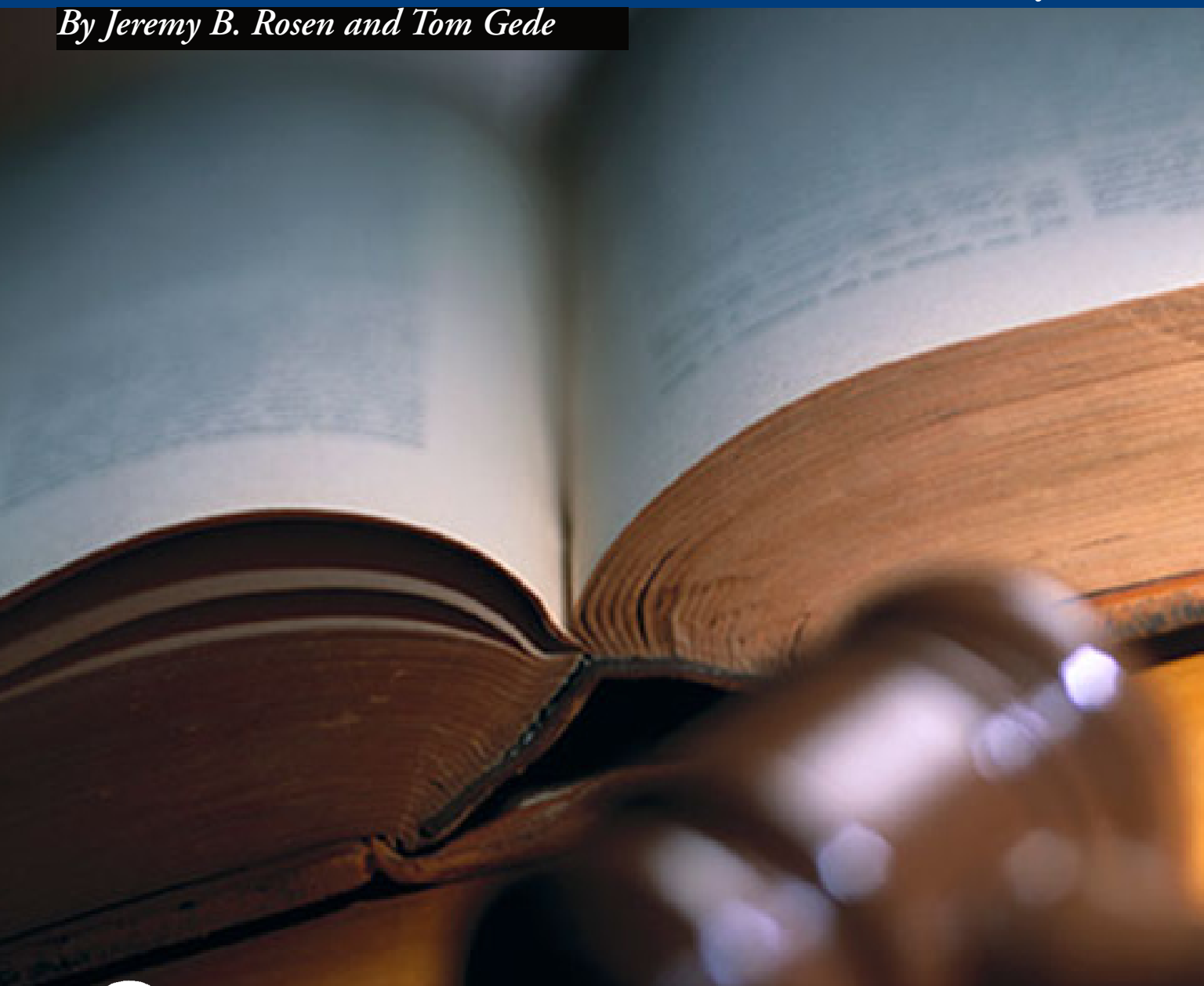
California 2010: The Courts and the Economy

By Jeremy B. Rosen and Tom Gede



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Executive Summary

With Chief Justice George's imminent retirement and replacement by California Court of Appeal Justice Tani Cantil-Sakauye, and the high likelihood that the Governor who is elected this November may have the ability to appoint a majority of the court during his or her term in office, this is a unique opportunity to consider the work, impact, and role of the California Supreme Court.

