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OF GREAT USE AND INTEREST: *CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER – THE HISTORY OF THE CALIFORNIA SUPREME COURT**

Donald Warner**

I. INTRODUCTION

Published under the auspices of the California Supreme Court Historical Society, this is a substantial and valuable effort by six authors (one of whom is also the editor) to provide a comprehensive history of the first 160 years—from 1850 through 2010—of the California Supreme Court. This Court has been, at times, among the most influential of the state courts of last resort,¹ which would make almost any treatment of its history interesting to at least a few readers. Fortunately for every reader of *The Journal*, this book offers more than the superficial information that one might expect in the typical commemorative volume. It is, on the whole, a valuable contribution to the literature of American legal history.

The book will be of great use and interest to several groups of potential readers: jurists, especially those in the twenty-plus states that provide for legislation by ballot initiative; California lawyers;² appellate lawyers from every state, but again

* Harry N. Scheiber ed., 2016 [hereinafter *GOVERNANCE AND POWER*].

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1. See, e.g., Peter Kay Westen, Note, *The Supreme Court of California 1966–1967: Introduction*, 55 Cal. L. Rev. 1059, 1059 & n.1 (1967) (pointing out that *Time* magazine had in the mid-1960s referred to the California Supreme Court as “the nation’s most aggressive and progressive state court” and quoting then-Chief Justice Earl Warren, who once observed that the California Supreme Court handled “a wider range of litigation than is to be found in most other States”).

2. This applies primarily to the last two thirds of the book, which covers the Court from 1964 on.

particularly those in the initiative states; and teachers and students of American legal history.

The text is divided into seven chapters, each covering a separate period in the history of the Court. The time periods covered in each chapter are generally (but not always, as described below) well chosen.

II. THE COURT'S 160-YEAR HISTORY IN SEVEN CHAPTERS

A. Chapter One: 1849–1879

This chapter begins with the establishment of the Court and of the State government, starting at the time of the first Constitution, which was negotiated and ratified in the full heat of the gold rush. It continues with the story of a series of three-Justice Courts whose membership changed almost annually. Through the actions of those Courts, the judiciary sorted itself out in the wake of the tremendous effects of the gold rush. Meanwhile the rest of the government, as well as civil society as a whole, was doing the same thing. Several of these early Justices were men for whom the label rough-and-tumble would be, if anything, an understatement. As one (admittedly extreme) example, take David S. Terry, an early Chief Justice, who in the course of a long career as lawyer and jurist: (1) was imprisoned and tried for attempted murder by the San Francisco Vigilance Committee; (2) killed a sitting United States Senator in a duel; and (3) was himself killed by a United States Marshal who was acting as the bodyguard for Justice Stephen Field of the United States Supreme Court.³ After chronicling the work of the Court during its earliest years, the chapter ends with the passage of the state's second—and present—Constitution.

B. Chapter Two: 1880–1910

The last part of the nineteenth century was in California a time of huge political turmoil that was reflected in the work of the Court. Depending on one's outlook, any one of a panoply of villains can be deemed responsible for that upheaval and

3. GOVERNANCE AND POWER, *supra* note *, at 24.

instability: Chinese laborers and launderers, too-dominant railroads, demagogic politicians, or polluting hydraulic mining companies. Whatever its cause, almost all of that turmoil seemed to make its way to the Court. In this period the legal issues surrounding the State's most valuable resource, water, emerged in litigation before the Court—and they have never left.⁴

C. Chapter Three: 1910–1940

The progressive revolution of the 1910s hit California as hard as it did anywhere, and brought with it the ballot initiative, a magic bullet or a poison pill, depending on one's viewpoint. Wherever the reader comes down on that question, the Court has had to wrestle with the initiative during term after term, throughout the century-plus since its first appearance in the state.⁵ This chapter also covers the Great Depression, which began the process of the slow grinding down of the Court's traditional conservative stance.⁶ The California variant of this trend would culminate decades later in the so-called liberal Courts covered in Chapters Four and Five.

