# Part 1
# The First 100 Years

The Act for the Admission of the State of California into the Union, enacted by Congress on September 9, 1850, reads:

> Whereas the people of California have presented a constitution and asked admission into the Union, which constitution was submitted to Congress by the President of the United States, by message dated February thirteenth, eighteen hundred and fifty, and which, on due examination, is found to be republican in its form of government:
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

With the adoption of the first California Constitution in 1849 and admission into the United States, the stage was set for a new system of justice to be established.

# Chapter 1
# The Century from 1850 to 1950

## Overview

The Constitution of 1849, under which California became a state in 1850, was drafted in convention by delegates who were mostly recent immigrants. The constitutions of the United States, New York, and Iowa greatly influenced its content.

The new court system, superseding the Mexican alcaldes, consisted of a Supreme Court with three justices, district courts of general jurisdiction, county courts, and justices of the peace. The California Legislature was authorized to establish additional courts of limited jurisdiction.

The Supreme Court was expanded to five members in 1862.

The Constitutional Convention of 1879 produced a far more detailed constitution, approved by the voters, but effected few major changes in the judicial system. A significant exception was increasing the size of the Supreme Court from five to seven justices.

The district courts of appeal were created in 1904 to ease delay and congestion in appellate litigation.

In 1924, the legislature was authorized to establish municipal courts in larger counties.

The Judicial Council was created by constitutional amendment in 1926 to, among other things, survey the condition of court business, simplify and improve "the administration of justice," and make suggestions to courts regarding "uniformity and expedition of business."

Contested elections of appellate justices were abolished in 1934. In their place a system was established, by constitutional amendment, whereby governors would appoint to fill vacancies and appointees would be subject to approval by a new Commission on Qualifications. All appellate justices would, under the new system, be subject to retention elections at the end of their terms at which voters would vote whether or not to approve an incumbent for a new term.

To appreciate the tremendous changes that occurred during this century, we can compare the state of society in 1850 and in 1950 and then compare the California court systems in those same years.

## The Beginning and End of the Era: Comparisons

### *The United States in 1850*

The year is 1850, and the 23 million residents of our nation are:

- Living in an agrarian society in which agriculture accounts for 59 percent of the national economy
- Living in a rural society with only 15 percent of the population residing in urban areas
- Living in a segregated society in which more than 2 million of the population are slaves and 1 million are freed slaves
- Recovering from the recent war with Mexico
- Assessing the impact of admitting California as a free state, which changes the preexisting balance of fifteen slave states and fifteen free states
- Anticipating the publication in 1851 of *Uncle Tom's Cabin* by Harriet Beecher Stowe
- Puzzling over Levi Strauss's new bibless overalls

California has an estimated population of 93,000 in 1850, inflated by the Gold Rush from a population of 10,000 in 1846. Four out of every 100 persons in the United States reside here.

### *The United States in 1950*

The year is 1950, and the 151 million residents of our nation are:

- Recovering from World War II
- Grappling with the implications of using atomic bombs in Japan
- Confronting Communism, the Cold War, the Iron Curtain, and the reality that China has fallen to Communists led by Mao Tse-tung
- Engaging in a new war in Korea on behalf of the United Nations after North Korea invaded South Korea

- Adapting to the Soviet Union's successful development and explosion of its first atomic bomb
- Marveling at new technology such as television
- Soon to be reading the bestseller *From Here to Eternity* by James Jones
- Hoping for the success of a young scientist named Jonas Salk, who is on the brink of developing a vaccine for polio

California has an approximate population of 10 million in 1950 with one out of fifteen Americans residing here.

## Comparing California Courts: 1850 and 1950

| | 1850 | 1950 |
|---|---|---|
| NUMBER OF COURT LOCATIONS | Unknown; but district courts were organized into nine judicial districts; a special district court existed for San Francisco; county courts were provided for in each county; and justice courts were organized for each township | 830 |
| TRIAL COURT STRUCTURE | District courts<br>County courts<br>Justice courts | Superior courts<br>Municipal courts<br>Township courts<br>City justice courts<br>City courts<br>Police courts |
| FILINGS | Unknown | 2,473,282 (appellate, superior, and municipal) |
| JUDGES/JUDICIAL OFFICERS | Unknown | 1,056 |
| FUNDING | Presumed township, county, and state | City, county, and state |
| STATE-LEVEL ADMINISTRATION | Supreme Court | Judicial Council |

| | 1850 | 1950 |
|---|---|---|
| TRIAL COURT ADMINISTRATION | Judges<br>County and court clerks | Presiding judges<br>County clerks and officials<br>Court clerks |
| JUDICIAL DISCIPLINE | Legislative impeachment, failure to achieve election or reelection | Legislative impeachment, voter recall, defeat at a regular election, or retirement for disability by the governor with consent of the Commission on Qualifications |
| JUDICIAL SELECTION | Contested elections, gubernatorial appointments to fill vacancies | Retention elections for appellate courts; contested elections for trial courts; gubernatorial appointments to fill vacancies |
| ALTERNATIVE DISPUTE RESOLUTION | Legislature authorized to create tribunals for conciliation, but they were never enacted | No court-annexed programs |
| JUDICIAL EDUCATION | No program | No program |
| PLANNING | Not a part of judicial administration | Not a part of judicial administration |

The California Constitution referred to by Congress in the Act for the Admission of California into the Union was adopted in 1849. The first constitution and the context in which it was adopted furnish important ingredients for understanding the administration of justice during the following 100 years.[1]

## The Population of California

Congressional and other references to "the people of California" on the eve of statehood should be considered with care. The frequently cited

statistics are that California had an estimated population of 10,000 in 1846, which had grown to more than 90,000 by 1850. These numbers refer primarily to persons of European or American descent.

Far less frequently mentioned, however, are the indigenous natives of California. When the Spaniards arrived in the late 1700s, there were an estimated 300,000 such persons living in tribes with dozens of different cultures and languages. In fact, the area that is now California is thought to have been the most densely populated area in North America.

