

## The California Judiciary

*David A. Carrillo*

### Introduction

The California judiciary is one of the three constitutional branches of the state government. This chapter provides an overview of the current state court system, its historical development, and its relationship with the other branches of state government and with the federal courts.

Why study state courts? While the federal courts can at times have a higher profile, the courts of the 50 states vastly outnumber their federal colleagues. Combined, the state high courts decide over ten thousand cases each year, far more than the federal courts, and in many of those cases the Supreme Court of the United States either declines to hear requests to review them, or has no jurisdiction to do so.<sup>1</sup> As a result, the state courts arguably have an overall greater effect on American jurisprudence, and an even greater effect on the citizens of their respective states. And due to the diversity among the state judicial systems, and their distinct differences from the federal high court, there is neither a typical state high court nor a typical role for those courts in the state and national arenas.<sup>2</sup> Conse-

---

<sup>1</sup> G. Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (Yale University Press, 1988) at 1.

<sup>2</sup> *Id.* at 2.

quently, studying the federal judiciary does not lead to a good understanding of the state courts. California is no exception, as its courts play a unique role in both the state government and, at times, on the national stage.

On a more fundamental level, why have state courts at all? Aren't they just junior branches of the national court system—preliminary stops that are necessary preludes to seeking review by higher federal courts? This common misconception could not be more wrong. A primary role of any governmental system is to provide a set of rules and a structure for enforcing them, and courts with neutral arbiters are an essential part of such a system. The federal courts cannot perform that role in a state government. The federal government is one of limited powers, while the states are plenary governments with primary responsibility for their citizens. As designed by the revolutionary founders, the American federal system is based on the concept of the states relinquishing some sovereignty to the federal government, but retaining a great measure of self-governance: "According to traditional legal theory, the state government inherently possesses all governmental power not ceded to the national government, and thus a state constitution does not grant governmental power but merely structures and limits it."<sup>3</sup>

Thus, rather than creating a strict judicial hierarchy, the relationship between the state and federal courts formed by our federal system instead is better characterized as a continuing dialogue, consistent with the principle of states as laboratories of democracy.<sup>4</sup> As a result, the courts of a citizen's state will have a far greater impact, on average, on one's daily life. True, when it applies federal law governs under the supremacy clause of the federal constitution, but federal courts are required to apply state law in cases with parties from different states, and respect for the principles of American federalism prevents federal courts from reviewing state high court decisions grounded on state constitutional provisions.<sup>5</sup> Consequently, unless a state high court's decision is expressly based on a provision of federal law, that decision is largely immune from review by the federal high court.

The state judiciary performs critical sovereign functions in California government:

It has exclusive responsibility for hearing and resolving criminal trials, a key component of the criminal justice system. It resolves civil actions brought by state government entities against private persons. It protects civil liberties from governmental encroachment by resolving suits brought by private persons against government. It resolves large numbers of purely private, civil disputes. Finally, by

---

<sup>3</sup> *Id.* at 50.

<sup>4</sup> *Id.* at 16 and 18-19.

<sup>5</sup> U.S. Const., Article VI, section 2 (federal law supreme); *Erie R.R. Co. v. Tompkins* (1938) 304 U.S. 64 (state law applied in diversity cases); *Michigan v. Long* (1983) 463 U.S. 1032 (adequate and independent state law ground).

virtue of its power of judicial review of legislative enactments and executive actions, the judiciary is the final word in interpreting the California Constitution.<sup>6</sup>

On a more practical level, state courts and agencies will handle your birth, your marriage, your house purchase and sale, your divorce and child custody, and your estate; if you are injured on the job or on the street, a state court will apply state law to determine liability and compensation; and most crimes you might commit will be adjudicated by state courts.<sup>7</sup> And despite the supremacy clause, state high courts do not always obediently follow decisions of the U.S. Supreme Court, at times refusing to read those decisions broadly, creating exceptions, or distinguishing them factually.<sup>8</sup>

California was organized and operated under its own constitution for almost a year before its entry into the Union as a state.<sup>9</sup> The California Supreme Court has the ultimate authority to interpret the state constitution as an organic charter of independent force and effect from the federal constitution.<sup>10</sup> This has significant implications for the policymaking function of our state high court. While the state constitution may not define rights at a level *below* the federal constitution (which due to the supremacy clause of the federal constitution sets the floor for all state constitutions), the California constitution may *exceed* the federal charter in, for example, protecting individual rights:

State high courts enjoy even more substantial policymaking opportunities through their power to provide the final interpretation of their own constitutions. State constitutions thus provide powerful means for achieving specific policy ends. For example, with state constitutional decisions, state high courts can even guarantee greater individual rights protections than those afforded under federal law. One study of equal protection cases indicated that decisions rooted in state law were *twice* as likely to strike down challenged policies as were federal-law decisions.<sup>11</sup>

---

<sup>6</sup> J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993) 66 S. Cal. L. Rev. 2209, 2209.

<sup>7</sup> Tarr and Porter, *State Supreme Courts in State and Nation* (Yale University Press, 1988) at 6-7.

<sup>8</sup> *Id.* at 13-15.

<sup>9</sup> The California constitution was adopted by vote of the people on November 13, 1849, and California was admitted to the Union as a state on September 9, 1850. Paul Mason, "Constitutional History of California," in *The Constitution 2011-12 Edition* (California State Legislature 2011) at 122-123.

<sup>10</sup> *People v. Hannon* (1977) 19 Cal.3d 588, 606 n.8; *People v. Longwill* (1975) 14 Cal.3d 943, 951 n.4.

<sup>11</sup> Staci L. Beavers and Craig F. Emmert, *Explaining State High-Courts' Selective Use of State Constitutions* (2000) *Publius: The Journal of Federalism*, Vol. 30, No. 3 at 2 (footnotes omitted).

Indeed, the California Supreme Court has rejected an initiative attempt by the voters to define individual rights as no broader than their interpretation by the U.S. Supreme Court.<sup>12</sup>

As noted above, the state high court can protect its constitutional decisions from potential U.S. Supreme Court review by basing a decision on the state rather than the federal constitution.<sup>13</sup> But this power of state high courts is a two-edged sword. While at times some courts may be eager to enter the policymaking realm, others may take the opposite, conservative approach to expanding state constitutional rights and point to federal limitations to avoid being held politically responsible.<sup>14</sup> Aside from policy considerations, the political culture of the time also can affect the degree of enthusiasm for relying on state constitutional law. Over the history of the country, interest in state constitutions has waxed and waned, with highs in the revolutionary, pre-Civil War, and post-1970 periods. California currently is in a period of a resurgence of interest in the state constitution, which began in 1974 when the state constitution was amended to add a provision on the independence of the state's constitutional liberties from any federal guarantees.<sup>15</sup>

In an ongoing process of refining the state court system, the California judiciary has undergone numerous structural changes and revisions during its history. Since the creation of the state courts with the adoption of the first California state constitution in the election of November 13, 1849, nearly every aspect of the courts has been changed, including their number, composition, and jurisdiction. The fact that the state court system has undergone such a long and complex series of changes does not mean that it was wrong from the beginning, or that any one set of changes was for naught. On the contrary, the historical development of the state judiciary is a typical example of American experimentation with democratic governance systems. As with many aspects of republican government, most of the major debates over structure and policy have always been with us, because they are intrinsic to our governmental system. Consequently, governance in the American republican system is one of ongoing examination, both to refine existing systems and to adapt them to changing circumstances.

The state judiciary is not exempt from that dynamic, as it is framed by a number of competing policy alternatives, known as value sets. Its structural debates concern, among other things, questions about whether judges should be elected or appointed, whether many or few kinds and levels of courts is best, and how to optimally exercise the power of judicial review. Valuing one alternative over another

---

<sup>12</sup> *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 355 (holding that Proposition 115, related to new Article I, section 24, was an invalid revision of the California constitution); John H. Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998) 61 Alb. L. Rev. 1461, 1472.

<sup>13</sup> See *Michigan v. Long* (1983) 463 U.S. 1032.

<sup>14</sup> Staci L. Beavers and Craig F. Emmert, *Explaining State High-Courts' Selective Use of State Constitutions* (2000) *Publius: The Journal of Federalism*, Vol. 30, No. 3 at 2.

<sup>15</sup> Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years* (2004) 31 *Hastings L. Q.* 141, 161.

reflects a decision to value a particular policy goal, and one choice is not necessarily better or worse than the other; it simply is a matter of making a policy choice, as the competing values are to a great extent mutually exclusive. For example, appointed judges are likely to be more independent, but less accountable; the reverse is true for elected judges, who are more accountable but tend to be less independent. For the policymaker, the question is whether to value independence or accountability more highly, as both cannot be maximized simultaneously. Thus, the continual changes to the judicial branch of state government reflect two dynamics: the need to react to changed circumstances, and new policy decisions.

