

The California Judiciary

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Introduction

The California judiciary is one of the three constitutional branches of the state government. This paper provides an overview of the current state court system, its historical development, its relationship with the other branches of state government and the federal courts, and a comparison of California's judiciary with other states' judicial systems.

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.¹ 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.

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.² Consequently, 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? For one thing, state courts are not just junior branches of the national court system—preliminary stops that are necessary preludes to seeking review by higher federal courts. 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. Under our federal system, the state courts have a critical role in protecting the rights of the people and enforcing the rule of law. 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

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

² *Id.* at 2.

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.”³

Thus, rather than creating a strict judicial hierarchy, the relationship between the state and federal courts formed by our federal system is better characterized as a continuing dialogue consistent with the principle of states as laboratories of democracy.⁴ As a result, a citizen’s state courts have a far greater impact, on average, on his daily life. True, state courts apply federal law when it 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.⁵ 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 California judiciary performs critical sovereign functions in state 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 virtue of its power of judicial review of legislative enactments and executive actions, the judiciary is the final word in interpreting the California Constitution.⁶

On a more practical level, state courts and agencies 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 will adjudicate most crimes you might commit.⁷ Despite the Supremacy Clause, state high courts do not always obediently follow decisions of the U.S. Supreme Court, at times refusing to read the decisions broadly, creating exceptions, or distinguishing them factually.⁸

California was organized and operated under its own constitution for almost a year before it entered the union as a state.⁹ 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.¹⁰ “[T]he California Constitution is an independent document and its constitutional pro-

³ *Id.* at 50.

⁴ *Id.* at 16 and 18–19. *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁵ 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).

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

⁷ Tarr and Porter, *State Supreme Courts in State and Nation* (Yale University Press, 1988) at 6–7.

⁸ *Id.* at 13–15.

⁹ 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.

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

tections are separate from and not dependent upon the federal Constitution.”¹¹ This has significant implications for the policymaking function of 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.¹²

Indeed, the California Supreme Court rejected an initiative attempt by the voters to define individual rights as no broader than their interpretation by the U.S. Supreme Court.¹³

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.¹⁴ 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.¹⁵

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 that began in 1974 when the state constitution was amended to add a provision on the independence of state constitutional liberties from any federal guarantees.¹⁶

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 it was wrong from the beginning, or that any one set of changes was for naught.

¹¹ *Los Angeles Alliance for Survival v. City of Los Angeles* (200) 22 Cal.4th 352, 365; Cal. Const., art. I, § 24 (“Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution”).

¹² 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).

¹³ *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.

¹⁴ See *Michigan v. Long* (1983) 463 U.S. 1032.

¹⁵ 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.

¹⁶ Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years* (2004) 31 *Hastings L. Q.* 141, 161.

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 to refine existing systems and 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 reflects a decision to value a particular policy goal. 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.¹⁷ 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 seems objectively suboptimal. In 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.¹⁸ And the state courts have sometimes caused political turmoil. The state high court, in particular, has not been reluctant to confront issues of major political and social significance.¹⁹ 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 studying them is less than exciting, but the California judiciary has a few tales to tell. In 1857, the governor sent California Chief Justice David S. Terry to meet with the San Francisco vigilance committees. While there, Terry

¹⁷ See, e.g., Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 *Harvard L. Rev.* 1061 (2010); Daniel R. Pinello, *The Impact of Judicial-Selection Method on State-Supreme-Court Policy* (1995).

¹⁸ 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.

¹⁹ 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.

stabbed a vigilante in the neck with a Bowie knife. The vigilance committee then kidnapped, imprisoned, tried, and convicted Terry—but not for murder, as the victim recovered.²⁰ Terry was elected to the court as a candidate of the Know-Nothing Party in 1855, and became chief justice in 1857. A proslavery 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. He served in the Confederate Army during the Civil War and achieved infamy by killing United States Senator David Broderick in a duel. Field's bodyguard killed Terry after he allegedly attacked Field.²¹

Chief Justice Field, for his part, led a spectacular life. As a practicing attorney, he narrowly escaped death at the hands of one judge²² and accepted a challenge to duel another in a small room, starting with pistols and ending with bowie knives.²³ Field would later go on to serve over three decades on the U.S. Supreme Court, where, in the process of dodging assassination by Terry, he became the only justice to be charged with murder.²⁴

In 1853, Chief Justice Hugh C. Murray, another proslavery, hot-tempered man, 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.²⁵ 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.²⁶

Even the location of the state high court was controversial. In 1854 the California 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 San Jose should be the capital and moved the court there. The legislature again directed the court to move to Sacramento in 1872. The court again ignored the legislature and returned to

²⁰ Dear and Levin, *Historic Sites of the California Supreme Court* (2000) California Supreme Court Historical Society Yearbook Vol. 4 at 70 n.31.

²¹ Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years* (2004) 31 Hastings L. Q. 141, 144. In fact, Terry resigned his position as Chief Justice so that he could duel Senator Broderick. A. Russell Buchanan, David S. Terry of California, *Dueling Judge* 98 (1956).

²² Donald R. Burrill, *Servants of the Law* 113 (2011). Field was saved from the would-be assassin's bullet by future U.S. Senator (and losing duelist) David Broderick. *Id.* See also Stephen J. Field, *Personal Reminiscences of Early Days in California* 85–87 (1893). For self-defense, Field had a coat made that concealed two revolvers and allowed him to fire through its pockets. *Id.* at 54.

²³ Carl Brent Swisher, *Stephen J. Field, Craftsman of the Law* 62–63 (1930).

²⁴ A U.S. Marshal assigned to guard Field shot and killed Terry.²⁴ Both men were arrested. The charges against Field were soon quashed at the urging of California's governor, and his bodyguard's case eventually reached the Supreme Court. *In re Neagle* (1890) 135 U.S. 1. Field had recently ruled against Terry's wife, who claimed to be the widow of a wealthy U.S. senator and was seeking her share of the estate. For a thorough account of the ordeal, see Swisher, *supra* note 23, at 321–361.