By 1850, diseases introduced by foreigners, war, and deprivation had wiped out two-thirds of the native population. Spanish missionary and military initiatives had shattered native multiculturalism. The declines in both numbers and cultures continued following statehood.[2]

## The Eve of Statehood

California in the 1840s was destined to be wrested from Mexico in one way or another. Even Californians of Spanish and Mexican descent resisted the "feeble yet despotic Mexican rule," rejecting governors appointed by Mexico and laying plans for an independent republic.[3]

The United States was so eager to acquire California that in 1842 an overenthusiastic commodore of the U.S. Navy, acting on an incorrect belief that Mexico had declared war on the United States, sailed to Monterey, demanded immediate surrender by the Mexican commandant, and issued a proclamation to Californians announcing his conquest. Upon being reliably informed of his error, he was compelled to restore Monterey to its lawful officials and withdraw.[4]

When war between the United States and Mexico did in fact begin in 1846, Commodore John Drake Sloat entered Monterey Bay with a squadron of vessels and raised the American flag over the customhouse. Within the next several days the American flag was raised in San Francisco, Sonoma, Sacramento, San Diego, and Los Angeles.[5]

The war ended in 1848 with the signing of the Treaty of Guadalupe Hidalgo, which became effective on May 30. "The most important provision of this treaty was the cession of California to the United States."[6]

Just ten days prior to the signing of the treaty, James Marshall discovered gold at Coloma on the American River in the vicinity of Sutter's Mill.

"Notwithstanding the distance to the Atlantic seaboard and the lack of telegraphic communication, news of the discovery traveled rapidly and within a few months the famous Gold Rush was underway."[7]

The expectation was that Congress would provide a territorial government for California and with it the much-needed structure for a civil government. This was not to be, however, because of the slavery issue. When California was acquired, the number of slave and nonslave states in the United States was equally divided at fifteen per side, and the question of whether any new states or territories, such as California, were to be slave or nonslave created an unbreakable impasse in Congress.

In the absence of congressional action to provide a government in California, such government as there was flowed from proclamations by the succession of military governors, several of whose names are still memorialized in the street names of San Francisco: Sloat, Stockton, Kearny, Mason, and Riley. Notwithstanding these proclamations and various references in them to a civil government for California, conditions suggest a void in actual governing. To cite just three indicators from among many:

1. There was a conceptual muddle over whether the laws of Mexico still applied until legislatively superseded.
2. There was a practical muddle since few of the Americans or other non-Hispanic immigrants knew anything of Mexican law or the preexisting system of government established by Mexico in California.
3. Thanks to the Gold Rush, the nonnative population of California, perhaps setting a pattern for California in the future, burst from 10,000 in the summer of 1846 to 50,000 by August 1849 to 93,000 during 1850.[8]

In the words of one historian, "No effectual measures were employed to perpetuate even the Mexican civil law, itself entirely inadequate under the new conditions; hence California had no suitable, properly constituted system of government from the conquest to the adoption of the Constitution."[9]

While martial law was in effect for the rudimentary purpose of maintaining order, among Californians old and new, the "greatest grievance was the very want of law adequate to the protection of life and property, and to the complete administration of justice."[10]

Justice Nathaniel Bennett, an inaugural member of the California Supreme Court, described the dire legal predicament immediately prior to statehood:

> Before the organization of the state government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition. This was the case more particularly in Northern California and in the mineral region–in Southern California, perhaps, to a less extent. Commercial transactions to an immense amount had been entered into, and large transactions in real estate had taken place between Americans, with reference to the Common Law as modified and administered in the United States, and without regard to the unknown laws of the republic of Mexico, and the equally unknown customs and traditions of the Californians; and the application of the strict letter of Mexican law in all cases, would have invalidated contracts of incalculable amount, which had been entered into without any of the parties having had the means of knowing that such laws ever existed.[11]

It appears that Colonel Richard Barnes Mason, during his tenure as the military governor of California, had the power to establish a temporary civil government but instead deferred, first, to the imminent conclusion of the war with Mexico and then to Congress for provision of a civil government.[12] Civil government, to the extent it existed at all, was handcrafted locally on an ad hoc basis. In rural areas and the rough-and-tumble world of the gold miners, rules and tribunals were created as circumstances demanded, often accompanied by swift penalties for infractions.

Dissatisfaction with these conditions precipitated a series of meetings in 1848 held in San Jose, Sacramento, San Francisco, and Sonoma that were the beginning of a movement, at least in the northern part of the state, to organize some type of civil government.[13] The most refined was in San Francisco, where the citizens created a temporary government in the form of a Legislative Assembly of fifteen members.[14]

In the spring of 1849, General Bennet Riley became the military governor of California. Upon learning that Congress for the third time had adjourned without addressing a government for California, Riley called for a Constitutional Convention, with the election of delegates to occur on August 1 and a convention to commence on September 1 in Monterey.[15]

## The Constitution of 1849

The Constitutional Convention convened as scheduled. Although seventy-three delegates were authorized, only forty-eight attended the convention.

> Most of the members were young men, more than thirty of them were less than 40 years of age, nine were less than 30 years of age, and the oldest was 53. The occupations were varied. There were 14 lawyers, 11 farmers, and 7 merchants. It is probable that a large number of the members were, temporarily at least, miners. Fifteen of the members may be considered as from the southern states and there were 23 members from the northern states. The northern members had also on the average been in California for a greater number of years. There were seven native Californians, and five foreign-born members, one from France, one from Scotland, one from Switzerland, one from Ireland and one from Spain.[16]

Not surprisingly, the federal constitution and the constitutions of other states were influential as the delegates proceeded with their substantive work. It appears that at least one copy of the constitution from each of the other thirty states was available for reference.[17] "The influence of the Constitutions of New York and Iowa is easily apparent in almost every article of California's [1849] Constitution: other States, as Michigan, Virginia, Louisiana, and Mississippi, while leaving an influence, are not at all to be compared to the two great models."[18]

The threshold issue was whether the convention should provide for a territorial or a state government. This was emphatically resolved in favor of creation of a constitution for the state of California. While important issues touching on capital punishment, slavery, education, corporations, and banks were addressed, the most vexatious issue was the boundary of the proposed state. Some argued for a boundary coterminous with the territory ceded by Mexico in the Treaty of Guadalupe Hidalgo, which embraced not only present-day California but Nevada, Arizona, New Mexico, Utah, and part of Colorado.[19] Others who were not prepared to embrace such a vast territory argued for what is now California and Nevada.

