal.3d at 815.

³⁷³ *Id.*

³⁷⁴ [Pacific Palisades Fire May Spell an End to Cheap Homeowners Insurance in California](#), Jan. 9, 2025.

³⁷⁵ *People v. Allison*, 48 Cal.3d at p. 909.

criminal conduct or prior felony convictions, it dismissed the judge’s comment as “harmless error.”³⁷⁶

The following year, the Court expanded employment tort law in *Rojo v. Kliger* (1990) 52 Cal.3d 65. The question in *Rojo* was whether sex discrimination in employment gives rise to a cause of action for wrongful discharge in violation of public policy. The Court not only held that the answer was “yes,” but also held that (1) the employee/plaintiff was not required to exhaust his or her administrative remedies, and (2) the Fair Employment and Housing Act (FEHA) was not the exclusive remedy for sex discrimination in employment. The majority further held that FEHA expressly disclaimed any intent to displace the state’s preexisting law on sex discrimination, and that an exhaustion of remedies was required only to bring a cause of action specifically authorized under FEHA.

In 1990, the Lucas Court decided thirty-nine civil cases and eighty criminal cases, including forty-one attorney disciplinary matters.³⁷⁷ The Court also decided twenty-six death penalty cases, affirming nineteen decisions in all respects, affirming in part and reversing in part six cases and reversing outright in one case. The lag time for death penalty cases between the judgment below and oral argument was 1,798 days—just short of five years. (Of course, death penalty cases generally raise many more issues, and the Public Defender’s Office was backlogged because it had responsibility for both death penalty appeals and habeas petitions, slowing its processing.) By contrast, the average lag time for civil cases was 449.62 days. Criminal non-death cases took an average of 484.15 days before decision.

In late July 1990, Governor Deukmejian nominated Justice Marvin Baxter of the Fifth District Court of Appeal to take Justice Eagleson’s seat on the Supreme Court. The Governor said that:³⁷⁸

. . . as an appellate court judge [Baxter] has established himself as a fair, but tough judge who respects the law and the principle of judicial restraint. Justice Baxter understands that the role of judges is to fairly and impartially interpret the law and that our judicial system should show as much compassion for the victims of crime and their families as it does for defendants.

In 1991, the Court answered one of the principal questions left unanswered by the Court’s 1978 decision in *Barker v. Lull Engineering*. Whereas *Barker* held

³⁷⁶ *Id.* at p. 911.

³⁷⁷ All of the analytics results from 1990 through 2024 are taken from my own research. Although habeas corpus cases and most mental health matters are technically civil, I treat them as criminal matters to avoid corrupting databases and predictive algorithms.

³⁷⁸ *San Francisco Examiner*, Jul. 29, 1990, pp. 1, 14.

that plaintiffs could state a products liability claim based on the proposition that a product design was defective, the question in *Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, was whether state-of-the-art evidence—that is, whether a risk was known or knowable at the time the product was manufactured and distributed—was admissible. The majority held that state-of-the-art evidence was admissible, at least in absence-of-warning cases.³⁷⁹ Justice Broussard concurred, but pointed out that when the test invoked by the plaintiff was whether the product performed as safely as a reasonably informed user would be entitled to expect, knowability was not admissible.³⁸⁰

With Governor Deukmejian declining the run for a third term, U.S. Senator Pete Wilson won the 1990 election for governor and took office the following year. On July 29, 1991, Governor Wilson nominated Court of Appeal Justice Ronald M. George as the successor to Justice Allen Broussard. Wilson observed that Justice George “has from the start shown a keen understanding that there must be balance between the rights of the accused and the rights of victims and the safety of society.”³⁸¹ According to the *San Francisco Examiner*, the Governor “ignored the advice of Broussard, the court’s only black justice and final appointee of former Gov. Jerry Brown, who had urged Wilson to appoint another black to the court.”³⁸² But such an appointment would come from Wilson in just a few years.

In *Legislature v. Eu* (1991) 54 Cal.3d 492, the Lucas Court faced another voter-adopted initiative and wound up getting in trouble with the Legislature. The Political Reform Act of 1990 had imposed a grab-bag of reforms, including term limits for constitutional state officers and state legislators, limits on the individual legislators’ budgets and limits on members’ pensions.³⁸³ The initiative was a reaction in part to the presence of prominent legislators who had been in office for many years and by the fact that from 1968 to 1990, the Governor’s budget had increased 417 percent while the Legislature’s had risen by a surprising 838 percent.³⁸⁴ In an opinion by Chief Justice Lucas, the Court invalidated the pension reforms with respect to incumbent legislators but approved the initiative in all other respects.³⁸⁵ Justice Mosk dissented from everything aside from the incumbents’ pension reform ruling, arguing that if the Political Reform Act did not violate the constitutional rule that

³⁷⁹ *Anderson*, 53 Cal.3d at p. 1000.

³⁸⁰ *Id.* at pp. 1004–1005 (Broussard, J., concurring).

³⁸¹ *Id.*

³⁸² *San Francisco Examiner*, Jul. 29, 1991, p. 1.

³⁸³ *Legislature*, 54 Cal.3d at pp. 500–503.

³⁸⁴ *Id.* at pp. 525–526.

³⁸⁵ *Id.* at pp. 528–534.

initiatives must deal only with a single subject, then the single subject rule was a dead letter.³⁸⁶ Following that decision and probably not coincidentally, the Legislature soon voted to slash the Court's budget by the same percentage that the initiative required cutting their own budget. In the event the Court did not get the message, Chief Justice Lucas was not invited to give another State-of-the-Judiciary address to the Legislature during his tenure.³⁸⁷

In 1991, the Supreme Court decided forty civil cases and sixty-seven criminal cases, including twenty-one disciplinary matters. The Court also decided twenty-five death penalty cases, affirming seventeen in all respects, affirming in part and reversing in part in seven cases, and reversing one in its entirety. The average lag time from pronouncement of judgment to oral argument in death penalty cases was 1,835.04 days—just over five years. Civil cases averaged 391.53 days.

As the Lucas era continued, the Court began showing signs of turning from retrenchment to carefully expanding certain kinds of claims. For example, *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083 raised the question of whether an employee, who is allegedly terminated in retaliation for supporting a coworker's claim of sexual harassment, may state a claim for wrongful discharge in violation of public policy. In an opinion by Justice Arabian, the Court answered "yes." The majority concluded that attempting to induce a witness to lie in an investigation by the Department of Fair Employment and Housing was clearly against public policy, and therefore actionable under *Tameny v. Atlantic Richfield Co.*³⁸⁸ The majority also concluded that the claim was not preempted by the workers' compensation law, which bars the great majority of employee claims against one's employer in return for the employer's contributions to the workers' compensation system.³⁸⁹

In *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, the Court established a foundational precedent for California arbitration law. *Moncharsh* involved an arbitration arising from the departure of an attorney from a law firm, leading to the firm's loss of several clients. Reviewing the history of arbitration in California, the Court concluded that such agreements are most often motivated by the wish for finality and cost savings, and that such interests would be impaired or lost entirely by broad-based review in court. Accordingly, in an opinion by Chief Justice Lucas, the Court held that the courts could not review arbitrators' decisions for errors of fact or law, even when the error appears on

³⁸⁶ *Id.* at pp. 536–538.

³⁸⁷ Egelko, *The Lucas Years, 1987–1996*, *supra*, at p. 549.

³⁸⁸ *Gantt*, 1 Cal.4th at pp. 1095–1097.

³⁸⁹ *Id.* at pp. 1097–1101.

the face of the award and causes substantial injustice to the parties. Justice Kennard filed a partial dissent, joined by Justice Mosk, arguing that courts should be able to review an error of law causing substantial injustice.

In 1992, the Court decided fifty-two civil cases and fifty-eight criminal cases. Thirty-three of the criminal cases involved the death penalty; the Court affirmed the judgment in twenty-four cases and affirmed in part nine times.

In 1993, the Court decided forty-six civil cases and fifty criminal cases. Seventeen of the criminal cases were death penalty judgments; the Court affirmed sixteen and reversed in part one. Although the civil and criminal dockets were almost evenly divided in terms of cases, the Court wrote nearly double the number of pages in criminal than in civil majority opinions (800 to 1,520), possibly due to the greater number of issues raised in death penalty appeals.

Justice Edward Panelli retired effective January 31, 1994. According to the Associated Press, Panelli's final year on the Court "may have been his most productive."³⁹⁰ On April 13, 1994, with Panelli's seat still not filled, the *San Francisco Examiner* reported on the candidates evaluated by the State Bar for possible appointment. Three future justices were on that list—Kathryn Werdegar, Ming Chin, and Janice Rogers Brown.³⁹¹ On May 3, 1994, Governor Pete Wilson announced his nominee: Kathryn Werdegar, who was first in her class at law school. The Governor said that Werdegar "is a brilliant legal scholar who knows both substantive law and legal procedure. Kathryn Werdegar has the extraordinary ability, a very rare one, to make complex legal issues clear."³⁹²

In 1994, for the first time in the decade, the Court decided more civil than criminal cases—fifty-one to forty-one. Seven of the Court's criminal cases were death penalty appeals, and the Court affirmed in all seven. Moreover, the lag time in death penalty cases was more than cut in half—1,981.43 days. Civil cases averaged almost exactly a year from the grant of review to oral argument—364.84 days. Non-death criminal cases averaged 442.39 days.

In 1995, the Court took an important step forward in California gender equity law with Justice George's opinion in *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594. In *Warfield*, the female plaintiff was awarded the couple's club membership in a divorce.³⁹³ Nevertheless, the club board

³⁹⁰ *Fresno Bee*, Jan. 31, 1994, p. 29.

³⁹¹ *San Francisco Examiner*, Apr. 13, 1994, p. 22.

³⁹² *San Francisco Examiner*, May 3, 1994, p. 1.