²⁵ Grodin, *supra* note 21, at 144.

²⁶ Dear and Levin, *Historic Sites of the California Supreme Court* (2000) California Supreme Court Historical Society Yearbook Vol. 4 at 70 n.31.

San Francisco. Finally, the 1878 state constitutional convention decided against requiring the justices to remain in the state capital permanently, due in part to feelings that the climate and whiskey in Sacramento were bad.²⁷

Colorful history aside, California's courts, particularly the Supreme Court, have long had national significance thanks to the state's size and prestige. California's judiciary is the largest in the nation—larger than the entire federal judiciary combined.²⁸ Some California appellate districts are larger by population than entire states with their own full court systems.²⁹ 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 looks to California to see what its courts think.³⁰ But the California Supreme Court has long been, and continues to be today, the most “followed” state high court.³¹ And it often has been the case that California decisions influenced the national discussion on an issue.

California courts were the first to establish a number of major legal principles that ultimately became the law of the land after the U.S. Supreme Court adopted them. The California Supreme Court was the first to decide that prohibiting interracial marriage was unlawful³² and that women have a right of procreative choice.³³ The state high court held, before the federal high court did, that alienage is a suspect class.³⁴ The California Supreme Court decision that race-based college admissions should be unlawful resulted in a U.S. Supreme Court decision that continues to frame the law on that issue today.³⁵

²⁷ 2 E. B. Willis & P. K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* (1881) at 951–957 (debate of Jan. 8, 1879). The delegates debated the merits of placing the Court permanently in Sacramento (the seat of government, though very hot), San Francisco (a healthy city with a great law library, though “earthquakes have shaken [it] from center to circumference”), or Los Angeles (a small but “growing city,” with the finest “unadulterated” wine in the state), and also considered the possibility of a traveling “court on wheels.” One advocate for placing the court in San Francisco argued: “If we could get good whisky, I would be willing to be more lenient to Sacramento, and concede something to her; but they have the most villainous whisky of any city I have ever had occasion to be in.” *Id.* at 955 (remarks of Mr. Barbour). Ultimately, the delegates voted against fixing the court's location in the constitution, and left the matter to the legislature.

²⁸ *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.

²⁹ “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).

³⁰ 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”).

³¹ See generally Jake Dear and Edward W. Jessen, “Followed Rates” and *Leading State Cases, 1940–2005* (2007) 41 *UC Davis L. Rev.* 683.

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

³³ *People v. Belous* (1969) 71 *Cal.2d* 954; *Roe v. Wade* (1973) 410 U.S. 133.

³⁴ *Purdy & Fitzpatrick v. State* (1969) 71 *Cal.2d* 566.

³⁵ *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.

Similarly, a California decision on free speech in privately owned public spaces prompted a federal high court decision defining the law on that issue.³⁶ The California Supreme Court decision prohibiting exclusion of prospective jurors based on their race was substantially followed by the U.S. Supreme Court.³⁷ The California high court sparked a nationwide wave of courts abolishing sovereign immunity for municipalities,³⁸ and another wave two years later of courts adopting strict liability in defective product cases.³⁹ The state high court was the first to allow limited bystander recovery for negligent infliction of emotional distress,⁴⁰ and it first recognized the duty of a mental health professional to warn of the reasonably foreseeable danger posed by a patient.⁴¹

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.⁴² While the judiciary may in theory have the power to order state budget appropriations to preserve a constitutional mandate, as a general rule the courts must rely on bare respect for their judgments to expect such rulings to be heeded, as the alternatives for compelling compliance are not favorable.⁴³

To maintain that respect and ensure credibility in its decisions, the judiciary must have institutional independence to maintain the balance of power between the branches and decisional in-

³⁶ *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, affirmed *sub nom. PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74.

³⁷ *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

³⁸ 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.

³⁹ *Id.* at 38–39; see *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57.

⁴⁰ 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”).

⁴¹ *Id.* (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”).

⁴² 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 quarter”) and 1365 (“We work with words and persuasion, not with the power to appropriate or legislate”).

⁴³ 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.

dependence to ensure that each case reaches a just result.⁴⁴ 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.⁴⁵

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.⁴⁶ There are broad subject area divisions within substantive American law, such as civil, criminal, administrative, and admiralty. Within those subjects are specific subdivisions. 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 matter (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.⁴⁷ Stated broadly, state trial and appellate bodies are courts of general jurisdiction that are not restricted to considering only certain subjects.

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, so federal courts will not issue advisory opinions.⁴⁸ Conversely, many state constitutions require their high courts to render advisory opinions when asked by state officials.⁴⁹ 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.

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.⁵⁰ The court consists of a chief justice and

⁴⁴ See Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1349–1350.

⁴⁵ Robert F. Williams, *State Constitutional Law Processes* (1983) 24 Wm. & Mary L. Rev. 169, 207.

⁴⁶ 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.

⁴⁷ 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.

⁴⁸ *Clinton v. Jones* (1997) 520 U.S. 681, 700 & n.33.

⁴⁹ Robert F. Williams, *State Constitutional Law Processes* (1983) 24 Wm. & Mary L. Rev. 169, 212.

⁵⁰ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L.J. 433, 451.

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.⁵¹ Since 1923 the court's chambers have been on Civic Center Plaza in San Francisco.⁵²

The California Supreme Court is an appellate court of primarily discretionary review. It hears cases that present novel issues of great public significance or resolve conflicts between decisions of the courts of appeal.⁵³ 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 the six appellate districts.⁵⁴ Decisions of the California Supreme Court are binding on all inferior state courts. Only the 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.⁵⁵

Unique among the courts of the state, the high court has a policymaking function.⁵⁶ 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.⁵⁷ 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.⁵⁸

⁵¹ Cal. Const., Article VI, section 2; *The Supreme Court of California* (2007 edition, updated April 2012) at 2.