The northern and southern boundaries were not so difficult. The northern boundary was rather easily fixed at the forty-second parallel and the southern at the Mexican border. The debated eastern border ultimately was fixed somewhat east of the Sierra Nevada mountains but not including any area in Nevada or any part of Arizona east of the Colorado River.[20]

After six weeks of work, the convention completed and approved a proposed constitution, which subsequently was approved on November 13 by the men of California (since there were no female voters), with an overwhelming majority of 12,061 to 811.[21] This was the constitution embraced by Congress the following year when granting statehood to California.

> The achievement illustrates the great capacity of the American people for self-government. The Constitution offered to the citizens of California for their consideration and their votes sprang immediately into great favor, and the members of the Convention were warmly praised for having done their work faithfully and "adjourned with unimpaired good will." The document received the highest commendations from all sources, as the "embodiment of the American mind, throwing its convictions, impulses, and aspirations into a tangible, permanent shape."[22]

## The Judicial System in the Constitution of 1849

The court structure, officials, and jurisdiction, as provided in article VI of the 1849 constitution, were:

### *Judicial Tribunals*

> Supreme Court—to consist of a Chief Justice and two associate justices.
> District Courts—to be held by one judge in each district as established by the Legislature.
> County Courts—to be held in each county by the county judge.
> Courts of Sessions—to be held by the county judge and two justices of the peace.
> Municipal Courts—municipal and other inferior courts as may be deemed necessary [by the legislature].
> Tribunals for Conciliation—may be established by the Legislature.
> Justices' Courts—to be held by justices of the peace; the number in each county, city, town, and incorporated village to be determined by the Legislature.

### *Judicial Officers*

> Justices of the Supreme Court—the first justices to be elected by the Legislature; subsequent justices elected by electors of the State; to hold office for 6 years.
> District Judges—the first judges to be appointed by the Legislature, to hold office for 2 years; later judges to be elected by electors or respective districts, to hold office for 6 years.

County Judges—to be elected by voters of the county; to hold office for 4 years.
Justices of the Peace—justices to be elected in each county, city, town, and incorporated village.

*Subject-Matter Jurisdiction*

Supreme Court—to have appellate jurisdiction in all cases when the dispute exceeds $200, when legality of a tax, toll, impost or municipal fine is in question, and questions of law in all criminal cases amounting to felony; court and justices to have power to issue writs of habeas corpus, and all writs necessary to the exercise of appellate jurisdiction.
District Courts—to have original jurisdiction in law and in equity in all civil cases where the amount in dispute exceeds $200, in criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts.
County Courts—to have such jurisdiction in cases arising in justices' courts, and in special cases, as prescribed by the Legislature, but no other original civil jurisdiction; county judge to perform duties of surrogate or probate judge.
Courts of Sessions—to have such criminal jurisdiction as the Legislature may prescribe.
Justices of the Peace—powers, duties, and responsibilities to be fixed by the Legislature.[23]

Anticipating contemporary alternative dispute resolution, the judicial article contained the following provision, which was never implemented by the legislature:

> Sec. 13. Tribunals for conciliation may be established, with such powers and duties as may be prescribed by law; but such tribunals shall have no power to render judgment, to be obligatory on the parties, except they voluntarily submit their matters in difference, and agree to abide the judgment, or assent thereto in the presence of such tribunal, in such cases as shall be prescribed by law.[24]

## The Next Thirty Years

The period between 1849 and 1879 was marked by numerous complaints, a series of legislative enactments pertaining to courts, and attempts to amend the original constitution. In fact, the legislature proposed the calling of a second constitutional convention in 1859, 1860, and 1873 "but each time the proposal had been voted down at the election."[25]

The legislature made an effort to construct a comprehensive court system during early statehood by passing the Court Act of 1851. A minor but amusing illustration of their swirling efforts is additional legislation that created the judges of the plains *(jueces del campo),* to be appointed by courts of sessions for one-year terms. These judges were charged with attending rodeos and roundups of cattle to decide disputes over "ownership, mark, or brand."[26]

Chief among the alleged defects in the original constitution were the legislature's practically unrestricted powers of taxation; the legislature's unrestricted control over finance; the absence of any control over legislative disposition of state property; the absence of provision for separate senatorial and assembly districts; the tyranny of corporations, especially the railroads; the unrestricted pardoning power of the governor; excessive borrowing of provisions from constitutions of agricultural states; and an unsatisfactory judicial system in which courts were overcrowded and decisions not reported.[27]

These substantive shortcomings were compounded by far more potent conditions in society. By 1879 California's population had increased ninefold to 865,000, almost a third of whom lived in San Francisco. The 1870s were a period of economic recession with "large-scale unemployment, business failures, homelessness, foreclosures, bank panics and failures, and a collapse of the speculative market in mining stocks."[28] Farmers suffered drought conditions that drove them deeper into debt.

Meanwhile, the unemployed gathered and agitated in the largest cities, finding in the Chinese an easy scapegoat. Since Chinese laborers were no longer employed in construction of the transcontinental railway and were willing to work at a lower wage than white laborers, resentment toward the Chinese grew and the newly formed Workingmen's Party, a supporter of a constitutional convention, adopted the slogan "The Chinese Must Go!"

Hostility toward corporations ran equally high. Railroads, for example, during their infancy in the 1860s were supported by generous subsidies and land grants from local jurisdictions and the state government. Control of the railroads became increasingly centralized in the Central Pacific Railroad, which itself was controlled by a few powerful men: Collis Huntington, Leland Stanford, Charles Crocker, Mark Hopkins, and David Coulton. "By the late 1870s, the company . . . controlled over 85 percent of the state's rail lines and was both the largest landowner and largest employer in California. Charging arbitrary freight rates, it favored certain merchants

and ruined others and further undermined public opinion. Location of new routes was decided by bribery, not need, with the knowledge that whole towns could be destroyed if the railroad refused to service them."[29]

During the otherwise tumultuous period between 1849 and 1879, the judicial system was tuned but hardly changed in epic dimensions. The following were the more notable developments:

1850: The Supreme Court asserted that "it will exercise a supervisory control over all the inferior courts of this state. . . ."[30]

1851: The legislature enacted the Court Act of 1851, fleshing out constitutional provisions in the areas of judicial officers, jurisdiction, and the creation of several minor courts of limited jurisdiction. This act was replaced by a more concise version with little substantive change by the Court Act of 1853.