³⁹³ *Warfield*, 10 Cal.4th at p. 605.

terminated her membership in accordance with its bylaws.³⁹⁴ The issue was whether the club was a “business establishment” subject to the Unruh Civil Rights Act.³⁹⁵ Noting that the club was an important source of business contacts to the plaintiff and derived significant income, thereby enabling it to keep fees lower from payments by nonmembers for goods and services, the majority concluded that the club was a business establishment within the meaning of the Act and reversed the judgment against the plaintiff.³⁹⁶

On November 13, 1995, Justice Armand Arabian announced his retirement. Arabian, who had been a paratrooper as a young man, continued parachute jumping as a hobby for many years, although he told reporters upon his retirement that he had stopped by that time. Nevertheless, he described his retirement announcement in parachuters’ language: “Now, the time has come when . . . I must step up and out, flying with the wind to the new and challenging drop zones of tomorrow.”³⁹⁷

In 1995, the Court decided fifty-seven civil cases and forty-nine criminal cases. Fifteen of the criminal cases involved death penalty judgments; the Court affirmed thirteen of these and reversed in part two of the cases. Lag times on death penalty cases crept up again. For the year, the average time from certification of the record to oral argument at the Supreme Court was 2,534.93 days—just short of seven years; but again, the fact that the State Public Defender’s Office was overwhelmed with its responsibility of handling both death penalty appeals and habeas petitions contributed to the delay. (By the end of his term, Governor Wilson’s administration had developed a proposal to speed the processing of death penalty appeals by accelerating the completion of the reporter’s transcript in those cases and by transferring responsibility for death penalty habeas petitions to a new entity, ultimately named the Habeas Corpus Resource Center,³⁹⁸ thereby relieving the Public Defender of the responsibility for habeas petitions so that he or she could focus on processing the death penalty appeals.)

On January 25, 1996, Governor Wilson named his nominee to take the seat of Justice Armand Arabian: Justice Ming Chin of the First District Court of Appeal. Justice Chin’s appointment drew “broad and enthusiastic praise.” A frequent commentator on the Court said: “He is a scholar. I think his opinions show real thoughtful reflection. I think he will be very independent. I expect

³⁹⁴ *Id.*

³⁹⁵ *Id.* at p. 614.

³⁹⁶ *Id.* at pp. 621–622, 630.

³⁹⁷ *San Francisco Examiner*, Nov. 14, 1995, p. 3.

³⁹⁸ See Sen. Bill No. 513 (1997–1998 Reg. Sess.); Gov. Code §§ 68660–68664.

him to find himself right in the middle of the court” ideologically. During his time on the Court of Appeal, Chin had written opinions on multiple cutting-edge issues, including DNA evidence, surrogate parenting, and pollution insurance.³⁹⁹

In the spring of 1996, the Supreme Court decided a major case about the intersection between the Free Exercise clause and the nation’s changing societal mores. In *Smith v. Fair Employment and Housing Comm’n* (1996) 12 Cal.4th 1143, the plaintiffs had filed a claim under the Fair Employment and Housing Act, alleging that the landlord defendant had declined to rent to them on religious grounds because they were unmarried. The Fair Employment and Housing Commission’s decision was for the plaintiffs; the Court of Appeal reversed; but in an opinion by Justice Werdegar, the Supreme Court sided with the plaintiffs.⁴⁰⁰ The Supreme Court rejected the defendant’s Free Exercise claim based on the U.S. Supreme Court’s rationale in *Employment Division v. Smith*, concluding that because the defendant could invest her money in something other than rental property, no substantial burden on Free Exercise rights had been shown.⁴⁰¹

THE GEORGE COURT TAKES CENTER STAGE

Chief Justice Malcolm Lucas announced during his State of the Judiciary speech at the State Bar Convention that he would retire from the Court in May 1996.⁴⁰² On March 28, 1996, Governor Wilson nominated Justice Ronald George as Chief Justice Lucas’s successor. “Justice George has proven to be a stellar Justice,” Wilson observed. “That comes as no surprise to those of us who already respected his talents as an outstanding attorney, a superb teacher of the law, and a valiant defender of the rights of the accused and the rights of victims.”⁴⁰³

During that same news conference, Wilson nominated his candidate to take Justice George’s seat as associate justice: Justice Janice Rogers Brown. Justice Brown’s nomination was controversial because although the State Bar Commission on Judicial Nomination Evaluation said that she was an “exceptional lawyer who is intelligent, insightful and decisive” and “a role model for many,” the Commission had concluded that her eighteen-month stint on the Court of Appeal for the Third District—her first judicial experience—

³⁹⁹ *Ukiah Daily Journal*, Jan. 26, 1996, p. 1.

⁴⁰⁰ *Smith*, 12 Cal.4th at p. 1150.

⁴⁰¹ *Id.* at p. 1170.

⁴⁰² *Daily Press*, Oct. 1, 1995, p. 5.

⁴⁰³ *San Luis Obispo County Telegram-Tribune*, Mar. 29, 1996, p. A-3.

was insufficient to qualify her for a Supreme Court seat. Governor Wilson responded: “I emphatically disagree.”⁴⁰⁴

The Court decided thirty-one civil cases and forty-one criminal cases in 1996. Eight of the criminal cases were death penalty matters; the Court affirmed in six and reversed in part two of them.

In 1997—the first full year of the George Court—in *Engalla v. Permanent Medical Group, Inc.* (1997) 15 Cal.4th 951, the Supreme Court addressed the circumstances in which a court may deny a motion to compel arbitration based either upon the petitioner’s fraud in inducing the agreement or a waiver of the right to arbitrate. There, beginning in 1986, the decedent had raised complaints consistent with respiratory disease at the defendant’s hospital. The hospital repeatedly gave him inhalation medication but failed to perform diagnostic tests that would have detected cancer until 1991—by which time the cancer was inoperable.⁴⁰⁵ The decedent and his family filed a demand for arbitration, but what followed was one delay after another by the hospital system. According to the opinion, this was typical: The hospital system only managed to retain a neutral arbitrator within the sixty days provided in the arbitration agreement in 1 percent of all cases. The average delay was 674 days.⁴⁰⁶ A neutral arbitrator was finally retained one day before the decedent’s death.⁴⁰⁷ The California high court held that there was sufficient evidence to support the trial court’s findings that the hospital engaged in fraudulent conduct justifying a denial of its petition to compel arbitration and remanded for resolution of further questions of fact.⁴⁰⁸

In 1997, the Court decided fifty civil cases and forty-four criminal cases. The Court decided fourteen death penalty cases, affirming ten, reversing in part three and reversing entirely one case. The death penalty docket sped up just a bit, with an average of 2,744.14 days from the certification of the record to oral argument. Civil cases were still taking nearly a year—342.02 days from grant of review to argument. Criminal non-death-penalty cases were nearly as slow: 331.86 days.

In 1998, the Supreme Court addressed the issue of whether employees who alleged they had been discharged due to a residual disability following a work-related injury were limited to workers’ compensation claims. In *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, the plaintiff filed claims

⁴⁰⁴ *Fresno Bee*, Mar. 29, 1996, p. 3.

⁴⁰⁵ *Engalla*, 15 Cal.4th at p. 961.

⁴⁰⁶ *Id.* at pp. 963–967.

⁴⁰⁷ *Id.* at p. 967.

⁴⁰⁸ *Id.* at pp. 960, 976, 978.

for FEHA violations and common law wrongful discharge following her termination after knee surgery.⁴⁰⁹ The Court reasoned that since workers' compensation exclusivity did not bar claims for sexual or racial discrimination, it likewise did not bar claims for disability discrimination following an at-work injury.⁴¹⁰ The Court further held that disability discrimination involved a "substantial and fundamental" interest; accordingly, plaintiffs were also free to state a claim for wrongful discharge in violation of public policy.⁴¹¹

In 1998, the Court decided fifty-four civil cases and forty-five criminal cases. There were thirteen death penalty cases, and the Court affirmed eleven, reversed in part one and reversed entirely in another case. Death penalty cases sped up a bit, averaging 2,339.23 days, but civil cases slowed, averaging 387.57 days from the grant of review to argument.

In the following year, Chief Justice George wrote an important opinion broadly affirming the public's access to court proceedings. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 arose from a civil trial involving two prominent figures from the entertainment industry. The trial court issued broad orders excluding the public and press from all proceedings held outside the presence of the jury and sealing the transcripts of all such proceedings.⁴¹² The Court held that the First Amendment's right of access extended to civil proceedings and that this right could only be overridden if the judge found that (i) an overriding interest supported closure; (ii) there was a substantial probability that the interest would be prejudiced absent closure; (iii) the proposed closure was narrowly tailored to serve that overriding interest; and (iv) there was no less restrictive means of achieving that interest.⁴¹³

In 1999, the Court decided fifty-two civil cases and forty-eight criminal cases. The Court decided six death penalty cases, affirming all six.

In *Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 Cal.4th 83, the Court addressed a key question for the future of employee/employer claims—whether an employee may be compelled, as a condition of employment, to agree to arbitrate antidiscrimination claims under the Fair Employment and Housing Act. In an opinion by Justice Mosk, the Court held that the answer was yes, so long as the arbitration permits the employee to vindicate his or her statutory rights.⁴¹⁴ The Court further held that to be enforceable, an arbitrator's

⁴⁰⁹ *City of Moorpark*, 18 Cal.4th at pp. 1148–1149.

⁴¹⁰ *Id.* at p. 1153.

⁴¹¹ *Id.* at pp. 1160–1161.

⁴¹² *NBC Subsidiary*, 20 Cal.4th at p. 1181.

⁴¹³ *Id.* at pp. 1181–1182, 1212.

⁴¹⁴ *Armendariz*, 24 Cal.4th at p. 90.

decision must include at least minimal findings of fact and conclusions of law, and that the agreement cannot impose any costs and fees on the employee that the employee could not be compelled to pay in court.⁴¹⁵

In 2000, the Court decided forty-nine civil cases and fifty-five criminal cases. Fifteen of the Court's criminal cases were death penalty matters; the Court affirmed fourteen of them and reversed in part one. The average lag time for death penalty cases was 2,747.2 days, nearly a year shorter than the previous year.