4. *See, e.g.,* Cal. Farm Bureau Fed'n v. State Water Res. Control Bd., 247 P.3d 112 (Cal. 2011) (involving fees on appropriative water rights); Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709 (Cal. 1983) (involving proposed diversion of lake water).

5. *See* Strauss v. Horton, 207 P.3d 48, 78–101 (Cal. 2009) (surveying the history of the California Supreme Court's initiative-review process), *abrogated on other grounds*, Obergefell v. Hodges, ___ U.S. ___, 135 S. Ct. 2584 (2015); *see also, e.g.,* Perry v. Brown, 265 P.3d 1002, 1145 n.16 (Cal. 2011) (characterizing as “well established” the principle that “California courts have an obligation to liberally construe the provisions of the California Constitution relating to the initiative power to assure that the initiative process is not directly or indirectly annulled”). Readers interested in learning more about the initiative process in California might consult any of the myriad scholarly works summarizing the history of its various aspects. *See generally, e.g.,* Gerald F. Uelman, *Review of Initiatives by the California Supreme Court, 2000–2010*, 44 LOYOLA L.A. L. REV. 659 (2011); *see also, e.g.,* Gerald F. Uelman, *Handling Hot Potatoes: Judicial Review of California Initiatives after Senate v. Jones*, 41 SANTA CLARA L. REV. 999, 999–1004 (2001).

6. This process was going on in the United States Supreme Court as well, during battles over the constitutionality of the various measures of Roosevelt's New Deal. *Compare, e.g.,* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding provisions of National Industrial Recovery Act unconstitutional as attempts to delegate legislative power to President and to regulate both intrastate commerce and local matters that had only an indirect connection to interstate commerce), *with, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding provisions of Agricultural Adjustment Act covering local actions deemed to affect intrastate commerce).

D. Chapter Four: 1940–1964

In the year 1940, the elevation of a new Chief Justice, Phil S. Gibson, was followed quickly by the appointment to his vacated Associate Justice seat of a University of California–Berkeley law professor, Roger Traynor. Their appointments jump-started a period of thirty years when the Court, under the leadership of these two men, became the intellectual and liberal bellwether of the state courts of last resort. In the area of tort law, California Supreme Court opinions under Gibson and Traynor established new rules for negligence,⁷ charitable immunity,⁸ emotional distress,⁹ and products liability¹⁰ that were often followed in other states. The Gibson Court prefigured the United States Supreme Court’s *Shelley v. Kraemer*¹¹ decision about restrictive covenants,¹² and held the State’s anti-miscegenation laws to be in violation of the Fourteenth Amendment,¹³ nineteen years before the United States Supreme Court decided *Loving v. Virginia*.¹⁴ It was out in front in

7. *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Gibson, C.J.) (holding that plaintiff could rely on *res ipsa loquitur* to indicate negligence); *see also id.* at 440–44 (Traynor, J., concurring) (outlining theory of strict liability).

8. *Malloy v. Fong*, 232 P.2d 241, 247 (Cal. 1951) (Traynor, J.) (holding that “charitable corporations are liable for their torts whether or not a particular plaintiff has paid for the charity received”).

9. *State Rubbish Collectors Ass’n v. Siliznoff*, 240 P.2d 282 (Cal. 1952) (Traynor, J.) (discarding physical-injury requirement in case involving threats and intimidation that amounted to intentional infliction of emotional distress); *see also Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (recognizing negligent infliction of emotional distress).

10. *Greenman v. Yuba Power Prods. Co.*, 377 P.2d 897, 900 (Cal. 1963) (recognizing that “[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”).

11. 334 U.S. 1 (1948) (holding state-court enforcement of restrictive covenants unconstitutional).

12. *Fairchild v. Raines*, 151 P.2d 260 (1944) (declining to enforce restrictive covenant due to changed character of neighborhood); *see also id.* at 267 (Traynor, J., concurring) (“In my opinion the findings of the trial court . . . also fail to consider whether enforcement [of restrictive covenants based on race] would be contrary to the public interest in the use of land in urban communities where people are concentrated in limited areas”).

