

# THE MODERN CALIFORNIA SUPREME COURT: PROGRESSIVISM AND PRACTICAL CONSTRAINTS

*by Damien M. Schiff & Timothy Sandefur*



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The California Supreme Court decides legal issues affecting a population of more than 30 million people, spread across 156,000 square miles, all from an enormous variety of backgrounds, with widely different political and cultural views. In addition to its array of different ideologies and interests, California's political culture is strongly rooted in an old-fashioned Progressivism. Although like many states, its urban centers are marked by the legacy of 1960s radicalism while its rural counties remain socially conservative, this difference is more apparent than real.<sup>1</sup> Progressivism was founded on replacing liberty, once the fundamental constitutional value, with collective decision-making. The Progressives were decidedly to the left on matters of economic liberty and private property, but sometimes conservative on matters involving morality, marriage and family.

In the years following the New Deal, many Progressives abandoned this latter aspect in favor of what is called "social liberalism;" today's California Supreme Court has, with some exceptions, adopted this neo-Progressive outlook, embracing socially liberal values while retaining a strong "law-and-order" position in criminal law along with an overwhelmingly liberal position on issues of economic freedom, property rights, and environmental law.<sup>2</sup>

California's legal history has featured many powerful, influential, and controversial judges, including Stephen J. Field and Roger Traynor. More recent appointees have proven controversial as well. When Governor Jerry Brown (now the state's Attorney

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General) appointed former state Secretary of Agriculture Rose Bird to the court, along with Cruz Reynoso and Joseph R. Grodin, conflict was to be expected. After voting consistently against implementing the state's death penalty, and in favor of expanding tort remedies, Bird, Reynoso, and Grodin were removed at a retention election, making them the only statewide officers except for Governor Gray Davis ever to be removed by voters.<sup>3</sup> The retention-election process is itself a legacy of the Progressive Era, being implemented in 1911, and the fact that Californians would use a Progressive device to remove Progressive judges is just the sort of paradox that sets the theme for the court's work in the years since.

In 1996, Governor Pete Wilson nominated Ronald George as Chief Justice. In the ensuing decade, the Court has remained firmly in the Progressive tradition that is so central to the state's political character.<sup>4</sup> While today's justices do not seem inclined to take the lead as aggressively as the Bird Court did,—and, in fact, have backed away from many of the Bird Court's more extreme positions— the George Court has been equally reticent to revise state law in a more conservative direction. The California Supreme Court also faces a number of practical constraints. Its decisions affect more citizens than any other state court, a challenge that is, no doubt, compounded by the diverse political and cultural differences between northern and southern California. Further, the court faces an extraordinarily large docket due to the state's liberal standing rules and automatic death penalty appeals. Such a large docket prevents the court from effectively narrowing its decision-making. For all of these reasons, the California Supreme Court is, in the words of law professor Clark Kelso, "not an ideologically consistent court," but one which instead seeks to accommodate the fundamentally contradictory principles of Progressivism lying at the heart of California's political culture.<sup>5</sup>

## I. ENVIRONMENTAL LAW

It is not surprising that the land of Yosemite and the adopted home of John Muir should be the vanguard of environmental regulation—and so it is with California. The Golden State has, among other environmental laws, the California Endangered Species Act (CESA), the Porter-Cologne Water Quality Act, the Streambed Alteration Act, the Natural Community Conservation Planning Act, the California Environmental Quality

Act (CEQA), and the Z'berg-Nejedly Forest Practice Act (FPA). Many of these statutes have been subjects of significant litigation, resulting in several especially important decisions from the California Supreme Court.

*Mountain Lion Foundation v. Fish & Game Commission* concerned two of the state's more comprehensive environmental laws—CEQA and CESA.<sup>6</sup> Specifically, the case addressed the issue of whether the Fish and Game Commission was required under CEQA to take into account the effects on the environment caused by its decision to “delist”—*i.e.*, remove from protection—the Mojave ground squirrel, a species that had been protected under CESA. That law requires the Commission to determine whether any petitioned action (whether for listing or delisting a species) is “warranted.” Although CESA does not contain guidelines for listing or delisting a species, the Commission has established through regulation when a species “may be delisted.”

CEQA is intended to provide the state and the public with knowledge of the effects of proposed state actions, so as to avoid environmental damage. It requires state agencies to prepare environmental impact reports (EIRs) to alert the public to potential environmental changes, and to prove that an agency has reviewed the ecological implications of the proposed action. Preparing an EIR can be costly and time-consuming, so avoiding an EIR is the aim of anyone seeking the expeditious completion of a project. CEQA contains several exceptions, the most relevant to *Mountain Lion* being that CEQA does not apply to *nondiscretionary* public projects. But in that case, the court distinguished between discretionary projects, involving “fixed standards or objective measurements” and thus not involving a public official’s “personal, subjective judgment,” and discretionary actions, which require “judgment or deliberation” on the part of the public agency.<sup>7</sup> The court then concluded that CEQA applies to the Commission’s decision to delist a species, because doing so involves discretion. Technical projects, like every complex action, require a great deal of expertise. In adopting a criterion, the court chose not to adopt whether the law mandates action one way or the other, once the necessary factual findings and agency determination (which may imply discretion) have been made.