The George court has been remarkable in its ability to achieve consensus, with the vast majority of its opinions unanimous. Thus, in many areas of the law, a changing composition of the court over the next four to eight years may not bring about much immediate change in the law. In this paper, we highlight a few other important areas of law (consumer class actions, property rights, arbitration, commercial speech, and employment) where the court has been strongly divided in recent years. In those areas of great importance to California's businesses, workers and consumers, changes in the court's personnel therefore could result in changes in the law that push the court away from its current balance.

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A. The importance of the California Supreme Court

California has the ninth largest economy on the globe and produces goods as diverse as computers to feature films to world renowned wines and produce. The Golden State is ethnically, racially, culturally and linguistically diverse.

The California Supreme Court sits at the apex of the state's vast judicial system, which is larger than the nation's entire federal court system and which has primary responsibility for resolving legal disputes for the state's thirty-eight million residents. The Supreme Court regularly construes statutes enacted by the Legislature and regulations promulgated by administrative agencies, is the steward of the ever-evolving common law that largely dictates everyday rights and obligations, resolves disagreements among 100-plus justices who comprise the intermediate Court of Appeal, and decides contentious and often divisive issues that affect the lives of vast numbers of people.[1]

The California Supreme Court's influence also extends well beyond simply deciding issues of California law. According to a recent study, over 1000 of the California Supreme Court's decisions in the past six decades have been followed by another state's supreme court, making the California Supreme Court the most followed state supreme court in the nation.[2]

B. The George court: A legacy of consensus

Recent commentary on the George Court's legacy has noted that from the time Ronald George was appointed as chief justice in 1996, "we have seen the California Supreme Court move to the center and express respect for the ordinary person's interests in employment and privacy and as consumers."[3] "[T]he court has searched for, and usually found, a middle ground where common sense and reasonableness rule the day. It has avoided the extremes, whether on the pro-plaintiff side or on the pro-business side."[4]

Other commentators have noted that the court's jurisprudence has reflected a strong political culture of Progressivism in the state, embracing socially liberal values, along with a strong "law-and-order" position in criminal law, and a liberal position on property and economic rights.[5] Adding to the tendencies of the Progressive political tradition is a deference to populist tendencies in California's political culture. This includes deference to the voters as expressed in ballot initiatives.[6] For example, notwithstanding the court's earlier four-three decision in 2008 holding unconstitutional under the state constitution a statutory ban on same-sex marriage,[7] the court, in a six-one holding, upheld the voter's endorsement of a constitutional amendment in Proposition 8 to bar same-sex marriage and overturn the court's earlier ruling.[8]

In August 2010, the California Supreme Court reinforced this deference to the voters' intent expressed in initiatives when it upheld Proposition 209, an initiative measure that banned affirmative action in government employment, contracting, and education. The court held the measure does not violate federal constitutional guarantees of equal protection.[9] Specifically, the court held, six-one, that the initiative-adopted constitutional provision forbidding cities that award public contracts from granting preferential treatment based on race or gender is consistent with equal protection because "'[a] law that prohibits the State from classifying individuals by race or gender a fortiori does not classify individuals by race or gender' [], and because the federal Constitution does not oblige the state to permit racial classifications the federal Constitution itself does not require."[10]

The court also rejected the "political structure doctrine" as a ground to invalidate the initiative measure's prohibition on preferences. Under that doctrine, states are prohibited from imposing obstacles to equal treatment whenever they change the structure of their laws affecting governmental

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decision-making.[11] The court said the doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender, and other similar classifications.[12] Thus, the court has tended to uphold voter initiatives.

Regardless how the jurisprudence of the court is characterized, in reaching its decisions, the George court has been able to reach broad consensus in most of its opinions. For example, in the past year, eighty-one of the court's ninety-six opinions were unanimous, with the lowest dissent rate in history of three percent.[13]

C. A new chief justice

Today the court sits at an important juncture in its history. On July 14, 2010, sitting Chief Justice Ronald George announced his intention to retire in January 2011, rather than placing his name on the ballot for retention to an additional twelve-year term as chief.[14] The announcement gave Governor Arnold Schwarzenegger, with six months left in his own term, the opportunity to nominate a new chief justice. He did so within a single week, surprising observers with his speed and his choice.[15] The governor selected a California intermediate appellate justice, Tani Cantil-Sakauye, a member of the Sacramento-based California Court of Appeal for the Third Appellate District. Few among the blog-writers, law professors, and the legal press had included her name in their speculations following Chief Justice George's retirement announcement.