⁵² 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.

⁵³ Cal. Rules of Court, Rule 8.500(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.

⁵⁴ *The Supreme Court of California* (2007 edition, updated April 2012) at 2.

⁵⁵ Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 170–171.

⁵⁶ 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).

⁵⁷ *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).

⁵⁸ Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1351 n.20.

The California Supreme Court has appellate jurisdiction over civil and criminal cases heard by the courts of appeal.⁵⁹ Appellate review by the court is primarily discretionary based on petitions for review of an appellate decision.⁶⁰ The court has original jurisdiction over habeas corpus and extraordinary relief petitions.⁶¹ Because the court's original jurisdiction is discretionary, as a general matter the court has near-complete control over its docket.⁶²

On average, the California Supreme Court issues between 105 and 115 opinions each year.⁶³ According to the most recent statistical report on statewide caseloads, in 2013 there were 7,813 total filings in the Supreme Court, and of those 4,188 were petitions for review.⁶⁴ The court granted only 150 petitions during that period (a 4% grant rate), and issued 94 opinions.⁶⁵

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."⁶⁶

On the other hand, when a petition for review is granted, that action automatically vacates the lower appellate opinion.⁶⁷ Due to the volume of appellate decisions and the court's limited capacity its grant rate is less than 5% annually, and overall it reviews only a very small portion of all appeals decided—less than 1%.⁶⁸ Thus, the court of appeal decision will be final in almost every case.⁶⁹

Is this the best use of a state high court? 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 discretion to control its docket so that it best serves the primary function of guiding and harmonizing the development of the law.⁷⁰ There

⁵⁹ 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.

⁶⁰ 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.

⁶¹ Cal. Const., Article VI, section 10.

⁶² J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 450.

⁶³ *The Supreme Court of California* (2007 edition, updated April 2012) at 1.

⁶⁴ Judicial Council of California, *2014 Court Statistics Report* at 5, 7, 8, 13.

⁶⁵ *Id.* at 13.

⁶⁶ 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.

⁶⁷ 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).

⁶⁸ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 439–440, 451 (on figures for 1991 to 1992). The figures are similar for the most recent 10-year period. Judicial Council of California, *2014 Court Statistics Report* at 5, 7, 8, 13. Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181–182.

⁶⁹ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 440.

⁷⁰ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 451.

also is a practical limitation: with the membership of the state high court remaining static at seven justices, its decision-making capacity stays comparatively fixed against the ever-rising tide of 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.⁷¹ 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."⁷² 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 determinative of the law.⁷³

In addition to its responsibility to adjudicate cases, the state high court has other responsibilities that traditionally have been viewed as judicial powers, 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 controls the admission to practice and discipline of attorneys in the state bar,⁷⁴ and the state constitution 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 (Janice Rogers Brown); and Governor Arnold Schwarzenegger appointed the first female Asian-American chief justice (Tani Cantil-Sakauye).⁷⁵

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, where the nation is divided into

⁷¹ 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.

⁷² Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181–182.

⁷³ 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") (footnote omitted); see Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181–182.

⁷⁴ 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).

⁷⁵ John H. Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998) 61 Alb. L. Rev. 1461, 1483–1484.

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.⁷⁶ 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.⁷⁷

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.⁷⁸ 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.⁷⁹ When there are conflicting decisions among the districts, one district is not bound to follow the law of another, and the trial courts must choose which of the conflicting decisions to follow.⁸⁰

The courts of appeal sit in panels of three justices on each case; unlike the federal courts there is no provision for en banc review by a larger panel.⁸¹ Why should an appeal be heard by more than one judge, and how many judges 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.⁸² One expression of this concept is Condorcet’s jury theorem, which essentially posits that the more people voting on an issue the more likely it becomes that the majority decision is correct.⁸³

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.”⁸⁴ The superior courts primarily make factual findings (either by judge or jury), apply those facts to the

⁷⁶ Cal. Const., Article VI, section 3; see Map 1.

⁷⁷ 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.

⁷⁸ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 443, 440.

⁷⁹ Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 177.

⁸⁰ 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).

⁸¹ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 441.

⁸² *Id.* at 484.

⁸³ For a scholarly debate on this, see Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 *Theoretical Inquiries L.* 87 (2002); Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 *Theoretical Inquiries L.* 125 (2002).

⁸⁴ Cal. Const., Article VI, section 4.

law (statutes, cases, or rules), and enter judgments. These trial courts are bound to follow the law as interpreted by the courts of appeal, the Supreme Court of California, and the U.S. Supreme Court. When there are conflicting decisions in the courts of appeal, the trial court must decide which to follow, and the trial court need not follow the case decided in its own appellate district.⁸⁵

Depending on the size of the county, there may be subdivisions within the superior court. 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 CEQA⁸⁶ 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.⁸⁷ The possibility of further appeal in such cases is restricted, as decisions of the appellate division generally are not appealable.⁸⁸

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.⁸⁹ The council is empowered to adopt rules for court administration, practice, and procedure.⁹⁰ Its internal administrative functions are performed by the Administrative Office of the Courts, which implements the council's policies and administers court system operations.⁹¹

There are 451 courthouses in the state,⁹² and the judicial branch owns and manages all of the state courthouses. This is a recent development, as the process of transferring those assets from the state and counties to the judiciary only began in 2002.⁹³

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. 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

⁸⁵ Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 184.

⁸⁶ CEQA is short for the "California Environmental Quality Act," Cal. Public Resource Code § 21000, et seq.

⁸⁷ Cal. Const., Article VI, section 4.

⁸⁸ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 439.

⁸⁹ Cal. Const., Article VI, section 6; William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 176.

⁹⁰ 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.

⁹¹ Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1357.

