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California Supreme Court Survey - A Review of Decisions: September 1995-December 1996

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California Supreme Court Survey

September 1995 - December 1996

The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of issues that the supreme court has addressed, as well as to serve as a starting point for researching any of the topical areas. Attorney discipline, judicial misconduct, and death penalty appeal cases have been omitted from the survey.

The survey will review California Supreme Court cases in either an article or summary format. Articles provide an in-depth analysis of selected California Supreme Court cases including the potential impact a case may have on California law. Additionally, articles guide the reader to secondary sources that focus on specific points of law.

Summaries provide a brief outline of the areas of law addressed in selected California Supreme Court cases. Summaries are designed to provide the reader with a basic understanding of the legal implications of cases in a concise format.

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I. COVENANTS, CONDITIONS, AND RESTRICTIONS

Publicly recording covenants, conditions, and restrictions provides adequate constructive notice to bind future purchasers to these recorded restrictions, despite the lack of specific reference to the covenants, conditions, and restrictions in the deed: Citizens for Covenant Compliance v. Anderson.

I. INTRODUCTION

In *Citizens for Covenant Compliance v. Anderson*,¹ the California Supreme Court considered whether the recording of covenants, conditions, and restrictions (CC&Rs) is enough to bind a future purchaser, even though the restrictions are not mentioned in the deed.² The superi-

1. 12 Cal. 4th 345, 906 P.2d 1314, 47 Cal. Rptr. 2d 898 (1995). The majority opinion was written by Justice Arabian, with whom Chief Justice Lucas, and Justices Mosk, Baxter, George, and Werdegar concurred. *Id.* at 348-69, 906 P.2d at 1315-29, 47 Cal. Rptr. 2d at 900-13. Justice Kennard filed a dissenting opinion. *Id.* at 369-88, 906 P.2d at 1329-41, 47 Cal. Rptr. 2d at 913-26 (Kennard, J., dissenting).

2. *Id.* at 356, 906 P.2d at 1320, 47 Cal. Rptr. 2d at 905. The Andersons wanted to maintain a winery on their parcels of land through an agreement with a company in the United Kingdom named Chaine d'Or Vineyards. *Id.* at 351, 906 P.2d at 1317, 47 Cal. Rptr. 2d at 902. In addition, the Andersons owned seven llamas which they intended to keep as pets. *Id.* However, the CC&Rs of both parcels of land prohibited such use of the property. *Id.* at 349-51, 906 P.2d at 1316-17, 47 Cal. Rptr. 2d at 901-02. The first parcel of land under consideration was subdivided in the 1950s and was known as Skywood Acres. *Id.* at 349, 906 P.2d at 1316, 47 Cal. Rptr. 2d at 901. CC&Rs on this parcel restricted the property to residential use and limited the type of pets allowed to "[d]ogs, cats, hares, fowls, . . . fish," and in some instances, horses. *Id.* at 350, 906 P.2d at 1316-17, 47 Cal. Rptr. 2d at 901. The restrictions were recorded in San Mateo County and contained a provision that they were to be binding upon future successors in interest. *Id.* at 349-50, 906 P.2d at 1316-17, 47 Cal. Rptr. 2d at 901. These restrictions were not mentioned in the Andersons' deed or in their chain of title. *Id.* at 350, 906 P.2d at 1317, 47 Cal. Rptr. 2d at 901. The second parcel of land the Andersons owned was known as the Friars subdivision. *Id.* The developer of the Friars subdivision recorded CC&Rs that restricted the property to single-family residential use and prohibited the "keeping [of] animals other than household pets and horses." *Id.* at 350-51, 906 P.2d at 1317, 47 Cal. Rptr. 2d at 901. The Friars parcel similarly contained an intention to bind future owners. *Id.* at 350-51, 906 P.2d at 1317, 47 Cal. Rptr. 2d at 901-02. To enforce these restrictions, the Citizens for Covenant Compliance, as well as representative landowners from both Skywood Acres and the Friars subdivision, filed suit to prevent the Andersons from continuing their winery and keeping the llamas as pets. *Id.* at 351, 906 P.2d at 1318, 47 Cal. Rptr. 2d at 902.

or court found that the CC&Rs were not enforceable and granted summary judgment in favor of the defendants.³ The court of appeal affirmed the decision of the lower court, finding that the CC&Rs were not enforceable as either covenants or equitable servitudes.⁴ The California Supreme Court reversed the decisions of the lower courts and formulated a new rule for determining the enforceability of CC&Rs.⁵ According to Justice Arabian, this rule serves to simplify the enforcement of CC&Rs by necessitating the recording of only one document and omitting the need to review all the deeds and restrictions upon an entire subdivision.⁶

II. TREATMENT

A. Majority Opinion

Justice Arabian began the majority opinion by explicitly stating the rule that the court adopted:

[I]f a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of property as part of the common plan is recorded before the execution of the contract of sale . . . the restrictions . . . are not unenforceable merely because they are not *additionally* cited in a deed or other document at the time of the sale.⁷

After setting forth the relevant facts of the case, Justice Arabian discussed the law governing real covenants⁸ and equitable servitudes.⁹ De-

3. *Id.* at 351, 368, 906 P.2d at 1318, 1329, 47 Cal. Rptr. 2d at 902, 913.

4. *Id.* at 351-52, 906 P.2d at 1318, 47 Cal. Rptr. 2d at 902; *see infra* notes 8-9 (discussing the history of real covenants and equitable servitudes).

5. *Id.* at 349, 906 P.2d at 1316, 47 Cal. Rptr. 2d at 900-01. *See infra* note 7 and accompanying text.

6. *Id.* at 363, 906 P.2d at 1325, 47 Cal. Rptr. 2d at 910.

7. *Id.* at 349, 906 P.2d at 1316, 47 Cal. Rptr. 2d at 900-01.

8. Real covenants developed as an action at law and "run with the land" according to statutory provision. *See id.* at 353, 906 P.2d at 1318-19, 47 Cal. Rptr. 2d at 903; *see also* CAL. CIV. CODE §§ 1460-1468 (West 1982 & Supp. 1996); 26 CAL. JUR. 3D *Deeds* §§ 237-249 (1976 & Supp. 1996) (discussing covenants running with the land); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 486-489 (9th ed. 1987 & Supp. 1996) (discussing the nature and elements of covenants running with the land). Previous statutory law provided that in order to bind future purchasers, a real covenant must "benefit" rather than "burden" the affected parcel. *Anderson*, 12 Cal. 4th at 353, 906 P.2d at 1319, 47 Cal. Rptr. 2d at 903. In addition, the covenant would not "run with the land" unless it was "made by the owner of land with the owner of other land," and not to a covenant between a grantor and a grantee." *Id.* (quoting *Marla v. Aetna Const. Co.*, 15 Cal. 2d 375, 377, 101 P.2d 490, 492 (1940)). Therefore, under the old rule, the CC&Rs in the present case would not run with the land because there was a burden on the property and the relationship was between a grantor and a grantee.

9. Equitable servitudes arose out of the development of equity courts to cover situations in which restrictions did not run with the land as covenants. *See Anderson*,

spite the differences between the two doctrines, the court stated that the rule announced will govern both areas.¹⁰ Justice Arabian also reviewed the recording process, reiterating the rule that recordation of any document affecting the title to real property provides constructive notice of that document to future purchasers.¹¹

Next, the court addressed prior cases that have shaped the current state of the law.¹² First, *Werner v. Graham*¹³ involved restrictions that were placed in earlier deeds but not included in the plaintiff's deed.¹⁴ Furthermore, the restrictions were not recorded.¹⁵ The *Werner* court held that the restrictions were unenforceable because they were not stated in the deed.¹⁶

Second, the court discussed *Riley v. Bear Creek Planning Committee*.¹⁷ In *Riley*, as in *Werner*, no restrictions were mentioned in the deed.¹⁸ Instead, the developer recorded the restrictions nine months af-

12 Cal. 4th at 353, 906 P.2d at 1319, 47 Cal. Rptr. 2d at 903; see also 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 493 (9th ed. 1987 & Supp. 1996) (discussing the nature and effect of equitable servitudes). California courts have traditionally used this doctrine to review CC&Rs. *Anderson*, 12 Cal. 4th at 354, 906 P.2d at 1319, 47 Cal. Rptr. 2d at 903. For a discussion regarding the use and enforcement of equitable servitudes in planned unit developments, also known as common interest developments, see generally Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1 (1995); Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837 (1995); Daniel R. Puterbaugh, Comment, *The Reasonable Pet: An Examination of the Enforcement of Restrictions in California Common Interest Developments After Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*, 36 SANTA CLARA L. REV. 793 (1996). Due to statutory amendment, real covenants are now more similar to equitable servitudes in that they are no longer applicable to CC&Rs made between a grantor and a grantee. *Anderson*, 12 Cal. 4th at 354, 906 P.2d at 1319, 47 Cal. Rptr. 2d at 903; see also CAL. CIV. CODE § 1468 (West 1982 & Supp. 1996). However, these amendments do not cover covenants made before their enactment. *Anderson*, 12 Cal. 4th at 354, 906 P.2d at 1319, 47 Cal. Rptr. 2d at 904.

10. *Anderson*, 12 Cal. 4th at 355, 906 P.2d at 1320, 47 Cal. Rptr. 2d at 904.

11. *Id.*; see also 55 CAL. JUR. 3D *Records and Recording Laws* §§ 37-39 (1980 & Supp. 1996) (discussing constructive notice as imputed by recording laws); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 198 (9th ed. 1987 & Supp. 1996) (discussing the nature of the California recording process).

12. *Anderson*, 12 Cal. 4th at 356-60, 906 P.2d at 320-23, 47 Cal. Rptr. 2d at 905-08.

13. 181 Cal. 174, 183 P. 945 (1919).

14. *Anderson*, 12 Cal. 4th at 356, 906 P.2d at 1320-21, 47 Cal. Rptr. 2d at 905.

15. *Id.*

16. *Id.* at 359, 906 P.2d at 1321-22, 47 Cal. Rptr. 2d at 905-06.

17. 17 Cal. 3d 500, 551 P.2d 1213, 131 Cal. Rptr. 381 (1976).

18. *Anderson*, 12 Cal. 4th at 356, 906 P.2d at 1321, 47 Cal. Rptr. 2d at 905.

ter the conveyance of the property, intending them to apply to the previously sold lots.¹⁹ The *Riley* court, however, stated that the developer could not restrict the property once sold because he no longer retained a valid interest.²⁰ In addition, dicta in *Riley* suggested that *Murry v. Lovell*²¹ required the restrictions to be recited in the deed.²²

The court found both cases factually distinguishable from the instant case because proper recording did not take place in either *Werner* or *Riley*.²³ Furthermore, because no common plan had been recorded in *Werner* or *Riley*, the only way to adequately determine the agreement of the parties was to look to the deeds.²⁴

The court next reviewed the current uncertainties in the law relating to CC&Rs.²⁵ First, in many instances, the order of conveyances governs the enforceability of restrictions.²⁶ Second, these uncertainties serve to "dramatically complicate[]" title searches.²⁷ The court concluded by stating that the law is not entirely clear on this subject, thus creating a "crazy-quilt pattern of uses."²⁸

Justice Arabian next discussed the solution to these uncertainties and the advantages of adopting the new rule relating to notice of CC&Rs.²⁹ In addition, the court asserted that the new rule is consistent with prior case law.³⁰ Previous courts have merely assumed that deeds must con-

19. *Id.*

20. *Id.* at 358, 906 P.2d at 1322, 47 Cal. Rptr. 2d at 906.

21. 132 Cal. App. 2d 30, 281 P.2d 316 (1955).

22. *Anderson*, 12 Cal. 4th at 359, 906 P.2d at 1322, 47 Cal. Rptr. 2d at 907.

23. *Id.* at 356-57, 906 P.2d at 1321, 47 Cal. Rptr. 2d at 905.

24. *Id.* at 359, 906 P.2d at 1323, 47 Cal. Rptr. 2d at 907.

25. *Id.* at 360-63, 906 P.2d at 1323-25, 47 Cal. Rptr. 2d at 908-09.

26. *Id.* at 360, 906 P.2d at 1323, 47 Cal. Rptr. 2d at 908. The court provided an example of the discrepancies resulting from the confusion created by the current state of the law. *Id.* at 361-62, 906 P.2d at 1324, 47 Cal. Rptr. 2d at 908-09. If the CC&Rs are not inserted in the first deed, but are later included in the fifth deed, the restrictions "spring[] into existence from deed five onwards." *Id.* at 361, 906 P.2d at 1324, 47 Cal. Rptr. 2d at 908. Furthermore, if deeds five and six contain the restrictions, but seven and eight do not, "lot owners five and six can enforce the restrictions against seven and eight, but seven and eight cannot enforce them against each other." *Id.* Finally, if the CC&Rs are once again placed in deeds nine and ten, "lot owners seven and eight cannot enforce the restrictions against nine and ten, and similarly nine and ten cannot enforce them against seven and eight." *Id.* at 361-62, 906 P.2d at 1324, 47 Cal. Rptr. 2d at 909.

27. *Id.* at 362, 906 P.2d at 1325, 47 Cal. Rptr. 2d at 909. Potential buyers must search all deeds in the subdivision as well as all deeds within their own chain of title. *Id.* This complicated title search takes place whether the CC&Rs are mentioned in the deed or not because the owner of such property containing the restrictions would be entitled to enforce those restrictions against the later purchasers. *Id.*

28. *Id.* at 362-63, 906 P.2d at 1325, 47 Cal. Rptr. 2d at 909.

29. *Id.* at 363-68, 906 P.2d at 1325-28, 47 Cal. Rptr. 2d at 909-13.

30. *Id.* at 365, 906 P.2d at 1326-27, 47 Cal. Rptr. 2d at 911.

tain the restrictions to which a buyer is bound in order to "evidence the purchaser's intent and agreement."³¹ However, the court found it reasonable to conclude that "property conveyed after the restrictions are recorded is subject to those restrictions even without further mention in the deed" because of the established notion of constructive notice.³²

Finally, the court addressed the Andersons' argument that the new rule should not apply retrospectively because they were relying on previous law.³³ The court disregarded this argument, citing the established principle that "a court of supreme jurisdiction overruling a former decision is retrospective in its operation."³⁴

Thus, the California Supreme Court reversed the court of appeal based solely on the narrow issue of whether a deed must independently contain the CC&Rs.³⁵

B. Justice Kennard's Dissenting Opinion

Justice Kennard began her dissent with a brief discussion of the background of the case³⁶ and the historical development of real covenants and equitable servitudes.³⁷ The dissent stated that the restrictions contained in the Friars and the Skywood Acres subdivisions would not be enforceable under previous law.³⁸ According to Justice Kennard, the majority conceded this point³⁹ but chose to adopt a new rule in order to uphold the CC&Rs.⁴⁰

Justice Kennard disagreed with the majority on two points. First, she found that eliminating the need to place restrictions in a deed of purchase effectively dispensed with the need for mutual agreement between

31. *Id.* at 365, 906 P.2d at 1327, 47 Cal. Rptr. 2d at 911.

32. *Id.* at 365-66, 906 P.2d at 1327, 47 Cal. Rptr. 2d at 911.

33. *Id.* at 367, 906 P.2d at 1327-28, 47 Cal. Rptr. 2d at 912.

34. *Id.* at 367, 906 P.2d at 1328, 47 Cal. Rptr. 2d at 912 (quoting *Peterson v. Superior Ct.*, 31 Cal. 3d 147, 151, 642 P.2d 1305, 1306, 181 Cal. Rptr. 784, 785 (1982)).

35. *Id.* at 368-69, 906 P.2d at 1329, 47 Cal. Rptr. 2d at 913.

36. *Id.* at 370-72, 906 P.2d at 1330-31, 47 Cal. Rptr. 2d at 914-16 (Kennard, J., dissenting).

37. *Id.* at 372-75, 906 P.2d at 1331-33, 47 Cal. Rptr. 2d at 916-17 (Kennard, J., dissenting); see *supra* notes 8-9. Justice Kennard did not dispute the statement of law made by Justice Arabian; she merely set forth the law in her own words. *Id.* at 372-75, 906 P.2d at 1331-33, 47 Cal. Rptr. 2d at 916-17 (Kennard, J., dissenting).

38. *Id.* at 375-76, 906 P.2d at 1333, 47 Cal. Rptr. 2d at 917-18 (Kennard, J., dissenting).

39. *Id.* at 376, 906 P.2d at 1333, 47 Cal. Rptr. 2d at 918 (Kennard, J., dissenting).

40. *Id.* at 376, 906 P.2d at 1333-34, 47 Cal. Rptr. 2d at 918 (Kennard, J., dissenting).

the buyer and the seller.⁴¹ Second, she claimed that the rule adopted by the majority violated section 1468 of the California Civil Code.⁴² Justice Kennard argued that the court lacked the power to create a rule in conflict with existing statutory law.⁴³ Instead, the legislature should be the forum for such change.⁴⁴

Finally, Justice Kennard stated that the court should not apply the newly adopted rule retroactively.⁴⁵ The dissent recognized as an exception to the general rule of retroactivity that "where . . . property rights [are] acquired in accordance with the prior decision . . . vested rights [will not] be impaired by applying the new rule retroactively."⁴⁶

41. *Id.* at 377, 906 P.2d at 1334, 47 Cal. Rptr. 2d at 918 (Kennard, J., dissenting). According to Justice Kennard, this rule is based on two premises. *Id.* at 377, 906 P.2d at 1334, 47 Cal. Rptr. 2d at 919 (Kennard, J., dissenting). First, the majority must find that recording CC&Rs is sufficient to constitute constructive notice. *Id.* (Kennard, J., dissenting). Justice Kennard stated that the law governing constructive notice does not cover CC&Rs because CC&Rs do not comport with the definition of "conveyance" as required by California Civil Code § 1213. *Id.* at 377-78, 906 P.2d at 1334-35, 47 Cal. Rptr. 2d at 919 (Kennard, J., dissenting). Second, despite the lack of specific inclusion of the CC&Rs in the deed, the majority presumes the buyer has agreed to be bound by the CC&Rs. *Id.* at 377, 906 P.2d at 1334, 47 Cal. Rptr. 2d at 919 (Kennard, J., dissenting). Justice Kennard asserted that under section 1105 of the California Civil Code, restrictions purporting to bind the successor "must be expressly stated in the deed." *Id.* at 380, 906 P.2d at 1336, 47 Cal. Rptr. 2d at 921 (Kennard, J., dissenting). Therefore, "if the subdivider gives every purchaser an unrestricted grant deed . . . then each purchaser receives the subdivider's entire interest in the lot purchased and the restrictions never come into existence." *Id.* at 379, 906 P.2d at 1336, 47 Cal. Rptr. 2d at 920 (Kennard, J., dissenting).

42. *Id.* at 381-82, 906 P.2d at 1337-38, 47 Cal. Rptr. 2d at 921-22 (Kennard, J., dissenting). Under § 1468, a subdivider must record an instrument containing the CC&Rs. *Id.* (Kennard, J., dissenting). In Justice Kennard's view, property law defines an instrument as "a document that either transfers or creates an interest in real property." *Id.* at 382, 906 P.2d at 1337, 47 Cal. Rptr. 2d at 922 (Kennard, J., dissenting). A document merely containing restrictions that encumber the property does not transfer or create a property interest. *Id.* (Kennard, J., dissenting).

43. *Id.* at 382, 906 P.2d at 1337-38, 47 Cal. Rptr. 2d at 922 (Kennard, J., dissenting).

44. *Id.* at 383, 906 P.2d at 1338, 47 Cal. Rptr. 2d at 922-23 (Kennard, J., dissenting). The dissent provided as example an instance where the legislature created special rules applying to planned unit developments. *Id.* (Kennard, J., dissenting); see *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994). See generally Arabian, *supra* note 9; Kress, *supra* note 9; Paula C. Murray, *Restrictive Covenants in Homeowners' Associations: Are They Going to the Dogs?* 23 REAL EST. L.J. 356 (1994-95); Sheri L. Marvin, Note, *California Supreme Court Survey: A Review of Decisions*, *Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*, 22 PEPP. L. REV. 1692 (1995); Puterbaugh, *supra* note 9.

45. *Anderson*, 12 Cal. 4th at 383-87, 906 P.2d at 1338-41, 47 Cal. Rptr. 2d at 923-25 (Kennard, J., dissenting).

46. *Id.* at 383, 906 P.2d at 1339, 47 Cal. Rptr. 2d at 922 (Kennard, J., dissenting) (quoting *Moraldi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 304, 758 P.2d 58, 69, 250 Cal. Rptr. 116, 126 (1988)).

III. IMPACT

According to the majority, the new rule has three beneficial impacts. First, the rule promotes simplicity.⁴⁷ Title searchers will only have to look at one document, the recorded CC&Rs, to determine the extent of the restrictions.⁴⁸ Second, the adoption of the new rule is considered "good policy" due to the increased use of CC&Rs in the modern market.⁴⁹ Third, the rule "fulfill[s] the intent, expectations, and wishes of the parties and community as a whole."⁵⁰ In addition, the rule is fair because developers no longer have the burden of placing restrictions on all future conveyances of property.⁵¹

However, according to Justice Kennard's dissent, applying the new rule retroactively will impose a significant financial burden upon landowners who rely upon prior law in land use planning.⁵² In addition, this decision does not automatically favor Citizens for Covenant Compliance, as there are other issues that remain to be litigated.⁵³

IV. CONCLUSION

The rule adopted by the court in *Anderson* simplifies property law in the area of restrictive covenants and equitable servitudes by eliminating the requirement that developers include CC&Rs in all subsequent deeds.⁵⁴ Recording one document identifying all restrictions upon the property is sufficient to provide successors in interest constructive notice, thereby binding future purchasers to all recorded restrictions.⁵⁵

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47. *Id.* at 363, 906 P.2d at 1325, 47 Cal. Rptr. 2d at 910.

48. *Id.* Previously, title searches were much more complicated, entailing a tedious search of all deeds in the buyer's chain of title, as well as all other deeds conveyed to other members of the subdivision. *See supra* note 27 and accompanying text.

49. *Anderson*, 12 Cal. 4th at 363-64, 906 P.2d at 1325-26, 47 Cal. Rptr. 2d at 910.

50. *Id.* at 364, 906 P.2d at 1326, 47 Cal. Rptr. 2d at 910.

51. *Id.* at 364-65, 906 P.2d at 1326, 47 Cal. Rptr. 2d at 910-11.

52. *Id.* at 384, 906 P.2d at 1339, 47 Cal. Rptr. 2d at 923 (Kennard, J., dissenting).

53. *Id.* at 368, 906 P.2d at 1329, 47 Cal. Rptr. 2d at 913.

54. *Id.* at 349, 906 P.2d at 1316, 47 Cal. Rptr. 2d at 900-01.

55. *Id.*; *see supra* note 11 and accompanying text.

II. CONSTITUTIONAL LAW

A reasonable legislative action regulating an inherent judicial power does not violate the separation of powers doctrine if the function of the judicial branch is not defeated or materially impaired:

Superior Court v. County of Mendocino.

I. INTRODUCTION

In *Superior Court v. County of Mendocino*,¹ the California Supreme Court addressed whether the legislative enactment of Government Code section 68108, requiring superior, municipal, and justice courts to close on days designated by the individual counties, violated the separation of powers doctrine by regulating an inherent power of the judicial branch.² The trial court held that the statute did not violate the separation of powers doctrine.³ The court of appeal reversed, reasoning that because the judiciary possesses the inherent power "to control their own hours and days of operation," the legislature violated the separation of powers

1. 13 Cal. 4th 45, 913 P.2d 1046, 51 Cal. Rptr. 2d 837 (1996). Justice George wrote the majority opinion in which Justices Mosk, Kennard, Baxter, Werdegarr, and Chin concurred. *Id.* at 48-66, 913 P.2d at 1048-60, 51 Cal. Rptr. 2d at 839-51. Chief Justice Lucas wrote a concurring opinion. *Id.* at 66-67, 913 P.2d at 1060-61, 51 Cal. Rptr. 2d at 851 (Lucas, C.J., concurring).

2. *Id.* at 48-52, 913 P.2d at 1048-50, 51 Cal. Rptr. 2d at 839-41. The California Legislature enacted section 68108 in 1993 as a result of the urgent fiscal situation. *Id.* at 49, 913 P.2d at 1048, 51 Cal. Rptr. 2d at 839. Section 68108 authorizes counties to specify unpaid furlough days in which superior, municipal, and justice courts are to remain closed. *Id.* Mendocino County issued a memorandum of understanding designating six unpaid furlough days for the 1993-1994 budget year under section 68108. *Id.* at 49-50, 913 P.2d at 1049, 51 Cal. Rptr. 2d at 839-40. However, after voicing its opposition to the county's action, the Superior Court of Mendocino County remained open during the first two specified days. *Id.* at 50, 913 P.2d at 1049, 51 Cal. Rptr. 2d at 840. Shortly thereafter, the superior court directed the county to pay its employees' salaries for the two designated furlough days. *Id.* As a result of non-payment, the superior court brought suit against the County of Mendocino, the Board of Supervisors, the county administrative officer, and the county auditor/controller seeking declaratory relief, injunctive relief and a writ of mandate requiring payment for the two furlough days and future inclusion in the furlough program only upon its approval. *Id.* at 51, 913 P.2d at 1049-50, 51 Cal. Rptr. 2d at 840. The county filed a cross-complaint seeking declaratory relief approving the county's actions under section 68108. *Id.*; see CAL. GOV'T CODE § 68108 (West 1976 & Supp. 1996). See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 107 (9th ed. 1988 & Supp. 1996) (discussing the separation of powers doctrine).

3. *County of Mendocino*, 13 Cal. 4th at 51, 913 P.2d at 1050, 51 Cal. Rptr. 2d at 840-41. By agreement of the parties, the sole issue determined at trial was whether section 68108 was constitutional on its face. *Id.*

doctrine by exercising a power exclusively retained by the judicial branch.⁴ Reversing the decision of the court of appeal, the California Supreme Court held the code constitutional, reasoning that the legislature's regulation of such inherent power did not defeat or materially impair the court's fulfillment of its constitutional purpose.⁵

II. TREATMENT

A. *Majority Opinion*

Justice George began his analysis of the separation of powers doctrine by examining the interaction between a legislative act and an inherent judicial power.⁶ Justice George noted that while the separation of powers doctrine limits the actions of the branches,⁷ California courts have continually recognized the interrelatedness of the three branches.⁸ After

4. *Id.* at 51, 913 P.2d at 1050, 51 Cal. Rptr. 2d at 841.

5. *Id.* at 52-66, 913 P.2d at 1050-60, 51 Cal. Rptr. 2d at 841-51.