Partially discretionary agency actions are subject to CEQA; yet discretionary decisions which go into an agency’s decision-making, as a matter of logic, do not affect whether that ultimate decision is discretionary or nondiscretionary. An agency is told, *if you find A, you must do B*: the discretionary nature of the finding of *A* does not make *B* a discretionary action. The practical effect of *Mountain Lion* is to make delisting more costly, not just for the Commission, but also for private petitioners. CEQA authorizes California agencies to pass on the reasonable costs of preparing an EIR to project proponents, meaning that the prosecution of a delisting petition is beyond the means of most Californians.

*Big Creek Lumber Co. v. County of Santa Cruz* concerned the FPA, under which anyone wishing to conduct a substantial timber harvesting operation must draft a timber harvesting plan and seek approval from the Department of Forestry and Fire Protection.<sup>8</sup> The City of Santa Cruz adopted two zoning ordinances. One, the “zone district” ordinance, forbade timber harvesting operations in areas adjacent to streams and residences; the other (the “helicopter” ordinance) restricted the areas where timber harvesting activities associated with helicopter operations could occur. The plaintiff alleged these zoning ordinances were preempted by the FPA, which provides that “individual counties shall not... regulate the conduct of timber operations.”<sup>9</sup> The county contended that the ordinances in question did not regulate the *conduct* of timber operations, but rather just the *location* of timber operations.

The court agreed with the county, by concluding that reading the FPA to preempt all county timber regulation would render superfluous the italicized portion of the following: “individual counties shall not... regulate *the conduct of* timber operations.” The court, thus, did not distinguish between this language and that which would read: “individual counties shall not... regulate timber operations.” As Justice Moreno’s dissent points out, reading the law this way nullifies the legislature’s attempt to respond to “local ordinances that had essentially prevented the harvesting of timber” and ignores the FPA’s other uses of the phrase “conduct of.” Those other uses have been interpreted administratively to apply to both “how” and “where” regulations.

The court’s construction evinces a desire to defer to local restrictions on timber harvesting. That is to

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say, the trumping order for the majority is not “local over state” but rather “environment over timber.” The majority opinion worried that reading the FPA to preempt all timber-related county ordinances “would require cities and counties to allow commercial logging even in residential districts.”<sup>10</sup> In contrast, the dissent explains,

the real question is much more narrow.... Whether it would be ‘absurd’ to deny localities the right to forbid or limit timber operations, other than those constituting a nuisance, on parcels of more than three acres that are located near residential areas, where the Board of Forestry has declined to enact sufficient prophylactic rules and the pertinent timber harvesting plan has not addressed residents’ concerns.<sup>11</sup>

The argument is essentially that the legislature could not have intended to preempt local regulation because that regulation is more effective than statewide rules; but this reasoning could soon preclude *any* preemption.

*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* concerned the adequacy of an EIR for a master planned community east of Sacramento.<sup>12</sup> The community encompassed some 6,000 acres, and was to include eventually 22,000 residential units with 60,000 people. The plaintiffs challenged the EIR on several grounds, the most important of which was that the EIR failed adequately to anticipate how the project’s water supply needs would be met in the long-term. Acknowledging that such information may be difficult to ascertain, the court still insisted that CEQA requires a discussion of “possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies.”

The majority found fault with several aspects of the EIR, including its failure to anticipate how future but *unrelated* development projects in the same area might also affect community water supplies. If a balance between future supply and demand for water could not be established, the EIR must either (1) demonstrate that water can be provided from another identified source, or (2) “fully disclos[e] the uncertainty, other possible outcomes, their impacts and appropriate mitigation measures.”<sup>13</sup> This information is difficult to ascertain, and the obligation, if taken literally, could forbid developments of any sort. As Justice Baxter explained in his dissent, a development “must be held hostage to

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a balancing of supply and demand for *all conceivable* development... even if no one has yet stepped forward to propose such development.”<sup>14</sup> Baxter further noted that requiring EIR analysis on a regional water supply imbalance would preclude housing development in many areas where there is enough water to provide for each and every development that may possibly be permitted under a general plan.

That the majority may have been motivated by environmental, rather than planning concerns, is suggested by the dissent’s observation that the EIR *had* identified enough water for the project—three-to-four times over. The immediate effects of the court’s ruling are to delay construction and to add another major barrier to the approval of EIRs. That result is consistent with a George Court’s interest in environmentally friendly growth. Perhaps the state’s most famous environmental law decision, the “Mono Lake” case concerned the scope of the modern public trust doctrine.<sup>15</sup> That doctrine holds that ownership of submerged lands lies with the state, which regulates the use of those lands to further the public interest for ecological purposes. The Mono Lake case concerned a challenge to the city of Los Angeles’s diversion of water upstream to provide for the city’s inhabitants. Environmental groups contended that this diversion reduced inflow to Mono Lake, in violation of the public trust doctrine, and the court agreed, concluding that the doctrine required a “reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.” It confirmed that the traditional protective uses of the trust—navigation, commerce, and fishing—had been expanded to include “recreational and ecological” values.<sup>16</sup>