Naturally, politics plays a role in decisions about the best design for a system of resolving legal disputes, and political considerations might at times force a policy choice that may seem objectively suboptimal. In the experience of the recent past, California political events have directly and indirectly affected the judiciary in significant and occasionally dramatic ways. For example, the nondiscretionary state budget spending mandates set by voter initiatives have an ongoing indirect effect on the judiciary, as policy decisions made by initiative do on every aspect of state government. At times the state legislature has threatened or actually enacted major cuts in the judicial branch budget.<sup>16</sup> And the state courts have sometimes caused political turmoil, as the state high court in particular historically has not shown reluctance in confronting issues of major political and social significance.<sup>17</sup> It is difficult to assess these events as successes or failures, as one person's political blunder is another's brilliant policy achievement.

So far it may seem as if the state courts are opaque and that studying them is less than exciting, but the California judiciary has a few tales to tell. In 1857, California Chief Justice David S. Terry was sent by the governor to meet with the San Francisco vigilance committees. While there, Terry stabbed a vigilante in the neck with a Bowie knife; Terry then was kidnapped, imprisoned, tried, and convicted by the vigilance committee—but not for murder, as the victim recovered.<sup>18</sup> Terry

---

<sup>16</sup> Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power* (2001) 76 N.Y.U. L. Rev. 1601, 1612-1613; John H. Culver, *The Transformation of the California Supreme Court: 1977-1997* (1998) 61 Alb. L. Rev. 1461, 1487-1488; California Supreme Court press release June 28, 2012, "Chief Justice Issues Statement in Response to the 2012-2013 Budget Act"; Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1364. The threat by the legislature was in response to the California Supreme Court decision in *Legislature v. Eu* (1991) 54 Cal.3d 492, upholding voter-initiated legislative term limits. J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993) 66 S. Cal. L. Rev. 2209, 2215. See also J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 497, noting that the state judiciary may have "residual power" to order state budget expenditures.

<sup>17</sup> John H. Culver, *The Transformation of the California Supreme Court: 1977-1997* (1998) 61 Alb. L. Rev. 1461, 1462 and n.8 ("deep-rooted, activist history") and n.9.

<sup>18</sup> Dear and Levin, *Historic Sites of the California Supreme Court* (2000) California Supreme Court Historical Society Yearbook Vol. 4 at 70 n.31.

later served in the Confederate States Army during the Civil War, and otherwise led an interesting life:

David Terry [] was elected to the court as a candidate of the Know-Nothing Party in 1855, and became chief justice in 1857. A pro-slavery southerner and a person of volatile temperament, he left the court in 1859 after losing out to Stephen Field for re-election as chief justice, and achieved infamy by killing United States Senator David Broderick in a duel. Terry himself was killed by Field's bodyguard on board a train, after Terry allegedly attacked Field.<sup>19</sup>

Chief Justice Hugh C. Murray was another pro-slavery, hot-tempered man, who in 1853 reportedly drew a Bowie knife on an abolitionist and chased him around a San Francisco ballroom, and later assaulted another abolitionist in Sacramento with a club.<sup>20</sup> The court's seventh reporter of decisions, one Harvey Lee, was apparently bad enough at his job that the court attempted to have him sacked.

This [led] to a bitter feeling on [Lee's] part toward the judges, and in a conversation with Mr. Fairfax, the clerk of the court, [Lee] gave vent to it in violent rage. Fairfax resented the attack, an altercation ensued, and Lee, who carried a sword cane, drew his sword and ran it into Fairfax's body, inflicting a serious wound in the chest just above the heart. A second wound, not so serious as the first, followed, and Fairfax drew his pistol as Lee raised his sword for a third thrust. He was about to shoot, but restrained by the thought of Lee's wife and children, let the pistol drop.<sup>21</sup>

Even the location of the state high court was controversial. In 1854 the state legislature decided on Sacramento as the seat of state government, and directed the state Supreme Court to relocate there from San Francisco. Not only did the justices refuse to move to Sacramento, they decided that San Jose should instead be the state capital and moved the court there. The legislature again directed the court to move to Sacramento in 1872, but soon after the court again ignored the legislature and returned to San Francisco. Finally, the 1878 state constitutional convention decided against requiring the justices to remain in the state capital permanently, apparently due in part to feelings that the climate and whiskey in Sacramento were bad.

Colorful history aside, there can be no doubt that the California courts, and particularly the state Supreme Court, have long had great national significance. This is so because of both size and prestige.

---

<sup>19</sup> Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years* (2004) 31 *Hastings L. Q.* 141, 144.

<sup>20</sup> *Ibid.*

<sup>21</sup> Dear and Levin, *Historic Sites of the California Supreme Court* (2000) California Supreme Court Historical Society Yearbook Vol. 4 at 70 n.31.

The California judiciary is the largest judicial system nationwide—larger than the entire federal judiciary combined.<sup>22</sup> Some of the California appellate districts are larger by population than entire states of the Union with their own full court systems.<sup>23</sup> For many years California courts have been pathfinders on the big issues. True, there is no official ranking order of state high court prestige, so it cannot be said that “everyone always” looks to California to see what its courts think.<sup>24</sup> But the California Supreme Court has long been, and continues to be today, the most “followed” state high court.<sup>25</sup> And it often has been the case that California decisions influenced the national discussion on an issue.<sup>26</sup>

California courts were the first to establish a number of major legal principles that ultimately became the law of the land after those principles were adopted by the U.S. Supreme Court. The California Supreme Court was the first to decide that prohibiting interracial marriage was unlawful,<sup>27</sup> and that women have a right of procreative choice.<sup>28</sup> The state high court held, before the federal high court did, that alienage is a suspect class.<sup>29</sup> The California Supreme Court decision that race-based college admissions should be unlawful resulted in a U.S. Supreme Court decision that framed the law on that issue for decades.<sup>30</sup> Similarly, a California decision on free speech in privately owned public spaces prompted a federal high

---

<sup>22</sup> *The Supreme Court of California* (2007 edition, updated April 2012) at 1. California is variously described as having either the largest judicial system in the nation, J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 *Hastings L. J.* 433, 502-503, or in the Western world, Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 *N.Y.U. L. Rev.* 1345, 1345 and 1352.

<sup>23</sup> “The least populous [California appellate] district would be more populous than any of the following states: New Mexico, Utah, Maine, Rhode Island, Hawaii, New Hampshire, Idaho, Montana, South Dakota, North Dakota, Delaware, Nevada, Vermont, Wyoming, Alaska.” Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 *UCLA L. Rev.* 167, 194 n.94 (based on 1971 census data).

<sup>24</sup> Tarr and Porter, *State Supreme Courts in State and Nation* (Yale University Press, 1988) at 32-33 (observing that, while there is no overall national “pecking order” of prestige for state supreme courts, decisions of the California Supreme Court are cited “far in excess of what might have been predicted”).

<sup>25</sup> See generally Jake Dear and Edward W. Jessen, “Followed Rates” and *Leading State Cases, 1940–2005* (2007) 41 *UC Davis L. Rev.* 683.

<sup>26</sup> Some may argue that the California Supreme Court decision in *Strauss v. Horton* (2009) 46 *Cal.4th* 364, upholding an initiative constitutional amendment banning same sex marriage, was a reversal of the court’s long tradition of being a leader on major social issues. As this chapter is being written, the U.S. Supreme Court has heard argument on a writ of certiorari in a case challenging that state constitutional provision, in *Perry v. Brown* (9th Cir. 2012) 671 *F.3d* 1052, cert. granted December 7, 2012, No. 12-144, *sub nom. Hollingsworth v. Perry*,—U.S.—, 2012 WL 3134429.

<sup>27</sup> *Perez v. Sharp* (1948) 32 *Cal.2d* 711; *Loving v. Virginia* (1967) 388 U.S. 1.

<sup>28</sup> *People v. Belous* (1969) 71 *Cal.2d* 954; *Roe v. Wade* (1973) 410 U.S. 133.

<sup>29</sup> *Purdy & Fitzpatrick v. State* (1969) 71 *Cal.2d* 566.