A Pete Wilson appointee to the Sacramento Superior Court, Cantil-Sakauye had previously served as Deputy Legal Affairs Secretary and Deputy Legislative Secretary to Governor George Deukmejian, following a stint at the Sacramento District Attorney's Office.[16] She was Governor Schwarzenegger's only appointment to the Third District Court of Appeal, a court significant for its prominent presence in Sacramento, its central role in reviewing many legislative, regulatory, and other government functions, and its generally restrained jurisprudence. Governor Schwarzenegger's appointment of a Filipina-American woman gives the California Supreme Court a female majority, four female to three male justices, and changes the court to a minority-majority composition, with three justices of full or partial East Asian ancestry and one Latino justice.

Justice Cantil-Sakauye, at fifty-one years old, is relatively young. The youngest of the sitting associate justices is a decade older, and four are close to or over seventy years of age. This is similar to President George W. Bush's nomination of a fifty-year old John Roberts as the 17th U.S. Supreme Court Chief Justice in 2005 in that Governor Schwarzenegger's appointment of a younger jurist to lead the court for a lengthy foreseeable time demonstrates the executive branch's power to shape the future of the judiciary.

Justice Cantil-Sakauye's record as an intermediate appellate justice reveals that she generally has ruled in favor of the prosecution in criminal cases before her.[17] However, her record in civil cases, like Chief Justice George's, is less predictable. For example, in a series of cases interpreting the scope of California's Unfair Competition Law, she took a fairly pro-defense position.[18] On the other hand, she dissented from an opinion holding that a city was not vicariously liable for a rape committed by a firefighter because such an act was outside the course and scope of his employment.[19] More recently, shortly after she was nominated to the high court, she issued a ruling on the court of appeal in a closely watched consumer rights case that favored a pro-plaintiff position advocated by the Consumer Attorneys of California, allowing a personal injury damages recovery of more than the actual amount that actually was paid for healthcare services.[20] The dissent in that case concluded that "I have difficulty finding detriment, that is, a loss or harm suffered by plaintiff, arising from bills he did not have to pay."[21]

D. More change on the horizon: The importance of the 2010 election for Governor

In addition to welcoming a new chief justice in 2011, the court may have more change in store for it. The next governor, who will be elected this November, could have the opportunity to appoint as many as four new associate justices, given the length of tenure of the majority of the associate justices currently serving on the court.[22] This makes the issue of the proper role of the court an important one in this election.

Governor Schwarzenegger's judicial appointment

record has been different from his predecessors of both parties because he has appointed roughly an even number of Republicans and Democrats.[23] By contrast, the prior three governors (of both parties) nominated judges of their party for nearly ninety percent of all vacancies.[24] The politics of judicial selection have already become an issue in the current campaign for governor, where it seems reasonable to expect that whoever wins will be more likely to appoint more members of their party to judicial vacancies and less likely to strive for partisan balance in making such appointments.

Meg Whitman has criticized former Governor Brown's record of appointments to the California Supreme court, three of whom (including Chief Justice Bird) were rejected in an unprecedented move by California voters in 1986 in part because they voted to reverse the death penalty in sixty-four cases.[25] Ms. Whitman claims she will appoint judges who will strictly observe the law, are tough on crime, and who are not "activists" eager to legislate from the bench.[26]

Former Governor Brown has not yet publicly explained during this campaign how he will make judicial selections. However, during a prior campaign, he defended his record on judicial appointments when he was governor: "I made my choices based on three factors: qualifications determined by the state bar; diversity in terms of philosophy and ethnicity, and third, community service. . . I'm really proud of the judges I appointed."[27]

In the next section we highlight some of the few cases in which the George court has been sharply divided in the past ten years. The broader areas of law reflected in those cases could be the first areas of law to be affected should the ideological composition of the court shift in any appreciable direction one way or the other.