The Mono Lake decision inspired hopes among environmentalists that the decision was part of a national movement to invigorate the public trust doctrine. Yet the court has not squarely addressed the issue since then, although in a recently decided case—*Environmental Protection Information Center v. California Department of Forestry & Fire Protection*—the court held that, where an activity arguably violates the public trust, if there is an existing and applicable statute, a court should focus on the statute—not the public trust doctrine—to determine whether any duty has been breached.<sup>17</sup>

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## II. TORTS

Once an innovator in tort law, the California Supreme Court has, if anything, withdrawn from its proclivity for establishing new liability standards. Beginning in the 1960s, the court permitted recovery against pharmaceutical companies on a newly-minted “market share” theory, which expanded “infliction of emotional distress” beyond previous limits and permitted a psychotherapist, who had failed to warn a person about threats uttered by a mental patient, to be sued.<sup>18</sup> During the Bird years, the court continued this trend, imposing unprecedented and expensive liability theories, imposing new duties on landowners, even allowing a homeowner to sue when a landslide caused another home to collapse against the plaintiff’s residence.<sup>19</sup> Two years later, the court held that the user of a telephone booth, who was injured when a drunk driver’s car jumped the curb, could sue the telephone company, because such a collision was foreseeable.<sup>20</sup> The case was later described as “[t]he high-water mark of California’s judicial tort expansionism.”<sup>21</sup>

But in recent years, the court has restricted some tort theories, particularly its premises liability rules.<sup>22</sup> This is especially true of cases where plaintiffs injured by criminal activities sue landowners for failing to take steps to prevent such crimes. In the 1985 case of *Isaacs v. Huntington Memorial Hospital*, the court established a “totality of the circumstances” test, which permitted liability if the criminal activities were foreseeable.<sup>23</sup> Chief Justice Bird wrote that even where there were no prior criminal incidents, a landowner could be sued when a third party committed a criminal act on the land. But in 1993, seven years after the voters elected not to retain Bird, *Isaacs* was sharply curtailed in *Ann M. v. Pacific Plaza Shopping Center*, which declared that, in the absence of prior similar incidents, or other similar evidence, the property owner would not be found liable for failing to take steps to prevent violent crime.<sup>24</sup> Although *Ann M.* did not expressly overrule *Isaacs*, the totality of the circumstances approach was virtually eliminated. Shortly thereafter, the court refused to allow premises liability for criminal activities by third parties; in *Sharon P. v. Aarman*, a woman who had been attacked in a parking garage sued the owner for failing to provide lighting or taking other preventative measures.<sup>25</sup> The court found there were no prior similar

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incidents or other indicia of likelihood of violent crime, and therefore the landowner had no duty to take preventative measures.

More recent cases have followed the same rule. In *Delgado v. Truax Bar & Grill*, the court declared that proprietors have “no duty under *Ann M.* and *Sharon P.* to hire a security guard or to undertake other similarly burdensome preventative measures,” although they do owe duties of due care to customers “and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor’s special relationship.”<sup>26</sup> In *Wiener v. Southcoast Childcare Centers, Inc.*, the court declared that a property owner was not liable when an individual drove a car onto the property, with the intention of running over and killing children in the playground.<sup>27</sup> “[H]ere, the foreseeability of a perpetrator’s committing premeditated murder against the children was impossible to anticipate,” the court concluded, “and the particular criminal conduct so outrageous and bizarre, that it could not have been anticipated under any circumstances.”<sup>28</sup>

While the court has withdrawn, to some degree, from the *Isaacs* approach, it has not eliminated landowner liability for criminal incidents entirely. Once an incident has occurred, the court still examines the “totality of the circumstances” to determine whether a criminal act was foreseeable. Attorney Deborah J. La Fetra contends that this approach

[p]laces too great a burden upon landowners and business owners because the court [has] eschewed any type of clear rule in favor of a sliding scale that actually slides on more than one axis. The level of the duty shifts not only depending on evidence of prior criminal acts on the premises, but also... on whether a crime is in the future, imminent, or ongoing.<sup>29</sup>

Similar to its approach in *Ann M.*, the court overruled *Royal Globe Ins. Co. v. Superior Court* in *Moradi-Shalal v. Fireman’s Fund Insurance Companies*. In *Royal Globe*, the Bird Court allowed private parties to sue insurance companies for unfairly denying coverage to other private parties, even over a single wrongful act, in spite of a California statute prohibiting insurance companies from engaging in certain acts “with such frequency as to indicate a general business practice.” Yet



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in *Moradi-Shalal*, decided two years after Bird’s removal, the court overruled *Royal Globe*, holding that private parties lacked standing, and that only the insurance commissioner could sue to enforce the law.