<sup>30</sup> *Bakke v. Regents of Univ. of Cal.* (1976) 18 *Cal.3d* 34; *Regents of the Univ. of Cal. v. Bakke* (1978) 438 U.S. 265.

court decision defining the law on that issue.<sup>31</sup> The California Supreme Court decision prohibiting excluding prospective jurors based on their race was substantially followed by the U.S. Supreme Court.<sup>32</sup> The California high court sparked a nationwide wave of courts abolishing sovereign immunity for municipalities,<sup>33</sup> and another wave two years later of courts adopting strict liability in defective product cases.<sup>34</sup> The state high court was the first to allow limited bystander recovery for negligent infliction of emotional distress,<sup>35</sup> and it first recognized the duty of a mental health professional to warn of the reasonably foreseeable danger posed by a patient.<sup>36</sup>

## Current Organization

### The Judiciary Is an Independent Constitutional Branch of State Government

A judiciary is an essential part of the American republican system of government, which is based on the concept of divided powers. To preserve liberty, governmental power is divided into three distinct elements: a general assembly, the executive, and the judiciary. In such a system of divided governmental powers, there must be a body with a final say—paralysis results if each branch of government has an equal veto. A judiciary is the best place for that final veto for two reasons: because it (in theory) is the most impartial and intellectually disciplined branch, and because it is the least dangerous branch due to its limited power to effectively enforce its judgments.<sup>37</sup> For example, while the state judiciary may in

---

<sup>31</sup> *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, affirmed *sub nom. PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74.

<sup>32</sup> *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

<sup>33</sup> Tarr and Porter, *State Supreme Courts in State and Nation* (Yale University Press, 1988) at 35, citing *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211.

<sup>34</sup> Tarr and Porter, *State Supreme Courts in State and Nation* (Yale University Press, 1988) at 38-39; see *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57.

<sup>35</sup> Jake Dear and Edward W. Jessen, “Followed Rates” and *Leading State Cases, 1940–2005* (2007) 41 UC Davis L. Rev. 683, 708 (citing *Dillon v. Legg* (1968) 68 Cal.2d 728, which “has been followed twenty times, more than any other opinion from any other state jurisdiction since 1940”).

<sup>36</sup> Jake Dear and Edward W. Jessen, “Followed Rates” and *Leading State Cases, 1940–2005* (2007) 41 UC Davis L. Rev. 683, 708 (citing *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, which “has been followed by seventeen out-of-state decisions and, like *Dillon*, is still relied upon and followed today”).

<sup>37</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 829-830; Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1346, citing Alexander Hamilton, *The Federalist* No. 78 (“the general liberty of the people can never be endangered from that quar-



theory have the power to order state budget appropriations to preserve a constitutional mandate (such as a core judicial branch function), as a general rule the courts must rely on bare respect for their judgments to expect such a ruling to be heeded, as the alternatives for compelling compliance are not favorable.<sup>38</sup> To maintain that respect and ensure credibility in its decisions, the judiciary must have both institutional independence to maintain the balance of power between the branches and decisional independence to ensure that each case reaches a just result.<sup>39</sup> This dual conception of judicial independence is not a recent development. Indeed, it was the early state high courts that first developed the concept of judicial review and the judicial power to declare laws unconstitutional.<sup>40</sup>

### Current State Court Structure and Composition

American law is based on the English common law system, in which judges are not limited to using only the laws enacted by a legislature, and courts can decide cases using judicially developed legal doctrines.<sup>41</sup> There are broad subject area divisions within substantive American law, such as civil, criminal, administrative, and admiralty. Within those subjects are specific subdivisions; for example, civil law includes property and torts, while criminal law includes subfields for capital punishment and habeas corpus. In the American common law system, courts can have jurisdiction over different kinds of cases. For example, a court's jurisdiction may be defined by subject matters (criminal or civil), or between levels or kinds of jurisdiction (general, appellate, discretionary review, original jurisdiction).

There are two basic types of courts in California: trial and appellate. A trial court considers evidence, finds facts, and is bound to apply the law according to precedent as established by decisions of the appellate courts. An appellate court applies the law to the facts found by the trial court and can create precedential decisions when interpreting the law.<sup>42</sup> Stated broadly, the state trial and appellate

---

ter") and 1365 ("We work with words and persuasion, not with the power to appropriate or legislate").

<sup>38</sup> See J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 497; Robert F. Williams, *State Constitutional Law Processes* (1983) 24 Wm. & Mary L. Rev. 169, 211.

<sup>39</sup> See Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1349-1350.

<sup>40</sup> Robert F. Williams, *State Constitutional Law Processes* (1983) 24 Wm. & Mary L. Rev. 169, 207.

<sup>41</sup> Note that the common law is not the only kind of legal system. For example, European courts generally derive from a civil law system with origins in the Napoleonic Code.

<sup>42</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 831.

bodies are courts of general jurisdiction, in that they are not restricted to considering only certain subject matters.

Courts generally observe some restrictions on the kinds of cases they can hear. For example, the “case or controversy” language in Article III of the federal constitution limits the jurisdiction of the federal courts to contested disputes, and so federal courts will not issue advisory opinions.<sup>43</sup> Conversely, many state constitutions require their high courts to render advisory opinions when asked by state officials.<sup>44</sup> The California Constitution is silent on the issue, and the courts of this state follow a rule (similar to the federal courts) of not issuing advisory opinions.

As described below, the state constitution currently provides for three courts: a Supreme Court, courts of appeal, and superior courts. Generally a legal action begins at the trial level in the superior courts, which sit in each of the state’s 58 counties. Challenges to superior court decisions are heard in the courts of appeal, which sit in six appellate districts around the state. Parties seeking to challenge a court of appeal decision may petition for review in the state Supreme Court.

### *Supreme Court of California*

The Supreme Court of California is the state’s highest court, and its primary function is to guide and harmonize the development of the state law.<sup>45</sup> The court consists of a Chief Justice and six associate justices, who are initially appointed by the governor after confirmation by the Commission on Judicial Appointments, and who stand for retention election to 12-year terms at the first gubernatorial election after appointment.<sup>46</sup> Since 1923 the court’s chambers have been on Civic Center Plaza in San Francisco.<sup>47</sup>

The California Supreme Court is an appellate court of primarily discretionary review, hearing cases that present novel issues of great public significance, or conflicts between decisions of the courts of appeal.<sup>48</sup> Because the court has considerable discretion over what cases it reviews, the court generally hears only cases to settle important questions of law and to ensure that the law is applied uniformly in

---

<sup>43</sup> *Clinton v. Jones* (1997) 520 U.S. 681, 700 and n.33.

<sup>44</sup> Robert F. Williams, *State Constitutional Law Processes* (1983) 24 Wm. & Mary L. Rev. 169, 212.

<sup>45</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 451.

<sup>46</sup> Cal. Const., Article VI, section 2; *The Supreme Court of California* (2007 edition, updated April 2012) at 2.

<sup>47</sup> Dear and Levin, *Historic Sites of the California Supreme Court* (2000) California Supreme Court Historical Society Yearbook Vol. 4 at 63; *The Supreme Court of California* (2007 edition, updated April 2012) at 3.

<sup>48</sup> Cal. Rules of Court, Rule 8.500 subdivision (b); see also J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 450. The California Supreme Court does have some original jurisdiction, and its docket is not entirely discretionary. The best example of this is the capital cases, as the court is required to review every verdict that imposes a judgment of death.

the six appellate districts.<sup>49</sup> Decisions of the California Supreme Court are binding on all inferior state courts; only the state Supreme Court itself may decline to follow one of its previous decisions; and its opinions on state law are dispositive for federal courts deciding state law claims.<sup>50</sup>

Unique among the courts of the state, the high court has a policymaking function.<sup>51</sup> This is so partly because of the countermajoritarian function of a court with the power of judicial review. Judicial review is the power of a court to invalidate a legislative act (or in California, an act of the electorate) on constitutional grounds.<sup>52</sup> This may be viewed as countermajoritarian because it thwarts the people's will in either instance. But the state constitution is an enactment of the full measure of the people's political sovereignty, and a legislative or electorate action is only a subpart of that power. Thus, in this context the court is better viewed as following the *supreme* expression of the people's will in the state constitution to prevent a contrary and lesser act.<sup>53</sup>

The California Supreme Court has appellate jurisdiction over civil and criminal cases heard by the courts of appeal.<sup>54</sup> Appellate review by the court is primarily discretionary, on granting a petition for review of an appellate decision.<sup>55</sup> The court has original jurisdiction over habeas corpus and extraordinary relief peti-

---

<sup>49</sup> *The Supreme Court of California* (2007 edition, updated April 2012) at 2.

<sup>50</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 170-171.

<sup>51</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 831; Staci L. Beavers and Craig F. Emmert, *Explaining State High-Courts' Selective Use of State Constitutions* (2000) *Publius: The Journal of Federalism*, Vol. 30, No. 3 at 1-2; Tarr and Porter, *State Supreme Courts in State and Nation* (Yale University Press, 1988) at 49 and 50-51 (noting that the greater length of a state constitution and broader coverage of its provisions contributes to the greater participation by a state supreme court in determining the ultimate policy of the state).