1862: Article VI of the constitution was revised. While dealing in minor respects with the structure and staffing of the trial courts, the major changes were to expand the Supreme Court by the addition of two associate justices; to extend Supreme Court terms to ten years rather than six; and to clarify that the Supreme Court had original jurisdiction, in addition to appellate jurisdiction, to issue writs of mandamus and certiorari, as well as habeas corpus. This was an area that had been in dispute since adoption of the 1849 constitution.

1872: The Code of Civil Procedure was adopted by the legislature.[31]

## The Constitution of 1879

The sequence of events leading to the Constitution of 1879 began on September 5, 1877, when the voters of California approved calling a convention to revise the state's constitution. Six months later the legislature adopted the enabling act for the convention, providing for the election of 152 delegates on June 19, 1878, to meet in Sacramento on September 28. The convention adjourned on March 3, 1879, and on May 7 the new constitution was approved by a statewide vote of 77,959 to 67,134.[32]

The most significant changes restricted the power of the legislature and its role in the system of government.[33] The sentiment behind this treatment of the legislative branch was captured in the following excerpt from an address to the people of California, adopted by convention delegates, asking for ratification of the proposed constitution and explaining the legislative provisions:

> For many years the people of this State have been oppressed by the onerous burdens laid upon them for the support of the government, and by the many acts of special legislation permitted and practiced under the present Constitution. Its provisions have been so construed by the Courts as to shift the great burden of taxation from the wealthy and non-producing class to the labourers and producers.
>
> The only restriction upon a Legislature is the Constitution of the State and of the United States. It, therefore, becomes necessary that State Constitutions should contain many regulations and restrictions, which must necessarily be enlarged and extended from time to time to meet the growing demands of the sovereign people.[34]

The judicial branch certainly received attention but apparently without the rancor that had been directed toward the legislature. Abundant proposals to revise court structure were made just prior to and during the convention but not adopted. For example, while the convention's Judiciary Committee was deliberating, the San Francisco Bar Association adopted and arranged to have presented to the committee a plan to create a single-level trial court, with at least one judge in each county, and to abolish all inferior trial courts.[35]

## The Judicial System in the Constitution of 1879

The key provisions are summarized in some detail, not because substantive change was extensive, but because they reflected the objective of convention delegates to place considerable restraints on the legislature and to do so by constitutional specifications that would be beyond legislative reach.

### *Courts and Officers*

- Supreme Court—to consist of a Chief Justice and six associate justices, with permission to sit in two three-judge departments and en banc and to be always open for business (not just during court sessions or terms). The justices to be elected statewide for twelve-year terms.
- Superior courts—one for each county or city and county; specified courts to have one judge, others to have two judges, San Francisco to have twelve judges; to be always open (legal holidays and nonjudicial days excepted). Judges to be elected by county,

or city and county, for six-year terms. The legislature may also provide for appointment of one or more superior court commissioners by each superior court to perform chamber business of the judges, to take depositions, and to perform such other business as may be prescribed by law.

- Justices' courts—number and terms to be fixed by the legislature. Justices to be elected by the unit of local government served by the court.
- Inferior courts—to be established at the discretion of the legislature in any incorporated city or town, or city and county, with powers, terms, and duties fixed by statute.

*Other Officers*

- Clerk of the Supreme Court—the legislature to provide for the clerk's election.
- Supreme Court reporter—the justices to appoint the reporter; the individual to hold office at their pleasure.
- County clerks—to be ex officio clerks of courts of record in the counties or cities and counties.[36]

*Jurisdiction*

The scope of jurisdiction for each category of court was not particularly notable. What was striking was the level of detail embedded in the constitution rather than statute. Superior courts, for example, were constitutionally granted

> original jurisdiction over all cases in equity, . . . certain cases at law involving title or possession of real property, the legality of any tax, impost, assessment, toll, or municipal fine and demands amounting to $300, . . . criminal cases amounting to felony [or] misdemeanor cases not otherwise provided for, actions of forcible entry and detainer, proceedings in insolvency, actions to prevent or abate a nuisance, all matters of probate, divorce, and for annulment of marriage, and special cases and proceedings not otherwise provided for; . . . power of naturalization; appellate jurisdiction of cases arising in justices' courts and other inferior courts as are prescribed by law; courts and judges to have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus.[37]

A major change, obviously, was the increase in the size of the Supreme Court to seven justices with authorization to sit in three-judge departments. Another significant change also involving the Supreme Court was to require in the determination of causes that all decisions of the court be in writing and the grounds of the decision stated.[38] The reasons were to assure that the law of the state was clear and, in cases of remand to the trial court, to furnish instruction to both the trial judge and attorneys as to the issues resolved by the Supreme Court and the rationale.[39] While there apparently was a fair amount of discussion regarding the methods of selecting Supreme Court justices and the length of their terms, no significant changes were made in this respect.

A change that did not receive majority support was a proposal that all sessions of the Supreme Court be held "at the seat of government," which of course was Sacramento rather than the court's established location in San Francisco.