Likewise, in *Thing v. La Chusa*, the court sharply limited the availability of damages for negligent infliction of emotional distress.<sup>30</sup> The court had previously allowed plaintiffs to sue on this theory, when it decided *Dillon v. Legg* and *Ochoa v. Superior Court*.<sup>31</sup> Those cases rejected the common law rule allowing a parent to recover emotional distress damages for witnessing the negligent injury or killing of her child, only if the parent herself was in fear of imminent physical harm—a rule the *Dillon* Court described as a “hopeless artificiality”—and replaced it with a multifactor balancing test for evaluating the foreseeability of the plaintiff’s emotional injury.<sup>32</sup> One of those factors was the requirement that the child’s injury be a “sudden occurrence,” and in a case in which a father observed his child’s stillbirth, and sued the doctors for negligent infliction of emotional distress, the Bird Court barred liability, approving of this as a useful limitation on liability.<sup>33</sup> Yet in *Ochoa*, the court eliminated this factor, finding it

arbitrarily limit[ed] liability when there is a high degree of foreseeability of shock to the plaintiff and the shock flows from an abnormal event, and, as such, unduly frustrates the goal of compensation—the very purpose which the cause of action was meant to further.<sup>34</sup>

In *La Chusa*, three years after Bird’s removal, the court reined in the guidelines. Noting that “policy considerations mandated that infinite liability be avoided by restrictions that would somehow narrow the class of potential plaintiffs,” and that the tests in *Dillon* and *Ochoa* were “amorphous,” and “murky,” the justices concluded that “[l]ittle consideration has been given in post-*Dillon* decisions to the importance of avoiding the limitless exposure to liability that the pure foreseeability test of ‘duty’ would create.”<sup>35</sup> It therefore held that “foreseeability of the injury alone is not a useful ‘guideline’ or a meaningful restriction on the scope of the [negligent infliction of emotional distress] action.”<sup>36</sup> The “overwhelming majority of ‘emotional distress’ which we endure,” the justices concluded, “is not compensable.”<sup>37</sup>

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### III. PROPERTY AND ECONOMIC RIGHTS

While the court has started to impose stricter standards in the tort liability context, it remains more relaxed in its enforcement of constitutional protections for private property owners. In the wake of the United States Supreme Court’s decision in *Kelo v. New London*, the California Supreme Court has remained silent on eminent domain, refusing to take cases such as that of a San Diego cigar store owner who was barred from offering evidence that his upscale shop was not actually “blighted.”<sup>38</sup> Generally, the court appears extremely deferential to state regulation on property rights issues.

The court has not decided a case addressing the “public use” issue for at least a decade; however, it did recently uphold California’s “quick take” law, which allows officials to take immediate possession of property they intend to condemn, *before* a court rules on the legitimacy of the condemnation.<sup>39</sup> Under this provision, the condemning agency is required to deposit into the court an amount of money equal to the property’s worth, and a property owner may later demand a trial to determine whether this amount is sufficient. However, a property owner who takes the money must waive his right to challenge the taking on “public use” grounds. Although other courts have looked with great skepticism on this method of eliminating a property owner’s right to defend her property, the California Supreme Court is one of few courts to hold that this method is a “reasonable” restriction on the property owner’s right to appeal.<sup>40</sup>

In *San Remo Hotel v. San Francisco*, the court considered San Francisco’s ordinance that required hotels to pay a heavy fee for the privilege of converting their rooms from long-term residential use to overnight tourist rentals. When the San Remo Hotel was required to pay \$567,000 for a “conversion” permit, the owners sued, arguing that this was a taking under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.<sup>41</sup> In finding that this fee was not a taking, the state’s highest court rounded out a series of decisions that eliminate remedies for Californians whose property rights are restricted through land-use regulations.<sup>42</sup> Despite the United States Supreme Court’s declaration that the Fifth Amendment prohibits officials from using the permit power as leverage to extract payoffs from

landowners, the court concluded that this fee was merely a regulation of property, and that “in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive,” property owners may be “called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.”<sup>43</sup>

Dissenting Justice Janice Rogers Brown commented that the case had rendered “private property, already an endangered species in California... entirely extinct in San Francisco.” Rather than seeing property as a fundamental right deserving constitutional protection, the *San Remo* decision made clear that the state’s courts, like its elected officials, regard private property as “a necessary evil because it funds government programs.”<sup>44</sup> *San Remo* caused many California officials to expand land-use regulations, which has contributed to the astronomical rise in housing costs in the state.<sup>45</sup>

In *Hernandez v. City of Hanford*, through reasoning similar to *Kelo*, the court found that a city may “protect or preserve the economic viability of its downtown business district or neighborhood shopping areas” by adopting laws that “control[] competition.”<sup>46</sup> If the city council claims that protecting the economic interests of a particular section of the city, or a particular industry, will somehow redound to the benefit of the general public, it may prohibit competition and economic opportunity:

so long as the primary purpose of the ordinance or action—that is, its principal and ultimate objective—is not the impermissible *private* anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate *public* purpose—such as the preservation of a municipality’s downtown business district for the benefit of the municipality as a whole—the ordinance reasonably relates to the general welfare of the municipality and constitutes a legitimate exercise of the municipality’s police power.<sup>47</sup>

As with the post-*Kelo* “public use” clause, California zoning law now allows officials almost complete discretion to impose burdens on property owners at will, so long as they declare that the burdens will benefit the public in some way.