<sup>52</sup> *Marbury v. Madison* (1803) 5 U.S. 137, 177 ("It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472 (the legislature has power to enact laws but the interpretation of those laws is an exercise of the judicial power assigned by the constitution to the courts); *Marin Water & Power Co. v. Railroad Commission* (1916) 171 Cal. 706, 711-712 (judicial function is to declare the law).

<sup>53</sup> Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1351 n.20.

<sup>54</sup> Cal. Const., Article VI, sections 10 and 11; J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 450.

<sup>55</sup> Cal. Const., Article VI, section 12(b). There are some important exceptions, such as where a party has a right to Supreme Court review in judgments of death and decisions of the state Public Utilities Commission. Cal. Const., Article VI, section 11(a). The California Supreme Court also may review decisions of the state Commission on Judicial Performance and decisions of the State Bar of California. *The Supreme Court of California* (2007 edition, updated April 2012) at 2.

tions.<sup>56</sup> Because the court's original jurisdiction also is discretionary, as a general matter the court has near-complete control over its docket.<sup>57</sup> On average, the California Supreme Court issues between 105 and 115 opinions each year.<sup>58</sup> According to the most recent statistical report on statewide caseloads, in 2011 there were 10,145 total filings in the Supreme Court, and of those total filings 4,999 were petitions for review, 176 of which were granted (a 4% grant rate), and the court issued 98 opinions.<sup>59</sup>

The state high court exercises its discretionary jurisdiction by granting or denying a party's petition for review. A decision by the court to deny a petition for review in a case has no legal meaning, other than that a majority of four justices did not vote for a hearing: "The decision of such refusal is no greater than this—that this court does not consider that the interests of justice, or the purposes for which the power [to grant a hearing] was given, require its exercise in the particular case."<sup>60</sup> On the other hand, when a petition for review is granted, that action automatically vacates the lower appellate opinion.<sup>61</sup> Due to the volume of appellate decisions, and the court's limited capacity, on average the court grants less than 5% of the review petitions it receives each year, and overall it reviews only a very small portion of all appeals decided—less than 1%.<sup>62</sup> Thus, the court of appeal decision will be final in almost every case.<sup>63</sup>

Is this the best use of a state high court? Or should it have a greater error correction function, reviewing a higher volume of inferior appellate opinions rather than choosing the best cases to shape the law? One view is that the high court must have control to keep its docket small and best serve its primary function of guiding and harmonizing the development of the law.<sup>64</sup> There also is a practical limitation: with the membership of the state high court remaining static at seven justices, its decisionmaking capacity stays comparatively fixed against the ever-rising tide of

---

<sup>56</sup> Cal. Const., Article VI, section 10.

<sup>57</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 450.

<sup>58</sup> *The Supreme Court of California* (2007 edition, updated April 2012) at 1.

<sup>59</sup> Judicial Council of California, *2012 Court Statistics Report* at 5, 7, 8, 13.

<sup>60</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 173, quoting *People v. Davis* (1905) 147 Cal. 346, 350.

<sup>61</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 175 (review grant renders the court of appeal opinion of no more significance than if it had not been written).

<sup>62</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 439 and 451 (on figures for 1991 to 1992). The figures are similar for the most recent 10-year period, 2001-2011. Judicial Council of California, *2012 Court Statistics Report* at 5, 7, 8, 13.

<sup>63</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 439-40; Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181-182.

<sup>64</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 451.

decisions from courts of appeal that have no real limit on their expansion. This reality may explain the court's use of decertification of inferior appellate opinions as a way of maintaining some quality control over the cases it lacks capacity to review in full.<sup>65</sup> These facts also mean that as the volume of opinions produced by the courts of appeal increases, "the probability that a given petition for hearing will be granted by the Supreme Court inexorably decreases."<sup>66</sup> This dynamic also tends to increase the power of the courts of appeal, as their decisions are increasingly certain to be not only the final word in a given case, but also determinative of the law.<sup>67</sup>

In addition to its responsibility to adjudicate cases, the state high court has other responsibilities that traditionally have been viewed as judicial powers, and which in California have been assigned to the judiciary by the state constitution. The California judiciary, like that of many states, has authority over rules of practice and procedure for the courts. It also controls the admission to practice and discipline of attorneys in the state bar.<sup>68</sup> The state constitution also gives the Chief Justice significant administrative responsibility.

Since the 1970s the California high court has diversified its membership. Governor Jerry Brown appointed the court's first woman and its first female Chief Justice (Rose Bird), the first African-American man (Wiley Manuel), and the first Hispanic justice (Cruz Reynoso); Governor George Deukmejian appointed the first Asian-American woman (Joyce Kennard); Governor Pete Wilson appointed the first Asian-American man (Ming Chin) and the first African-American woman

---

<sup>65</sup> Cal. Const., Article VI, section 13; Cal. Rules of Court, Rule 8.1105. See J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 454. The decertification of appellate opinions is discussed below.

<sup>66</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181-182.

<sup>67</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 439-440 ("Only a very small percentage of decisions by the court of appeal are reviewed by the supreme court,[] and as a practical matter, the court of appeal ends up being the court of last resort in the overwhelming majority of cases"); see Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181-182.

<sup>68</sup> Cal. Const., Article VI, section 9; *Jacobs v. State Bar* (1977) 20 Cal.3d 191, 196 and 198 (power over attorney admission and discipline is held exclusively by the Supreme Court and the State Bar acting as its administrative arm); *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710 (following State Bar Act amendment in 1951 Supreme Court is sole judicial entity with jurisdiction over attorney discipline under Bus. & Prof. Code sections 6087, 6100); see also Robert F. Williams, *State Constitutional Law Processes* (1983) 24 Wm. & Mary L. Rev. 169, 210 (attorney admission and discipline claimed as inherent judicial power in addition to constitutional grant of authority limiting legislative power).

(Janice Rogers Brown); and Governor Arnold Schwarzenegger appointed the first female Asian-American Chief Justice (Tani Cantil-Sakauye).<sup>69</sup>

### *Courts of Appeal*

The California Courts of Appeal form the state's inferior appellate court. The basic structure of these appellate courts is similar to the federal judicial system, wherein the nation is divided into a number of geographic circuits each with its own appellate court, denominated for example as the Ninth Circuit Court of Appeals. In California, a court of appeal has jurisdiction in each of six different geographic areas known as districts.<sup>70</sup> The courts of appeal have appellate jurisdiction in all cases over which the superior courts have original jurisdiction, and original jurisdiction in habeas corpus, mandamus, certiorari, and prohibition proceedings.<sup>71</sup>

The review responsibility of the courts of appeal is essentially the opposite of the state high court—while most of the high court's cases are taken on discretionary review, the courts of appeal mainly handle nondiscretionary appeals where the parties have a right to demand review of the trial court decision.<sup>72</sup> Decisions of the courts of appeal are binding on the state trial courts; the courts of appeal are bound by California Supreme Court decisions; and court of appeal opinions on state law are not dispositive for federal courts deciding state law claims.<sup>73</sup> When there are conflicting decisions from more than one district, one district is not bound to follow the law of another, and the trial courts must choose which of the conflicting decisions to follow.<sup>74</sup>

The courts of appeal sit in panels of three justices on each case, and unlike the federal courts there is no provision for en banc review by a larger panel.<sup>75</sup> Why

---

<sup>69</sup> John H. Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998) 61 Alb. L. Rev. 1461, 1483-1484.

<sup>70</sup> Cal. Const., Article VI, section 3; see Map 1.

<sup>71</sup> Cal. Const., Article VI, sections 10 and 11(a); J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 439.

<sup>72</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 440.

<sup>73</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 177.

<sup>74</sup> While the rule is that a court of appeal decision is binding on all trial courts, in practice a trial court likely will follow the court of appeal in its district. Eisenberg et al., *Cal. Practice Guide: Civil Appeals & Writs* (The Rutter Group 2005) ¶ 14:195, p. 14-72 (trial court can choose between on point and conflicting court of appeal decisions; even adopting the position taken by another district over a decision from its own district; as a practical matter, trial courts usually adhere to the decisions from their own districts), citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 n.4; see also 9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, § 933, p. 971 (as a practical matter trial court will ordinarily follow an appellate opinion from its own district, but is not required to).

<sup>75</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 441.

should an appeal be heard by more than one judge, and how many should sit on the panel? Having several independent judges working together to review a lower court decision helps to ensure a just resolution of the appeal.<sup>76</sup> One expression of this concept is the Condorcet jury theorem, which essentially posits that the more people voting on an issue the more likely it becomes that the majority decision is correct. So why is it that the number of cases a court hears decreases at the higher levels, but the number of judges increases?