6. *Id.* at 52-59, 913 P.2d at 1050-55, 51 Cal. Rptr. 2d at 841-45; see CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."). See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 111 (9th ed. 1988 & Supp. 1996) (discussing the powers of the legislative branch); 16 CAL. JUR. 3D *Courts* § 17 (1989) (detailing the inherent powers of the judicial branch); George Anhang, *Separation of Powers and the Rule of Law: On the Role of Judicial Restraint In "Secur[ing] the Blessings of Liberty"*, 24 AKRON L. REV. 211 (1990) (discussing the rationale behind the separation of powers doctrine).

7. *County of Mendocino*, 13 Cal. 4th at 52-53, 913 P.2d at 1050-51, 51 Cal. Rptr. 2d at 841-42. See generally 13 CAL. JUR. 3D *Constitutional Law* § 101 (1989 & Supp. 1996) (discussing the limits of the separation of powers doctrine); Phillip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986) (describing the evolution of the interpretation of the separation of powers doctrine); James M. McGoldrick, Jr., *The Separation of Powers Doctrine: Straining Out Gnats, Swallowing Camels*, 18 PEPP. L. REV. 95 (1990) (detailing recent Supreme Court interpretations of the separation of powers doctrine).

8. *County of Mendocino*, 13 Cal. 4th at 52-53, 913 P.2d at 1051, 51 Cal. Rptr. 2d at 841-42; see also *Brydonjack v. State Bar*, 208 Cal. 439, 442, 281 P. 1018, 1020 (1929) (stating that while the government operates under the separation of powers doctrine, "this does not mean that the three departments of our government are not in many respects mutually dependent"). See generally 13 CAL. JUR. 3D *Constitutional Law* § 102 (1989) (discussing various interactions between the three branches of government); Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57 (1990) (discussing the evolution of the separation of powers outside of court interpretation); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976) (tracing the development and purposes of the separation of powers doc-

a thorough review of each case relied on by the court of appeal,⁹ Justice George concluded that while the judiciary possesses an inherent power to ensure continued operation of that branch, the legislature is not foreclosed from enacting reasonable regulations which do not defeat or materially impair the court's function.¹⁰

The supreme court next considered the trial court's contention that the California Constitution reserves the power of determining days of operation solely to the judicial branch.¹¹ Refuting the plaintiff's claim, Justice George first stated that past and current statutes regulating legal holidays reflect the legislature's perceived authority in this area.¹² Second, the court found that statutes regulating holidays have been upheld by past California courts.¹³ Third, Justice George noted that a fiscal crisis has

trine).

9. *County of Mendocino*, 13 Cal. 4th at 53-59, 913 P.2d at 1051-55, 51 Cal. Rptr. 2d at 841-45 (citing *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018 (1929) (holding that although bar admission is an inherent power of the judiciary, the legislature is not foreclosed from imposing reasonable regulations that do not defeat or materially impair the function of the judicial branch); *Millholen v. Riley*, 211 Cal. 29, 34, 293 P. 69, 71 (1930) (stating that while the judiciary may act to ensure its livelihood, the legislature may still impose restrictions "so long as their efficiency is not thereby impaired"); *Johnson v. Superior Court*, 50 Cal. 2d 693, 329 P.2d 5 (1958) (holding a statute enacted by the legislature that set guidelines for disqualification of judges was a reasonable regulation and did not interfere with an inherent power of the court); *In re McKinney*, 70 Cal. 2d 8, 447 P.2d 972, 73 Cal. Rptr. 580 (1968) (upholding a statute dictating contempt of crime penalties as a reasonable legislative act)). See generally Annotation, *Power of Legislature Respecting Admission to Bar*, 66 A.L.R. 1512 (1930) (discussing the inherent power of the court to determine bar admission requirements and the legislature's authority to impose reasonable regulations thereon).

10. *County of Mendocino*, 13 Cal. 4th at 58-59, 913 P.2d at 1054-55, 51 Cal. Rptr. 2d at 845. "It does not follow . . . that the Legislature necessarily violates the separation of powers doctrine whenever it legislates with regard to such an inherent judicial power or function." *Id.* at 57, 913 P.2d at 1054, 51 Cal. Rptr. 2d at 845. See generally 16 C.J.S. *Constitutional Law* § 115 (1984 & Supp. 1996) (discussing legislature burdening or interfering with a judicial function).

11. *County of Mendocino*, 13 Cal. 4th at 61-66, 913 P.2d at 1056-60, 51 Cal. Rptr. 2d at 847-51. An inherent power is a power within the scope of the branch's authority which has not necessarily been expressly authorized by the legislature or the constitution. *Id.* at 57, 913 P.2d at 1054, 51 Cal. Rptr. 2d at 845. See generally 13 CAL. JUR. 3D *Constitutional Law* § 108 (1989 & Supp. 1996) (discussing the inherent powers of the judicial branch).

12. *County of Mendocino*, 13 Cal. 4th at 61-62, 913 P.2d at 1057-58, 51 Cal. Rptr. 2d at 847-48; see CAL. CIV. PROC. CODE § 133-136 (West 1989 & Supp. 1996) (detailing the business days and holidays of the court system). See generally 37 CAL. JUR. 3D *Holidays* § 15 (1989 & Supp. 1996) (discussing judicial holidays).

13. *County of Mendocino*, 13 Cal. 4th at 62-63, 913 P.2d at 1057-58, 51 Cal. Rptr. 2d at 848 (citing *People v. Soto*, 65 Cal. 621, 4 P. 664 (1884) (recognizing the legislature's authority in designating holidays); *Matter of Smith*, 152 Cal. 566, 93 P. 191 (1907) (reasoning that the framers of the constitution did not intend to bar the legislature from regulating holidays of the courts)).

been upheld as a valid reason for a legal holiday.¹⁴ Finally, the court asserted that the history of the California Constitution affirms the drafter's intent to render control of legal holiday regulation to the legislature.¹⁵ Therefore, the court concluded that regulation of the operational hours of the courts does not lie exclusively with the judicial branch.¹⁶

Justice George further stated that the power to determine legal holidays does not interfere with the "integrity of independence of the judicial process."¹⁷ Citing valid regulations previously enacted by the legislative and executive branches affecting public access to the court system, the supreme court dismissed the trial court's contention that the interest in public access to the court system requires the judiciary's exclusive authority over court closures.¹⁸

The court concluded that while the judiciary possesses the power to ensure effective operation of the courts,¹⁹ that power is not exclusive to the judiciary,²⁰ and the legislature is not foreclosed from enacting sec-

14. *County of Mendocino*, 13 Cal. 4th at 63, 913 P.2d at 1057-58, 51 Cal. Rptr. 2d at 847 (citing *Diepenbrock v. Superior Court*, 153 Cal. 597, 95 P. 1121 (1908) (allowing a closure of the courts due to the fiscal situation)).

15. *County of Mendocino*, 13 Cal. 4th at 63-64, 913 P.2d at 1058-59, 51 Cal. Rptr. 2d at 848-50. The 1879 California Constitution stated that courts should always be open except for holidays and weekends. *Id.* at 63, 913 P.2d at 1058, 51 Cal. Rptr. 2d at 848. This clause was deleted in 1966, however, because the framers wanted to leave this area of regulation to the legislature. *Id.* at 64, 913 P.2d at 1058, 51 Cal. Rptr. 2d at 848.

16. *Id.* at 65, 913 P.2d at 1059, 51 Cal. Rptr. 2d at 850.

17. *Id.*

18. *Id.* at 66, 913 P.2d at 1060, 51 Cal. Rptr. 2d at 850-51. "The legislative and executive branches are necessarily and centrally involved in the formulation of a great variety of measures that vitally affect the public's 'access to justice' through the judicial system, from determining the number and location of new judgeships and courthouses to establishing which court-related expenses should be financed at the state level and which at the local level." *Id.* See generally 13 CAL. JUR. 3D *Constitutional Law* § 107 (1989 & Supp. 1996) (discussing the extent and limit of the judiciary's independence); 13 CAL. JUR. 3D *Constitutional Law* § 109 (1989 & Supp. 1996) (distinguishing between judicial and legislative powers); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 2.1-2 (2d ed. 1988) (discussing the balancing of the independence and interdependence of the three branches of government).

19. *County of Mendocino*, 13 Cal. 4th at 54-58, 913 P.2d at 1051-54, 51 Cal. Rptr. 2d at 842-45.

20. See *supra* note 18 and accompanying text.

tion 68108.²¹ Accordingly, the judgment of the court of appeal was reversed and section 68108 was held facially constitutional.²²

B. Chief Justice Lucas' Concurring Opinion

While Chief Justice Lucas concurred with the majority, he disagreed with the majority's failure to question the legislature's authority to permit each county individually to determine the need for furlough days.²³ Chief Justice Lucas argued that the issue should have been addressed because it appeared on the face of the statute and was mentioned in the court of appeal decision.²⁴

III. IMPACT

Because the court limited consideration of the issue to the facial constitutionality of the statute,²⁵ many issues remain unresolved. For example, it is unclear whether the implementation of section 68108 will enable the courts to fulfill their constitutional duties.²⁶ This is an especially interesting issue because each county individually implements this regulation.²⁷

Additionally, an exception to section 68108 allowing courts to remain in session in an emergency remains untested,²⁸ and therefore, courts may attempt to escape the application of this holding by declaring judicial emergencies due to heavy caseloads.

IV. CONCLUSION

The California Supreme Court held that a reasonable legislative action regulating an inherent judicial power does not violate the separation of powers doctrine if the function of the judicial branch is not defeated or

21. *County of Mendocino*, 13 Cal. 4th at 60-61, 913 P.2d at 1056, 51 Cal. Rptr. 2d at 847.

22. *Id.* at 66, 913 P.2d at 1060, 51 Cal. Rptr. 2d at 851.

23. *Id.* at 66-67, 913 P.2d at 1060-61, 51 Cal. Rptr. 2d at 851 (Lucas, C.J., concurring).

24. *Id.* at 67, 913 P.2d at 1060, 51 Cal. Rptr. 2d at 851 (Lucas, C.J., concurring).

25. *Id.* at 59-61, 913 P.2d at 1055-56, 51 Cal. Rptr. 2d at 846-47.

26. *Id.* at 59-60, 913 P.2d at 1055-56, 51 Cal. Rptr. 2d at 846-47. The trial court only considered the facial constitutionality of section 68108. *Id.* at 51, 913 P.2d at 1050, 51 Cal. Rptr. 2d at 840-41. Therefore, the supreme court could not consider whether the statute, "as applied," would hinder the ability of the courts in performing their constitutional functions. *Id.* at 59 n.7, 913 P.2d at 846 n.7, 51 Cal. Rptr. 2d at 1055 n.7.

27. *Id.* at 49, 913 P.2d at 1048, 51 Cal. Rptr. 2d at 839.

28. *Id.* at 60, 913 P.2d at 1056, 51 Cal. Rptr. 2d at 846-47.

materially impaired.²⁹ While the court affirmed an established standard for legislative regulation of an inherent judicial power,³⁰ the effects of this application are yet to be determined.

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29. *Id.* at 58-59, 913 P.2d at 1054-55, 51 Cal. Rptr. 2d at 845.

30. *Id.* at 60-61, 913 P.2d at 1056, 51 Cal. Rptr. 2d at 847.

III. COUNTIES

A sales tax proposed by the transportation authority is a "special tax" applied by a "special district" within the meaning of the statutory initiative; thus, the tax was subject to a statutory requirement that local special taxes be approved by a two-thirds vote among the local electorate. The proposed sales tax received less than the two-thirds vote required by statute and was held invalid because it failed to satisfy the threshold statutory requirement: Santa Clara County Local Transportation Authority v. Guardino.

I. INTRODUCTION

In *Santa Clara County Local Transportation Authority v. Guardino*,¹ the California Supreme Court addressed whether the sales tax proposed by the transportation authority, petitioner, was subject to either (1) the two-thirds voter approval requirement of Government Code section 53722,² as contained in Proposition 62, which was adopted in 1986, or (2) the two-thirds voter approval requirement imposed by Article XIII A, section four, of the California Constitution,³ as contained in Proposition 13. The court further considered whether the initiatives containing such voter approval requirements are constitutional. The supreme court reversed the court of appeal's decision,⁴ holding that the sales tax pro-

1. 11 Cal. 4th 220, 902 P.2d 225, 45 Cal. Rptr. 2d 207 (1995). Justice Mosk delivered the majority opinion, in which Justices Arabian, Baxter, George, and Kennard concurred. *Id.* at 226-61, 902 P.2d at 228-51, 45 Cal. Rptr. 2d at 210-33. Chief Justice Lucas wrote a dissenting opinion. *Id.* at 261-69, 902 P.2d at 251-56, 45 Cal. Rptr. 2d at 233-38 (Lucas, C.J., dissenting). Justice Werdegard also wrote a dissenting opinion. *Id.* at 269-71, 902 P.2d at 256-58, 45 Cal. Rptr. 2d at 238-40 (Werdegard, J., dissenting).

2. Section 53722 provides: "No local government or district may impose any special tax unless and until such special tax is submitted to the electorate of the local government, or district, and approved by a two-thirds vote of the voters voting in an election on the issue." CAL. GOV'T CODE § 53722 (West Supp. 1996). See generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 109 (9th ed. 1989) (summarizing the restrictive effects of adopting Proposition 62 on the imposition of taxes by local governments and districts).

3. CAL. CONST. art XIII A, § 4. The relevant portion of this section states that "Cities, Counties, and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district . . ." *Guardino*, 11 Cal. 4th at 231, 902 P.2d at 231, 45 Cal. Rptr. 2d at 213. See generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §§ 107-122 (9th ed. 1989 & Supp. 1996) (summarizing the provisions of Proposition 13 and their implementation).

4. *Santa Clara County Local Transp. Auth. v. Guardino*, 34 Cal. App. 4th 858, 24 Cal. Rptr. 2d 854 (1993).

posed by the petitioner was invalid under Proposition 62, because it received less than the two-thirds vote required for approval under section 53722.⁵

II. TREATMENT

A. Majority Opinion

Prefacing its analysis, the majority opinion stated that traditionally the California Supreme Court had postponed the consideration of constitutional issues where statutory relief was determined to be adequate.⁶ Accordingly, the majority stated that because the statutory relief in this case was adequate, and therefore dispositive, "a constitutional decision would have been unnecessary and therefore inappropriate."⁷

5. *Guardino*, 11 Cal. 4th at 226-61, 902 P.2d at 228-51, 45 Cal. Rptr. 2d at 210-33. In *Guardino*, the sales tax at issue was authorized by the enactment of the Local Transportation Authority and Improvement Act, which declared that "federal and state funding . . . is inadequate" to meet local transportation needs and provided for taxation and bond-issuing measures to "raise additional local revenues." *Id.* at 227, 902 P.2d at 228, 45 Cal. Rptr. 2d at 210. Pursuant to the Act, the Santa Clara County Board of Supervisors created the Santa Clara Local Transportation Authority, which adopted an ordinance that imposed a countywide sales tax and empowered the petitioner to issue bonds payable from the revenues of the sales tax. *Id.* at 227-28, 902 P.2d at 228-29, 45 Cal. Rptr. 2d at 211. The revenues were required to be used to satisfy the stated local transportation needs. *Id.* Subsequently, the proposed ordinance was placed on the General Election Ballot and was approved by 54.1% of the voters. *Id.* at 228, 902 P.2d at 229, 45 Cal. Rptr. 2d at 211. Following the election, petitioner adopted a resolution to issue bonds pursuant to the Act, ordering its auditor-comptroller, Carl Guardino (respondent), to sign the bonds to be issued. *Id.* Guardino refused to do so unless the taxation scheme was determined to be valid. *Id.* The court of appeal denied petitioner's prayer for a writ of mandate compelling respondent to sign the bonds and held the tax scheme invalid under Proposition 13. *Id.*

6. *Guardino*, 11 Cal. 4th at 228-31, 902 P.2d at 229-31, 45 Cal. Rptr. 2d at 211-13. *But see* *Rider v. County of San Diego*, 1 Cal. 4th 1, 820 P.2d 1000, 2 Cal. Rptr. 2d 490 (1991) (opting to address only the constitutional ground and holding a similar tax scheme invalid when challenged on the same constitutional and statutory grounds as in the instant case). *See, e.g.,* *City of Woodlake v. Logan*, 230 Cal. App. 3d 1058, 282 Cal. Rptr. 27 (1991) and *City of Westminster v. County of Orange*, 204 Cal. App. 3d 623, 251 Cal. Rptr. 511 (1988) (holding other sections of Proposition 62 unconstitutional, expressing the court's uncertainty as to the constitutionality of California Government Code section 53722, and recognizing the necessity of a prompt resolution of that issue).

7. *Guardino*, 11 Cal. 4th at 231-32, 902 P.2d at 231, 45 Cal. Rptr. 2d at 213 (quoting *Lyng v. Northwest Indian Cemetery Protection Ass'n*, 485 U.S. 439, 446 (1988)). Although the statutory ground was dispositive in the instant case, the court found it nec-

1. Within the meaning of the statutory initiative, the sales tax imposed was a special tax and petitioner was a district.

As a basis for its analysis, the majority stated that on its face section 53722 invalidated the sales tax if it was a special tax within the meaning of that section and if petitioner was a district as set forth in section 53722.⁸

First, the court addressed whether the sales tax imposed in the instant case was a special tax within the meaning of section 53722.⁹ The court relied on *Rider v. County of San Diego*¹⁰ to narrowly define a special tax as a tax imposed for a specific purpose.¹¹ The narrow purpose of the tax in *Guardino* was for funding "local transportation maintenance and improvement needs," conditioning payment of the proceeds to the satisfaction of such needs.¹²

Finding the instant case sufficiently analogous to *Rider*, the court concluded that the sales tax imposed in the instant case was a special tax within the meaning of section 53722.¹³

essary to determine the constitutionality of Government Code section 53722. *Id.* at 238-61, 902 P.2d at 236-51, 45 Cal. Rptr. 2d at 218-33 (finding section 53722 constitutional).

8. *Guardino*, 11 Cal. 4th at 231, 902 P.2d at 231, 45 Cal. Rptr. 2d at 213. Because of its two-thirds voter approval requirement and because the proposed sales tax was approved by only 54.1% of the voters, section 53722 would invalidate the tax if the conditions following were met: (1) the tax must have been a special tax within the meaning of section 53722, and (2) petitioner must have been a "district" within the meaning of section 53722. *Id.*; see *supra* note 2 (setting forth the conditions that must be satisfied to apply section 53722).

9. *Guardino*, 11 Cal. 4th at 231, 902 P.2d at 231, 45 Cal. Rptr. 2d at 213.

10. 1 Cal. 4th 1, 820 P.2d 1000, 2 Cal. Rptr. 2d 490 (1991).

11. *Id.* at 15, 820 P.2d at 1009, 2 Cal. Rptr. 2d at 499. The court in *Rider* further construed the term special tax to mean a tax "levied to fund a specific governmental project or program" *Id.*

12. *Guardino*, 11 Cal. 4th at 232, 902 P.2d at 232, 45 Cal. Rptr. 2d at 214 (quoting CAL. PUB. UTIL. CODE § 180001(c) (Deering 1997)); CAL. GOV'T CODE § 53721 (West 1983 & Supp. 1996) (providing that special taxes are defined as "taxes imposed for specific purposes"); cf. *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982) (construing the term special taxes to mean "taxes which are levied for a specific purpose" and not a levy "to be utilized for general governmental purposes").

13. *Guardino*, 11 Cal. 4th at 232, 902 P.2d at 232, 45 Cal. Rptr. 2d at 214. In *Rider*, the court held that the sales tax imposed by the San Diego County Regional Justice Facility Financing Agency "for the purpose of financing the construction and operation of criminal detention and courthouse facilities" was subject to the two-thirds voter approval requirement of Proposition 13 because the tax was a special tax and the Agency was a "district" within the meanings set forth in Proposition 13. *Rider*, 1 Cal. 4th at 11, 820 P.2d at 1006, 2 Cal. Rptr. 2d at 496. Therefore, the court held that the tax was invalid due to the fact that it was only approved by a majority of the voters. *Id.* at 13, 820 P.2d at 1007, 2 Cal. Rptr. 2d at 498.

Second, the court considered whether petitioner was a "district" within the meaning of section 53722. Relying on the plain meaning of the term "district" as defined by Proposition 62 and the legislative intent of the drafters of Proposition 62, the court stated that a district is an "agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries."¹⁴

Applying the foregoing definition to the instant case, the majority concluded that "petitioner is an agency of the state formed pursuant to general law (Pub. Util. Code, § 180000 et seq.) for the local performance of a governmental function (raising tax revenues) within limited boundaries (Santa Clara County)."¹⁵ Therefore, on its face, section 53722 was applicable because petitioner was determined to be a "district" within the meaning of the statute.¹⁶

2. Because the statutory initiative was constitutional, the sales tax was invalid when it failed to satisfy the voting requirement of section 53722.

Next, the majority addressed whether the voter approval requirement of section 53722 was a referendum within the meaning of the constitution.¹⁷ The majority distinguished Proposition 62 from a constitutional

14. *Guardino*, 11 Cal. 4th at 233, 902 P.2d at 232, 45 Cal. Rptr. 2d at 214; see CAL. GOV'T CODE § 53720(b) (West 1983 & Supp. 1996). *But see* Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 205-08, 643 P.2d 941, 945-47, 182 Cal. Rptr. 324, 328-30 (1982) (construing the term special district as used in Proposition 13 to mean "only districts that are authorized to levy a property tax"). In the instant case, petitioner argued that its lack of authority to levy a property tax prevented it from being classified as a special district. *Guardino*, 11 Cal. 4th at 223, 902 P.2d at 232, 45 Cal. Rptr. 2d at 214. Based on the contention that Proposition 62 intended to adopt the *Richmond* construction of special district as the definition of "district," petitioner argued that it was not subject to the section 53722 voting requirement. *Id.* The court rejected the argument, holding that Proposition 62 applied to all "districts," not just special districts. *Id.*

15. *Guardino*, 11 Cal. 4th at 233, 902 P.2d at 232-33, 45 Cal. Rptr. 2d at 215.

16. *Id.*

17. *Id.* at 238-54, 902 P.2d at 236-46, 45 Cal. Rptr. 2d at 218-28. The court stated that the constitutional referendum was "the right reserved to the people to adopt or reject any act or measure which has been passed by a legislative body, and which, in most cases, would without action on the part of the electors become a law." *Id.* at 241, 902 P.2d at 237-38, 45 Cal. Rptr. 2d at 219-20 (citing Referendum Comm. v. City of Hermosa Beach, 184 Cal. App. 3d 152, 157, 229 Cal. Rptr. 51, 54 (1986) (emphasis added) (quoting *Whitmore v. Carr*, 2 Cal. App. 2d 590, 592 (1934))). Furthermore, the

referendum as follows: (1) the voter approval requirement of section 53722 was a condition precedent to the enactment of a sales tax, whereas a constitutional referendum was invoked only after a statute had been enacted;¹⁸ (2) a statute subject to Proposition 62 was not enacted until it was submitted to and approved by the local electorate, whereas a statute subject to the constitutional referendum was automatically enacted unless the voters themselves petitioned to prevent its enactment;¹⁹ and (3) during the entire legislative process before the tax was submitted to the voters, Proposition 62 described the tax as merely "proposed," whereas a referendum operated only after the legislative process was completed.²⁰ For the foregoing reasons, the majority concluded that Proposition 62 was not a constitutional referendum.²¹

Furthermore, the majority stated that the legislature's characterization of a statutory initiative as a referendum was not necessarily dispositive of the fact that the initiative functioned as a referendum.²²

court noted that the California Constitution defines referendum and sets forth exceptions to its applicability: "The referendum is the power of the electors to approve or reject statutes or parts of statutes except . . . statutes providing for tax levies or appropriations for usual current expenses of the State." *Id.* at 238-39, 902 P.2d at 236, 45 Cal. Rptr. 2d at 218 (quoting CAL. CONST. art. II, § 9(a)). *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 122 (9th ed. 1988) (summarizing the scope of the referendum power and its constitutional basis); 42 AM. JUR. 2D *Initiative and Referendum* § 15 (2d ed. 1969) (discussing taxes and appropriation measures exempt from referendum).

18. *Guardino*, 11 Cal. 4th at 240, 902 P.2d at 237, 45 Cal. Rptr. 2d at 219. *See generally* 38 CAL. JUR. 3D *Initiative and Referendum* §§ 56-63 (1977 & Supp. 1996) (discussing the procedural requirements and scope of the referendum power as defined by the constitution).

19. *Guardino*, 11 Cal. 4th at 240, 902 P.2d at 237, 45 Cal. Rptr. 2d at 219. *See generally* 82 C.J.S. *Statutes* §§ 115-151 (1953) (discussing the purpose and scope of the initiative and referendum powers).

20. *Guardino*, 11 Cal. 4th at 240-41, 902 P.2d at 237, 45 Cal. Rptr. 2d at 219. The court further stated that the tax was merely "proposed" at the time it was submitted to the electorate for a vote; therefore, the tax could not yet have been "enacted," an essential element of a constitutional referendum. *Id.* at 240-41, 902 P.2d at 237-38, 45 Cal. Rptr. 2d at 219-20. According to the court, a tax could not have been considered "enacted" unless and until it was submitted to and approved by the voters. *Id.*; *see* CAL. GOV'T CODE §§ 53722, 53723 (West 1983 & Supp. 1996).

21. *Guardino*, 11 Cal. 4th at 240, 902 P.2d at 237, 45 Cal. Rptr. 2d at 219.

22. *Id.* at 242-43, 902 P.2d at 238-39, 45 Cal. Rptr. 2d at 220-21. The court stated that its use of the "referendum" label in referring to voter approval requirements similar to the one in Proposition 62 was merely for convenience. *Id.*; *see, e.g.*, *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976); *James v. Valtierra*, 402 U.S. 137 (1971); *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *vacated*, 403 U.S. 915 (1971); *Rossi v. Brown*, 9 Cal. 4th 688, 889 P.2d 557, 38 Cal. Rptr. 2d 363 (1995).

