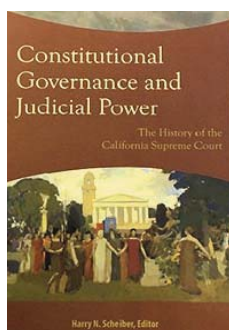


Constitutional Governance and Judicial Power: The History of the California Supreme Court



Edited by Harry N. Scheiber
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A history book on the California Supreme Court may sound like a volume headed for the back shelf of a law library or the bargain bin at Barnes and Noble, but the California Supreme Court Historical Society has published a comprehensive history of the court that is readable, educational, and enjoyable for lawyers and lay persons alike. Edited by Harry N. Scheiber, the Stefan A. Reisenfeld Professor of Law and History at the University of California

at Berkeley, *Constitutional Governance And Judicial Power: The History of the California Supreme Court* is co-written by

Scheiber and five other distinguished authors, each of whom focuses on a distinct period of the court.

In its early days of statehood, frontier California built new legal institutions combining American legal traditions with the laws and traditions of Mexico and the Californios who owned large land grants from Spain and Mexico in the early 1800s. Much of the early court's energy focused on reconciling the rights of the Californios with the demands for land by settlers and newcomers who were flocking to California. Among the newcomers were the Chinese whom white settlers viewed as competition for land and gold. Generally, the early court had a mixed record on racial issues. For example, a Chinese person could not testify against a white person in court; however, in 1857, the court ruled in *In re Archy* that a slave passing through California was free under the California Constitution. Nevertheless, Archy had to be returned to his owner in the South. The court also held that black children had the right to attend public schools, albeit segregated public schools.

During this important formative period, Justice Stephen Field sat as the chief justice from 1859 to 1863. He would later serve as a justice on the U.S. Supreme Court.

During that period, what was good for the railroads was good for the public. However, a populist revolt in response to the power of the railroads and the anti-immigrant sentiment against the Chinese led to the formation of the Workingmen's Party. The Workingmen's Party dominated the state constitutional convention in 1878 that adopted the California Constitution still in effect today (with about 480 amendments along the way). The convention delegates—progressive in many ways—were virulently racist against the Chinese and pushed for a government by and for white men. The supreme court was increased from five to seven with six of the seven justices holding membership in the Workingmen's Party.

The first 30 years of the court under the new California Con-

stitution were a time of dramatic social, economic, and demographic change in the state as the court worked its way through complex issues—railroads and water rights among the most prominent. In particular, the court sought to establish the right of the state to tax the railroads and found the railroad lawyers adept at avoiding taxation at the local level and, if necessary, seeking relief from the federal courts. In the case of *Santa Clara County v. Southern Pacific Railroad*,¹ the story goes that the railroads wanted the court to find that Fourteenth Amendment protections extended to corporations. Although the court declined to hear the argument, the finding was

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included in a headnote of the official reports. During this period, the court also affirmed a woman's right to access to employment and extended the law of torts by finding strict liability involving dangerous instrumentalities.

The period after the turn of the century was known as the "Progressive Era" as Governor Hiram Johnson and legislators enacted laws affecting employer-employee relations, property rights, and the power of corporations. The Progressives sought to reform the court—perceived as a tool of the Southern Pacific Railroad—by enacting the recall of judges. While the Progressives were not completely off base in their opinion of some of the justices, there were justices such as Frederick Henshaw who were known for their independence and intellectual abilities. In the 1920s, the Asian community was again the target of nativist laws as voters used the initiative process, recently obtained in the Progressive era, to enact a poll tax on alien men and to pass the Alien Land Law of 1920, closing loopholes of the 1913 law prohibiting the sale or leasing of property to the Japanese. Although the court found the poll tax to violate the Fourteenth Amendment, it upheld the Alien Land Law for the most part.

During the 1920s and 1930s, the supreme court focused on stability and reform and on establishing independence from the political arena. During the Depression, the court balanced the need for government regulation with a strained economy and demands of labor. In spite of a general hostility to labor, the court affirmed the right of workers to strike. The court, however, was less sympathetic to the right of workers to picket for a closed shop. Labor strikes brought before the court complicated the issues of speech and press and, in particular, the con-

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tempt powers of the court.