### *Superior Court*

The superior court is the state's trial court, and it sits in each of the 58 counties in the state, denominated for example as the Superior Court of California, County of San Francisco.<sup>77</sup> The superior courts primarily make factual findings (either by judge or jury), apply those facts to the law (statutes, cases, or rules), and enter judgments. These trial courts are bound to follow the law as it is interpreted by the courts of appeal and the state and federal high courts. When there are conflicting court of appeal decisions, the trial court must decide which to follow, and the trial court need not follow the case decided in its own appellate district.<sup>78</sup>

Depending on the size of the county, there may be some subdivisions within the superior court in that county. In a less-populous county, such as Alpine, there may be a single courthouse with two judges who divide all the cases between them. San Francisco, on the other hand, has several divisions (civil, criminal, juvenile, etc.) that each may be further subdivided; for example, the civil division has departments devoted to law and motion, complex civil, and asbestos litigation. A superior court may also have an appellate division, with jurisdiction to hear appeals from misdemeanor convictions, judgments in limited civil cases (those with small amounts in controversy), and small claims decisions.<sup>79</sup> The possibility of further appeal in such cases is restricted, as decisions of the appellate division generally are not appealable.<sup>80</sup>

### **Administrative Organization**

The judicial branch is self-governing. In 1926 the state constitution was amended to establish a Judicial Council as the self-governing body of the state courts.<sup>81</sup> The council is empowered to adopt rules for court administration, prac-

---

<sup>76</sup> *Id.* at 484.

<sup>77</sup> Cal. Const., Article VI, section 4.

<sup>78</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 184.

<sup>79</sup> Cal. Const., Article VI, section 4.

<sup>80</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 439.

<sup>81</sup> Cal. Const., Article VI, section 6; William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 176.

tice and procedure.<sup>82</sup> Its internal administrative functions are performed by the Administrative Office of the Courts, which implements the council's policies and administers court system operations.<sup>83</sup>

There are 451 courthouses in the state.<sup>84</sup> The judicial branch now owns and manages all of the state's courthouses—but this is a recent development, as the process of transferring those assets from the state and counties to the judiciary only began in 2002.<sup>85</sup>

The appellate courts are assisted by judicial staff attorneys. In the California Supreme Court, there are several groups of staff attorneys: the civil, criminal and capital central staffs, and the staff attorneys in the chambers of the individual justices. Similarly, in the courts of appeal, there are central and chambers staff attorneys. There are varying views of the role of these judicial staff attorneys. One view is that the appellate courts, particularly the state high court, simply could not function as currently constituted without the assistance of staff attorneys due to the volume of work those courts handle.<sup>86</sup> Another view is that the staff attorneys form a powerful “shadow court” that can unduly influence the judicial function.<sup>87</sup> Certainly there is a powerful practical consideration at play. Justices of the Supreme Court might have only 200 or so working days a year—and given that the court in recent years has issued approximately 100 written opinions per year, that would require the justices to issue an opinion every other day.<sup>88</sup> At the very least this means that there is only so much work that the justices themselves can do, and that the court cannot produce many more opinions than it already does.<sup>89</sup> It may

---

<sup>82</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 834.

<sup>83</sup> Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1357.

<sup>84</sup> *Id.* at 1359.

<sup>85</sup> *Id.* at 1359-1360.

<sup>86</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L.J. 433, 442 and 452 (noting that preparing a single capital case for consideration by the justices can occupy a staff attorney full time for six to nine months); Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 826 and n.47.

<sup>87</sup> See, e.g., Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 821 and 850.

<sup>88</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 177 (yearly maximum of 210 working days for Supreme Court justices); Judicial Council of California, *2012 Court Statistics Report* at 13 (data from fiscal years 2001-02 through 2010-11).

<sup>89</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181.



also mean that, unless fewer cases are to be resolved or a long backlog is to be tolerated, the justices *must* have the assistance of their staff attorneys.

### Historical Development of the State Courts

Why do the courts separate the trial (fact finding) and appellate (review) functions? Why should trial court judgments be appealable at all? The federal constitution does not require that the states provide for appeals of judgments—but every state does.<sup>90</sup> The traditional wisdom gives three reasons for appellate review: to correct errors, to maintain uniformity in the law, and to satisfy the public's demand for justice.<sup>91</sup> Consider whether the judiciary could be made more efficient if avenues for appeal were more limited than they are, and how best to balance the cost-benefit analysis between ensuring a just result and reducing transaction costs.

How many courts—levels and kinds—should we have? One view is that having many courts is a characteristic of an “immature” legal system, and that a state needs only three: a trial court with statewide general jurisdiction, a local court for resolving minor disputes, and an appellate tribunal to review questions of law.<sup>92</sup> On that view, the California Supreme Court is superfluous. Certainly it is true that in California the trend has been “from the complex to the simple, from the multiple to the unitary.”<sup>93</sup> But it need not be so. Although they may be paragons of legal wisdom and learning, not every judge can be an expert in every legal field. This leads of necessity to subdivisions even within the unified trial courts the state currently employs, as demonstrated by the specialized departments within the superior court of the larger counties. Is this simply a distinction without a difference? In other words, if the law naturally tends towards specialization and categorization, is there a clear advantage between many courts to handle specific matters versus one court with subdivisions to handle the same matters?

How many judges should hear a case? Does it depend on the level of the court, the kind of case, or both? The state trial courts generally have a single judge assigned to a matter, while the courts of appeal sit in panels of three, and all seven justices of the Supreme Court hear each case it considers. Why is only one judge necessary for a judgment, but three are needed to hear an appeal, and seven are needed to review the decisions of those three?<sup>94</sup> Is there an optimal number for

---

<sup>90</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 *Hastings L. J.* 433, 438.

<sup>91</sup> *Id.* at 434-435.

<sup>92</sup> William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 *Hastings L. J.* 121, 193-194.

<sup>93</sup> *Id.* at 194.

<sup>94</sup> One theory for having multijudge appellate panels is that having “three to seven independent judges working to resolve the same problem helps to insure that the ultimate conclusion is just.” J. Clark Kelso, *A Report on the California Appellate System* (1994)

each kind of judging? For example, the U.S. Supreme Court has nine justices, and the California Supreme Court has seven. But both courts have evolved through phases of differing numerical compositions. Chief Justice of the United States Warren E. Burger once observed that “nine is the maximum number of judges with which an appellate court can operate efficiently.”<sup>95</sup> Is that correct, and is there a reasoned basis to have an appellate court with fewer than nine justices? There may be some truth to the proposition that opinions of the state Supreme Court are “better” than court of appeal decisions in the sense that they are more scholarly—why would that be so?<sup>96</sup>

All of these questions are relevant to the historical evolution of the state courts, as the changes over time reflect differing solutions to those questions.

### Creation, Initial Structure, and Changes over Time

The evolution of the state’s courts generally shows a pattern of alternation between the possible choices: many kinds of courts or few, local or central control. The variation reflects changing opinions over which policy to favor in competing value sets. Dividing jurisdiction permits specialization but can produce conflict and confusion, while simplifying the court structure reduces complexity but decreases individualized service. Local control permits adaptation of a court to its setting—what makes sense in a large urban court may not work in a rural setting.<sup>97</sup> On the other hand, central control permits unitary budgeting, equitable distribution of assets and services, and promotes uniformity in administration and planning.<sup>98</sup> Since the 1920s, the pattern has been one of expansion and diversification followed by a reverse trend towards simplification of a complex court system.<sup>99</sup>

The 1849 state constitution created a traditional hierarchical court system.<sup>100</sup> This original plan of the state courts was adapted from the Iowa court plan.<sup>101</sup> The first level was local trial courts run by justices of the peace in cities, towns, and villages, and it was common in the 1850 era for local executive officers to retain the inferior judicial power they had under the alcalde system.<sup>102</sup> The first

---

45 Hastings L. J. 433, 484. If that is true, why only have one judge presiding at the trial level?

<sup>95</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 186 n.75.

<sup>96</sup> *Id.* at 202.

<sup>97</sup> Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1355.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Id.* at 1358 and n.33.

<sup>100</sup> William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 127-128. The following overview of the early California courts relies on Professor Blume’s thorough description of their history.

<sup>101</sup> *Id.* at 150-151.