> In the debate that followed, two principal questions were raised: (1) Which is better, a Supreme Court held at one place (the State capital), or a Supreme Court held at different places in the State, referred to as a "Court on wheels"? (2) If the latter, should the places be fixed by constitutional provision, or left to the Legislature? After extended discussion which included the climate, population, and other features of the three cities mentioned, Byron Waters, a delegate-at-large from the Fourth Congressional District, moved to strike the whole provision, warning, "You had better leave this to the Legislature." His motion was carried by a vote of 64 to 45. This result must have placated those who had suggested that any provision adopted would antagonize many voters, and jeopardize the approval of the constitution.[40]

The remaining notable change was the provision in civil jury cases that eliminated the need for unanimous verdicts and permitted civil verdicts by a three-fourths vote of the jury.[41]

## Intermediate Appellate Courts

Apparently the addition of two justices on the Supreme Court and authorization to sit in divisions did not assure prompt appellate justice. By January 1882, approximately three years following adoption of the new constitution, the Supreme Court had a backlog of 790 cases and attorneys

were protesting that a system under which a case must remain on the calendar for two years before a decision was heard was a "positive denial of justice."[42]

This dissatisfaction led the legislature in 1885 to direct the Supreme Court to appoint three commissioners to aid the court in performance of its duties and to clear the backlog of pending cases.[43] In 1889 the number of commissioners was increased from three to five.[44]

While the authority of the legislature to impose a system of commissioners on the Supreme Court appears not to have been legally challenged, the court explicitly declared that commissioners "do not usurp the functions of judges of this court, and do not exercise any judicial power whatever."[45]

Dissatisfaction continued to mount, culminating in a 1904 amendment to the constitution creating district courts of appeal. The amendment also divided the state into three appellate districts, specifying the counties encompassed by each district, with further provision for three elected justices in each district, to hold regular sessions in San Francisco, Los Angeles, and Sacramento.[46] Concurrently, the California experiment of utilizing commissioners to aid the Supreme Court came to an end.[47]

During the following half-century there were numerous constitutional amendments to increase the number of appellate districts and the number of divisions within each district. The need to achieve expansion by constitutional amendment was finally eliminated as part of the work of the Constitution Revision Commission when the voters in 1966 approved an amendment authorizing the legislature to determine the number of districts, divisions, and justices within the intermediate appellate courts.[48]

## Municipal Courts

The lower court structure that had evolved since 1849 was a matter of continuing concern. That concern produced a constitutional amendment in 1924 authorizing the legislature to establish a municipal court in "any city and county . . . containing a population of more than 40,000 inhabitants. . . ."[49] Acting under authority of this amendment, the legislature adopted enabling legislation permitting the establishment of municipal courts with detailed specifications regarding matters such as jurisdiction, selection and qualification of judges, and court staff.[50] Although only larger charter cities were authorized to act, most of them did so by the 1940s. By establishing

municipal courts within city boundaries, they succeeded in displacing the existing justice, police, and small claims courts.[51]

## Creation of the Judicial Council of California

The role and evolution of the Judicial Council of California are explored in Chapters Three and Four in connection with governance of the judicial branch during the latter half of the twentieth century. The creation of the Judicial Council in the earlier part of the century was achieved by a constitutional amendment in 1926.[52] The extraordinary expectations underlying creation of the council were stated in the supporting ballot arguments by Senators M. B. Johnson and J. M. Inman. There were no opposing arguments.

> The purpose of this amendment is to organize the courts of the state on a business basis. The "judicial council" which the amendment creates is not a commission, but will be composed of judges in office. The chief justice of the state and ten other judges chosen by him from both the trial and appellate courts will meet from time to time as a sort of board of directors, and will be charge with the duty of seeing that justice is being properly administered. No new office is created; the chief justice will act as chairman of the council and the clerk of the supreme court will act as its secretary.
>
> One of the troubles with our court system is that the work of the various courts is not correlated, and nobody is responsible for seeing that the machinery of the courts is working smoothly. When it is discovered that some rule of procedure is not working well it is nobody's business to see that the evil is corrected. But with a judicial council, whenever anything goes wrong any judge or lawyer or litigant or other citizen will know to whom to make complaint, and it will be the duty of the council to propose a remedy, and if this cannot be done without an amendment to the laws the council will recommend to the legislature any change in the law which it deems necessary.
>
> Similar judicial councils have recently been created in Oregon, Ohio, North Carolina, and Massachusetts. The chief justice will fill the position that a general superintendent fills in any ordinary business. He will be the real as well as the nominal head of the judiciary of the state, and will have the power of transferring judges

> from courts that are not busy to those that are. This will make it unnecessary to have judges "pro tempore," or temporary judges, as now provided in the constitution.[53]

A "board of directors . . . charged with the duty of seeing that justice is being properly administered"? A Chief Justice filling "the position that a general superintendent fills in any ordinary business"? A Chief Justice who is "the real as well as the nominal head of the judiciary of the state"? A new institution and new role for the Chief Justice with responsibility for assuring that the work of the courts is "correlated" and further responsibility "for seeing that the machinery of the courts is working smoothly"? These reasonably stated propositions were quietly planted seeds of major, perhaps at the time radical, change that blossomed later in the century. The fruit was self-governance of the judicial branch and major growth of the judicial system toward its rightful place as an equal and independent partner in our tripartite form of government.

As originally enacted, the Judicial Council consisted of the Chief Justice or Acting Chief Justice and an additional ten members appointed by the Chief Justice. These consisted of one associate justice of the Supreme Court, three justices of courts of appeal, four judges of superior courts, one judge of a police or a municipal court, and one judge of an inferior court. The council was directed to:

> (1) Meet at the call of the chairman or as otherwise provided by it.
>
> (2) Survey the condition of business in the several courts with a view to simplifying and improving the administration of justice.
>
> (3) Submit such suggestions to the several courts as may seem in the interest of uniformity and the expedition of business.
>
> (4) Report to the Governor and legislature at the commencement of each regular session with such recommendations as it may deem proper.
>
> (5) Adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force; and the council shall submit to the legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure.
>
> (6) Exercise such other functions as may be provided by law.[54]

The Chief Justice as chair was also directed to seek to "expedite judicial business and to equalize the work of the judges" by assigning judges to assist "a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred."[55] The clerk of the Supreme Court was designated as secretary to the Judicial Council.

The amendment was approved by the voters. In fact, the voters must have been quite favorably disposed toward the judiciary since they also approved measures that increased the state's contribution toward salaries of trial judges (Proposition 16) and provided for judicial pensions (Proposition 19). The proposal to create the Judicial Council passed by a vote of more than two to one.