⁹² *Id.* at 1359.

⁹³ *Id.* at 1359–1360.

courts handle.⁹⁴ Another view is that the staff attorneys form a powerful “shadow court” that can unduly influence the judicial function.⁹⁵

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.⁹⁶ At the very least this means there is only so much work that the justices themselves can do, and the court cannot produce many more opinions than it already does.⁹⁷ It may 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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.”¹⁰¹

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 courts of the larger counties. Is this simply a distinction without a dif-

⁹⁴ 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.

⁹⁵ 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.

⁹⁶ 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 2001–2002 through 2010–2011).

⁹⁷ Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 181.

⁹⁸ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 438.

⁹⁹ *Id.* at 434–435.

¹⁰⁰ William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 193–194.

¹⁰¹ *Id.* at 194.

ference? If the law naturally tends towards specialization and categorization, is there a clear advantage between many courts that 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 case, 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?¹⁰² Is there an optimal number for each kind of judging?

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.”¹⁰³ 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?¹⁰⁴

All of these questions are relevant to the historical evolution of the state courts, and 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.¹⁰⁵ On the other hand, central control permits unitary budgeting, equitable distribution of assets and services, and promotes uniformity in administration

¹⁰² 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 Kelson, *A Report on the California Appellate System* (1994) Hastings L. J. 433, 484. If that is true, why only have one judge presiding at the trial level?

¹⁰³ Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 186 n.75. The U.S. Supreme Court has not always been fixed at nine justices. The Judiciary Act of 1789 established a six-justice court. The court was briefly reduced to five members in 1801, 2 Stat. 89, returned it to six in 1802, 2 Stat. 156, then grew to seven in 1807, 2 Stat. 420. As the country expanded, so did the size of the court. The eighth and ninth seats were added in 1837, 5 Stat. 176. The Judiciary Act of 1863, 12 Stat. 794, added a tenth justice. The Court fell to nine members after Justice Catron’s death in 1865. Congress then passed the Judicial Circuits Act of 1866, 14 Stat. 209, which allowed the Court to fall to seven members, and prevented President Johnson from appointing any justices. The Court stood at eight members from Justice Wayne’s death in 1867 until 1870, when the Circuit Judges Act of 1869, 16 Stat. 44, set the Court at nine members.

¹⁰⁴ *Id.* at 202.

¹⁰⁵ Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1355.

and planning.¹⁰⁶ Since the 1920s, the pattern has been one of expansion and diversification followed by a reverse trend towards simplification.

The 1849 state constitution created a traditional hierarchical court system.¹⁰⁷ This original plan of the state courts was adapted from Iowa.¹⁰⁸ 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.¹⁰⁹ The first 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 in dispute. Finally, the Supreme Court heard appeals from the district courts.¹¹⁰ 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.¹¹¹

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 1910s when California further “democratized” its government by creating the direct democracy institutions of the initiative, referendum, and recall.¹¹² 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 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 California constitutional convention there were 11 different grades of state courts.¹¹³

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

¹⁰⁶ *Ibid.* 99 *Id.* at 1358 and n.33.

¹⁰⁷ 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.

¹⁰⁸ *Id.* at 150–151.

¹⁰⁹ *Id.* at 133–134.

¹¹⁰ Gordon Morris Bakken, *California’s Constitutional Conventions Create Our Courts* (1994) 1 *Cal. Sup. Ct. Hist. Soc’y Y.B.* 33, 34.

¹¹¹ William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 *Hastings L. J.* 121, 126–127.

¹¹² *Id.* at 129 n.21.

¹¹³ *Id.* at 194.

existing districts in San Francisco and Los Angeles needed to be expanded by subdividing them each into two three-judge divisions. As a result, in 1928 the state constitution was amended to permit legislative acts creating additional districts and divisions.¹¹⁴

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 heard only “great and important” cases.¹¹⁵ 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.”¹¹⁶ 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.¹¹⁷

The initial location of the California Supreme Court was 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.”¹¹⁸

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.¹¹⁹ 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 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.

¹¹⁴ 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.

¹¹⁵ William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 173–174.

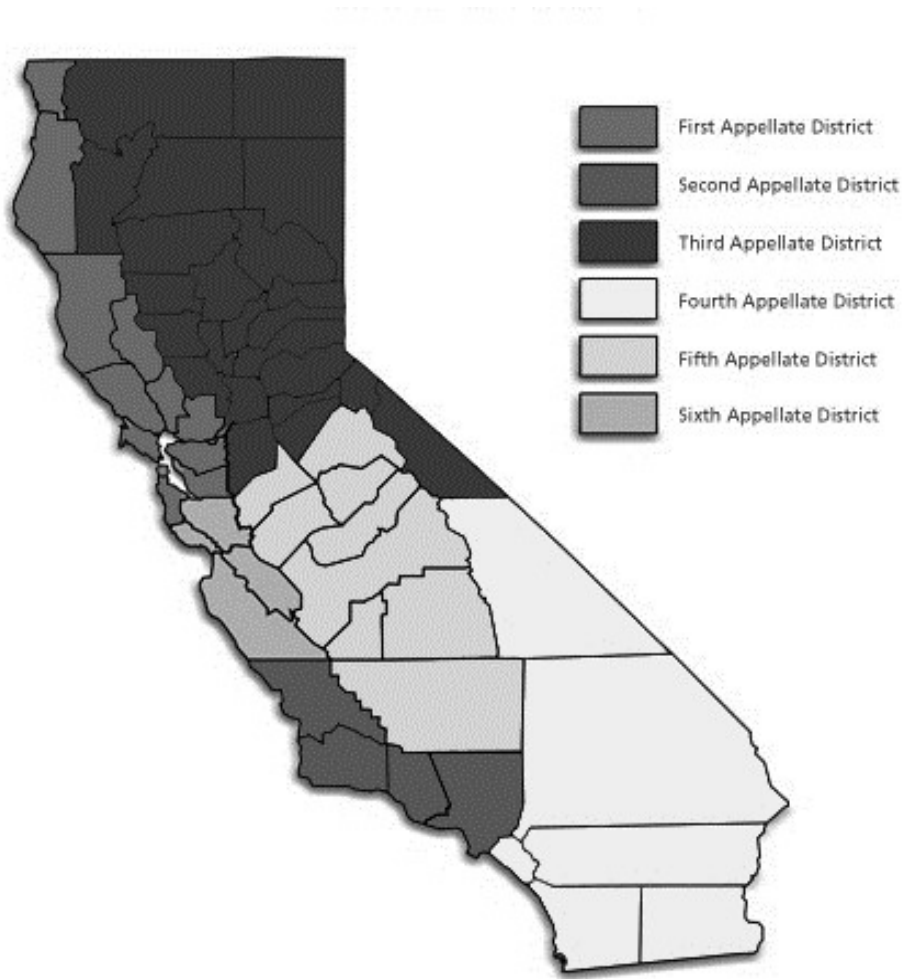
¹¹⁶ *Id.* at 192.