E. Flashpoints in the George court's jurisprudence

1. Consumer protection/class actions

The consumer protection statutory scheme known as the Unfair Competition Law (UCL) has, in various forms, been in effect in California since the 1930s.[28] By its terms, it affords consumers remedies against "unfair competition," which is broadly defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[29] And, particularly in the last twenty-thirty years, court decisions have read the vague statutory language in ever broader terms, so that now, an extremely broad range of business practices can be prosecuted in court as a violation of the UCL.[30]

Until a few years ago, the UCL dispensed with the usual rule that actions must be prosecuted by the real party in interest, instead permitting "any person" to sue on behalf of the general public as a self-appointed private attorney general.[31] Lawyers were not required to find a consumer who was subjected to (much less complained about) a company's business practice in order to bring suit.[32] The result was a large number of non-class class actions with enormous potential exposure for defendants and a very low threshold for proving liability.

However, California voters passed Proposition 64 in 2004 to eliminate the "any person" standing rule, so that only authorized government law enforcement officials or private citizens who were actually injured by a business practice could sue.[33] The California Supreme Court ultimately granted review to decide whether the entire class had to meet the new standing requirement set by Proposition 64.[34]

In the *In re Tobacco II* case, prior to passage of Proposition 64, the trial court had certified the case as a class action, but after Proposition 64 was approved, the trial court granted defendants' motion to decertify the class on the grounds that each class member was now required to show an actual injury in fact.[35] The Supreme Court reversed, in a four-three majority opinion where the deciding vote was cast by a pro-tem justice sitting in for Chief Justice George, who was recused, concluding that while a class representative proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, all class members are not required to demonstrate Proposition 64 standing.[36] Thus, there was no need to show that the large class of plaintiffs had actually been injured by the defendants' conduct.

Rather, the majority determined that under traditional class action process, only the named

plaintiff need show standing, and that Proposition 64 did not alter this for section 17200:

> Generally standing in a class action is assessed solely with respect to class representatives, not unnamed members of the class. Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation. . . . As noted, nothing in the text of Proposition 64, nor in the accompanying ballot materials, makes any reference to altering class action procedures to impose upon all absent class members the standing requirement imposed upon the class representative. Moreover, Proposition 64 left intact provisions of the UCL that support the conclusion that the initiative was not intended to have any effect on absent class members. Specifically, Proposition 64 did not amend the remedies provision of section 17203. This is significant because under section 17203, the primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction, along with ancillary relief in the form of such restitution "as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."[37]

The three dissenting justices disagreed with the majority's approach, maintaining that the reasoning has a counterintuitive effect:

> [S]o long as the named plaintiffs actually relied on the [tobacco company defendant's] allegedly deceptive advertising claims when buying and smoking cigarettes, they may seek injunctive and restitutionary relief on behalf of all California smokers who simply saw or heard such ads during the period at issue, regardless of whether false claims contained in those ads had anything to do with any class member's decision to buy and smoke cigarettes.[38]

The dissent further offered some predictions about the long-term effect the majority's opinion could have on California businesses:

> Indeed, the majority's holding encourages the very sort of abusive shakedown suits that Proposition 64 was designed to curb. That holding can be applied not only to the unsympathetic facts alleged in this case-i.e., that large tobacco companies lured consumers into nicotine addiction by falsely claiming, over many years, that cigarettes were safe-but also to a myriad of situations in which the anticonsumer implications are far less dire. . . . The majority's reasoning contains an even more fundamental flaw. As explained above, under the majority's construction of Proposition 64, a person may be a party to a UCL private representative action as a class member even though he or she could not sue in his or her own name. Thus, an individual whose personal effort to bring a UCL action failed because he or she could not demonstrate any personal injury or loss caused by the unfair practice may simply join, as an uninjured class member, in an identical class action brought by another named plaintiff who does meet the minimal injury-in-fact and causation requirements. Again, this cannot be what the electorate intended to achieve by enacting Proposition 64.[39]

With the lower appellate courts struggling to apply the majority's opinion in *In re Tobacco II*, this issue could well be brought to the Supreme Court again in the near future[40] where the new Chief Justice and any additional new justices appointed by the next Governor could well alter or solidify the initial holding.