On June 19, 2001, Justice Stanley Mosk died unexpectedly. The longest-serving member in the Court's history, Justice Mosk was in his chambers working all day on the very day before his death. According to the *Los Angeles Times*, Mosk wrote 1,688 opinions during his 38-year tenure on the Supreme Court: 727 majority opinions, 570 dissents, and 391 concurrences. Chief Justice George issued the following statement: "Stanley Mosk was a giant in the law. His legacy will continue to serve the people of California for many years. We at the court will miss his wisdom and his wealth of experience."⁴¹⁶

A noteworthy case in 2001 was *Merrill v. Navegar* (2001) 26 Cal.4th 465, mostly for Justice Werdegar's dissent. That case arose out of the 1993 shooting rampage at 101 California Street in downtown San Francisco. The majority had held that the plaintiff's negligence claim against the manufacturer was barred by the provisions of Civil Code section 1714.4, subdivision (a), which forbade claims against gun manufacturers based on a risk-benefit theory. However, Justice Werdegar argued that the majority opinion misunderstood the nature of the plaintiff's claim, which was not that the gun itself was defective, but rather that the manufacturer had been negligent by marketing the weapon to the general public—which had no legitimate need for it—rather than to the military and police units only.⁴¹⁷

A mere few months later, Justice Werdegar wrote another noteworthy dissent in *Golden Gateway Center v. Golden Gateway Tenants Association* (2001) 26 Cal.4th 1013. There, the plurality held that the defendant had no constitutional right to distribute a newsletter in a privately owned complex because (1) no state action was involved, and (2) the complex was not generally open to the public. In doing so, the majority effectively confined the landmark decision in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, to its facts.⁴¹⁸

⁴¹⁵ *Id.* at pp. 107, 111.

⁴¹⁶ *Los Angeles Times*, Jun. 20, 2001, pp. 1, 16.

⁴¹⁷ *Merrill*, 26 Cal.4th at p. 493.

⁴¹⁸ *Golden Gateway Center*, 26 Cal.4th at p. 1016.

But Justice Werdegar dissented,⁴¹⁹ joined by Justice Kennard and Justice Pro Tem Joan Dempsey Klein of the Second Appellate District, who was sitting by designation, arguing that California’s Free Speech clause was plainly *not* limited to state action, and that the reasoning of *Robins* was not limited to property generally open to the public.⁴²⁰

On September 26, 2001, Governor Gray Davis announced his nomination to replace Justice Mosk: U.S. District Judge Carlos Moreno. Prior to his appointment, Judge Moreno had served as a judge in the California state courts, and for three-and-a-half years as a judge on the U.S. District Court. Governor Davis praised Moreno’s record as “second to none.” And Judge Moreno responded: “I can think of few if any greater honors that can be bestowed on a citizen of this state.”⁴²¹

Even without a full court in year 2001, the George Court decided forty-eight civil cases and fifty-eight criminal cases. There were eleven death penalty cases; the Court affirmed in ten and reversed in part one.

In 2002, in *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, the Court faced one of the earliest cases wrestling with the legal implications of a then-emerging technology: the internet. In that case, the defendant maintained a static website—essentially an online bulletin board with no interactive features.⁴²² In October 1999, he allegedly posted the source code for something called DeCSS, which was designed to enable decryption of DVDs, including those containing motion pictures.⁴²³ Unsurprisingly, he was sued by the DVD Copy Control Association in California; however, the defendant had no apparent contact with California.⁴²⁴ In an opinion by Justice Brown, the majority reviewed the history in the lower courts of the “effects test” established by *Calder v. Jones* (1984) 465 U.S. 783. The majority concluded that the mere knowledge that a defendant’s conduct is likely to cause harm in California or harm industries largely located in California is insufficient by itself to establish jurisdiction.⁴²⁵ Justice Baxter dissented, joined by Chief Justice George and Justice Chin.⁴²⁶

For the year 2002, the Court decided forty-eight civil and seventy-one criminal cases. Fourteen of those criminal cases were death penalty matters,

⁴¹⁹ *Id.* at pp. 1043–1060.

⁴²⁰ *Id.* at pp. 1046–1047.

⁴²¹ *Victorville Daily Press*, Sep. 27, 2001, p. 4.

⁴²² *Pavlovich*, 29 Cal.4th at 267.

⁴²³ *Id.*

⁴²⁴ *Id.* at p. 266.

⁴²⁵ *Id.* at p. 278.

⁴²⁶ *Id.* at pp. 279–299.

and the Court affirmed eleven of them and reversed, in part, three of them. Not surprisingly, that meant that the Court filed considerably more work product in criminal matters—2,253 pages of majority opinions—than in civil cases, where there were “only” 974 pages.

The Court’s docket also sped up a bit, with death penalty cases taking 3,183.71 days from certification of the record to oral argument. Civil cases averaged 435.1 days, and non-death penalty criminal cases averaged 406.82 days.

As for amicus traffic, 2002 was the rare year in which more filers favored respondents (1.46 per civil case) than appellants (1.42). And it was an unusually busy year on the criminal side, with forty-nine amicus briefs being filed.

For 2003, the Court decided forty-four civil cases and sixty-three criminal cases. Twenty cases involved death sentences: The Court affirmed fifteen, reversed in part four judgments, and reversed entirely one. The death penalty docket also moved slightly faster, averaging 2,924.4 days from certification of the record to oral argument. Civil cases and non-death criminal cases averaged 442.66 days and 551.95 days, respectively.

In 2004, the Supreme Court decided the first of several landmark cases involving the rights of same-sex married couples: *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055. In that case, on February 10, 2004, then-Mayor of San Francisco, Gavin Newsom, sent a letter to the County Clerk, stating that he had concluded that the California Constitution barred discrimination against LGBT+ applicants for marriage licenses. Based on his conclusion, Newsom directed the clerk to amend the relevant forms to be consistent with gender neutrality.⁴²⁷ A little more than two weeks later, the state Attorney General filed a petition for a writ of mandate with the Supreme Court asking that the Court halt the issuance of same-sex marriage licenses.⁴²⁸ In an opinion by Chief Justice George, the Court held that “a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official’s view that it is unconstitutional.”⁴²⁹ The Court emphasized the potential for chaos if local officials were empowered to effectively cancel state laws with which they disagreed.⁴³⁰

⁴²⁷ *Lockyer*, 33 Cal.4th at pp. 1069–1070.

⁴²⁸ *Id.* at p. 1072.

⁴²⁹ *Id.* at p. 1082.

⁴³⁰ *Id.* at pp. 1067–1068.

In that same year, the Court decided fifty-three civil cases and seventy-three criminal cases. Twenty-one of the criminal cases involved death penalties, the Court affirming nineteen and reversing two in part. In a departure from the usual trend, but like 2002, amici for respondents outnumbered appellants' amici in 2004: 1.77 per civil case for respondents, 1.58 for appellants. Nineteen amicus briefs were filed in criminal cases.

On December 9, 2005, Governor Arnold Schwarzenegger announced his choice to take Justice Janice Rogers Brown's seat on the Court following her confirmation as judge on the District of Columbia Circuit: Justice Carol Corrigan of the Court of Appeal's First District. Governor Schwarzenegger said of Corrigan:⁴³¹

She is a brilliant jurist, and for the past 12 years has done a magnificent job on the First District Court of Appeal . . . Justice Corrigan is careful, thoughtful, quick-witted and brings a deliberate, detail-oriented approach to the law. She will bring honor to California's high court and serve the people with dignity and integrity.

In *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, the Court decided yet another emerging issue in LGBTQ+ relations: the support obligations of a lesbian partner who supports her partner's artificial insemination, receives the resulting twin children into her home, and holds them out as her own.⁴³² The majority wrote, "We perceive no reason why both parents of a child cannot be women."⁴³³ The Court held that because the partner received the children into her home and held them out as her own—and because the remaining partner was at present unable to support the children—the partner would be conclusively construed as the children's parent.⁴³⁴

In 2005, the Court decided fifty-one civil cases and sixty-one criminal cases. Twenty-six of the criminal cases involved death penalties, with twenty-three affirmed and three reversed in part. Amicus traffic ticked up, as appellants averaged 2.22 briefs per civil case and respondents averaged 2.04. There were an additional twenty-eight amicus briefs filed in criminal cases.

In the spring of 2006, the Court decided an important case about the intersection between discrimination law and the entertainment industry, *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264. In that case, plaintiff was hired as an assistant to the comedy writers of the popular television show

⁴³¹ *The Signal*, Dec. 10, 2005, p. 8.

⁴³² *Elisa B.*, 37 Cal.4th at p. 113.

⁴³³ *Id.* at p. 119.

⁴³⁴ *Id.* at p. 125.

Friends. She was warned before she began working that given the themes of the show, she would be listening to sexual jokes and discussions and transcribing similar jokes and dialogue. Following her termination, she sued the production company and various individuals, alleging that the discussions constituted sexual discrimination under Fair Employment and Housing Act.⁴³⁵ In an opinion by Justice Baxter, the Court held that given that plaintiff worked in a creative workplace focused on generating scripts for the television show, no reasonable trier of fact could find that the language at issue constituted sexual harassment directed at plaintiff. To the extent that certain comments were made about women other than plaintiff, the Court held that they were not sufficiently severe or pervasive to create a hostile work environment.⁴³⁶

In 2006, the Court's docket was evenly balanced at fifty-three civil cases and fifty-three criminal cases. There were nineteen death penalty cases, of which fourteen were affirmed and five were reversed in part. The death penalty docket sped up a bit, with cases taking an average of 3,089.42 days from certification to oral argument.

In 2007, the Court decided an interesting First Amendment case: *Balboa Island Village Inn v. Lemen* (2007) 40 Cal.4th 1141. There, the plaintiff Inn and the individual defendant owned competing businesses in Newport Beach, California. After the defendant bought a cottage across an alley from the plaintiff Inn, the defendant began videotaping and harassing customers of the plaintiff Inn, calling plaintiff's customers, employees, and the owners various names. After a trial, the court entered an injunction that prohibited the defendant from making certain enumerated statements about the plaintiff and its business. The question before the Supreme Court was whether the injunction was a prior restraint that interfered with the defendant's free speech rights.⁴³⁷

In an opinion by Justice Moreno, the Court pointed out that the protection of the First Amendment is not all-encompassing: the defamatory or libelous speech at issue was of such slight value that it was not protected. The Court held that while certain aspects of the injunction were somewhat overbroad, the defendant's First Amendment rights would not be infringed by an injunction limited to barring statements found at trial to be defamatory.⁴³⁸

In 2007, the Court decided fifty-six civil cases and sixty-one criminal cases. Twenty-three cases involved death penalty judgments: nineteen were affirmed

⁴³⁵ *Lyle*, 38 Cal.4th at pp. 271–272.