13. *Perez v. Lippold*, 198 P.2d 17, 29 (Cal.1948) (Traynor, J.) (also reported as *Perez v. Sharp*, 32 Cal. 2d 711 (1948)) (holding that California’s anti-miscegenation statutes “violate[d] the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups”).

14. 388 U.S. 1 (1967).

criminal law, as well, in the areas of diminished capacity¹⁵ and the exclusionary rule.¹⁶ In its twenty-four years the Gibson Court set the table for Justice Traynor's elevation to Chief Justice in 1964.

E. Chapter Five: 1964–1987

This long chapter is the heart of the book, and a small masterpiece of legal historical writing. Written by the book's editor, Harry N. Scheiber, it plays out like a Greek tragedy. The hubris may have begun with the Traynor Court's six more years of Gibson-like leadership. Then followed seven years under Chief Justice Donald Wright, who Governor Ronald Reagan later described as his "worst appointment"¹⁷ when referring to the California Supreme Court decision that first held the state's death penalty unconstitutional.¹⁸

In 1977 came Governor Jerry Brown's controversial appointment of Chief Justice Rose Bird. In the nine-year period thereafter, nemeses accumulated in the form of reaction to the Court's consistent overturning of death-penalty verdicts. This culminated in the removal of Bird and two Associate Justices in the retention election of 1986. Not all of the opposition to Bird was Republican or arch-conservative. But through the period, politics—including party politics—impinged on the Court's activity to a major degree. This was not surprising: California in the 1960s, 1970s, and 1980s was not the stable, predictably

15. See, e.g., *People v. Conley*, 411 P.2d 911 (Cal. 1966) (Traynor, C.J.) (assessing diminished-capacity defense in context of *People v. Wells*, 202 P.2d 53 (1949), *superseded by statute as recognized in*, e.g., *People v. Saille*, 820 P.2d 588, 592 (Cal. 1991) (recognizing in addition that *Wells* had by 1991 itself been disapproved)).

16. *People v. Cahan*, 282 P.2d 905 (Cal. 1955), *superseded by constitutional amendment, as recognized in* *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985) (en banc) (explaining that then-recent change in State Constitution left state exclusionary rule intact, but "eliminate[d] a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled" (emphasis in original)).

17. *Former California Chief Justice Who Angered Reagan Dies*, UNITED PRESS INT'L (Mar. 22, 1985), <http://www.upi.com/Archives/1985/03/22/Former-California-Chief-Justice-who-angered-Reagan-dies/8541480315600/> (noting that Reagan "called Wright his 'worst appointment'").

18. See *People v. Anderson*, 493 P.2d 880 (Cal. 1972) (en banc), *superseded by constitutional amendment, as recognized in*, e.g., *People v. Hill*, 839 P.2d 984, 1017 (Cal. 1992).

liberal state that it now appears to be. Politically it was all over the place. By contrast the Court, even in the Wright years, was decidedly, even stubbornly, liberal.

It would be tempting, writing about this period, to focus entirely on the death penalty, which was certainly the principal bone of contention. But Professor Scheiber covers it all, including the fascinating (to scholars, at least) issue of independent and adequate state grounds, which the Court used to try to shield its rulings from the more conservative United States Supreme Courts that followed the Warren Court.

F. Chapter Six: 1987–1996

For some reason, the writers carved off the term of Chief Justice Malcolm Lucas into a separate chapter. Far better would have been a Chapter Five on Traynor and Wright, followed by Chapter Six on Bird and Lucas. This is because the transition from Bird to Lucas was the most important aspect of the latter's term. In a wink, with the removal of three liberal Justices and their replacement with three conservative ones, the Court should have become staunchly right wing. Yet that did not happen, or not entirely.