¹¹⁷ *Id.* at 191.

¹¹⁸ Dear and Levin, *Historic Sites of the California Supreme Court* (2000) California Supreme Court Historical Society Yearbook Vol. 4 at 63–64.

¹¹⁹ 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

The municipal courts were created by constitutional amendment in 1924 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.¹²⁰ 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.¹²¹ All of those disparate inferior courts were collapsed into 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 adopted by the voters, permitted the counties to unify their municipal and superior courts.¹²² By 2001, the courts in all 58 counties were unified into a single superior court.¹²³

California began 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. In 1950 the voters amended the constitution to consolidate six different kinds of inferior courts into the municipal courts.¹²⁴ 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.¹²⁵ Looking forward, it is not difficult to envision that 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.¹²⁶ 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,

¹²⁰ 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.

¹²¹ William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 194–195.

¹²² Cal. Const., Article VI, section 23.

¹²³ Ronald M. George, *Challenges Facing an Independent Judiciary* (2005) 80 N.Y.U. L. Rev. 1345, 1358 and n.33.

¹²⁴ William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 181.

¹²⁵ *Id.* at 195.

¹²⁶ 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.

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.¹²⁷ Appointed judges, particularly those with long or life-time tenures, have the advantage of greater independence. After their initial appointment they are more insulated from political pressure, but they have 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.

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.¹²⁸

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.¹²⁹ Life tenure encourages judges to exercise their best judgment free from the possibly corrupting influence of politics.¹²³ Elected judges tend to write more opinions, while the opinions of appointed judges tend to be cited as authority more often.¹²⁴

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.¹³⁰ The length of a judge's term also has an effect on decision-making, with long-term judges showing greater willingness to expand state constitutional rights.¹³¹

California's judicial selection process represents a middle ground: This state uses a combination of the three selection systems, resulting in a compromise between 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 (both at the Supreme Court and the Courts of Appeal) are appointed and retained in uncontested elections to 12-year terms. Trial judges are appointed and reelected in contested elections to six-year terms.¹²⁷ Thus, the state ju-

¹²⁷ 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.

¹²⁸ J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993) 66 S. Cal. L. Rev. 2209, 2214.

¹²⁹ 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. 123 J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993) 66 S. Cal. L. Rev. 2209, 2210. 124 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.

¹³⁰ 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.

¹³¹ *Id.* at 6. 127 Cal. Const., Article VI, section 16(c).

diciary is neither a wholly politically accountable branch like the state legislature, nor is it a fully independent branch like the federal judiciary with its life tenure.¹³²

The state has wrestled with the conflicting value-enhancing features of appointed versus elected judicial officers. The 1849 California constitution provided that the people would elect justices of the Supreme Court and district courts for six-year terms, and county court judges would be elected for four-year terms.¹³³ That was consistent with the style of the time, as every new state since 1846 has (at least initially) provided for contested judicial elections.¹³⁴

California 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. A constitutional commission then confirms the nominee, and the new justice stands for retention on the ballot in the next gubernatorial election.¹³⁵ 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.¹³⁶ 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.¹³⁷

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 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.¹³⁸ 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.¹³⁹

¹³² 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.

¹³³ Cal. Const. 1849, Article VI, sections 3, 5, and 8.

¹³⁴ Administrative Office of the Courts, Report on ACA 1 (Nation): Superior Court Elections (June 7, 2001) at 5.

¹³⁵ 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.

¹³⁶ William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 179–180.

¹³⁷ *Id.* at 180.

¹³⁸ *Id.* at 179–180.

¹³⁹ Stanley Mosk, *A Retrospective* (1983) 71 Cal. L. Rev. 1045, 1045.

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 debating questions about how cases should be decided.¹⁴⁰ 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.¹⁴¹

The Judicial Function: Decision-Making, 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?¹⁴²

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?¹⁴³ Again, there are competing theories. One formalist approach holds that the words of a law must be read with their ordinary meaning, and 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 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 ascer-

¹⁴⁰ 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.

¹⁴¹ 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.

¹⁴² 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.

¹⁴³ *Id.* at 815, 819 n.30, and 820.

tainable principles of law made it logical to assume that a case would be decided a given way no matter which court made the decision.¹⁴⁴

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.¹⁴⁵ 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.¹⁴⁶ Do some areas of the law benefit from strict rules, and others from more flexible standards?

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.¹⁴⁷

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 the written brief, and in times past in this country “courts would sometimes listen for hours or even days to the arguments of counsel.”¹⁴⁸ But in the modern American system, argument is much less important than the parties’ written briefs—which often results in hefty written submissions. In fact, in California the appellate courts schedule argument only *after* preparing a draft decision, further reducing the perceived importance of oral argument.¹⁴⁹ 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?¹⁵⁰ 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

¹⁴⁴ Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 193 n.91.