Notwithstanding petitioner's contrary contention, the majority stated that the policy reasons behind the legislature's decision to except tax levies from the referendum power, as set forth in *Rider*, were not applicable to the Proposition 62 voter approval requirement.²³

The majority then found that article XIII, section 24, of the California Constitution²⁴ authorized the legislature to grant local governments the power to impose local taxes.²⁵ In addition, the court stated that "[t]he Legislature's authority to grant taxing power to local governments, moreover, includes the authority to prescribe the terms and conditions under which local governments may exercise that power."²⁶ Applied to

23. *Guardino*, 11 Cal. 4th at 245-46, 902 P.2d at 240-41, 45 Cal. Rptr. 2d at 222-23. The main reason for the tax levy exception is to prevent the interference with or disruption of the administration of a state's fiscal powers and policies. *Id.* (citing *Geiger v. Board of Supervisors*, 48 Cal. 2d 832, 313 P.2d 545 (1957)). Furthermore, in *Rider*, the court stated that the policy justifications for the exception were not violated by the voter approval requirement due to the fact that the local legislative body was aware that it lacked the power to levy the tax until it was approved by the electorate. *Guardino*, 11 Cal. 4th at 245-46, 902 P.2d at 240-41, 45 Cal. Rptr. 2d at 222-23 (citing *Rider*, 1 Cal. 4th at 23, 820 P.2d at 1014, 2 Cal. Rptr. 2d 504 (George, J., concurring)). See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 123 (9th ed. 1988 & Supp. 1996) (discussing the prohibition against referenda on tax levies); 42 AM. JUR. 2D *Initiative and Referendum* § 15 (2d ed. 1969 & Supp. 1993) (setting forth the tax levying exception to the referendum power); Richard A. Chesley, Comment, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. CIN. L. REV. 541 (1984) (discussing the exceptions to the referendum power).

24. CAL. CONST. art. XIII, § 24. This section provides: "The Legislature may not impose taxes for local purposes but may authorize local governments to impose them." *Guardino*, 11 Cal. 4th at 247, 902 P.2d at 242, 45 Cal. Rptr. 2d at 224. See generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 101 (9th ed. 1989 & Supp. 1996) (stating that the legislature cannot impose local taxes for local purposes, but may vest such power in local governments); 13 CAL. JUR. 3D *Constitutional Law* § 176 (1989) (stating that under article 13, section 24, "[t]he whole subject of county and municipal taxes for local purposes is relegated to local authorities, and the legislature has no power to impose any tax whatever within those territories for local purposes"); 51 CAL. JUR. 3D *Public Improvements* §§ 5-8 (1979 & Supp. 1996) (stating that the legislature may exercise its power to levy taxes only through its delegation to municipalities and other local bodies).

25. *Guardino*, 11 Cal. 4th at 246-54, 902 P.2d at 241-46, 45 Cal. Rptr. 2d at 223-28.

26. *Id.* at 248, 902 P.2d at 242, 45 Cal. Rptr. 2d at 224. See, e.g., CAL. REV. & TAX. CODE §§ 9501-9507 (West 1994 & Supp. 1997) (placing conditions on authorization of counties to levy a motor vehicle fuel tax for local transportation purposes); CAL. REV. & TAX. CODE §§ 7287-7287.10 (West 1997) (placing conditions on authorization of local governments to impose a sales tax on certain consumer products for purposes of graffiti prevention). Furthermore, the delegated power may be "revoked, modified, or limit-

the instant case, the majority concluded that the voter approval requirement contained in Proposition 62 was within the scope of the legislature's authority to place conditions on the exercise of local taxing power.²⁷ Therefore, the majority held that section 53722 was constitutional.²⁸

The majority next addressed whether the local electorate could constitutionally enact Proposition 62 by initiative. The court relied primarily on article II, section 8(a), of the constitution²⁹ to conclude that section 53722 was within the scope of the initiative power.³⁰

3. Section 53722 did not violate the Equal Protection Clause of the Fourteenth Amendment.

As its final point of analysis, the majority discredited petitioner's claim that section 53722 denied the proponents of the tax equal protection of the laws.³¹ To do so, the court stated that (1) the applicable rule was

ed at any time" by the legislature. 16 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 44.05 (3d rev. ed. 1994). See generally 13 CAL. JUR. 3D *Constitutional Law* §§ 170-172 (1989 & Supp. 1996) (summarizing the extent of the legislature's power to tax and the means by which the legislature may determine the mode of levying, assessing, and collecting the tax).

27. *Guardino*, 11 Cal. 4th at 250, 902 P.2d at 244, 45 Cal. Rptr. 2d at 226. The court added that "[i]f the local government chooses to exercise that power [to tax following the legislature's delegation], the [l]egislature may require it to take several steps in order to impose the tax." *Id.* According to the court, a voter approval requirement is one such step. *Id.*

28. *Id.* at 252-53, 902 P.2d at 245, 45 Cal. Rptr. 2d at 227.

29. CAL. CONST. art. II, § 8(a). The initiative power was defined as the constitutional power of the electorate "to propose statutes . . . and to adopt or reject them," and was coextensive with the legislature's power to enact statutes. *Guardino*, 11 Cal. 4th at 253, 902 P.2d at 246, 45 Cal. Rptr. 2d at 228. See generally 7 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW, Constitutional Law* § 121 (9th ed. 1988 & Supp. 1996) (summarizing the scope of the initiative power and its constitutional basis); 38 CAL. JUR. 3D *Initiative and Referendum* §§ 40-55 (1977 & Supp. 1996) (discussing the constitutional basis, scope, and procedural requirements for the adoption of ordinances by initiative); 42 AM. JUR. 2D *Initiative and Referendum* §§ 1-66 (1969 & Supp. 1993) (summarizing the initiative and referendum powers).

30. *Guardino*, 11 Cal. 4th at 254, 902 P.2d at 246, 45 Cal. Rptr. 2d at 228. See generally David B. Magleby, *Governing by Initiative: Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13 (1995) (discussing the procedural requirements for exercising the initiative power); James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491 (1986) (discussing the initiative power as a limitation on the legislature's authority to enact legislation).

31. *Guardino*, 11 Cal. 4th at 254-61, 902 P.2d at 246-51, 45 Cal. Rptr. 2d at 228-33; see U.S. CONST. amend. XIV, § 1. See generally 13 CAL. JUR. 3D *Constitutional Law* §§ 183-187 (1989 & Supp. 1996) (stating the fundamental principle of taxation that a tax must be equal in its burdens and uniform in its operation).

that "so long as such provisions do not discriminate against or authorize discrimination against any identifiable class, they do not violate the Equal Protection Clause,"³² and (2) under *Gordon*, the electorate voting on the tax initiative did not constitute an "identifiable class."³³ Therefore, the court concluded that section 53722 did not violate the Equal Protection Clause.³⁴

In sum, the court determined that section 53722 applied to petitioner and was constitutional. As a result, the sales tax imposed by petitioner was invalid because its 54.1% approval vote failed to satisfy the two-thirds voter approval requirement contained in section 53722.³⁵

B. Chief Justice Lucas' Dissenting Opinion

In a separate dissenting opinion, Chief Justice Lucas contended that the tax levy exception to the referendum power was tantamount to "a declaration of policy against subjecting [tax] legislation . . . to a vote of the people."³⁶ Since Proposition 62 and its voter approval requirement in section 53722 purported to condition the assessment of local taxes on electorate approval, Chief Justice Lucas opined that Proposition 62 was a referendum that violated the constitution's prohibition against tax-levying referenda.³⁷ Therefore, pursuant to his finding that section 53722 was

32. *Guardino*, 11 Cal. 4th at 256, 902 P.2d at 247-48, 45 Cal. Rptr. 2d at 229-30 (quoting *Gordon v. Lance*, 403 U.S. 1, 7 (1971)).

33. *Id.* at 258, 902 P.2d at 249, 45 Cal. Rptr. 2d at 231. See generally Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act-Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615 (1983) (discussing *Gordon v. Lance* and supermajority voting requirements).

34. *Guardino*, 11 Cal. 4th at 254-61, 902 P.2d at 246-51, 45 Cal. Rptr. 2d at 228-33. See generally Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261 (1990) (outlining the effects of equal protection jurisprudence on the legislature's power to tax).

35. *Guardino*, 11 Cal. 4th at 226-61, 902 P.2d at 228-51, 45 Cal. Rptr. 2d at 210-33.

36. *Id.* at 261-69, 902 P.2d at 251-56, 45 Cal. Rptr. 2d at 233-38 (Lucas, C.J., dissenting) (quoting *Geiger v. Board of Supervisors*, 48 Cal. 2d 832, 836, 313 P.2d 545, 547 (1957)); see *supra* note 23 and accompanying text (setting forth the justifications for the tax levy limitation on the referendum power). Because voter disapproval of the tax initiative would have prevented its enactment, Chief Justice Lucas argued that the Proposition 62 voting requirement rendered the tax "a nullity in the same manner as a constitutionally forbidden referendum." *Guardino*, 11 Cal. 4th at 262, 902 P.2d at 252, 45 Cal. Rptr. 2d at 234 (Lucas, C.J., dissenting). Chief Justice Lucas further contended that the Proposition 62 two-thirds vote requirement violated the constitutional provision requiring only a simple majority vote to approve initiatives and referenda. *Id.* (Lucas, C.J., dissenting); see CAL. CONST. art II, § 10(a).

37. *Guardino*, 11 Cal. 4th at 262, 902 P.2d at 251, 45 Cal. Rptr. 2d at 233 (Lucas,

unconstitutional because it functioned as a tax-levying referendum, Chief Justice Lucas concluded that petitioner's tax was not invalidated by its failure to receive a two-thirds approval vote.³⁸

C. *Justice Werdegär's Dissenting Opinion*

Justice Werdegär, in a separate dissenting opinion, stated that Proposition 62 had the same effect as a referendum, notwithstanding the majority's contention that Proposition 62 did not "literally" constitute a referendum.³⁹ According to Justice Werdegär, classification of Proposition 62 was irrelevant because the proposition was an "effort to evade the constitutional rule that 'statutes providing for tax levies' are not subject to referendum."⁴⁰ Therefore, Justice Werdegär concluded that section 53722 was unconstitutional because it effectively granted to the electorate the "equivalent of a power denied to them in the [constitution]."⁴¹

III. IMPACT

Prior to *Guardino*, the supreme court had not settled the constitutionality of supermajority voter approval requirements as they pertained to local tax initiatives imposed by local governments.⁴² The majority in *Guardino*, finding that the two-thirds voter approval requirement of section 53722 was constitutional, held that the local sales tax imposed by petitioner was invalid because it received only a 54.1% approval vote.⁴³ Although its holding appeared to solidify a previously unsettled area of the law, the *Guardino* court's analysis is neither beyond criticism, nor incapable of producing negative results.

First, as stated in Chief Justice Lucas's dissenting opinion, the court's holding could have a crippling effect on the financing and implementation of local projects and improvements: "Given the general unpopularity of new tax measures (a factor that undoubtedly led to the initial adoption of the constitutional prohibition against tax referenda), it is likely

C.J., dissenting).

38. *Id.* at 269, 902 P.2d at 256, 45 Cal. Rptr. 2d at 238 (Lucas, C.J., dissenting).

39. *Id.* at 269-71, 902 P.2d at 256-58, 45 Cal. Rptr. 2d at 238-40 (Werdegär, J., dissenting).

40. *Id.* at 270, 902 P.2d at 256, 45 Cal. Rptr. 2d at 239 (Werdegär, J., dissenting) (quoting CAL. CONST. art. II, § 9(a)).

41. *Id.* at 271, 902 P.2d at 258, 45 Cal. Rptr. 2d at 240 (Werdegär, J., dissenting).

42. *Id.* at 226-27, 902 P.2d at 228, 45 Cal. Rptr. 2d at 211.

43. *Id.* at 238-54, 902 P.2d at 236-46, 45 Cal. Rptr. 2d at 218-28.

that few, if any, proposed local tax measures will meet the required two-thirds voter approval."⁴⁴

Second, the vote required by Proposition 62 would have a similar effect as a referendum in that it could severely impede the ability of the local government to exercise its fiscal powers.⁴⁵ In fact, Justice Werdegar stated that even more significant interference could result from Proposition 62 because it "requires a vote on every new tax, even if there would not exist sufficient interest to place a particular tax on the ballot."⁴⁶

IV. CONCLUSION

Prior to *Guardino*, uncertainty existed as to whether supermajority voter approval requirements, such as section 53722 contained in Proposition 62, were (1) constitutional under the legislature's power to delegate the authority to local governments to impose local taxes, and (2) unconstitutional under the prohibition against tax-levying referenda. Concluding that the former construction was proper, the majority found the two-thirds voter approval requirement of section 53722 constitutional.⁴⁷ In the instant case, section 53722 applied to the special tax proposed by petitioner, which was a "district" within the meaning of the statute.⁴⁸ Therefore, section 53722 rendered petitioner's proposed sales tax invalid due to its failure to receive the required approval of two-thirds of the voters.⁴⁹

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44. *Id.* at 263, 902 P.2d at 252, 45 Cal. Rptr. 2d at 234 (Lucas, C.J., dissenting).

45. *Id.* at 271, 902 P.2d at 257, 45 Cal. Rptr. 2d at 239-40 (Werdegar, J., dissenting). According to Justice Werdegar, the effect of such an interference would result in the postponement of fiscal planning until subsequent elections. *Id.* (Werdegar, J., dissenting).

46. *Id.* at 271, 902 P.2d at 257, 45 Cal. Rptr. 2d at 240 (Werdegar, J., dissenting).

47. *Id.* at 238-54, 902 P.2d at 236-46, 45 Cal. Rptr. 2d at 218-28.

48. *Id.* at 231-38, 902 P.2d at 228-36, 45 Cal. Rptr. 2d at 213-18.

49. *Id.* at 261, 902 P.2d at 251, 45 Cal. Rptr. 2d at 233.

IV. CRIMINAL LAW

The 1986 amendment to Penal Code section 664(a) creates a penalty provision rather than a delineation of degrees of attempted murder; therefore, a defendant can be retried on the issue of premeditation and deliberation: People v. Bright.

I. INTRODUCTION

In *People v. Bright*,¹ the California Supreme Court examined whether the 1986 amendment to Penal Code section 664(a),² which imposes a longer prison sentence on individuals who attempt to commit murder with premeditation and deliberation, creates a higher degree of attempted murder or is merely a penalty provision.³ The trial court found that

1. 12 Cal. 4th 652, 909 P.2d 1354, 49 Cal. Rptr. 2d 732 (1996). Justice George delivered the majority opinion, in which Chief Justice Lucas and Justices Arabian, Baxter, and Werdegar concurred. *Id.* at 655-71, 909 P.2d at 1355-66, 49 Cal. Rptr. 2d at 733-44. Justice Mosk wrote a dissenting opinion. *Id.* at 671-83; 909 P.2d at 1366-74, 49 Cal. Rptr. 2d at 744-52 (Mosk, J., dissenting). Justice Kennard wrote a separate dissenting opinion. *Id.* at 683-93, 909 P.2d at 1374-80, 49 Cal. Rptr. 2d at 752-58 (Kennard, J., dissenting).

2. As amended, section 664(a) of the Penal Code reads in relevant part:

(a) If the offense so attempted is punishable by imprisonment in the state prison, the person guilty of that attempt is punishable by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense so attempted; *provided, however, that if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole; . . . [t]he additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.*

CAL. PENAL CODE § 664(a) (West Supp. 1996) (emphasis added to indicate changes made by 1986 amendment).

3. *Bright*, 12 Cal. 4th at 656, 909 P.2d at 1355, 49 Cal. Rptr. 2d at 733. In *Bright*, a police officer stopped the defendant for defective brake lights. *Id.* at 657, 909 P.2d at 1356, 49 Cal. Rptr. 2d at 734. The defendant pulled over, and the officer approached the vehicle on the driver's side. *Id.* The defendant aimed a .357 magnum at the officer and fired six rounds, hitting the deputy in the waist, abdomen, and leg. *Id.* The officer survived the shooting, and the defendant was arrested. *Id.* The defendant was charged with "willfully, deliberately, and premeditatedly attempt[ing] to murder" the officer. *Id.* The jury convicted the defendant of attempted murder, but was unable to agree on the premeditation allegation. *Id.* at 658, 909 P.2d at 1357, 49 Cal. Rptr. 2d at 736. A mistrial was declared on the issue of premeditation, and the case was set for retrial. *Id.* The defendant filed a motion to dismiss the premeditation allegation asserting that he had already been tried and found guilty of the lesser included offense of attempted murder.

the 1986 amendment created a higher degree of attempted murder, and therefore, retrial on the issue of premeditation and deliberation was barred by double jeopardy.⁴ The court of appeal reversed, stating that attempted murder is not divided into degrees.⁵ Upholding the decision of the court of appeal, the California Supreme Court agreed that the amendment creates a penalty provision and does not divide attempted murder into degrees. Consequently, the supreme court held that retrying a defendant on the issue of premeditation and deliberation would not be barred by double jeopardy.⁶

II. TREATMENT

A. Majority Opinion

1. The legislative intent in writing the 1986 amendment to Penal Code section 664(a) was to create a penalty provision.

The court began its opinion by noting the differences between degrees of a crime and enhancement or penalty provisions.⁷ When a crime is divided into degrees, conviction on a greater or lesser included offense comprises the "same offense" under double jeopardy provisions, and retrial is barred.⁸ The court contrasted this with a penalty provision that

Id. at 658-59, 909 P.2d at 1357-58, 49 Cal. Rptr. 2d at 735-36.

4. *Id.* at 659, 909 P.2d at 1258, 49 Cal. Rptr. 2d at 735.

5. *Id.* at 660, 909 P.2d at 1358, 49 Cal. Rptr. 2d at 736.

6. *Id.* at 656-57, 909 P.2d at 1356, 49 Cal. Rptr. 2d at 734.

7. *Id.* at 660-61, 909 P.2d at 1358-59, 49 Cal. Rptr. 2d at 736-37.

8. *Id.* at 660, 909 P.2d at 1359, 49 Cal. Rptr. 2d at 737; *see also* *Brown v. Ohio*, 432 U.S. 161, 169-70 (1977) (holding that a prior conviction for the lesser offense of joyriding bars a subsequent conviction for auto theft); *Stone v. Superior Court*, 31 Cal. 3d 503, 646 P.2d 809, 183 Cal. Rptr. 647 (1982) (noting that courts must allow the jury to give a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense); *People v. Lohbauer*, 29 Cal. 3d 364, 627 P.2d 183, 173 Cal. Rptr. 453 (1981) (holding defendants conviction on a lesser charge was an implied acquittal of the greater charge). *See generally* David F. Abele, *Jury Deliberations and the Lesser Included Offense: Getting the Courts Back in Step*, 23 U.C. DAVIS L. REV. 375 (1989); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 326 (2d ed. 1988 & Supp. 1996) (discussing the barring of multiple prosecutions in lesser included offenses); 20 CAL. JUR. 3d *Criminal Law* §§ 2322, 2332 (1985 & Supp. 1996) (discussing the doctrine of lesser included offenses and consequences of a jury's failure to agree on an unchanged lesser included offense).

The double jeopardy clause of the United States Constitution, which provides that no person will be put twice in jeopardy for the same offense, was made applicable to the states through the Fourteenth Amendment in *Benton v. Maryland*, 395 U.S. 784

imposes a greater penalty when the crime is committed in specific circumstances.⁹ A conviction or acquittal on an underlying offense does not bar a retrial during the penalty phase.¹⁰

The court then reviewed the history of Penal Code section 664 to better determine the intent of the legislature in amending the legislation.¹¹ The court examined the language used in the amendment and determined that it was language typically used in sentence enhancement penalty provisions.¹² Further, the court noted that nothing in the language of the statute expressly created degrees of attempted murder.¹³ Consequently, the court concluded that the legislature intended to create enhancement penalty provisions and not degrees of attempted murder.¹⁴

(1989). California also incorporated a similar provision in the state constitution. CAL. CONST. art. I, § 5. For a discussion on the early history of the double jeopardy clause, see Justice Marshall's opinion in *United States v. Wilson*, 420 U.S. 332, 340-353 (1975). For a general discussion of the double jeopardy clause, see Paul G. Flynn, *Judicial Sentencing Error: Thomas v. Morris and the Double Jeopardy Clause*, 16 PEPP. L. REV. 613 (1989). See generally Richard Finacom, Comment, *Successive Prosecutions and the Continuing Criminal Enterprise: the Double Jeopardy Analysis in Garrett v. United States*, 13 HASTINGS CONST. L.Q. 785 (1986).

9. *Bright*, 12 Cal. 4th at 661, 909 P.2d at 1359, 49 Cal. Rptr. 2d at 737. For a general discussion of sentence enhancements, see 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 1473-1479 (2d ed. 1989 & Supp. 1996).

10. *Bright*, 12 Cal. 4th at 661, 909 P.2d at 1359, 49 Cal. Rptr. 2d at 737; see also *People v. Bryant*, 10 Cal. App. 4th 1584, 13 Cal. Rptr. 2d 601 (1992) (allowing defendant to be retried on enhancement to a rape charge after defendant plead no contest to rape); *People v. Guillen*, 25 Cal. App. 4th 756, 759, 31 Cal. Rptr. 2d 653, 655 (1994) (holding that retrial on sentence enhancement in a drug possession case was not barred by double jeopardy); *People v. Schultz*, 5 Cal. App. 4th 563, 7 Cal. Rptr. 2d 269 (1992) (holding that defendant could be retried on enhancement after the jury was hung as to the enhancement but found him guilty of attempted murder). For a discussion of collateral estoppel issues in sentence enhancement, see Daniel P. Fliflet, California Supreme Court Survey, 23 PEPP. L. REV. 290 (1995) (analyzing *People v. Santamaria*).

11. *Bright*, 12 Cal. 4th at 662, 909 P.2d at 1360, 49 Cal. Rptr. 2d at 738.

12. *Id.* at 667-68, 909 P.2d at 1363-64, 49 Cal. Rptr. 2d at 741-42. See *supra* note 2 for the text of Penal Code § 664(a) and indicated changes made by the 1986 amendments.

13. *Bright*, 12 Cal. 4th at 668, 909 P.2d at 1364, 49 Cal. Rptr. 2d at 742.

14. *Id.* at 669, 909 P.2d at 1364, 49 Cal. Rptr. 2d at 742. The court noted that the 1986 amendment did not change existing law. *Id.* In *People v. Macias* the court rejected Macias' contention that treating all those convicted of attempted murder the same was a violation of due process and held that there are not degrees of attempted murder. 137 Cal. App. 3d 465, 468-69, 187 Cal. Rptr. 100, 101 (1983); see also *People v. Miller*, 6 Cal. App. 4th 873, 879, 8 Cal. Rptr. 2d 193, 196 (1992) (noting that attempted murder is not divided into degrees).

2. The language of the charging instrument and jury instructions does not establish degrees of attempted murder.

The court next focused on the trial court's assertion that the language of the documents charging the defendant with attempted murder, taken together with the jury instructions, created degrees of attempted murder.¹⁵ The supreme court first rebutted the trial court's finding by emphasizing that it is only the legislature that decides if a crime is to be divided into degrees and not the courts.¹⁶ Furthermore, the supreme court stated that the purpose of charging documents are only to give the defendant notice, and not to delineate degrees of murder.¹⁷ Lastly, the supreme court recognized that jury instructions¹⁸ do not create degrees of attempted murder.¹⁹ Even if they do, the defendant did not object to the instructions at trial, and therefore, any objection was waived.²⁰

15. *Bright*, 12 Cal. 4th at 669, 909 P.2d at 1365, 49 Cal. Rptr. 2d at 743. In support of its finding, the trial court cited *People v. Wilson*, 224 Cal. App. 2d 738, 37 Cal. Rptr. 42 (1964), *overruled on other grounds by Kellett v. Superior Court*, 63 Cal. 2d 822, 409 P.2d 206, 48 Cal. Rptr. 366 (1966). In *Wilson*, the police went to arrest the defendant pursuant to a warrant. *Id.* at 740, 37 Cal. Rptr. at 43. The defendant fled to his father's house, and when the officer entered the house, the defendant pointed a rifle at the officer. *Id.* In two separate complaints, defendant was charged with exhibiting a firearm and resisting arrest. *Id.* The relevant issue was whether the first count was a lesser included of the second count. *Id.* at 743, 37 Cal. Rptr. at 45. The court found that the first count was not a lesser included. *Id.* In making its decision, the court looked at the language of the accusatory pleading and fairness to the parties. *Id.*

The California Supreme Court countered the trial court's assertion by citing *People v. Wolcott*, 34 Cal. 3d 92, 665 P.2d 520, 192 Cal. Rptr. 748 (1983). *Bright*, 12 Cal. 4th at 661, 909 P.2d at 1359, 49 Cal. Rptr. 2d at 737. In *Wolcott*, the court rejected defendant's contention that assault with a deadly weapon was a lesser included offense of robbery enhanced by use of a weapon. *Id.* at 100, 665 P.2d at 525, 192 Cal. Rptr. at 753. Consequently, the *Wolcott* court discarded the argument that sentence enhancement allegations in a pleading should be considered in defining lesser included offenses. *Id.* at 100, 665 P.2d at 525, 192 Cal. Rptr. at 754.

16. *Bright*, 12 Cal. 4th at 669, 909 P.2d at 1365, 49 Cal. Rptr. 2d at 743; *see also* *People v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983) (noting that the division of crimes into degrees is a legislative function).

17. *Bright*, 12 Cal. 4th at 670, 909 P.2d at 1365, 49 Cal. Rptr. 2d at 743; *see also* 4 B.E. WITKIN & NORMAN L. EPSTEIN, *California Criminal Law* § 2060 (2d ed. 1989) (noting that due process requirements include notice to the accused of the charges against him).

18. The jury instructions used were CALJIC Nos. 8.66 and 8.67. *Bright*, 12 Cal. 4th at 658 & nn.3-4, 909 P.2d at 1357 & nn.3-4, 49 Cal. Rptr. 2d at 735 & nn.3-4; ARNOLD LEVIN, CALIFORNIA JURY INSTRUCTIONS CRIMINAL Nos. 361-64 (5th ed. 1988 & Supp. 1996) (dealing with attempt to commit murder).

19. *Bright*, 12 Cal. 4th at 669-70, 909 P.2d 1465-66, 49 Cal. Rptr. 2d 743-44.

20. *Id.* at 671, 909 P.2d at 1366, 49 Cal. Rptr. 2d at 744; *see also* *People v.*

B. Justice Mosk's Dissenting Opinion

In a dissenting opinion, Justice Mosk contended that the language of Penal Code section 664 clearly creates degrees of attempted murder.²¹ To show this, Justice Mosk focused on the language of Penal Code section 664(d), which states that “[i]f a crime is divided into degrees, an attempt to commit the crime may be of any of those degrees”²² Because murder is a crime divided into degrees,²³ and because the 1986 amendment to Section 664(a) does not create an exception to section 664(d) for murder, Justice Mosk concluded that Penal Code section 664(d) governs.²⁴

Justice Mosk further noted that while enhancement or penalty provisions typically add on to a base sentence, the 1986 amendment to Section 664(a) of the Penal Code instead imposes a life sentence.²⁵ After discussing the history of Penal Code Section 664 from its enactment in 1872 to present, Justice Mosk ultimately concluded that the legislature intended for there to be degrees of attempted murder.²⁶

C. Justice Kennard's Dissenting Opinion

Justice Kennard focused her dissenting opinion on the language of the 1986 amendment.²⁷ She contended that the addition of the provision imposing a life sentence for attempted murder that is “willful, deliberate, and premeditated” created a separate crime, not merely a penalty provision.²⁸ Justice Kennard maintained that every Penal Code crime can include an attempted offense.²⁹ Furthermore, she contended that be-

Carbonie, 48 Cal. App. 3d 679, 121 Cal. Rptr. 831 (1975) (holding that defendant waived her objection when she failed at trial to object to adequacy of notice). See generally Gabriel J. Chin, *Double Jeopardy Violations as “Plain Error” Under Federal Rule of Criminal Procedure 52(b)*, 21 PEPP. L. REV. 1161 (1994) (discussing waiver and plain error in double jeopardy cases).