Lucas had for three years been an almost invisible member of the Bird Court. After 1986, as Chief, he came to the fore, and was a very active writer of opinions. But the new Court's only important legacy was to reverse the trend established by the Bird Court with regard to the death penalty.¹⁹ Aside from that, not much new law was made. As this chapter puts it, the Lucas Court's aim seemed to be "retrenchment, not revolution."²⁰

G. Chapter Seven: 1996–2010

This chapter ends the book on a high note, from the appointment of Ronald George as Chief through his fourteen years in office. George was a highly competent Justice and a brilliant administrator. His Court had to wrestle with the ballot-

19. See Gerald F. Uelmen, *The Lucas Legacy*, CAL. LAW., May 1996, at 29 (explaining that "[u]nder Lucas, 'harmless error' became a mantra, as the court dramatically lowered the level of judicial, prosecutorial, and defender competence demanded in capital cases").

20. GOVERNANCE AND POWER, *supra* note *, at 550.

initiative law many times, and did a good job overall. Much of this had to do with the premier hot-button issue of the time, marriage equality. The California electorate performed an amazing policy U-turn between 2004, when this issue first came before the Court,²¹ and 2010, the end of George's incumbency. George, appointed by a Republican, was a centrist in just about every way, and led the Court through a stormy period, and out of it, with its reputation, and thus its power, largely intact.

III. THE JUDICIAL BIOGRAPHIES

The book is replete with capsule biographies of certain Justices, as it naturally would be. The job of writing those biographies was made easier in Chapters One through Four because of an earlier work that contains biographies of all the Justices who sat on the Court between 1850 and 1950.²² This debt is indicated by the frequent citations to that work here, but it was produced in the mid-1960s. Since then, a new volume covering Justices who were on the Court after 1950 has been needed, but has not been produced. The biographical information about more recent Justices in this comprehensive history of the Court goes some way toward filling that gap.

IV. THE AUTHORS AND THE EDITOR

Half of the writers here are affiliated in some way with the University of California–Berkeley. Others have ties to Stanford. And one, Gordon Bakken, formerly at California State University–Fullerton, was the author of two seminal volumes on law, and law practice, in frontier California.²³ Sadly, Professor Bakken became ill and died during the development of the book.

21. In re Marriage Cases, 183 P.3d 184 (2008), *superseded by statute as recognized in Horton v. Hollingsworth*, 207 P.3d 48 (2009). Of course, the decision in *Horton* was itself eventually abrogated by the United States Supreme Court's decision in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015).

22. *See generally* II HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA, 1900–1950 (J. Edward Johnson ed., 1966); I HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA, 1850–1900 (J. Edward Johnson ed., 1963).

23. *See generally* GORDON MORRIS BAKKEN, PRACTICING LAW IN FRONTIER CALIFORNIA (1991); GORDON MORRIS BAKKEN, THE DEVELOPMENT OF LAW IN FRONTIER CALIFORNIA (1985).

Still, his contribution, Chapter Two, is excellent and does not display any negative effects of that unfortunate event.²⁴

Which brings us back to the editor, Professor Scheiber. His authorship of the terrific Chapter Five has been noted. Praise is due as well for the editing of a volume which, not only because of the number of authors, but also because of the time scope of the work, must have been a challenging job. One evidence of the quality of that work may be found in the many references in text to the downstream effect of certain decisions of the Court, when such effects took place in a later era, or in the prefiguring of certain decisions in the precedents set by the Court acting in an era set in an earlier segment of the book. That must not have been an easy task.