¹⁴⁵ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 448.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Id.* at 457 (footnote omitted).

¹⁴⁸ *Id.* at 459 and 464.

¹⁴⁹ *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.

¹⁵⁰ 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.”

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*.¹⁵¹

Finally, there is the question of access to decisions. California’s appellate decision-making process is relatively open. Briefs are public documents, and appellate arguments are open to the public.¹⁵² The state constitution requires that all appellate decisions be in writing.¹⁵³ 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 decision to withstand the disciplined process of a written analysis.¹⁵⁴ 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.”¹⁵⁵

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.¹⁵⁶

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.”¹⁵⁷

As a result, since 1971, the state high court has controlled decisions of the inferior appellate courts through a process called decertification or depublication.¹⁵⁸ 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.¹⁵⁹ Published opinions are printed in the official reports of California decisions and

¹⁵¹ Cal. Const., Article VI, section 13; J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 467.

¹⁵² J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 486.

¹⁵³ 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”).

¹⁵⁴ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 487.

¹⁵⁵ Roger Traynor, *Some Open Questions on the Work of State Appellate Courts* (1957) 24 U. Chi. L. Rev. 211, 218.

¹⁵⁶ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 488.

¹⁵⁷ Roy A. Gustafson, *Some Observations about California Courts of Appeal* (1971) 19 UCLA L. Rev. 167, 204 and n.124.

¹⁵⁸ 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.

¹⁵⁹ Cal. Rules of Court, Rule 8.1105.

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.¹⁶⁰

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.¹⁶¹ Decertification often occurs "because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent."¹⁶² 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.¹⁶³

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

Comparing California with Other States: What Difference Does It Make?

Reviewing the structure and history of the California judiciary in isolation provides an incomplete picture of how the state government operates. Comparing California's system to those in other states helps to round out our understanding of the organization and operation of California's judicial branch. Here we provide a snapshot of how California stacks up to other states by looking at four basic measures: structure of trial and appellate courts, size of the judiciary, judicial caseload, and case clearance rates.

Structure

Trial Court

Broadly speaking, states organize their trial court systems in one of two ways, and the distinguishing feature between the systems lies in the distribution of jurisdiction among the lower courts. The vast majority of states use a divided trial court system, with limited jurisdiction courts and general jurisdiction courts.

Limited jurisdiction courts are usually confined to a particular economic value (e.g., small claims or claims under \$25,000), restricted to a specific subject matter (such as traffic, probate,

¹⁶⁰ Cal. Rules of Court, Rule 8.1120.

¹⁶¹ 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 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.

¹⁶² Joseph R. Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514, 514–515.

¹⁶³ J. Clark Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L. J. 433, 453–454.

or misdemeanors), or responsible for a defined geographic area.¹⁶⁴ General jurisdiction courts handle all matters not confined to the limited jurisdiction courts, such as complex civil litigation and felonies. The U.S. Department of Justice explains:

Limited jurisdiction courts . . . have jurisdiction on a restricted range of cases, primarily lesser criminal and civil matters, including misdemeanors, small claims, traffic, parking, and civil infractions. ¶ General jurisdiction courts have primary jurisdiction on all issues not delegated to lower courts, most often hearing serious criminal or civil cases.¹⁶⁵

In a unified trial court system, all types of cases are processed through a single court of general jurisdiction.¹⁶⁶ As a result of the unification of the state’s trial courts,¹⁶⁷ California is one of only five states with a single-tier system.¹⁶⁸ In California, the 58 county superior courts have general jurisdiction over all cases at the trial court level. Traffic violations, probating a will, small claims actions, misdemeanors—the superior courts handle them all.

Granted, many superior courts classify cases by type for internal organization and case management purposes—often in terms similar to the limited jurisdiction courts in other states. But unlike in divided systems, every case remains under the superior court’s jurisdictional umbrella. So, for example, while the Sacramento County Superior Court has a Probate Division, there is not an independent “Sacramento County Probate Court.”

Appellate Court

California, like most states, has an appellate system consisting of an intermediate appeals court (the Courts of Appeal) and a court of last resort (the Supreme Court of California).¹⁶⁹ Ten states do not have intermediate appeals courts; those states have only a trial court system and a high court.¹⁷⁰

There is significant variation among the structures employed by the 40 states with intermediate appellate courts. Alabama and Tennessee, for example, have separate appeals courts for crim-

¹⁶⁴ “A court’s jurisdiction is described as ‘limited’ by one or more of the following factors: the range, severity, or economic value of cases it processes; the geographic area it serves; or the qualifications of its judicial officers. Courts of general jurisdiction typically hear the more complex or higher-valued civil cases, felony cases, domestic relations cases, and juvenile cases.” Robert C. LaFountain, et al., *Examining the Work of State Courts: An Overview of 2012 State Trial Court Caseloads* 7 (Nat’l Ctr. for State Courts 2014).

¹⁶⁵ U.S. Dept. of Justice, Bureau of Justice Statistics, *Special Report: State Court Organization, 2011* 2 (Nov. 2013) (“*State Court Organization*”).

¹⁶⁶ A “single-tiered court” is defined as “[a] trial court having original jurisdiction over all subject matter or persons within its geographical limits and sharing no jurisdiction with any special or limited jurisdiction court.” Robert C. LaFountain, et al., *Examining the Work of State Courts: An Overview of 2010 State Court Caseloads* 50 (Nat’l Ctr. for State Courts 2012).

¹⁶⁷ See *supra*, notes 122–124, and accompanying text.