⁴³⁶ *Id.* at p. 272.

⁴³⁷ *Balboa Island Village*, 40 Cal.4th at pp. 1144–1146.

⁴³⁸ *Id.* at pp. 1147–1148.

and four were reversed in part. Lag times in death penalty cases were further down slightly to 2,758.3 days (although this was still seven-and-a-half years).

In 2008, the Court decided yet another landmark case involving LGBTQ+ rights: *In re Marriage Cases* (2008) 43 Cal.4th 757. In an opinion by Chief Justice George, the Court struck down the statutory mandate that marriage was limited to the union of people of different genders. The Court held that the right to marry the person of one's choice is guaranteed by the California Constitution. In doing so, the Court invoked its 1948 decision in *Perez v. Sharp*,⁴³⁹ which struck down California's ban on interracial marriage.⁴⁴⁰ The Court rejected the notion that offering all of the same privileges as marriage but attaching a different name, such as a "domestic partnership," was sufficient, since such a "compromise" denied the plaintiffs equal dignity and respect.⁴⁴¹ The Court held that limiting marriage to opposite-sex unions failed both elements of the equal protection test: Specifically, the desire to maintain the historic view of marriage was not a compelling state interest, and the restriction was not necessary.⁴⁴²

For the year 2008, the Court decided forty civil cases and sixty-six criminal cases. Twenty-six cases were automatic death penalty appeals, and the Court affirmed twenty, reversed in part five, and reversed completely one.

The following year, in May 2009, the Court handed down decisions in two controversial cases: *In re Tobacco II Cases* and *Strauss v. Horton*.

In re Tobacco II Cases (2009) 46 Cal.4th 298 required the Court to determine the impact of Proposition 64, which had narrowed standing to sue under the state's Unfair Competition Law to those with an identifiable loss or injury, in an enormous class action against tobacco companies. The plaintiffs' complaint alleged that the defendants had conducted "a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease."⁴⁴³ The Court concluded that "standing requirements are applicable only to the class representatives"⁴⁴⁴ and went on to say that while the plaintiffs would be required to prove actual reliance on fraudulent statements, this did not require an "unrealistic degree of specificity" of reliance on particular advertisements or statements when the practice at issue was a fraudulent advertising campaign.⁴⁴⁵

⁴³⁹ *Perez v. Sharp*, 32 Cal.2d 711 (1948).

⁴⁴⁰ *In re Marriage Cases*, 43 Cal.4th at p. 811.

⁴⁴¹ *Id.* at p. 783.

⁴⁴² *Id.* at p. 784.

⁴⁴³ *In re Tobacco II Cases*, 46 Cal.4th at p. 306.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

Strauss v. Horton (2009) 46 Cal.4th 364 was a sequel to *In re Marriage Cases* (which was a sequel of sorts to *Lockyer v. City and County of San Francisco*). By way of background, *In re Marriage Cases* was itself a thoroughly controversial decision in some circles, and accordingly, a movement arose to amend the California Constitution to specifically overturn that decision. In November 2008, the measure—Proposition 8—narrowly passed. *Strauss* raised several constitutional objections to Proposition 8. But the central question was whether Proposition 8 was a mere amendment to the Constitution, meaning that it could be validly adopted by voter initiative, or a revision to the Constitution, which could not be.⁴⁴⁶

The Court emphasized that Proposition 8 had not narrowed citizens’ privacy or equal protection rights under the state Constitution, which were central to *In re Marriage Cases*. Rather, it simply reserved the official designation of “marriage” for opposite-sex unions. Given that understanding, the Court held that Proposition 8 was a lawful amendment to, rather than an unconstitutional revision of, the Constitution (the latter of which cannot be effectuated by an initiative measure).⁴⁴⁷ Finally, the Court held that Proposition 8 did not apply retroactively, meaning that all marriages performed between *In re Marriage Cases* and *Strauss* remained valid under California law.⁴⁴⁸

Justice Moreno filed a concurring and dissenting opinion, arguing that an initiative “requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution.” Justice Moreno concluded that such a “drastic and far-reaching change in the nature and operation of our governmental structure” certainly constituted a “revision” rather than an “amendment.”⁴⁴⁹

For the year 2009, the Court decided forty-four civil cases and sixty-one criminal cases. The Court decided twenty-five death penalty appeals, affirming the judgment in twenty, reversing in part three cases, and reversing entirely two cases.

In 2010, in *International Society for Krishna Consciousness of California v. City of Los Angeles* (2010) 48 Cal.4th 446, the Court once again faced the intersection of free speech and public forum access, which had been at the center of *Golden Gateway Center v. Golden Gateway Tenants Association* and *Robins v. Pruneyard Shopping Center*.

⁴⁴⁶ *Id.* at p. 386.

⁴⁴⁷ *Id.* at p. 388.

⁴⁴⁸ *Id.* at p. 392.

⁴⁴⁹ *Strauss*, 46 Cal.4th at pp. 483–484.

By way of background, in 1997, the City of Los Angeles had enacted an ordinance prohibiting persons from soliciting funds at the Los Angeles International Airport (known as LAX). A trial court subsequently entered an injunction on the grounds that the ordinance violated the free speech clause of the California Constitution.⁴⁵⁰ On appeal to the Ninth Circuit, the circuit court certified a question to the California Supreme Court: Was LAX a public forum under the free speech clause of the state Constitution?⁴⁵¹ While the appeal was pending, the state Supreme Court decided *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 357, which held that a regulation directed at the public solicitation for the immediate donation of funds was neither content based nor constitutionally suspect under the California Constitution, and should instead be evaluated under the intermediate level of scrutiny of time, place, and manner regulations.⁴⁵²

The Court ultimately concluded that regardless of whether LAX was a public forum, the ordinance was a valid time, place, and manner regulation within the meaning of the free speech clause, because soliciting the immediate donation of funds from passersby was a much greater intrusion than merely handing out literature that the recipient was free to read at a later time (or not at all).⁴⁵³ Given that the peak periods of congestion varied depending on the arrival and departure times of flights, the total ban on solicitation of funds was narrowly tailored to achieve the desired end.⁴⁵⁴

On July 14, 2010, Chief Justice Ronald George announced that he would retire on January 2, 2011. *The Los Angeles Times* opined: “George wasn’t perfect in leading the court through the crucial 14-year period that ends with his tenure, but it’s hard to imagine someone who could have done better.”⁴⁵⁵

On July 21, 2010, Governor Arnold Schwarzenegger announced his nomination for George’s successor: Justice Tani Cantil-Sakauye of the Third District Court of Appeal. According to the Governor, “Justice Tani Cantil-Sakauye has a distinguished history of public service and understands that the role of a justice is not to create law but to independently and fairly interpret and administer the law.” The nominee responded, “It is a privilege and a tremendous honor to have the opportunity to serve as Chief Justice of the California Supreme Court. I deeply respect the inspirational and visionary

⁴⁵⁰ *International Society*, 48 Cal.4th at p. 452.

⁴⁵¹ *Id.* at pp. 449–450.

⁴⁵² *Id.* at p. 452.

⁴⁵³ *Id.* at pp. 450, 455, 459.

⁴⁵⁴ *Id.* at p. 460.

⁴⁵⁵ *Los Angeles Times*, Jul. 16, 2010, p. 15.

work of Chief Justice Ronald George and hope to build upon it.”⁴⁵⁶

As Chief Justice George’s tenure drew to a close, *The Los Angeles Times* reported that he had drafted two endings to his majority opinion in *In re Marriage Cases*—one recognizing the right of all Californians to marry and one not. But when he polled the Court, he found that the associate justices were split 3-3. It was up to him.⁴⁵⁷ As noted above, the Chief Justice opted for the version recognizing the broader right to marry.

“He was the most extraordinary leader of the Supreme Court in modern history,” said Treasurer Bill Lockyer. “Incredibly effective,” said state Senate Leader Darrell Steinberg. “He is not a partisan, and he doesn’t go out of his way to poke you in the eye. He is a pretty darn good country politician.” *The Los Angeles Times* concluded that with his majority opinion in *In re Marriage Cases*, George “left his most enduring stamp on the law and California history.”⁴⁵⁸

Retiring Chief Justice George gave a lengthy series of oral history interviews, beginning on May 26, 2011. In his oral history, the Chief Justice explained how petition conferences work:

The central staffs prepare memoranda summarizing the thorough analysis of the petition and a recommended disposition . . . We go through the cases, which are divided into an A list and a B list. The B list is a nondiscussion agenda, or “consent agenda,” which can be elevated to the A list for discussion at the request of any one justice. But if there is no such request, we usually deny review without any discussion. The A list involves dozens of cases, individually discussed and voted upon by each justice in order of seniority.⁴⁵⁹

The Chief Justice also explained that sometimes amicus briefs were crucial in pushing a petition over the line into a grant:

Our basic function in granting review was to focus on cases with widespread ramifications. In that situation, the filing of an *amicus curiae* brief could sometimes cast light on the potential significance of an issue. If a petition is filed by a party arguing that the case presents a substantial issue—but added to that showing are one or more briefs of *amici curiae* showing that, from the standpoint of, let’s say, a given industry or trade group or employee group, many more individuals and entities would be affected by the decision than just the named parties to the lawsuit—that might very

⁴⁵⁶ *Modesto Bee*, Jul. 22, 2010, p. A5.

⁴⁵⁷ *Los Angeles Times*, Dec. 30, 2010, p. 1.

⁴⁵⁸ *Id.* at p. 9.