2. Private property rights

The California Supreme Court, in a four-three opinion with Chief Justice George in the majority, re-affirmed its oft-debated *Robins v. Pruneyard Shopping Center*[41] decision holding that California's free speech clause applies to private shopping centers, notwithstanding the fact that the shopping center owners do not want to permit their property to be used for certain expressive activities.[42] Thus, in a case arising out of a union members' leaflet campaign

against a mall tenant, the court concluded that the mall acted improperly when it sought to enforce its rules prohibiting expressive activities advocating a boycott of mall tenants.[43]

The Supreme Court in *Pruneyard* held that an individual's free speech rights trumped the private property owner's right to control expression on its property:

> [A]ll private property is held subject to the power of the government to regulate its use for the public welfare. . . . We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.[44]

The three justices in dissent would have overruled the *Pruneyard* decision and upheld the right of private property owners to prohibit expressive activity antithetical to their economic interests from taking place on their property:

> By a bare four-to-three majority, *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, overruled a decision then only five years old and held that public free speech rights exist on private property under the California Constitution. *Pruneyard* was wrong when decided. In the nearly three decades that have since elapsed, jurisdictions throughout the nation have overwhelmingly rejected it. We should no longer ignore this tide of history. The time has come for us to forthrightly overrule *Pruneyard* and rejoin the rest of the nation in this important area of the law. Private property should be treated as private property, not as a public free speech zone.[45]

The dissent explained its views of the importance of this question to property owners:

> Fashion Valley Mall is a privately owned shopping center. A shopping center exists for the individual businesses on the premises to do business. Urging a boycott of those businesses contradicts the very purpose of the shopping center's existence. It is wrong to compel a private property owner to allow an activity that contravenes the property's purpose.[46]

Given the new chief justice's recent court of appeal opinion aggressively applying *Fashion Valley*[47], any change in the court's jurisprudence on this issue could only arise from the replacement of one of the justices in the *Fashion Valley* majority.

3. Enforcement of arbitration agreements

The California Arbitration Act, like the Federal Arbitration Act, provides that "a written agreement to submit an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."[48] The California Supreme Court has issued a number of divided opinions regarding the application and enforcement of arbitration agreements in recent years. The court has seemed to struggle with when it will enforce an agreement as written and when it will not.

Gentry v. Superior Court. The California Supreme Court considered whether class action arbitration waivers in employment arbitration agreements may be enforced to preclude class arbitrations by employees whose statutory rights to overtime pay allegedly have been violated. The supreme court, in a four-three opinion with Chief Justice George in the majority, held that the prohibition of class-wide relief impermissibly undermined the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's

overtime laws.[49] Thus, Gentry could proceed with his class action and avoid arbitration.

The dissent argued that this was an improper effort to limit and restrict the terms of private arbitration agreements, which enjoy special protection under both state and federal law. As the dissent noted,

> [B]oth the Federal Arbitration Act and the California Arbitration Act provide that an agreement to resolve disputes by arbitration, rather than by court litigation, must be enforced except upon grounds applicable to contracts generally. These statutes are intended to override courts' historical suspicion of arbitration as an inferior forum for the vindication of claims, and to endorse contracts—including employment contracts—in which parties agree to resolve their disputes by this relatively cheap, simple, and expeditious means.[50]

Cable Connection, Inc. v. DIRECTV, Inc. In a five-two decision with Chief Justice George dissenting, the supreme court enforced an arbitration clause that provided for judicial review of legal error in an arbitration award. The parties were thus free to contract around the general rule that courts do not review arbitration awards for legal error.[51] In doing so, the majority noted that "policies favoring the efficiency of private arbitration as a means of dispute resolution must sometimes yield to its fundamentally contractual nature, and to the attendant requirement that arbitration shall proceed as the parties themselves have agreed."[52]

The dissent argued that the parties' contractual rights and powers must be limited to exclude the ability to contract for judicial review for legal error:

> The object of an agreement requiring de novo judicial review is not to constrain the unreasonable exercise of the arbitrator's power, as is permitted by statute, but to conscript courts to serve as appellate arbitration tribunals, with all the attendant costs and burdens. The parties are without power under the statute to do so.[53]