¹⁶⁸ See Robert C. LaFountain, et al., *Examining the Work of State Courts: An Overview of 2012 State Trial Court Caseloads* 7 (Nat’l Ctr. for State Courts 2014). Joining California are Illinois, Iowa, Minnesota, and Vermont, as well as the District of Columbia and Puerto Rico. *Id.*

¹⁶⁹ *Special Report: State Court Organization, 2011* at 3 and 12–14 (Appendix Table 1).

¹⁷⁰ The 10 states without intermediate appellate courts are Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. *Id.* See also *The Book of the States 2014*, Tables 5.2 and 5.6.

inal and civil matters.¹⁷¹ Indiana has an appellate court for tax cases.¹⁷² New York has multiple levels of intermediate appellate courts,¹⁷³ and Pennsylvania has one intermediate appellate court of general jurisdiction and one dedicated solely to appeals involving the government.¹⁷⁴

At the high-court level, there is a significant split among the states over size. California is one of twenty-six states with seven-member high courts. Eighteen states have five-member courts of last resort, and five states have nine on the bench. New Jersey stands alone with its six-justice Supreme Court. And Oklahoma and Texas have separate courts of last resort dedicated to criminal matters.

Size

As of January 2015, California employs over 2,000 full-time judicial officers.¹⁷⁵

California’s Judicial Officers		
Supreme Court of California		7
California Courts of Appeal		105
Superior Courts	Judges	1,705
	Commissioners/Referees	342
Total		2,159

¹⁷¹ *Special Report: State Court Organization, 2011* at 12–14.

¹⁷² The Indiana Tax Court, online at <http://www.in.gov/judiciary/tax/>.

¹⁷³ New York’s terminology is confusing. The Supreme Court of New York is a trial-level court. The intermediate appellate courts are the Appellate Terms of the Supreme Court and the Appellate Divisions of the Supreme Court. The state court of last resort is the New York Court of Appeals. Jonathan Lippman and A. Gail Prudenti, *The New York State Courts: An Introductory Guide* 3–4 (The New York State Unified Court System 2014).

¹⁷⁴ Pennsylvanians for Modern Courts, *Tell Me More about the PA Court System*, online at <http://pmconline.org/node/214>.

¹⁷⁵ As of January 2015. Judicial Council of California, *Fact Sheet—California Judicial Branch* (Jan. 2015), online at http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf.

Here's how the size of California's judiciary compares to the next five most-populous states:

Total Number of Judicial Officers					
Trial Courts				Appellate Courts	
State	Population ¹⁷⁶	Total Judicial Officers ¹⁷⁷	Per 100k Population	State High Court	Intermediate Appellate Courts ¹⁷⁸
California	38,041,430	1,588 ¹⁷⁹	4.2	7	104
Texas	26,059,203	2,492	9.5	9	89
New York	19,570,261	1,067	5.5	7	73
Florida	19,317,568	921	4.8	7	61
Illinois	12,875,255	917	7.1	7	54
Pennsylvania	12,763,536	1,025	8.0	7	32
Ohio	11,544,225	632	5.5	7	70

¹⁷⁶ 2012 Population figures from The Book of the States 2014, Table 10.4.

¹⁷⁷ As of 2011. *State Court Organization* at 15–19. For two-tiered systems, these numbers include judges from both limited and general jurisdiction courts, but excludes certain judicial officers that are outside of the standard trial court system, including commissioners and referees in California superior courts, justices of New York's Town and Village Justice Courts, magistrates of Ohio's Mayor's Courts, and Justice of the Peace Courts in Texas.

¹⁷⁸ As of 2011. *State Court Organization* at 12–14.

¹⁷⁹ Although California currently has 1,705 current trial court judges (*see* Table #), the remaining tables rely on 2011 state judiciary figures from the National Center for State Courts for analytical consistency.

And here's how California's trial court system compares to the other states with unified trial court systems:

Trial Court Size Relative to Population (Unified States)			
State	Population ¹⁸⁰	Total Judicial Officers ¹⁸¹	Per 100k Population
California	38,041,430	1,588	4.2
Idaho	1,595,728	126	7.9
Illinois	12,875,255	917	7.1
Iowa	3,074,186	335	10.9
Maine	1,329,192	69	5.2
Minnesota	5,379,139	280	5.2
Vermont	626,011	50	8.0

Caseload

Beyond raw numbers, judicial caseload is an indicator of the relative workload faced by California's judicial officers compared to other states. Although California processes a high volume of cases, the per-capita filing rate is not out of line with the experience of other populous states or those jurisdictions with unified trial court systems.

Incoming Trial Court Caseload (2013) (Unified States)				
State	Civil	Per 100k	Criminal	Per 100k
California	1,003,010	2,617	1,450,603	3,784
Idaho	72,823	4,517	92,950	5,766
Illinois	537,930	4,176	385,801	2,995
Iowa	130,308	4,217	129,804	4,200
Maine	36,362	2,737	53,091	3,997
Minnesota	176,675	3,259	167,474	3,090
Vermont	18,170	2,900	18,046	2,880

¹⁸⁰ 2012 Population figures from The Book of the States 2014, Table 10.4.

¹⁸¹ As of 2011. *State Court Organization* at 15–19. For two-tiered systems, these numbers include judges from both limited and general jurisdiction courts, but excludes certain judicial officers that are outside of the standard trial court system, including commissioners and referees in California superior courts, justices of New York's Town and Village Justice Courts, magistrates of Ohio's Mayor's Courts, and Justice of the Peace Courts in Texas.

California’s per-judge trial court caseload is in the middle of the pack compared against other populous states, but has a higher caseload than all other states with unified trial court systems.