⁴⁵⁹ George and McCreery, Chief: The Quest for Justice in California (2013), p. 236.

well make the difference in persuading the court that the issue presented by the petition is in fact a substantial one and therefore merits review.⁴⁶⁰

The Chief Justice next explained the process by which the Court arrived at its opinions:

After the briefs came in, the assigned justice would prepare and circulate a calendar memo to his or her colleagues. Under our practices, ideally within 15 days of that circulating, the six other justices were to circulate a “P.R.” or preliminary response indicating anything from checking off a box, “I concur,” to one saying “I concur with reservations,” setting those forth, or “I disagree” or “I will dissent,” sometimes relating dissenting views at great length in several pages of single-spaced typewritten comments. Then, when those responses would all be in, the author of the majority calendar memo would have the opportunity to put out a responsive memorandum . . . indicating how he or she would or would not accommodate the various reservations or suggestions. Sometimes one or more wholly new revised calendar memos would be circulating, inviting a new round of P.R.s. It was only when four or more of the justices were pointed in basically the same direction that I would inquire whether the justices were ready to calendar the case for oral argument.⁴⁶¹

The Chief Justice’s view of the significance of oral argument contrasted sharply with many other observers, including Justice Edward Panelli⁴⁶² and long-time staff attorney Peter Belton.⁴⁶³ The Chief observed:

I knew then, and I know even better today, that it’s quite dangerous to make predictions about how a court is going to rule based upon the oral arguments . . . Questions, whether hypothetical or not, are not always a good clue as to how that particular justice may be thinking about the case.⁴⁶⁴

THE CANTIL-SAKAUYE COURT TAKES FORM

Tani Cantil-Sakauye was sworn into office as the 28th Chief Justice of California on January 3, 2011.

During the first week of January 2011—as Chief Justice Cantil-Sakauye took her seat and almost simultaneously with Chief Justice George’s retirement—Associate Justice Carlos Moreno announced his decision to retire.

⁴⁶⁰ *Id.* at p. 339.

⁴⁶¹ *Id.* at p. 340.

⁴⁶² *Oral History of Edward A. Panelli, supra*, p. 568.

⁴⁶³ LaBerge, *Peter Belton Oral History, supra*, pp. 1, 23-29.

⁴⁶⁴ George and McCreery, Chief, *supra*, p. 53.

The *Oakland Tribune* cited Moreno’s commuting between his home in Los Angeles and the Court’s sessions in San Francisco as a factor in his decision. “I felt with so much transition in the air, the chief justice leaving, the change in administrations, I started looking at my own career and what else I’d like to do. It seemed exciting to try something new.”⁴⁶⁵

On May 25, 2011, after an extended Republican filibuster, Berkeley law professor Goodwin Liu asked President Obama to withdraw his nomination for a seat on the Ninth Circuit.⁴⁶⁶ And two months after his Ninth Circuit nomination was withdrawn, Governor Jerry Brown nominated Professor Liu to take Justice Moreno’s seat. Governor Brown called Liu “an extraordinary man and a distinguished legal scholar.” In a statement, Liu said he was “deeply honored” by the Governor’s nomination.⁴⁶⁷ Liu’s nomination was confirmed by the Commission on Judicial Appointments on August 31, 2011.⁴⁶⁸

Perry v. Brown (2011) 52 Cal.4th 1116 brought the hot-button issue of same-sex marriage once again to the Court. *Perry* arose from a federal court constitutional challenge to Proposition 8, the voter-adopted initiative that had overruled the Court’s decision in *In re Marriage Cases* and reinstated the state-law ban on same-sex marriage. The federal district court had allowed proponents of Proposition 8 to intervene in the action to defend its validity when both the Governor and the Attorney General declined to defend the California law. The district court issued a lengthy decision striking down the initiative, but when the matter was appealed to the Ninth Circuit, the federal appellate court first called for briefs on the proponents’ standing and then certified the question to the California Supreme Court regarding whether the proponents had standing under state law to defend their initiative.⁴⁶⁹

The Court concluded that although the question of standing was ultimately one of federal law, federal courts had looked to state law to determine who the state had authorized to assert its interests in the federal courts.⁴⁷⁰ The Court unanimously held that under article II, section 8 of the California Constitution and the relevant provisions of the state Elections Code, the official proponents of a voter-approved initiative are authorized to assert the state’s interest in the measure’s validity.⁴⁷¹ Theodore Olson and David Boies, the attorneys leading

⁴⁶⁵ *Oakland Tribune*, Jan. 7, 2011, pp. 1, 11.

⁴⁶⁶ *Merced Sun-Star*, May 26, 2011, p. 3.

⁴⁶⁷ *Philadelphia Inquirer*, Jul. 27, 2011, p. A06.

⁴⁶⁸ *Fresno Bee*, Sep. 1, 2011, p. A7.

⁴⁶⁹ *Perry*, 52 Cal.4th at p. 1131.

⁴⁷⁰ *Id.* at pp. 1133–1135.

⁴⁷¹ *Id.* at pp. 1152, 1165.

the attack on Proposition 8, said: “This frees up the Ninth Circuit to go ahead and decide the constitutional questions on the merits: the due process and equal protection rights of gay and lesbian citizens in California.”⁴⁷²

For the year 2011, the state Supreme Court decided thirty-three civil cases and fifty-one criminal cases. Just over half of the criminal docket—twenty-six cases—were death penalty appeals, and the Court affirmed twenty-three of them, reversed two in part, and reversed one in full. The Court’s death penalty docket got a full year shorter, with an average lag time of 2,940.62 days from certification of the record to oral argument. And civil cases moved about three months more quickly, averaging 477.42 days from the grant of review to oral argument. Only non-death criminal cases slowed down, averaging 636.56 days from the grant of review to argument. Twenty-five of the civil decisions and thirty-seven of the criminal decisions were unanimous.

In 2012, the Court addressed the limitations involved in applying traditional tort theory to recreational activities. *Nakwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148 involved a plaintiff who broke her wrist while riding a bumper-car ride at an amusement park. The trial court entered judgment for the defendant based upon the doctrine of primary assumption of risk, but the Court of Appeal had reversed, finding the bumper car rides too “benign” to be considered a sport.⁴⁷³ However, in an opinion by Justice Werdegar, the Court concluded that the policy behind the primary assumption of risk doctrine applied to activities involving physical recreation, whether they were considered “sports” or not.⁴⁷⁴

In 2012, the Court decided twenty-six civil cases and seventy-seven criminal cases—nineteen cases more than the prior year. The Court decided twenty-five death penalty cases, affirming eighteen, reversing six in part, and reversing one case in its entirety. Nineteen of the Court’s civil case decisions and sixty-two of the criminal decisions were unanimous, which may explain the Court’s ability to increase its volume.

In 2013, *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 raised a fundamental question regarding the parties’ capacity to control the appealability of judgments. *Kurwa* involved claims for breach of fiduciary duty and competing cross claims for defamation. The resulting judgment disposed of the fiduciary duty claims with prejudice, and the parties agreed to dismiss the remaining claims without prejudice with mutual waivers of the applicable statutes of

⁴⁷² *The Bulletin*, Nov. 18, 2011, p. 21.

⁴⁷³ *Nakwa*, 55 Cal.4th at p. 1153.

⁴⁷⁴ *Id.*

limitations.⁴⁷⁵ In an opinion by Justice Werdegar, the Court held that it was not free to adopt whatever rule of appealability best balanced trial and appellate efficiency, given that California law provided no case-by-case efficiency exception to the one-final judgment rule.⁴⁷⁶ Accordingly, the Court held that the judgment was not final and appealable and that review was available only through a petition for writ of mandate.⁴⁷⁷

For the year 2013, the Court decided thirty-two civil cases and fifty criminal cases. Eighteen of the Court's decisions arose out of death penalty appeals, with affirmances in seventeen of them and a partial reversal in one. That year, death penalty cases averaged more than ten years from certification of the record to oral argument.

On February 11, 2014, Justice Joyce Kennard, the longest-serving current Justice of the Court, announced that she would retire effective April 5. Governor Brown observed, "The state and its people have been very well served by Justice Kennard," and added, "Her independence and intellectual fortitude have left a lasting mark on the Court." The *Tulare Advance-Register* described Kennard's questioning style at oral argument: "In her tenure on the court, she became famous for interjecting questions during oral arguments, often turning them into lengthy speeches before pointing her finger at a lawyer and demanding an answer."⁴⁷⁸

On June 18, 2014, Justice Marvin Baxter announced his retirement after more than twenty-four years on the Court, observing, "It is a great honor to have served on the state's high court since 1991." He explained that he wanted to spend more time with his wife of fifty-one years and the rest of his family. "I will miss his sage advice and counsel," lamented Chief Justice Tani Cantil-Sakauye.⁴⁷⁹ "His quiet yet thoughtful demeanor served as a steady influence during some troublesome times that I experienced in the governor's office," said former Governor George Deukmejian in a statement, adding: "His endless efforts resulted in well-established recommendations that I grew to rely upon."⁴⁸⁰

In 2014, in *Beacon Residential Community Association v. Skidmore, Owings & Merrill* (2014) 59 Cal.4th 568, the Court considered the scope of an architect's duty of due care to future residents in the homes that the architect had designed. In an opinion by Justice Liu, the Court held that an architect owes a duty of care to

⁴⁷⁵ *Kurwa*, 57 Cal.4th at p. 1100.

⁴⁷⁶ *Id.* at p. 1107.

⁴⁷⁷ *Id.* at pp. 1100, 1105, 1108.

⁴⁷⁸ *Tulare Advance-Register*, Feb. 12, 2014, p. 11.

⁴⁷⁹ *Fresno Bee*, Jun. 19, 2014, p. A6.