In another case touching on economic issues, the justices used the doctrine of “unconscionability” to nullify a contract between Circuit City stores and its

workers that barred employees from bringing class-action lawsuits against Circuit City and required that they submit to private arbitration.<sup>48</sup> The company did not force employees to sign the contracts; it provided workers with a package of information that included a clear explanation of its arbitration procedures, and gave them a month to opt out of the arbitration agreement if they chose. The information packet also recommended that employees consult with an attorney before signing, and employees were asked to watch a video tape which also explained what the arbitration agreement would mean. The court found, however, that the contract was procedurally unconscionable because it was not explicit enough about the possible disadvantages to employees, and because employees could not be expected to consult an attorney or to read and understand a “nine-page single-spaced document” that explained the arbitration process.<sup>49</sup> In addition, although Circuit City never told employees they were required to sign, the employees “felt at least some pressure not to opt out of the arbitration agreement.”<sup>50</sup>

The justices insisted they were not declaring all class-action waivers illegal, but dissenting Justice Marvin Baxter suggested that that was precisely the effect of the decision. The court was “elevat[ing] a mere judicial affinity for class actions as a beneficial device for implementing the wage laws above the policy expressed by both Congress and our own Legislature.”<sup>51</sup> By annulling the agreement, the California Supreme Court used the unconscionability theory to question the terms of the parties’ openly-negotiated contract.

Finally, in *Nike v. Kasky*, the court employed the state’s vague Unfair Competition Law to allow a plaintiff to sue a corporation for publishing an allegedly misleading response to public attacks on its business practices.<sup>52</sup> Nike maintained that publications were clearly the type of political speech at the core of the First Amendment, but the plaintiff brought suit, arguing that the information in the publications was untrue and, therefore, that Nike engaged in an unfair business practice.<sup>53</sup> Employing the “commercial speech” doctrine, the court held 4-3 that the publications were not protected, because they were “intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller.”<sup>54</sup> The decision was troubling to advocates of free speech, particularly because of its reach; *all* speech by businesses is intended,

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to some extent, to increase sales and profits.<sup>55</sup> Thus, while private citizens are free to utter false statements against Nike in political debates, Nike cannot respond without risking a lawsuit.<sup>56</sup> These cases reveal that the California Supreme Court remains firmly rooted in the Progressive-era constitutional theory which holds that economic rights, including property rights and freedom to make and enforce contracts are, in fact, permissions which the government may revoke to effectuate its broader purposes.

#### IV. SOCIAL MATTERS

The California Supreme Court still appears to be a relatively strong “law and order” court. Not long after the United States Supreme Court held that police officers may subject even minor traffic offenders to full custodial arrest, its California counterpart held that police officers could stop, arrest, and search a person who was riding a bicycle on the left side, instead of the right side of the road.<sup>57</sup> Only Justice Janice Brown dissented, pointing out that:

[i]n the pervasively regulatory state, police are authorized to arrest for thousands of petty *malum prohibitum* ‘crimes’ many too trivial even to be honestly labeled infractions.... Since this indiscriminate power to arrest brings with it a virtually limitless power to search, the result is the inevitable recrudescence of the general warrant.<sup>58</sup>

But the court has also moved to the left on significant social issues. In the recent *Catholic Charities* case, it upheld a requirement in the state’s health insurance law that forced a Catholic organization to provide benefits for its employees which would include contraceptives.<sup>59</sup> Although the law included an exemption for religious institutions, that exemption was drafted in language narrow enough to exclude the Catholic Charities, who argued that by defining some activities as “religious” and others as “secular” in a manner different from that used by the Church, the statute unconstitutionally interpreted Catholic religious doctrine. But the court upheld the requirement, holding that the statute was religiously neutral and merely governed the relationship between the church and its employees. “The act conflicts with Catholic Charities’ religious beliefs only incidentally,” it concluded, “because those beliefs happen to make prescription

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contraceptives sinful.” Thus the requirement was constitutional under the principles of *Employment Division v. Smith*.<sup>60</sup> In the court’s eyes, the state was not requiring the church to take a position contrary to its views, but simply pursuing a legitimate secular policy.

In a related vein, the decision in *Evans v. City of Berkeley*, upholding a city’s decision to eliminate free berthing privileges for a Sea Scouts’ boat so as to express the city’s hostility to the Boy Scouts of America’s exclusion of homosexuals, did not itself appear to be motivated by hostility to the Scouts’ position. Rather, the justices emphasized that the city was not requiring the organization to endorse a viewpoint, or speak or remain silent on any matter, it was simply eliminating a government subsidy.<sup>61</sup>

The court’s recent decision in the *Marriage Cases* seems to have a different rationale.<sup>62</sup> Although the court acknowledged that California’s “domestic partnership” law already allowed gay couples all—or virtually all—of the substantive guarantees received by heterosexual married couples, the court nevertheless found that describing these arrangements by the words “civil union” or “domestic partnership” rather than “marriage” was enough to violate the state constitution’s guarantees of equality.<sup>63</sup> Gay couples, the justices concluded, have a right to “have their family relationship accorded dignity and respect equal to that accorded other officially recognized families.” For the state to “assign[] a different designation for the family relationship of same-sex couples while reserving the historic designation of ‘marriage’ exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.”<sup>64</sup> The court thus decided that California’s constitution forbids assigning different names for same-sex and opposite sex relationships, even though the two were already substantively identical. Thus the court did not “legalize” same-sex unions, which were already legal in California; instead it declared that those unions cannot be constitutionally called by any other word than “marriage.”<sup>65</sup> Yet, the terms “domestic partnership” or “civil unions” do not appear to be derogatory, and it is questionable whether citizens have a constitutional right to be described by words they find preferable, except in cases where the government purposely chooses derogatory words.<sup>66</sup>