Trial Court Judicial Caseload¹⁸²			
State	Judicial Officers	Incoming Cases	Cases Per Judge
Ohio	632	1,392,581	2,203
New York	1,067	2,231,251	2,091
Texas	2,492	4,998,070	2,006
Florida	921	1,600,496	1,738
California	1,588	2,453,613	1,545
Illinois	917	923,731	1,007
Pennsylvania	1,025	1,000,987	977

Trial Court Judicial Caseload (unified states)			
State	Judicial Officers	Incoming Cases	Cases Per Judge
California	1,588	2,453,613	1,545
Idaho	126	165,773	1,316
Maine	69	89,453	1,296
Minnesota	280	344,149	1,229
Illinois	917	923,731	1,007
Iowa	335	260,112	777
Vermont	50	36,216	724

Case Clearance Rates

The next task is to compare the efficiency of California’s courts. To do so, we look at case clearance rates, which is a commonly-used metric of a court’s ability to efficiently handle its caseload.¹⁸³ It is one of the key appellate court performance measures designed by the National Center for State Courts to assess and improve efficiency in the judiciary nationwide. The center explains: “Clearance rates are calculated by dividing the total number of incoming cases by the total number of outgoing cases, for each case type during a specific time period (e.g., month,

¹⁸² As of 2011. *State Court Organization* at 15–19. 2013 filing data from from Court Statistics Project, CSP DataViewer.

¹⁸³ See Nat’l Ctr. for State Courts, *CourTools, Appellate Court Performance Measures 1* (2011) (The case clearance rate “gauges whether a court is keeping up with its incoming caseload.”).

quarter, year). The resulting number is then multiplied by 100 to obtain a result expressed as a percentage.”¹⁸⁴

Trial Court

While California’s civil clearance rate is in line with other states, only West Virginia (72%) had a lower criminal clearance rate than California in 2013. California fared no better in 2012, when it posted a criminal clearance rate of 86%. That year, only West Virginia (78%) and Hawaii (55%) joined California in the states below 90%.

There is good news: California’s criminal clearance rate has been steadily improving over the past decade. In 2004, the total criminal clearance rate was at 80%, and the felony clearance rate was at 74%.¹⁸⁵ The civil clearance rate has consistently approached 90% over the last half-decade, and the felony clearance rate has ranged between 93–96% over the same time period.

Trial Court Clearance Rates (2013) ¹⁸⁶						
State	Civil			Criminal		
	In	Out	Rate	In	Out	Rate
California	1,003,010	991,855	99%	1,450,603	1,268,421	87%
Texas	1,596,824	1,396,120	87%	3,401,246	3,414,838	100%
New York	1,539,950	1,436,831	93%	691,301	669,077	97%
Florida	768,943	868,347	113%	831,553	869,064	105%
Illinois	537,930	991,855	99%	385,801	377,209	98%
Ohio	568,239	591,087	104%	824,342	821,243	100%

Appellate Court

At the appellate level, California posted a clearance rate at or above 100% in 2012. That is consistent with past performance; only once in the past decade has the California Supreme Court’s clearance rate dipped below 99%.¹⁸⁷

¹⁸⁴ *Id.*

¹⁸⁵ Judicial Council of California, *2014 Court Statistics Report: Statewide Caseload Trends* 44–45 (2014); see also *id.*, App’x F, p. 5 (“Criminal Filings, Dispositions, and Caseload Clearance Rate”).

¹⁸⁶ Data from Court Statistics Project, CSP DataViewer, online at http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro. Case clearance data for Pennsylvania unavailable.

¹⁸⁷ *2014 Court Statistics Report* at 3–5. The Judicial Council did not publish similarly detailed information concerning clearance rates for the courts of appeal.

Appellate Case Filing and Disposition (2012)¹⁸⁸				
State	In	In/100k	Out	Rate
California				
Supreme Court	9,237	24	9,739	105
Courts of Appeal	24,118	63	24,215	100
State Total	33,355	88	33,954	102
Texas				
Supreme Court	1,003	4	978	98
Court of Criminal Appeals	7,669	29	7,409	97
Courts of Appeals	11,919	46	11,709	98
State Total	20,591	79	20,096	98
New York				
Court of Appeals	3,484	18	3,223	93
Appellate Div. of Sup. Ct.	9,693	50	17,332	179
Appellate Terms of Sup. Ct.	3,078	16	3,231	105
State Total	16,255	83	23,786	146
Florida				
Supreme Court	2,756	14	2,465	89
District Courts of Appeal	25,756	133	27,012	105
State Total	28,512	148	29,477	103
Illinois				
Supreme Court	2,698	21	2,778	103
Appellate Court	8,393	65	8,062	96
State Total	11,091	86	10,840	98
Pennsylvania				
Supreme Court	2,971	23	3,257	101
Superior Court	7,807	61	7,578	97
Commonwealth Court	4,140	32	4,130	100
State Total	14,918	117	14,965	100
Ohio				
Supreme Court	2,187	19	2,171	99
Courts of Appeals	9,886	86	10,132	102
State Total	12,073	105	12,303	102

¹⁸⁸ Data from Court Statistics Project, *Appellate Caseloads 2012*, online at <http://www.courtstatistics.org/Appellate.aspx> (“Grand Total Appellate Court Caseloads”).

These data show that the recent performance of California's courts is in line with the experience of other populous states.

Overall, we think this analysis is amenable to two conclusions. First, there is broad consistency within the states regarding how they structured their courts. But the degree of design variance is significant enough that the overall consistency of efficiency results stands out. As a result, we conclude that differences in size, design, and relative caseload are not determinative of a state judicial system's efficiency.

Although case clearance rates are an important metric, they provide only a high-level snapshot of one aspect of judicial administration that leaves several important questions unanswered. For one thing, the data do not explain why the case clearance rates are relatively consistent. This may be the natural result of judicial systems developing efficiency over time, the bureaucratic pressure to keep pace with filing, or the necessities of case management. More critically, these data tell us very little about the quality of the services provided by California's courts. Thus, we have not considered key issues such as judicial performance; access to justice and related initiatives; and the financial, administrative, and operational management of the courts.

Conclusion

Justice must be assured in an ordered society, 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 do other states, California has its 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?