⁴⁸⁰ *Modesto Bee*, Jun. 19, 2014, p. A3.

future homeowners in the design of a residential building where the architect is the principal architect for the project.⁴⁸¹ The Court commented: “A liability rule that places the onus on home buyers to employ their own architects to fully investigate the structure and design of each home they might be interested in purchasing” was “unrealistic.”⁴⁸²

On July 22, 2014, Governor Jerry Brown nominated Professor Mariano-Florentino Cuéllar as Justice Marvin Baxter’s successor. In a statement, Governor Brown observed, “Tino Cuéllar is a renowned scholar who has . . . made significant contributions to both political science and the law. His vast knowledge and even temperament will—without question—add further luster to our highest court.”⁴⁸³

Four months later, on November 24, 2014, Governor Brown nominated Leondra Kruger to succeed Justice Kennard. “Leondra Kruger is a distinguished lawyer and uncommon student of the law,” Governor Brown said in announcing the nomination. “She has won the respect of eminent jurists, scholars and practitioners alike.”⁴⁸⁴

For the year 2014, the Court decided twenty-three civil cases and fifty-five criminal cases. Twenty-three of those criminal cases were death penalty appeals, of which the Court affirmed fourteen, reversed in part eight, and reversed one in its entirety. Death penalty lag times remained over ten years.

In 2015, in *Iskanian v. CLS Transportation Los Angeles* (2015) 59 Cal.4th 348, the Court addressed an issue that had arisen repeatedly in recent years—the interplay between the Federal Arbitration Act and California’s robust state-law protections for employees and consumers. In *Iskanian*, the plaintiff had filed a class action seeking back pay for overtime and meal and rest periods, notwithstanding his having earlier signed an arbitration agreement that expressly waived any class proceedings.⁴⁸⁵ The Court held that its earlier precedent declining to enforce such waivers had been overturned by recent precedent from the United States Supreme Court interpreting the Federal Arbitration Act.⁴⁸⁶ However, the Court held that claims under the Private Attorneys General Act (“PAGA”)—a type of *qui tam* action authorized by state law regarding claims brought on behalf of the state—were not preempted by

⁴⁸¹ *Beacon Residential*, 59 Cal.4th at pp. 571, 581.

⁴⁸² *Id.* at p. 585.

⁴⁸³ *Fresno Bee*, Jul. 23, 2014, p. A10.

⁴⁸⁴ *Sacramento Bee*, Nov. 25, 2014, p. A8.

⁴⁸⁵ *Iskanian*, 59 Cal.4th at p. 359.

⁴⁸⁶ *Id.* at p. 360.

the Federal Arbitration Act.⁴⁸⁷

For the year 2015, the Court decided thirty-two civil cases and forty-four criminal cases. Seventeen of those criminal cases involved death sentences, for which the Court affirmed nine and reversed eight in part. Death penalty cases sped up a bit, although they still averaged over ten years from certification of the record to oral argument. Most of the Court’s decisions were unanimous—twenty-eight of the civil matters and thirty-four of the criminal cases.

Twice in 2016, the Court faced an issue that arises regularly in death penalty practice: the defendant’s right to insist upon representing himself and the nature of the defendant’s plans should a court grant the defendant’s motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806.

People v. Burgener (2016) 1 Cal.5th 461 had been up and down between the trial and the appellate courts repeatedly. In the final appeal, the question was whether a defendant had a constitutional right to insist upon representing himself for the hearing on the automatic posttrial motion to modify a death penalty verdict under Penal Code section 190.4, subdivision (e). The defendant challenged the granting of his motion to represent himself on the grounds that his request was equivocal and that the trial court gave him an inadequate warning of the dangers involved.⁴⁸⁸ In a majority opinion by Justice Liu, the Court held that there was no bar to granting a defendant’s motion to represent himself in connection with a hearing under Penal Code section 190.4, subdivision (e) in connection with his seeking relief from the death sentence.⁴⁸⁹

In *People v. Mickel* (2016) 2 Cal.5th 181, the defendant argued that the trial court had erred in allowing him to represent himself because he was incompetent to do so, and again for failing to terminate his self-representation at the penalty phase. In an opinion by Justice Cuéllar, the Court held that “the critical question” was not “whether a self-represented defendant meets the standards of an attorney, or even whether a defendant is capable of conducting an effective defense.”⁴⁹⁰ The Court concluded that defendant’s decision to present no defense “was a valid exercise of his right to control his defense.”⁴⁹¹

In 2016, the Court decided thirty-six civil cases and fifty-two criminal cases. Twenty-four cases involved death penalty judgments. Of these, fourteen were affirmed, eight were reversed in part and two were reversed outright.

⁴⁸⁷ *Id.* at pp. 360, 382.

⁴⁸⁸ *Burgener*, 1 Cal.5th at p. 465.

⁴⁸⁹ *Id.* at p. 472.

⁴⁹⁰ *Mickel*, 2 Cal.5th at 206.

⁴⁹¹ *Id.* at p. 209.

The California voters faced two competing ballot initiatives in November 2016: Proposition 62 would repeal the death penalty and automatically resentence all defendants to life without parole, and Proposition 66, the Death Penalty Reform and Savings Act, made sweeping changes to death penalty appeals, including a tight deadline for the litigation. The vote was a photo finish: Proposition 62 was defeated 46.9 to 53.1 percent and Proposition 66 passed 51.1 to 48.9 percent.

In *Briggs v. Brown* (2017) 3 Cal.5th 808, opponents of Proposition 66 challenged the Act on four grounds: (1) that it violated the single-subject rule; (2) that it interfered with the Supreme Court’s jurisdiction to hear original petitions for habeas corpus; (3) that it violated equal protection by treating capital prisoners differently from others with respect to successive habeas corpus petitions; and (4) that it ran afoul of the separation of powers doctrine by impairing the ability to resolve capital appeals and habeas petitions.

But *Briggs* is mostly notable for the dissent of Justice Cuéllar. Justice Cuéllar was openly skeptical of the notion that the electorate would have passed Proposition 66 if they had been told that the five-year time limit was merely a gentle suggestion rather than a hard deadline. Justice Cuéllar wrote that in “interpreting” the deadline:

the majority disregards the electorate’s clear purpose in enacting Proposition 66 and fails to promote forthright deliberation. It distorts our statutory and constitutional jurisprudence, and—by insisting the mandate be treated as both a mere “exhortation” yet one “not empty” of legal meaning—leaves in its wake grave uncertainty about the rules and standards the Judicial Council is supposed to adopt to render meaningful that exhortation.⁴⁹²

Justice Cuéllar explained that “all of the parties agreed that Proposition 66 ‘requires’ or ‘directs’ state courts to complete the automatic appeal and review of the initial state habeas corpus petition within five years, and that the five-year deadline is—and was intended to be—enforceable through a petition for writ of mandate.”⁴⁹³ In the face of that unanimous understanding, he argued that the majority’s “gentle suggestion” interpretation was untenable.

On March 8, 2017, Justice Kathryn Werdegar announced her forthcoming retirement. “It has not been an easy decision,” Justice Werdegar lamented, but she wanted to “expand my life a little bit, reconnect with friends, do a lot more

⁴⁹² *Briggs*, 3 Cal.5th at 873.

⁴⁹³ *Id.* at pp. 879–880.

hiking, more piano, more time with family and just smell the roses.”⁴⁹⁴

Justice Werdegar gave a wide-ranging oral history interview following her retirement. That interview included a story of one “hazing” ritual for new justices:⁴⁹⁵

When we go to the Sacramento courthouse, on the ceiling there they have these little recessed impressions, and they all have a little round flower in the middle of them, rosettes, except there’s one that doesn’t. The tradition that occurs is every new justice is challenged when we take the bench in Sacramento, to find the one little square that’s missing its little flower in the center. So during oral argument there’s the new justice with his or her head swiveling to look on the ceiling, but the twist is that where the newest justice sits is the one seat where you can’t see it.

Like a great many appellate justices, Justice Werdegar spoke highly of appellate specialists:⁴⁹⁶ “[O]f course now it’s not a complete specialty, but the attorneys that are before us are the appellate branch of their firm or they have a completely appellate practice. We benefit from that. We can tell.”

Justice Werdegar reported that the Court’s conferences had a new “vibe” with the turnover in personnel in recent years: “Actually, conferences are more . . . people seem more engaged, and there are more questions being asked. When you’ve worked with the same group for years . . . perhaps there isn’t a motivation to have so much discussion. Now we are all new personalities interacting, and I would say there’s a fresh energy.”⁴⁹⁷

Justice Werdegar also commented that the Court’s patterns had shifted with respect to granting review of unpublished opinions: “Further, the belief that we won’t grant review of opinions that are unpublished no longer has the credence that it once did . . . we’ll see that an opinion is unpublished but there is a trend of appellate opinions that are conflicting with a published opinion, so we will grant the petition.”⁴⁹⁸

In 2017, the Court’s docket was split down the middle: forty-two civil cases and forty-two criminal cases. The Court decided eleven death penalty appeals, affirming nine judgments and reversing in part two. In the year of *Briggs v. Brown* and the new five-year limit on death penalty appeals, death cases averaged 10.7 years from certification of the record to oral argument—3,903.73 days. But of

⁴⁹⁴ *Los Angeles Times*, Mar. 13, 2017, p. A1.

⁴⁹⁵ McCreery and Werdegar, *Oral History of Justice Kathryn Mickle Werdegar* (2017) 12 Cal. Legal Hist., p. 249.

⁴⁹⁶ *Id.* at p. 255.

⁴⁹⁷ *Id.* at p. 388.

⁴⁹⁸ *Id.* at pp. 393–394.

course, those cases had already been pending before *Briggs*, and the statistics do not account for requests for extensions by overworked death penalty counsel or the number of issues. Civil cases averaged 639.12 days from the grant of review to argument. Non-death criminal cases averaged 1,891.55 days from grant to argument.