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Far more significant in the *Marriage Cases* was the court's adoption of strict scrutiny in cases where the government classifies people on the basis of sexual orientation.<sup>67</sup> This portion of the opinion will have far-ranging effects in the coming years. Under the *Marriage Cases*, the state may now discriminate between men and women more easily than it can discriminate between homosexuals and heterosexuals. Given that California remains the epicenter of major battles between traditionalists, located for the most part in the state's rural counties, and urban social liberals, a statewide rule requiring school districts, public health clinics, and all other government institutions to treat both groups with precise equality may result in serious conflicts in the decades ahead.<sup>68</sup>

## V. PRACTICAL CONSTRAINTS

One recurring problem for the California Supreme Court is that it must preside over the most populous state in the nation; a state whose northern and southern halves comprise diverse political cultures, concerns, and interests.<sup>69</sup> The State Constitution provides that the court must hear all death penalty cases on direct appeal—a load which is difficult for the justices to bear.<sup>70</sup> Moreover, California's extremely lenient standing rules make it even harder for the judiciary to limit its docket.<sup>71</sup> Techniques for controlling the court's case load—including shifting some of its burden to the courts of appeal—and expanding the court to at least nine justices could help the court narrow the scope of its decision-making.

Although the court hears more than 100 cases per year, and is asked to hear up to 9,000, the justices are constitutionally required to announce their decisions within 90 days of oral argument, or risk having their pay withheld.<sup>72</sup> The result, as law professor Shaun Martin notes, is that lawyers “all know that the California Supreme Court basically finishes drafting most of its opinions prior to oral argument...[meaning] that oral argument is essentially irrelevant, since the outcome is largely predetermined at that point.”<sup>73</sup> The court should not be pressured by this severe requirement in a way that might prejudice a case. Nor should its ability to reexamine broad questions about property rights, social issues, and environmental matters be impaired by an overloaded docket of urgent cases.

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Finally, despite being the second busiest state supreme court (behind only New York), and second to none in the number of people affected by its rulings, the court receives relatively little attention in the media or even from law journals. Until 2008, there was no law journal devoted to California's highest court. Earlier this year, Chapman University School of Law announced that an annual issue of its law review would be devoted to the court's work, filling an important void. Still, while reporters like Tony Mauro, Linda Greenhouse, and Nina Totenberg devote their energies to the workings of the Nation's top judges, the only journalist regularly focusing on the workings of California's Supreme Court is Santa Clara University law professor Gerald Uelman.<sup>74</sup> As a result, most Californians know little about their Supreme Court, and attorneys are only slightly better informed.

Even more fundamental is the issue raised recently by the dean of the state's journalists, *Sacramento Bee* columnist Dan Walters. The state, Walters wrote, “is a broken institution, endemically incapable of dealing with major policy issues.”<sup>75</sup> Given its enormous geographic size, its 35 million inhabitants, its widely divergent cultures and sub-cultures, the extreme density of its cities and the wide openness of its rural areas, California “is testing whether the American system of government, with myriad checks and balances aimed at making decision-making difficult, works when society reaches an advanced level of diversity.”<sup>76</sup> Presiding over the conflicts generated by such a complicated state is a seven-member court with the final word on matters of state law.

## CONCLUSION

More than fifteen years ago, one insightful commentary noted that while the California Supreme Court had “embarked on a clear course of cutting back the principles of liability and the bases for [tort] relief,” and had abandoned the Bird Era crusade against the death penalty, it had otherwise “expressed a preference for deferring policy judgments affecting important social issues and commercial relationships to legislative decision-making.”<sup>77</sup> Essentially this means that the court showed little interest in protecting private property and economic freedom, or staking out new positions with regard to social matters. The same remains moderately true of the George Court. While in

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some ways it has maintained its retreat from the ideas of the Bird era, the court has not steered a consistent course in any direction. Instead, it has remained fixed within the Progressive Era ideas of law and politics, seeing collective decision-making, rather than the preservation of constitutional liberty, as the standard for jurisprudence. In addition to its ideological identity, the court's workload and stringent schedule, as well as Californians' lack of familiarity with its work—largely a function of the lack of media coverage—have limited the court's ability to address important legal issues with thoughtful consistency.

## Endnotes

1 See Louis Menand, *Life in The Stone Age*, in LOUIS MENAND, *AMERICAN STUDIES* 163 (2002) (1960s radicalism “was... profoundly middle-class.... [T]he counterculture wasn't hedonistic; it was puritanical.... [T]he parents were worshipping false gods, and the students who tore up (or dropped out of) the university in an apparent frenzy of self destruction... were, in effect, smashing the golden calf.”).

2 See MICHAEL MCGERR, *A FIERCE DISCONTENT: AMERICA IN THE PROGRESSIVE AGE* 317 (2003) (noting that New Deal leaders “realized that most Americans wanted to be left free to pursue pleasure, to indulge in the individual gratification of consumerism. The task of government was to make sure Americans could afford pleasure, and then get out of the way.”).

3 Judges on the California Supreme Court and Courts of Appeal are nominated by the governor, but face retention elections.