Pearson Dental Supplies v. Superior Court. Here, by contrast, in a four-three opinion with Chief Justice George in the majority, the supreme court held that where a plaintiff seeks relief under an important statute such as FEHA for employment discrimination, a court must review the arbitrator's decision for legal error even where the contract itself does not call for such enhanced judicial review as in *Cable Connection*.[54]

The dissent argued that review of the arbitral decision for legal error was unauthorized:

> [Because] the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive because the parties have agreed that it be so. By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain.[55]

The dissent stated, in an attempt to characterize the Court's ideological division on this question: "I cannot join in this unsupported and unprecedented move to judicialize the arbitration process. The majority . . . undermines the strong public policy favoring arbitration as a fair, quick, and inexpensive means of resolving disputes."[56]

The divided approach to the enforcement of arbitration contracts evidenced by these recent cases suggests that this will continue to be an evolving area of the law even without new members to the court. However, the new chief justice as well as any other new members in the next few years could have significant impact in shaping this area of law.

4. Commercial speech

The supreme court, in a four-three opinion with Chief Justice George in the majority, held that Nike's published statements about its labor practices were unprotected commercial speech.[57] The court found the messages in question were directed by a commercial speaker to a commercial audience, and that they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products.[58]

The three justices in dissent argued that Nike should have First Amendment protection for its statements:

> Nike is a major international corporation with a multibillion-dollar enterprise. The nature of its labor practices has become a subject of considerable public interest and scrutiny. Various persons and organizations have accused Nike of engaging in despicable practices, which they have described sometimes with such caustic and scathing words as "slavery" and "sweatshop." Nike's critics and these accusations receive full First Amendment protection. And well they should. . . . While Nike's critics have taken full advantage of their right to "uninhibited, robust, and wide-open" debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy. . . . According to the majority, if Nike utters a factual misstatement, unlike its critics, it may be sued for restitution, civil penalties, and injunctive relief under these sweeping statutes. Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate.[59]

The issue decided in this case is an extremely important one as reflected by the fact that the United States Supreme Court initially granted certiorari to review the decision of the California Supreme Court.[60] The United States Supreme Court ultimately dismissed certiorari as improvidently granted because of jurisdictional problems in the case[61] but also made clear that the issue was an extremely important one that the California Supreme Court may well have wrongly decided.[62] When this issue reaches the California Supreme Court in the future, the new chief justice and/or any other new members of the court could either alter or solidify the *Kasky* holding.

5. Employment

The California Supreme Court has recently issued two divided pro-employer decisions interpreting aspects of California's Fair Employment and Housing Act (FEHA).

Ross v. RagingWire Telecommunications, Inc. The supreme court in this case addressed an employee's claim that he was wrongfully terminated for drug use, where the drug (marijuana) has been recommended by his doctor pursuant to the voter-approved Compassionate Use Act (CUA). In a five-two opinion with Chief Justice George in the majority, the court concluded that the employee could not state a cause of action against the employer under FEHA because the voters did not intend the CUA to address the respective rights and duties of employers and employees.[63] It also held that the employee could not state a cause of action for wrongful termination in violation of public policy because the CUA did not put the employer on notice that it would be required to accommodate the use of marijuana.[64]

The dissent argued that the voters did not intend for people who availed themselves to the CUA be disqualified from employment. Thus, unless doctor-approved marijuana use under the CUA is likely to impair the employer's business operations, the discharge of such an employee is disability discrimination prohibited by the FEHA.[65]

Jones v. Lodge at Torrey Pines Partnership. An employee sued his supervisor and others under the California Fair Employment and Housing Act, asserting a claim for retaliation under Government Code section 1294, subdivision (h). In a four-three opinion with Chief Justice George in the majority, the court held that non-employer individuals may not be held personally liable under FEHA for their role in retaliation.[66] The majority noted the problematic policy consequences to individual supervisors if liability could attach to them:

> Moreover, imposing personal liability against individual supervisory employees adds little to an alleged victim's legitimate prospects for monetary recovery. The plaintiff-employee's primary target remains the employer. Adding individual supervisors personally as defendants adds mostly an in terrorem quality to the litigation, threatening individual supervisory employees with the spectre of financial ruin for themselves and their families and correspondingly enhancing a plaintiff's possibility of extracting a settlement on a basis other than the merits. Enhancing the prospects for

obtaining a settlement on a basis other than the merits is hardly a worthy legislative objective.[67]

The dissent argued that such personal liability should attach in order to properly enforce FEHA's goal of eradicating "discrimination, harassment and retaliation in the workplace on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation."[68]

Future cases involving the scope of FEHA will surely come to the supreme court, and a changing composition of the court could well affect the direction the court takes on such cases.