21. *Bright*, 12 Cal. 4th at 672, 909 P.2d at 1366, 49 Cal. Rptr. 2d at 744 (Mosk, J., dissenting).

22. *Id.* at 672, 909 P.2d at 1367, 49 Cal. Rptr. 2d 745 (Mosk, J., dissenting).

23. *Id.*; see also CAL. PENAL CODE § 189 (West 1996) (authorizing degrees of murder).

24. *Bright*, 12 Cal. 4th at 672, 909 P.2d at 1367, 49 Cal. Rptr. 2d at 745 (Mosk, J., dissenting).

25. *Id.* (Mosk, J., dissenting); see also *supra* note 2 (restating CAL. PENAL CODE § 664(a) with emphasis on amended portion).

26. *Bright*, 12 Cal. 4th at 674-83, P.2d at 1368-74, 49 Cal. Rptr. 2d at 746-52 (Mosk, J., dissenting).

27. *Id.* at 683-84, 909 P.2d at 1374, 49 Cal. Rptr. 2d at 752 (Kennard, J., dissenting).

28. *Id.* at 684, 909 P.2d at 1374, 49 Cal. Rptr. 2d at 752 (Kennard, J., dissenting).

29. *Id.* at 687, 909 P.2d at 1376, 49 Cal. Rptr. 2d at 754 (Kennard, J., dissenting); see also CAL. PENAL CODE § 21(a) (West 1988 & Supp. 1996) (setting out the elements of

cause the defendant was already charged with attempt to commit second degree murder, double jeopardy prohibits him from being retried for an attempt to commit first degree murder.³⁰

III. IMPACT

This decision does little to change the existing law because prior to *Bright*, most courts had already found that attempted murder was not divided into degrees.³¹ One issue raised by this decision, however, is the defendant's right to a jury trial.³² While defendants have a right to a jury trial on all elements of charged offenses,³³ defendants are not entitled to a jury trial for an enhancement or penalty provision.³⁴ Yet the majority opinion failed to specifically address whether the defendant would have a right to a jury in determining whether premeditation and deliberation played a part in the attempted murder.³⁵

Also, it is possible that *McMillian v. Pennsylvania*³⁶ could be used to limit the application of *Bright*.³⁷ In *McMillian*, the United States Supreme Court noted that when the new punishment to the defendant is substantially greater, states cannot always redefine crimes when the change will remove the issue of sentence enhancements from the jury.³⁸

attempted murder).

30. *Bright*, 12 Cal. 4th at 687, 909 P.2d at 1377, 49 Cal. Rptr. 2d at 755 (Kennard, J., dissenting).

31. See *People v. Miller*, 6 Cal. App. 4th 873, 8 Cal. Rptr. 2d 193 (1992); *People v. Macias*, 137 Cal. App. 3d 465, 187 Cal. Rptr. 100 (1982); *People v. Douglas*, 220 Cal. App. 3d 544, 269 Cal. Rptr. 579 (1990).

32. See *Bright*, 12 Cal. 4th at 690, 909 P.2d at 1379, 49 Cal. Rptr. 2d at 757 (Kennard, J., dissenting).

33. *United States v. Gaudin*, 115 S. Ct. 2310 (1995) (holding judge had to submit question of materiality of defendants false statements to the jury).

34. *Id.* at 690-91, 909 P.2d at 1379, 49 Cal. Rptr. 2d 756 (Kennard, J., dissenting); see also *McMillian v. Pennsylvania*, 477 U.S. 79, 93 (1986) (holding that there is no right to a jury for sentencing even when facts are in dispute); *People v. Wims*, 10 Cal. 4th 293, 895 P.2d 77, 41 Cal. Rptr. 2d 241 (1995) (noting that penalty provisions are sentencing).

35. See *Bright*, 12 Cal. 4th at 671, 909 P.2d at 1365-66, 49 Cal. Rptr. 2d at 743-44.

36. 477 U.S. 79 (1986).

37. See *Bright*, 12 Cal. 4th at 690-92, 909 P.2d at 1379-80, 49 Cal. Rptr. 2d at 757-58.

38. *McMillian*, 477 U.S. at 88.

IV. CONCLUSION

The defendant in this case was tried and found guilty of attempted murder, but the jury was unable to convict the defendant on the enhancement provision provided by the 1986 amendment to Penal Code section 664(a).³⁹ The supreme court therefore held that the 1986 amendment creates only a penalty provision and not degrees of attempted murder; therefore, double jeopardy is not offended, and the defendant can be tried again on the issue of premeditation and deliberation.⁴⁰

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39. *Bright*, 12 Cal. 4th at 658, 909 P.2d at 1357, 49 Cal. Rptr. 2d at 735.

40. *Id.* at 671, 909 P.2d at 1366, 49 Cal. Rptr. 2d at 744.

V. DISSOLUTION OF MARRIAGE

A parent seeking relocation does not bear a burden of establishing that the move is "necessary" as a condition of custody: In re Marriage of Burgess.

I. INTRODUCTION

In *In re Marriage of Burgess*,¹ the court considered "whether a parent seeking to relocate after dissolution of marriage is required to establish that the move is 'necessary' before he or she can be awarded physical custody of minor children."² The trial court entered judgment for the moving parent, allowing the mother to move to Lancaster with the children.³ The court of appeal reversed, finding that the move to Lancaster was not "reasonably necessary"; rather, it was merely for convenience.⁴

1. 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996). Justice Mosk wrote the majority opinion in which Chief Justice Lucas and Justices Kennard, George, Werdegar, and Chin concurred. *Id.* at 28-40, 913 P.2d at 476-84, 51 Cal. Rptr. 2d at 447-55. Justice Baxter wrote a concurring and dissenting opinion. *Id.* at 40-44, 913 P.2d at 484-86, 51 Cal. Rptr. 2d at 455-57 (Baxter, J., concurring and dissenting).

2. *Id.* at 28, 913 P.2d at 476, 51 Cal. Rptr. 2d at 447. In May of 1992, Paul (father) and Mary (mother) Burgess separated when their two children were three and four years old. *Id.* at 29, 913 P.2d at 476, 51 Cal. Rptr. 2d at 447. Shortly thereafter, the mother sought marital dissolution. *Id.* "In July 1992, the trial court entered a 'Stipulation and Order' dissolving the marriage and providing for temporary custody in accordance with a mediation agreement between the parties." *Id.* The parents agreed to share joint legal custody of the children while the mother assumed sole physical custody. *Id.* The mother later accepted employment in Lancaster and announced her intention to relocate herself and the children at a custody hearing in February 1993. *Id.* at 29, 913 P.2d at 477, 51 Cal. Rptr. 2d at 448. In response, the father testified that he would not be able to keep his current visitation schedule because of the forty minute distance between Tehachapi and Lancaster. *Id.* at 30, 913 P.2d at 477, 51 Cal. Rptr. 2d at 448. Thus, he requested that he be made the children's primary caretaker should the mother relocate to Lancaster. *Id.*

3. *Id.*

4. *Id.* at 31, 913 P.2d at 477-78, 51 Cal. Rptr. 2d at 448-49. The court of appeal formulated a three part test for relocation cases. *Id.* First, the "noncustodial non-moving" parent must demonstrate that the move "will impact significantly the existing pattern of care and adversely affect the nature and quality of the noncustodial parent's contact with the child." *Id.* (quoting *In re Marriage of Burgess*, 39 Cal. Rptr. 2d 213, 230 (1995)). If this burden is met, then the other parent has the burden of proving that the relocation is reasonably necessary. *Id.* at 31, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449. Last, if necessity is shown, then "the trial court 'must resolve whether the benefit to the child in going with the moving parent outweighs the loss or diminution of contact with the nonmoving parent.'" *Id.* at 31, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449

The California Supreme Court reversed the court of appeal, holding that a parent "has the right to change the residence of a child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."⁶

II. TREATMENT

A. *Majority Opinion*

Justice Mosk, writing for the majority, first addressed the issue of the trial court's role in an initial custody determination.⁶ Citing Family Code Section 3040(b), he stated that the trial court has wide discretion in choosing "a parenting plan that is in the best interest of the child."⁷ Addressing the issue of relocation by one or both parents, the court held that either parent has the right to move, so long as the move is in the "best interest" of the child.⁸ Additionally, the court limited the court of appeal's review, allowing reversal only when a trial court has abused its discretion.⁹ Specifically, the court of appeal may only address "whether the trial court could have reasonably concluded that the order in question advanced the 'best interests' of the child."¹⁰

The court next discussed the issue of showing that the relocation is a "necessity" in order to retain custody.¹¹ The court held that in an initial

(quoting *In re Marriage of Burgess*, 39 Cal. Rptr. 2d 213, 231 (1995)).

5. *Id.* at 29, 913 P.2d at 476, 51 Cal. Rptr. 2d at 447 (quoting CAL. FAM. CODE § 7501 (West 1994)). For an opinion addressing federal post-divorce laws, see Mandy S. Cohen, Note, *A Toss of the Dice . . . The Gamble with Post-Divorce Relocation Laws*, 18 HOFSTRA L. REV. 127 (1989) (discussing the need for uniform rules among states regarding child custody, due to the increased mobility in modern society).

6. *Burgess*, 13 Cal. 4th at 31-33, 913 P.2d at 478-79, 51 Cal. Rptr. 2d at 449-50.

7. *Id.* at 31, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449 (citing CAL. FAM. CODE § 3040(b) (West 1994)). See generally 33 CAL. JUR. 3D *Family Law* § 903 (1994) (discussing the discretion of the court in making a custody award); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 139 (9th ed. 1989 & Supp. 1996) (discussing the discretionary power of the trial court). But see Janet Bulow & Steven G. Gellman, Note, *The Judicial Role in Post-Divorce Child Relocation Controversies*, 35 STAN. L. REV. 949 (1983) (criticizing the courts' discretionary powers in relocation cases and its use of the "best interests" standard to resolve disputes).

8. *Burgess*, 13 Cal. 4th at 31-32, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449. The court citing Family Code Section 7501, stated that "[a] parent entitled to custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." *Id.* at 32, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449 (citing CAL. FAM. CODE § 7501 (West 1994)).

9. *Id.* at 32, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449.

10. *Id.* The court further stated that the reviewing court must "uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." *Id.* at 32, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449.

11. *Id.* at 33-36, 913 P.2d at 479-81, 51 Cal. Rptr. 2d at 450-52.

custody determination, there is no statutory basis for requiring "either parent to justify a choice of residence as a condition of custody."¹² Criticizing the court of appeal, the court stated that "necessity" of relocating frequently has little, if any, substantive bearing on a parent's suitability to retain the role of a custodial parent.¹³ Thus, the court declined to impose on the relocating parent the burden of establishing necessity.¹⁴

Lastly, the court addressed the issue of altering legal and physical custody.¹⁵ The court held that the noncustodial parent must show a substantial change of circumstances "so affecting the minor child that modification is essential [or expedient or imperative] to the child's welfare."¹⁶ Moreover, where the custodial parent's relocation is at issue, the burden of persuasion remains with the noncustodial parent to show that the change in custody is in the child's best interest.¹⁷ The court placed the

12. *Id.* at 34, 913 P.2d at 479, 51 Cal. Rptr. 2d at 450. The court listed several factors that a trial court must use in an initial custody determination, among them are, "the effects of relocation on the 'best interest' of the minor children, including the health, safety, and welfare of the children and the nature and amount of contact with both parents." *Id.* (citing CAL. FAM. CODE § 3011(a) & (c) (West 1994)). See generally Carolyn Eaton Taylor, Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059 (1984) (challenging the current judicial approaches to post-divorce disputes and discussing the interests of each party to the dispute); Frank G. Adams, Comment, *Child Custody and Parental Relocations: Loving Your Children From a Distance*, 33 DUQ. L. REV. 143 (1994) (discussing the difficulties of continued contact by both parents with the child where the custodial parent relocates).

13. *Burgess*, 13 Cal. 4th at 36, 913 P.2d at 481, 51 Cal. Rptr. 2d at 452. The court does list one exception where the parent's sole reason for moving is to frustrate the noncustodial parent's contact with the children. *Id.* at n.6, 913 P.2d at 481 n.6, 51 Cal. Rptr. 2d at 962 n.6. However, the court rejected the court of appeal's interpretation of Family Code Section 3020 that "frequent and continuous contact" with both parents establishes the "necessity" requirement for relocation. *Id.* at 34, 913 P.2d at 480, 51 Cal. Rptr. 2d at 451. Rather, the court found that "[t]he Family Code specifically refrains from establishing a preference or presumption in favor of any arrangement for custody and visitation. *Id.*

14. *Id.* at 36, 913 P.2d at 481, 51 Cal. Rptr. 2d at 452.

15. *Id.* at 37, 913 P.2d at 481, 51 Cal. Rptr. 2d at 452.

16. *Id.* The court stated that a change in custody is not justified merely because the custodial parent makes a good faith decision to relocate; rather, relocation must be so detrimental to the child that modification is "essential or expedient for the welfare of the child." *Id.* at 38, 913 P.2d at 482, 51 Cal. Rptr. 2d at 453; see also 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 138 (9th ed. 1989) (discussing the power to modify a custody award based on changed circumstances); 33 CAL. JUR. 3D *Family Law* § 938 (Supp. 1996) (explaining the "expedient, essential, and imperative" rule).

17. *Burgess*, 13 Cal. 4th at 37, 913 P.2d at 482, 51 Cal. Rptr. 2d at 453 (quoting *In*

burden on the “requesting” parent to promote its policy of maintaining custody with the primary caretaker, thereby allowing the child a more stable custodial and emotional environment.¹⁸

B. Justice Baxter’s Concurring and Dissenting Opinion

In a separate opinion, Justice Baxter concurred with the majority’s result and several parts of its reasoning.¹⁹ Justice Baxter agreed with the majority that custody decisions should be in the best interest of the child, in light of all relevant factors, irrespective of whether a parent is moving.²⁰ Additionally, he stated that no special burden should rest on the moving parent to prove the “necessity” of the move.²¹ Lastly, he agreed that where an initial award of custody is made, and one parent wants to alter the custody arrangement, the changed circumstances rule should apply.²²

Although he concurred with the majority on several points, Justice Baxter dissented with regard to the court’s implication that “the child’s ‘best interest’ has a special, more stringent connotation in a ‘changed circumstances’ case.”²³ He was concerned about the majority’s focus on *In re Marriage of Carney*²⁴ which stated that a change in custody cannot occur absent a change in circumstances which “render it essential or expedient for the welfare of the child that there be change.”²⁵ Justice

re Marriage of Garay, 24 Cal. 3d at 725, 730, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385). The court stated that the “change of circumstances” rule did not apply to the instant case because it involved an initial custody determination rather than a change in custody determination. *Burgess*, 13 Cal. 4th at 37 n.8, 913 P.2d at 481 n.8, 51 Cal. Rptr. 2d at 452 n.8. However, the court recognized the necessity to fashion a rule because the two instances are closely interrelated. *Id.*

18. *Id.* at 37, 913 P.2d at 481, 51 Cal. Rptr. 2d at 452.

19. *Id.* at 40, 913 P.2d at 484, 51 Cal. Rptr. 2d at 455 (Baxter, J., concurring and dissenting).

20. *Id.* (Baxter, J., concurring and dissenting).

21. *Id.* (Baxter, J., concurring and dissenting).

22. *Id.* at 41, 913 P.2d at 484, 51 Cal. Rptr. 2d at 455 (Baxter, J., concurring and dissenting). Justice Baxter stated, “[a] child’s welfare is not served by casual changes in caregiving arrangements, and the law abhors the endless relitigation of matters already determined.” *Id.* (Baxter, J., concurring and dissenting) (citing *Burchard v. Garay*, 42 Cal. 3d 531, 536, 724 P.2d 486, 489, 229 Cal. Rptr. 800, 803 (1986)).

23. *Id.* at 41, 913 P.2d at 484, 51 Cal. Rptr. 2d at 455 (Baxter, J., concurring and dissenting).

24. *In re Marriage of Carney*, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979), overruled in part by *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986), and overruled in part by *In re Marriage of Burgess*, 32 Cal. App. 4th 1786, 39 Cal. Rptr. 2d 213 (5th Dist. 1995).

25. *Burgess*, 13 Cal. 4th at 41, 913 P.2d at 484-85, 51 Cal. Rptr. 2d at 455-56 (Baxter, J., concurring and dissenting) (quoting *In re Marriage of Carney*, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979)). Specifically, Justice Baxter was concerned

Baxter raised concern over the majority's holding, under the *Carney* decision, that a custodial parent has a "presumptive right" to change residence.²⁶ He interpreted the right to mean that, according to the majority, a moving parent could retain custody even if the move was not in the "best interests" of the child so long as the move causes no "positive harm."²⁷

III. IMPACT

While holding that a parent need not show "necessity" to relocate, the court recognized that creating any bright line rules would be inappropriate.²⁸ Rather, the courts must conduct evaluations on a case-by-case basis.²⁹ On the other hand, through the court's preference for custodial stability and its creation of a custodial parent's "presumptive right" to relocate, the court has made it more difficult for the noncustodial parent to challenge a relocation.³⁰ Under such a presumption, the court's holding creates the possibility that a parent may retain custody of the child even where a move may not be in the "best interests" of the child.³¹ Fur-

with the majority's use of a statute created in 1872, now Family Code Section 7501. *Burgess*, 13 Cal. 4th at 41, 913 P.2d at 485, 51 Cal. Rptr. 2d at 456 (Baxter, J., concurring and dissenting) (citing CAL. FAM. CODE § 7501 (West 1988)). He argued that Section 7501 does not deal with custody disputes, rather, it deals only with "rights between parents and their children." *Burgess*, 13 Cal. 4th at 42, 913 P.2d at 485, 51 Cal. Rptr. 2d at 456 (Baxter, J., concurring and dissenting).

26. *Id.* at 41, 913 P.2d at 485, 51 Cal. Rptr. 2d at 456 (Baxter, J., concurring and dissenting).

27. *Id.* at 42-43, 913 P.2d at 485, 51 Cal. Rptr. 2d at 456 (Baxter, J., concurring and dissenting). Justice Baxter's interpretation of *Carney* differed from the majority. He did not believe that the case required showings of positive detriment in "changed circumstances" cases. *Id.* at 43, 913 P.2d at 486, 51 Cal. Rptr. 2d at 457 (Baxter, J., concurring and dissenting). Rather, under Justice Baxter's view, the *prior* "best interest" findings in the initial custody determination could not be relitigated in a subsequent hearing. *Id.* at 43, 913 P.2d at 486, 51 Cal. Rptr. 2d at 457 (Baxter, J., concurring and dissenting).

28. *Id.* at 39, 913 P.2d at 483, 51 Cal. Rptr. 2d at 454. *But see* Kimberly K. Holtz, Comment, *Move-away Custody Disputes: The Implications of Case-by-Case Analysis and the Need for Legislation*, 35 SANTA CLARA L. REV. 319 (1995) (criticizing the lack of guidelines and objective standards for judges to use in "move-away" cases).

29. *Burgess*, 13 Cal. 4th at 39, 913 P.2d at 483, 51 Cal. Rptr. 2d at 454. While stating that in most cases the primary caretaker will prevail, the court reasoned that other factors must still be considered, such as "the child's existing contact with both parents . . . and the child's age, community ties, and health and educational needs." *Id.*

30. *Id.* at 32, 913 P.2d at 478, 51 Cal. Rptr. 2d at 449.

31. *Id.* at 42-43, 913 P.2d at 485, 51 Cal. Rptr. 2d at 456 (Baxter, J., concurring and

thermore, by requiring the noncustodial parent to show substantial prejudice, the court may be creating a "bright line barrier" that a noncustodial parent must overcome to prevent a particular relocation.³²

IV. CONCLUSION

Today, in an increasingly mobile society, tensions continue to arise where one divorced parent proposes to move the children away from the other divorced parent. Following the opinion in *Burgess*, which states that a parent must show a substantial change in circumstances to modify a custodial arrangement, it still remains unclear whether the court has slowed down a parent's mobility. Moreover, as Justice Baxter points out, what is more uncertain is whether the "best interests" of the child remain the most important factor in a relocation determination.

JEREMY D. DOLNICK

dissenting).

32. *Id.* at 38, 913 P.2d at 482, 51 Cal. Rptr. 2d at 453.

VI. EMPLOYMENT LAW

A plaintiff may state a cause of action for fraudulent inducement of an employment contract because: (1) fraud actions are permitted in the employment context, and (2) damages for employment termination are not limited to contract remedies: Lazar v. Superior Court.

I. INTRODUCTION

In *Lazar v. Superior Court*,¹ the California Supreme Court considered whether a plaintiff could plead fraudulent inducement of an employment contract, and if so, under what circumstances such a cause of action could be maintained.² At the trial level, the plaintiff's causes of action were limited to violations of Labor Code section 970³ and breach of con-

1. 12 Cal. 4th 631, 909 P.2d 981, 49 Cal. Rptr. 2d 377 (1996). Justice Werdegar wrote the majority opinion in which Chief Justice Lucas and Justices Arabian, Baxter, and George concurred. *Id.* at 634-49, 909 P.2d at 982-92, 49 Cal. Rptr. 2d at 378-88. Justice Mosk wrote a concurring opinion. *Id.* at 649-51, 909 P.2d at 992-93, 49 Cal. Rptr. 2d at 388-89 (Mosk, J., concurring). Justice Kennard also authored a concurring opinion. *Id.* at 651, 909 P.2d at 993, 49 Cal. Rptr. 2d at 389 (Kennard, J., concurring).

2. *Id.* at 634-35, 909 P.2d at 982-83, 49 Cal. Rptr. 2d at 378-79. At trial, the plaintiff alleged that for 18 years he was employed by a family-owned restaurant in New York, and as of 1990 he was earning \$120,000 annually as president. *Id.* at 635, 909 P.2d at 983, 49 Cal. Rptr. 2d at 379. The plaintiff further explained that in late 1989 and early 1990 he was recruited by the defendant, Rykoff-Sexton, Inc. (Rykoff), to work in its West Coast offices. *Id.* The plaintiff alleged that Rykoff made representations to him that the company was financially strong, that there was a real chance for advancement, that raises would quickly be forthcoming, that no written employment contract was necessary, and that he would not be terminated as long as he performed his duties and accomplished goals. *Id.* at 635-36, 909 P.2d at 983, 49 Cal. Rptr. 2d at 379. The plaintiff accepted the employment offer and moved his family to Southern California. *Id.* at 636, 909 P.2d at 984, 49 Cal. Rptr. 2d at 380. The plaintiff alleged that Rykoff's representations were false, and Rykoff's agents knew them to be false in that they knew Rykoff was financially unstable, they knew Rykoff planned a merger which would eliminate the plaintiff's position, and they knew company policy prevented granting the promised annual wage increases. *Id.* at 636, 909 P.2d at 983-84, 49 Cal. Rptr. 2d at 379-80. Finally, the plaintiff alleged that two years after he joined Rykoff, the plaintiff's position was usurped by a new management structure and promises to preserve plaintiff's image as a competent employee were broken. *Id.* at 636-37, 909 P.2d at 984, 49 Cal. Rptr. 2d at 380.

3. Labor Code § 970 states in pertinent part:

No person . . . directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place

tract.⁴ The court of appeal ruled that the plaintiff had alleged facts sufficient to state a cause of action for fraudulent inducement of an employment contract.⁵ Examining only the court of appeal's conclusion that the plaintiff had set forth a proper claim for fraudulent inducement of an employment contract, the supreme court affirmed the appellate decision.⁶

II. TREATMENT

A. Justice Werdegar's Majority Opinion

1. Promissory Fraud

Justice Werdegar examined the elements of fraud,⁷ noting that within the cause of action for fraud lie actions for promissory fraud.⁸ Actions for promissory fraud may arise when false promises are made to induce contract formation.⁹ An enforceable contract need not have been fully formed for a promissory fraud claim to arise, but if a plaintiff brings both a fraud and a breach of contract cause of action,¹⁰ the rule prohibiting double recovery precludes recovery of both the tort and contract

outside to any place within the State . . . for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either: (a) The kind, character, or existence of such work; (b) The length of time such work will last, or the compensation therefor. . . .

CAL. LAB. CODE § 970 (Deering 1991 & Supp. 1996); see also 41 CAL. JUR. 3D *Labor* § 19 (Supp. 1996) (stating § 970 was originally enacted to protect migrant workers, but has not been limited to any category of employment).

4. *Lazar*, 12 Cal. 4th at 637, 909 P.2d at 984, 49 Cal. Rptr. 2d at 380.

5. *Id.* at 635, 907 P.2d at 982-83, 49 Cal. Rptr. 2d at 378-79.

6. *Id.* at 635, 649, 909 P.2d at 983, 992, 49 Cal. Rptr. 2d at 379, 388.

7. "The elements of fraud . . . are: (a) misrepresentation . . . (b) knowledge of falsity . . . (c) intent to defraud . . . (d) justifiable reliance; and (e) resulting damage." *Id.* at 638, 909 P.2d at 984, 49 Cal. Rptr. 2d at 380 (quoting 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 676 (9th ed. 1988)).

8. *Id.* at 638, 909 P.2d at 984-85, 49 Cal. Rptr. 2d at 380-81. See generally 34 CAL. JUR. 3D *Fraud and Deceit* § 20 (1977 & Supp. 1996) (explaining that failures to keep promises are normally actionable only as breach of contract, but constructive fraud may also be a remedy under some conditions).

9. *Lazar*, 12 Cal. 4th at 638, 909 P.2d at 985, 49 Cal. Rptr. 2d at 381.