4 See generally KEVIN STARR, *INVENTING THE DREAM: CALIFORNIA AND THE PROGRESSIVE AGE* (1986); BRIAN JANISKEE AND KEN MASUGI, *DEMOCRACY IN CALIFORNIA* (2d ed. 2007). California operates under a constitution originally drafted in 1878-79, at the twilight between the Populist and Progressive Eras; however, this constitution has been radically altered over the years, due to the Progressive period's own initiative process.

5 Quoted in Nancy McCarthy, *A Decade As Chief Justice*, *CALIFORNIA BAR JOURNAL*, May 2006, available at [http://calbar.ca.gov/state/calbar/calbar\\_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/May2006&sCatHtmlPath=cbj/2006-05\\_TH\\_01\\_Chief-Justice-George.html&sCatHtmlTitle=Top%20Headlines](http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/May2006&sCatHtmlPath=cbj/2006-05_TH_01_Chief-Justice-George.html&sCatHtmlTitle=Top%20Headlines) (last visited June 16, 2008).

6 16 Cal.4th 105 (1997).

7 *Id.* at 117.

8 38 Cal.4th 1139 (2006).

9 The Forest Practice Act § 4516.5 (d).

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10 *Id.* at 1156.

11 *Id.* at 1173 (Moreno, J., dissenting).

12 40 Cal.4th 412 (2007).

13 *Id.* at 446.

14 *Id.* at 452 (Baxter, J., dissenting) (emphasis added).

15 *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983).

16 *Id.* at 435, 448.

17 2008 WL 2757358 (July 17, 2008).

18 *Tarasoff v. Regents of University of California*, 17 Cal.3d 425 (1976); *Sindell v. Abbott Laboratories*, 26 Cal.3d 588 (1980).

19 *Sprecher v. Adamson Co.*, 30 Cal.3d 358 (1981).

20 *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal.3d 49 (1983).

21 Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 *BROOKLYN L. REV.* 1, 48.

22 Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with “New” Torts*, 49 *DEPAUL L. REV.* 455 (1999); John H. Culver, *The Transformation of the California Supreme Court: 1977-1997*, 61 *ALB. L. REV.* 1461 (1998).

23 38 Cal.3d 112 (1985).

24 6 Cal. 4th 666 (1993).

25 21 Cal. 4th 1181 (1999).

26 *Delgado v. Trax Bar & Grill*, 36 Cal.4th 224, 240 (2005).

27 32 Cal. 4th 1138 (2004).

28 *Id.* at 1150.

29 Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 *WHITTIER L. REV.* 409, 461 (2006).

30 48 Cal.3d 644 (1989).

31 68 Cal.2d 728 (1968); 39 Cal.3d 159 (1985).

32 *Dillon*, 68 Cal.2d at 733.

33 *Justus v. Atchison*, 19 Cal.3d 564 (1977).

34 *Ochoa*, 39 Cal.3d at 168.

35 *La Chusa*, 48 Cal.3d at 654, 656, 659.

36 *Id.* at 663.

37 *Id.*

38 TIMOTHY SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21<sup>ST</sup> CENTURY AMERICA* 28-29 (2006); see also *Kelo v. New London*, 545 U.S. 469 (2005).

39 *Mt. San Jacinto Cmty. College Dist. v. Super. Ct.*, 40 Cal. 4th 648 (2007).

40 See, e.g., *Mayor and City Council of Baltimore City v.*

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Valsamaki, 397 Md. 222 (2006); *Dep't of Pub. Works v. Vogt*, 366 N.E.2d 310 (Ill. App. Ct. 1977); *Coop. Power Ass'n v. Eaton*, 284 N.W.2d 395, 398 (Minn. 1979).

41 483 U.S. 825 (1987); 512 U.S. 374 (1994).

42 27 Cal.4th 643 (2002); *see also* Michael M. Berger, *Silence at The Court: The Curious Absence of Regulatory Takings Cases from California Supreme Court Jurisprudence*, 26 LOY. L.A. L. REV. 1133 (1993). Other examples of the court's position on property rights, particularly in the context of regulatory takings, include *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), *aff'd* 477 U.S. 255 (1980); *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), *cert. denied* 519 U.S. 929 (1996); and *Landgate, Inc. v. California Coastal Com'n*, 17 Cal.4th 1006, *cert. denied*, 525 U.S. 876 (1998).

43 27 Cal.4th at 675. Anticipating the court's hostility to property rights, the *San Remo* plaintiffs sought to preserve their right to pursue their takings claim later in federal court, but the United States Supreme Court rejected their opportunity. *See* J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts under a Rule Intended to Ripen The Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247 (2006).

44 27 Cal.4th at 692 (Brown, J., dissenting).

45 John M. Quigley & Steven Raphael, *Regulation and the High Cost of Housing in California*, 95 AM. ECON. REV. 323, 327 (2005); Leonard Gilroy, *Regulating California's Housing Crisis*, Reason Foundation, Apr. 13, 2006, [http://www.reason.org/commentaries/gilroy\\_20060413.shtml](http://www.reason.org/commentaries/gilroy_20060413.shtml); Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, Harvard Institute of Economic Research Discussion Paper No. 2061, at 8 (Feb. 2005), *available at* <http://econweb.fas.harvard.edu/hier/2005papers/HIER2061.pdf>; Marla Dresch & Steven M. Sheffrin, *Who Pays for Development Fees And Exactions?*, Public Policy Institute of California 74 (1997), *available at* [http://www.ppic.org/content/pubs/report/R\\_697SSR.pdf](http://www.ppic.org/content/pubs/report/R_697SSR.pdf); Mary Martinez, *National Association of Realtors Field Guide to Development Impact Fees*, <http://www.realtor.org/libweb.nsf/pages/fg805>; Jack Estill, et al., *Taxing Development: the Law and Economics of Traffic Impact Fees*, 16 B.U. PUB. INT. L.J. 1, 37 (Fall 2006).