In 2018, the Court took up several important issues in partnership and bankruptcy law triggered by one of the most shocking events of 2008: the bankruptcy of the venerable law firm Heller Ehrman. According to the Court’s opinion in *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 Cal.4th 467, Heller’s dissolution plan included a provision known as a *Jewel* waiver. That provision waived any rights and claims that Heller might have had to seek payment of legal fees generated after the departure date of any lawyer or group of lawyers to other employment with respect to non-contingency matters.⁴⁹⁹ However, the bankruptcy administrator filed adversary proceedings against law firms to which former equity partners had moved, alleging that the *Jewel* waiver was a fraudulent transfer of Heller’s rights.⁵⁰⁰

In an opinion by Justice Cuéllar (complete with a first-line quotation from Shakespeare), the Supreme Court held that a dissolved law firm has no property interest in legal matters handled on an hourly basis, and therefore, no property interest in the profits generated by former partners’ work on such matters following the dissolution.⁵⁰¹ The Court found that the limited nature of the interest accorded to the dissolved law firm protected the clients’ choice of counsel by allowing them to choose new law firms unburdened by the reach of the dissolved firm.⁵⁰² Furthermore, any hope that the dissolved firm may have had to continue working on unfinished hourly fee matters was necessarily speculative, not rising to the level of a property interest, because of the client’s right to discharge its counsel at any time, with or without cause.⁵⁰³

In November, one of the longest vacancies in the Court’s history finally ended with Governor Jerry Brown’s nomination of his senior advisor, Joshua Groban, to the seat on the Court vacated a year earlier by Justice Werdegar. “Josh Groban has vast knowledge of the law and sound and practical judgment,” the Governor enthused in a statement. “He’ll be a strong addition to California’s highest court.” Like the Governor’s three previous nominees, Groban had never been a judge and responded, “I am truly humbled by this

⁴⁹⁹ *Heller*, 4 Cal.4th at pp. 471–472.

⁵⁰⁰ *Id.* at p. 472.

⁵⁰¹ *Id.* at p. 471.

⁵⁰² *Id.* at p. 473.

⁵⁰³ *Id.* at p. 478.

nomination and, if confirmed, I look forward to working alongside the highest court’s truly exemplary jurists.”⁵⁰⁴

For the year 2018, the Court decided thirty-three civil cases and fifty criminal cases. Twenty-one of the criminal matters were death penalty appeals; the Court affirmed sixteen judgments and reversed in part five. The year 2018 was a rarity for the amicus practice: More briefs were filed supporting civil respondents (2.27) than were filed favoring appellants (2 per case). Another thirty amicus briefs were filed in criminal cases.

In 2019, in *Patterson v. Padilla* (2019) 8 Cal.5th 220, the Supreme Court considered an important question raised by the upcoming 2020 election: Did Donald Trump’s refusal to release his tax returns—the first Presidential candidate in many years to do so—disqualify him from the 2020 primary ballot?

The Presidential Tax Transparency and Accountability Act—Elections Code section 6880—provided that no candidates could be listed by the Secretary of State on the primary ballot for president who had failed to file tax returns for the past five years with the Secretary of State.⁵⁰⁵ In an opinion by Chief Justice Cantil-Sakauye, the Court held that Article II, section 5(c) of the California Constitution required all recognized candidates for the presidency to be on the California primary ballot, regardless of whether they had disclosed their tax returns.⁵⁰⁶

In 2019, the Court decided thirty-four civil cases and forty-one criminal cases. The Court decided nineteen death penalty cases, affirming in thirteen and reversing six in part. By 2019, the issuance of death penalty majority opinions had grown to an average of nearly thirteen years from certification of the record to oral argument, but again, this could result from applications for extensions by overworked defense counsel, the length of the record, and the number of issues addressed in the briefs.

On January 15, 2020, Justice Ming Chin announced that he would retire effective August 31, 2020, ending nearly twenty-five years on the Court. Chief Justice Cantil-Sakauye called Chin’s loss to the Court “incalculable.” She observed that “he has been a valuable mentor who took me under his wing when I first became Chief Justice . . . Before he joined the bench, he spent years performing at the very highest levels of the legal professions and he is an accomplished teacher and lecturer.” Among Justice Chin’s administrative contributions to the Court was his work helping the Court embrace technology

⁵⁰⁴ *Sacramento Bee*, Nov. 15, 2018, p. A7.

⁵⁰⁵ *Patterson*, 8 Cal.5th at 223.

⁵⁰⁶ *Id.* at p. 242.

to expand public access.⁵⁰⁷

In *K.Ĵ. v. Los Angeles Unified School Dist.* (2020) 8 Cal.5th 875, the Court addressed one of the most crucial moments in California state-law appellate practice: getting the Notice of Appeal right. In that case, the plaintiff's attorney had been cited for contempt and sanctioned for allegedly interfering in an examination by placing questions about the details of the sexual assault at issue off limits.⁵⁰⁸ The sanctions order was appealed, but the notice of appeal listed only the plaintiff as the appealing party.⁵⁰⁹ The Court of Appeal issued a “suggestive *Palma* notice”—an order strongly suggesting that the trial court should vacate its order without further proceedings. The trial court vacated the contempt, but specifically left in place a further \$16,111 sanctions award that it had imposed while the contempt order was stayed.⁵¹⁰ In an opinion by Justice Groban, the Court held that appellate courts are not categorically precluded from construing such a notice of appeal to include the attorney as the appealing party given that (1) the notice of appeal designated the sanctions order alone as the basis for the appeal; (2) the sanctions order had no effect on the rights of the client; (3) the attorney had extensively litigated the matter below; and (4) the respondent did not suggest that it had been misled or prejudiced.⁵¹¹

Another case during that term, *People v. Miles* (2020) 9 Cal.5th 513, is noteworthy for the eloquent dissent by Justice Liu. In *Miles*, an African American defendant was sentenced to death for raping and murdering a white woman.⁵¹² The prosecutor removed every black juror who had not already been excused for cause, and only one of the alternate jurors was black.⁵¹³ In *Miles*, jurors were asked during voir dire whether they were upset by the verdict in the O.J. Simpson murder case. Justice Liu commented that exercising strikes based on the Simpson verdict “seems like playing with fire.”⁵¹⁴ He noted that at the time jury selection took place, a practice of striking jurors who said they were not upset by the Simpson verdict would have resulted in the disproportionate removal of black jurors.⁵¹⁵ Comparative juror analysis also supported an inference of pretext, according to Justice Liu.⁵¹⁶ Justice Liu

⁵⁰⁷ *Los Angeles Times*, Jan. 16, 2020, p. B4.

⁵⁰⁸ *K.Ĵ.*, 8 Cal.5th at pp. 878–879.

⁵⁰⁹ *Id.* at p. 881.

⁵¹⁰ *Id.* at pp. 879–880.

⁵¹¹ *Id.* at p. 878.

⁵¹² *Miles*, 9 Cal.5th at p. 606.

⁵¹³ *Id.*

⁵¹⁴ *Id.* at p. 613.

⁵¹⁵ *Id.* at p. 614.

⁵¹⁶ *Id.*

concluded by noting that while the Supreme Court had not found a *Batson-Wheeler* error involving the peremptory strike of a black juror in more than thirty years, it was plain that Miles’s conviction should have been reversed.⁵¹⁷

On October 5, 2020, Governor Gavin Newsom announced his first nomination to the Supreme Court: his judicial appointments secretary and a former state and federal court judge, Martin Jenkins. Jenkins came to the Court with extensive judicial experience, having served as a state trial court judge, a federal trial court judge from 1997 to 2008, and an Associate Justice on the California Court of Appeal from 2008 until his retirement to join Newsom’s administration. Governor Newsom said that Jenkins had built a reputation of “fortitude and fairness” and that he was a man of “inner strength, grace and compassion.” “Justice Martin Jenkins has the right experience at the right time in our state’s history,” observed the Governor.⁵¹⁸ Justice Jenkins was unanimously confirmed on November 11, 2020.⁵¹⁹

For the year 2020, the Court decided twenty-nine civil cases and forty-two criminal cases. Sixteen of the criminal cases were death penalty matters, in which the Court affirmed a dozen, reversed in part three, and reversed entirely once. Of course, 2020 was largely a story of dealing with COVID lockdowns. One curious impact: the Court’s civil majority opinions got longer, averaging 27.82 pages before the lockdown began and 36.06 thereafter.

The main impact of the pandemic seems to have been on the Court’s oral arguments, which featured a considerably less “hot” bench than ordinarily. Before the Court shut down, it averaged 24.18 questions to appellants and 23.27 questions to respondents per civil case. After the pandemic shut life down, the Court averaged 11.75 questions to appellants and 11.25 questions to respondents.

In 2021, the Supreme Court’s decision in *People v. McDaniel* (2021) 12 Cal.5th 97 brought back echoes of the death penalty disputes of 1986. In an opinion by Justice Liu, the Court unanimously affirmed a death penalty judgment. But Justice Liu filed a concurrence (to his own opinion), concluding:

In sum, the 20-year arc of the high court’s Sixth Amendment jurisprudence raises serious questions about the constitutionality of California’s death penalty scheme. There is a world of difference between a unanimous jury finding of an aggravating circumstance and the smorgasbord approach

⁵¹⁷ *Id.* at pp. 616, 617.

⁵¹⁸ *Sacramento Bee*, Oct. 6, 2020, p. A1.

⁵¹⁹ *Los Angeles Times*, Nov. 11, 2020, p. B3.

that our capital sentencing scheme allows. Given the stakes for capital defendants, the prosecution, and the justice system, I urge this court, as well as other responsible officials sworn to uphold the Constitution, to revisit this issue at an appropriate time.⁵²⁰

On September 16, 2021, Justice Mariano-Florentino Cuéllar surprised observers by announcing that he was leaving the Court to become the new president of the Carnegie Endowment for International Peace. “I have been fortunate to serve the people of California for nearly seven years on our highest court—a distinction I could not have imagined when I first arrived here as a high school student in the Imperial Valley,” said Justice Cuéllar in a statement.⁵²¹ According to *The Los Angeles Times*, “Cuéllar had a disarming way of asking incisive questions and perking up the conversation,” during his tenure as a member of the Obama administration. “He had so much humility that people weren’t scared of him.”⁵²²

For the year 2021, the Court decided twenty-one civil cases and thirty-four criminal cases. The Court decided fifteen death penalty cases, affirming the judgment in eleven cases, reversing in part three judgments, and reversing completely one case.

This year also saw a sky-high unanimity rate; concurring and dissenting opinions were rare. Amicus practice slowed down a bit, as the Court received an average of 1.91 briefs per appellant and 1.67 per respondent in civil cases. In contrast, there was a spike in amicus briefs in criminal cases, with seventy-two being filed, which included fifty for appellants, nineteen for respondents, and three favoring neither side.