10. See E. Allan Farnsworth, *Decisions, Decisions: Some Binding, Some Not*, 28 SUFFOLK U. L. REV. 17, 26-27 (1994) (preferring contract rules to tort rules except for cases in which "one's conduct worsens another's situation by increasing the other's dependence, but in which there is no reliance of the sort required under section 90 [of the Restatement (Second) of Contracts]").

damages.¹¹ The court concluded that Lazar's allegations, if true, sufficiently proved the elements of a promissory fraud cause of action.¹²

2. *Hunter v. Up-Right, Inc.*

The defendant countered that *Hunter v. Up-Right, Inc.*¹³ precluded the court from finding a cause of action for fraudulent inducement of an employment contract because *Hunter* limited tort claims for wrongful termination to those claimed to be in violation of public policy.¹⁴ The supreme court renounced this argument for three reasons.¹⁵

First, the court pointed to language in *Hunter* expressly providing for the possibility "that a misrepresentation *not* aimed at effecting termination of employment, but instead designed to induce the employee to alter detrimentally his or her position in some other respect, might form a

11. *Lazar*, 12 Cal. 4th at 638, 909 P.2d at 985, 49 Cal. Rptr. 2d at 381. See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1322 (9th ed. 1988) (stating that the idea behind compensatory damages is to ensure the same wrong will not create multiple sources of recovery). The court concluded that the plaintiff's fraud claim covered expenses resulting from relocation, including his loss of income and security. *Lazar*, 12 Cal. 4th at 648-49, 909 P.2d at 992, 49 Cal. Rptr. 2d at 388. The contract claim covered expenses caused by the wrongful termination. *Id.* For a discussion of the development of damages for fraud and deceit, see generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1441 (9th ed. 1988 & Supp. 1996). For a discussion of remedies for breach of contract, see generally 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 797 (9th ed. 1987 & Supp. 1996).

12. *Lazar*, 12 Cal. 4th at 639, 909 P.2d at 985, 49 Cal. Rptr. 2d at 381.

13. *Hunter v. Up-right, Inc.*, 6 Cal. 4th 1174, 864 P.2d 88, 26 Cal. Rptr. 2d 8 (1993).

14. *Lazar*, 12 Cal. 4th at 639, 909 P.2d at 985, 49 Cal. Rptr. 2d at 381. After allegedly being told his employment was soon to be terminated, the plaintiff in *Hunter* resigned. *Hunter*, 6 Cal. 4th at 1179, 864 P.2d at 89, 26 Cal. Rptr. 2d at 10. The employer could have fired the plaintiff directly, thereby subjecting himself to contract liability only, but the misrepresentation opened the door to tort remedies for fraud as well. *Id.* at 1178-79, 864 P.2d at 89, 26 Cal. Rptr. 2d at 10. However, because the fraud was not necessary to effect the plaintiff's termination, the court concluded the plaintiff had not detrimentally relied on the misrepresentation. *Id.* at 1178, 864 P.2d at 89, 26 Cal. Rptr. 2d at 9. Under this reasoning, tort causes of action for fraud will fail for lack of reliance in most wrongful termination cases. *Id.* But see J. Ghent, Annotation, *Employer's Misrepresentations as to Employee's or Agent's Future Earnings as Actionable Fraud*, 16 A.L.R. 3d 1311 (1967) ("Some courts take the view that actionable fraud may be perpetrated by an employer in misrepresenting his employee's or agent's future earnings."). See generally Laura Quackenbush, *Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?*, 39 HASTINGS L.J. 1229, 1238-42 (1988) (discussing tort causes of action for wrongful termination).

15. *Lazar*, 12 Cal. 4th at 640-43, 909 P.2d at 986-88, 49 Cal. Rptr. 2d at 382-84.

basis for a valid fraud claim even in the context of a wrongful termination.¹⁶ The court found that because the plaintiff's employer made misrepresentations to induce him into employment, rather than to compel his resignation, *Hunter* did not preclude his claim.¹⁷

Second, the supreme court found clear reference in *Hunter* to the availability of actions for promissory fraud, even when a breach of contract action is also brought, because not all employer conduct falls within the contractual employment relationship.¹⁸ Thus, when conduct falls outside contractual obligations, a "defrauded employee is entitled to recover tort damages."¹⁹

Finally, the supreme court explained that the reasoning behind *Hunter* did not apply to the plaintiff's situation.²⁰ The fraud claim in *Hunter* was disallowed because the fraud element of detrimental reliance was necessarily missing for an employee who knew he could be fired outright.²¹ The court concluded that even if an employee did rely on a misrepresentation which resulted in his termination, such reliance would not cause the employee any detriment because he could also have been simply fired.²² The court emphasized that its holding in *Hunter* was not meant to jeopardize established uses of fraud causes of action by terminated employees.²³

3. *Foley v. Interactive Data Corp.*

As a policy argument, the defendant contended that *Foley v. Interactive Data Corp.*²⁴ should apply to fraudulent inducement of employment

16. *Id.* at 640, 909 P.2d at 986, 49 Cal. Rptr. 2d at 382 (quoting *Hunter*, 6 Cal. 4th at 1185 n.1, 864 P.2d at 94 n.1, 26 Cal. Rptr. 2d at 14 n.1).

17. *Id.*

18. *Id.* at 640-41, 909 P.2d at 986-87, 49 Cal. Rptr. 2d at 382-83; see *Hunter*, 6 Cal. 4th at 1186 n.1, 864 P.2d at 94 n.1, 26 Cal. Rptr. 2d at 14 n.1 ("[N]othing in this opinion affects the availability of tort damages in any case . . . of promissory fraud."); *id.* at 1188, 864 P.2d at 96, 26 Cal. Rptr. 2d at 16 (Mosk, J., dissenting) ("[I]n cases of promissory fraud . . . both the breach [of contract] and the fraud leading to the breach are separately actionable."); *id.* at 1197, 864 P.2d at 102, 26 Cal. Rptr. 2d at 23 (Kennard, J., dissenting) (stating that a defrauded employee may recover tort damages for the employer's conduct that is outside the scope of the employment relationship).

19. *Lazar*, 12 Cal. 4th at 641, 909 P.2d at 987, 49 Cal. Rptr. 2d at 383 (quoting *Hunter*, 6 Cal. 4th at 1197, 864 P.2d at 102, 26 Cal. Rptr. 2d at 23 (Kennard, J., dissenting)).

20. *Id.* at 641, 909 P.2d at 987, 49 Cal. Rptr. 2d at 383.

21. *Id.* at 641-42, 909 P.2d at 987, 49 Cal. Rptr. 2d at 383.

22. *Id.* at 642, 909 P.2d at 987-88, 49 Cal. Rptr. 2d at 383-84. Causation and actual reliance are treated in 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 711 (9th ed. 1988 & Supp. 1996).

23. *Lazar*, 12 Cal. 4th at 642, 909 P.2d at 987-88, 49 Cal. Rptr. 2d at 383-84.

24. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

contract cases.²⁵ *Foley* indicated that employment termination damages should be limited to contract remedies.²⁶ The supreme court distinguished *Foley* on several grounds and found it inapplicable.²⁷

a. *The logic of Foley is inapplicable*

The first key distinction the court made was that *Foley* involved a contract cause of action in which the court refused "to expand the availability of tort remedies for breach of contract," whereas *Lazar* involved a tort cause of action in which the plaintiff sought established tort remedies.²⁸ The court in *Foley* was urged to sanction the granting of tort remedies for breach of the implied covenant of good faith and fair dealing in an employment contract.²⁹ The court declined, believing such a holding would infringe upon the legislature's role in creating new torts.³⁰ The court in *Lazar* noted for contrast the long history of actions for promissory fraud.³¹

Second, the court found that the policy concern in *Foley*, of preventing widespread tort recovery in termination suits applied to a lesser extent in the present case.³² The court emphasized that unlike a new contract cause of action with tort remedies, tort recovery for fraud is already limited because it must be pled specifically.³³ The court thus concluded that the economic concerns related to holding employers liable in tort are not pervasive enough to exempt "employers from ordinary fraud rules that apply to Californians generally."³⁴

25. *Lazar*, 12 Cal. 4th at 643-44, 909 P.2d at 988, 49 Cal. Rptr. 2d at 384.

26. *Foley*, 47 Cal. 3d at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236-37.

27. *Lazar*, 12 Cal. 4th at 643-48, 909 P.2d at 988-92, 49 Cal. Rptr. 2d at 384-88.

28. *Id.* at 647, 909 P.2d at 991, 49 Cal. Rptr. 2d at 387.

29. *Foley*, 47 Cal. 3d at 693, 765 P.2d at 396, 254 Cal. Rptr. at 234.

30. *Lazar*, 47 Cal. 3d at 644, 909 P.2d at 989, 49 Cal. Rptr. 2d at 384-85. Other courts have also declined to grant tort remedies for breach of the implied covenant of good faith and fair dealing in the employment context. See W. Wendell Hall & Renée A. Forinash, *Employment and Labor Law*, 48 SMU L. REV. 1135, 1176 (1995). For the view that breaches of the implied covenant of good faith and fair dealing may be actionable in tort, see H. Anthony Miller & R. Wayne Estes, *Recent Judicial Limitations On the Right to Discharge: A California Trilogy*, 16 U.C. DAVIS L. REV. 65 (1982).

31. *Lazar*, 12 Cal. 4th at 644, 909 P.2d at 989, 49 Cal. Rptr. 2d at 385.

32. *Id.* at 644-45, 909 P.2d at 989, 49 Cal. Rptr. 2d at 385.

33. *Id.*

34. *Id.* at 644-45, 909 P.2d at 989-90, 49 Cal. Rptr. 2d at 385-86.

b. *Hunter's discussion of Foley's underlying policy considerations is inapplicable*

The defendant further argued that based on policy discussed in *Hunter*, cases stemming from the employment relationship are confined to contractual remedies unless a fundamental public policy has been transgressed.³⁵ In response, the supreme court reiterated that its view of the employment relationship as primarily contractual³⁶ meant only that recovery for breaches of employment contracts should be limited to contract remedies, not that any legitimate claims for fraud should be endangered because they arise in an employment context.³⁷

The court also discounted the applicability of other cases mentioned in *Hunter* which the defendant cited to defend its position that employers should generally not face tort liability for wrongful termination.³⁸ Judge Werdegar warned that nothing in those cases supported the defendant's position. Rather, they merely expressed the general understanding of employment relationships and should not be read to rule out tort liability for employers who wrongfully terminate employees.³⁹

B. *Justice Mosk's Concurring Opinion*

Justice Mosk agreed with the decision and most of the reasoning of the majority, but added that the *Hunter* decision is flawed because it "stands for the radical proposition" that policy concerns may preclude a finding of any tort liability in the employment termination context.⁴⁰ He supported the majority's determination that a fraud cause of action is sustainable only when an employee detrimentally relies on an employer's misrepresentation, but cautioned that the element of detrimental reliance cannot be automatically assumed to be absent whenever an employer who acts deceptively also had a legal right to fire the employee.⁴¹ He presented as an example a situation in which an employer who could fire

35. *Id.* at 647, 909 P.2d at 991, 49 Cal. Rptr. 2d at 387.

36. See Kate M. Fox, *Wyoming Employment Law*, 31 LAND & WATER L. REV. 775, 776-84 (1996) (examining the roles of express contracts, implied-in-fact contracts, oral contracts, and promissory estoppel in employment contracts).

37. *Lazar*, 12 Cal. 4th at 647, 909 P.2d at 991, 49 Cal. Rptr. 2d at 387.

38. *Id.* at 647-48, 909 P.2d at 991, 49 Cal. Rptr. 2d at 387 (referring to *American Guar. & Liab. v. Vista Med. Supply*, 699 F. Supp. 787 (N.D. Cal. 1988); *Soules v. Cadam, Inc.*, 2 Cal. App. 4th 390, 3 Cal. Rptr. 2d 6 (1991), *overruled by* *Turner v. Anheuser Busch, Inc.*, 7 Cal. 4th 1238, 876 P.2d 1022, 32 Cal. Rptr. 2d 223 (1994); and *Hine v. Dittrich*, 228 Cal. App. 3d 59, 278 Cal. Rptr. 330 (1991)).

39. *Id.*

40. *Id.* at 649, 909 P.2d at 992, 49 Cal. Rptr. 2d at 388 (Mosk, J., concurring).

41. *Id.* at 650, 909 P.2d at 993, 49 Cal. Rptr. 2d at 389 (Mosk, J., concurring).

an employee outright might instead "resort to fraudulent deception" to reduce the risk of a lawsuit for wrongful termination.⁴²

C. Justice Kennard's Concurring Opinion

Justice Kennard wrote separately to express dissatisfaction with the majority's endorsement of the rationale in *Hunter*.⁴³ Justice Kennard dissented in *Hunter*, but agreed that the present case is factually distinguishable.⁴⁴

III. IMPACT

Before *Lazar* was decided, *Hunter* and *Foley* made possible the argument that tort actions for wrongful termination were limited to cases involving a violation of public policy. Had the court accepted that view, employers would enjoy large-scale immunity from many tort actions.⁴⁵

Lazar makes clear that employees can plead tort actions arising out of wrongful termination as long as they can prove each element.⁴⁶ Thus, fraudulent inducement of an employment contract is a viable tort when the facts support such a pleading.⁴⁷ Although it is often difficult for plaintiffs to establish detrimental reliance when a breach of contract claim is concurrently brought, there will be instances in which the tort can be successfully proven.

IV. CONCLUSION

In addition to a breach of contract claim, a wrongfully terminated plaintiff has a tort claim for fraudulent inducement of the employment contract. Because fraud can occur during initial employee recruitment and occur outside the contractual employment relationship, policy con-

42. *Id.* (Mosk, J., concurring).

43. *Id.* at 651, 909 P.2d at 993, 49 Cal. Rptr. 2d at 389 (Kennard, J., concurring).

44. *Id.* (Kennard, J., concurring).

45. *Id.* at 648, 909 P.2d at 992, 49 Cal. Rptr. 2d at 388.

46. *Id.* at 642, 909 P.2d at 988, 49 Cal. Rptr. 2d at 384.

47. *Id.*

cerns protecting employers do not outweigh an employee's right to plead traditional tort causes of action when they arise.

TERRI SCHALLENKAMP

VII. EVIDENCE

When a defendant's testimony implicates a codefendant in a joint trial, redaction of that testimony is examined on a case-by-case basis to determine whether the codefendant's Sixth Amendment right to confrontation is violated: People v. Fletcher.

I. INTRODUCTION

In *People v. Fletcher*,¹ the California Supreme Court addressed whether a defendant's out-of-court statement that implicates his codefendant can be redacted by substituting the codefendant's name with a "symbol" or "neutral pronoun" without violating the codefendant's Sixth Amendment right to confront witnesses against him.² At trial, the court admitted an out-of-court statement³ made by the defendant which had been

1. 13 Cal. 4th 451, 917 P.2d 187, 53 Cal. Rptr. 2d 572 (1996), *modified*, No. S044323, 1996 WL 410895 (Cal. July 12, 1996). Justice Kennard wrote the majority opinion for the court, in which Chief Justice George and Justices Mosk, Baxter, Werdegar, Chin, and Lucas concurred. *Id.* at 471, 917 P.2d at 199, 53 Cal. Rptr. 2d at 584. The Honorable Malcolm M. Lucas, retired Chief Justice of the California Supreme Court, was assigned specially in accordance with the California Constitution. *See* CAL. CONST. art. VI, § 6.

2. *Id.* at 464-65, 917 P.2d at 194, 53 Cal. Rptr. 2d at 579. On June 20, 1991, at approximately 2:40 a.m., Maria Estrada was driving along the freeway with five passengers when she encountered two men standing near a taxi that was stopped on the freeway on-ramp. *Id.* at 457, 917 P.2d at 189, 53 Cal. Rptr. 2d at 574. Estrada stopped her car to ask if they needed any help. *Id.* One of the two men standing near the car asked Estrada if she had jumper cables, and when she replied that she did not, he became agitated. *Id.* As Estrada began to drive away, the man she had spoken with fired a gun at her from close range, fatally wounding her. *Id.* The two men immediately ran from the scene. *Id.* Shortly after the shooting, two men, Moord and Fletcher, showed up at a friend's doorstep requesting to stay the night. *Id.* at 457-58, 917 P.2d at 189-90, 53 Cal. Rptr. 2d at 574-75. Their friend's mother answered the door, and instead of allowing them to stay the night, she called a taxi for them. *Id.* As the two men waited for the taxi, the mother saw a gun fall from Fletcher's jacket, which he picked up and put in his jacket. *Id.* at 458, 917 P.2d at 190, 53 Cal. Rptr. 2d at 575. After the taxi arrived, the two men left and went to the apartment of Fletcher's ex-girlfriend, where they spent the night. *Id.* Fletcher told his ex-girlfriend that "something had happened and that he hoped no one was dead." *Id.* Fletcher was later arrested and, while in custody, made incriminating statements to a fellow inmate, identifying himself and Moord as the two men who shot Estrada. *Id.* Moord and Fletcher were jointly tried for the murder and attempted robbery of Estrada. *Id.* at 457, 917 P.2d at 189, 53 Cal. Rptr. 2d at 574.

3. *Id.* at 459, 917 P.2d at 190-91, 53 Cal. Rptr. 2d at 575-76. Fletcher's fellow in-

redacted by substituting the codefendant's name with a "neutral pronoun."⁴ The jury was instructed to consider the out-of-court testimony only against the defendant who made the statement.⁵ Subsequently, both defendants were found guilty of murder and armed robbery.⁶ The California Court of Appeal reversed the conviction of the codefendant⁷ on the ground that the out-of-court testimony was incriminating and violated his Sixth Amendment rights under the Confrontation Clause.⁸ The Cali-

mate testified at the first trial about his conversation with Fletcher: "they were using a ruse of needing a jump . . . to get people to stop" and Fletcher shot a woman who pulled over to help them. *Id.* at 459, 917 P.2d at 190, 53 Cal. Rptr. 2d at 575. In the second trial, the witness testified again, stating:

'[Fletcher] told me that he and a friend were on a freeway ramp and had a cab or a vehicle—like there was a cab or something there, and they were using jumper cables or some kind of ruse to get people to stop and that they were doing that so when people would stop that they could rob them, take their money.' . . . '[T]his woman had slowed down and stopped, and . . . as she drove away he shot at her.'

Id. at 458, 917 P.2d at 190, 53 Cal. Rptr. 2d at 575 (first brackets in original).

4. *Id.* at 459, 917 P.2d at 190, 53 Cal. Rptr. 2d at 575. The trial court admitted Fletcher's statement to the inmate but edited the statement by replacing all references to Moord with a pronoun or with the phrase "another person." *Id.*

5. *Id.* In her majority opinion, Justice Kennard reasoned that jury instructions may be ineffective because it could be "psychologically impossible for jurors to put the confession out of their minds" to determine the guilt or innocence of the co-defendant. *Id.* at 455, 917 P.2d at 188, 53 Cal. Rptr. 2d at 573. See generally 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* § 316 (3d ed. 1995 & Supp. 1995) (discussing the deletion of inadmissible matter as an alternative to a jury instruction); Sheldon R. Shapiro, Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial*, 17 A.L.R. FED. 249 (1973) (discussing the ineffectiveness of jury instructions after incriminating evidence has been introduced).

6. *Fletcher*, 13 Cal. 4th at 459, 917 P.2d at 191, 53 Cal. Rptr. 2d at 576.

7. *Id.* The court of appeal also reversed Fletcher's murder and armed robbery convictions on different grounds. *Id.* at 460 n.2, 917 P.2d at 191 n.2, 53 Cal. Rptr. 2d at 576 n.2. The court affirmed his convictions for offenses unrelated to the issue at hand. *Id.* at 457, 917 P.2d at 189, 53 Cal. Rptr. 2d at 574.

8. *Id.* at 459-60, 917 P.2d at 191, 53 Cal. Rptr. 2d at 576. The Confrontation Clause of the Sixth Amendment guarantees that a criminal defendant will have the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The right to confrontation includes the right to cross-examine witnesses. See generally Christopher K. Descherer & David L. Fogel, *Sixth Amendment at Trial*, 84 GEO. L.J. 1222, 1230 (1996) (discussing the Confrontation Clause and a defendant's right to be present at any crucial stage in which his presence would contribute to his opportunity for effective cross-examination); William G. Dickett, Note, *Sixth Amendment—Limiting the Scope of Bruton*, 78 CRIM. L. & CRIMINOLOGY 984 (1988) (discussing how hearsay evidence implicates the Sixth Amendment when the defendant was not present to confront the party testifying against him out-of-court); 19 CAL. JUR. 3D *Criminal Law* § 2126 (1984 & Supp. 1996) (discussing extrajudicial statements and the right of confrontation when an accomplice's testimony implicates a second party).

ifornia Supreme Court affirmed the decision of the court of appeal, holding that when a defendant's testimony implicates a codefendant in a joint trial, testimony which has been redacted by replacing the codefendant's name with a "symbol" or "neutral pronoun" may violate his Sixth Amendment right of confrontation.⁹

II. TREATMENT

The court began its analysis by reviewing the issue reserved by the United States Supreme Court in *Richardson v. Marsh*:¹⁰ whether the Confrontation Clause is violated when an out-of-court statement implicating a codefendant has been redacted by replacing that codefendant's name with a "symbol" or "neutral pronoun."¹¹ In *Richardson*, the Court found that the defendant's Sixth Amendment right to confrontation was not violated where the confession was redacted to omit any indication that another person participated in the crime.¹² The Court, however, did not address whether any reference to a coparticipant would violate the Confrontation Clause.¹³ Since *Richardson*, a split of authority has developed among federal and state courts.¹⁴ Some jurisdictions hold that redaction is "always or almost always sufficient."¹⁵ Other jurisdictions hold that redaction may or may not be sufficient and should be determined on a case-by-case basis.¹⁶

9. *Fletcher*, 13 Cal. 4th at 468-69, 917 P.2d at 197, 53 Cal. Rptr. 2d at 582.

10. 481 U.S. 200 (1987). The United States Supreme Court held that in a joint trial in which a defendant's out-of-court confession implicates his codefendant, the statement would be admissible without violating the Confrontation Clause if that statement "is redacted to eliminate not only the [co]defendant's name, but any reference to his or her existence." *Id.* at 211. The Court stated that it would "express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at n.5.

11. *Fletcher*, 13 Cal. 4th at 464-65, 917 P.2d at 194, 53 Cal. Rptr. 2d at 579.

12. *Richardson*, 481 U.S. at 203.

13. *Fletcher*, 13 Cal. 4th at 464, 917 P.2d at 194, 53 Cal. Rptr. 2d at 579. See generally 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *The Hearsay Rule* § 612 (3d ed. 1995) (discussing adequacy for editing out-of-court statements).

14. *Fletcher*, 13 Cal. 4th at 465, 917 P.2d at 194, 53 Cal. Rptr. 2d at 579.

15. *Id.*; see *United States v. Strickland*, 935 F.2d 822, 826 (7th Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1192 (4th Cir. 1990); *State v. Craney*, 662 A.2d 899, 903 (Me. 1995).

16. *Fletcher*, 13 Cal. 4th at 465, 917 P.2d at 194, 53 Cal. Rptr. 2d at 579; see *United States v. Hoac*, 990 F.2d 1099, 1107 (9th Cir. 1993); *United States v. Van Hemelryck*, 945 F.2d 1493, 1502-03 (11th Cir. 1991); *United States v. Long*, 900 F.2d 1270, 1280 (8th Cir. 1990).

A. The "Contextual Linkage" Problem

The first concern addressed by the *Richardson* Court was that certain testimony would be incriminating to a codefendant only when mentioned in context with evidence to be presented later at trial.¹⁷ In these situations, a case-by-case analysis would require consideration of redacted testimony in conjunction with extrinsic evidence.¹⁸

The California Supreme Court agreed that, in light of extrinsic evidence presented at trial, some redacted statements will enable a jury to identify the accused.¹⁹ The court reasoned that redaction would be effective "unless the average juror . . . could not avoid drawing the inference that the nondeclarant is the person so designated in the confession."²⁰ Because redaction requires a fact-specific determination, the court held that a case-by-case analysis was necessary to determine whether testimony was incriminating in light of extrinsic evidence to be presented at trial.²¹ Although the *Richardson* Court stated that the case-by-case analysis would present problems within the courtroom, the California Supreme Court maintained that such effects would not be "insurmountable."²²

B. Practical Problems for the Trial Judge

One problem addressed by the *Richardson* Court was that if a trial judge was required to consider evidence extrinsic to testimony in order to make a determination of whether that testimony violates the Confrontation Clause, motions to exclude testimony or to sever a joint trial would become complicated.²³ The court reasoned that in order to make

17. *Richardson*, 481 U.S. at 208.

18. *Id.* at 208-09; see James B. Haddad & Richard G. Agin, *A Potential Revolution in Bruton Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Co-defendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use?*, 81 J. CRIM. L. & CRIMINOLOGY 235, 265-66 (1990) (discussing the difficulties of determining the impact of the Confrontation Clause in a case-by-case analysis).

19. *Fletcher*, 13 Cal. 4th at 465-66, 917 P.2d at 195, 53 Cal. Rptr. 2d at 580. The court employed *People v. Terry*, 2 Cal. 3d 362, 466 P.2d 961, 85 Cal. Rptr. 409 (1970), to illuminate its point that a "bright-line test" would not be appropriate in all circumstances. *Fletcher*, 12 Cal. 4th at 465-66, 917 P.2d at 195, 53 Cal. Rptr. 2d at 580. In *Terry*, the defendant's name was substituted with the word "deleted" in court testimony, but his identity was obvious to jurors because the statements mentioned characteristics and distinguishing features of the defendant. *Terry*, 2 Cal. 3d at 384-86, 466 P.2d at 974-75, 85 Cal. Rptr. at 422-23.

20. *Fletcher*, 13 Cal. at 467, 917 P.2d at 196, 53 Cal. Rptr. 2d at 581.

21. *Id.*

22. *Id.* at 466-67, 917 P.2d at 195-96, 53 Cal. Rptr. 2d at 580-81.

23. *Richardson*, 481 U.S. at 209.

these pre-trial determinations, the trial judge must essentially determine the outcome of the trial before it begins.²⁴

The California Supreme Court stated that such pre-trial determinations were not problematic because a trial judge could review preliminary hearing transcripts, depositions, offers of proof submitted by the parties before trial, and all other case materials submitted in the pre-trial stage to determine whether to sever trials or exclude evidence.²⁵ Furthermore, the court emphasized that the pre-trial decisions made by the trial judge would not be irrevocable because rulings made before trial could be reconsidered at trial if the evidence presented is materially different.²⁶

C. A Less Efficient Court System

A second problem addressed by the *Richardson* Court was that if redaction was not effective in preserving a codefendant's rights under the Confrontation Clause, the court system would become less efficient.²⁷ The Court reasoned that the trial judge would have to sever joint trials and hear evidence separately even though the evidence to be presented would be virtually identical.²⁸ This could waste judicial and prosecutorial resources, create inconveniences to witnesses, risk additional trauma to crime victims, and increase the possibility of inconsistent verdicts.²⁹

The California Supreme Court argued that the "contextual linkage" approach, which examines extrinsic evidence in conjunction with redacted testimony, would not reduce the utility of redaction and, thus, would protect an individual's Constitutional rights under the Confrontation Clause.³⁰ Furthermore, in cases where effective redaction is not possible, courts have alternatives to severing a joint trial, thus conserving the efficiency of the courtroom while protecting rights under the Confrontation Clause.³¹

24. *Id.*

25. *Fletcher*, 13 Cal. 4th at 468, 917 P.2d at 196, 53 Cal. Rptr. 2d at 581.