<sup>102</sup> *Id.* at 133-134.

state constitution also permitted the legislature to establish municipal courts and tribunals for conciliation. Above that the county trial courts had one judge, and when sitting with two local justices of the peace constituted a court of sessions. Next, the district trial courts covered multicounty areas and heard civil cases involving more than \$200. Finally, the Supreme Court heard appeals from the district courts.<sup>103</sup> The Supreme Court as originally proposed would have included four judges, each hearing cases in separate circuits, and three sitting together would have reviewed the judgments of the fourth, but as adopted the state high court consisted of a Chief Justice and two associate justices, with only appellate jurisdiction.<sup>104</sup>

Thus, the 1849 state constitution allowed for seven different courts, each with varying kinds of jurisdiction: some had original, some had appellate, and those were further subdivided into amounts in controversy, degrees of criminal offenses, and by geography. This impulse towards compartmentalization of courts and cases may partly be explained by the context of the time, as the first state constitutional convention was held at a time when the popular trend was towards the “democratization of government”—as it was again in the early 1910’s when California further “democratized” its government by creating the direct democracy institutions of the initiative, referendum, and recall.<sup>105</sup> Subdividing the courts, particularly at the local level, was consistent with that trend as it permitted greater local control of the administration of justice.

That dynamic continued to have effect when the state legislature passed the Court Act of 1851, which established nine different judicial bodies, again divided by territory and subject matter jurisdiction. The state continued to tinker with its court system, so that by the time of the 1878 state constitutional convention there were 11 different grades of state courts.<sup>106</sup>

The 1879 constitution made substantial changes to the state judiciary. Terms of court were abolished, and since then the California Supreme Court has been open for business year-round. That court’s membership was increased to seven, where it has remained ever since. The overall number of state courts decreased compared with the 1849 constitution, from seven to four, and jurisdictional divisions similarly were simplified.

The legislature soon realized that requiring a constitutional amendment to expand the appellate districts was a cumbersome procedure, as by 1918 the appellate workload was such that the existing districts in San Francisco and Los Angeles needed to be expanded by subdividing them each into two three-judge divisions.

---

<sup>103</sup> Gordon Morris Bakken, *California’s Constitutional Conventions Create Our Courts* (1994) 1 Cal. Sup. Ct. Hist. Soc’y Y.B. 33, 34.

<sup>104</sup> William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 126-127.

<sup>105</sup> *Id.* at 129 n.21.

<sup>106</sup> *Id.* at 194.

As a result, in 1928 the state constitution was amended to permit legislative acts creating additional districts and divisions.<sup>107</sup>

Before the courts of appeal were created in 1904, the California Supreme Court was the only appellate body in the state. With more than one appellate court, naturally the question arose of how to divide their work. Initially, it was intended that the courts of appeal would handle the “ordinary current of cases” and the Supreme Court would hear only the “great and important” cases.<sup>108</sup> Accordingly, before 1966 the Supreme Court followed a policy of automatically transferring all direct appeals to the Courts of Appeal, except “death penalty cases, cases of public importance, emergency matters, and cases involving questions similar to those in other pending litigation.”<sup>109</sup> This ad hoc system ultimately was adopted by constitutional revision in 1966, and the present system allows discretionary grants of review by the Supreme Court for its nonmandatory jurisdiction cases, and generally relies on the court’s discretion in choosing its cases rather than on somewhat arbitrary subject matter distinctions.<sup>110</sup>

The initial location of the California Supreme Court was in San Francisco, and it has been housed in its current chambers overlooking the Civic Center Plaza in San Francisco since 1923. But in its first 75 years the court moved at least 18 times, and its beginnings in February 1850 were humble:

[T]he California Legislature authorized the Clerk of the California Supreme Court to “rent a suitable room” in San Francisco to hold its March 1850 term. Quarters were not to exceed \$1,000 per month, and the clerk was permitted to expend sums necessary for “furniture, stationery, and fuel,” from the general fund. . . . [The clerk] purchased court supplies, including . . . “4 bottles red ink,” “1 bottle black ink,” “3 gross Gillett’s pens,” “1 Parallel Ruler,” “6 Gold pens,” “12 sheets blotting paper,” “1 doz. Pencils,” “24 sticks red tape,” “6 stamps,” “6 Reams fine blue linen cap” paper, and “2 Hydrostatic Inkstands.”<sup>111</sup>

Beginning with constitutional amendments in 1928, the courts of appeal were not only divided into geographic districts, but further subdivided within each district into divisions.<sup>112</sup> The current courts of appeal have grown into six districts (see Map 1). For example, the justices of the First Appellate District sit in San

<sup>107</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 168. For the current geographic distribution of the appellate districts, see Map 1.

<sup>108</sup> William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 173-174.

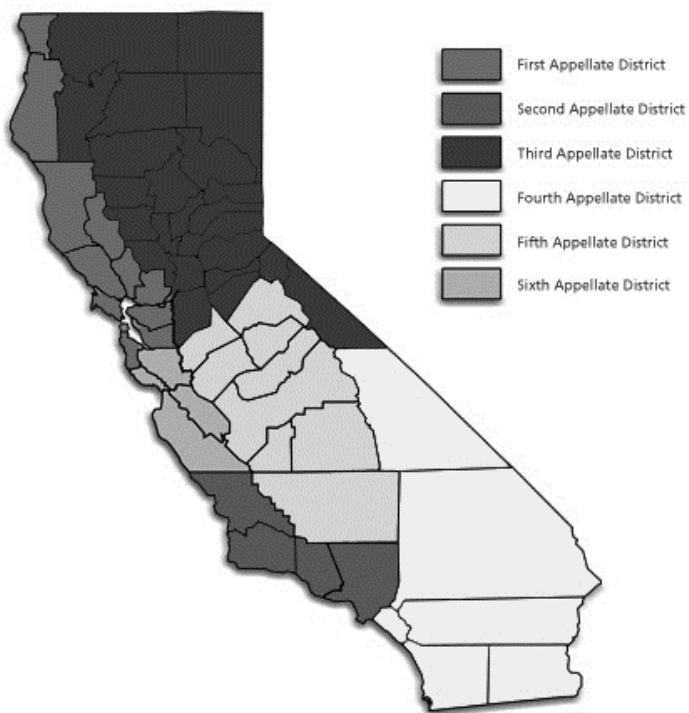
<sup>109</sup> *Id.* at 192.

<sup>110</sup> *Id.* at 191.

<sup>111</sup> Dear and Levin, *Historic Sites of the California Supreme Court* (2000) California Supreme Court Historical Society Yearbook Vol. 4 at 63-64.

<sup>112</sup> Cal. Const., Article VI, section 3 (legislature sets appellate districts); William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 175.

**Map 1. California Appellate Districts Map**



First Appellate District	Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, Sonoma
Second Appellate District	Los Angeles, San Luis Obispo, Santa Barbara, Ventura
Third Appellate District	Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, Yuba
Fourth Appellate District	Imperial, Inyo, Orange, Riverside, San Bernardino, San Diego
Fifth Appellate District	Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, Tuolumne
Sixth Appellate District	Monterey, San Benito, Santa Clara, Santa Cruz

Francisco, and within its chambers there are five divisions, each with three or four justices. The fact that the courts of appeal are so easily expanded creates a funnel effect between the inferior and high courts: while the courts of appeal can expand to accommodate the always-increasing flow of cases from the trial courts and produce an ever-growing number of appellate opinions, the Supreme Court's capacity has remained static with its membership fixed at seven since 1879. Is increasing the membership of the California Supreme Court a viable solution to the problem of the ever-expanding caseload?

The municipal courts were created in 1924 by constitutional amendment, to permit charter cities with over forty thousand inhabitants to take over the functions of the existing police, justice of the peace, and small claims courts.<sup>113</sup> From that time until 1998, the trial courts in each county were divided into two levels, inferior and superior, and the two levels had different jurisdiction in civil and criminal cases: generally the misdemeanors were heard in the municipal courts, and felonies in the superior courts. In an echo of the pre-1879 trend of multiplication of courts, by 1950 there were six different types of inferior court across the state.<sup>114</sup> All of those disparate inferior courts were collapsed into just one statewide type of local court beginning in 1998, when the legislature acted on a request by the judiciary to propose a constitutional amendment that, when it was adopted by the voters, permitted the counties to unify their municipal and superior courts.<sup>115</sup> By 2001, the courts in all 58 counties were unified into a single superior court.<sup>116</sup>

California began its history with seven kinds of courts, expanded to eleven, and now has just three: a trial court, an inferior appellate court, and a high court. Expanding needs for judicial capacity tended to cause expansion of the courts, either in kind or in number, which created an eventual reaction against the increased complexity and resulted in efforts to simplify the court structure. For example, in 1950 the voters amended the constitution to consolidate six different kinds of inferior courts into the municipal courts.<sup>117</sup> Subsequently, the municipal courts again diversified, and in 1998 were again consolidated into the superior courts. Similarly, at one point the California Supreme Court was divided into departments to cope with the growing volume of appeals, and when that plan failed, the courts of appeal became necessary.<sup>118</sup> Looking forward, it is not difficult to envision that

---

<sup>113</sup> Alden Ames, *The Origin and Jurisdiction of the Municipal Courts in California* (1933) 21 Cal. L. Rev. 117; William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 175 and n.254.