## Early Judicial Council Efforts

The Judicial Council made a fast start under Chief Justice William H. Waste, who had become Chief Justice in January 1926 and served until 1940. Members were appointed on December 3, 1926, approximately one month after the election, and the first meeting was held on December 10 in the chambers of the Supreme Court in San Francisco.[56]

The first report of the Judicial Council was made on February 28, 1927, approximately two and one-half months after the first meeting. The report was as ambitious as the Judicial Council's timetable, covering an array of subjects ranging from court workloads to arbitration to criminal procedure.

However, two aspects of that inaugural report are particularly noteworthy. The first is the importance that the council attached to its own existence. "The members of the council are of the opinion that the adoption of the Judicial Council amendment marks the beginning of the most significant movement in the interests of the administration of justice in California that has been initiated since the inauguration of the state government in 1849. Behind the motive which led the people to approve the amendment was the appreciation of the fact that there should be a coordination of the courts with the resultant speeding up of the judicial business of the state."[57]

Acknowledging that "expectations have been aroused which it will be difficult to satisfy," the Judicial Council nonetheless also acknowledged that "the time has come for a bold advance in the administration of the judicial business of this state. . . ."[58]

The second noteworthy matter was the decision by the Judicial Council at its initial meeting to make its top priority the state of affairs in the superior courts.

> As a result of the deliberations of its initial session, the council reached the conclusion that its first duty was to survey the condition of business in the superior court throughout the various counties of the state—that being the principal trial court, and to ascertain the present condition of the trial calendars in the several courts. It was decided to at once determine in what counties the superior court has a comparatively small amount of business to attend to, and the judge little to do; what courts afford litigants a reasonably speedy hearing; where trials are delayed so long as to virtually amount to a denial of justice; to ascertain where judicial assistance is needed, and to determine from what courts judges can be spared, in order to render such relief. These were matters that seemed to demand urgent attention.[59]

In this endeavor the Judicial Council confronted a reality that was to persist until creation of the Administrative Office of the Courts (AOC) in 1961: the Judicial Council had no supporting staff. This was overcome at the outset by relieving Judge Harry A. Hollzer, a Los Angeles Superior Court judge and council member, from his judicial duties to assume direction of a survey of judicial business throughout the state. He completed a preliminary survey in approximately two months and was able to present his findings to the Judicial Council on February 11–12, 1927. The report was accepted and appended to the first Judicial Council report to the governor and legislature.

With equal measures of pride and criticism, the Judicial Council hailed this achievement: "To appreciate the difficulties involved, it should be borne in mind that, after the lapse of more than three-quarters of a century, the State of California, for the first time, is now engaged in making a scientific study of its judicial system, 'with a view to simplifying and improving the administration of Justice.' No commercial organization could have survived which had delayed for so long a period of time to investigate its methods of transacting business."[60]

Two years later Judge Hollzer submitted to the Judicial Council his "Report of the Condition of Judicial Business in the Courts of the State of California," together with a summary of research studies of judicial systems in other jurisdictions.[61]

Judge Hollzer's efforts constituted the substance of the Judicial Council's second report to the governor and legislature. Before launching into his methodology, statistics, and conclusions, Judge Hollzer struck an energetic note: "Approximately two years ago, California gave notice to the world that this commonwealth no longer would tolerate antiquated, 'go-as-you-please,' methods in the operation of its courts, but, instead, would insist upon establishing business efficiency and economy in its judicial system, to the end that the disposition of litigation might be expedited and the administration of justice improved."[62]

This report, embraced by the Judicial Council, furnished for the first time a respectable snapshot of the volume of litigation in California, particularly in the superior courts. The conclusions drawn from these data were not timid. The Judicial Council concluded that there was a gross inequality in the amount of work imposed upon various superior courts around the state, in both civil and criminal litigation. This also was true with respect to the number of contested cases around the state. The report stressed that businesslike methods were essential to the efficient and economical administration of the courts. Use of the master calendar in Los Angeles County was cited as a commendable example.[63]

During ensuing years, the Judicial Council institutionalized the gathering and publication of information regarding the volume and disposition of business in the courts of California.[64]

The Judicial Council also on occasion ventured into substantial matters of public policy. For example, the Judicial Council officially recommended against a proposal (Senate Constitutional Amendment 13) presented for voter approval in November 1936 that would have created a separate appellate system for criminal cases and established a court of criminal appeals.[65] The Judicial Council, likewise, in 1946 opposed a proposed constitutional amendment that would have created a separate court of tax appeals.[66]

## Judicial Council Projects at Midcentury

As the first half of the twentieth century drew to a close, the Judicial Council launched two major endeavors. The first was a review of procedures in the various administrative agencies of the state. This was undertaken in response to a 1943 request of the legislature. The result was extensive recommendations and proposed legislation in January 1945. In a nutshell, the Judicial Council proposed (1) a uniform procedure for the conduct of formal adjudicatory hearings by forty state agencies engaged in licensing and disciplining of members in various businesses and professions;

(2) maintenance of a staff of qualified hearing officers to preside over such hearings, to be administered by a newly created Division of Administrative Procedures; and (3) detailed procedures for judicial review of adjudicatory decisions by administrative agencies.[67] These recommendations were enacted by the legislature.

In addition to the extent and substance of the measures proposed by the Judicial Council, the research and analysis required to support those measures were truly remarkable. For these purposes the Judicial Council required a special, ad hoc research staff directed by a member of the San Francisco Bar, Ralph N. Kleps, later destined to be the first Administrative Director of the Courts.

The second extraordinary undertaking by the Judicial Council also was at the request of the legislature, which in 1947 adopted a concurrent resolution stating: "The Judicial Council is requested to make a thorough study of the organization, jurisdiction and practice of the courts in California exercising jurisdiction inferior to the superior court, and to make recommendations for the improvement of the administration of justice therein, and to report the result of its studies to the Governor and Legislature."[68]

The Judicial Council responded in 1948 with a major proposal to reorganize the courts of limited jurisdiction. These recommendations also were supported by an extraordinary research effort conducted with the assistance of special staffing.[69] This culminated in a successful ballot measure to reorganize these courts (addressed in detail in Chapter Five).