46 41 Cal. 4th 279, 296 (2007).

47 *Id.*

48 *Gentry v. Superior Court*, 42 C.4th 443(Aug. 30, 2007).

49 *Id.* at 471.

50 *Id.* at 472.

51 *Id.* at 477 (Baxter, J., dissenting).

52 27 Cal.4th 939 (2002), *cert. granted*, 537 U.S. 1099, *cert. dismissed*, 539 U.S. 654 (2003).

53 Even factually untrue speech is supposed to be protected in the realm of political debate. *See* *New York Times v. Sullivan*, 376 U.S. 254 (1964).

54 *Id.* at 962.

55 *See, e.g.*, Thomas C. Goldstein, *Nike v. Kasky and the Definition of "Commercial Speech,"* 2002-2003 CATO SUP. CT. REV. 63; Deborah J. La Fetra, *Kick It Up A Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004).

56 *See* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 296 (1998).

57 *People v. McKay*, 27 Cal.4th 601 (2002); *see* *Atwater v. Lago Vista*, 532 U.S. 318 (2001).

58 *Id.* at 632-33 (Brown, J., dissenting).

59 *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 527, *cert denied* 543 U.S. 816 (2004).

60 *Id.* at 549 (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)).

61 *See* 38 Cal. 4th 1, 14 (2006).

62 43 Cal.4th 757 (2008).

63 *Id.* at 782.

64 *Id.*

65 *See* Timothy Sandefur, *The California Supreme Court Did Not 'Legalize Same-Sex Marriage,'* FREESPACE, <http://sandefur.typepad.com/freespace/2008/05/the-california.html> (May 15, 2008). *Contra*, David R. Usher, *On Legalized Gay Marriage in California*, THE CONSERVATIVE VOICE, *available at* <http://www.theconservativevoice.com/article/32264.html> (May 18, 2008).

66 In *Hamilton v. Alabama*, 376 U.S. 650 (1964), the Supreme Court summarily reversed a contempt conviction for a black woman who was jailed for refusing to answer questions posed by a white attorney who insisted on calling her by her first name—a common practice in the Jim Crow south. *See* *Ex Parte Hamilton*, 156 So.2d 926 (Ala. 1963). In such cases, a citizen's equal protection rights would clearly seem to be violated, given the history of abuse and denigration underlying such a practice. But this does not appear to be analogous to the use of terms "civil union" or "domestic partnership."

67 43 Cal.4th at 839-44.

68 A particularly good discussion of the cultural clashes in California is JACK CASHILL, *WHAT'S THE MATTER WITH CALIFORNIA?* (2007).

69 Every so often, state residents recur to the proposal that the state be divided into two or three different states. Although the recommendation has never been very popular, it received more attention than usual in 1992. *See* ASSEMBLY OFFICE OF RESEARCH, *TWO NEW CALIFORNIAS: AN EQUAL DIVISION* (1992).

70 CAL. CONST. Art. VI § 11; Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697 (2007).

71 California law recognizes not only taxpayer standing, but

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also “citizen standing,” by which a citizen may “seek[] to procure the enforcement of a public duty.” *Green v. Obledo*, 29 Cal.3d 126, 145 (1981). In addition, many intentionally broad statutes allow people to sue over injuries to others. *See, e.g.*, Cal. Labor Code § 2699 (allowing employees to sue employers for injuries to fellow workers). Until recently, a plaintiff did not need to show a personal injury of any kind to bring a lawsuit under the state’s unusually broad Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. Voters were required to enact an initiative to limit the reach of this law to those who could prove some (even slight) monetary injury. All told, there are more than 9 million lawsuits filed every year in California. *THE SUPREME COURT OF CALIFORNIA* 1 (2007).

72 CAL. CONST. Art. VI § 19.

73 Shaun Martin, “Maynard v. Brandon (Cal. Supreme Ct. - July 11, 2005),” *California Appellate Report*, July 13, 2005, available at <http://calapp.blogspot.com/2005/07/maynard-v-brandon-cal-supreme-ct-july.html> (visited June 16, 2008).

74 Gerald Uelmen’s article in *California Lawyer* reviews the court’s decisions from the previous term and makes predictions for the coming term.

75 Dan Walters, *Infrastructure Collapse Proves Capitol is Badly Broken*, OAKLAND TRIB., Mar. 18, 2006, available at [http://findarticles.com/p/articles/mi\\_qn4176/is\\_20060318/ain16210911?tag=untagged](http://findarticles.com/p/articles/mi_qn4176/is_20060318/ain16210911?tag=untagged) (last visited July 23, 2008).

76 *Id.*

77 Bill Blum, *The California Supreme Court: Toward a Radical Middle*, 77 A.B.A. J. 48, 50 (1991).













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