<sup>114</sup> William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 194-195.

<sup>115</sup> Cal. Const., Article VI, section 23.

<sup>116</sup> Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1358 and n.33.

<sup>117</sup> William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 181.

<sup>118</sup> *Id.* at 195.

our state Supreme Court may see another experimental structural change, perhaps a subdivision or an increase in the number of justices to handle the capital appeals that threaten to overwhelm the court's docket. This history can be viewed as a process of experimentation to find the optimal number and kinds of courts to handle the state's legal proceedings in a timely and efficient manner without excess subdivision and complexity.

### Selection and Retention

Selection is the third issue to be confronted in designing a judicial system, after the initial questions of whether to have a separate judicial system at all and the values favored in the system's design. There are three basic judicial selection systems.<sup>119</sup> An appointments system permits a governor or state legislature to select judges, sometimes in concert and sometimes with the advice of a commission. A merit system permits a nonpartisan or bipartisan body to select judges, with a retention election at the end of the judge's first term. An electoral system permits direct contested elections for judges, which may be partisan or nonpartisan.

Appointment process design decisions are driven by the competing values of judicial independence and judicial accountability.<sup>120</sup> Appointed judges, particularly those with long or lifetime tenures, have the advantage of greater independence, as after their initial appointment they are more insulated from political pressure, but the disadvantage of little or no accountability. The reverse is true for elected judges, who have the advantage of greater accountability to the voters through the retention or reelection process, and the disadvantage of decreased independence due to their close connection to the political process.

In other words, the question is how to make judges independent enough to make good decisions while retaining enough control to prevent abuses of power:

There is virtually no way to entirely insulate the judiciary from the political process. Moreover, entirely insulating the judiciary from social and political pressures would be contrary to the fundamentally democratic principles that underlie our government. The question is whether making judges accountable to the public by subjecting them to retention elections exacts too high a price in terms of the independence of judges and the judicial branch.<sup>121</sup>

---

<sup>119</sup> Stephen J. Choi, Mitu Gulati, Eric A. Posner, "Which States Have the Best (and Worst) High Courts?" Public Law and Legal Theory Working Paper No. 217 (2008) at 13.

<sup>120</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 814.

<sup>121</sup> J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993) 66 S. Cal. L. Rev. 2209, 2214.

Differences in selection method have practical effects. Generally, appointed judges have the longest tenure, merit system judges the next longest, and elected judges tend to have the shortest tenure.<sup>122</sup> Life tenure encourages judges to exercise their best judgment free from the possibly corrupting influence of politics.<sup>123</sup> Elected judges tend to write more opinions, while the opinions of appointed judges tend to be cited as authority more often.<sup>124</sup> Whether the appointment system determines the judicial boldness of a court is debatable. Some studies suggest that states with appointment systems have activist high courts that are more likely to expand individual liberties, while other research indicates that states with electoral systems are more likely to have judges willing to risk striking down challenged legislation.<sup>125</sup> The length of a judge's term also has an effect on decisionmaking, with long-term judges showing greater willingness to expand state constitutional rights.<sup>126</sup>

California uses a combination of the three selection systems that generally occupies a middle ground in the value sets. Rather than favoring judicial independence and stability in the law with life terms, or accountability with contested elections and short terms, California appellate jurists are appointed and retained in uncontested elections to 12-year terms. Trial judges are appointed and reelected in contested elections to six-year terms.<sup>127</sup> Thus, the state judiciary is neither a wholly politically accountable branch like the state legislature, nor is it a greatly independent branch like the federal judiciary with its life tenure.<sup>128</sup>

The state has wrestled with the conflicting value-enhancing features of appointed versus elected judicial officers. The 1849 California constitution provided that justices of the Supreme Court and district courts would be elected by the people for six-year terms, and county court judges would be elected for four-year terms.<sup>129</sup> That was consistent with the style of the time, as every new state since 1846 has (at least initially) provided for contested judicial elections.<sup>130</sup> California

---

<sup>122</sup> Stephen J. Choi, Mitu Gulati, Eric A. Posner, "Which States Have the Best (and Worst) High Courts?" Public Law and Legal Theory Working Paper No. 217 (2008), at 14.

<sup>123</sup> J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993) 66 S. Cal. L. Rev. 2209, 2210.

<sup>124</sup> Stephen J. Choi, Mitu Gulati, Eric A. Posner, "Which States Have the Best (and Worst) High Courts?" Public Law and Legal Theory Working Paper No. 217 (2008) at 25.

<sup>125</sup> Staci L. Beavers and Craig F. Emmert, *Explaining State High-Courts' Selective Use of State Constitutions* (2000) Publius: The Journal of Federalism, Vol. 30, No. 3 at 5.

<sup>126</sup> *Id.* at 6.

<sup>127</sup> Cal. Const., Article VI, section 16(c).

<sup>128</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 829.

<sup>129</sup> Cal. Const. 1849, Article VI, sections 3, 5, and 8.

<sup>130</sup> Administrative Office of the Courts, Report on ACA 1 (Nation): Superior Court Elections (June 7, 2001) at 5.



changed to nonpartisan ballots for judicial elections in 1911, and since 1934, state appellate justices have been selected through a unique process: new justices are first nominated by the governor to fill the unexpired remainder of a departing justice's term, the nominee is vetted by a State Bar commission (described below), a constitutional commission then confirms the nominee, and the new justice stands for retention on the ballot in the next gubernatorial election.<sup>131</sup> This method, wherein appellate justices could file a declaration of candidacy to stand for another term, is known as the "Commonwealth Club Plan" as that organization first proposed it.<sup>132</sup> Relative to the debate over whether judges should be appointed or elected, at least initially this process was thought to continue the existing character of appellate justices as elective rather than appointive officers, who would hold and continue to occupy their positions only at the will of the voters.<sup>133</sup>

As with the appellate justices, state trial judges are initially appointed by the governor, but unlike the appellate justices the state constitution generally provides that trial judges must appear in a contested election "at the next general election after the second January 1" following the vacancy created by the departure of the previous judge. Interestingly, the state constitution also permits each county to decide for itself whether to use that general trial judge system, or to adopt the appellate appointment/uncontested retention election system for the county's trial judges. This provision raises several questions. Why would the constitution permit counties to have different methods of selecting trial judges? Why permit the option of eliminating the distinction between the trial and appellate judicial selection methods? Has any county adopted such a measure?

The Judicial Nominees Evaluation Commission is an organization of the State Bar of California, with members from the public and the bar, which exists to vet candidates for judicial appointment and provide recommendations to the governor. Trial court nominees need only pass through the JNE Commission before they may be appointed by the governor, while appellate court nominees must also be confirmed by the Commission on Judicial Appointments.<sup>134</sup> Only once has a candidate failed to be confirmed by the CJA: in 1940 Governor Culbert Olson nominated Professor Max Radin, who was opposed by Attorney General Earl Warren because he felt that Radin was too liberal, and Radin was not confirmed.<sup>135</sup>

One criticism of retention elections is that, as a political process, such elections are subject to the disadvantages of a campaign and are the wrong venue for

---

<sup>131</sup> Cal. Const., Article VI, section 16; John H. Culver, *The Transformation of the California Supreme Court: 1977-1997* (1998) 61 Alb. L. Rev. 1461, 1464 and n.18; Administrative Office of the Courts, Report on ACA 1 (Nation): Superior Court Elections (June 7, 2001) at 7.

<sup>132</sup> William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 179-180.

<sup>133</sup> *Id.* at 180.

<sup>134</sup> *Id.* at 179-180.

<sup>135</sup> Stanley Mosk, *A Retrospective* (1983) 71 Cal. L. Rev. 1045, 1045.

debating questions about how cases should be decided.<sup>136</sup> Since retention elections were instituted in 1934, there has been only one election where any state appellate justice was not retained by the electorate. In 1986, following an unprecedented campaign that focused primarily on the number of capital verdicts the court overturned, three justices of the California Supreme Court were voted off the court: Chief Justice Rose Bird, and associate justices Joseph Grodin and Cruz Reynoso.<sup>137</sup>

### **The Judicial Function: Decisionmaking, and Deciding How to Decide**

Before discussing the process and effect of decisions reached by the various state courts, one first must consider a deep issue of jurisprudence, which is deciding how to decide:

Should judges have the freedom to reach any result they choose, regardless of their inability to articulate a sensible reason for it? Does this unbridled freedom exist because “law” is so indeterminate that another judge might have been able to construct a plausible basis for that decision? Should judges be guided by neutral principles, or should they apply principles neutrally? Should judges be restricted by framers’ intent in matters of constitutional interpretation and to legislative intent in construing statutes? Or does the appropriate role of the judge lie somewhere between unrestricted discretion and framers’ intent?<sup>138</sup>

In other words, “what the law is” is unclear – is it plainly observable, or must it be found? Is the meaning of the law always something objectively definable, and all judges are merely reading from the same book, or is it necessary to interpret the law, and judges must use their judgment?<sup>139</sup> Again, there are competing theories. One formalist approach holds that the words of a law must be read with their ordinary meaning, and that the result will be obvious; another that the law should be read as the average person at the time the law was adopted would have understood it. The opposing interpretive approaches look to evidence of the lawmaker’s intent, or to the purpose of the law, or attempt to adapt the principles of the living

---

<sup>136</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 824.