On February 15, 2022, Governor Newsom announced his nominee to succeed Justice Cuéllar on the Supreme Court: Justice Patricia Guerrero of the Fourth District Court of Appeal. “Her extraordinary journey and nomination to serve as the first Latina justice on the bench of our state’s highest court is an inspiration to all of us and a testament to the California Dream’s promise of opportunity for all to thrive, regardless of background or zip code,” said Newsom in a statement. “With her extensive experience handling complex litigation matters, intellectual rigor and commitment to fairness and equality, Justice Guerrero . . . will make an excellent addition to our state’s highest court,” added retired Justice Carlos Moreno.⁵²³

⁵²⁰ *McDaniel*, 12 Cal.5th at p. 176.

⁵²¹ *Santa Maria Times*, Sep. 17, 2021, p. A2.

⁵²² *Los Angeles Times*, Sep. 17, 2021, p. B3.

⁵²³ *Napa Valley Register*, Feb. 16, 2022, p. A4.

In 2022, the Court addressed a situation which not infrequently arises in civil tort practices arising out of suburban living: the scope of the recreational use immunity and the “express invitation” exception to it. *Hoffman v. Young* (2022) 13 Cal.5th 1257 was a majority opinion by Justice Corrigan: “Under Civil Code section 846, landowners generally owe no duty of care to keep their property safe for others who may enter or use it for recreational purposes. There is an exception to that statutory negation of duty, however, when a landowner expressly invites someone onto the property.” The question there was whether the exception applied when the invitation was extended by a live-at-home child without the knowledge or permission of the owners.⁵²⁴ The trial court had held that the invitation could only come from the landowners—the adult parents themselves. But the Court of Appeal held that the child had an implied agency to invite guests onto the land. Taking a common sense approach, the Supreme Court disagreed with both courts.⁵²⁵ “Though we agree that landowners can authorize nonowners to expressly invite others onto their property, we reject the proposition that a landowner necessarily does so by allowing a child to live on the property and failing to prohibit the child from extending the invitation.”⁵²⁶ The court remanded the matter to the Court of Appeal for it to address the plaintiff’s argument that the court had erred by denying her motion for a new trial.

For the year 2022, as California continued to recover from the pandemic, the Court decided only nineteen civil cases. It decided thirty-two criminal cases, of which fourteen were death penalty cases. In the death penalty cases, the Court affirmed ten judgments and reversed in part 4 judgments. Eighteen civil decisions and twenty-three criminal decisions were unanimous.

The sole dissent in a civil case was written by the Chief Justice. However, Justice Liu wrote seven dissents in criminal cases, followed by Justices Kruger and Groban with two each. Amicus practice remained relatively busy for appellants on the civil side with an average of two briefs per case, but for respondents, briefing dropped quite low, averaging only 0.84 briefs per case. Only thirteen amicus briefs were filed in criminal cases.

THE GUERRERO COURT BEGINS

On July 27, 2022, Chief Justice Cantil-Sakauye announced that she would not seek reelection when her term concluded in January 2023. Governor Newsom said that the Chief Justice had “steered our state’s courts through

⁵²⁴ *Hoffman*, 13 Cal.5th at p. 1262.

⁵²⁵ *Id.* at p. 1276.

⁵²⁶ *Id.* at p. 1273.

times of great challenge and opportunity, championing important reforms to make our justice system fairer and more transparent, and expanding equal access to justice for all Californians.” The Governor called the Chief “a fierce defender of access to the courts” and “a leading voice for bail reform, calling out its disproportionate impacts on low-income people.”⁵²⁷

Only two weeks after the Chief Justice’s announcement, Governor Newsom announced his choice for the next Chief Justice of California: the newest Associate Justice, Patricia Guerrero. Said the Governor: “Justice Guerrero has established herself as a widely respected jurist with a formidable intellect and command of law and deep commitment to equal justice and public service.”⁵²⁸ On the same day, Newsom nominated Judge Kelli Evans of the Alameda County Superior Court to take Guerrero’s seat as an associate justice. A former civil rights attorney and civil division attorney at the U.S. Department of Justice, Evans served as Special Assistant to the Attorney General at the California Department of Justice before becoming Newsom’s Chief Deputy Legal Affairs Secretary. Natasha Minsker of Smart Justice California called Evans’s nomination a “really big deal.”⁵²⁹

The year 2023 had some noteworthy cases, and one in particular involved California’s continuing vulnerability to wildfires. In the fall of 2019, the Pacific Gas & Electric Company had conducted a series of emergency power shutoffs to reduce the risk of wildfires during extreme weather conditions. The plaintiff in *Gantner v. PG&E Corp.* (2023) 15 Cal.5th 396 alleged that decades of PG&E’s negligence in maintaining the power grid in the first place had made the shutoffs necessary.⁵³⁰ In a unanimous opinion by Justice Liu, the Court noted that after the 2019 shutoffs, the Public Utilities Commission (“PUC”) had conducted an investigation and found multiple violations of its regulatory regime, fining PG&E \$106 million.⁵³¹ The Court concluded that the plaintiff’s claim inevitably interfered with “a broad and continuing supervisory or regulatory program” of the PUC by creating a “parallel review process” that if successful would require findings in tension with PUC guidelines.⁵³² Accordingly, the Court held that the plaintiff’s remedy lay before the PUC, not in Court.⁵³³ PG&E said in a statement that its “most important responsibility is the safety of our customers and the communities we serve.” The company

⁵²⁷ *Los Angeles Times*, Jul. 28, 2022, p. B1.

⁵²⁸ *Hanford Sentinel*, Aug. 11, 2022, p. A3.

⁵²⁹ *San Francisco Examiner*, Aug. 14, 2022, p. A2.

⁵³⁰ *Gantner*, 15 Cal.5th at p. 400.

⁵³¹ *Id.* at p. 404.

⁵³² *Id.* at pp. 405, 410.

⁵³³ *Id.* at p. 412.

added, “We know that losing power significantly disrupts people’s lives.” Gantner’s attorneys said, however, that it was a “sad day for Californians,” as the Court’s opinion “leaves consumers footing the bill” for shutoffs, “no matter how negligent PG&E is in maintaining its electric grid and no matter how much damage it causes to its customers.”⁵³⁴

For the year 2023, the Court decided twenty-four civil cases and twenty-eight criminal cases. With Governor Newsom having declared a moratorium on the death penalty during his term, however, the death penalty docket slowed to a trickle: the Court decided only three cases, affirming two and reversing one. The lag time from certification of the record to oral argument in death penalty cases got a bit shorter, but for a variety of reasons, was still nearly thirteen years—4,709.33 days. Civil cases averaged 622.21 days from the grant of review to decision—roughly the same as the prior year. Non-death criminal cases averaged 542.08 days. All twenty-four of the Court’s civil decisions were unanimous, as were twenty-five of the criminal decisions. Fourteen of the civil cases involved reversals, either in whole or in part, and twenty-one of the criminal decisions were reversals.

Not surprisingly given the sky-high unanimity rate, the Court’s writing in 2023 consisted almost entirely of majority opinions. There were no concurrences or dissents in civil cases. Amicus traffic remained heavy, as the Court received an average of 2.68 briefs per civil case supporting appellants and 1.84 for respondents. Another twenty-three amici were filed in criminal cases.

In 2024, in *People v. Lamb* (2024) 16 Cal.5th 400, the Court considered the impact of video evidence in a criminal case. The jury had convicted the defendant of the murder of a gang member and a police officer. The jury was shown two Fox news videos discussing a white supremacist gang called Public Enemy Number 1 (“PEN1”).⁵³⁵ According to the videos, PEN1 was positioning itself as a criminal force inside prison walls and making inroads into organized crime.⁵³⁶ The defendant argued that the videos were irrelevant and unduly prejudicial. In an opinion by Justice Evans, the Court held that the probative value of the videos in establishing the defendant’s motive was not substantially outweighed by the prejudice from the sensational nature of the videos.⁵³⁷ Observing that Evidence Code section 352 ““speaks in terms of *undue* prejudice,”” the Court concluded that the jury could permissibly infer

⁵³⁴ *Los Angeles Times*, Nov. 21, 2023, p. B1.

⁵³⁵ *Lamb*, 16 Cal.5th at pp. 411, 425.

⁵³⁶ *Id.* at pp. 421, 422.

⁵³⁷ *Id.* at pp. 422–423.

defendant’s familiarity with the videos and in establishing motive.⁵³⁸ In any event, the Court held that there was strong evidence of the defendant’s guilt, and thus the admission of the videos was harmless under any standard.⁵³⁹

For the year 2024, the Court decided thirty-five civil cases and twenty-three criminal cases. Given Governor Newsom’s determination to sign no death certificates, the death penalty docket slowed to nearly nothing—five cases, four affirmed, one reversed in part.

Chief Justice Guerrero and Justices Evans, Kruger, and Liu led the Court with six majority opinions apiece in civil cases. The Chief Justice led on the criminal side with six majority opinions. Amicus traffic declined a bit; the Court received 1.71 amicus briefs per appellant in civil cases and 1.6 per respondent. And twenty-nine amicus briefs were filed in criminal cases.

CONCLUSION

The story of the California Supreme Court is the story of California—the law of water rights, debates over immigration, racial tensions, explosive population growth, and the development of California as the agricultural breadbasket of the nation. The California Supreme Court has considered it all. It’s also a story of villains—David Terry, Hugh Murray, the Workingmen’s Party, Abraham Ruef, and Eugene Schmitz. And it’s a story of heroes—indeed, of giants—Archy Lee, Yick Wo, Roger Traynor, Donald Wright, Phil Gibson, Ronald George, and Matt Tobriner. In short, for 175 years, the California Supreme Court has been the preeminent state Supreme Court in America.⁵⁴⁰



⁵³⁸ *Id.* at p. 424.

⁵³⁹ *Id.* at p. 427.

⁵⁴⁰ Johnson, *History of the Supreme Court Justices of California* (1963) vol. 1, p. 100.