## Selection of Judges and the Commission on Qualifications

The remaining event of significance in the first century of justice administration in California involved selecting judges. The crucial event occurred in 1934 and is described below, but the story is prolonged and begins much earlier.

The Commonwealth Club played a leading role. Based in San Francisco, the club was and is a membership organization devoted to providing "an impartial forum for the discussion of disputed questions" and aiding in the solution of problems affecting the welfare of the commonwealth.[70]

In December 1912, the club convened a meeting on court delay that evolved into a proposal to the club's board to formulate an appointive system for judges. This request launched a twenty-year effort. The highlight of this effort was the establishment of a Committee on Selection of Judges, which

promulgated a plan, approved in 1914 by the club's membership, for appointment of judges by the governor with confirmation by the voters. Legislation was prepared and introduced in 1915 to implement the plan, and thus began more than a decade of legislative defeats for the Commonwealth Club.[71]

Malcolm Smith, in his article "The California Method of Selecting Judges," attributes these defeats "to the subtle pressure of several groups."[72] First were attorneys, who believed the elective system offered better chances for a judicial career. Next were organized labor groups, who remembered earlier injunctions and court orders and feared losing their power over judges in contested elections. Both urban and rural superior court judges were reluctant to change a known system.[73]

In the early 1930s the Commonwealth Club withdrew from the fray. However, the State Bar of California took up where the club left off. Thanks to a well-coordinated effort, the State Bar succeeded in securing legislative approval of a proposed constitutional amendment to be placed on the November 1934 ballot. The thrust of the measure was to provide for appointment by the governor of judges from a list of candidates presented by a nominating commission consisting of the Chief Justice, the presiding justice of the district court of appeal, and the state senator for the county in which the appointment would be made. After a period of service from four to six years, a superior court judge would be required to submit his candidacy for reelection to the voters of the county (Proposed Assembly Constitutional Amendment 98). Although the measure originally was intended to apply statewide, a legislative amendment confined application of the system to counties with a population more than 1,500,000, which in effect made the system applicable only in Los Angeles County.[74]

There was a significant parallel development. The California Committee on Better Administration of Law was formed in 1934 to draft legislation to combat crime in California. The committee had two auxiliary groups: the Committee on Better Administration of Justice, established by the California State Chamber of Commerce, which acted as a coordinating agency; and an advisory committee consisting of prominent members of the State Bar.[75]

The California Committee on Better Administration of Law ultimately proposed a series of constitutional amendments, using the initiative process. One of its measures pertained to selection of judges. After considering numerous proposals and attempting to coordinate plans with the State Bar, the committee ultimately embraced the revived proposal of the Commonwealth

Club and endorsed appointment of appellate judges by the governor, conditioned upon approval by a Commission on Qualifications consisting of the Chief Justice, the district court of appeal presiding justice, and the attorney general; twelve-year terms; and confirmation by the voters at an appropriate time, with a local option at the county level as to whether to use the system for selecting superior court judges.[76]

Although it had a competing proposal on the ballot, the State Bar also endorsed the proposal of the statewide committee.[77]

At the November 1934 election, the voters approved the statewide committee's proposal (Proposition 3) and, at the same time, rejected Proposed Assembly Constitutional Amendment 98, sponsored by the State Bar and approved by the Legislature.[78]

> Why the voters should choose to accept appointment of judges in one instance and reject it in another is not wholly explainable. It is difficult to determine to what extent the voters were confused by two judicial selection amendments appearing on the ballot. Inferentially, it would seem that A.C.A. No. 98 received less favorable treatment in the position it received on the ballot. As Proposition No. 14 it followed a very unpopular local option amendment, which was overwhelmingly defeated. Considering the vote, however, it seems quite likely that the committee proposal (Proposition No. 3) would also have been defeated had it appeared separate from the "package" arrangement, that is to say, if it had not appeared as one of the "curb crime" amendments.[79]

During its early years the Commission on Qualifications functioned as intended. The only public eruption occurred when the commission by a two-to-one vote rejected a Supreme Court nominee proposed for appointment by Governor Culbert Levy Olson in 1940.[80]

As the first half of the century drew to a close, this assessment was offered by Malcolm Smith, a scholar who had studied both judicial selection and the commission in commendable detail: "There seems to be a consensus that the Qualifications Commission has worked well, but that it has been unwilling or unable to offer a serious check to the governor. Again, this is only part of the opinion on the subject.

"That changes in the plan are needed, few will deny. But the plan was, and remains, a major step toward providing a means whereby only the best shall be selected to be judges."[81]

## End of the First Century

The first 100 years of California's judicial history drew to a close in 1950. Twenty-two men served as Chief Justice of California during this time.[82] Chief Justice Phil S. Gibson spanned the conclusion of the first century and the commencement of the ensuing "golden era."

The most striking feature of this period was the rather modest nature and extent of changes in the judicial system. Court organization or structure remained substantially intact, with recognition of the necessity of easing appellate litigation by creating an intermediate tribunal and a partial attempt to rationalize limited jurisdiction by providing for municipal courts. Likewise, jurisdictional arrangements endured substantially unchanged during this period.

The remarkable developments were the move in the appellate courts away from an egalitarian insistence on popular election of all judges and the provision for governance of the judicial branch. While the Judicial Council remained more embryonic than fully developed during its first quarter-century, its untapped potential began to be exploited at mid-century and was in early maturity by the end of the century.

# Notes

1 Numerous sources were consulted in exploring the first 100 years of statehood, but the cited works by the following scholars were invaluable and heavily used in crafting the text: Professor William Wirt Blume, Peter Thomas Conmy, Professor Rockwell Dennis Hunt, Carleton W. Kenyon, Paul Mason, Professor Noel Sargent, and Dr. Malcolm Smith.

2 James J. Rawls, "The Hispanicization of California"; and J. S. Holliday, "The California Gold Rush: Its Impact and Influences" (audiotapes) (Berkeley: The Bancroft Library, University of California at Berkeley).

3 Rockwell Dennis Hunt, *The Genesis of California's First Constitution (1846–49)*, Johns Hopkins University Studies in Historical and Political Science, 13th series, no. 8 (Baltimore: Johns Hopkins Press, 1895) [New York: Johnson Reprint, 1973], p. 10.