<sup>137</sup> John H. Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998) 61 Alb. L. Rev. 1461, 1466 and n.31, 1486; J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993) 66 S. Cal. L. Rev. 2209, 2214.

<sup>138</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 813-814.

<sup>139</sup> *Id.* at 815, 819 n.30, and 820.

law to the current context. Consider whether this is a valid view of the decisionmaking process:

The naïve premise . . . was that all principles of law were so clear that any three judges ought to be able to apply the appropriate principles in any given case. The perpetuation of the popular myth that a given set of facts compels a given result by reason of the application of readily ascertainable principles of law made it logical to assume that a case would be decided a given way no matter which court made the decision.<sup>140</sup>

Stated differently, the issue concerns judicial discretion: should judges have less discretion, and the law consist of clear rules, or should judges have more discretion, and the law consist of broad standards? Clear rules provide stability and certainty in the law, and reduce transaction costs by discouraging litigation, as the more clear the answer is, the less incentive there is to litigate.<sup>141</sup> Broad standards create uncertainty and so provide greater incentive to litigate because the answer in a given case is less clear, thus giving the law flexibility to adapt and grow to accommodate new circumstances.<sup>142</sup> Do some areas of the law benefit from rules, and others from standards?

Next, consider the distinction between a trial court judgment and an appeal. At the trial court level, a judge or jury acts as a neutral fact finder, taking evidence and resolving factual disputes. At the appellate level, a judge or (more commonly) a panel of justices reviews the judgment below according to standards of review ranging from very deferential to *de novo*, where the case is considered anew with no deference to the trial court decision. While there is variation between the states, and between the states and the federal courts, the American appellate process is now somewhat standardized:

[O]nce a notice of appeal has been filed, an appeal typically involves the following steps: (1) the trial court clerk prepares a record from the lower court transcript; (2) counsel prepare and file adversary briefs; (3) in an initial review, the appellate court determines whether the appeal qualifies for special treatment . . . (4) counsel argue orally before a panel of three or more judges; (5) the appellate court reaches a decision . . . and (6) the appellate court publicly releases its opinion.<sup>143</sup>

Certainly this is not the only way to handle appeals from trial court judgments. For example, in the English courts oral argument is more important than

---

<sup>140</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 193 n.91.

<sup>141</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 448.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Id.* at 457 (footnote omitted).

the written brief, and in times past in this country “courts would sometimes listen for hours or even days to the arguments of counsel.”<sup>144</sup> But in the modern American system, argument is much less important than the parties’ written briefs—which as a result generally are the opposite of brevity. In fact, in California the appellate courts schedule argument only *after* preparing a draft decision, further reducing the perceived importance of oral argument.<sup>145</sup> The reverse is true in the U.S. Supreme Court, where argument is heard before work begins on a draft opinion.

What standard should apply to reversing or upholding a trial court judgment?<sup>146</sup> A low bar for reversal would mean that many more judgments will be overturned, as even small errors could require a reversal. This can result in higher transaction costs, as more cases will be retried, but it also will provide greater quality control over trial court processes. A high bar for reversal will reduce transaction costs and permit more technical errors to escape, so long as the ultimate result seems correct—but this depends on the assumption that it is possible to know whether the result would have been different if the error had not occurred. California has a relatively high bar for reversal, as appellate courts may set aside a judgment only when the court “is of the opinion that the error complained of has resulted in a miscarriage of justice”—which means that not only must there be an error, the error must be *prejudicial*.<sup>147</sup>

Finally, there is the question of access to decisions. The appellate decisionmaking process in this state is relatively open. Briefs are public documents, and appellate arguments are open to the public.<sup>148</sup> And the state constitution requires that all appellate decisions be in writing.<sup>149</sup> There are many reasons for decisions to be written, rather than delivered orally from the bench. Written decisions can become part of the ongoing development of the law and are useful to others beyond the parties to a case. Written decisions are easier to review, as the reasons for the decision are explained. But the fundamental justification for requiring a decision in writing with reasons stated is that this imposes the greatest possible intellectual rigor on the appellate justices by requiring the panel’s initial deci-

---

<sup>144</sup> *Id.* at 459 and 464.

<sup>145</sup> *Id.* at 464. Nevertheless, counsel for a party in an appeal has an absolute right to demand oral argument. *Id.* at 465; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1243 n.4.

<sup>146</sup> Cal. Const., Article VI, section 13 provides in part that judgments shall not be set aside on appeal unless the error complained of “has resulted in a miscarriage of justice.”

<sup>147</sup> Cal. Const., Article VI, section 13; J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 467.

<sup>148</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 486.

<sup>149</sup> Cal. Const., Article VI, section 14; Cal. Rules of Court, Rule 8.1105(a) (“All opinions of the Supreme Court are published in the Official Reports”).

sion to withstand the disciplined process of a written analysis.<sup>150</sup> As described by California Chief Justice Roger Traynor: “In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest.”<sup>151</sup>

The appellate process is not completely open. While a written statement of the reasons supporting an appellate decision is constitutionally required, publication of that statement is not.<sup>152</sup>

All appellate opinions were once published, but by 1963 the volume posed such a problem to the legal profession that legislation was enacted to permit the Supreme Court to determine which opinions should be published. The Supreme Court decided to publish all of its opinions but only an opinion of a Court of Appeal or of an appellate department of a superior court which, as determined by two judges of the three-judge panel rendering the opinion, “involves a new and important issue of law, a change in an established principle of law, or a matter of general public interest.”<sup>153</sup>

As a result, since 1971, the state high court has controlled decisions of the inferior appellate courts through a process called decertification or depublishation.<sup>154</sup> Under the Rules of Court, a panel of the Courts of Appeal may decide whether its decision in a case should be published or unpublished.<sup>155</sup> Published opinions are printed in the official reports of California decisions and are citable as precedent, while unpublished decisions are not printed in the casebooks and are not citable. Even if the appellate opinion is certified for publication, the California Supreme Court can order it decertified either on a party’s request or on the court’s own motion.<sup>156</sup> While there is no publicly articulated standard governing the exercise of the court’s discretion to decertify an opinion, it is generally accepted that decertification is used when the appellate court reached a right result but with a wrong analysis.<sup>157</sup> Decertification often occurs “because a majority of the justices consid-

<sup>150</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 487.

<sup>151</sup> Roger Traynor, *Some Open Questions on the Work of State Appellate Courts* (1957) 24 U. Chi. L. Rev. 211, 218.

<sup>152</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 488.

<sup>153</sup> Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 204 and n.124.

<sup>154</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 851-852.

<sup>155</sup> Cal. Rules of Court, Rule 8.1105.

<sup>156</sup> Cal. Rules of Court, Rule 8.1120.

<sup>157</sup> Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate* (1986) 59 S. Cal. L. Rev. 809, 852-853; J. Clark Kelso, *A Report on the California Appellate*

er the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent.”<sup>158</sup> One view of the court’s use of decertification is that it is an expedient response to the fact that the court is unable to review all such cases.<sup>159</sup>

What are the benefits of having written opinions, and making them publicly available? Why have unpublished decisions at all?

### **Conclusion**

Justice must be assured in an ordered society, and so we must have judges. Designing a judiciary necessarily involves a version of the who-watches-the-watchmen issue that pervades democratic government generally. As with the other states, California has its own unique set of structural solutions to the policy conflicts inherent in an American court system. Whether this state has achieved the optimal balance of the competing value sets for our present circumstances is for you to decide. But as you contemplate these issues, consider this: for whatever variation on the theme you would implement, why would it be superior to the status quo?

---

*System* (1994) 45 Hastings L. J. 433, 493 (“depublication does not mean the *decision* was wrong, but only that something in the *opinion* was wrong even though the *decision* was correct”); on the Supreme Court’s decertification and case selection processes generally, see Joseph R. Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514.

<sup>158</sup> Joseph R. Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514, 514-515.

<sup>159</sup> J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 453-454.