26. *Id.*

27. *Richardson*, 481 U.S. at 210.

28. *Id.*

29. *Id.*

30. *Fletcher*, 13 Cal. 4th at 468, 917 P.2d at 196, 53 Cal. Rptr. 2d at 581.

31. *Id.* See Note, *Richardson v. Marsh: Codefendant Confessions and the Demise of Confrontation*, 101 HARV. L. REV. 1876, 1890 (1988) (discussing use of multiple juries in a joint trial to eliminate any prejudice found within a confession); Annotation, *Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in Federal*

D. The Case-by-Case Approach Adopted

The California Supreme Court considered the practical problems that a courtroom might face by adopting a case-by-case approach and concluded that these problems were not insurmountable.³² Furthermore, the consideration of extrinsic evidence with redacted testimony would provide an effective means of determining whether a portion of testimony violates a person's confrontation rights.³³ Thus, the court held that the propriety of redacting testimony by replacing a codefendant's name with a "symbol" or "neutral pronoun" must be determined on the facts of each case, in light of the testimony and evidence to be presented at trial.³⁴

III. IMPACT

Prior to *Fletcher*, the California Supreme Court established a rule in *People v. Aranda*³⁵ that either a defendant's testimony in a joint trial must be redacted to eliminate any reference to a codefendant or the court must separate the trials.³⁶ This law protected an individual's constitutional rights under the Confrontation Clause to the fullest extent possible, but may have had a negative impact on the state's ability to effectively prosecute codefendants in a joint trial.³⁷ In *Fletcher*, the California Supreme Court created state precedent that balances the accused's constitutional rights with the state's interests in judicial efficiency and the presentation of relevant evidence in a criminal proceeding.³⁸ Under *Aranda*, if testimony could not be redacted to eliminate all

Criminal Case, 72 A.L.R. FED. 875 (1996) (discussing multiple juries in a joint trial in the Federal criminal court system); David Carl Minneman, Annotation, *Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in State Criminal Prosecution*, 41 A.L.R. 4th 1189 (1995) (discussing multiple juries in a joint trial in the state criminal court system).

32. *Fletcher*, 13 Cal. 4th at 468, 917 P.2d at 197, 53 Cal. Rptr. 2d at 582.

33. *Id.*

34. *Id.*

35. 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

36. *Id.* at 530-31, 407 P.2d at 272-73, 47 Cal. Rptr. at 360-61; see 21 CAL. JUR. 3D *Criminal Law* § 3208 (1985) (discussing the admissibility of statements made by codefendants). The *Aranda* rule corresponds to federal constitutional law in accordance with *Bruton v. United States*, 391 U.S. 123 (1968), and thus is not abrogated by the 1982 adoption of Proposition 8. See CAL. CONST. art. I, § 28(d) (stating that relevant evidence shall not be excluded from any criminal proceeding).

37. See generally Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019 (1987) (discussing laws that strengthen individual rights and their impact on the ability of the state to prosecute effectively); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558-59 n.5 (1988) (discussing various criticisms of laws that favor the individual or the state).

38. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balanc-*

references to a coparticipant, the evidence would not be admissible in a joint trial.³⁹ The California Supreme Court realized that in certain situations this law would be unfair to the state and unnecessary to protect the rights of the accused. The new law immediately benefits the entire criminal system because the case-by-case analysis should ensure a fair outcome in criminal proceedings where redaction is at issue.

IV. CONCLUSION

After *Fletcher*, it is clear that in some cases a defendant's testimony that implicates his codefendant in a joint trial may be redacted by replacing the codefendant's name with a "symbol" or "neutral pronoun" without violating the Sixth Amendment right of confrontation. The court would not establish a precedent which would unfairly favor the prosecution or the defense, but stated that the determination of whether redacted testimony is incriminating must be evaluated on a case-by-case basis. This decision balances the individual's interests with those of the state, and should provide a fair and efficient analysis in each individual case.

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ing, 96 YALE L.J. 943 (1987) (discussing the process of balancing conflicting interests within the judicial system).

39. *Aranda*, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353.

VIII. INITIATIVE AND REFERENDUM

A legislative amendment which excludes surety insurance from a voter implemented rate rollback and approval statute is invalid because it does not further the purposes of Proposition 103, the statute under which the amendment was codified: Amwest Surety Insurance Co. v. Wilson.

I. INTRODUCTION

In *Amwest Surety Insurance Co. v. Wilson*,¹ the California Supreme Court determined whether a legislative amendment adding surety insurance to a list of insurances exempt from the recently passed rate reduction and rate approval initiative was valid in light of the requirement that any legislative amendments to the initiative must further the objectives of the initiative.² The trial court ruled in favor of the insurance company and held that the amendment was a valid addition to the initiative.³ The three-judge court of appeal rendered judgment for the voter group based upon article II, section 10(c) of the state constitution, which states that "the Legislature may not amend or repeal an initiative statute without voter approval 'unless the initiative statute permits amendment or repeal without their approval.'"⁴ Although two of the three court of appeal judges concurred in the judgment, it was unclear from the expressed opinion whether they agreed with the reasoning of the judgment.⁵ Upon review,

1. 11 Cal. 4th 1243, 906 P.2d 1112, 48 Cal. Rptr. 2d 12 (1996). Justice George delivered the majority opinion, in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, and Werdegar concurred. *Id.* at 1247-68, 906 P.2d at 1114-28, 48 Cal. Rptr. 2d at 14-28. Justice Mosk authored a concurring opinion. *Id.* at 1268-69, 906 P.2d at 1128-29, 48 Cal. Rptr. 2d at 28-29 (Mosk, J., concurring).

2. *Id.* at 1251, 906 P.2d at 1116, 48 Cal. Rptr. 2d at 17. In 1988, California voters passed Proposition 103 which required insurance companies to reduce their rates and obtain approval from the Commissioner of Insurance before implementing any rate increases. *Id.* at 1247, 906 P.2d at 1114, 48 Cal. Rptr. 2d at 14. Additionally, the initiative provided that "[t]he provisions of this act shall not be amended by the legislature except to further its purposes." *Id.* After the initiative passed, Amwest Surety Insurance Co. filed suit against the government claiming that Proposition 103 was invalid with respect to surety insurance. *Id.* at 1249, 906 P.2d at 1115, 48 Cal. Rptr. 2d at 15. In 1990, after the courts held that several other sections of Proposition 103 were invalid, the government amended the act to exclude surety insurance from its reach. *Id.* at 1249-50, 906 P.2d at 1115-16, 48 Cal. Rptr. 2d at 16-17. Shortly thereafter, a voters group intervened in the suit, claiming that the legislature's amendment was invalid and did not further the underlying purposes of the initiative. *Id.* at 1250, 906 P.2d at 1116, 48 Cal. Rptr. 2d at 16. For a general discussion of legislative alterations of initiatives, see 38 CAL. JUR. 3D *Initiative and Referendum* § 15 (1994).

3. *Amwest*, 11 Cal. 4th at 1250, 906 P.2d at 1116, 48 Cal. Rptr. 2d at 16.

4. *Id.* (quoting CAL. CONST. art. I, § 10(c)).

5. *Id.*; see 5 CAL. JUR. 3D *Appellate Review* § 559 (1994) (discussing the require-

the supreme court affirmed the court of appeal in its finding that the California Legislature's amendment excluding surety insurance from the auspices of the initiative statute was invalid because it did not further the law's purposes.⁶ Nevertheless, the court also held that the appellate court's opinion did not meet the state "constitutional requirement that the reasons for the decision rendered by the appellate court be stated in writing."⁷

II. TREATMENT

A. *Majority Opinion*

The court began its opinion by exploring the applicable standard of review, namely whether the court should defer to the legislature or construe the initiative's language according to accepted principles of statutory interpretation.⁸ After noting the scarcity of case precedent addressing similar language regarding the government's right to amend, the court decided that deference to the legislature was inappropriate; however, the court qualified its conclusion by applying "a strong presumption of constitutionality" to the legislature's amendment.⁹ Thus, the court declared that it would rule in favor of the government if there was any rational basis to conclude that the amendment served the purposes of the initiative statute.¹⁰

Not limiting interpretation of the initiative's purposes to those expressed in the proposition's text, the court detailed the history of insurance regulation, from federal control under the McCarran-Ferguson Act to state mandates under the McBride-Grunsky Insurance Regulatory Act

ments imposed on reviewing court opinions, as well as exceptions to the rules).

6. *Amwest*, 11 Cal. 4th at 1266, 906 P.2d at 1126, 48 Cal. Rptr. 2d at 26.

7. *Id.* at 1267, 906 P.2d at 1127, 48 Cal. Rptr. 2d at 27-28; see J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 487-98 (1994) (discussing the process of opinion publication).

8. *Amwest*, 11 Cal. 4th at 1251, 906 P.2d at 1116, 48 Cal. Rptr. 2d at 17. *But see* Stephen H. Sutro, *Interpretations of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 973-76 (1994) (arguing that courts should limit their interpretation of initiatives to the words that were before the peoples' eyes when they voted).

9. *Amwest*, 11 Cal. 4th at 1252-53, 906 P.2d at 1117-18, 48 Cal. Rptr. 2d at 18 (quoting California Hous. Fin. Agency v. Patitucci, 22 Cal. 3d 171, 175, 583 P.2d 729, 731, 148 Cal. Rptr. 875, 877 (1978)).

10. *Id.* at 1256, 906 P.2d at 1120, 48 Cal. Rptr. 2d at 20.

of 1947.¹¹ Addressing the McBride-Grunsky Act, which created state insurance regulation in California, the supreme court explained that insurance rates, including surety insurance, were traditionally checked by market competition.¹² In contrast, the court recognized that the two major purposes of Proposition 103 were to reduce insurance rates, and “replace the former system for regulating insurance rates (which relied primarily upon competition between insurance companies).”¹³ Accordingly, the court found that the legislature’s amendment exempting surety insurance from the people’s statute did not further the purpose of rate reduction, and because Proposition 103 as enacted replaced the former regulations, the court held that the amendment was invalid.¹⁴

Turning to the argument of partial exemption of surety insurance from the “rate rollback” and commissioner approval provisions of the amendment, the supreme court held that the addition to the initiative statute did not further the purpose to “ensure that rates were fair and reasonable at the inception of the regulations promulgated in Proposition 103.”¹⁵ The court concluded its analysis of the amendment issue with the observation that the people intended Proposition 103 to “have broad application to various types of insurance,” a purpose which the legislative amendment should not limit.¹⁶

The court further considered whether the form of the appellate court’s opinion satisfied the state constitutional requirement that supreme court decisions and court of appeal decisions “be in writing ‘with reasons stated.’”¹⁷ The supreme court held that the appellate court’s opinion failed to meet this requirement because the concurrence in the judgment did not set forth the reasons for the decision.¹⁸

B. Justice Mosk’s Concurring Opinion

Justice Mosk concurred with the majority, but disagreed with the amount of deference given to the legislature by the court. Justice Mosk asserted that it is the court’s role to review and interpret state congress-

11. *Id.* at 1257, 906 P.2d at 1120, 48 Cal. Rptr. 2d at 20.

12. *Id.* at 1258, 906 P.2d at 1121, 48 Cal. Rptr. 2d at 21.

13. *Id.* at 1259, 906 P.2d at 1122, 48 Cal. Rptr. 2d at 22.

14. *Id.* at 1261, 906 P.2d at 1123, 48 Cal. Rptr. 2d at 23.

15. *Id.* at 1262-63, 906 P.2d at 1124, 48 Cal. Rptr. 2d at 24-25.

16. *Id.* at 1264-65, 906 P.2d at 1125-26, 48 Cal. Rptr. 2d at 25-26.

17. *Id.* at 1265, 906 P.2d at 1126, 48 Cal. Rptr. 2d at 26.

18. *Id.* at 1267, 906 P.2d at 1127, 48 Cal. Rptr. 2d at 27-28. The court declared that concurrence “in the judgment” and concurrence “in the result” have essentially the same meaning. *Id.* at 1267, 906 P.2d at 1127, 48 Cal. Rptr. 2d at 27. The court noted that neither phrase may be construed as agreeing with the majority’s underlying reasons for the final result of the case. *Id.* (citing B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 115 (1977)).

sional acts, not to be bound by them.¹⁹ Justice Mosk also took issue with the majority's holding that the appellate court failed to issue its opinion in writing with reasons stated.²⁰ He interpreted that phrase to preclude summary dispositions, which was not the problem in the case at bar.²¹

III. IMPACT

Although the court presumed that "the Legislature acted within its authority," *Amwest* reinforces the premise that it is extremely difficult, if not impossible, for the government to change a law enacted by the people.²² Accordingly, the court has adopted a standard of deferring to the voters in connection with enacted propositions, rather than the court's traditional deference to the legislature's judgment.²³ Legislative alterations to initiative laws will most likely be confined to minor corrections of drafting errors, clarifications of statutory language clearly within the enacted proposition's scope, and adjustments necessary to "facilitate the initiative's operation in changed circumstances."²⁴

Additionally, with respect to the supreme court's review of the appellate court's written opinion, the court considered the meaning of "concur[ring] in the result."²⁵ Because the court found that judges who sim-

19. *Amwest*, 11 Cal. 4th at 1268-69, 906 P.2d at 1128, 48 Cal. Rptr. 2d at 28-29 (Mosk, J., concurring).

20. *Id.* at 1269, 906 P.2d at 1128-29, 48 Cal. Rptr. 2d at 29 (Mosk, J., concurring).

21. *Id.* (Mosk, J., concurring).

22. *Id.* at 1256, 906 P.2d at 1119-20, 48 Cal. Rptr. 2d at 20; see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1545 (1990) (noting that "state legislatures often are constitutionally limited in the amendment or repeal of voter action").

23. *Amwest*, 11 Cal. 4th at 1251-52, 906 P.2d at 1116-18, 48 Cal. Rptr. 2d at 16-18; see also 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 121 (9th ed. 1989 & Supp. 1996) ("The constitutional provision for initiative and referendum is based on 'the theory that all power of government ultimately resides in the people' . . .") (quoting *Associated Home Builders v. Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976)). For discussions of the history, process, and problems of the California voter initiative, see Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95, 118-21 (1993). See also Elizabeth M. Stein, *The California Constitution and the Counter-Initiative Quagmire*, 21 HASTINGS CONST. L.Q. 143 (1993).

24. *Amwest*, 11 Cal. 4th at 1255-56, 906 P.2d at 1119-20, 48 Cal. Rptr. 2d at 19-20.

25. *Id.* at 1265-66, 906 P.2d at 1126, 48 Cal. Rptr. 2d at 26-27. The court noted that the phrases "concur in the judgment" and "concur in the result" are synonymous. *Id.* at

ply "concur in the result" violate the constitutional provision that all opinions by the supreme court and courts of appeal be in writing with reasons stated, judges must now concur in the result, or judgment, as well as its underlying rationale.²⁶

IV. CONCLUSION

In *Amwest*, the court examined and limited the scope of the legislature's authority to alter statutes enacted directly by the voting public.²⁷ By limiting the legislature's ability to amend, the court anointed the people's initiative power with an almost sacred status.²⁸

The court also changed a long-standing practice of allowing appellate court justices simply to concur in the result. Construing the constitutional requirement that such opinions be "in writing with reasons stated," the court mandated that the opinion reflect a concurrence in the judgment and its underlying justification.²⁹

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1267, 906 P.2d at 1127, 48 Cal. Rptr. 2d at 27.

26. *Id.* at 1267, 906 P.2d at 1127, 48 Cal. Rptr. 2d at 27-28.

27. *Id.* at 1265, 906 P.2d at 1126, 48 Cal. Rptr. 2d at 26.

28. *See id.*

29. *Id.* at 1267-68, 906 P.2d at 1127-28, 48 Cal. Rptr. 2d at 27-28. For further discussion of the *Amwest* case, see 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 121A (Supp. 1996).

IX. PROPERTY / EMINENT DOMAIN

A fee imposed by the city on an individualized and discretionary basis as a condition to issuing a development permit can be a compensable regulatory taking under the Fifth Amendment and is subject to a heightened standard of judicial scrutiny. Furthermore, a general ordinance requiring either the placement of art on a development site or payment of its equivalent value is within the authority of the city, and is not a taking under the Fifth Amendment: Ehrlich v. City of Culver City.

I. INTRODUCTION

In *Ehrlich v. City of Culver City*,¹ the California Supreme Court considered whether a monetary exaction imposed as a condition of approving a zoning request is a compensable regulatory taking under the Takings Clause of the Fifth Amendment.² The trial court entered judgment

1. 12 Cal. 4th 854, 911 P.2d 429, 50 Cal. Rptr. 2d 242 (1996). Retired Associate Justice Arabian, assigned by the Chairperson of the Judicial Council, delivered the majority opinion in which Chief Justice Lucas and Justice George concurred. *Id.* at 859-87, 911 P.2d at 432-51, 50 Cal. Rptr. 2d at 245-64. Justice Mosk wrote a concurring opinion. *Id.* at 887-902, 911 P.2d at 451-61, 50 Cal. Rptr. 2d at 264-74 (Mosk, J., concurring). Justice Kennard concurred in part and dissented in part, joined by Justice Baxter. *Id.* at 903-12, 911 P.2d at 461-68, 50 Cal. Rptr. 2d at 274-81 (Kennard, J., concurring and dissenting). Justice Werdegar concurred in part and dissented in part. *Id.* at 912, 911 P.2d at 468, 50 Cal. Rptr. 2d at 281 (Werdegar, J., concurring and dissenting).

2. *Id.* at 859, 911 P.2d at 433, 50 Cal. Rptr. 2d at 246. Between 1973 and 1975, Richard K. Ehrlich obtained approval from Culver City to build a private tennis club and recreational facility on a vacant lot he owned, and he persuaded the city to amend its zoning laws to allow tennis club activities on the site. *Id.* at 860-61, 911 P.2d at 433-34, 50 Cal. Rptr. 2d at 246-47. After struggling financially with the tennis club, Ehrlich applied for rezoning of his property in 1981 to permit the development of a commercial office building in lieu of the health club. *Id.* at 861, 911 P.2d at 434, 50 Cal. Rptr. 2d at 247. The city rejected Ehrlich's application, and the tennis club went out of business in August 1988. *Id.* Ehrlich then proposed an alternative rezoning plan to allow for the construction of a 30-unit condominium complex. *Id.* Culver City considered purchasing the property to preserve the recreational facility for public use, but it lacked the requisite funds. *Id.* Ehrlich's second rezoning proposal was also rejected. *Id.* at 862, 911 P.2d at 434, 50 Cal. Rptr. 2d at 247. Upon rejection, discussions resumed in an effort to restructure the condominium project. *Id.* Culver City initially suggested that, as a condition for approval, Ehrlich agree to construct four new tennis courts for public use. *Id.* However, in lieu of requiring actual construction, the city

for Culver City and invalidated a \$280,000 mitigation fee imposed as a condition for the project's approval because no reasonable relationship existed between the proposed project and the need for public recreational facilities.³ The trial court, however, approved a \$33,200 art fee, holding that it was not an unconstitutional taking.⁴

The court of appeal, on rehearing, reversed the trial court's ruling that the mitigation fee was an unconstitutional taking, reasoning that a "substantial nexus" between the condominium project and the \$280,000 fee existed.⁵ On writ of certiorari, the United States Supreme Court ordered the case remanded to the court of appeal for reexamination in light of its recent decision in *Dolan v. City of Tigard*.⁶ Upon remand, the court of appeal reaffirmed its initial findings in favor of Culver City.⁷

The California Supreme Court reversed the court of appeal, rejecting the contention that the heightened takings standards of *Dolan* and

council conditioned its approval upon the payment of a \$280,000 mitigation fee to be used to construct the lost recreational facilities. *Id.* at 862, 911 P.2d at 434-35, 50 Cal. Rptr. 2d at 247-48. The city derived the \$280,000 fee amount from a study of replacement costs for the recreational facilities. *Id.* at 862, 911 P.2d at 435, 50 Cal. Rptr. 2d at 248. Additionally, the city conditioned its approval upon compliance with the "art in public places" program. *Id.* The ordinance required all commercial buildings valued in excess of \$500,000 to provide artwork in an amount of one percent of the building's total value, or pay such amount to the city's art fund. *Id.* Ehrlich elected to pay the "in-lieu" fee of \$33,200, but his successor in interest later refused to pay the fee, placing his own chosen artwork in the condominiums. *Id.* at 862-63, 911 P.2d at 435, 50 Cal. Rptr. 2d at 248. Ehrlich, in compliance with the California Government Code, filed formal written protests regarding both the \$280,000 mitigation fee exaction and the \$32,200 "art in public places" fee exaction. *Id.* at 863, 911 P.2d at 435, 50 Cal. Rptr. 2d at 248. These protests were rejected, and Ehrlich filed suit alleging that the imposition of fees constituted an unconstitutional taking under the Fifth and Fourteenth Amendments. *Id.* To facilitate the completion of his project, Ehrlich paid the \$280,000 mitigation fee in protest, retaining the right to proceed with his lawsuit. *Id.* Culver City obtained a lien on the property as security for payment of the \$280,000, pending the outcome of the suit. *Id.* For a discussion of what constitutes a taking under the Fifth Amendment, see John E. Theuman, Annotation, *Just Compensation-Taking Property*, 89 A.L.R. L. ED. 2D 977 (1988).

3. *Ehrlich*, 12 Cal. 4th at 863, 911 P.2d at 435, 50 Cal. Rptr. 2d at 248.

4. *Id.*

5. *Id.* at 863-64, 911 P.2d at 435-36, 50 Cal. Rptr. 2d at 248-49.

6. *Id.* at 864, 911 P.2d at 436, 50 Cal. Rptr. 2d at 249. The United States Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994), set forth the "rough proportionality" standard to measure the required degree of connection between the exaction and the impact of the proposed development for possessory dedications. *Dolan* expanded the United States Supreme Court's earlier decision of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), which adopted the requirement of an "essential nexus" between the state interest and the permit condition, without which the possessory dedication would be an unconstitutional taking under the Fifth Amendment. *Ehrlich*, 12 Cal. 4th at 864, 911 P.2d at 436, 50 Cal. Rptr. 2d at 249.

7. *Ehrlich*, 12 Cal. 4th at 864, 911 P.2d at 436, 50 Cal. Rptr. 2d at 249.

Nollan should apply only to possessory dedications of real property.⁸ The court found that Culver City demonstrated the essential nexus between the rezoning of Ehrlich's property from recreational to commercial use and the imposition of a monetary exaction to mitigate the public's loss of recreational facilities.⁹ The court remanded the case for additional proceedings, finding that Culver City presented insufficient evidence to sustain the determination of \$280,000 as the amount of its mitigation fee request.¹⁰ Finally, the court upheld the imposition of the \$33,200 public arts fee because it was within Culver City's authority and was not a regulatory taking.¹¹

II. TREATMENT

A. Majority Opinion

1. The statutory framework of the mitigation fee act permits statutory and constitutional taking challenges.

The court began its analysis by focusing on the required standard for measuring the validity of exactions under the California Mitigation Fee Act.¹² The court stated that a "reasonable relationship" must exist among (1) the proposed use of the exaction, (2) the type of development project, and (3) the need for both the public facility and the development project.¹³ The court explained that the statutory reasonable relationship standard should be construed in light of the constitutional requirements set forth in *Nollan* and *Dolan* because of the statute's conforming legislative purpose to protect individuals from ad hoc, disproportionate fee exactions.¹⁴ The court held that, because the California legislature incorporated a standard that reflects the United States Supreme Court's interpretation of the Takings Clause of the Fifth Amendment,¹⁵ protests to

8. *Id.* at 859-60, 911 P.2d at 433, 50 Cal. Rptr. 2d at 246.

9. *Id.*

10. *Id.*

11. *Id.* at 886, 911 P.2d at 450, 50 Cal. Rptr. 2d at 263.

12. *Id.* at 864-65, 911 P.2d at 436-37, 50 Cal. Rptr. 2d at 249-50; see CAL. GOV'T CODE §§ 66001, 66021-66022 (West Supp. 1996) (explaining procedures to protest the imposition of monetary exactions).

13. *Ehrlich*, 12 Cal. 4th at 865, 911 P.2d at 436-37, 50 Cal. Rptr. 2d at 249-50; see *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (adopting the "reasonable relationship" test).

14. *Ehrlich*, 12 Cal. 4th at 867, 911 P.2d at 437, 50 Cal. Rptr. 2d at 251.

15. The Takings Clause of the Fifth Amendment states, "private property [shall not]

development fees under the statute may also embody constitutional challenges and can be measured by constitutional standards.¹⁶

2. Nonpossessory dedications imposed by a local government on an individualized and discretionary basis are subject to a heightened standard of judicial scrutiny.

The court next discussed whether *Nollan* and *Dolan* apply to nonpossessory exactions.¹⁷ The court noted that many courts have interpreted the *Nollan* heightened standard of judicial scrutiny to apply only to possessory exactions.¹⁸ Nonetheless, the court held that such a heightened standard must apply to exactions imposed on an individualized and discretionary basis, such as those in the case at bar.¹⁹ The court reasoned that the risk of excessive use of governmental police power associated with the physical occupation or conveyance of property may also accompany monetary exactions imposed on individual property owners.²⁰ The court illuminated the possibility that governmental monopoly power over development permits could be exploited through the imposition of conditions unrelated to legitimate regulatory objectives.²¹

be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment was made applicable to the states through the Fourteenth Amendment in *Chicago B & Q R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897), which held that the taking of property by the city without compensation violates the Fourteenth Amendment. See 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 939 (9th ed. 1988 & Supp. 1996) (discussing takings that require just compensation); 29 CAL. JUR. 3D *Eminent Domain* § 312 (1986 & Supp. 1996) (explaining what constitutes a taking of property within the meaning of the Fifth Amendment).

16. *Ehrlich*, 12 Cal. 4th at 865-67, 911 P.2d at 436-38, 50 Cal. Rptr. 2d at 249-51.

17. *Id.* at 874-77, 911 P.2d at 447-48, 50 Cal. Rptr. 2d at 255-57. See generally Jason R. Biggs, Comment, *Nollan and Dolan: The End of Municipal Land Use Extortion—a California Perspective*, 36 SANTA CLARA L. REV. 515, 538-55 (1996) (analyzing *Ehrlich* and the general application of the possessory taking holdings of *Nollan* and *Dolan* to non-possessory takings claims in California).