Conclusion

The California Supreme Court is entering a period of transition. While most of its jurisprudence is likely to remain stable in the foreseeable future, there are a few significant areas in which the court could chart a new direction when the new chief justice and possibly one or more new associate justices join the court in the coming years. In other words, it is important this election cycle to have a debate about the proper role of the courts in our society, how the California Supreme Court has fared in recent years, and what judicial philosophy future appointees ought to embrace. With a divided bench on so many issues affecting business and commercial issues, role of courts issues are a natural extension of the broader conversations taking place in the political universe about jobs and economic growth.

Endnotes

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5 *See* Damien Schiff and Timothy Sandefur, *The Modern California Supreme Court: Progressivism and Practical Constraints* (Federalist Society White Paper 2008)

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8 Strauss v. Horton, 46 Cal.4th 364 (2009).

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10 *Id.*, 113 Cal.Rptr. at 290 (quoting Coalition for Economic Equity v. Wilson 122 F.3d 692, 702 (9th Cir. 1997)).

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19 *See* M.P. v. City of Sacramento, 177 Cal.App.4th 121, 124 (2009).

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29 *See* Cal. Bus. & Prof. Code, § 17200.

30 *See, e.g.*, Californians For Disability Rights v. Mervyn's, LLC, 39 Cal.4th 223, 228 (2006).

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32 *See id*.

33 *See* Californians For Disability Rights, 39 Cal.4th at p. 228.

34 *In re* Tobacco II, 46 Cal.4th 298 (2009).

35 *Id*. at 308-311.

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40 *See* Remarks of Jeremy B. Rosen, *California 17200: Its Nature, Function, and Limits*, State Court Docket Watch (Summer 2010), http://www.fed-soc.org/doclib/20100909_SCDWSummer2010.pdf.

41 23 Cal.3d 899 (1979).

42 Fashion Valley Mall, LLC v. NLRB, 42 Cal.4th 850 (2007).

43 *Id*. at 857-870.

44 *Pruneyard*, 23 Cal.3d at 905-906 (internal quotes omitted).

45 *Id*. at 870 (Chin, J. dissenting).

46 *Id*.

47 *See* Snatchko v. Westfield LLC, 187 Cal.App.4th 469 (2010).

48 *See* Cal. Code. Civ. Proc. Section 1281; *cf.* 9 U.S.C. section 2.

49 Gentry v. Superior Court, 42 Cal.4th 443, 453-466 (2007).

50 *Id*. at 473 (Baxter, J. dissenting).

51 Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal.4th 1334, 1356-1364.

52 *Id*. at 1358.

53 *Id*. at 1375 (Moreno, J. dissenting).

54 Pearson Dental Supplies, Inc. v. Superior Court, 48 Cal.4th 665, 679-680.

55 *Id.* at 684 (2010) (Baxter, J., dissenting).

56 *Id*. at 683.

57 Kasky v. Nike, Inc., 27 Cal.4th 939, 963-969 (2002).

58 *Id*.

59 *Id*. at 970-971 (Chin, J., dissenting).

60 *See* Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

61 *See id*. at 655-664 (Stevens, J., concurring)

62 *See id*. at 680 (Breyer, J., dissenting) ("[I]t is likely, if not highly probable, that, if this Court were to reach the merits, it would hold that heightened scrutiny applies; that, under the circumstances here, California's delegation of enforcement authority to private attorneys general disproportionately burdens speech; and that the First Amendment consequently forbids it.").

63 Ross v. RagingWire Telecommunications, Inc., 42 Cal.4th 920, 925-931 (2008).

64 *Id*. at 931-933.

65 *Id*. at 933-934 (dissenting opn, Kennard, J.).

66 Jones v. Lodge at Torrey Pines Partnership, 42 Cal.4th 1158, 1173-1174 (2008).

67 *Id*. at 1166.

68 *Id*. at 1174 (Werdegar, J., dissenting).

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