4 Ibid.

5 Peter Thomas Conmy, *The Constitutional Beginnings of California* (San Francisco: Native Sons of the Golden West, 1959), p. 5.

6 Ibid.

7 Ibid.

8 Hunt, *The Genesis of California's First Constitution*, p. 30; Conmy, *The Constitutional Beginnings of California*, pp. 9–10; and Paul Mason, "Constitutional History of California," *Constitution of the State of California and of the United States and Other Documents* (California Senate), 1958, pp. 293, 301–3.

9 Hunt, *The Genesis of California's First Constitution*, p. 17.

10 Id., p. 19.

11 1 California Reports (San Francisco: Bancroft-Whitney, 1851), preface, pp. vi–vii.

12 Hunt, *The Genesis of California's First Constitution*, pp. 21–23.

13 Id., p. 26.

14 Hunt, *The Genesis of California's First Constitution*, pp. 26–27; Mason, "Constitutional History of California," pp. 301–3.

15 Hunt, *The Genesis of California's First Constitution*, pp. 29, 34–35.

16 Mason, "Constitutional History of California," p. 306. Id., p. 309.

17 Id., p. 309.

18 Hunt, *The Genesis of California's First Constitution*, p. 56.

19 Conmy, *The Constitutional Beginnings of California*, p. 16

20 Id., pp. 16–17.

21 Id., p. 23.

22 Hunt, *The Genesis of California's First Constitution*, p. 57.

23 William Wirt Blume, "*California Courts in Historical Perspective," Hastings Law Journal* 22 (1970–1971): pp. 127–28.

24 California Constitution of 1849, article VI, section 13.

25 Mason, "Constitutional History of California," p. 318.

26 Blume, "California Courts in Historical Perspective," pp. 140–41. These judges apparently rode into the sunset upon enactment of the Court Act of 1853.

27 Noel Sargent, "The California Constitutional Convention of 1878–9," *California Law Review* 6 (1917–1918).

28 Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham, *The California State Constitution: A Reference Guide*, Reference Guides to the State Constitutions of the United States, no. 11 (Westport, Conn.: Greenwood Press, 1993), p. 9.

29 Id., p. 10.

30 *People ex rel. The Attorney General, ex parte*, 1 Cal 85, 89 (dictum).

31 Blume, "California Courts in Historical Perspective," pp. 133–51.

32 Id., pp. 153–55.

33 Sargent, "The California Constitutional Convention of 1878–9," pp. 8–12.

34 Quoted in Sargent, "The California Constitutional Convention of 1878–9," p. 8.

35 Blume, "California Courts in Historical Perspective," p. 158.

36 Id., pp. 158–60.

37 Blume, "California Courts in Historical Perspective," p. 160.

38 California Constitution of 1879, article VI, section 2, as originally adopted.

39 Sargent, "The California Constitutional Convention of 1878–9," pp. 13–14.

40 Blume, "California Courts in Historical Perspective," p. 163.

41 California Constitution, article I, section 7.

42 Quoted in Blume, "California Courts in Historical Perspective," p. 169.

43 California Statutes 1885, chapter 120, section 1, p. 101.

44 California Statutes 1889, chapter 16, section 1, p. 13.

45 *People ex rel. Morgan v. Hayne* (1890), 83 Cal. 111, p. 121.

46 California Constitution (1904), article VI, section 4.

47 Id., section 25.

48 California Constitution (1966), article VI, section 3.

49 California Constitution (1924), article VI, section 11.

50 California Statutes 1925, chapter 358, p. 648.

51 Alden Ames, "The Origin and Jurisdiction of the Municipal Courts in California," *California Law Review* 21 (1933), p. 117.

52 California Constitution (1926), article VI, section 1a.

53 Senators M. B. Johnson and J. M. Inman, Argument in Favor of Proposition 27, Senate Constitutional Amendment No. 15 (1925 Regular Session), submitted to voters on November 2, 1926.

54 California Constitution (1926), article VI, section 1a

55 Ibid.

56 Judicial Council of California, *First Report of the Judicial Council of California to the Governor and the Legislature* (1927), p. 11.

57 Id., p. 25.

58 Ibid.

59 Id., p. 11.

60 Id., p. 13.

61 Judge Harry A. Hollzer, "Report of the Condition of Judicial Business in the Courts of the State of California, together with a Summary of Research Studies of Judicial Systems in other Jurisdictions," in Judicial Council of California, *Second Report of the Judicial Council of California to the Governor and the Legislature* (1929), part 2, p. 11.

62 Ibid.

63 Id., pp. 15–23.

64 See, for example, Judicial Council of California, *Fifth Report of the Judicial Council of California* (covering Period July 1, 1932, to June 30, 1934).

65 Judicial Council of California, "Special Report on Proposed Court of Criminal Appeals," *Sixth Report of the Judicial Council of California* (June 30, 1936), part 1.

66 California Statutes 1945, p. 3165; Judicial Council of California, *Eleventh Biennial Report to the Governor and the Legislature* (1946), pp. 11–12.

67 Judicial Council of California, "Report on the Administrative Agencies Survey," *Tenth Biennial Report to the Governor and Legislature* (December 31, 1944), part 2, pp. 8–46.

68 California Statutes 1947, chapter 47, p. 3448.

69 Judicial Council of California, *Twelfth Biennial Report to the Governor and the Legislature* (1948).

70 Commonwealth Club bylaws quoted in Malcolm Smith, "The California Method of Selecting Judges," *Stanford Law Review* 3 (1951), p. 573.

71 Id., pp. 573–6.

72 Id., p. 576.

73 Ibid.

74 Id., pp. 576–8.

75 Id., pp. 579–80.

76 Id., pp. 582–4.

77 Id., p. 585

78 Based on [California Secretary of State], "Statement of Vote at General Election 31 (November 6, 1934)," cited in Smith, p. 586, n. 93

79 Smith, p. 586.

80 Id., pp. 591–3.

81 Id., p. 600.

82 Supreme Court of California, *Supreme Court of California Practices and Procedures* (1997 revision; June 2000 reprint). Appendix I lists all Chief Justices from 1850 to 2000.