18. *Ehrlich*, 12 Cal. 4th at 874-77, 911 P.2d at 447-48, 50 Cal. Rptr. 2d at 255-57.

19. *Id.* General or ministerial exactions would not require such a heightened standard. *Id.* at 876, 911 P.2d at 444, 50 Cal. Rptr. 2d at 257.

20. *Id.* See generally 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 49 (9th ed. 1987 & Supp. 1996) (discussing the government's power to adopt regulation and impose development fees); 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 938 (9th ed. 1988) (discussing valid exercises of government police power).

21. *Ehrlich*, 12 Cal. 4th at 876, 911 P.2d at 444, 50 Cal. Rptr. 2d at 257.

3. The validity of nonpossessory dedications is measured by a two-prong test.

The court next analyzed the standards set forth in *Nollan* and *Dolan*²² and adopted a two-prong test that combined both standards.²³ The first prong of this test is the *Nollan* "essential nexus" standard.²⁴ The reviewing court must determine whether an essential nexus exists between the public impact and the monetary exaction.²⁵ Without such a nexus, the legitimacy of the exaction would be undermined, and the exaction would qualify as a taking requiring just compensation.²⁶

The second prong of the *Ehrlich* test adopts the *Dolan* "rough proportionality" standard.²⁷ The reviewing court must find a connection between the "exaction and the impact of the proposed development."²⁸ The court recognized that lower courts have used inconsistent degrees of connection when applying the rough proportionality standard.²⁹ The court concluded that the exacted fee must be roughly proportional in both nature and extent to the impact of the proposed development change.³⁰ The court further stated that the determination of rough pro-

22. *Id.* at 869-74, 911 P.2d at 439-42, 50 Cal. Rptr. 2d at 252-55.

23. *Id.* at 879-81, 911 P.2d at 446-47, 50 Cal. Rptr. 2d at 259-60.

24. *Id.* at 869-70, 911 P.2d at 439-40, 50 Cal. Rptr. 2d at 252-53. In *Nollan*, the United States Supreme Court held that the absence of an essential nexus between the asserted state interest and the permit condition made the exaction of a public easement an unconstitutional taking. *Nollan*, 483 U.S. at 838-42.

25. *Ehrlich*, 12 Cal. 4th at 869-70, 911 P.2d at 439-40, 50 Cal. Rptr. 2d at 252-53.

26. *Id.*

27. *Id.* at 871-74, 911 P.2d at 440-42, 50 Cal. Rptr. 2d at 253-55. In *Dolan*, the United States Supreme Court held that permit conditions imposed on a property owner were uncompensated takings because the exactions were not sufficiently related to the projected impact of the development. *Dolan*, 114 S. Ct. at 2321-22. See generally Joseph D. Lee, Note and Comment, *Sudden Impact: The Effect of Dolan v. City of Tigard on Impact Fees in Washington*, 71 WASH. L. REV. 205 (1996) (discussing the evolution of impact fees in light of *Dolan*); Catherine Buchanan Lehmann, *Dolan v. City of Tigard: A Heightened Scrutiny of the Takings Clause of the Fifth Amendment*, 32 HOUS. L. REV. 1153 (1995) (analyzing the heightened standard of review adopted by *Dolan*).

28. *Ehrlich*, 12 Cal. 4th at 872, 911 P.2d at 441, 50 Cal. Rptr. 2d at 254.

29. *Id.* at 872-73, 911 P.2d at 441-42, 50 Cal. Rptr. 2d at 871-73. The court compared the following three common applications of the "rough proportionality" standard: (1) a deferential standard requiring a very generalized connection between the exaction and the project; (2) a "specifically and uniquely attributable test" requiring the exaction to be precisely proportional to the burden of the project; and (3) a "reasonable relationship" standard between the exaction and the proposed development. *Id.*

30. *Id.* at 879-80, 911 P.2d at 446-47, 50 Cal. Rptr. 2d at 259-60.

portionality must entail individualized findings based upon quantitative evidence provided by the city.³¹

Lastly, the court applied its two-prong test to the instant case.³² The court held that while the essential nexus between the monetary exaction and the proposed rezoning existed, the city presented insufficient evidence to demonstrate that the amount of the mitigation fee was roughly proportionate to the loss of public recreational facilities.³³ The court reasoned that because the lost property was private in nature, the city may not quantify its exaction based upon such a loss.³⁴ Therefore, the court remanded the case and required the city to further demonstrate the additional costs it may incur to attract comparable private recreational facilities.³⁵

4. A general ordinance is not a taking.

The court held that the “art in public places” fee was not a type of exaction subject to a heightened standard of judicial scrutiny.³⁶ Because the imposition of an “art in public places” fee was a “valid exercise . . . of the city’s . . . police power,” the court affirmed the conclusion of the lower court that no taking occurred.³⁷

B. Justice Mosk’s Concurring Opinion

Justice Mosk concurred with the majority, but he disagreed with the generalized notion that monetary exactions should be held to a heightened standard of judicial scrutiny.³⁸ Justice Mosk analogized the imposition of monetary exactions to other fees such as excise taxes, special assessments, and user fees.³⁹ Justice Mosk stated that local governments

31. *Id.* at 873, 911 P.2d at 442, 50 Cal. Rptr. 2d at 255. While “precise mathematical calculation[s]” are not required, “mere conclusory statements” by the city will not suffice for “rough proportionality.” *Id.*

32. *Id.* at 881-85, 911 P.2d at 447-50, 50 Cal. Rptr. 2d at 260-63.

33. *Id.*

34. *Id.* at 882-85, 911 P.2d at 448-50, 50 Cal. Rptr. 2d at 261-63.

35. *Id.* For a discussion of measuring damages for takings under the California Constitution, see 29 CAL. JUR. 3D *Eminent Domain* §§ 62-63 (1986 & Supp. 1996).

36. *Id.* at 885-86, 911 P.2d at 450-51, 50 Cal. Rptr. 2d at 263. The “art in public places” fee was “more akin to traditional land use regulations.” *Id.* For a discussion of valid and invalid statutes requiring development fees, see A.S. Klein, Annotation, *Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof*, 43 A.L.R. 3D 862 (1972 & Supp. 1996).

37. *Ehrlich*, 12 Cal. 4th at 885-86, 911 P.2d at 450-51, 50 Cal. Rptr. 2d at 263.

38. *Id.* at 892-99, 911 P.2d at 454-59, 50 Cal. Rptr. 2d at 267-72 (Mosk, J., concurring).

39. *Id.* at 893-96, 911 P.2d at 455-57, 50 Cal. Rptr. 2d at 268-70 (Mosk, J., concurring).

should be granted discretion to impose monetary fees, thus subjecting them to a lesser standard of judicial scrutiny.⁴⁰ He wrote that courts should not interfere with legislatively imposed fees unless they are arbitrary or confiscatory.⁴¹ However, because Justice Mosk reasoned that the case fell into a unique category for ad hoc exactions imposed on individual property owners, he concurred with the majority and stated that a heightened standard of scrutiny should apply.⁴²

C. Justice Kennard's Concurring and Dissenting Opinion

In Justice Kennard's opinion, she concurred with the majority's holding that the "art in public places fee" was a general ordinance and not subject to the essential nexus and rough proportionality tests of *Nollan* and *Dolan*.⁴³ Justice Kennard also agreed with the majority that the *Nollan* and *Dolan* tests governed monetary exactions individually imposed on a single property owner.⁴⁴

Justice Kennard disagreed, however, with the majority's consideration of the state's Mitigation Fee Act in its formulation of an appropriate constitutional standard to measure regulatory takings under the Fifth Amendment.⁴⁵ Justice Kennard concurred with the majority's invalidation of the \$280,000 mitigation fee; however, she reasoned that an exaction for the lost use of recreational facilities required the plaintiff to bear a grossly disproportionate share of an essentially public expense and thus failed the rough proportionality test.⁴⁶ Because Justice Kennard

ring). These types of restrictions involve diminutions in economic value and have traditionally been accorded greater deference. *Id.* at 896, 911 P.2d at 457, 50 Cal. Rptr. 2d at 270 (Mosk, J., concurring). Justice Mosk characterized the development fees as "special assessment[s] placed on developing property, calculated according to preestablished legislative formulae based on square footage or per unit of development." *Id.* (Mosk, J., concurring).

40. *Id.* at 896-97, 911 P.2d at 457, 50 Cal. Rptr. 2d at 270 (Mosk, J., concurring).

41. *Id.* at 897, 911 P.2d at 458, 50 Cal. Rptr. 2d at 271 (Mosk, J., concurring).

42. *Id.* at 899-901, 911 P.2d at 459-61, 50 Cal. Rptr. 2d at 272-74 (Mosk, J., concurring).

43. *Id.* at 903, 911 P.2d at 461-62, 50 Cal. Rptr. 2d at 274-75 (Kennard, J., concurring and dissenting).

44. *Id.* (Kennard, J., concurring and dissenting).

45. *Id.* (Kennard, J., concurring and dissenting).

46. *Id.* at 909-12, 911 P.2d at 466-68, 50 Cal. Rptr. 2d at 279-81 (Kennard, J., concurring and dissenting). See generally 26 AM. JUR. 2D *Eminent Domain* §§ 147-149 (Supp. 1996) (discussing factors determining whether the exercise of governmental police power constitutes a Fifth Amendment taking); 29 CAL. JUR. 3D *Eminent Domain*

believed the plaintiff was arbitrarily subjected to a disproportionate burden, she concluded that the fee was a taking under the Fifth Amendment and must be invalidated.⁴⁷

D. Justice Werdegar's Concurring and Dissenting Opinion

Justice Werdegar concurred with the majority, but wrote that an analysis of the Mitigation Fee Act was unnecessary.⁴⁸

III. IMPACT

The holding in *Ehrlich* will further the policy of preventing harmful government restrictions that are an abuse of police power.⁴⁹ The court's two-prong test will ensure that exactions are imposed only where justified by a significant public benefit.⁵⁰ There has been concern that this result will elevate the interests of property owners above those of the community,⁵¹ but the court considered the heightened standard a middle ground between increased protection of property rights and deferential government power.⁵² Furthermore, general legislative fees approved by governments were not at issue.⁵³ *Ehrlich* analyzed only ad hoc fees arbitrarily imposed against single property owners.⁵⁴ Because the trend towards government cutbacks further increases the likelihood of imposing

§ 325 (1986 & Supp. 1996) (discussing activities that are valid exercises of the government's police power).

47. *Ehrlich*, 12 Cal. 4th at 912, 911 P.2d at 468, 50 Cal. Rptr. 2d at 281 (Kennard, J., concurring and dissenting).

48. *Id.* at 912, 911 P.2d at 468, 50 Cal. Rptr. 2d at 281 (Werdegar, J., concurring and dissenting).

49. *Ehrlich* promotes the purpose of modern taking jurisprudence of "bar[ring] government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 880, 911 P.2d at 447, 50 Cal. Rptr. 2d at 260. See generally Douglas W. Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 148 (1995) (discussing the importance of maintaining a property-police power balance).

50. Lehmann, *supra* note 27, at 1168-69 (discussing the impact of a higher standard of judicial scrutiny).

51. See generally J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995).

52. *Ehrlich*, 12 Cal. 4th at 887, 911 P.2d at 451, 50 Cal. Rptr. 2d at 264. See generally James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 TEX. TECH L. REV. 73, 92-119 (1996) (discussing the trend and effects of imposing development fee exactions as conditions for the issuance of permits).

53. *Id.* at 899-900, 911 P.2d at 459-60, 50 Cal. Rptr. 2d at 272-73 (Mosk, J., concurring).

54. *Id.* (Mosk, J., concurring).

development fees, it is crucial to prevent the passing of exorbitant fees to private real estate developers who will most likely pass these costs on to California property owners.⁵⁵

IV. CONCLUSION

Prior to *Ehrlich*, uncertainty existed as to whether the heightened standard of scrutiny applied by the court to physical occupations and invasions of property would also extend to nonpossessory exactions such as development fees.⁵⁶ Through its holding, the California Supreme Court permitted this high standard of judicial review in cases involving conditional development fees imposed on individual property owners at the discretion of local governments.⁵⁷ The court did not, however, extend such a standard to instances of enforcement of general rules or ordinances calling for specific fee amounts.⁵⁸

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55. See Holloway & Guy, *supra* note 52, at 77 (explaining that real estate developers do not earn sufficient revenue to sustain high development costs).

56. *Ehrlich*, 12 Cal. 4th at 874-75, 911 P.2d at 442-43, 50 Cal. Rptr. 2d at 255-56.

57. *Id.* at 876, 911 P.2d at 443-44, 50 Cal. Rptr. 2d at 257.

58. *Id.* at 886-87, 911 P.2d at 450, 50 Cal. Rptr. 2d at 263.

X. ZONING AND PLANNING

A mining or extractive activity operated as a legal non-conforming use may move into areas not in use at the time of an ordinance's passage if the operator can demonstrate a manifest objective intent to move into the area prior to the ordinance's enactment: Hansen Brothers Enterprises v. Board of Supervisors.

I. INTRODUCTION

In *Hansen Brothers Enterprises v. Board of Supervisors*,¹ the California Supreme Court considered whether the "diminishing asset" doctrine applied to a mining business operated as a legal nonconforming use when a zoning ordinance excludes mining as a permissible use of the property.² The trial court denied the plaintiff's petition for writ of man-

1. 12 Cal. 4th 533, 907 P.2d 1324, 48 Cal. Rptr. 2d 778 (1996). Justice Baxter wrote the plurality opinion in which Chief Justice Lucas and Justice Arabian concurred. *Id.* at 540-76, 907 P.2d at 1327-51, 48 Cal. Rptr. 2d at 781-805. Justice Werdegar wrote a separate concurring opinion. *Id.* at 576, 907 P.2d at 1351-52, 48 Cal. Rptr. 2d at 805-06 (Werdegar, J., concurring). Justice Mosk wrote a dissenting opinion. *Id.* at 577-81, 907 P.2d at 1352-55, 48 Cal. Rptr. 2d at 806-09 (Mosk, J., dissenting). Justice Kennard also wrote a dissenting opinion in which Justice George joined. *Id.* at 581-92, 907 P.2d at 1355-62, 48 Cal. Rptr. 2d at 809-16 (Kennard, J., dissenting).

2. *Id.* at 540-76, 907 P.2d at 1327-51, 48 Cal. Rptr. 2d at 781-805. In *Hansen*, the plaintiff owned more than 67 acres of land called the Bear's Elbow Mine in Nevada County. *Id.* at 543, 907 P.2d at 1330, 48 Cal. Rptr. 2d at 784. The plaintiff used the property for mining and production of aggregate, a product composed of gravel, sand, and rock. *Id.* The operations consisted of two distinct components, riverbed mining of sand and gravel and mining of a hillside quarry for rock. *Id.* In 1954, Nevada County enacted a land use and development ordinance excluding mining as a permissible use of the property, but excepted existing uses from its coverage, thus allowing them to continue as legal nonconforming uses. *Id.* at 540, 907 P.2d at 1328, 48 Cal. Rptr. 2d at 782. In order to foster eventual achievement of the zoning's objective, the ordinance prohibited continuation of nonconforming uses discontinued for 180 days. *Id.* In response to the 1975 Surface Mining and Reclamation Act (SMARA), CAL. PUB. RES. CODE §§ 2710-2795 (West 1996), the Nevada County Board of Supervisors enacted a mining ordinance requiring mining permits and reclamation plans. *Id.* at 547, 907 P.2d at 1332, 48 Cal. Rptr. 2d at 786. Because the plaintiff operated the Bear's Elbow Mine prior to SMARA's enactment, the reclamation plan requirement, not the permit requirement, applied to its vested mining rights. *Id.* at 547, 907 P.2d at 1332-33, 48 Cal. Rptr. 2d at 786-87; see CAL. PUB. RES. CODE § 2776. Hansen Brothers submitted a reclamation proposal that contemplated removal of all remaining reserves over the next 100 years, ranging between 5000 and 250,000 cubic yards per year. *Hansen*, 12 Cal. 4th at 548, 907 P.2d at 1333, 48 Cal. Rptr. 2d at 787. When the Planning Commission reviewed the plan, it concluded that the plaintiff had lost any vested right in the hillside quarry through discontinuance of mining in that area. *Id.* The Commission also found that even if a vested right existed, the proposed use would constitute an impermissible

date, concluding that although the plaintiff had never discontinued its aggregate business, the hillside quarry was a separate operation which the plaintiff had ceased, thus abandoning any vested right.³ The trial court also found that the proposed use was an impermissible expansion of a nonconforming use and allowed the imposition of a conditional use requirement.⁴ The court of appeal affirmed the judgment on different grounds, holding that the proposed use would be an impermissible expansion or intensification.⁵ This holding made it unnecessary to consider whether California recognized the diminishing asset doctrine or whether the riverbed and hillside were separate operations.⁶ Reversing the court of appeal, the supreme court held that California does recognize the diminishing asset doctrine, the exception applied to the plaintiff's case, and the nonconforming use in which the plaintiff had a vested right was the aggregate business as a whole, not the separate mining operations.⁷

expansion or intensification of a nonconforming use. *Id.* The Commission concluded that SMARA required a permit to resume mining the hillside quarry. *Id.* Hansen Brothers appealed to the Board of Supervisors contending that the nonconforming use was the integrated business of aggregate production, which had continued uninterrupted since 1946, and not the separate riverbed and quarry mining operations. *Id.* at 548-49, 907 P.2d at 1333-34, 48 Cal. Rptr. 2d at 787-88. Hansen Brothers conceded that it conducted mining of the quarry intermittently, but explained that it stock piled mined rock and further mining was only necessary when the supply of rock was nearly depleted. *Id.* The Board rejected Hansen Brothers' argument, concluding that the riverbed and hillside mining were separate operations. *Id.* at 549, 907 P.2d at 1333-34, 48 Cal. Rptr. 2d at 787-88. Because the operations were separate and the business had discontinued quarry mining for 180 days or more, interruption of the quarry mining operations forfeited any vested right in the hillside quarry through discontinuance. *Id.* Additionally, the Board agreed with the Commission that the reclamation plan proposed an enlarged or intensified operation beyond the vested right. *Id.* at 549, 907 P.2d at 1334, 48 Cal. Rptr. 2d at 788. The Board rejected the reclamation plan and denied the plaintiff's hillside mining rights absent a conditional use permit. *Id.* The plaintiff then filed a petition for a writ of "administrative mandate," seeking review of the conditional use permit requirement. *Id.* See generally 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 471 (9th ed. 1987 & Supp. 1996) (discussing the general validity of zoning); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 84 (9th ed. 1987 & Supp. 1996) (discussing regulation of mining under SMARA).

3. *Hansen*, 12 Cal. 4th at 550, 907 P.2d at 1334, 48 Cal. Rptr. 2d at 788.

4. *Id.*

5. *Id.* at 551, 907 P.2d at 1335, 48 Cal. Rptr. 2d at 789.

6. *Id.*

7. *Id.* at 542, 907 P.2d at 1328, 48 Cal. Rptr. 2d at 783.

II. TREATMENT

A. *Lead Opinion*

Justice Baxter, writing for the plurality, began his analysis by discussing zoning and nonconforming uses.⁸ The court then considered whether mining and other extractive uses are subject to the general prohibition against intensifying, expanding, or moving nonconforming uses.⁹ After considering the nature of mining, the court concluded that this type of activity warranted an exception to the general prohibitions.¹⁰ The court reasoned that mining, unlike other nonconforming uses, necessarily anticipates movement and extension into areas beyond those in use at the time an ordinance is enacted.¹¹ Recognizing that the diminishing asset doctrine took this into account, the court held¹² that “[w]hen there is objective evidence of the owner’s intent to expand a mining operation, and that intent existed at the time of the zoning change, the use may expand into the contemplated area.”¹³ For support, the court cited

8. *Id.* at 551-52, 907 P.2d at 1335-36, 48 Cal. Rptr. 2d at 789-90. Nonconforming uses are uses in existence at the time an ordinance is adopted. *Id.* at 552, 907 P.2d at 1335, 48 Cal. Rptr. at 789. Ordinances exempt these existing uses to prevent constitutional challenges to the ordinance as an uncompensated taking. *Id.*; see *Edmonds v. County of Los Angeles*, 40 Cal. 2d 642, 651, 255 P.2d 772, 777 (1953). Generally, a landowner may not intensify, expand, or move a nonconforming use. *Hansen*, 12 Cal. 4th at 552, 907 P.2d at 1336, 48 Cal. Rptr. 2d at 790; see also *County of San Diego v. McClurken*, 37 Cal. 2d 683, 687-88, 234 P.2d 972, 975-76 (1951). If a landowner abandons a nonconforming use the government may prohibit resumption of the nonconforming use. *Hill v. City of Manhattan Beach*, 6 Cal. 3d 279, 286, 98 Cal. Rptr. 785, 789 (Ct. App. 1971). For a general discussion of nonconforming uses, see 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 854-855 (9th ed. 1987 & Supp. 1996), and 66 CAL. JUR. 3D *Zoning* §§ 108-111 (1981 & Supp. 1996).

9. *Hansen*, 12 Cal. 4th at 553, 907 P.2d at 1336, 48 Cal. Rptr. 2d at 790.

10. *Id.* The court reasoned that because mining is essentially a one time use, any subsequent prohibition of expansion would likely deprive an owner of all economic use of the land and thus effect a taking requiring compensation. *Id.*; see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that a regulation is a compensable taking if the property’s total economic value is deprived); *Morton v. Superior Court*, 124 Cal. App. 2d 577, 582, 269 P.2d 81, 85 (1954); see also *Jonathan Belcher, Exploring the Latitude of Lucas v. South Carolina Coastal Council: Local Control of Surface Mining*, 17 WM. & MARY J. ENVTL. L. 165 (1993) (discussing regulatory takings in the context of mining); *Lorraine Hollingsworth, Note, Lucas v. South Carolina Coastal Council: A New Approach to the Takings Issue*, 34 NAT. RESOURCES J. 479 (1994) (discussing when a government-imposed restriction becomes a taking).

11. *Hansen*, 12 Cal. 4th at 553, 907 P.2d at 1337, 48 Cal. Rptr. 2d at 790.

12. For a discussion of the diminishing asset doctrine, see Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches*, 14 UCLA J. ENVTL. L. & POL’Y 41 (1995-96).

13. *Hansen*, 12 Cal. 4th at 553, 907 P.2d at 1336, 48 Cal. Rptr. 2d at 790.

*McCaslin v. City of Monterey Park*¹⁴ which held that an entire tract of land may be considered within the exemption even though the landowner may only be mining a portion of the land at the time of an ordinance's enactment.¹⁵ In addition, the court recognized the uniformity with which other jurisdictions have adopted the diminishing asset doctrine when faced with the issue.¹⁶ The court warned, however, that the exception is not unlimited.¹⁷

The court next considered three areas of error that the plaintiff attributed to the court of appeal: (1) the ruling that the riverbed and hillside had separate uses; (2) the conclusion that the plaintiff had discontinued the nonconforming use; and (3) the conclusion that the proposed use would be an impermissible expansion even if a vested right existed.¹⁸ On the plaintiff's first argument, whether the hillside and riverbed had separate uses, the court agreed with the plaintiff.¹⁹ The court stated that

14. 163 Cal. App. 2d 339, 329 P.2d 522 (1958).

15. *Hansen*, 12 Cal. 4th at 554, 907 P.2d at 1337, 48 Cal Rptr. 2d at 791.

16. *Id.* at 554-58, 907 P.2d at 1337-40, 48 Cal Rptr. 2d at 791-94. Alaska, Illinois, Minnesota, New Hampshire, New Jersey, New York, Utah, and Wisconsin have adopted the doctrine. *Id.*; see *Stephan & Sons v. Municipality of Anchorage*, 685 P.2d 98 (Alaska 1984); *County of Du Page v. Elmhurst-Chicago Stone Co.*, 165 N.E.2d 310 (Ill. 1960); *Hawkins v. Talbot*, 80 N.W.2d 863 (Minn. 1957); *Flanagan v. Town of Hollis*, 293 A.2d 328 (N.H. 1972); *Moore v. Bridgewater*, 173 A.2d 430 (N.J. 1961); *Syracuse Aggregate Corp. v. Weise*, 414 N.E.2d 651 (N.Y. 1980); *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559 (Utah 1967); *Smart v. Dane County Bd. of Adjustments*, 501 N.W.2d 782 (Wis. 1993).

17. *Hansen*, 12 Cal. 4th at 554-58, 907 P.2d at 1337-40, 48 Cal. Rptr. 2d at 791-94. The court stated the requirements of the diminishing asset doctrine as follows: (1) the owner must manifest an objective intent to expand; (2) the expansion must be limited to mining for the same mineral or composite; and (3) the mining may not expand into neighboring property, or other parcels owned by the same owner, unless these parcels also enjoy a vested mining right. *Id.* For a discussion of limitations on nonconforming uses, see 66 CAL. JUR. 3D *Zoning* §§ 117, 120-121 (1981 & Supp. 1996).

18. *Hansen*, 12 Cal. 4th at 560, 907 P.2d at 1341, 48 Cal. Rptr. 2d at 795. Before addressing these arguments, the court considered whether the plaintiff's vested rights extended to the entire 60 acre operation. *Id.* The court concluded that because the burden of proof is on the party asserting a right to a nonconforming use, the plaintiff's rights extended only to the 32 acres established at trial, but that the lower court should reconsider this issue on remand. *Id.* at 561-64, 907 P.2d at 1341-44, 48 Cal Rptr. 2d at 795-98. Rather than rule that the right did not exist in the remaining 28 acres, the court merely held that the record was insufficient to support a contrary finding. *Id.* The court also rejected the plaintiff's contention that the County was estopped from litigating or had waived the right to raise the issue by allowing the use to continue illegally. *Id.*

19. *Id.* at 565-68, 907 P.2d at 1344-46, 48 Cal Rptr. 2d at 798-800.

the nonconforming use of the property, rather than the separate mining uses, was the integrated business of aggregate production as a whole.²⁰ On the second argument, whether the plaintiff had discontinued its use of the property, the court concluded that because the nonconforming use was the business as a whole, which had not been interrupted, it was unnecessary to consider the issue of discontinuation.²¹ On the plaintiff's third argument, whether the proposed use would be an intensification or expansion, the court concluded that the record was insufficient to determine the true level of proposed production.²² The court did find, however, that a prohibition against expansion or intensification of a nonconforming use does not necessarily preclude a reasonable or natural increase in business volume.²³ The court stated that, on remand, the lower court should assess the level of production to determine whether it would be an expansion or merely an increase in volume.²⁴

20. *Id.*

21. *Id.* at 568-71, 907 P.2d at 1346-48, 48 Cal Rptr. 2d at 800-02. The court noted the ordinance's failure to define discontinuation, but concluded that defining the term was unnecessary because discontinuation was no longer an issue. *Id.* See generally 66 CAL. JUR. 3D *Zoning* §§ 120-21 (1981 & Supp. 1996) (discussing termination of nonconforming uses); Douglas Hale Gross, Annotation, *Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity Caused by Governmental Activity*, 56 A.L.R. 3D 138 (discussing abandonment of right to maintain a nonconforming use through discontinuation); Eric J. Strauss & Mary M. Giese, *Elimination of Nonconformities: The Case of Voluntary Discontinuance*, 25 URB. LAW. 159 (1993) (analyzing voluntary discontinuance and its interpretation by courts and legislatures).