In the following period of the court, known as the “Gibson Era,” Chief Justice Phil Gibson presided over a court of monumental intellect confronted with sweeping economic, social, and demographic changes in the state. Among the associate justices was Roger Traynor, generally recognized as one of the great justices of the twentieth century. The Gibson court transformed the law of torts in the state, significantly easing the burden of proof in causation for certain tort plaintiffs and establishing the theory of product liability. The Gibson court also made significant progress in race relations knocking down racially restrictive covenants and ending segregation in unions. In particular, challenges to the Alien Land Law, used to exclude and marginalize persons of Japanese ancestry, were finally successful, and the court struck down the law.

The next period is called the “Liberal Court.” It began when Governor Edmund G. (“Pat”) Brown elevated Roger Traynor to chief justice and included the chief justice appointments of Donald Wright by Governor Ronald Reagan and Rose Elizabeth Bird by Edmund G. (“Jerry”) Brown, Jr. The liberal period from 1964 to approximately 1987 was marked by enormous political and social changes. During this period, the court faced challenges to housing discrimination and school segregation, forcefully establishing that neither de facto nor de jure racial segregation would be tolerated in California schools. The court split, however, on the issue of affirmative action with Justice Stanley Mosk’s writing for the majority that the University of California admissions policy amounted to a racial quota and thus violated the Fourteenth Amendment. Justice Mathew Tobriner, representing the countervailing view, took the position that a society cannot be completely colorblind in the short term if it is to have a colorblind society in the long term. In the law of torts, the liberal courts continued to expand upon the development in the law that were begun by Justice Traynor and the Gibson court. The court was generally lauded for expansion of the law of torts, and only when the chief justice was a woman were the critics calling the court “pro-plaintiff.”²

The court became a particular target of political criticism for its handling of the death penalty. It began in 1972 when the Wright court declared the death penalty unconstitutional in *People v. Anderson*,³ a decision that was overridden by a state ballot proposition led by Senator (later Governor) George Deukmejian and deputy attorney general (later Chief Justice) Ronald George. The death penalty became the lightning rod for conservatives to rally against the liberal court and, in 1984, was the catalyst for gubernatorial candidate Deukmejian to run against the liberal

court and successfully oust Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin—both appointed by Governor Jerry Brown—from the court. The morning after the election, the book recounts, Pete Belton, Justice Mosk’s longtime staff attorney, expressed the feeling around the court that they had been hit by a ton of bricks.

Shortly after the election, Malcom Lucas was nominated as chief justice and saw his task as restoring morale among court staff and removing the court from the political arena. At the same time, Justice Lucas set about moving the court in a more conservative direction in the area of criminal law and narrowing tort liability for insurers and corporations.

In 1996, Justice Lucas was succeeded by Ronald George who is known for his administrative accomplishments as well as his jurisprudence. California’s court system had grown to be the largest in the nation, and Chief Justice George set about unifying the administrative functions and the funding for California’s 220 courts. The George court was generally known for its pragmatic and centrist approach to the law. However, it was not without controversy, finding that the three-strikes law enacted by voters did not eliminate a judge’s discretion to strike a prior offense in the interest of justice and reversing a previous decision requiring parental consent

for a minor to have an abortion. In 2001, Justice Mosk, who had served 37 years on the supreme court, died in office. Carlos Moreno, the second Latino to serve on the court, was nominated to fill his seat.

This book is a worthwhile read not only for lawyers and legal historians but also for persons interested in California history and politics. The book is well-researched—even the footnotes are interesting. If there is a weakness in the book, it is the discussion of the liberal court period and the fallout after the defeat of Justices Bird, Grodin, and Reynoso. Scheiber’s discussion of the Wright and Bird tenures does not do justice to their accomplishments and their efforts to build on the jurisprudence established by the Traynor and Gibson courts. In addition, the success of the campaign against “Jerry’s judges” was a severe blow to the court that threatened judicial independence in California and across the nation. However, these criticisms do not diminish the accomplishments of Scheiber and the other contributors to this historical and informative book. Readers will reach for it for pleasure and information over and over again. ■

¹ *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886).

² *CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER* 383-85 (Harry F. Scheiber ed. 2016).

³ *People v. Anderson*, 6 Cal. 3d 628 (1972).