V. ON THE OTHER HAND . . .

A few nits. The index is large and contains listings of the Court's more important decisions, but a table of cases cited would have made the book more valuable as a future go-to reference. Moreover, a single paperbound volume of well over 600 pages is just too large for easy handling and for resistance to wear and tear. Two volumes would have been better, at least for the paperbound version.²⁵

And one big criticism. The authors do a good job of relating important events in, and aspects of, the California Supreme Court's relations to that other Supreme Court—the one in Washington, D.C. Surprisingly, however, little to nothing is included about the Ninth Circuit, or indeed about the four federal district courts in California. The federal system has always, throughout the life of the California Supreme Court, existed as a parallel avenue for litigation. Forum shopping by litigants who preferred the federal courts meant that some issues never reached the California Supreme Court, even when it might be argued that they should have. The premier example of this

24. A personal note: years ago, Professor Bakken kindly helped this author gain access to the restricted precincts of the Rare Books and Manuscripts collections of the Huntington Library in San Marino, California.

25. The book was issued in both hardcover and paperbound versions, *see Constitutional Governance and Judicial Power*, CAL. SUP. CT. HISTORICAL SOC'Y (n.d.), <https://my.cschs.org/product/court-history-book> (indicating that both versions are available).

was the Ninth Circuit's decision in *Mendez v. Westminster School District*,²⁶ the late-1940s school-segregation case that preceded and significantly prefigured the *Brown*²⁷ decision seven years later. Because the *Mendez* plaintiffs decided to begin in federal court, and because the school districts and the state Department of Education decided not to appeal from the Ninth Circuit's order, the school-desegregation issue never reached the California Supreme Court and the *Mendez* case itself never reached the United States Supreme Court.

There were also times when important matters, such as Sarah Althea Hill's claims against William Sharon that culminated in the death of Justice Terry,²⁸ flowed through both the state and federal systems,²⁹ seriously impacting the outcomes in each. And this sort of parallel progress meant on occasion that the federal outcome overshadowed the work of the California Supreme Court, as was the case with the federal courts' 1880s rulings in its *North Bloomfield Gravel-Mining Company* cases.³⁰ These were decided at about the same time as the California Supreme Court's rulings on hydraulic mining and the destruction of downstream environments,³¹ but were of greater impact on actual events thereafter. In recent years the California Supreme Court and the Ninth Circuit have continued to be active in the same areas of law, and in so doing have sometimes created conflicting lines of precedent. Given that the two courts, despite having a greatly overlapping geographic

26. 64 F. Supp. 544 (S. D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

28. See text accompanying note 3, *supra*. The Hill-Sharon saga included a high-profile politician, a socialite, an alleged secret marriage, substantial amounts of cash, at least one extramarital affair, a fortune-teller, and—eventually—a diagnosis of insanity. See generally, e.g., Edmund W. Pugh, *A California Drama*, 21 ABA J. 351 (June 1935); *The Tragic History of the Sharon Cases*, in *HISTORY OF THE BENCH AND BAR OF CALIFORNIA* 173 (Oscar T. Shuck ed., 1901).

29. See, e.g., *Cunningham v. Neagle*, 135 U.S. 1 (1890) (ending federal-court litigation); *Sharon v. Sharon*, 23 P. 1100 (Cal. 1890) (ending state-court litigation).

30. See, e.g., *N. Bloomfield Gravel-Mining Co. v. United States*, 88 F. 664 (9th C.C. 1898) (addressing the dumping and discharge of mining debris).

31. See, e.g., *N. Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315 (1881) (addressing the dumping of mine tailings).

jurisdiction, are parts of two different systems, these conflicts have been hard to resolve.³²

VI. A FINAL PERSONAL NOTE

In 2005 I started teaching a law school course in California legal history. The materials for that course were made from scratch, consuming untold professor-hours in the making. If this volume had existed twelve years ago, that burden would have been largely removed. But, at least we have it now, and that is a good thing.



32. Two examples are the enforcement of agreements to arbitrate in areas in which the parties have unequal bargaining power, *see, e.g.*, *Armendariz v. Found. Healthcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000), *abrogated by* *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011) (holding, in case originating in the United States District Court for the Southern District of California, that the Federal Arbitration Act preempts California decisions on unconscionability of class arbitration waivers), and the enforcement of post-employment covenants not to compete, as the California Supreme Court generally enforces the state's restraint-of-trade statute more completely than do the federal courts.