22. *Hansen*, 12 Cal. 4th at 571-75, 907 P.2d at 1348-51, 48 Cal Rptr. 2d at 802-05. This was because the only evidence of the plaintiff's expansion was SMARA proposal's "check the box" form that indicated a range of 5000 to 250,000 cubic yards per year. *Id.* at 574, 907 P.2d at 1350-51, 48 Cal. Rptr. at 804-05. The court suggested that oppositions to alleged expansions should not be based on SMARA proposals; rather, the county should wait until actual production appears to exceed the previous level and seek injunctive relief. *Id.* at 574-75, 907 P.2d at 1351, 48 Cal. Rptr. at 805.

23. *Id.* at 573, 907 P.2d at 1350, 48 Cal. Rptr. at 804. The court, by analogy, distinguished between expansions and increases in volume. *Id.* at 573, 907 P.2d at 1350, 48 Cal. Rptr. 2d at 804. If a nonconforming grocery store in an area of increasing population increases the volume of goods sold or number of customers served, neither an expansion nor intensification has occurred and it is simply a permissible increase in volume. *Id.*

24. *Id.* at 574-76, 907 P.2d at 1350-51, 48 Cal Rptr. 2d at 804-05.

B. Justice Werdegar's Concurring Opinion

Justice Werdegar wrote separately to emphasize three elements of the plurality's opinion.²⁵ First, she emphasized California's recognition of the diminishing asset doctrine.²⁶ Second, Justice Werdegar stressed that the court should consider the mining operation as a whole.²⁷ And finally, the diminishing asset doctrine allows a nonconforming use in all areas of the plaintiff's property that "satisfy the doctrine's requirements."²⁸ Justice Werdegar concluded that the issue for remand is to what extent the plaintiff satisfied the doctrine's requirements.²⁹

C. Justice Mosk's Dissenting Opinion

Justice Mosk dissented on the ground that the court should give deference to the superior court's factual determinations.³⁰ Justice Mosk argued that the superior court properly reviewed the petition for writ of mandate, and that the reviewing court should not disturb this determination unless it was not supported by substantial evidence.³¹ Justice Mosk then reviewed the evidence and concluded that there was adequate evidence to affirm the superior court's findings of facts.³²

D. Justice Kennard's Dissenting Opinion

In a separate dissenting opinion, Justice Kennard stated that the lower courts had properly determined that the riverbed and hillside were separate operations.³³ Justice Kennard reached this conclusion for several reasons.³⁴ First, the plaintiff sold the riverbed sand and gravel and the

25. *Id.* at 576, 907 P.2d at 1351-52, 48 Cal Rptr. 2d at 805-06 (Werdegar, J., concurring).

26. *Id.* (Werdegar, J., concurring).

27. *Id.* (Werdegar, J., concurring).

28. *Id.* (Werdegar, J., concurring).

29. *Id.* (Werdegar, J., concurring).

30. *Id.* at 577-81, 907 P.2d at 1352-55, 48 Cal. Rptr. 2d at 806-09 (Mosk, J., dissenting).

31. *Id.* at 578, 907 P.2d at 1352, 48 Cal. Rptr. 2d at 806 (Mosk, J., dissenting).

32. *Id.* at 579-81, 907 P.2d at 1354-55, 48 Cal. Rptr. 2d at 808-09 (Mosk, J., dissenting).

33. *Id.* at 581-92, 907 P.2d at 1355-62, 48 Cal. Rptr. 2d at 809-16 (Kennard, J., dissenting).

34. *Id.* (Kennard, J., dissenting).

hillside rock separately to some customers.³⁵ Second, the SMARA reclamation proposal addressed only the hillside quarry, which implied the plaintiff's acknowledgment of separateness.³⁶ Third, the diminishing asset doctrine is inconsistent with the replenishment which is concomitant with riverbed mining.³⁷ Justice Kennard argued that because the uses were separate, it was appropriate to consider the intensification of each use separately.³⁸ Furthermore, the proposed level of quarry mining in the SMARA proposal could have reached 250 times the previous level, which would have been well beyond the plurality's permitted reasonable growth.³⁹ Justice Kennard concluded that because these findings of separateness, inconsistency, and intensification were supported by substantial evidence, the court should affirm the lower courts' findings.⁴⁰

III. IMPACT

Prior to *Hansen*, only one California court had considered the diminishing asset doctrine.⁴¹ Because the plurality and concurring opinions in *Hansen* were in clear agreement that California recognizes the doctrine, this holding carries the force of a majority and resolves any uncertainty.⁴² The impact of the court's holding in *Hansen* is not likely to be far-reaching because the doctrine creates a narrowly tailored exception to the prohibition on expansion of nonconforming uses.⁴³ Additionally, allowing mining to move to new areas, when supported by objective evidence of an intent to move prior to an ordinance's passage, is consistent with the policy of allowing existing uses—which incorporate current and future mining uses—to continue as nonconforming uses.⁴⁴ Therefore, the diminishing asset exception does not appear to confer preferential treatment to mining uses; rather, it merely allows the continuation of business operations, placing them on the same footing as nonmining, nonconforming uses.

35. *Id.* (Kennard, J., dissenting).

36. *Id.* (Kennard, J., dissenting). The plaintiff explained that riverbed mining was likely to cease in the near future because of the installation of a dam upstream which drastically restricted the flow and deposit of sand and gravel at the mining site. *Id.* at 544, 907 P.2d at 1329, 48 Cal. Rptr. 2d at 783.

37. *Id.* at 581-92, 907 P.2d at 1355-62, 48 Cal. Rptr. 2d at 809-16 (Kennard, J., dissenting).

38. *Id.* at 589, 907 P.2d at 1360, 48 Cal. Rptr. 2d at 814 (Kennard, J., dissenting).

39. *Id.* at 590-92, 907 P.2d at 1362, 48 Cal. Rptr. 2d at 816 (Kennard, J., dissenting).

40. *Id.* at 592, 907 P.2d at 1362, 48 Cal. Rptr. 2d at 816 (Kennard, J., dissenting).

41. *Id.* at 587, 907 P.2d at 1359, 48 Cal. Rptr. 2d at 813 (Kennard, J., dissenting) (citing *McCaslin v. City of Monterey Park*, 163 Cal. App. 2d 339, 329 P.2d 522 (1958)).

42. *See id.* at 559, 576, 907 P.2d at 1340, 1351, 48 Cal. Rptr. 2d at 794, 805.

43. *See id.* at 557-58, 907 P.2d at 1339-40, 48 Cal. Rptr. 2d at 793-94.

44. *See id.* at 552, 907 P.2d at 1335-36, 48 Cal. Rptr. 2d at 789-90.

IV. CONCLUSION

While the adoption of the diminishing asset doctrine creates an exception to the prohibition on expanding nonconforming uses, the doctrine's requirement of objective evidence of intent is likely to prevent abuse. Moreover, the holding is consistent with SMARA's concern for protecting natural resources⁴⁵ and prevents the need to expand mining to all possible property prior to an ordinance's enactment. As a consequence, the court has brought California in line with the majority of other states that have addressed the issue.

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45. See CAL. PUB. RES. CODE § 2712 (West 1984).

SUMMARIES

I. Construction of Wills

A court must apply the law in existence at the time a will is executed to determine the presumed intent of a testator, unless a contrary intent is expressed in the will.

Newman v. Wells Fargo Bank, N.A., Supreme Court of California, Decided December 5, 1996, 14 Cal. 4th 126, 926 P.2d 969, 59 Cal. Rptr. 2d 2.

Facts. Helen Lathrop executed her will in November of 1972. The will contained a residual clause, leaving a remainder of her estate to her six brothers and sisters, or to that person's living "issue" upon their death. Ms. Lathrop's brother, Earl Mitchell, was the natural father of Jon Newman, who was adopted by his stepfather in 1946. At the time Ms. Lathrop's will was executed, current law stated that "[a]n adopted child shall be deemed a descendant of one who has adopted him," thus making the child ineligible to succeed to the estate of his natural parent. A new law was enacted in 1985 which would allow Jon Newman to succeed to the estate of his adopted parent and each of his natural parents. After Earl Mitchell's death in 1993, Wells Fargo Bank, acting as trustee of Mitchell's estate, brought a petition to determine which law should apply for purposes of distributing Earl Mitchell's share of Ms. Lathrop's estate. The superior court applied the law which was in effect at the time her will was executed. The court of appeal reversed, arguing that Ms. Lathrop would be presumptively aware that laws governing inheritance rights might change.

Holding. Reversing the decision of the court of appeal, the supreme court held that a court must apply the law which is in effect at the time a will is executed to reflect the presumed intent of a testator with regard to adopted children, unless a contrary intent is expressed within the body of the will. The court stated that there are presumptions which govern the construction of wills, and a testator is presumed to be aware of the law at the time a will is executed. The court argued that it was more reasonable to require a testator to be aware of the current law when they execute a will than it would be to assume that a testator intended for the will to be enforced pursuant to some future legislative fiat. Further, if a testator had a contrary intent, they could express it

within the body of the will, and the court would permit the testator's intent to prevail over the contrary current law.

Applying the court's holding to the facts of this case, the court held that the adopted child was not the "issue" of his natural father under the law at the time Ms. Lathrop's will was executed, and therefore, he could not receive any benefits as a remainder beneficiary under her will.

II. Courts (Jurisdiction)

Where defendant owners of out-of-state restaurant franchises purposefully avail themselves of the benefits of a forum state by reaching out to forum residents to create an ongoing franchise relationship, the franchisees have sufficient contacts with the forum state such that the forum state may exercise specific jurisdiction over the non-resident defendants.

Vons Companies, Inc. v. Seabest Foods, Inc., Supreme Court of California, Decided December 12, 1996, 14 Cal. 4th 434, 926 P.2d 1085, 58 Cal. Rptr. 2d 899.

Facts. Jack-in-the-Box restaurant customers in several states became ill from exposure to *Escherichia coli* (*E. coli*) bacteria traced to hamburgers sold in select restaurants. Eighty-five Jack-in-the-Box franchisees sued Foodmaker, a Delaware corporation with its principal place of business in San Diego, California of which Jack-in-the-Box is a division, Vons Companies, Inc. (Vons), Foodmaker's meat supplier who processed and shipped hamburger patties in its El Monte, California plant to Foodmaker for use in Jack-in-the-Box restaurants, and other meat processors in San Diego County Superior Court. The franchisees alleged causes of action for negligence, breach of implied warranty, and breach of contract, and sought damages for loss of business caused by the adverse publicity from the *E. coli* incidents. Foodmaker filed a cross-complaint against Vons and the other meat suppliers alleging that the suppliers had delivered contaminated meat to Foodmaker, exposing Foodmaker to liability to both injured customers and franchisees. Vons then filed the cross-complaint at issue against Foodmaker, several meatpackers and several franchisees including Seabest Foods, Inc. (Seabest) and Washington Restaurant Management Inc. (WRMI) (collectively, the defendants), alleging that the defendants failed to follow the proper cooking procedures and

government regulations in their hamburger preparation. Vons further alleged that the defendants failed to require adequate qualifications and training for their cooks. The defendants specially appeared and moved to quash service of process on the grounds of lack of personal jurisdiction.

The trial court considered both parties' contacts with the forum state of California. Seabest and WRMI both owned Jack-in-the-Box franchises in Washington State at which the E. coli contamination had injured or killed its customers. Seabest executed franchise agreements, leases, equipment purchases and a security agreement with Foodmaker in California, several of which reference Seabest's home office address as Granada Hills, California. Further, a majority of Seabest's board of directors lived in California, its officers attended training sessions in California, and the franchise agreements for the Washington restaurants provided that any contract disputes would be litigated in California under California law. Seabest also sent invoices and payments to Foodmaker's San Diego headquarters, and hired an accountant in San Diego to prepare monthly financial statements for Foodmaker. While WRMI conducted most of its business with Foodmaker through Foodmaker's Washington office, WRMI negotiated three franchise agreements in California and executed one in California. Moreover, WRMI's franchise agreements with Foodmaker also provided that any disputes would be resolved in California under California law. WRMI officers participated in on-site training and policy discussions with Foodmaker's San Diego office, as well as engaged in occasional telephone conversations with Foodmaker in San Diego. Finally, WRMI received and mailed purchase and income statements and payments to Foodmaker's San Diego office. The trial court granted Seabest and WRMI's motions to quash for lack of personal jurisdiction. The court of appeal affirmed the trial court's finding, also ordering Vons to pay the defendants' costs on appeal.

Holding. Reversing the decision of the court of appeal, the supreme court held that the defendants were subject to specific jurisdiction in the forum state of California because both defendants purposefully availed themselves of forum benefits, and a substantial nexus or connection existed between the defendants' forum activities and the plaintiff's claims. The two defendant franchisees knowingly established a connection to a business with its headquarters in the forum state. Further, the defendants purposefully undertook ongoing contractual obligations to the California business, agreeing that all disputes would be litigated under California law. Therefore, the court concluded that the defendants had purposefully availed themselves of forum benefits.

The court further held that the exercise of specific jurisdiction is warranted so long as the claim bears a substantial connection to the nonresident's forum activities. It is unnecessary to require that the claim

arise directly from the defendant's contacts with the forum state. Instead, the court found that a relaxed, flexible standard comports with the fairness rationale of the specific jurisdiction doctrine provided by the U.S. Supreme Court. In applying the substantial connection standard, the court reasoned that because the defendants sought out and maintained an ongoing contractual relationship with Foodmaker, they became joint tortfeasors in the instant case. The court also noted that because the allegedly deficient procedures were set forth in the contract between the defendants and Foodmaker, this forum contact bore a substantial relationship to the alleged injuries.

The court finally determined that the assertion of specific jurisdiction in the instant case was fair. Considering the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interests of judicial efficiency, and the shared interest of the several states in furthering fundamental substantive social policies, the court held that the defendants failed to demonstrate that the exercise of jurisdiction in this action would be unreasonable.

III. Criminal Law

- A. **Because the initiative version of the "three strikes" provision, Proposition 184, was substantively identical to the legislative version of the statute, Penal Code section 667, the legislature's definition of a prior felony conviction, which included out-of-state convictions, was applied to Proposition 184.**

People v. Hazelton, Supreme Court of California, Decided December 5, 1996, 14 Cal. 4th 101, 926 P.2d 423, 58 Cal. Rptr. 2d 443.

Facts. The defendant was charged with felonies in two separate complaints. The first complaint alleged that the defendant had suffered one prior felony conviction under Penal Code section 667, and the second complaint alleged that the defendant had suffered two prior felony convictions, one of which was an out-of-state conviction. Before these cases were adjudicated, Proposition 184, the initiative version of the three strikes law, was adopted and became operative. In response to the defendant's motion, the trial court ruled that under Proposition 184, the

defendant's prior out-of-state conviction could not be used for three-strike purposes. The court of appeal reversed and remanded.

Holding. Affirming the decision of the court of appeal, the supreme court concluded that the three strikes provisions in Penal Code section 667 and Proposition 184 were "virtually identical" and that section 667's definition of a prior felony conviction was applicable to Proposition 184. Because that definition included out-of-state convictions, the supreme court held that such convictions could be used for three-strike purposes.

B. Evidence of third party threats is admissible to support a self-defense claim if there is evidence that the defendant reasonably associated the victim with those threats.

People v. Minifie, Supreme Court of California, Decided August 29, 1996, 13 Cal. 4th 1055, 920 P.2d 1337, 56 Cal. Rptr. 2d 133.

Facts. The defendant was charged with two counts of assault with a deadly weapon and one charge of possession of a firearm by an ex-felon. At trial, the defense attempted to establish self-defense by introducing evidence that individuals, whom the defendant reasonably associated with the victim, had threatened him prior to the shooting incident. Additionally, the defense attempted to introduce evidence of the violent reputation of the individuals who made the threats. The court held the evidence inadmissible under California Evidence Code, section 1100. The court also noted that even if the evidence was found admissible under California Evidence Code, section 1100, it would have been excluded under California Evidence Code, section 352, because it would confuse the jury and consume too much time.

Holding. Affirming the decision of the court of appeal, the supreme court held that evidence of threats by those whom the defendant reasonably associated with the victim are admissible to establish a self-defense claim. In proving self-defense, a defendant is entitled to prove that he had a reasonable and honest fear for his life. Accordingly, the jury must consider evidence which reveals the defendant's state of mind at the time of the act. Therefore, the court concluded that the third party threats which the defendant associated with the victim and other relevant circumstances should be admitted. Further, the court held that evi-

dence of the violent reputation of the group associated with the victim should have been admitted because this is not character evidence being used to explain the victim's conduct, but instead is evidence establishing the defendant's state of mind.

While acknowledging a trial judge's discretion to exclude prejudicial evidence under California Evidence Code, section 352, the court held that the trial judge abused his discretion by excluding all the evidence relating to the third party threats. The court reasoned that the evidence was not outweighed by its prejudicial value because proving the defendant's state of mind is a key element of the defendant's self defense action.

While the court held the error was harmless as to the possession of a firearm charge, the court held the error prejudicial to the two assault charges because the excluded evidence was crucial to the self-defense claim.

- C. **A defendant cannot claim his right to effective council was violated when he was represented by an attorney who was on inactive status when the suspension resulted from noncompliance with mandatory continuing legal education (MCLE) requirements.**

People v. Ngo, Supreme Court of California, Decided October 24, 1996, 14 Cal. 4th 30, 57 Cal. Rptr. 2d 456.

Facts. On May 9, 1994, the defendant was charged with thirteen counts including second degree robbery, attempted robbery, false imprisonment, burglary, buying or receiving stolen property, and automobile theft; there were also allegations of a weapon use enhancement on some of the counts. Defendant plead no contest and the court agreed to sentence defendant to ten years in prison. At the sentencing hearing, the defendant expressed a desire to withdraw his plea and asked for new council. The trial court denied this request, and the ten year sentence was imposed. The defendant obtained a certificate of probable cause and appealed. The defendant argued that he received ineffective assistance of council because his attorney was put on inactive status by the state bar for failure to comply with MCLE requirements. The court of appeal

found that this constituted ineffective assistance of council and that there was a per se denial of the right to council. The court of appeal reversed the defendant's conviction. The Supreme Court of California granted the petition for review.

Holding. The supreme court reversed the opinion of the court of appeal holding that the council was not rendered ineffective when the attorney has been suspended for failure to comply with MCLE requirements. MCLE requires members of the bar to complete certain amounts of legal education in a specified time period. Failure to supply the bar with proof of this compliance will make an attorney inactive without a hearing.

Distinguishing this type of attorney suspension with other types that may result from attorney wrongdoing, the court reasoned that failure to comply with these requirements does not directly relate to the professional competence of the attorney. The court noted that noncompliance could result from simply failing to send in the appropriate paperwork, and therefore, the defendant was not prejudiced.

IV. Deed of Trust

California Civil Code section 2943 permits a seller to seek recovery of sums omitted from a payoff statement as an unsecured obligation under the principles of unjust enrichment.

Ghirardo v. Antonioli, Supreme Court of California, Decided October 31, 1996, 14 Cal. 4th 39, 924 P.2d 996, 57 Cal. Rptr. 2d 687.

Facts. The plaintiffs purchased real property from the defendants subject to two promissory notes. Following payment of the smaller note, the plaintiffs requested that the defendants make a demand for the balance of the obligation on the larger note. After the balance was paid, the defendants discovered that their request was understated and sought the additional sum from the plaintiffs. Thereafter, the plaintiffs filed this action contending that the notes were usurious. The superior court found for the plaintiffs. Furthermore, the court denied the defendants' cross-claim reasoning that the defendants were not entitled to a deficiency judgment because they had conveyed the deed of trust rather than proceed by way of judicial foreclosure. The court of appeal affirmed the superior court's decision. The California Supreme Court reversed, holding that the notes did not fall within the meaning of usury law. On remand, the court of appeal stated that the defendants could not recover

on the notes because under California Civil Code section 2943, amounts excluded are not collectible.

Holding. Reversing the court of appeal, the supreme court held that the defendants could recover under common law principles. Under the law of restitution, the supreme court found that a party may be required to make restitution if it unjustly retained a benefit at the expense of the other party. Thus, a party may recover for a mistake of fact where the unjustly enriched party would be receiving a windfall by the miscalculation of the debt.

While finding that the defendants could recover by restitution, the court held that the defendants could not recover under two alternate theories. First, the court held that a party cannot obtain a deficiency judgment unless the party first proceeds by judicial foreclosure. Second, the defendants could not recover under Civil Code section 2943, which incorporated the unjust enrichment theory, because it had not been enacted at the time of payoff and reconveyance. Thus, the same action today could be brought under this statute.

V. Healing Arts

Investigative subpoenas issued by the Medical Board of California while conducting an inquiry into physician misconduct are not "discovery" within the meaning of California Evidence Code section 1157, which provides that hospital peer review committee records are not subject to discovery.

Arnett v. Dal Cielo, Supreme Court of California, Decided October 3, 1996, 14 Cal. 4th 4, 923 P.2d 1, 56 Cal. Rptr. 2d 706.

Facts. Following three incidents in as many months, two nurses at Alameda Hospital reported to their supervisor that they suspected an anesthesiologist, "Dr. A," had been treating patients while under the influence of narcotics. Following the reports, the Hospital's Medical Executive Committee, a peer review body statutorily required to monitor the adequacy and quality of medical care, convened to address the matter.

Dr. A appeared before the committee and admitted to injecting himself with narcotics he had taken from the hospital's supplies. Dr. A requested a leave of absence for two months to attend an in-patient drug rehabilitation program. California Business and Profession Code section 805 requires that a peer review committee report to the Medical Board of California (the Board), the agency responsible for the licensing and discipline of physicians, whenever a physician takes a leave of absence following notice of an investigation into conduct likely to be detrimental to patient care. The hospital did not file such a report. Upon Dr. A's return, his privileges were severely limited. The hospital was also required to report this to the Board, but failed to do so.

Despite the hospital's failure to report the leave of absence and restricted privileges, a confidential informant notified the Board that Dr. A was addicted to narcotics and treated patients while under the influence. The hospital provided the investigator with some information but refused access to any peer review records. The investigator then served a subpoena duces tecum, issued pursuant to the Board's investigatory subpoena power, upon the hospital's chief executive officer seeking the peer review body's records concerning Dr. A. The hospital's chief executive officer, William Dal Cielo, refused to comply with the subpoena. The Board's executive director, Dixon Arnett, filed a petition for an order to enforce the subpoena. The hospital opposed the petition on the grounds that the records sought were immune from discovery under California Evidence Code section 1157, which protects peer review bodies' records from discovery. The trial court granted the petition and the court of appeal affirmed.

Holding. Reaching the same conclusion as the court of appeal, the supreme court affirmed on different grounds. The Board argued that discovery meant "the formal exchange of evidentiary information between parties to a pending adversary proceeding," while the hospital argued that it included subpoenas issued by administrative agencies for investigative purposes. The court of appeal reasoned that because the word "discovery" is susceptible to more than one reasonable interpretation extrinsic evidence should be considered. The supreme court rejected that approach, applying a different rule of construction. The court stated that although "plain meaning" is the general rule of construction, "when a word used in a statute has a well-established legal meaning, it will be given that meaning in construing the statute." The court stated that although discovery has the informal meaning of "finding something out by search or observation," the word also has the specific legal meaning advanced by the Board. The court reasoned that because the legislature knew of the specific legal meaning, as evidenced by its use in other areas of law, the specific legal meaning should prevail. The court also stated

that the legislature was aware of the distinction between discovery and the subpoena power. Therefore, the court concluded that because the investigatory subpoena was not discovery within the meaning of Evidence Code section 1157, the peer review body's records were not protected from the subpoena.

VI. Health & Safety

The Safe Drinking Water and Toxic Enforcement Act of 1986 is applicable to water stored in or run through household drinking water faucets as a "source of drinking water."

People ex rel. Lungren, Supreme Court of California, Decided December 9, 1996, 14 Cal. 4th 294, 926 P.2d 1042, 58 Cal. Rptr. 2d 855.

Facts. On November 4, 1986, the people of California adopted Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (hereinafter the Act). The Act provides that chemicals known to cause cancer or birth defects shall not be permitted to pass into any "source of drinking water." The Attorney General of California brought suit against sixteen manufacturers and distributors of drinking water faucets seeking injunctive relief and civil penalties for violations of the Act. The faucets manufactured and distributed by the defendants allegedly contained significant amounts of lead, which was known by the state to increase the risk of cancer and birth defects when released into water. The trial court sustained the defendants' demurrer, finding that water faucets were not sources of drinking water and were therefore not within the scope of the Act. The California Court of Appeal denied the Attorney General's request for a writ of mandate for the same reasons. The sole issue presented to the California Supreme Court was the meaning and scope of the phrase "sources of drinking water," and whether it included the faucets manufactured and distributed by the defendants.

Holding. The California Supreme Court held that the provisions of the Act were applicable to household drinking water faucets. The court first looked to the plain meaning of the statute to discern the intended meaning of "sources of drinking water." The definition of "source" in the

statute provides for two classifications. First, the regional water quality control jurisdiction includes lakes, rivers, creeks, and other bodies of water. Therefore, waters of all types that are considered "suitable for domestic or municipal use" are sources of drinking water under the Act. The second class of source includes "present sources of drinking water." The Attorney General successfully argued that this second classification included water that was part of the delivery system of the water supply, thereby covering the faucets themselves. The California Supreme Court next looked at the legislative purpose of the Act to determine the intended interpretation of sources of drinking water. The court found the primary purpose to be protection of the general public from chemicals that cause cancer, birth defects, and other reproductive harm. The ballot materials connected to the Act further evidence that in order to achieve this purpose, the Act was specifically designed to cover drinking water that comes through the faucet. Finally, the court noticed that the interpretation of the Health and Welfare Agency (HWA), the designated "lead agency," should be given adequate deference. However, HWA did not propose any definition for sources of drinking water, stating that the phrase was adequately defined within the statute. Therefore, the court concluded that the Attorney General was correct in applying the Safe Drinking Water and Toxic Enforcement Act to drinking water faucets as sources of drinking water.

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